THE BULLETIN

The Belgian Court of Arbitration holding the presidency of the 12th Conference of the European Constitutional Courts (Brussels, 13-16 May 2002) has asked the European Commission for Democracy through Law (Venice Commission) to provide a working document on the relations between constitutional courts and other national courts, including the interference in this area of the action of the European courts.

Following its presentation at the Conference, an amended version of this working document now becomes part of the collection of Special Bulletins on Leading Cases of the Commission as has been the case with the issue on freedom of religion and beliefs, requested by the Constitutional Tribunal of Poland for the 11th Conference of the European Constitutional Courts in Warsaw on 16-20 May 1999.

The aim of this Special Bulletin is to provide a presentation of the case-law of constitutional courts in this area, following the usual design and layout of the Bulletin on Constitutional Case-Law, which is published by the Venice Commission.

The boundaries of action of constitutional courts and other national courts may sometimes be tested, in particular in countries where constitutional jurisdiction is relatively new and where it may take time for the constitutional court to assert its rightful position within the legal system. Co-operation between constitutional courts or courts of equivalent jurisdiction and other national courts is thus important, especially in the field of human rights protection where it is essential that the same standards be applied by all courts in a given country. In this regard, it is particularly interesting to note the influence of the European Court of Human Rights in member states of the Council of Europe and the Court of Justice of the European Communities in member states of the European Union and to measure the extent to which it serves as a unifying factor.

This publication provides an overview of the key decisions concerning the relations between constitutional courts and other national courts, including the interference in this area of the action of the European courts, that have been delivered in the history of constitutional justice.

This edition contains a certain number judgments which have already appeared in normal editions of the Bulletin on Constitutional Case-Law (classified using identification numbers of the form 1 – 2 – 3) but first of all also those which have not been published in the Bulletin but were considered to be relevant by the constitutional courts' liaison officers. These judgments are indicated by the letter "C".

This special issue will also be incorporated into the CODICES database (on CD-ROM and via http://codices.coe.int). This database on constitutional case-law contains all the regular issues and special editions of the Bulletin on Constitutional Case-Law, full texts of decisions, constitutions and laws on the constitutional courts, and already comprises 3400 précis and more than 4000 full texts.

The European Commission for Democracy through Law hopes in this way to have contributed to the success of the 12th Conference of the European Constitutional Courts and more generally to the dissemination, knowledge, development and particular dynamics of constitutional case-law. It is particularly grateful to the liaison officers for their invaluable co-operation which has made it possible for us to produce this Special Bulletin.

G. Buquicchio

Secretary of the European Commission for Democracy through Law

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 Central and Eastern Europe democracies to set up new 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, 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.

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European Court of Human Rights..... N. Sansonetis
Court of Justice of the European Communities ..... Ph. Singer

Strasbourg, February 2003

Albania
Constitutional Court

Important decisions

Identification: ALB-1999-3-006

a) Albania / **b)** Constitutional Court / **c)** / **d)** 04.06.1999 / **e)** 43 / **f)** / **g)** *Fletorja Zyrtare* (Official Gazette), 22, 789 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.7.4.1.5.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Judge, absence, justification / Institution, interest in dispute / Judge, disciplinary measure / Notification.

Headnotes:

Under the Judiciary (Organisation) Act, the Judicial Service Commission (JSC), sitting to decide on a disciplinary measure against a judge, is required to summons the judge concerned and hear his or her side of the case. Two judges who sat on the JSC panel that disciplined a judge subsequently also sat in the joint chamber of the Court of Cassation, which rejected the judge's appeal. The Constitutional Court found that there had been a violation of the judge's right to be heard by the JSC, and of the principle of a fair trial inasmuch as two judges who were members of the JSC panel also sat in the joint chamber of the Court of Cassation.

Summary:

The JSC, by its Decision no. 4 of 10 November 1997, dismissed R.D. from the bench. The decision was taken on the grounds that the judge had been absent for a long period without justifying his failure to perform his judicial duties. The joint chamber of the Court of Cassation, in its Decision no. 1462 of 3 November 1998, rejected the judge's appeal against dismissal. The applicant claimed in the Constitutional Court that he had not been called before the JSC and had thus been prevented from exercising his right to defend himself. The Constitutional Court found there was no evidence that the judge had been given prior notification of the grounds for his dismissal. It held that the joint chamber of the Court of Cassation had failed, in its decision, to consider properly these omissions by the JSC. The joint chamber had, admittedly, given the applicant a hearing and allowed him to be assisted by the legal representative of his choice, who was able to defend his claims and submit evidence in support of them, but this was not enough to ensure that the proceedings were fair because, having been asked to review the legal basis and merits of the JSC's decision, the joint chamber ought to have scrutinised its procedure closely and ruled on the breaches of procedure that occurred.

It is particularly important to examine breaches of procedure likely to infringe an individual's basic rights (such as the right to a fair hearing or any other constitutional right concerning the independence of the judiciary). The joint chamber should have given due consideration to the impact of such breaches on the outcome of the dispute; moreover, if it considers there is a possibility of restoring rights that have been infringed, it should make its findings known to the JSC so that similar errors can be avoided in the future. The judge's right to be heard in advance of any decision must be respected both by the court hearing the appeal and by the body legally empowered to decide on the dismissal.

The Court also found other significant flaws in the procedure followed by the joint chamber of the Court of Cassation, which seriously undermined its impartiality. Two judges who had sat on the JSC panel that imposed the disciplinary measure also sat in the joint chamber. Irrespective of how they voted in the JSC, their presence in the joint chamber seriously called into question the impartiality of the proceedings there. The Constitutional Court held that the presence of these two judges on the bench of the joint chamber and the fact that their participation was authorised constituted a flagrant breach of Section 11 of Act no. 7561 of 29 April 1992, under which a judge is required to withdraw from a case if there are lawful

grounds for challenging his or her impartiality, and to avoid any behaviour detrimental to the credibility or dignity of the court. Similarly, under Article 72.5 of the Code of Civil Procedure, judges must withdraw from a case if, *inter alia*, they perform other duties on behalf of an institution with an interest in the dispute.

The fact that these constitutional and statutory requirements were not observed, either by the two members of the JSC or by the other judges sitting in the joint chamber of the Court of Cassation, who failed to challenge their presence, dictates that the joint chamber's decision must be set aside as unconstitutional because it violates the basic rights to a fair trial under the law, by an independent and impartial tribunal.

The Constitutional Court therefore set aside the decision of the joint chamber of the Court of Cassation on the grounds that it was unconstitutional, and ordered that the case be referred to the joint chamber of the Supreme Court for review.

Languages:

Albanian, French (translation by the Court).

Identification: ALB-1999-3-008

a) Albania / **b)** Constitutional Court / **c)** / **d)** 10.12.1999 / **e)** 65 / **f)** / **g)** *Fletorja Zyrtare* (Official Gazette), 33, 1301 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.2 **Sources of Constitutional Law** – Categories – Unwritten rules.
2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
3.9 **General Principles** – Rule of law.
3.13 **General Principles** – Legality.
3.18 **General Principles** – General interest.
4.16 **Institutions** – Transfer of powers to international organisations.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.1.4 **Fundamental Rights** – General questions – Emergency situations.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Death penalty, abolition / Human dignity / Human life, intrinsic value / Treaty, ratification, reference for a preliminary ruling / Death penalty, enforcement, prohibition.

Headnotes:

The existence of the death penalty in peacetime, under the Criminal Code and Military Criminal Code, is unconstitutional. The legal effects of this decision concern all death sentences pronounced by the courts and not yet enforced.

Summary:

The Criminal Chamber of the Supreme Court, hearing an appeal against a decision by lower courts to sentence a defendant to death, referred the case to the Constitutional Court for a preliminary ruling on the grounds that, under the Constitution, the right to life is a fundamental personal right, the essence of which would be violated by the application and enforcement of the death penalty.

Under Article 21 of the Constitution, “The life of a person is protected by law”. This provision expresses the principle of the protection of human life, affirming it as a constitutional right. The concepts of life and human dignity are of key importance in the Constitution and form the basis for all other fundamental and absolute rights. The inviolability of personal rights and freedoms underpins the entire section of the Constitution in which these rights and freedoms are enunciated. Article 15 of the Constitution stipulates that the fundamental human rights and freedoms are inalienable and inviolable and stand at the basis of the entire juridical order. The state therefore has a basic constitutional duty to see that they are respected and protected. The essence of these articles is concerned with ensuring respect for life and human dignity. All other rights are founded on the right to life, the denial of which implies the removal of all other human rights. Human life thus takes

precedence over all the other rights protected by the Constitution.

The question raised in the application cannot be decided solely on the basis of Article 21 of the Constitution. For while stipulating that the life of every person is protected by the law, this article does not explicitly prohibit the death penalty (although that does not imply that it permits it), and it leaves scope for the counter-argument that the protection of individuals' lives is a matter for statute law rather than the Constitution. The Constitutional Court interpreted this article on the one hand in conjunction with the rest of the Constitution and its spirit generally, and on the other in relation to the way the question was addressed under Albania's former Major Constitutional Provisions. It analysed and compared the two sets of provisions, noting a significant difference between them. The new Constitution extends and reinforces the substance of the fundamental personal rights and freedoms, and thus constitutes a clear step forward.

By comparison with Article 1 of Chapter VII of the Major Constitutional Provisions, as amended by Law no. 7692 of 31 March 1993, Article 21 of the current Constitution represents a significant shift towards abolition of the death penalty, the protection of life and recognition of its inviolability, inasmuch as the death penalty is no longer mentioned even in terms of a possible exception to the general principle contained in Article 1 of Chapter VII of the Major Constitutional Provisions. As a legal affirmation of the principle of the protection of life, it does not simultaneously negate that principle, nor does it leave other alternatives open. Thus it was not the law-makers' intention to retain the death penalty, even in exceptional circumstances. Otherwise (i.e. had they been in favour of the death penalty and its application in Albania), they would have been bound to make provision to that effect, for example by including in Article 21 of the Constitution the words used in Article 1 of Chapter VII of the Major Constitutional Provisions.

The new Constitution makes provision for personal rights and freedoms. But clearly, in accordance with the guiding principles of international law, these cannot be regarded as total and absolute. The Constitution itself explicitly permits restrictions to be placed on certain rights and freedoms, as exceptions to the general principle. There is provision for such restrictions, for example, in Articles 18.3, 26, 27, 29, 34, 35, 37, 41, 43, 45 and 47.2 of the Constitution. On the other hand, certain provisions in the part of the Constitution on fundamental rights and freedoms are framed simply as general rules without any reference to exceptions. The absence of exceptions is notable in a number of Articles, among them Article 21 of the Constitution, which, because it includes no provision for the death penalty, cannot be deemed to permit violation of the right to life through the existence of such a penalty.

The entire Constitution is coloured by the fundamental principles of the protection of human life. Life is a right and a fundamental attribute, and the taking of life arbitrarily or otherwise entails the destruction of the person as an individual with rights and duties. Human life is a basic constitutionally protected value. That is not to say that the level of protection of life is identical at all times and in all circumstances, for it depends on many different factors, and it is therefore up to the law-makers to frame appropriate provisions. Only they are empowered to establish by statute the exceptional circumstances in which a person may be deprived of life in order to protect a more important right. Hence the Constitutional Court found it necessary to study Article 21 in depth in order to grasp its intent.

Article 21 can only be interpreted in the light of Article 2.2 ECHR, which permits deprivation of life. But the taking of life as envisaged by the European Convention on Human Rights, even though it may be done by the organs of the state, bears no relation to the death penalty; and because it results from exceptional circumstances it cannot be compared with the death penalty, which is a sentence imposed by a court.

The legal provisions for the protection of human life, as required by Article 21 of the Constitution, thus need interpretation. Article 21 merely refers to the law, without any mention of death in particular circumstances where – in the light of Article 2.2 ECHR – the taking of life is permissible. The legal definition of such circumstances is to be found in the general provisions of the Criminal Code, which recognises the legal concept of self-defence, and in the Use of Firearms Act, under which the armed forces are permitted to use firearms in specific situations. Furthermore, under Article 17.1 of the Constitution, it may be lawful to take life in order to protect the rights of others or to defend a vital constitutional principle. The limitations [on the right to life] imposed under Article 17.1 of the Constitution must relate to cases where the law can permit the taking of an individual's life in order to protect the rights of others. The taking of any life in the enforcement of a court decision does not fall into this category, because the death penalty is not one of the exceptions or limitations permitted by the Constitution.

Moreover, several Articles of the Constitution, particularly in the section on fundamental rights and freedoms, refer to the European Convention on Human Rights. That is why it is important to interpret

Article 21 of the Constitution in conjunction with Article 17.2, which stipulates: “These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights".

Under Articles 5, 116 and 122 of the Constitution, the Republic of Albania is bound to carry out its obligations under international law by providing for the incorporation of ratified international agreements into its domestic legislation and by giving them precedence over statute law. One such international agreement is the European Convention on Human Rights, which Albania has ratified. Article 1 Protocol 6 ECHR stipulates: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed". Albania has not yet ratified the protocol, but given that Article 17.2 of the Constitution prohibits any limitations of rights and freedoms exceeding those permissible under the Convention, it follows that the death penalty as provided for in the Criminal Code lies outside the intention and spirit of Constitution and of the European Convention on Human Rights itself, which does not admit this type of limitation.

Considered in the light of the Constitution and the European Convention on Human Rights, the death penalty is essentially incompatible with fundamental rights and freedoms. It negates the right to life and is a cruel and inhuman penalty even when applied by the state in the exercise of its judicial authority. Capital punishment has nothing to do with limiting the right to life, its purpose being to eliminate individuals absolutely, removing them from society. It is a means of killing people with the state in the role of executioner.

Nor can the death penalty be seen as a measure for punishing crime that serves an important function by significantly influencing the sentenced person, which would put it in the same category as general or social rehabilitation or solitary confinement, for example. The other penalties provided for in the Penal Code, such as fines, imprisonment for up to 25 years, or life imprisonment as an alternative to the death penalty, are quite adequate for the purposes of punishing offenders.

The Criminal Code's provisions concerning the death penalty are incompatible with the spirit of the Constitution and infringe the essence of the right to life and human dignity. In particular, when a death sentence is enforced as a result of human error it cannot be undone, and the individual executed becomes the innocent victim of the mistake.

It is clear, on the one hand, from an analysis of Article 17.2 of the Constitution in the light of the application before the court, that the right to life cannot be limited by a measure such as the death penalty, because this penalty constitutes not merely a limitation but the abolition of the right. And on the other hand, the limitations permissible under the European Convention on Human Rights do not extend to the death penalty as a punishment for crime.

The Constitutional Court concluded that a complete understanding of the spirit and substance of Article 21 of the Constitution could be reached under the terms of Article 17.2, which provides, as a matter of principle, for legislation to limit fundamental rights and freedoms.

It found, in particular, that Articles 3, 5, 17.2, 21, 116 and 122 of the Constitution, taken together and in conjunction with the preamble to the Constitution, not only failed to justify the death penalty, but in fact prohibited its application in Albania. It concluded that the death penalty as provided for in the Criminal Code was unconstitutional.

Since the Supreme Court's application was concerned only with the constitutionality of certain Articles of the Criminal Code, the Constitutional Court, recognising a direct link between these articles and the Military Criminal Code's provisions concerning the death penalty in peacetime, decided to review the constitutionality of the latter at the same time. Under Article 15 ECHR, the High Contracting Parties may, in time of war or other public emergency, take measures derogating from their obligations under the Convention, and Article 2 Protocol 6 ECHR stipulates that "a state may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war [...]". The European Convention on Human Rights thus permits the application of the death penalty in time of war, so the Military Criminal Code's provisions to that effect, rather than being exceptions, are in fact compatible with the Convention. By contrast, its provisions concerning the death penalty in peacetime (referred to above) cannot be deemed compatible with the Constitution.

In conclusion, the Constitutional Court decided unanimously that the death penalty in peacetime, as provided for in the Criminal Code and Military Criminal Code, was to be abolished on the grounds that it was incompatible with the Albanian Constitution.

This decision is final and irrevocable and its legal effects concern all death sentences not yet enforced.

Languages:

Albanian, French (translation by the Court).

Identification: ALB-2000-1-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 17.04.2000 / **e)** 17 / **f)** / **g)** *Fletorja Zyrtare* (Official Gazette), 11 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

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

Headnotes:

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

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

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

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

Summary:

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

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

The reasoning of the Plenary Session decision stipulates that an accused tried *in absentia* does not forfeit the right of appeal, but he/she must first ask for the appeal period to be re-established. This reasoning is unfounded because it confuses the right of appeal with the right to ask for the reestablishment of the lost appeal period. Furthermore, it is contradictory and illogical, because it recognises the right of appeal, but does not settle a practical and legal way

of its resolution. The accused tried *in absentia* would not able to realise both the right of appeal and the right to re-establish the appeal. This is why the law, in pursuance of the constitutional principle, places this duty on the advocate appointed in one of the ways foreseen by law. To accept the fact that the accused tried *in absentia* may realise the right of appeal through re-establishing the appeal period, when the law has guaranteed this right to the advocate appointed by his or her families, amounts to a denial of the right of appeal and restricts the trial only to the court of first instance, which makes the trial unfair.

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

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

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

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

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

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

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

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

Languages:

Albanian.

Andorra
Constitutional Court

Important decisions

Identification: AND-2001-2-002

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 03.04.1995 / **e)** 95-1-PI / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 05.04.1995 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.2.3 **Constitutional Justice** - Types of claim - Referral by a court.
3.16 **General Principles** - Proportionality.
3.17 **General Principles** - Weighing of interests.
5.3.27 **Fundamental Rights** - Civil and political rights - Freedom of association.

Keywords of the alphabetical index:

Association, professional, membership, obligatory.

Headnotes:

The chambers are outside the scope of freedom of association, since they are not created through the free decision of their members. They are effectively set up by the public authorities so that specific administrative rights may be assigned to them and they may be entrusted with the management of certain public services.

Summary:

The administrative chamber of the Higher Court of Justice referred to the Constitutional Court a preliminary question for a ruling on the conformity with the Constitution of certain sections of the Law on the Chamber of Commerce, Industry and Services of Andorra, which obliges traders, industrialists and service providers to join the Chamber.

The Higher Court of Justice in fact wondered whether or not the freedom of association enshrined in Articles 17 and 18 of the Constitution allowed the public authorities to create a public legal entity to which affiliation was compulsory.

In this judgment, the Constitutional Court says that, firstly, there is no constitutional incompatibility between associations that can derive from private initiatives and professional associations of public origin, for the freedom not to associate cannot be interpreted as being an obstacle to the existence of the former, and, secondly, the public authorities may set up professional associations:

- if they are necessary for public purposes unable to be fulfilled by other means;

- if they do not prevent free competition by associations which have emerged in the same field and have as their lawful purpose the defence of sectoral interests; and

- if, without prejudice to logical administrative supervision, the democratic and autonomous functioning of the professional associations set up is guaranteed.

The Constitutional Court therefore declared the aforementioned law to be in accordance with the Constitution.

Supplementary information:

When, during proceedings, a court has reasonable and well-founded doubts as to the constitutionality of a law or of a decree issued in pursuance of a delegation of legislative powers *(delegació legislativa)*, of which application is necessary in order to resolve the dispute, it refers a preliminary question to the Constitutional Court, asking it to rule on the validity of the legal rule concerned. The Constitutional Court has to issue its ruling within two months.

Andorra's Constitution contains an explicit recognition only of freedom of association and does not mention any possibility of professional associations being set up by the public authorities.

Languages:

Catalan.

Identification: AND-2001-2-004

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 05.11.1999 / **e)** 99-7-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 12.11.1999 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.6.6 **Constitutional Justice** - Effects - Influence on State organs.
1.6.8.1 **Constitutional Justice** - Effects - Consequences for other cases - Ongoing cases.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
4.7.1.3 **Institutions** - Judicial bodies - Jurisdiction - Conflicts of jurisdiction.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial.
5.3.13.12 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Trial within reasonable time.
5.3.13.17 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Reasoning.

Keywords of the alphabetical index:

Res iudicata, scope / Marriage, dissolution, property, separation / Decision, operative part, setting aside.

Headnotes:

Res iudicata is not confined to the operative part of the court's decision, but also extends to the reasons on which the decision is based and on which it depends.

Summary:

A constitutional appeal was lodged with the Constitutional Court against a decision of the civil chamber of the Higher Court of Justice, which had issued its ruling on referral by the Constitutional Court, on the grounds of violation of the right to a trial and of the right to a trial within a reasonable time, recognised in Article 10 of the Constitution, and of failure to execute the judgment of the Constitutional Court.

The Constitutional Court had already ruled on this case by granting protection to the applicant, to which end it had set aside part of the civil chamber's decision. The Constitutional Court's judgment made it clear that the civil chamber, after having declared the matrimonial causes judge to have jurisdiction (something which this judgment neither confirmed nor stated to be wrong), should consequently have divided the jointly held property.

On the other hand, in its new decision, the civil chamber declared that, although it was the matrimonial causes judge's duty to dissolve the matrimonial property arrangements, it was not its duty to effect settlement, which was the responsibility of a civil court ruling in accordance with the ordinary procedure.

In this judgment, the Constitutional Court expresses the view that, in the civil chamber's first decision, the reasons relating to the power of the matrimonial causes judge to divide the jointly held property provided the necessary foundation on which the operative part, where it relates to the settlement of the matrimonial arrangements for jointly held property, was based and on which it depended. As this section of the operative part has been set aside, the civil chamber's decision could not, on this point, constitute *res iudicata*. It is indeed exceptional and surprising that, in a single case, the appeal court should contradict the reasons for an earlier decision and recognise, in its first decision, the jurisdiction of one specific court, and then, in its second decision, that of another; however, in so far as the reasons for the first decision gave rise to the setting aside of a section of the operative part of the decision, this contradiction cannot be considered to be a violation of *res iudicata*.

Where the violation of the right to a trial within a reasonable time is concerned, the Constitutional Court expressed the view that, while the excessive duration of a trial may contravene Article 6 ECHR, it is nevertheless the case that the obligation to keep to a reasonable time cannot, a priori, have the effect of obliging the court to amend the rules of procedure which it is the courts' duty to interpret.

Cross-references:

This case is linked to case 98-3-RE of 13.02.1999, *Bulletin* 2001/2 [AND-2001-2-002].

Languages:

Catalan.

Armenia
Constitutional Court

There was no relevant constitutional case-law.

Austria
Constitutional Court

This contribution is based on the Austrian Constitutional Court's report to the XII[th] Congress of the Conference of the European Constitutional Courts (Brussels 2002).

Important decisions

Identification: AUT-1954-C-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 03.07.1954 / **e)** GZ V 14/54; GZ G 16/61; GZ G 14/62; GZ V 75-78/68; GZ G 20/70; GZ G 36/77; GZ V 28/79; G 6,25,54/79; V 30/79; G 68/80; G 113/84, G 134/84, G, 135/84 *et al.*; G 153/84; G 151/85; G 175/84; G 224/85; G 1/86; B 556/85; G 261-267/86, G 11/87, G 39/87 *et al.*; G 142/87; V 5-9/87, G 26-30/87; V 204-209/90, V 232-254/90 *et al.*; G 86/91, G 137/91; G 72,73/91; G 187/91, G 269/91; G 103-107/92, G 123-127/92 *et al.*; G 76/92; G 212-215/92, G 242-245/92 *et al.*; V 21,22/92; G 67/93, G 81,82/93, G 89,90/93 *et al.*; G 400/96, G 44/97; B 1917/99, G 96/99, G 117/00 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 2713/1954 of 03.07.1954, 4158/1962 of 24.03.1962, 4318/1962 of 05.12.1962, 5872/1968 of 13.12.1968, 6278/1970 of 14.10.1970, 8253/1978 of 01.03.1978, 8647/1979 of 13.10.1979, 8871/1980 of 26.06.1980, 9089/1981 of 19.03.1981, 9167/1981 of 26.06.1981, 10.311/1984 of 11.12.1984, 10.456/1985 of 15.06.1985, 10.580/1985 of 30.09.1985, 10.705/1985 of 29.11.1985, 10.841/1986 of 20.03.1986, 10.904/1986 of 13.06.1986, 10.925/1986 of 20.06.1986, 11.401/1987 of 29.06.1987, 11.466/1987 of 01.10.1987, 11.580/1987 of 11.12.1987, 12.564/1990 of 03.12.1990, 12.776/1991 of 26.06.1991, 12.811/1991 of 30.09.1991, 12.883/1991 of 16.10.1991, 13.179/1992 of 01.10.1992, 13.335/1993 of 13.03.1993, 13.336/1993 of 13.03.1993, 13.571/1993 of 11.10.1993, 13.704/1994 of 05.03.1994, 14.805/1997 of 12.04.1997, 15.293/1998 of 26.09.2000 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.3.4.10 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments.
1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
1.4.1 **Constitutional Justice** – Procedure – General characteristics.
1.5.2 **Constitutional Justice** – Decisions – Reasoning.
1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.8 **Constitutional Justice** – Effects – Consequences for other cases.
1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
2.3.1 **Sources of Constitutional Law** – Techniques of review – Concept of manifest error in assessing evidence or exercising discretion.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.13 **General Principles** – Legality.

Keywords of the alphabetical index:

Legislation, reviewed, relevance to a specific case / Legislation, reviewed, amended in the course of proceedings / Legislation, interpretation / Legislation, re-examination / Reasons, statement / Referral, compulsory / Reasoning, limitation of arguments advanced.

Headnotes:

Relations between the Austrian Constitutional Court and other courts in Austria are determined by the former's jurisdiction, since the Constitutional Court has a monopoly on reviewing the constitutionality of legislation or its conformity with higher-ranking laws. No other court or executive body has authority to perform such reviews. Accordingly, under Article 89.2 of the Constitution, the courts are in principle obliged to apply to the Constitutional Court should they have doubts about the constitutionality of a law which they must enforce (or the lawfulness of a regulation). Similarly, the Constitutional Court is required to institute review proceedings *ex officio* where it itself has doubts – by reason of a specific case – about a regulation. Any application to the Constitutional Court challenging legislation must set out in detail the "doubts" or the reasons why the impugned law or regulation may be contrary to the constitution or the law (*VfSlg* – Official Digest – 12.564/1990, 13.571/1993). The reasons stated in a sense constitute the "subject matter" of the review proceedings before the Constitutional Court, which is solely required to determine whether the reservations expressed are founded. In deciding the case, the Constitutional Court is therefore bound by the grounds of unconstitutionality or unlawfulness relied on (*VfSlg* 8253/1978, 9089/1981, 11.580/1987, 13.335/1993, 13.704/1994). In practice, the Constitutional Court will dismiss any legislative review application which it deems to be based on clearly irrelevant grounds, in other words where the critical relevance of the legislation challenged can be seen to be "manifestly lacking", is "ruled out *prima facie*" or is considered "inconceivable". At the same time, the Constitutional Court's verdict concerning the relevance of the challenged legislation must not bind the applicant court to interpret it in a given manner, thus anticipating that court's decision (*VfSlg* 2713/1954, 4158/1962, 4318/1962, 6278/1970, 8871/1980, 12.811/1991).

When assessing the constitutionality of a challenged law (or the lawfulness of a regulation), the Constitutional Court is nonetheless obliged to give its own interpretation of the legislation under consideration. In this connection, it is bound by the reservations expressed by the referring court, since it cannot annul the challenged legislation for a reason not set out in the application. It can, however, dismiss an application at any time on the ground that the ordinary law would have to be interpreted differently in the light of the Constitution, since, where a number of interpretations are possible, priority must be given to that which "shows the legislation to be in conformity with the Constitution" (*VfSlg* 11.466/1987, 12.776/1991, 12.883/1991, 13.336/1993, 15.293/1998). The Constitutional Court has in practice frequently opted for this solution, finding the challenged legislation to be in conformity with the Constitution (decisions of 02.12.1999, G 96/99, and 08.03.2001, G 117/00). Where the Constitutional Court rejects an application on the ground that the challenged legislation should be interpreted differently in the light of the Constitution, the applicant court is bound by that interpretation in the case which it has to determine.

Similarly, the challenged legislation can be cancelled only for reasons advanced by the court referring it for

review. For example, if a law is challenged on the ground that it is inconsistent with the fundamental principle of freedom of opinion, and the Constitutional Court holds that that is not the case, it is obliged to dismiss the application even if the same legislation breaches the principle of compliance with the law. Furthermore, since a decision by the Constitutional Court to dismiss an application is binding only within the limits of the reservations and grounds set out in that application, the Constitutional Court can still re-examine the same legislation on some other ground (*VfSlg* 5872/1968, 10.311/1984, 10.841/1986, 12.883/1991, 13.179/1992).

The legal position is somewhat different where review proceedings are initiated by the Constitutional Court *ex officio*. This is permitted when, in the course of administrative review proceedings (under Article 144 of the Constitution), doubts arise as to the constitutionality of a law or the lawfulness of a regulation applied by the administrative authorities. In such circumstances, the Constitutional Court regards as "relevant", and accordingly open to a review of their constitutionality or lawfulness, the provisions effectively applied by the authorities in the individual case under consideration (*VfSlg* 10.925/1986), those which the authorities should have applied (*VfSlg* 8647/1979), and those which constitute a "prior condition for the Constitutional Court's decision", that is to say all provisions which, without being really "relevant", form a sort of substantive whole with the case in which the preliminary question of law must be settled (*VfSlg* 10.705/1985, 10.904/1986). This means that review proceedings can, for example, also relate to special provisions which are not applicable in that case but limit the basic circumstances thereof (*VfSlg* 14.805/1997).

Under the Austrian Constitution (Articles 139.4 and 140.4), the legislature can "intervene" in legislative review proceedings in progress by revoking the provisions under review. Where the legislation is amended with retrospective effect, it loses its relevance as a result and the referring court's application must immediately be withdrawn (Sections 57.4 and 62.4 of the Constitutional Court Act). An application that is not withdrawn must be dismissed, and the Constitutional Court must drop any review proceedings it has itself instituted (*VfSlg* 9167/1981, 10.456/1985, 10.580/1985, 11.401/1987). On the other hand, where the change in legislation takes effect from the date of its adoption (*ex nunc*), and consequently has no impact on the legal proceedings already pending, the Constitutional Court can no longer annul the challenged provisions. In such cases it is expressly empowered to hold that the law under consideration "was anti-constitutional" or the regulation "was in breach of the law" (Articles 139.4 and 140.4 of the Constitution). The effect of such a finding is that the provisions in question must no longer be applied in the proceedings concerning which the preliminary question of law has been referred.

Languages:

German.

Identification: AUT-1968-C-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 13.12.1968 / **e)** B 622/78; G 113/84, G 134/84, G 135/84 *et al.*; B 168/85; G 224/85; G 187/91, G 269/91; G 103-107/92, G 123-127/92 *et al.*; K I-2/94; B 1171/94; G 388-391/96; G 363-365/97, G 463,464/97 *et al.*; G 48-55/99 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 5872/1968 of 13.12.1968, 9690/1983 of 10.06.1983, 10.311/1984 of 11.12.1984, 10.616/1985 of 09.10.1985, 10.841/1986 of 20.03.1986, 12.883/1991 of 16.10.1991, 13.179/1992 of 01.10.1992, 13.951/1994 of 29.11.1994, 14.304/1995 of 11.10.1995, 14.723/1997 of 24.01.1997, 15.129/1998 of 11.03.1998, 15.506/1999 of 09.06.1999 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.
1.3.4.8 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of jurisdictional conflict.

1.3.4.9 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the formal validity of enactments.
1.3.4.10 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments.
1.5.4.4 **Constitutional Justice** – Decisions – Types – Annulment.
1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes* – *Stare decisis*.
1.6.5.1 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect *(ex tunc)*.
1.6.5.3 **Constitutional Justice** – Effects – Temporal effect – *Ex nunc* effect.
1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Cancellation, effects / Administrative decision, individual / Proceedings, pending, application / Decision, constitutional, compliance / Constitutional appeal / Promulgation / *Stare decisis*, binding force.

Headnotes:

Where the Constitutional Court holds that a provision is unconstitutional or unlawful, it must cancel that provision. This cancellation usually takes effect within the express limits of the grounds relied on or, where the Constitutional Court institutes review proceedings *ex officio*, solely in the case pending before it where it is itself required to apply the provision in question. The Constitutional Court can annul an entire law only in quite exceptional circumstances: where the legislative body that passed the law lacked authority to do so or where its publication was procedurally flawed (Article 140.3 of the Constitution).

Cancellation in principle takes effect as of the date of the decision *(ex nunc)* and is binding on all courts and administrative authorities. It does not have retrospective effect, which means that the provision remains applicable to events which took place up to that point in time. The Constitutional Court may also decide to postpone the effect of a cancellation decision for a period not exceeding 18 months. The provision in question then continues to apply until expiry of the time-limit (Articles 139.5, 139.6, 140.5 and 140.7 of the Constitution).

In practice, a time-limit is set where the legislature has to take remedial action and this will in all probability require some time.

A departure from the *ex nunc* rule exists regarding the case in which the preliminary ruling on a point of law is sought (the *Anlaßfall*). The *Anlaßfall* concept refers to the legal proceedings at the origin of cancellation of a provision by the Constitutional Court. The provision annulled will not be applicable in those proceedings (this is known as “the applicant's reward”). In addition, its cancellation will also be effective in all similar cases that were pending in the Constitutional Court when it began to decide the issue (*VfSlg* – Official Digest – 10.616/1985, 14.304/1995). Otherwise, it is left to the Constitutional Court's discretion to declare the cancellation valid also in respect of earlier cases, that is to say to give it retrospective effect (Articles 139.6 and 140.7 of the Constitution). This retrospective effect may solely concern cases which were already pending in the courts at the time of the judgment (“selective retrospective effect”) or all events arising prior to the cancellation (“general retrospective effect”). In one particularly noteworthy case, the Constitutional Court ruled that the retrospective effect extended even to disputes in which a final decision had already been given. Since the outcome was that the relevant administrative decisions were also deemed to have been cancelled, all applications already lodged with the Constitutional Court were dealt with accordingly (*VfSlg* 14.723/1997).

In general, cancellation of a legal provision normally results in the re-entry into force of provisions repealed by the law held to be unconstitutional by the Constitutional Court. That court may nonetheless rule otherwise. It must then specify in its judgment which provisions will re-enter into force (Article 140.6 of the Constitution).

As regards regulations, the cancellation process is in the main identical to that applicable to laws. However, cancellation of a regulation by the Constitutional Court does not result in the re-entry into force of the regulation previously applicable (*VfSlg* 9690/1983).

When new legislation is promulgated as a result of a cancellation decision by the Constitutional Court, the relevant decision must be taken into consideration in the new legislation's content, if the legislative or regulatory body does not wish to run the risk of a further challenge and cancellation. However, the Constitutional Court has no possibility of interpreting its own decision or giving official explanations and guidance. It has no part in the legislative process and can only take action anew if an application is filed, challenging the newly promulgated legislation. In

reality, the legislature has on several occasions been unsuccessful in managing to "repair" legislation annulled by the Constitutional Court in a manner compatible with the Constitution (*VfSlg* 15.129/1998, *Bulletin* 1998/1 [AUT-1998-1-004]; *VfSlg* 15.506/1999).

Where an application for review of the constitutionality or the lawfulness of a provision is dismissed by the Constitutional Court, the decision is binding only within the limits of the reservations and grounds set out in the application for cancellation. It remains possible for the Constitutional Court to re-examine the same provision on other grounds (*VfSlg* 5872/1968, 10.311/1984, 10.841/1986, 12.883/1991, 13.179/1992).

In constitutional appeals against individual administrative decisions, the Constitutional Court's decision is in principle binding only with regard to the specific case under consideration. In other cases – even those which are similar – the court can choose to interpret the relevant legal provisions differently and is not bound by its own earlier reasoning. Nevertheless, in practice, the Constitutional Court generally attempts to adhere to a constant line of decisions *(stare decisis)*.

As regards compliance with decisions, the Constitutional Court enjoys considerable prestige, and its decisions are usually respected by the courts. This is also partly due to the fact that the Constitutional Court has no jurisdiction to review other courts' decisions.

However, in a dispute as to jurisdiction (where two courts either claim or refuse jurisdiction to deal with a case) the Constitutional Court may be obliged to set aside all legal decisions conflicting with its verdict. It will then exceptionally be empowered possibly to overturn the decisions of other courts (*VfSlg* 13.951/1994).

Should the Constitutional Court decide not to cancel a legal provision, the applicant court is required to apply that provision, as interpreted by the Constitutional Court. However, where the court concerned fails to follow this interpretation, in breach of the law, an appeal against its decision may solely be brought in the ordinary courts. As a result, where the question has already been decided by one of the highest courts (the Supreme Court or the Administrative Court), the failure to comply with the Constitutional Court's ruling cannot be challenged in the courts.

Languages:

German.

Identification: AUT-1984-C-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 01.10.1984 / **e)** B 327/80; B 211/84; G 274-283/90, G 322/90, G 46-51/91; B 1071/91; B 102/93; B 1172/98; B 10/97 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 10.163/1984 of 01.10.1984, 10.549/1985 of 27.09.1985, 12.649/1991 of 01.03.1991, 13.242/1992 of 30.11.1992, 13.830/1994 of 30.06.1994, 15.385/1998 of 16.12.1998 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.2 **Constitutional Justice** – Jurisdiction – Type of review.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
3.16 **General Principles** – Proportionality.
3.21 **General Principles** – Equality.
3.22 **General Principles** – Prohibition of arbitrariness.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Constitutional Court, Administrative Court, attribution of jurisdiction / Decision, authority / Interpretation / "Successive" appeal / Administrative decision, parallel review / Supreme courts, parity.

Headnotes:

As regards review of an individual administrative decision *(Bescheid)*, the jurisdiction of the Constitu-

tional Court is, in a sense, "shared" with the Administrative Court.

One of the conditions for lodging an appeal with the Constitutional Court is exhaustion of administrative remedies (Article 144.1 of the Constitution). In proceedings involving a number of parties, these remedies must be exhausted by the appellants themselves, not merely by other parties to the proceedings (*VfSlg* – Official Digest – 13.242/1992 and decision of 10.06.1997, B 10/97). The number of levels of proceedings in the case under consideration depends on the relevant administrative provisions. Usually there are two, and at most three. To appeal to the Constitutional Court it is not necessary to have challenged the individual administrative decision in the Administrative Court.

A final administrative decision can therefore be challenged not only in the Constitutional Court, but also in the Administrative Court. The difference lies in the grounds of appeal that can be relied on. Whereas the Constitutional Court in principle only accepts applications alleging a violation of constitutionally guaranteed rights or inconsistency with general law, in the Administrative Court appellants can solely allege a violation of their individual rights guaranteed by ordinary law. The Constitutional Court consequently finds itself obliged to decide cases "in parallel", as it were, with the Administrative Court.

A number of measures exist with a view to co-ordinating the conduct of the two sets of proceedings, so as to avoid duplicate administrative review. For instance, the applicant may first refer the matter to the Constitutional Court, which performs a sort of "rudimentary verification" aimed at determining whether the general rule applied was unlawful or fundamental rights were interfered with. Should the Constitutional Court deem the application inadmissible, the applicant may lodge a "successive appeal" with the Administrative Court, which, after performing a "detailed verification", must decide whether the challenged administrative decision was in breach of ordinary law.

Although the Constitutional Court enjoys some precedence in such cases, neither of the two courts has jurisdiction to review the other's decisions (the fundamental principle of "parity" between supreme courts).

However, the distribution of jurisdiction between the Constitutional Court and the Administrative Court is clear-cut in appearance only. This is because fundamental rights have become so complex in substance, on account of the precedents established over the past few decades, that any allegation of a breach of individual rights safeguarded by ordinary law may at the same time be considered to involve a breach of fundamental rights. Any procedural irregularity in the handling of an administrative dispute amounts to "arbitrariness" on the part of the administrative authorities and, consequently, constitutes a breach of the fundamental right to equal treatment (*VfSlg* 10.163/1984, 10.549/1985, 13.830/1994, 15.385/1998, *Bulletin* 1998/3 [AUT-1998-3-009]); failure to consider the parties' arguments may be construed as a breach of the right to a fair trial (*VfSlg* 12.649/1991); and virtually any materially significant breach of the law may qualify as "disproportionate" interference and hence violation of a fundamental right.

This system doubtless has its advantages. On the basis of what is often a routine complaint, the Constitutional Court manages to express its doubts about the general rules on which the individual administrative decision appealed against was based and to conduct an *ex officio* review of their constitutionality. This obliges the administrative authorities to interpret legal rules in a manner compatible with the Constitution. However, this organisation of jurisdiction has three undesired effects: firstly, a very heavy case-load in the Constitutional Court; secondly, a sometimes very negative perception in the Administrative Court of the precedence enjoyed by the Constitutional Court in interpreting ordinary law; and, lastly, the question of the mutually final and binding nature of the two courts' decisions.

Supplementary information:

"Individual administrative decision" is generally understood to mean an official individual administrative decision by an entity exercising public authority. As a general rule, the term therefore also applies to the legal outcome of an administrative dispute.

Languages:

German.

Identification: AUT-1987-C-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 14.10.1987 / **e)** B 267/86; B 2434/95; G 363-365/97, G 463,464/97 *et al.*; 120s63/97, 4Ob266/00x,

6Ob69/01t, B 1625/98 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 11.500/1987 of 14.10.1987, 14.939/1997 of 02.10.1997, 15.129/1998 of 11.03.1998, 15.462/1999 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
3.19 **General Principles** – Margin of appreciation.

Keywords of the alphabetical index:

Fundamental rights / Interpretation.

Headnotes:

In Austria fundamental rights guaranteed by the European Convention on Human Rights (hereafter the Convention) are regarded as individual rights and rank as constitutional law. The courts are at liberty, within the limits of their jurisdiction, to base their decisions on provisions of the Convention. This is a frequent practice. For example, in the field of criminal law, the fundamental right to freedom of opinion takes on considerable importance when offences against a person's reputation are being dealt with (cf. the Supreme Court's decisions of 18.12.1998, 120s63/97; 24.10.2000, 4Ob266/00x; and 26.04.2001, 6Ob69/01t). The courts are also required to take account of the fundamental rights guaranteed by the Convention when interpreting the provisions of ordinary law. However, consideration of the Convention when interpreting ordinary written law is admissible only to the extent that this leaves some room for freedom of interpretation.

Where an ordinary law that a court must apply in a given case is at variance with fundamental rights under the Convention, and must consequently be deemed "unconstitutional", the court concerned is nonetheless under an obligation to apply it. The matter must then be referred to the Constitutional Court, which can cancel the provisions in question if it holds that they are unconstitutional by reason of their failure to comply with the Convention.

Anyone entitled to appeal to the Constitutional Court may do so on the ground that a legal decision (an administrative decision, a law or a regulation) has interfered with his or her rights under the Convention.

Nonetheless, the Constitutional Court does not consider itself strictly bound by the case-law of the European Court of Human Rights. It has, for instance, already expressly underlined that it is in principle autonomous in giving its own interpretations and pointed out that "domestic law governing organisation of the state, which is of constitutional rank" may gainsay the consequences of certain interpretations. The Constitutional Court has also stated that the European Court of Human Rights must be regarded as "the principal body required to interpret the Convention and must accordingly be accorded 'special importance'" (*VfSlg* 11.500/1987). In this respect, to avoid contravening international law, the Constitutional Court makes a regular effort to take account of developments in the Strasbourg court's case-law (*VfSlg* – Official Digest – 14.939/1997, *Bulletin* 1997/3 [AUT-1997-3-007]; *VfSlg* 15.129/1998, *Bulletin* 1998/1 [AUT-1998-1-004]; *VfSlg* 15.462/1999; decision of 24.02.1999, B 1625/98, *Bulletin* 1999/1 [AUT-1999-1-002]).

Languages:

German.

Identification: AUT-1995-C-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11.12.1995 / **e)** B 2300/95; G 400/96, G 44/97; B 877/96; G 2/97; G 57/98; B 3073/96, B 65/00 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 14.390/1995 of 11.12.1995, 14.805/1997 of 12.04.1997, 14.886/1997 of 26.06.1997, 15.215/1998 of 24.06.1998, 15.368/1998 of 11.12.1998 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.

2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
3.26.2 **General Principles** – Principles of Community law – Direct effect.

Keywords of the alphabetical index:

Constitutional Court, Court of Justice of the European Communities, relations / Court of Justice of the European Communities, referral of a preliminary question / Court of Justice of the European Communities, sole jurisdiction.

Headnotes:

The organs of the EU member states, and consequently all courts and administrative authorities, are required to apply Community law. They are also under an obligation not to apply domestic law which is contrary to Community law in force. Furthermore, it is for the ordinary courts, the Constitutional Court and the Administrative Court, in their respective spheres of jurisdiction, to enforce Community law in cases where the bodies whose activities they review have failed adequately to comply with it. The Constitutional Court has had occasion to determine in which circumstances a breach of Community law comes within its review jurisdiction; for example, administrative measures taken by administrative authorities have been held to be "unlawful" where they blatantly disregarded the Community law in force (*VfSlg* – Official Digest – 14.886/1997, *Bulletin* 1997/2 [AUT-1997-2-004]; decision of 05.03.1999, B 3073/96). In addition, the Constitutional Court has held that a fundamental right – the right to a lawful court recognised under Article 83.2 of the Constitution – is violated where a court qualifying as a "court ... against whose decisions there is no judicial remedy", within the meaning of Article 234 EC, and consequently the body required to seek a preliminary ruling, wrongly fails to refer to the Court of Justice a preliminary question on a point of Community law (cf. a constant line of decisions since *VfSlg* 14.390/1995, *Bulletin* 1996/1 [AUT-1996-1-002] and most recently the decision of 15.06.2000, B 65/00).

By virtue of its precedence in the hierarchy of law, directly applicable Community law supersedes any national law. It must accordingly be applied by all courts without the Constitutional Court being able to intervene in any way. A provision of domestic law which clearly contradicts a provision of Community law can accordingly never be "relevant" within the meaning of the conditions for challenging legislation in the Constitutional Court (*VfSlg* 15.215/1998, 15.368/1998). Where a provision of Community law which a court deems relevant requires interpretation, that court must, under Article 234 EC, refer the question of interpretation for a preliminary ruling by the Court of Justice. The same legal question can under no circumstances be posed to the Constitutional Court, as an "alternative", since the latter's basis for review is solely higher-ranking domestic law (*VfSlg* 14.805/1997, 14.886/1997, 15.368/1998). It is only in cases where, irrespective of a question of European law, a court has doubts about the constitutionality of a provision it must apply, that that court can challenge the provision in the Constitutional Court, on condition it is empowered to do so.

As to the case-law of the Court of Justice of the European Communities, in a case where the points of law raised are extremely similar to those of a case already decided by the Court of Justice, the Constitutional Court bases its reasoning on the legal opinion given by the Court of Justice. In view of the precedence of Community law, the Constitutional Court refrains from applying domestic law (*VfSlg* 15.215/1998, 15.368/1998). In case of doubt, the Constitutional Court must refer the point of law back to the Court of Justice for another preliminary ruling under Article 234 EC.

Languages:

German.

Belgium
Court of Arbitration

All the decisions are published on the Court's website (www.arbitrage.be), where they may be consulted in French, Dutch and German.

Important decisions

Identification: BEL-1986-C-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 25.03.1986 / **e)** 12/86 / **f)** / **g)** *Moniteur belge* (Official Gazette), 17.04.1986 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.9 **Constitutional Justice** – Procedure – Parties.
4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.

Keywords of the alphabetical index:

Preliminary question, subject-matter / Preliminary question, limitation / Constitutional Court, appeal, limits / Preliminary question, judge *a quo* and *ad quem*, jurisdiction, repartition / Preliminary question, applicability of legal rules to the facts of a case.

Headnotes:

Parties in proceedings before the Court of Arbitration may not modify, or cause to be modified, the content of questions referred to the Court.

It is up to the court to which a case is referred for hearing and decision, and to that court alone, to decide within the time limits on the applicability of a legal rule relied on in court and to decide, where necessary, whether or not it should consult the Court of Arbitration about the rule.

Even if the Court of Arbitration considers that the court handling the case is mistaken in its appreciation of the legislation applicable to the facts, it cannot correct the questions accordingly. Nor can it rule on the applicability of a legal rule to the relevant facts, if that rule has not been submitted to it via the referral decision.

Summary:

The Court of Arbitration was asked to rule on the preliminary question of the compatibility of a decree of the Dutch Cultural Community of 19 July 1973 with the rules governing the division of powers between the different sources of legislation in Belgium (see "Supplementary information, point 1").

One of the parties submitted that it was not the decree of 19 July 1973 that was applicable to the particular facts of the case but a French Community decree of 30 June 1982 (paragraph 3.A.1 of the preamble to the decision).

In its decision, the Court established the following principles: it is up to the lower court to decide which legal rule is applicable to the case before it and to decide whether or not it is necessary to ask a preliminary question concerning the rule **(19)**. The parties may not modify the content of the preliminary question **(23)**, nor may the Court correct the questions as regards the applicability of the legal rule to the case pending before the lower court **(17)** (paragraph 3.B.1 of the preamble to the decision) (see "Supplementary information, point 2").

Supplementary information:

1. Since Belgium is a federal country, the French, Flemish and German-speaking communities are empowered to enact their own legislation in the form of "decrees". The Cultural Council of the Dutch Cultural Community was the institution that preceded the establishment of the Flemish Community.

The "federal" courts are required, as appropriate, to apply the legal rules enacted by the federal authority, the three communities, or the three regions (the Walloon and Flemish Regions, and the Brussels-Capital Region). Where necessary, the Court of Arbitration rules, on the basis of preliminary questions, on which of these legislative bodies is competent to enact the particular legal rule to be applied by the court.

2. The principle established in this decision has been confirmed in many subsequent decisions (see, *inter alia*, Decisions nos. 3/89, 18/91 [BEL-1991-C-001], 23/91, 77/92, 16/97, 23/98, 87/99). However, on occasion it has also been qualified, insofar as the Court of Arbitration has sent certain cases back to the lower court and ordered it to make sure the question is still relevant, for example following retroactive

amendment of the legal rule in question (see in particular Decisions nos. 59/95, 19/96, 79/97, 59/98, 129/98, 137/98, 57/99, etc.), or has declared that there is no question to answer if in the meantime it has declared the legal rule void (Decisions nos. 72/94 and 73/94), or has rectified a material error (Decision no. 60/95).

Languages:

French, Dutch, German.

Identification: BEL-1991-C-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 04.07.1991 / **e)** 18/91 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.08.1991 / **h)**.

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.10 **General Principles** – Certainty of the law.
5.2 **Fundamental Rights** – Equality.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Preliminary question / Inheritance rights on intestacy / Descent, lawful / Child, natural / *Res iudicata*.

Headnotes:

In continuing to enforce, on a transitional basis, a provision of the Civil Code which deprives natural children of their inheritance rights even after a judgment of the European Court of Human Rights declaring Belgium to be guilty of breaching Article 8 ECHR in conjunction with Article 14 ECHR (Judgment in the case of *Marckx v. Belgium* of 13 June 1979, *Special Bulletin Leading Cases ECHR* [ECH-1979-S-002]), the legislature violates the constitutional principles of equality and non-discrimination (Articles 6 and 6bis of the former Constitution, now (since 1994) Articles 10 and 11 of the Constitution).

Summary:

Under former Article 756 of the Civil Code, natural children were not recognised as heirs and had no rights in respect of the property of their deceased father and mother unless they had been officially recognised. They also had no rights under the article in respect of their parents' relatives' property. The Article was amended by an Act of 31 March 1987 but maintained, on a transitional basis for estates passed to heirs prior to the Act's entry into force on 6 June 1987.

A natural child applied to the Belgian civil courts to have his inheritance rights recognised. The Court of Cassation asked the Court of Arbitration to rule on the question of whether the transitional provision that applied the old law to estates passed to heirs in 1956 and 1983 was compatible with the principles of equality and non-discrimination.

The Court of Arbitration noted that the explanatory memorandum accompanying the amending bill was based, *inter alia*, on the view that it was necessary to put an end to the discrimination against children born out of wedlock, which constituted a "glaring exception" to the principle that all people were equal before the law. It also noted that in its Judgment in the case of *Marckx v. Belgium* of 13 June 1979 (*Special Bulletin Leading Cases ECHR* [ECH-1979-S-002]), the European Court of Human Rights had considered that the limitations imposed on the rights of recognised natural children in respect of their right to inherit their mother's property and the fact that they had no inheritance rights at all in respect of their close relatives on their mother's side breached Articles 8 and 14 ECHR **(43)**.

The Court found that the difference in the treatment of children born in and out of wedlock, in terms of their inheritance rights and as established under Article 756 of the Civil Code and kept in force on a transitional basis under Section 107 of the Act of 31 March 1987, breached the constitutional principles of equality and non-discrimination (Articles 6 and 6bis of the former Constitution, now (since 1994) Articles 10 and 11 of the Constitution).

The Court then examined the question of the extent to which its decision constituted *res iudicata* **(37)**. It noted that according to Section 28 of the Special Law of 6 January 1989, a ruling handed down by the Court of Arbitration in respect of a preliminary question only constituted *res iudicata* for the lower court and other courts required to rule "on the same case". However,

in accordance with Sections 4.2 and 26.2, sub-paragraph 3.1 of the Act, insofar as the scope of such a ruling exceeded the limits laid down in Section 28, the Court needed to bear in mind the possible consequences of its decision for cases other than the case giving rise to the preliminary question.

Accordingly, the Court observed that in its Judgment in the *Marckx* case, the European Court of Human Rights had stated that "the principle of legal certainty, which is necessarily inherent in the law of the Convention (…) dispenses the Belgian State from re-opening legal acts or situations that antedate the delivery of the present judgment". It found that the fact that estates passed to heirs prior to this judgment were not affected by the unconstitutionality ruling was justified by the principle of legal certainty. It followed that former Article 756 of the Civil Code could still be applied to estates passed to heirs prior to 13 June 1979 but not to any passed to heirs after that date.

Supplementary information:

See also Decision no. 83/93 of 1 December 1993, *Bulletin* 1993/3 [BEL-1993-3-038].

Languages:

French, Dutch, German.

Identification: BEL-1991-C-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 04.07.1991 / **e)** 21/91 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.08.1991 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.2 **Constitutional Justice** – Procedure – Summary procedure.
1.6.4 **Constitutional Justice** – Effects – Effect *inter partes*.
1.6.8 **Constitutional Justice** – Effects – Consequences for other cases.

Keywords of the alphabetical index:

Preliminary question, obligation to request a preliminary ruling.

Headnotes:

Courts are not required to ask the Court of Arbitration for a preliminary ruling if the Court has already ruled on a question or appeal on the same subject-matter. If, however, the courts do request a preliminary ruling on the same question, the Court of Arbitration can adopt a shortened form of procedure and hand down an "immediate response decision".

Summary:

In its Judgment no. 9/91 of 2 May 1991, the Court of Arbitration ruled on a preliminary question. On 29 April 1991, a few days before this judgment was handed down, it was asked by a police court to rule on the same question.

The Court found (Decision, Part IV) that the police court had not been in a position to make use of Section 26.2, sub-paragraph 3.1 of the Special Law of 6 January 1989 on the Court of Arbitration, according to which it was dispensed from seeking a preliminary ruling from the Court if the Court had already ruled on a question with the same subject-matter. **(12) (35-37)**

The Court noted that a preliminary question could be considered to be "manifestly unfounded" within the meaning of Section 72 of the Special Law of 6 January 1989 if the Court had already handed down a ruling on an identical question.

In accordance with the preliminary procedure set out in aforementioned Section 72 **(16)**, the Court decided not to examine the case any further (no exchange of documents and no hearing) and to deliver an "immediate response decision", which was the same as its ruling in Decision no. 9/91.

Supplementary information:

1. Decisions of the Court of Arbitration setting aside a contested statutory provision (in principle *ex tunc*) are universally binding *(erga omnes)* (see, *inter alia*, Decision no. 12/86 of 25 March 1986 [BEL-1986-C-001]). Decisions dismissing applications to set aside a provision or provisions are binding on courts in respect of the points of law in question (Section 9 of the Special Law of 6 January 1989).

A ruling on a preliminary question is binding only on the parties *(inter partes)* insofar as the court that has

asked the question and any other court required to rule on the same case must comply with it (Section 28 of the aforementioned Special Law). However, other courts are not required to seek a preliminary ruling in respect of another case when the Court of Arbitration has already ruled on a question on the same subject (Section 26.2, sub-paragraph 3.2 of the Special Law).

Section 26 defines the circumstances that determine whether or not courts are required to seek a preliminary ruling. The cases where courts ruling at last instance can avoid asking a preliminary question are very limited and the question must be asked even if the Court of Arbitration has already ruled on it. Accordingly, such questions generally give rise to an "immediate response decision" after a shortened form of procedure.

The aforementioned provisions are published in the *Special Bulletin* on Basic Texts, issue 2, and in the CODICES database, http://codices.coe.int.

2. Cf. Decision no. 119/98 (preliminary procedure and partial referral of the case to the lower court so that it can assess whether or not a reply is still necessary).

3. For the binding effect *(inter partes)* of decisions dismissing applications to set aside legal provisions, see in particular Decision nos. 53/99 and 80/99, *Bulletin* 1999/2 [BEL-1999-2-006].

Languages:

French, Dutch, German.

Identification: BEL-1993-C-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.07.1993 / **e)** 56/93 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.08.1993 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.9 **Constitutional Justice** – Procedure – Parties.
1.4.10.1 **Constitutional Justice** – Procedure – Interlocutory proceedings – Intervention.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Preliminary question, parties to the proceedings / Intervention.

Headnotes:

Under Section 87.1 of the Special Law of 6 January 1989, when the Court of Arbitration hands down a preliminary ruling, anyone with an established interest in the case pending before the court which requests a preliminary ruling may, providing they submit a memorial to the Court of Arbitration within the prescribed time-limit, be joined to the proceedings.

Parties with an established interest in similar cases, however, do not have this possibility of being joined to the proceedings.

In the event of an application from such parties, the Court of Arbitration must check that the Act governing its own organisation does not breach the principles of equality and non-discrimination laid down in Articles 10 and 11 of the Constitution. The court found that it was competent to carry out this check on an interlocutory basis and ruled the aforementioned Section 87.1 to be compatible with the constitutional principles of equality and non-discrimination.

Summary:

Applications from third parties to be joined to proceedings relating to preliminary questions are governed by the Special Law of 6 January 1989. In order to be joined to preliminary proceedings before the Court of Arbitration, a person must meet both of the conditions laid down in Section 87.1. In other words, he or she must have an established interest in the case pending before the court that sought the preliminary ruling and must have submitted a memorial to the Court of Arbitration within the prescribed time-limit.

The Court found that people with an established interest in the case pending before the court that requested the preliminary ruling and people with an established interest in similar cases were treated differently **(23)**. It then found that this difference in treatment was justified, given the conditions governing the referral of cases for a preliminary ruling and the fact that the ruling constituted *res iudicata* **(37)**. It was up to the court dealing with a particular case to refer it to the Court of Arbitration.

Section 28 of the aforementioned Special Law limits the scope of a ruling on a preliminary question to the case in respect of which the question is asked. Consequently, it is possible under the Act to limit applications to be joined to Court of Arbitration proceedings to people who can intervene in the case in issue.

Lastly, the Court found that while it was probably true that a ruling on a preliminary question could have an indirect impact on similar cases insofar as the court dealing with a similar case could consider that it did not have to seek a preliminary ruling from the Court of Arbitration because the Court had already handed down a ruling on a preliminary question on the same subject, there was nothing to prevent the parties to a similar case from arguing before the court dealing with the case that it should also seek a preliminary ruling.

Consequently, Section 87.1 of the Special Law of 6 January 1989 does not violate the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) by not allowing applications to be joined to the proceedings to be submitted by people who do not have an established interest in the case pending before the court that referred the case for a preliminary ruling.

Supplementary information:

1. See also Decisions nos. 57/93 (*Bulletin* 1993/2 [BEL-1993-2-028], 65/93, 7/94, 60/95, 82/95, 10/97, 35/97 and 26/2001, applying the same provision of the Act.

2. See also, however, Decision no. 55/99, according to which parties to a case similar to the case giving rise to the preliminary question could be joined to the proceedings given that, in both cases brought before the *Conseil d'État,* the parties had requested that the Court of Arbitration be asked to rule on a preliminary question and the *Conseil d'État* had reserved judgment on the cases until the Court of Arbitration had ruled on the question asked in relation to the case before it. See also Decision no. 126/2000, which adopts the same solution insofar as the case brought by the intervening party before the industrial tribunal in Brussels was referred by the tribunal to the special list pending the Court of Arbitration's ruling on the preliminary question submitted by the industrial tribunal in Antwerp in this case.

Languages:

French, Dutch, German.

Identification: BEL-1993-C-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15.07.1993 / **e)** 63/93 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.09.1993 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.

Keywords of the alphabetical index:

Preliminary question, subject-matter / Preliminary question, limitation / Constitutional Court, appeal, limits.

Headnotes:

In cases where a preliminary question regarding compliance with the constitutional principle of equality (Article 10 of the Constitution) concerns a provision that provides for a number of distinctions, the Court of Arbitration limits its examination to the distinction which, having regard to the facts of the case and the wording of the preliminary question, constitutes the subject-matter of the case.

In other words, the Court does not rule in an abstract manner on the constitutionality of the contested provision but answers a preliminary question in relation to the case pending before the court below.

Summary:

Mr E. Van Daele started receiving a special advance pension payable on redundancy under a collective agreement at the age of 57. His application to receive an old-age pension when he reached the age of 60 was rejected on the ground that he was already claiming an advance pension under a collective agreement and was not entitled to an old-age pension before the age of 65. He lodged an appeal against this decision with the industrial tribunal.

The industrial tribunal in Antwerp requested a preliminary ruling on the question of whether or not Section 2 of the Act of 20 July 1990 "establishing a flexible retirement age for salaried workers and adapting salaried workers' pensions to the changes in the general standard of living" was consistent with the constitutional principle of equality and non-discrimination (Articles 6 and 6bis of the former Constitution, currently Articles 10 and 11 of the Constitution) insofar as men receiving an advance pension under a collective agreement were not entitled to claim the old-age pension before the age of 65, whereas, in principle, anyone else could claim it from the age of 60.

The Court of Arbitration noted that the case that had given rise to the preliminary question concerned an appeal lodged by a male claimant of an advance pension under a collective agreement on the ground that he was not entitled to claim the old-age pension from the age of 60.

The Court found that it was not necessary in order to answer this question to carry out a specific comparison, within the category of people in receipt of advance pensions under a collective agreement, between male and female beneficiaries, which would also have meant assessing the contested provision's compliance with Articles 6 and 6bis of the former Constitution (now Articles 10 and 11 of the Constitution) taken in conjunction with (former) Article 119, now Article 141 EC, as interpreted by the Court of Justice **(46)**.

Having regard to the particular facts of the case and the wording of the preliminary question, the Court of Arbitration therefore limited its examination **(6)** to the distinction made between a claimant of an advance pension under a collective agreement and anyone else claiming an old-age pension from the age of 60. (The outcome of the case in terms of its merits is not important here.)

Supplementary information:

See by way of analogy in particular Decisions nos. 21/96, 39/96, 23/97, 54/98, 58/2000.

Languages:

French, Dutch, German.

Identification: BEL-1996-C-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15.05.1996 / **e)** 32/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 20.06.1996 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.

Keywords of the alphabetical index:

Preliminary question, judges *a quo* and *ad quem*, jurisdiction, repartition / Interpretation, of the legal rules applicable to the facts of the case.

Headnotes:

It is not up to the Court of Arbitration to settle a dispute about the exact scope of contested provisions on which a lower court has already ruled. However, in cases where the Court considers that a legal rule, as interpreted by the court below, violates the Constitution, and that another interpretation is possible according to which the legal rule would not be unconstitutional, the Court has a duty to draw attention, in the operative words of its ruling, to the interpretation that would avoid declaring the legal rule unconstitutional.

Summary:

In two cases, property owners claimed compensation (under Articles 1382, 1383 or 544 of the Civil Code) for damage caused to their property as a result of work carried out by the State. The government had submitted that, by virtue of special legal provisions, claims against the Belgian State were time-barred after five years.

The courts asked the Court of Arbitration to rule on the question of whether or not the fact that the victims of damage caused by the State had only five years in which to bring their compensation claims, even though the limitation for bringing such claims under ordinary law was thirty years, violated the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The victims submitted that although their claims were based on provisions of ordinary law (Articles 1382, 1383 and 544 of the Civil Code), the courts dealing with the cases had expressly considered that it was the five-year limitation period that was applicable. In other words, the courts held that the special provisions were to be interpreted as also applying when actions brought against the State concerned a claim for compensation on the ground of unlawful behaviour.

In proceedings before the Court of Arbitration, a number of parties again challenged the interpretation of the provisions by the courts handling the cases **(23)**.

The Court of Arbitration found that the courts handling the cases had handed down an express ruling on the matter **(17)** and that the question the Court of Arbitration had to decide was whether or not, according to their interpretation by the courts below, the contested provisions breached Articles 10 and 11 of the Constitution **(21)**. The Court added, however, that while it seemed that the provisions, as interpreted by inferior courts, did indeed violate Articles 10 and 11 of the Constitution, it would also have to examine whether or not they were consistent with the principles of equality and non-discrimination if interpreted differently **(39)**.

The Court held that it was discriminatory to impose a five-year limitation period on a claim for compensation for damage caused to property as a result of work carried out by the State when the limitation period for bringing the same claim against a private party was thirty years. In particular, the Court took into account the fact that damage caused to immovable property is sometimes not apparent until several years after work has been carried out.

On that basis, the Court found that, as interpreted by the courts handling the cases, the contested provisions were discriminatory. It added, however, that it was also possible, as a number of parties had submitted, to interpret the provisions differently, in such a way that the difference in treatment no longer applied and they were no longer discriminatory. The operative words of the judgment give both interpretations. **(36) (39) (41)**.

Supplementary information:

1. See and compare with, in particular, Decisions nos. 27/93, 64/93, 32/96, 66/96, 29/97, 101/99 and 105/99. Concerning the question of whether superior courts take specific interpretations of legal provisions into account, see in particular Decisions nos. 117/99 and 26/2000 **(36)**.

2. In Decision no. 26/2000, the Court of Arbitration had to rule on a preliminary question asked by a court of appeal in a case that had already been brought before a court of first instance, a court of appeal and the Court of Cassation. After the Court of Cassation had set aside the appeal court decision, the case was referred to another court of appeal. One of the parties submitted that the Court of Arbitration lacked the necessary jurisdiction to rule on the question insofar as it could not criticise an interpretation already given to the contested law by the Court of Cassation in the same case. The Court of Arbitration rejected this plea, claiming jurisdiction under the Constitution and pointing out that its role was not to decide whether or not the Court of Cassation's interpretation was correct but to consider whether or not, according to that interpretation, the legal rule was compatible with Articles 10 and 11 of the Constitution. In so doing, it did not encroach on the jurisdiction of the ordinary courts.

Languages:

French, Dutch, German.

Identification: BEL-1996-C-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 13.11.1996 / **e)** 65/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.01.1997 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Preliminary question, judge *a quo* / Court, definition.

Headnotes:

Article 142.3 of the Constitution provides that "The Court may be solicited, on an interlocutory basis, by any court". Sections 26 to 30 of the Special Law of 6 January 1989 regarding the Court of Arbitration are concerned with requests for preliminary rulings submitted to the Court of Arbitration by other courts.

The Court has to define what is understood by the term “court” **(11)**.

Summary:

The Standing Committee of Appeal for Refugees asked the Court of Arbitration to rule on a preliminary question.

The Court could only rule on the question if the Standing Committee could be deemed to constitute a court.

The Court found that the Committee could be deemed to constitute a court having regard to the following factors: 1) the membership of the Committee, 2) the conditions of appointment of its members, which guaranteed that they were independent of the government, 3) the Committee’s recognised powers of investigation and enquiry, 4) the fact that both parties were represented in hearings organised by the Committee, 5) the special obligation for the Committee to give reasons for its decisions, and 6) the possibility of appealing against its decisions on points of law before the Court of Cassation. The Court also found that the judicial nature of the Committee had been confirmed at various stages of the drafting process of the Act governing the Committee.

On this basis, the Court held that it had the necessary jurisdiction to rule on the preliminary question.

Languages:

French, Dutch, German.

Identification: BEL-1997-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.02.1997 / **e)** 6/97 / **f)** / **g)** *Moniteur belge* (Official Gazette), 04.03.1997; *Cour d'arbitrage - Arrêts* (Official Digest), 1997, 77 / **h)**.

Keywords of the systematic thesaurus:

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

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
3.25.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.

Keywords of the alphabetical index:

Preliminary question, Court of Justice of the European Communities / Teaching, general medicine / Free movement of persons / Free movement of services / Right of establishment, mutual recognition of diplomas.

Headnotes:

The Court referred three preliminary points of law to the Court of Justice of the European Communities, concerning the interpretation of the provisions of Council Directive 93/16/EEC of 5 April 1993 designed to facilitate the free movement of doctors and the mutual recognition of diplomas, with particular reference to training in general medical practice (Title IV of the directive). The questions asked were:

1. Should the directive, and in particular Title IV, be interpreted as meaning that specific training in general medical practice cannot begin in Belgium unless the person concerned has obtained a diploma of doctor of medicine, surgery and obstetrics (“physician” in the Flemish community)?

2. Does the requirement laid down by Article 31 of the Directive, in accordance with which specific training in general medical practice must “entail the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works”, mean that the candidate may perform the activities of a doctor, which in Belgium are restricted to those holding the diploma of: “doctor of medicine, surgery and obstetrics” (“physician” in the Flemish community)?

3. If so, should that provision be interpreted as meaning that the candidate may perform such activities from the beginning of the specific training in general medical practice, which in the Flemish community begins in the seventh year of medical studies, i.e. before being awarded the diploma in medicine, surgery and obstetrics (“physician” in the Flemish community)?

Summary:

This judgment is the first in which a Constitutional Court referred a preliminary point of law to the Court of Justice of the European Communities **(45) (47)**.

A medical union filed an appeal to set aside a decree of the Flemish Community relating to specific training in general medical practice, adopted primarily in order to transpose the provisions of Title IV of Council Directive 93/16/EEC of 5 April 1993 to the Flemish Community.

In Belgium, basic medical studies last seven years. The contested decree authorises students to begin specific training in general medical practice at the beginning of the final year of the seven-year course. This first year of specific training is supplemented by two additional years of general medical training.

There are problems in interpreting the European Directive: Articles 23 and 30 stipulate that students having completed six years of medical training may be admitted to specific training in general medical practice, whereas Article 3 considers that the basic diploma of formal medical qualifications in Belgium is that of doctor of medicine, surgery and obstetrics ("physician" in the Flemish community). In Belgium, this diploma is awarded only after seven years of studies, but the contested decree authorises the start of the specific training from the beginning of the seventh year. Does the Directive authorise this specific training from the beginning of the seventh year of studies or is it necessary to wait until the basic training has been completed? This is the subject matter of the *first preliminary point of law*.

The *second* relates to one aspect of the specific training required by the Directive: does the personal participation of the trainee in the professional activities and responsibilities of the person with whom he or she works imply the exercise of activities restricted to those holding the basic diploma of formal medical qualifications? The reply to this question is relevant for consideration of the grounds on which the applicant relies on the provisions of Belgian law on medical monopoly with regard to the healing profession.

The *third preliminary point of law* will be considered only if there is an affirmative reply to the second. Should this personal participation of the trainee be initiated at the beginning of the specific training, i.e. from the seventh year of basic training (in accordance with the contested decree), or should it wait until the beginning of the additional two years of training which do not commence until the diploma of doctor has been awarded?

Languages:

French, Dutch, German.

Identification: BEL-1997-C-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 18.07.1997 / **e)** 54/97 / **f)** / **g)** *Moniteur belge* (Official Gazette), 03.10.1997 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.

Keywords of the alphabetical index:

Preliminary question, judges *a quo* and *ad quem*, division of jurisdiction.

Headnotes:

In Belgium, the Court of Arbitration has sole jurisdiction over the review of the constitutionality of legislation; jurisdiction over the review of the constitutionality of decisions taken by the government and its agencies rests with the ordinary or administrative courts.

The Court of Arbitration has jurisdiction to rule on preliminary questions concerning the compliance with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), where appropriate interpreted in conjunction with Articles 6.1, 13 and 14 ECHR, of a legal provision which, according to its interpretation by a lower court, authorises the King to decide under what circumstances a person may inspect documents in a criminal case file or obtain copies of such documents, insofar as it gives a legal foundation to a royal decree which provides for a difference in treatment.

Summary:

Under Article 1380.2 of the Judicial Code, the King may decide under what circumstances a person may be allowed to inspect documents in a criminal case file or to obtain copies of such documents. Article 125 of the Royal Decree of 28 December 1950, which lays down general rules governing court fees in criminal cases, states that the authorisation of either the Principal Crown Prosecutor at the Court of Appeal or the Advocate General is expressly required before a person can have access to the criminal case file. According to case-law, the Principal Crown Prosecutor has discretionary powers in this area, and there is no legal provision for lodging an appeal in court should the Prosecutor decide to refuse access to the file.

The parents of a crime victim were granted permission to inspect the criminal case file, but only subject to certain conditions which, in their view, meant inspection was impossible in practice. They asked the President of the court of first instance, as a matter of urgency, to request permission to obtain a copy of parts of the file. The President of the court of first instance asked the Court of Arbitration to rule on the question of whether or not Article 1380.2 of the Judicial Code was discriminatory insofar as it gave a legal foundation to the aforementioned royal decree and in so doing allowed a distinction to be made between people who could only have access to a criminal case file under conditions decided by the King (such as the party claiming damages in a criminal case, who requires the permission of the Principal Crown Prosecutor) and other people, such as the accused, or individuals in a civil action, whose scope for inspecting the case files and procedural documents and obtaining copies was broader.

In the proceedings before the Court of Arbitration, the Council of Ministers **(23)** submitted that the Court lacked the necessary jurisdiction to rule on this case, insofar as the difference in treatment complained of was the result not of primary legislation but of the aforementioned royal decree, which was an executive regulation.

The Court confirmed that it could only rule on whether or not a difference in treatment was justified in the light of the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) if the difference in treatment was the result of legislation **(3)**. It added that when a legislative body delegated authority, it was generally to be assumed that the lawmaker's intention in delegating authority was that such authority should only be exercised in accordance with Articles 10 and 11 of the Constitution.

However, the Court observed that in the case in question, Article 1380.2 of the Judicial Code authorised the King to decide under what circumstances a person was able to inspect documents in a criminal case file or obtain copies of such documents, and in so doing had allowed a distinction to be made. According to the court below, the contested law was to be interpreted as giving a legal foundation to the executive decree. The Court would therefore examine the measure set out in the royal decree not in order to rule on its compliance with the Constitution, for which it lacked jurisdiction, but only insofar as, under the contested law, the power invested in the Principal Crown Prosecutor as a result of the royal decree could be assumed **(21)** to have a legal foundation.

On this basis, the Court declared that it had the necessary jurisdiction to rule on the preliminary question (subsequent outcome of the case – violation – is not important here).

Supplementary information:

1. See and compare with, in particular, Decisions nos. 71/92, 33/97, 1/98, 16/99, 113/99, 18/2000, 109/2000 and 133/2000.

2. This decision is also characterised by the fact that in carrying out its review on the basis of Articles 10 and 11 of the Constitution (principles of equality and non-discrimination), the Court took into account fundamental rights guaranteed under the Constitution and international treaties (in this case, Articles 6.1, 13 and 14 ECHR). Discriminatory infringement of these fundamental rights may be deemed contrary to Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-1999-2-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 26.02.1999 / **e)** U 7/98 / **f)** Appeal of the Office of the Public Attorney of the Federation of Bosnia and Herzegovina against the Decision of the Human Rights Chamber of 11 March 1998 in Case no. CH/96/30, Sretko Damjanovic vs. the Federation of Bosnia and Herzegovina / **g)** *Sluzbeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) 9/99, 15.6.1999 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Human Rights, protection, highest domestic tribunal / Decision, final and binding, appeal / General Framework Agreement (Dayton) / Procedure, expenses, compensation / International body, powers, nature.

Headnotes:

The Constitutional Court is not competent to review decisions of the Human Rights Chamber for Bosnia and Herzegovina under Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

Summary:

The appellant challenged the Decision of the Human Rights Chamber in Case no. CH/96/30 in which the Chamber had ordered the Federation of Bosnia and Herzegovina to pay to Sretko Damjanovic the amount of 16 750 DEM as a compensation for procedural expenses. The appellant argued that the order of the Human Rights Chamber was not in conformity with the national laws and international conventions, since compensation had not been requested and the death sentence had been pronounced before the General Framework Agreement was signed on 14 December 1995.

The Court denied its competence to review decisions of the Human Rights Chamber. According to Article VI.3.b of the Constitution of Bosnia and Herzegovina, the Court has jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The Court did not consider the Chamber to be such a "court in Bosnia and Herzegovina", even though, according to Article II.2 and II.3 as well as Article VI.3.b of the Constitution, the protection of human rights falls in principle within the Court's jurisdiction. The Court found no mention in the Constitution nor in any other law of a specific hierarchy or other relationship between the Court and the Chamber. However, it observed that Article II.1 of the Constitution in conjunction with Annex 6 to the General Framework Agreement – Agreement on Human Rights – provided for an additional protection mechanism, the Human Rights Commission consisting of the Ombudsman and the Human Rights Chamber. The Constitution and Annex 6 General Framework Agreement were adopted at the same time as Annexes to the General Framework Agreement. They should therefore be considered to supplement each other and could not be contradictory. According to Article VIII of Annex 6 to the General Framework Agreement, the Chamber shall have jurisdiction to examine questions of alleged human rights violations.

The Constitutional Court considered that although the Chamber exercised its judicial functions with respect to alleged violations of human rights in Bosnia and Herzegovina, it was an institution of a special nature. According to Article XIV Annex 6 to the General Framework Agreement, the Chamber would only function during a transitional five-year period, unless the Parties to the Agreement agreed otherwise. In the legal terminology of Annex 6 to the General Framework Agreement, the Chamber was neither a court nor (in view of Article XIV of Annex 6 to the General Framework Agreement) any institution of Bosnia and Herzegovina. Moreover, the Court found

that the Constitution referred to the concept of a "court in Bosnia and Herzegovina" also in Article VI.3.c, according to which the Court has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible, in particular, with this Constitution or the European Convention on Human Rights. In the Court's opinion, it was quite certain that the authors of this provision did not intend the Chamber to be included among those institutions which should be competent to refer human rights issues to the Court for preliminary consideration.

Finally, the Court argued that both, the decisions of the Court (Article VI.4 of the Constitution) as well as those of the Chamber (cf. Article XI.3 of Annex 6 to the General Framework Agreement) shall be final and binding. As these two provisions were adopted at the same time, the Court found the correct interpretation must be that the authors did not intend to give either one of these institutions the competence to review the decisions of the other, but rather considered that, in regard to human rights issues, the Court and the Chamber should function as parallel institutions, neither of them being competent to interfere in the work of the other and it being left in some cases to the discretion of applicants to make a choice between these alternative remedies.

Judge Begic expressed his separate opinion finding the Court to be competent to review decisions of the Chamber, mainly on the grounds that the Constitution of Bosnia and Herzegovina obliges the Court to protect human rights in Bosnia and Herzegovina.

Supplementary information:

Similar questions arose regarding acts of the Office of the High Representative (Annex 10 to the General Framework Agreement), the Provisional Election Commission (Annex 3 to the General Framework Agreement) and the Commission for Real Property Claims (Annex 7 to the General Framework Agreement).

Cross-references:

- Decisions U 3/98, U 4/98 of 05.06.1998 (question left unanswered), *Bulletin* 1998/2 [BIH-1998-2-001];
- Decisions U 8/98, U 9/98, U 10/98, U 11/98 (almost identical reasoning as in U 7/98;
- Decision U 13/01 confirms Decision U 7-11/98.

Languages:

Bosniac, Croat, Serb.

Identification: BIH-2001-3-006

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 04.05.2001 / **e)** U 17/01 / **f)** Requests of employees of the Municipal Court of Sanski Most and Rasim Jusufovic for the institution of proceedings for the evaluation of the constitutionality of Article 152 of the Law on Work of Republika Srpska / **g)** *Sluzbeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) 27/2001, 24.10.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.

Keywords of the alphabetical index:

Employment, conditions, criteria / Referral, conditions.

Headnotes:

Lower courts in Bosnia and Herzegovina may only refer questions to the Constitutional Court of BiH according to Article VI.3.c of the Constitution of Bosnia and Herzegovina if they relate to a case pending before that court.

Summary:

The President of the Municipal Court of Sanski Most, on behalf also of other employees of the Court who resided before the war in municipalities which are now on the territory of Republika Srpska, as well as Rasim

Jusufovic from Bijeljina requested the Court to evaluate the constitutionality of Article 152 of the Labour Law of the Republika Srpska (Official Gazette of the Republika Srpska no. 38/00 of 8 November 2000).

The appellants argued that Article 152 of the Labour Law of the Republika Srpska violates the human rights of citizens who, on 31 December 1991, were employed on the territory of the Republika Srpska. They referred to the "well-known fact" that employment used to be terminated for reasons based on racial discrimination, which was in contravention of the Constitution and international conventions.

The Court found the request to be inadmissible under Article VI.3.a and VI.3.c of the Constitution. The appellants do not belong to the categories of persons who are entitled to bring a dispute regarding the conformity of a law with the Constitution before the Court. According to Article VI.3.a of the Constitution, the Constitutional Court has exclusive jurisdiction to decide any dispute that arises under the Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including disputes as to whether any provision of an Entity's constitution or law is consistent with the Constitution of Bosnia and Herzegovina. These disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

The Court added that, in so far as the President of the Municipal Court may be considered to have made the request on behalf of the Court itself, the request was not related to any case pending before the Court, this being a condition for the right of a court, under Article VI.3.c of the Constitution, to refer a constitutional issue to the Constitutional Court.

Cross-references:

- Decision U 19/01 declares the contested article (without the second alinea) to be in conformity with the Constitution of Bosnia and Herzegovina.

Languages:

Bosniac, Croat, Serb.

Identification: BIH-2001-3-007

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 05.05.2001 / **e)** U 10/01 / **f)** Preliminary question referred by the Cantonal Court of Zenica / **g)** Ruling not to be published / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
3.9 **General Principles** – Rule of law.

Keywords of the alphabetical index:

Judgment, execution, conditions.

Headnotes:

The Court may not pronounce itself on a question referred to it by a lower court if that question does not fall within the jurisdiction of the Court under Article VI.3.c of the Constitution of Bosnia and Herzegovina, even if it raises issues under the Constitution.

Summary:

The Cantonal Court of Zenica requested the Court to state its opinion on whether the judgment of the Supreme Court of Bosnia and Herzegovina no. KZ 30/92 of 6 July 1992 could be legally executed, despite the existence of a conflicting ruling of the Supreme Court of Republika Srpska no. KZ 40/93 of 17 November 1993.

In 1991, the Higher Court of Doboj had convicted Mirko Karatovic and Nikola Karatovic of murder and sentenced each of them to 10 years' imprisonment. In 1992, the Supreme Court of Bosnia and Herzegovina increased these sentences to 12 years' imprisonment. No further appeal was available against that judgment. Nevertheless, in November 1993, the Supreme Court of Republika Srpska annulled the judgment of the Higher Court of Doboj and referred

the case back for retrial to the First Instance Court of Maglaj. In May 1994, the Higher Court of Doboj, upon a proposal of the President of the Higher Court of Maglaj, decided that the further criminal proceedings should be held before the First Instance Court of Doboj. That Court scheduled a main hearing to be held in March 2000, but the hearing was cancelled since the accused were not present.

The Court denied its competence to pronounce itself on the referred question. It observed, that in view of the continuing criminal proceedings, the question could arise as to whether or not the execution of the judgment of the Supreme Court of Bosnia and Herzegovina of 6 July 1992 would be compatible with Article 6 ECHR and Article 4 Protocol 7 ECHR. The European Convention and its Protocols are part of the constitutional protection in Bosnia and Herzegovina, and the courts in charge of the execution of the Supreme Court's judgment must therefore apply those provisions and have regard to the fact that, according to Article II.2 of the Constitution of Bosnia and Herzegovina, the European Convention on Human Rights and its Protocols shall have priority over all other law.

However, the Court found that at the present stage of the proceedings the conditions laid down in Article VI.3.c of the Constitution of Bosnia and Herzegovina were not satisfied. According to that provision, the Constitutional Court has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with the Constitution, with the European Convention on Human Rights and its Protocols, or with the laws of Bosnia and Herzegovina, or concerning the scope of a general rule of public international law pertinent to the court's decision. In the case in point, the Cantonal Court of Zenica had raised a specific issue of legal interpretation but had not referred to any law whose compatibility with the Constitution or with the European Convention on Human Rights or its Protocols would be at issue, or concerning the scope of a general rule of public international law (19, 20).

Languages:

Bosniac, Croat, Serb.

Croatia
Constitutional Court

Important decisions

Identification: CRO-1995-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 15.02.1995 / **e)** U-I-143/1995 / **f)** / **g)** *Narodne novine* (Official Gazette), 11/1995 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.7 **Institutions** – Judicial bodies – Supreme court.

Keywords of the alphabetical index:

Power, balance / Supreme Court, president, appointment.

Headnotes:

The provision which stipulates that the President of the Supreme Court of the Republic shall be appointed at the proposal of the Government of the Republic is not unconstitutional.

Summary:

The provision was disputed from the standpoint of the constitutional principle of the separation of powers into legislative, executive and judicial branches, and also by reference to the principle according to which judicial power shall be autonomous and independent.

The Court held that the purpose of the constitutional provision of the separation of powers is to prevent the concentration of authority and political power solely within one government body. The realisation of this purpose in contemporary constitutional systems is dealt with in different ways, which results in entrusting the basic governing functions to different government bodies. In the Croatian system of a tripartite

separation of powers, these powers control and limit each other, but they also permeate each other.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.01.1997 / **e)** U-IV-947/1996 / **f)** / **g)** *Narodne novine* (Official gazette), 2/1997, 98-100 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.4.1.5.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

Keywords of the alphabetical index:

Judge, exclusion / Judge, challenging.

Headnotes:

The State Judiciary Council itself decides on the motion for the exclusion of its president and/or of its members in disciplinary proceedings conducted before it against a president of a court or a judge.

Denial of exclusion in cases of disciplinary proceedings before the State Judiciary Council would mean the acceptance of partial judges in some cases, which would be a violation of the constitutional right to a fair trial.

Summary:

The decision concerns the conflict of jurisdiction between legislative and judicial bodies, in this case between the House of Counties of the Parliament and the State Judiciary Council which appoints judges, relieves them of duty and deals with their disciplinary responsibility.

A president of a court and a judge may appeal to the House of Counties against decisions by which punishments are imposed upon them in disciplinary proceedings before the State Judiciary Council.

In disciplinary proceedings against him, the then president of the Supreme Court of the Republic made a motion for the exclusion of the president of the State Judiciary Council and two of its members, justifying the motion by the circumstances which made their impartiality doubtful.

The State Judiciary Council deferred the motion to the House of Counties, which also declared its incompetence in cases of exclusion, and expressed the view that exclusion is not acceptable in proceedings before the State Judiciary Council.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-3-034

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 27.10.1997 / **e)** U-I-914/1996, U-I-34/2997 / **f)** / **g)** *Narodne novine* (Official Gazette), 115/1997, 3688-3690 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.7.4.1.4 **Institutions** – Judicial bodies – Organisation – Members – End of office.
4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – Status.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.

Keywords of the alphabetical index:

Judge, retirement age.

Headnotes:

A legal provision on the termination of judicial office by retirement does not contravene the constitutional provision according to which the judicial office shall be permanent.

Differentiation between judges who retire according to general regulations on old-age pension insurance and other members of the judicial branch, like State attorneys, public attorneys and public notaries, who are allowed to work until they are 70 years old, is not concordant with the principle of equality.

Equality is also violated in relations among fellow judges by the fact that only some judges may hold their offices until they are 70.

Summary:

The disputed provisions of the Law on Courts stipulated that a judge performs his judicial duty at the court to which he or she was appointed until he acquires the right to full old-age pension (at the age of 60 for men and 55 for women, or – depending on the number of years in service – at 65 for men and 60 for women). They also stated that the judicial mandate of a judge who has acquired the right to full old-age pension may be extended by the High Judiciary Council, upon a proposal of the Minister of Justice, based on a previously obtained opinion of the president of the judge's court, until the age of 70. Both disputed provisions were repealed.

In his concurring opinion, one constitutional judge stated that the Constitution regulates entirely all the aspects of the permanence of judicial office and reasons for relief of that office, among which there is no age limit, and also that the Constitution does not provide for a possibility to regulate this issue by legislative acts. Therefore, the legislator was not authorised to prescribe additional reasons for relief of judicial office. If an age limit after which judicial office is automatically terminated is to be introduced, this should be incorporated into the Constitution, or the Constitution should contain an authorisation to the legislator to regulate this issue by law, but until the adequate amendments to the Constitution are made there is no possibility to regulate by law cases of relief of judicial office.

Supplementary information:

Legal norms referred to:

- Articles 2, 14, 120, 121 of the Constitution;
- Article 32 of the Act on Retirement and Invalidity Insurance.

On 26 November 26 1997, the Law on Amendment to the Law on Courts was passed (*Narodne novine* 131/1997, 4227) according to which a judge performs his judicial duty to which he was appointed “until the end of the year in which he/she is 70 years old”.

Cross-references:

In case U-I-261/1990 the Court had held that reasons for termination of judicial office were stated in the Constitution only and that the legislator is not authorised to prescribe additional reasons for that termination.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1998-1-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.04.1998 / **e)** U-III-244/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 58/1998, 1342-1344 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.34.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Judge, relief of duty / Independence / Impartiality / Disciplinary proceedings / Telephone tapping.

Headnotes:

Evidence illegally obtained is not admitted in court and disciplinary proceedings.

Summary:

A former president of the Supreme Court of Croatia claimed a violation of his constitutional rights during the proceedings in which he was relieved of his presidential and judge's duty. The Court, finding that the decision of the State Judicial Council was based on information obtained by invalid pieces of evidence, repealed the decision of the State Judicial Council and returned the case to the Council for renewal of proceedings. The invalid pieces of evidence were tapes of telephone conversations, the surveillance of which was conducted in connection with other persons, not the former president, and also, interrogation of a witness who, as a member of State Judicial Council, participated in the same disciplinary proceedings as a judge.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2000-1-010

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

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.9 **General Principles** – Rule of law.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judge, appointment / Judge, relief of duty.

Headnotes:

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

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

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

Summary:

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

Supplementary information:

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

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

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2000-3-017

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.11.2000 / **e)** U-I-745/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 112/2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
3.9 **General Principles** – Rule of law.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.8 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Public hearings.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Public judgments.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Tribunal, quality / Civil right.

Headnotes:

The Administrative Court, which in the structure of the Croatian courts reviews the administrative acts involved in the process of expropriation (i.e. acts determining the expropriation and acts determining the level of compensation for the expropriated real estate) and thus determines civil rights and obligations, is not a court of full jurisdiction in the sense of Article 6 ECHR.

Summary:

Three provisions of the Law on Expropriation were repealed with the effect that they shall lose their legal force on 31 December 2001.

Although they were not the subject of review in this case, the Court analysed provisions of the Law on Administrative Lawsuits, which regulate the procedure before the Administrative Court, having in view issues concerning expropriation. The Court found that the Administrative Court does not have the authority to establish the facts of a case independently or to present and assess evidence independently, and that therefore it lacks the quality of an independent and impartial tribunal established by law. In addition, the procedure before that court, as a rule, does not provide for any oral hearing for complaints against an administrative act in which a civil right or obligation is being decided; nor does it provide for any public hearing and public pronunciations of the judgment, or for a right for the ruling to be made within a reasonable time.

The relevant provisions of the Law on Expropriation were thus repealed.

The grounds for the decision were not only based on violations of the provisions of Article 3 of the Constitution (rule of law), Article 5 of the Constitution (laws shall conform with the Constitution, other regulations with the Constitution and laws), and of Article 134 of the Constitution (concluded and ratified international agreements shall be part of the domestic legal order and shall have legal force superior to law), but also Article 6 ECHR (right to a fair trial).

Languages:

Croatian, English.

Identification: CRO-2001-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.07.2001 / **e)** U-I-190/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 67/01 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.7.4.1.1 **Institutions** – Judicial bodies – Organisation – Members – Qualifications.
4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.

Keywords of the alphabetical index:

Court, president, appointment.

Headnotes:

Provisions in the Courts Act, whereby a candidate for president of a court (except in the case of the Supreme Court of the Republic) may be a person who is not a judge, were held to be unconstitutional.

Summary:

The subject of review was the revised Courts Act (*Narodne novine*, 129/00), of which part of the provisions of Article 73c.2 and 73c.3 were repealed. These provisions had prescribed (as an exception to the rule that candidates for presidency of a court must be a judge who satisfies the requirements for a judge of that court) that a candidate for the presidency may exceptionally be a person who does not perform a function of judge, provided that he or she is a distinguished lawyer who satisfies the requirements for a judge of the court in question. The provisions had further described that the president of a court, who had not been a judge prior to being appointed president, shall inform, within 30 days from the date of his appointment, the state judicial council which may appoint him a judge of that court. In the case of non-appointment, the whole procedure of appointment has to be repeated.

The Court found in these provisions a source of instability of judicial power which is manifested, for instance: in legal uncertainty as to whether the state judicial council will appoint the president of the court as judge or not; in institutional instability caused by the repeated procedure of appointing the president of a court in the case of the elected president subsequently not being appointed a judge; and in legal future of acts and activities made, signed and undertaken by the elected president between his appointment as the president and the decision of the state judicial council to refuse his or her request to be appointed a judge. Apart from reasons concerning the instability of judicial power, the Court found that the repealed provisions violated the constitutional demand for judicial power to be performed exclusively by the courts and the principle that everyone shall be equal before law.

The Court did not accept the proposals to repeal the provisions which prescribed the following: that the president of a court shall be appointed by the Minister of Justice from among the candidates proposed by judges' council; that the president of the judges' council shall request from the Minister of Justice an evaluation of judicial performance and other data from the records of judges, which are important for the establishment of the professional ability of the candidate for the president of a court; that the decision of the Minister of Justice to relieve the president of a court of his duty shall be in writing and shall contain reasons for the decision; that the election of members of judicial councils and the appointments of the presidents of courts according to the provisions of the Act shall be carried out within three months from the day of the Act's entry into force; as regards provisions regulating the election of the President of the Supreme Court of the Republic of Croatia (who, on constitutional grounds holds a unique position which differs from that of the presidents of other courts); provisions concerning evaluation of judicial performance, the provision according to which judges appointed for the first time shall be evaluated in terms of their judicial performance every year, and the work of other judges once every three years; the provision according to which a member of the judges' council shall cease to perform his or her duty prior to expiry of office if he or she so requests; and the provision according to which legal interpretation adopted at a meeting of the Department of the Supreme Court of the Republic, and of the Department of the Administrative Court of the Republic, shall be binding on all levels in that department.

Supplementary information:

Dissenting opinion of Judge Petar Klarić, who did not find the repealed provisions unconstitutional, particularly having in view that the identical provision concerning the President of the Supreme Court was not repealed. The opinion holds that a part of Article 44.1 is unconstitutional when it states that "appointments of the presidents of the courts according to the provisions of this Act shall be carried out within three months from the day of entry into force of this Act".

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.11.2001 / **e)** U-III-302/1997 / **f)** / **g)** *Narodne Novine* (Official Gazette), 111/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.

Keywords of the alphabetical index:

Dismissal, prior notice, obligatory / Worker, conditions, collective settlement / Employment, notice of termination.

Headnotes:

In cases concerning alleged arbitrary displays of public power (e.g. no reasons given, relevant considerations ignored etc) and violations of the principle of equality guaranteed by Articles 14 and 26 of the Constitution, the Constitutional Court may exceptionally decide for itself on the correct application of the substantive law, despite the fact that it is the Supreme Court which is defined by the Constitution as the highest court in the country, competent to ensure the uniform application of laws and equal justice for all.

Summary:

The applicant in a constitutional complaint was a company whose headquarters were in Skopje. In the previous civil trial, the Court annulled the disputed act of the applicant, and ordered him to re-employ two workers (who were claimants in the previous trial) and enable them to perform their previous job.

The applicant claimed that in the meantime Croatia as well as “The Former Yugoslav Republic of Macedonia” had become independent states; that the Court did not respect the rules of the Law on Civil Procedure (LCP), according to which the court is obliged to stay within the limits of its jurisdiction during the procedure; and that the provisions of Article 55 of the Law on Resolving Disputes on Conflicts of Law in Particular Relationships (LRDCLPR) were violated. These provisions provide that the Croatian court has jurisdiction if a foreign legal person (i.e. the defendant) has its representative office or agency in Croatia, or if the legal person who acts in favour of the foreign legal person is based in the country.

Furthermore, the applicant pointed out that the court did not apply the relevant provisions of the Law on Basic Rights in Labour Relations and Collective Agreements that were in force at the time. He claimed that the relevant provisions provided that in case of dismissal due to incapacity for performing a particular job, and the failure to achieve set results, the employer is not obliged to give a dismissal period. This point of view is also supported by the current practice of the Court of Appeal and the Supreme Court.

The Constitutional Court rejected the applicant's complaints regarding the lack of jurisdiction of the Croatian courts and based its considerations on the application of the substantive law.

The contested judgments were adopted on the basis of the incorrect application of the substantive law, according to which the courts concluded that the dismissal period was not in question.

Since the obviously relevant provision of the substantial law was not applied, the Constitutional Court found that there had been a violation of the constitutional rights guaranteed by Articles 14 and 26 of the Constitution, which state that court and other bodies should judge similar cases equally.

Languages:

Croatian.

Cyprus
Supreme Court

Important decisions

Identification: CYP-1995-C-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 22.05.1995 / **e)** 8656 / **f)** / Larkos v. Attorney-General of the Republic / **g)** (1995) 1 *C.L.R.* 510 / **h)** *Yearbook of the European Convention on Human Rights*, 1999, p. 88.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.16 **General Principles** – Proportionality.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

House, lease / Discrimination, justification / Legitimate aim, action / Tenant, capacity, rights.

Headnotes:

Difference in treatment is discriminatory if it has no objective and reasonable justification.

Summary:

Article 28.1 of the Constitution safeguards the right of equality and Article 28.2 safeguards the enjoyment of all the rights and liberties provided for in the Constitution without any direct or indirect discrimination. Furthermore Article 8 ECHR safeguards the right to respect for private and family life and Article 14 ECHR prohibits discrimination.

The appellant was a retired civil servant. In May 1967 he rented a house from the Government under the terms of a tenancy agreement which had many of the features of a typical landlord-tenant agreement for the lease of property. On 3 December 1986 the Ministry of Finance, his employer, gave him notice to quit the property by 30 April 1987. The appellant refused to do so. He claimed that he was a protected tenant within the meaning of the Rent Control Law 1983. Following his refusal the Government sued the appellant before the District Court of Nicosia and claimed his eviction from the premises. The appellant contended that he was protected by the Rent Control Law 1983 and thus the District Court lacked jurisdiction. The District Court ruled against the appellant. It held that the Government was not bound by the above law. It further held that the appellant was in unlawful possession of the premises after the termination of the tenancy and ordered him to vacate the premises.

The appellant lodged an appeal against the above decision before the Supreme Court. He invoked Article 28 of the Constitution and Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR which safeguards the right to respect of property. He contended that his undisputed capacity as tenant of the premises constituted a species of property. He invited the Supreme Court to hold that he was protected by the above law because to hold otherwise would have amounted to unequal treatment in relation to his rights, as a protected tenant, which constitute property. Regarding Article 28 of the Constitution the appellant contended that since the Government enjoyed the benefits of the above Law as a tenant it would have constituted a violation of the principle of equality had the Law relieved them from the obligations of the landlord as prescribed by the Law in question.

The Supreme Court rejected the contentions of the appellant. By means of its decision, dated 22 May 1995, it held that Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR had not been violated because the appellant did not satisfy the prerequisite of being a protected tenant. It further held that the principle of equality which is safeguarded by Article 28 of the Constitution was not violated because under the Rent Control Law it was possible for the Government to be “a tenant” without, at the same time, being considered as a “landlord”.

Supplementary information:

The appellant lodged an application against the above decision of the Supreme Court with the European Commission on Human Rights on 21 November 1995. The Commission declared the application admissible. It adopted a report in which it expressed the unanimous opinion that there had been a violation of Article 14 ECHR in conjunction

with Article 8 ECHR and that it was not necessary to examine whether there had been a violation of Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR.

The Cypriot Government referred the case to the European Court on Human Rights on 1 November 1998.

The appellant complained that as a Government tenant living in an area regulated by the Rent Control Law 1983 he had been unlawfully discriminated against in the enjoyment of his right to respect for his home. He maintained that, unlike a private tenant living in accommodation in such an area rented from a private landlord, he was not protected from eviction at the end of his lease. He alleged a breach of Article 14 ECHR in conjunction with both Article 8 ECHR and Article 1 Protocol 1 ECHR.

The Court concluded that there had been a violation of Article 14 ECHR taken together with Article 8 ECHR. It recalled that in accordance with its established case-law a difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

While it accepted that public interest considerations may justify treating differently persons in a relatively similar situation, the Court noted that the Government had not adduced any preponderant interest which would warrant the withdrawal from the appellant of the protection accorded to other tenants under the 1983 Law. As to the Government's contention that they could not be equated to a private landlord when disposing of State property, the Court recalled that the authorities had leased the house to the appellant acting as a party to a private-law transaction. It also observed that a decision not to extend the protection of the 1983 Law to Government tenants living side-by-side with tenants in privately-owned dwellings in a regulated area requires specific justification, more so since the Government are themselves protected by that Law when renting property from private individuals. For these reasons the Court concluded that the Government had not adduced any reasonable and objective justification for treating the applicant differently.

Cross-references:

European Court of Human Rights, *Larkos v. Cyprus*, Reports 1999-I.

Languages:

Greek, English.

Czech Republic
Constitutional Court

Important decisions

Identification: CZE-1995-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 16.02.1995 / **e)** III. US 61/94 / **f)** Position of the Constitutional Court in the system of courts / **g)** *Sbírka nálezů a usnesení Ustavního soudu ČR* (Official Digest), Vol. 3, no. 10 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Evidence, submission / Litigation, procedure, correctness / Court, proceedings, procedural correctness.

Headnotes:

The Constitutional Court is not at the top of the pyramid of ordinary courts but remains outside the system of ordinary courts. It is, however, empowered to review decisions of ordinary courts that infringe upon the principle of a fair trial.

Summary:

The position of the Constitutional Court is that of an organ outside the system of ordinary courts of the Czech Republic. As provided for by the Constitution, it does not represent the top level of court jurisdiction. Therefore, any intervention of the Constitutional Court in the exercise of ordinary jurisdiction can be justified only if the ordinary court steps outside the scope and limits set by the principle of a fair trial (Article 36 of the Charter of Fundamental Rights and Freedoms *et al.*). This can be interpreted in such a way that the Constitutional Court is first of all empowered to watch over the procedural correctness of court proceedings in the course of a litigation.

This interpretation was handed down by the Constitutional Court in a case raised against court proceedings by which the ordinary court abruptly violated general procedural rules on the acceptance and/or dismissal of evidence. Ordinary courts are obliged not only to decide on the submission of evidence but also to specify reasons for the dismissal of evidence proposed by a party. By not doing so, the decision of the ordinary court is tainted with defects that make it reviewable and unconstitutional at the same time.

Supplementary information:

The principle established in this decision had been confirmed in many subsequent decision (see also Decisions I. US 68/93, IV. US 55/94, II. US 294/95).

Languages:

Czech.

Identification: CZE-1995-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 06.06.1995 / **e)** I. US 30/94 / **f)** Placement of minor children in nursing homes without prior consent of their parents / **g)** *Sbírka nálezů a usnesení Ustavního soudu ČR* (Official Digest), Vol. 3, no. 26 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Parents, authority, limitation.

Headnotes:

Placement of a minor in a nursing home against the will of his or her parents is possible only by the decision of an ordinary court that is based on the law. Any preliminary administrative decision is therefore contrary to the Constitution.

Summary:

According to Article 224.5 of the Penal Code and Article 95.2 of the Constitution, ordinary courts shall, if they presume that a measure to be applied in the decision on a given case is inconsistent with a constitutional norm, interrupt the proceedings and submit the case to the Constitutional Court. It is therefore perfectly possible for the ordinary court not to reach such a conclusion; but if it does the court is to proceed as stated above. Should a party bring such a claim before the court, it must either give a decision or state its opinion on the alleged contradiction.

The appellant claimed that an order of the Court of Appeal rejecting his appeal from a decision of a first instance court should be set aside. The decision in question found the appellant guilty of a criminal offence in the provision of obligatory support to minors under Article 312.1 of the Penal Code since he failed to pay the nursing fee set by the nursing institute for placing his son (a minor) in an institution following a decision by the municipal authority. In doing so, he alleged, the Court violated a fundamental right granted by the Constitution as well as by international conventions. According to Article 32.4 of the Charter of Fundamental Rights and Freedoms, parents can be separated from their children against their will only by a court decision based on law. Article 9.1 of the Convention on the Rights of the Child contains a similar provision. The appellant had already objected on this basis in the course of earlier proceedings, but the administrative as well as the judicial bodies took no heed of his claim.

The plenary Court has stated already, in Finding no. Pl. ÚS 20/94 of 27 March 1995 in which it abrogated the provision of Article 46 of the Family Code and respective implementing regulations, that a regulation imposing a duty on the District Office in urgent cases to take a preliminary decision on questions that would otherwise be decided only by a court is inconsistent with Article 32.4 of the Charter of Fundamental Rights and Freedoms according to which only a court can, in accordance with the law, decide on limitations on parental rights and the separation of minor children from their parents.

With due respect to the said opinion of the plenary Court the Chamber of the Constitutional Court allowed the constitutional complaint and set aside the decision in question since this decision as well as the order of the court in the criminal case were based on a decision concerning placement in a nursing house which was contrary to the Constitution.

Cross-references:

- Decision Pl. US 20/94 of 28.03.1995, *Bulletin* 1995/1 [CZE-1995-1-004].

Languages:

Czech.

Identification: CZE-1996-C-001

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 13.03.1996 / **e)** II. US 193/94 / **f)** / **g)** *Sbírka nálezů a usnesení Ustavního soudu ČR* (Official Digest), Vol. 8, no. 19 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
1.4.3.1 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Ordinary time-limit.
1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Restitution / Administrative act / Constitutional complaint, admissibility.

Headnotes:

Although the Act on the Constitutional Court enables the complainant to leave out other procedural remedies afforded by the law for the protection of his right, he bears the risk of failure in the matter, provided the Constitutional Court comes to a conclusion unfavourable for the complainant during the obligatory adjudicating of the fact whether the significance of the complaint extends "substantially" beyond the personal interests of the complainant. This is an exemption from the general rule and such a provision cannot be interpreted in an extensive way. Therefore, in this situation the Constitutional Court does not enter into a proceeding instead of second instance authorities but this is a special procedure presumed by the legislator.

Summary:

A petition connected with a proposal to annul a statute was lodged with the Constitutional Court.

The Senate of the Constitutional Court reached the conclusion that the complainant met statutory requirements. It discontinued the proceedings by means of a resolution and submitted the proposal for the annulment of the provisions at issue to the Plenum for its decision. After the Plenum of the Constitutional Court decided on the constitutionality of the contested provision by its judgment file no. Pl. US 8/95, the Senate continued with the suspended proceedings.

As far as the admissibility of the petition is concerned, it was necessary to address the fact that the petitioner lodged his complaint more than six months after the contested decision acquired legal force, but not later than one year from the time when, in the opinion of the petitioner, the infringement of the fundamental law occurred. The Act on the Constitutional Court stipulates that a constitutional complaint is inadmissible if the complainant has failed to exhaust all procedural remedies afforded to him by law.

At the same time the Act provides for an exemption which applies when: "the significance of the complaint extends substantially beyond the personal interests of the complainant and it was submitted within one year of the day when the events which are the subject of the constitutional complaint took place".

When interpreting this provision, the Constitutional Court proceeded from the principle that this is an exemption from the general rule and this means that such a provision cannot be interpreted in an extensive way.

Therefore the Constitutional Court did not consider it to be a change of its settled jurisprudence, whereby the Court is not another instance of appeal and part of the court system, by not directly rejecting such a complaint. It is necessary to stress that in case of an unconstitutional law even instance of review cannot decide otherwise than at the preceding stage of an administrative proceeding.

Even a court of appeal must discontinue the proceedings and refer to the Constitutional Court if it comes to the conclusion that the act is unconstitutional. For that reason, the situation cannot arise where the Constitutional Court enters into a proceeding instead of a court of second instance, but this procedure is quite special and presumed by the legislator.

Such a procedure also makes it possible for the Constitutional Court, in special cases, to decide when all procedural remedies have not been exhausted.

The Constitutional Court reached the conclusion that the case under review was actually one where the significance of the complaint extended substantially beyond the personal interests of the complainant. The reasons leading to this conclusion can be summarised as follows:

The Constitutional Court had already dealt with an analogous situation in the case of the Act on Extra-judicial Rehabilitation where the condition of permanent stay was assessed as unconstitutional.

This judgment and the ensuing inactivity of the legislator brought about a situation of unequal positions between those who asserted the restitution claims as agricultural property and as property defined in a negative way in the Act on Extra-Judicial Rehabilitation.

The matter concerned a number of people whose fundamental rights could be violated by the contested provision of the Act on Extra-Judicial rehabilitation, if the unconstitutionality of such provisions was proved.

The Constitutional Court was at the same time guided by the interest to remove inequality among persons asserting the restitution claims under various regulations. All this led the Court to the conclusion that the adjudicated matter extended substantially beyond the personal interests of the complainant.

Therefore the petition was accepted for further proceedings and submitted for consideration to the Plenum of the Court, which granted the petition and annulled the contested decision. It followed from the reasoning of the judgment Pl. US 8/95 that such a

regulation was in contradiction with the same provisions, i.e. Articles 1 and 10 of the Constitution, Articles 1, 3.1, 4.2 and 4.3, 11.2 and 14.2 of the Charter of Fundamental Rights and Basic Freedoms and Article 1.1 ECHR, as analogous provisions defining the requirement of permanent stay related to the Act on Extra-Judicial Rehabilitation and from the fact that no reason was found to depart from the legal principle of general significance announced by the Court in the Pl. US 3/94 judgment. The implemented proceeding proved that the reason for the decision of the Land Office, stating that the complainant was not the owner of the real estate enumerated in the decision, was the fact that the requirement of permanent stay had not been met. Thus the above-mentioned rights of the complainant had been breached.

Nevertheless, this infringement cannot be blamed on the administrative authority that decided in the matter as it proceeded in accordance with the valid legal regulations by which it is bound under Article 1 of the Constitution and Section 3 paragraph 1 of the Administrative Code. When applying these regulations a situation occurred which is the subject of a legitimate, constitutional complaint.

The provision of Section 82.2.a of the Act on the Constitutional Court stipulates that if the Court grants the constitutional complaint of a natural or legal person under Section 87.1.d of the Constitution, the Constitutional Court annuls the contested decision of the public authority.

As the requirements of this provision had been met, the Constitutional Court was forced to annul the contested decision of the Land Office.

Accordingly, Section 75.1 of the Law on the Constitutional Court provides that a "constitutional complaint is inadmissible if the complainant failed to exhaust all remedial actions afforded him by law for the protection of his rights". However, Section 75.2 of the Law makes an exception to this rule in two cases:

1. where "the significance of the complaint extends substantially beyond the personal interests of the complainant, so long as it was submitted within one year of the day when the events which are the subject of the constitutional complaint took place"; or

2. "the proceeding in an already filed remedial procedure ... is being considerably delayed" and may lead to "to serious and unavoidable detriment" to the complainant.

Cross-references:

- Decision Pl. US 3/94 of 12.07.1994, *Bulletin* 1994/3 [CZE-1994-3-001];
- Decision Pl. US 8/95 of 13.12.1995, *Bulletin* 1995/3 [CZE-1995-3-013];
- See also Decisions II.US 45/94, II. US 15/95, III. US 114/93, II. US 281/95.

Languages:

Czech.

Identification: CZE-1996-C-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 12.06.1996 / **e)** Pl. US 42/95 / **f)** / **g)** *Sbírka zákonů České Republiky* (Official Gazette), 192/1996, *Sbírka nálezů a usnesení Ustavního soudu ČR* (Official Digest), Vol. 5, no. 47 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
3.13 **General Principles** – Legality.
3.18 **General Principles** – General interest.
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*.
4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.

Keywords of the alphabetical index:

Municipality, activity, prohibition / Constitutional Court, predecessor state.

Headnotes:

Article 79.3 of the Constitution stipulates that the bodies of territorial self-governing units, as well as ministries and other administrative offices, may issue

regulations on the basis of and within the limits of the law. This means that a municipality carries out state administration to the extent set by special regulations. Under Article 104 of the Constitution, representative bodies of municipalities may, within the limits of their jurisdiction, issue generally binding ordinances. The Constitutional Court agrees with the opinion of the former federal Constitutional Court (Pl. US 1/92, Pl. US 22/92) that the situation at the moment of lodging a petition is decisive for judging the deputies' procedural capacity. Namely, the Act on the Constitutional Court does not mention reducing the number of deputies who had lodged the complaint as a reason for proceedings which have been initiated.

Summary:

A group of 31 deputies of the Chamber of Deputies proposed that the Constitutional Court should annul the municipal Ordinance on Prohibition of Communist, Nazi and Fascist Propaganda on the Territory of the town of Jicín.

The complainants stated that the municipalities may issue generally binding ordinances but they may do so only within statutory limits. It is in the competence of the municipalities to restrain or prohibit activities which could disturb public order in some public places of the municipality. However, this extended competence relates only to local matters of public order.

The town of Jicín pointed out in its statement that, with regard to the seriousness of this problem, it would be suitable to deal with this matter in oral proceedings. As far as the objection of the town of Jicin is concerned, relating to the absence of procedural capacity of the complainant, the Constitutional Court did not agree and referred to the judgment of the Federal Constitutional Court in the cases Pl. US 1/92, Pl. US 95/92 and Pl. US 22/92. The Constitutional Court took over their conclusion that the moment of lodging a complaint is decisive. This follows from an interpretation of the Act on the Constitutional Court and especially from the fact that the Act does not mention a reduction in the number of deputies who lodge the complaint as a reason for suspending proceedings which have already been started. It also corresponds to the requirement of the protection of constitutionality when the Constitutional Court, on the basis of general interest, has already proceeded in case.

Under Section 68.2 of the Act on the Constitutional Court, in making its decision, the Court assesses the contents of a statute or some other enactment from the perspective of its conformity with constitutional acts and international treaties according to Article 10 of the Constitution, or with a statute if some other type of enactment is concerned, and ascertains whether they were adopted and issued within the confines of the powers laid down in the Constitution and in the constitutionally prescribed manner.

The contested ordinance had been properly approved and adopted. The ordinance was displayed properly on the official board and came into force. Thus it had been adopted and issued in the constitutionally prescribed manner. However, it was not adopted and issued within the confines of the powers laid down by the Constitution.

In this sense the Constitution stipulates under Article 79.3 that the bodies of territorial self-governing units, as well as the ministries and other administrative bodies, may issue regulations on the basis of and within the limits of the law. It can be presumed that in this case the municipality acted within the bounds of special statutes, owing to the ranking of this article in Chapter Three regulating the Executive. But on the other hand, Article 104.3 of the Constitution stipulating that the representative bodies may, within the limits of their jurisdiction, issue generally binding ordinances, is ranked in Chapter Seven on Territorial Self-Government. The jurisdiction of the territorial self-government authorities to issue normative acts, indicated in the Act on Municipalities, is described in Chapter Two “Jurisdiction of Municipality” in such a way that its powers can be either separate or delegated.

The municipality can issue generally binding ordinances related to the matters falling into delegated competence only on the basis of and within the limits of a statute. The present case evidently does not represent the issuance of generally binding ordinance within the delegated jurisdiction because there was no statutory basis. Therefore the Constitutional Court further dealt with the issue whether the contested ordinance could be considered to be generally binding in relation to the matters falling to the separate jurisdiction of the municipality. Section 14.1 of the Act on Municipalities regulates separate jurisdiction of the municipality; paragraph 1 enumerates the individual activities belonging to separate jurisdiction whereas paragraph 2 regulates individual jurisdiction more extensively by stating that the municipality secures economic, social and cultural development and the protection and creation of a healthy environment in its territorial district, with the exception of those activities which are entrusted, as part of state administration, to other bodies.

In the opinion of the Constitutional Court, it can hardly be presumed that the separate jurisdiction of the municipality can be understood as prohibition of activities which are not in essence anything other

than an enumeration of merits of case under the Criminal Code.

The town of Jicín went beyond the limits of the jurisdiction laid down by the Constitution and the Act on Municipalities by issuing the ordinance. The Constitutional Court remarked that if the municipality wished to declare its political will in this sense, it could do so using other adequate means. The above-mentioned ordinance was annulled on the day of the judgment's publication in the Collection of Laws.

Cross-references:

See also Decisions Pl. US 20/93, Pl. US 5/93, Pl. US 24/94, Pl. US 1/96.

Languages:

Czech.

Identification: CZE-1997-C-001

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.03.1997 / **e)** I.US 70/96 / **f)** / **g)** *Sbírka nálezů a usnesení Ustavního soudu ČR* (Official Digest), Vol. 7 no. 29 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.5 **Constitutional Justice** – Decisions.
1.6 **Constitutional Justice** – Effects.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Constitutional Court, decision, binding nature / Binding effect / Proceedings, defect, removable / Court, duty to instruct.

Headnotes:

Article 89.2 of the Constitution stipulates that enforceable decisions of the Constitutional Court are binding on all authorities and persons. The Court decides the case on its merits by a judgment which presents reasons justifying the decision and its finding. The Court's legal interpretation listed in the reasoning of a judgment is not without any significance as it is the expression or reflection of the application of the Constitution, the Charter of Fundamental Rights and Basic Freedoms or relevant international treaties concerning human rights which have an immediate binding effect and take precedence over statutes under Article 10 of the Constitution. Non-compliance with such legal interpretation raises doubts whether the ordinary court really complies with Article 90 of the Constitution, according to which the Constitutional Court is called upon above all to provide protection of rights in the legally prescribed manner.

The above-mentioned situation makes an impact on the citizens' feeling of legal certainty which is the necessary consequence of the democratic character of a constitutional state. The behaviour of a legal state, which is not only in accordance with formal legal regulations but also just, must also be in accordance with the state's democratic character.

Summary:

The complainants sought annulment of a court's resolutions discontinuing the proceedings in which they requested imposition of the duty to conclude an agreement on the delivery of real property. The discontinuance of the proceedings was justified by the fact that the complainants designated the defendant in the proceedings incorrectly.

The Regional Court confirmed the first instance resolution on discontinuance of the proceedings. In the constitutional complaint the complainants argued that the legal interpretations used by both judicial instances were not in accordance with the jurisprudence of the Supreme Court and the Constitutional Court.

The complainants contested the procedure of the courts as formalist and pointed out that ordinary courts accepted the decision-making practice of the Supreme and Constitutional Courts, holding thus the

opinion that the incorrect determination of a party to the proceedings represents a removable defect of proceedings. Therefore the duty of the court to instruct is in place. They regard the procedure of the courts as an infringement of the Charter of Fundamental Rights and Basic Freedoms.

Under Article 83 of the Constitution, the Constitutional Court is the judicial body responsible for the protection of constitutionality. The Constitutional Court also decides, under Article 87.1 of the Constitution, constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms resulting from constitutional laws or international treaties under Article 10 of the Constitution. After reviewing the file, the Constitutional Court arrived at the conclusion that it cannot agree with the courts' conclusions, which also follows from the settled decision-making practice of the Constitutional Court. The present case concerned the Restitution Act, by means of which a democratic society tries to mitigate the results of past property and other injustice, namely the infringement of generally acknowledged human rights and freedoms on the part of the state.

In the proceedings, the state and its bodies are obliged to proceed in accordance with the legitimate interests of the persons who shall be compensated, at least partially, for violation of their fundamental rights and basic freedoms. The extent of the court's duty to instruct has to be assessed with regard to individual aspects of the given case. It is always necessary to bear in mind that individual justice within the law, including procedural regulations, is the highest value of decision-making of the courts. Petitions initiating a suit shall contain elements necessary for the hearing of the matter. The Court is certainly not obliged to instruct the plaintiff in matters relating to substantive law. Nevertheless, in its settled decision-making practice the Constitutional Court has already come to the opinion that it is necessary to instruct the plaintiff about the correct determination of the party to the proceedings, and when the defended person has no capacity to be party to the proceeding, and all the more so in the given restitution case where it is appropriate to proceed in this way to eliminate the formalistic approach of the courts (e.g. II. US 108/93, II. US 74/94). In another case the Constitutional Court directly declared that “it is not for the court to instruct the party to the proceeding about substantive law, including the issue of justiciability; which, however, does not mean that the court should not instruct the plaintiff about the correct determination of parties to the proceeding at all, i.e. also in case somebody is sued who has no capacity to be party to the proceeding. The Constitutional Court holds this opinion because the capacity to be party to the proceeding is the procedural requirement of the proceeding which the court examines *ex officio,* the absence of which leads to the discontinuance of the proceeding. Thus the Court, before it terminates the proceeding, should give the plaintiff (i.e. party to the proceeding) the opportunity to repair the matter (IV. US 41/95). In accordance with the above-mentioned conclusion, the Constitutional Court deduced that the contested decisions of both courts breached both Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms, stipulating everybody's right to assert, through a legally prescribed procedure, his/her rights before an independent and impartial court and Article 90 of the Constitution imposing on the courts the duty to provide protection of rights as stipulated by law.

At the same time, the Court had to pay attention to the opinion of the Regional Court claiming that it was not bound by the decisions of either the Constitutional or the Supreme Court, because there was no legal reason for such conclusions. Of course, it is possible to agree that – generally speaking – these are decisions in particular cases and ordinary courts are not bound by them in individual cases; nevertheless, generalisation is not appropriate. Article 89.2 of the Constitution stipulates that enforceable decisions of the Constitutional Court are binding on all authorities and persons. This includes the case of a constitutional complaint against the decisions of ordinary courts, where the annulment of the contested decision is listed in the judgment of the Constitutional Court. This certainly does not mean that the Court's legal interpretation listed in the reasoning of such a judgment is without any significance as it is not the interpretation of a particular statutory provision, but the expression or reflection of the application of the Constitution, Charter of Fundamental Rights and Basic Freedoms or relevant international treaties concerning human rights which are directly applicable and take precedence over statutes under Article 10 of the Constitution. In general, the negative attitude to such legal interpretation causes uncertainty whether the ordinary court really complies with the provision of the Constitution, according to which this Court is called upon above all to provide protection of rights in the legally prescribed manner. That is to say that the court has to be aware of the fact that if it does not take into account the opinion of the Constitutional Court in a particular case, the Constitutional Court is likely to decide on a possible constitutional complaint in the same way as before. However, it is worth remarking that different procedures of the court, i.e. general non-compliance with the decision-making practice resulting in different decisions in the same matter, make an impact on the citizens' feeling of legal certainty which is the necessary consequence of

the democratic character of a constitutional state. The behaviour of a legal state, which is not only in accordance with formal legal regulations but also just, must also be in accordance with the state's democratic character. Therefore the Constitutional Court granted the complaint and dismissed the contested decisions.

Article 89.2 of the Constitution, however, is expressed in a broad manner: “Enforceable decisions of the Constitutional Court are binding on all authorities and persons”. This provision can be interpreted as meaning Constitutional Court decisions are binding precedents, but that interpretation has not prevailed in practice, rather a more restrictive interpretation has.

Cross-references:

- See also IV. US 41/95, II.US 156/95, III. US 200/2000.

Languages:

Czech.

Identification: CZE-1997-C-002

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 14.05.1997 / **e)** I. US 16/97 / **f)** / **g)** *Sbírka nálezů a usnesení Ustavního soudu ČR* (Official Digest), Vol. 8, no. 52 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.13 **General Principles** – Legality.
3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Civil procedure, fairness, principle / Spouse, property, settlement.

Headnotes:

Under Article 90 of the Constitution courts are called upon above all to provide protection of rights in the legally prescribed manner. Under Article 95 of the Constitution, in making their decisions, judges are bound by statutes; they are authorised to judge whether enactments other than statutes are in conformity with statutes. Although both cited articles are connected very closely with the right to a fair trial, they nonetheless are included in Chapter IV of the Constitution (Judicial Power) and it can hardly be unambiguously concluded that they guarantee fundamental rights or freedoms.

The content of these articles essentially regulates the principles of courts' activities. Under Article 4 of the Constitution, fundamental rights and basic freedoms enjoy the protection of judicial bodies, including ordinary courts. Therefore it is their obligation to respect the principles of a fair trial under Article 36 of the Charter of Fundamental Rights and Freedoms and following and Article 6.1 ECHR.

Summary:

A Regional Court suspended by a resolution, on the basis of a withdrawal of the motion, proceedings on the settlement and distribution of property of spouses.

The Appellate Court confirmed the contested resolution. The complainant contested both above cited resolutions by means of a constitutional complaint objecting to a breach of fundamental freedoms. The complainant did not insist on an oral hearing before the Constitutional Court. The Constitutional Court stated that a constitutional complaint lodged in time meets all statutory requirements and therefore nothing prevents the hearing and decision on the matter itself. The parties to the proceedings, the Regional Court in Jihlava, the Regional Court in Brno and J. Š. as a party joined to the proceedings, made their comments on the constitutional complaint. The constitutional complaint was found to be justified. Article 11.4 of the Charter of Fundamental Rights and Freedoms relates to issues of expropriation or other mandatory limitations upon property rights in the public interest, thus not to civil law adversarial proceedings concerning the settlement of communal property of spouses. Therefore, Article 11.4 of the Charter of Fundamental Rights and Freedoms could not be breached and the

constitutional complaints in this respect were unreasonable. Articles 36, 37 and 38 of the Charter of Fundamental Rights and Freedoms are included in Chapter V entitled “The Right to Judicial and Other Legal Protection” and represent part of the comprehensive right to a fair trial.

Under Article 36.1 of the Charter of Fundamental Rights and Freedoms everybody may assert, through a legally prescribed procedure, his rights before an independent and impartial court or, in specific cases, before another body. Under Article 37.3 of the Charter of Fundamental Rights and Freedoms all parties to the proceedings are equal. Under Article 38.2 of the Charter of Fundamental Rights and Freedoms everyone has the right to have their case considered in public, without unnecessary delay, and in their presence, as well as to express their views on all of the admitted evidence.

The public may be excluded only in cases specified by law. The content of Articles 90 and 95 of the Constitution regulates the principles of the courts' activities. Therefore the Constitutional Court did not consider it necessary to deal with these articles and concentrated its attention on adjudicating the question whether the contested decisions of ordinary courts breached the complainant's right to a fair trial. There were ten protocols from the preparation for the hearing in the three years, as follows from the relevant file, while during the preparation of the last protocol, J. Š. withdrew her petition to open the proceedings. The Constitutional Court concluded that, in fact, it was not a case of preparation for a hearing, both from the point of view of length and content. The preparation for the hearings took an unreasonably long period of three years. Also from the point of view of content they were real hearings. As follows from the relevant protocols on the preparation for a hearing, all parties to the proceedings with their counsels took part in them, they asked questions, the hearings were postponed in order to obtain further written evidence, the postponement was recorded as “the suspension of hearing”, part of the protocols were agreements of parties to the proceeding, some items were dealt with repeatedly and the parties made their comments on them.

Although, at a general level, some of these acts can evidently be considered as part of the preparation for a hearing, the activities of the court and the parties went so far that they cannot be considered to be a preparation for a hearing either from the point of view of content or time. If Section 114 of the Civil Procedure Code mentions that the aim of the preparation for a hearing is to be able to decide on the matter, usually in one hearing, this undoubtedly does not mean that the considerable, extensive part of the evidentiary hearing could take place during the preparation for a hearing. Therefore the procedure of the Regional Court in this sense cannot be accepted. The courts shall respect the principle of a fair trial. In the present case, a more extensive preparation for the hearing can be accepted than in the case of other disputes. Nevertheless, the Regional Court also admits that the procedure of the ordinary court “deviates from the normal procedure” as the court was dealing with it “such a long time”. If the Regional Court did not formally order a hearing within three years, although it actually acted in the matter itself, according to the content of the file, and thus excluded the possibility of the complainant lodging a petition for the settlement due to the statutory conclusive presumption of settlement of property between spouses, it proceeded, in the opinion of the Constitutional Court, contrary to the principles of a fair trial which forms part of the complainant's fundamental rights and freedoms. With regard to this particular situation, it was the obligation of the District Court to formally order the proceeding in an adequate time limit and thus to fulfil the constitutional obligation regulated in Article 4 of the Constitution. The complainant himself suggested in writing the examination of witnesses, which can be interpreted as a request to order the hearing. The contested resolutions breached the complainant's right to a fair trial and therefore both contested resolutions were annulled.

Languages:

Czech.

Identification: CZE-2001-C-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 10.01.2001 / **e)** Pl. US 33/00 / **f)** / **g)** *Sbírka zákonů České Republiky* (Official Gazette) 78/2001 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.13 **Constitutional Justice** – Jurisdiction – Types of litigation – Universally binding interpretation of laws.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
2.1.1.1.1 **Sources of Constitutional Law** – Categories – Written rules – National rules – Constitution.
2.2.1.6.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and domestic non-constitutional legal instruments.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, exclusive / Vacuum, legal, artificial / Decision, adoption, failure / Transport, contract, implicit.

Headnotes:

In making their decisions, judges are bound by statutes and are authorised to judge whether acts are in conformity with statutes. Should a judge come to the conclusion that a statute which should be applied in the resolution of a matter, i.e. not only a valid one but also one that is invalid at that time but still applicable, is inconsistent with a constitutional act, s/he shall submit the matter to the Constitutional Court.

The Constitutional Court has derived its duty to adjudicate the matter on the basis of the following provision. Articles 83, 95.1 and 95.2 of the Constitution provide for the concept of constitutional review which is concentrated in only one institution, namely the Constitutional Court. Therefore a district court had no other choice but to comply with its constitutional obligation and refer to the Constitutional Court the issue of adjudicating the constitutionality of applicable provisions of the statute.

The fundamental feature of private law is the equality of persons which is in accordance with the principles of freedom of contract and of free disposition. Equality of their position means above all that there are no relations of superiority and inferiority and no party to this relation can in principle impose any obligation on another party by a unilateral act. Nevertheless, equality of parties to private legal relations does not exclude the interference of the state.

Summary:

The Constitutional Court received a petition from the District Court in Karviná to annul some provisions of the Law on Road Transport. After reviewing the formal requirements, the petition was sent to the Chamber of Deputies and the Senate of the Parliament with a request for a written statement on its content.

The Chamber of Deputies found the statute compatible with community law according to the Council Directive 1191/69 EEC. The Chairman further stated that the contested provision was not amended and came into effect on 1 July 2000.

The Senate and the Ministry of Transport also communicated their opinions.

First of all, the Constitutional Court had to deal with the issue whether the petition lodged by the District Court in Karviná was admissible and whether there were reasons for discontinuance of the proceeding. The contested provisions of the statute were amended, although only partially. But this amendment did not change either the content or the meaning of the contested provisions. The petition in the present case was not connected with the constitutional complaint but it was a direct submission of the ordinary court under Article 95.2 of the Constitution. Thus, it did not represent the proceeding on the annulment of the laws but a direct application of the Constitution. It is necessary to proceed from the fact that:

a. the Constitution is directly applicable if it itself does not stipulate otherwise;

b. under Article 83 of the Constitution, the Constitutional Court is the judicial body responsible for the protection of constitutionality and not any other judicial body, such as the Supreme Court or lower ordinary courts;

c. what the Constitution entrusts to the Constitutional Court in its provisions belongs to its jurisdiction, i.e. not only the powers under Article 87 of the Constitution, but also under Article 95.2.

It is evident from the Constitution itself that ordinary courts, including the Supreme Court, are not allowed to decide on the unconstitutionality of a statute. Article 95.1 of the Constitution stipulates that judges are bound by statutes in making their decisions and are authorised to judge whether acts are in conformity with the statutes. Should a judge come to the conclusion that a statute which should be applied in

the resolution of a matter, i.e. not only a valid one but also one that is invalid at that time but still applicable, is inconsistent with a constitutional act, s/he shall submit the matter to the Constitutional Court. The Constitutional Court has derived its duty to adjudicate the case on the basis of this provision.

Should the Constitutional Court refuse to provide instruction to the ordinary court by means of its decisions regarding the constitutionality of the applicable law, an artificial legal vacuum would arise, as it is not possible to ask the ordinary court in a particular case to grant the complaint of a plaintiff if s/he is convinced that the case depends on an unconstitutional provision of the law. Should the ordinary court itself decide on the basis of its conviction on the unconstitutionality of the applied provisions, it would act in contradiction to the Constitution. Articles 83, 95.1 and 95.2 of the Constitution provide for the concept of constitutional review which is concentrated in only one institution, namely the Constitutional Court.

The Constitutional Court concluded, after deliberations, that not even on the basis of the interpretation of the Act on the Constitutional Court is it possible to deny the obligation of the ordinary courts laid down by the Constitution to appeal to the Constitutional Court if they are to apply a statute which they consider to be unconstitutional. If the Constitution imposes on the court in Article 95 the obligation to submit to the Constitutional Court every case in which "it comes to the conclusion that a statute which should be applied in the resolution of a case is inconsistent with a constitutional act", then the nature of the task which should be dealt with by the Constitutional Court also derives from this provision. Article 95.2 of the Constitution implicitly contains an obligation for the Constitutional Court to provide instruction to the ordinary court by means of its decision on constitutionality, regardless of whether the statute has been later amended or not. Although the Constitutional Court is not generally entitled to provide a binding interpretation of the Constitution, whenever or whoever for, it nevertheless acts in accordance with its competence, and its activity in terms of content is nothing other than a legally binding interpretation of the Constitution. Therefore, if it deals with the constitutionality of the statute on the motion of an ordinary court, it also deals with the interpretation of the Constitution. After reviewing the petition, the Constitutional Court arrived, on the one hand, at the conclusion that it is not possible to grant the appeal on the annulment of the statute if these provisions were amended by means of a new statute and, on the other hand, that this legal regulation is not in contradiction with the Constitution.

A contract on transportation in public transport is concluded by implication consisting of a passenger entering a particular means of transport. The particularity of this contract consists in the form of payment for transport which can be in advance or direct. By getting on the means of transport, the passenger enters into an implied contract covering a whole range of services, including adjoining agreements, namely the obligation to have a valid ticket and to present it for checking when requested. If the passenger does not pay the fare before the beginning of transportation, s/he tacitly agrees that a contractual price will be charged. Thus the citizen as passenger has public transport at his or her disposal and it is for him or her to decide whether to get on the means of transport under these circumstances and conclude the contract or not.

A penalty is by its nature a contractual one following the non-fulfilment of the obligation to pay the fare for the provided services. When the state sets the maximum limit of this contractual penalty, it protects the citizens against the arbitrariness of the contractor. The contractor has to set the penalty in its transport conditions which he is obliged to publish in places designated for contacts with passengers and a substantive part thereof also in every vehicle. Thus it is guaranteed that the passenger is acquainted with the conditions in advance. The contract is concluded by the passenger's entering the means of transport, and thus agreeing with the conditions of the contractor including the price and the way of imposing a penalty. When the passenger does not have a valid ticket, fare penalties are common abroad. They are called fines, surcharge or increased fare.

The Constitutional Court dismissed the petition. The dissenting opinion to this judgment stated among other things that it is not in the jurisdiction of the Constitutional Court to adjudicate petitions on annulment of statutes or individual provisions thereof if they lost their validity before the end of the Constitutional Court proceeding. The material adjudication of the contested provision was prevented by an obstacle to the proceedings due to the fact that the petition for annulment was delivered to the Constitutional Court on 29 June 2000, and the provisions in question lost their validity on 1 July 2000. The Constitutional Court is obliged to terminate the proceedings in such a case. Although Article 95.2 of the Constitution obliges the ordinary court to submit a case to the Constitutional Court if it comes to the conclusion that a statute which should be applied in the resolution of a matter is inconsistent with a constitutional act, it can do so only in relation to the laws or individual provisions thereof which are a "living" part of the legal order. However, even in individual cases, the Constitutional Court, in view of

possible proceedings on a constitutional complaint, has the final word in cases lodged by an ordinary court concerning the application or the interpretation of any law or its individual provision.

Supplementary information:

In addition to the grounds of inadmissibility which apply generally to all proceedings before the Constitutional Court *(res iudicata*, and *litispendens)*, the Law on the Constitutional Court provides, as an additional grounds of inadmissibility, solely in relation to the abstract review of legal enactments, that the norms at issue are a valid part of the legal order (though not necessarily in force); see also II. US 87/95.

Languages:

Czech.

France
Constitutional Council

Important decisions

Identification: FRA-1975-C-001

a) France / **b)** Constitutional Council / **c)** / **d)** 14.01.1975 / **e)** 74-54 DC / **f)** Law on the voluntary termination of pregnancy / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.01.1975, 671 / **h)**.

Keywords of the systematic thesaurus:

1.2.1.2 **Constitutional Justice** – Types of claim – Claim by a public body – Legislative bodies.
2.1.1.1.2 **Sources of Constitutional Law** – Categories – Written rules – National rules – Quasi-constitutional enactments.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

Keywords of the alphabetical index:

Review of compatibility with a Convention / Abortion.

Headnotes:

It is not for the Constitutional Council, on an application under Article 61 of the Constitution, to examine whether a law is compatible with the requirements of an international instrument or agreement.

Summary:

In order to determine the admissibility of an argument alleging a violation of Article 2 ECHR, the Constitutional Council was required for the first time to rule on the compatibility of a law with a treaty.

This was also the first application from Parliament following the 1974 constitutional reform which conferred the right to refer legislation to the Constitutional Council on 60 deputies or 60 senators.

The *"Loi Veil"*, which regulated the voluntary termination of pregnancy, was alleged to be contrary to the European Convention on Human Rights, which provides that "Everyone's right to life" is to be protected. The Constitutional Council refused to entertain the application and held that Article 55 of the Constitution does not provide or imply that respect for the principle of superiority of treaties over laws must be ensured in the context of a review of the constitutionality of laws provided for in Article 61 of the Constitution.

Consequently, the Court of Cassation immediately (24 May 1975, *Société des cafés Jacques Vabre*) and the Council of State later (Ass., 20 October 1989, *Nicolo*) agreed to sanction, solely in the context of their application, the incompatibility of French legislation with international conventions or with Community law, even if the legislation had been enacted subsequently.

Supplementary information:

This decision of the Constitutional Council was indexed in 2001 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 Professors Louis Favoreu and Loïc Philip have undertaken since 1975 in the *Dalloz collection* dedicated to leading judicial decisions.

Languages:

French.

Identification: FRA-1987-C-001

a) France / **b)** Constitutional Council / **c)** / **d)** 22.01.1987 / **e)** 86-224 DC / **f)** Law transferring jurisdiction to the ordinary courts in disputes relating to decisions of the Competition Commission / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.01.1987, 924 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.1.2 **Sources of Constitutional Law** – Categories – Written rules – National rules – Quasi-constitutional enactments.
3.4 **General Principles** – Separation of powers.
4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Administrative and judicial authorities, separation / Fundamental principles recognised by the laws of the Republic / Administrative courts, reserved competence.

Headnotes:

With the exception of matters which by their nature are reserved for the ordinary courts, the annulment and variation of decisions adopted, in the exercise of powers conferred by public law, by authorities exercising executive power, their agents, the local and regional authorities of the Republic or the public bodies placed under their authority or their control, ultimately fall within the jurisdiction of the administrative courts or tribunals.

Summary:

An ordinance of December 1986 established, *inter alia*, a Competition Commission with advisory powers but also empowered to make orders and to impose penalties. The ordinance was amended by a law in order to allow jurisdiction to review decisions of the Competition Commission to be transferred from the Council of State to the ordinary courts. The purpose of the law, which was referred to the Constitutional Council, was to create new powers for the ordinary courts. The Council declared the transfer of jurisdiction lawful but found the law invalid on the ground that (in the absence of any provision for a stay of execution) it infringed the rights of the defence, a principle of constitutional rank.

This decision also establishes the existence of an area of jurisdiction reserved to the administrative courts.

Supplementary information:

This decision of the Constitutional Council was indexed in 2001 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 Professors Louis Favoreu and Loïc Philip have undertaken 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-1989-C-001

a) France / **b)** Constitutional Council / **c)** / **d)** 28.07.1989 / **e)** 1989-261 DC / **f)** Law on the conditions of residence and entry for foreigners in France / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 01.08.1989, 9679 (corrigendum to the Official Gazette of 05.08.1989, p. 9896) / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.7.1.3 **Institutions** – Judicial bodies – Jurisdiction – Conflicts of jurisdiction.
4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Justice, proper administration / Jurisdiction, rules, unification in favour of one class of courts / Removal order; appeal / Foreigner, entry, residence.

Headnotes:

In the French conception, the principle of separation of powers between administrative and ordinary courts is a fundamental principle recognised by the laws of the Republic. Accordingly, with the exception of subject-matter which is by nature reserved for the ordinary courts, the administrative courts are competent to deal with the annulment or rectification of decisions taken by the executive acting in accordance with its prerogatives as a public authority.

However, for the purposes of applying a given body of legislation or regulations, the legislator may, in the interest of the proper administration of justice, unify the rules governing jurisdiction within the class of courts principally concerned.

The Constitutional Council decided as follows: in so far as the statute before it required the judicial authority's competence to review surveillance measures affecting personal freedom to be exercised separately from its scrutiny of the lawfulness of administrative decisions, and moreover not so frequently as to depart from the normal rules governing jurisdiction; and in so far as the effective safeguarding of the rights affected could be achieved equally by the ordinary courts and the administrative courts, the proper administration of justice did not admit of any interference with a principle which ranked as constitutional law.

Summary:

The Constitutional Council was requested by more than 60 senators to examine the law on conditions of entry and residence for foreigners in France and to determine the constitutionality of certain of its provisions, notably Section 10. Indeed, among the contested provisions in this instrument, being a further amendment to Order no. 45-2658 governing conditions of entry and residence for foreigners in France, there was a provision instituting a remedy before the President of the Regional Court, or the latter's deputy, against a removal order issued by the Prefect in respect of a foreigner, an appeal being open before the First President of the Court of Appeal or the latter's deputy. The Constitutional Council found this provision, which formally established the ordinary courts' jurisdiction, to be unconstitutional as contrary to the principle of the separation of administrative and ordinary courts.

Languages:

French.

Identification: FRA-1996-2-004

a) France / **b)** Constitutional Council / **c)** / **d)** 23/07/1996 / **e)** 96-378 DC / **f)** Telecommunications Regulation Act / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 27.07.1996, 11403 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Property, public / Fees for service provided / Telecommunications, regulation / Penalty, administrative.

Headnotes:

The legislature may delegate the implementation of a constitutionally protected freedom to the regulatory authority only on condition that the legislature define the guarantees attaching thereto.

In this case, by assigning to the Higher Informatics Committee the task of preparing recommendations concerned *inter alia* with professional ethics for adoption by the National Audiovisual Council, to which it is answerable, without setting any restrictions other than very general ones, and having regard to the fact that recommendations with possible implications for criminal liability might ensue, the legislature had acted outside the scope of its powers.

Summary:

The text in question raised only one other substantive question, but one specific to the French legal system, namely that of the respective areas of jurisdiction of the ordinary and administrative courts. In this case, the Constitutional Council acknowledged that the principle of the proper administration of justice could justify, in the light of the subject matter, namely a set of specific disputes relating to the interconnections of telecommunication networks, the fact that jurisdiction had been assigned to the ordinary courts in disputes concerning binding decisions issued by administrative authorities in the exercise of public powers.

Languages:

French.

Identification: FRA-1999-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 22.01.1999 / **e)** 98-408 DC / **f)** Treaty on the Statute of the International Criminal Court signed in Rome on 18 July 1998 / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 24.01.1999, 1317 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
3.1 **General Principles** – Sovereignty.
3.24 **General Principles** – Loyalty to the State.
4.4.4.1.1 **Institutions** – Head of State – Liability or responsibility – Legal liability – Immunities.
4.16 **Institutions** – Transfer of powers to international organisations.

Keywords of the alphabetical index:

Jurisdiction, universal / International courts, jurisdiction / High treason / International Criminal Court.

Headnotes:

The authorisation to ratify commitments entered into by France is subject to the Constitution being amended when such commitments contain a clause or clauses which conflict with the Constitution, call constitutionally guaranteed rights and freedoms into question, or undermine the essential conditions for the exercise of national sovereignty.

Article 27 of the Statute, which exempts no political leaders from its field of application and states that

"Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person", is incompatible with the special rules on criminal liability established by Articles 26, 68 and 68-1 of the Constitution (legal immunities and privileges of the President of the Republic and the members of the government and of parliament).

France's obligation to arrest and hand over to the Court anyone responsible for acts which, under French law, are covered by an amnesty or a time-limit infringes the essential conditions for the exercise of national sovereignty.

The Prosecutor's right, even in cases where the national judicial system is available, to carry out certain investigative acts, collect evidence or inspect public sites, outside the presence of the authorities of the requested State and on its territory, is such as to undermine the essential conditions for the exercise of national sovereignty.

Obligations deriving from international agreements to promote world peace and security and ensure respect for the general principles of public international law are binding on each of the States Parties irrespective of the conditions of their enforcement by other States Parties.

The scenarios outlined in Article 17 of the Statute, in which the International Criminal Court is entitled to deal with a case in the event of the State's unwillingness to prosecute, do not violate the essential conditions for the exercise of national sovereignty. This is first because the Court's jurisdiction in cases where a State Party deliberately shirks its obligations under the agreement derives from the *pacta sunt servanda* rule, and second because the conditions under which the Court may intervene are stipulated exhaustively and objectively.

The President of the Republic enjoys immunity for acts carried out in the exercise of his office except in the case of high treason; furthermore, during his term of office, his criminal liability may only be invoked before the High Court of Justice in accordance with the procedure described in Article 68 of the Constitution.

Summary:

As France was one of the States most actively involved in drawing up the Statute for the International Criminal Court, it was anxious for its instrument of ratification to be deposited very quickly. Senegal got in ahead of it, and so France will probably be only the second State to ratify the Rome Statute; however, the Constitutional Council is the first constitutional court to have ruled on questions raised concerning the compatibility of the Statute with a constitutional text.

On this occasion it confirmed the system of interpretation it applies to treaties when examining their compliance with the Constitution under Article 54 of the Constitution (Headnotes, point 1).

In the case of the ICC Statute, the Council identified three areas of non-compliance (Headnotes, point 2).

As a result of the finding of non-compliance, the Constitution had to be amended before the ratification act could be voted. This amendment was effected on 28 June 1999 by inserting an Article 53-2 under which "The Republic may recognise the jurisdiction of the International Criminal Court under the conditions set out in the treaty signed on 18 July 1998". The ratification act should be submitted to Parliament in the course of 1999, and legislative changes incorporating some of the specific stipulations of the treaty into national law should follow.

In terms of legal precedent, however, the impact of this decision outweighs the reasons given for non-compliance because, when examining the text, the Council confirmed its receptiveness to international law. It stated in particular that the condition of reciprocity stipulated in Article 55 of the Constitution does not apply to humanitarian agreements (Headnotes, point 3).

The Council also reiterated the principles of criminal law and criminal procedure.

The political impact of this decision was strongest at the national level in the interpretation that the Council gave on this occasion of Article 68, thereby settling a debate which had divided legal opinion (Headnotes, point 4).

Henceforth, during his term of office, the criminal liability of the Head of State during his term of office may only be invoked before the High Court of Justice. The ordinary courts have already had occasion to draw conclusions from this interpretation.

Languages:

French.

Identification: FRA-2001-2-009

a) France / **b)** Constitutional Council / **c)** / **d)** 25.07.2001 / **e)** 2001-448 DC / **f)** Organic Law on Finance Acts / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 02.08.2001, 12490 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.4.1.4 **Institutions** – Head of State – Powers – Promulgation of laws.
4.7.10 **Institutions** – Judicial bodies – Financial courts.

Keywords of the alphabetical index:

Audit Court, independence / National life, continuity / Finance Act, proper examination.

Headnotes:

In the French conception of separation of powers, provisions which, in the context of the review and appraisal of the execution of Finance Acts, authorise application to the competent court for an urgent ruling, can only be construed as enabling the administrative court to issue an urgent order to a legal entity exercising public powers to disclose requested documents or information on pain of a coercive penalty.

In the light of the provisions of Article 64 of the Constitution and of the fundamental principles acknowledged by the laws of the Republic and the law of 24 May 1872 on administrative courts, the independence of the different classes of courts, as well as the specificity of their functions, are secured.

The Court of Audit is an administrative court whose independence in relation to the legislature and the executive is guaranteed by the Constitution. Requiring it to communicate its draft auditing programme to the parliamentary committees, which are able to put forward their opinions on the draft, is apt to interfere with its independence and is contrary to the Constitution.

In providing that no law with budgetary implications for the State could be published without a financial appendix specifying its effects for the year of entry into force and for the following year, the Organic Law on Finance Acts runs counter to the principle that promulgation by the President of the Republic constitutes an order to all the competent authorities and departments to publish it without delay.

If circumstances prevented the government departments from complying in the prescribed time with any one of the provisions requiring them to meet various new obligations regarding timetable, background research and information for the due information of parliament, such provisions were not to be interpreted as preventing debate on the Finance Act. It would then be for the Constitutional Council to examine whether the Finance Act had complied with the Constitution and the new Organic Law, and in doing so it would have regard to the need to ensure continuity of national life and the requirement that examination of the Finance Act be full enough at all stages to be satisfactory.

Summary:

After numerous unsuccessful attempts, in June 2001 parliament enacted a new Organic Law on Finance Acts reforming “the financial constitution of the State”, previously constituted by the order of 2 January 1959 introducing an Organic Law on Finance Acts, intended to improve public management and consolidate the exercise of parliament's powers with respect to the budget.

One of the Constitutional Council's reservations as to interpretation concerned parliamentary controls over the execution of the Finance Acts. Indeed, the presidents and rapporteurs of the finance committees of the houses of parliament, in the discharge of their duty to monitor and supervise the execution of the Finance Acts, may ask the competent court to make an urgent ruling to remove any obstructions to the exercise of their duties, particularly refusal to disclose information and documents. The Constitutional Council accepted these powers on condition that they relate to the administrative court having sole authority to make an urgent order directing a legal entity exercising public powers to take these measures.

One of the two aspects found to be unconstitutional concerned the principle of separation of powers and specifically the principle of the independence of the courts. Requiring the Court of Audit to communicate its draft “programme of audits” to the Assembly and Senate finance committees, and enabling these to put forward their opinions on the draft, were apt to interfere with the Court’s independence vis-à-vis the legislature and the executive.

The second point of unconstitutionality concerned the provision which, by preventing laws with budgetary implications for the State from being published without a financial appendix, infringed the rule that promulgation of a law by the President of the Republic constituted an order to publish it without delay.

The main reservation applied generally to the numerous provisions of the Organic Law which, in order to strengthen Parliament's control over the preparation and execution of Finance Acts, imposed fresh obligations on the State departments regarding timetable, background research and information. The Council held that if circumstances prevented any one of these obligations from being fulfilled in the prescribed time, such provisions were not to be interpreted as preventing debate on the Finance Act. It would then be for the Constitutional Council to examine whether the Finance Act had complied with the Constitution and the new Organic Law, and in doing so it would have regard to the need to ensure continuity of national life and the requirement that examination of the Finance Act be full enough at all stages to be satisfactory.

Languages:

French.

Germany
Constitutional Court

Important decisions

Identification: GER-1954-C-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.02.1954 / **e)** 2 BvN 1/54 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.1 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation.
1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.
3.6 **General Principles** – Federal State.
3.9 **General Principles** – Rule of law.
4.8.6.3 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Courts.
4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.

Keywords of the alphabetical index:

Constitutional Court, federal and regional, relations / Constitutional Court, decision, binding force / Constitutional Court, decision, deviation / Constitution, interpretation, jurisdiction / Constitutional jurisdiction, subsidiarity.

Headnotes:

The term “decision” of the Federal Constitutional Court, as used by Article 100.3 of the Basic Law and constituting the controlling judgment from which a constitutional court of a *Land* proposes to deviate by way of a proposed replacement decision of the Federal Constitutional Court, does not include only the operative provisions of the respective judgment. Rather, such a decision is to be understood as the interpretation of the law upon which the Federal

Constitutional Court based its judgment, i.e., the interpretation of the Basic Law, which can be inferred from the grounds, without which the operative provisions of the judgment could not have been obtained.

Summary:

I. In principle, the constitutional jurisdiction on the Federal and on the *Länder* level co-exist autonomously and separately. The Federal Constitutional Court is the guardian of the Basic Law; it is the task of the *Land* constitutional courts to review acts of state power of a *Land* in accordance with the standard that is provided by the respective *Land* constitution. The referral procedure pursuant to Articles 100.1 and 100.3 of the Basic Law guarantees that there is uniform administration of justice between the *Land* constitutional courts and the Federal Constitutional Court as concerns the interpretation of the Basic Law, which binds the *Land* constitutional courts, like every state power, pursuant to the principle of the rule of law: if the Constitutional Court of a *Land* proposes a deviation from a decision of the Federal Constitutional Court or of another *Land* constitutional court when interpreting the Basic Law, it is obliged to obtain the decision of the Federal Constitutional Court before doing so.

In the proceeding which was the basis of the present referral to the Federal Constitutional Court, the parliamentary group of the *"Niederdeutsche Union"* in the parliament of Lower Saxony brought an action against the parliament before the *Oberverwaltungsgericht* (Higher Administrative Court) in Lüneburg on account of a violation of a minority's right to establish an investigative committee, a right which this parliamentary group was entitled to invoke pursuant to Article 11 of the Provisional Constitution of Lower Saxony.

All parties to the original proceedings were of the opinion that the Higher Administrative Court of Lüneburg was competent to decide this dispute. The Higher Administrative Court itself also regarded itself as competent, pursuant to § 27d of the Decree no. 165 of the British Military Government, to decide constitutional disputes within the *Land* of Lower Saxony. It, however, regarded itself as being prevented from deciding the case at issue by the fact that "the Federal Constitutional Court, in its judgment of 5 April 1952, claimed its own competence for such disputes pursuant to Article 93.1.4 of the Basic Law".

In the referenced judgment, the Federal Constitutional Court had been of the opinion that the competence of the Higher Administrative Courts of the British occupation zone over constitutional disputes had been abolished by Article 93.1.4 of the Basic Law.

Certainly, the Lüneburg Higher Administrative Court had doubts as to whether it was bound by this interpretation; the Court was, however, of the opinion that Article 100.3 of the Basic Law obliged a *Land* constitutional court "to obtain a decision from the Federal Constitutional Court" even "if it is doubtful whether a judgment of the Federal Constitutional Court has a binding effect in the constitutional dispute that is to be decided."

By way of an order dated 15 December 1953, the Lüneburg Higher Administrative Court suspended the proceedings and submitted the files pursuant to § 85.1 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act) to the Federal Constitutional Court with a statement of its divergent legal opinion.

II. The Second Panel decided that the judgment of the Federal Constitutional Court of 5 April 1952 – 2 BvH 1/52 – did not preclude the Lüneburg Higher Administrative Court, i.e., the court that had submitted the case, from deciding on the original proceedings.

The term "decision" of the Federal Constitutional Court, as used by Article 100.3 of the Basic Law and constituting the controlling judgment from which a constitutional court of a *Land* proposes to deviate by way of a proposed replacement decision of the Federal Constitutional Court, does not, at any rate, include only the operative provisions of the respective judgment. Rather, such a decision is to be understood as the interpretation of the law upon which the Federal Constitutional Court based its judgment, i.e., the interpretation of the Basic Law, which can be inferred from the grounds, without which the operative provisions of the judgment could not have been obtained.

It can also be inferred from the relationship that exists between Article 93.1.1 of the Basic Law and Article 100.3 of the Basic Law that Article 100.3 must be construed in this manner. Pursuant to Article 93.1.1 of the Basic Law, the Federal Constitutional Court "shall rule" on the "interpretation of the Basic Law". § 67 of the Federal Constitutional Court Act, however, provides that the operative provisions of its judgment are to contain a pronouncement about the compatibility of the challenged measure or omission with the Basic Law. This means that the "interpretation of the Basic Law", which Article 93.1.1 of the Basic Law regards as the real subject of the decision, is contained in the grounds. The "interpretation of the Basic Law" which is apparent from the grounds of the decision is what binds the *Land* constitutional courts,

and it is this binding effect from which a *Land* constitutional court seeks to deviate when submitting a judicial referral pursuant to Article 100.3 of the Basic Law.

Article 100.3 of the Basic Law does not have the objective of binding the constitutional courts of the *Länder* to the decision that had been taken in a specific dispute, but to ensure that the Basic Law is interpreted in a uniform manner in the decisions of the Federal and *Land* constitutional courts. This aim would not be achieved if a *Land* constitutional court based the operative provisions of a decision on an interpretation of the Basic Law which was contrary to an interpretation upon which a decision of the Federal Constitutional Court is based. Therefore, statements that the Federal Constitutional Court makes in the grounds of its judgments will be the subject of the referral procedure pursuant to Article 100.3 of the Basic Law.

If the statements made by the Federal Constitutional Court in the judgment of 5 April 1952, about the general importance of Article 93.1.4 of the Basic Law for the *Länder* in the British zone of occupation, are seen against this background, they only concern the Federal Constitutional Court's competence for constitutional disputes in Schleswig-Holstein. In this judgment, the Federal Constitutional Court "decided" only, in the sense of justifying its competence for the judgment on the merits on the specific constitutional dispute, that Article 37.1 of the Constitution of the *Land* of Schleswig-Holstein refers the entire field of possible constitutional disputes within the *Land* Schleswig-Holstein to the Federal Constitutional Court. This, and this alone, was the procedural basis for the Court's decision on the merits. As, consequently, there is no "decision" of the Federal Constitutional Court that would bind the Lüneburg Higher Administrative Court, it was not necessary for that court to obtain a decision of the Federal Constitutional Court pursuant to Article 100.3 of the Basic Law.

Moreover, the Panel was of the opinion, which was in contrast to the statements in the order for referral, that § 27d of Decree no. 165 was no longer in force and that the Federal Constitutional Court was competent for deciding constitutional disputes in the *Länder* of the British occupation zone to the extent that the *Länder* have not themselves established *Land* constitutional courts in their constitutions. The Panel, however, was unable to enforce its opinion on this point of law against the diverging opinion of the Lüneburg Higher Administrative Court. The referral pursuant to Article 100.3 of the Basic Law is not a procedure for settling disputes about the competencies between the Federal Constitutional Court and the *Länder* constitutional courts; it only provides a procedure in the case that a *Land* constitutional court, in the framework of competencies that it accepts, wants to deviate from an interpretation of the Basic Law that is contained in a "decision" of the Federal Constitutional Court.

Languages:

German.

Identification: GER-1964-C-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.06.1964 / **e)** 1 BvR 37/63 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 18, 85-95 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.4 **Constitutional Justice** – Procedure.
3.17 **General Principles** – Weighing of interests.
3.19 **General Principles** – Margin of appreciation.
3.22 **General Principles** – Prohibition of arbitrariness.
3.25 **General Principles** – Market economy.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Constitutional complaint, limits of review / Constitutional complaint, admissibility / Patent Office, file, confidentiality / Invention / File, confidentiality / Norm, legal, interpretation, application.

Headnotes:

The organisation of the proceedings, the establishment and evaluation of the facts, the interpretation of a legal norm and its application to an individual case

are all matters for the courts which are generally competent. They are not subject to revision by the Federal Constitutional Court.

As part of a so-called "constitutional complaint against a judgment" the Federal Constitutional Court does not examine the decision in respect of every statutory breach, but instead in respect of "specific constitutional law". In this respect the limits for intervention by the Federal Constitutional Court are not clearly delineated once and for all. All that can be said generally is that only those errors in applying the law or incorrect interpretations of statutes which result from a fundamentally erroneous view of the meaning of a fundamental right or, in particular, an erroneous view of the scope of its protection, will violate specific constitutional law and only such errors or incorrect interpretations will make a substantive difference to the actual case and will be of importance.

A challenge based on the violation of the right to a hearing is inadmissible if it is raised as part of another constitutional complaint dealing with the violation of a different fundamental right after the deadline for lodging a constitutional complaint has expired.

Summary:

I. At the beginning of the 1960s, a cosmetics company applied to have a patent for a skin-browning preparation registered. The Patent Office objected to the application claiming that one of the active substances was insufficiently non-perishable for commercial exploitation. The patent applicant then restricted its application to the remaining substances. Thereafter the restricted application was published. A competitor objected to the grant of the patent and sought to inspect the documents in the application file. After the Patent Office had first removed the part of the application which had been dropped, the competitor was allowed to see the whole file by the Federal Patent Court. In the opinion of the Federal Constitutional Court the patent applicant did not have a confidentiality interest requiring protection within the meaning of § 24 of the *Patentgesetz* (Patent Act) – even with regards to the part of the application which had been dropped and, accordingly, there was nothing which should prevent the file from being inspected. It held that it was common practice to allow those parts of an application which have been dropped due to an objection to be inspected. The Federal Constitutional Court also held that objections are indications of all obstacles to the grant of a patent including an absence of commercial exploitability. A person who registers an unfinished invention runs the risk that the unfinished part will become public.

The patent applicant lodged a constitutional complaint against the order of the Federal Patent Court alleging that the disclosure of the part of the application which had been dropped violated Article 14 of the Basic Law. It was of the opinion that the inspection of the part of an application, which has been dropped in a file is not detrimental if such part of an application will never be granted patent protection, for instance where the patent is refused because the invention is not new. However, in the present case the lack of commercial exploitability was not a final obstacle to obtaining a patent since the patent applicant wanted to improve the part in question in order to make it suitable for the grant of a patent.

In subsequent pleadings the complainant also alleged that the conduct of proceedings by the Federal Patent Court had violated Article 103.1 (hearing in accordance with law).

II. The constitutional complaint was unsuccessful. In particular, the First Panel was unable to find that the Federal Patent Court had misjudged the meaning and scope of fundamental rights.

In principle, the competent courts must take into account the values inherent in the Basic Law when they are interpreting and applying a legal norm, and in particular when they are interpreting and applying general clauses. The organisation of the proceedings, the establishment and evaluation of the facts, the interpretation of a legal norm and its application to an individual case are all matters for the courts which are generally competent. They are not subject to revision by the Federal Constitutional Court.

There will still be no violation of the Basic Law if the competent judge reaches a conclusion when applying a legal norm and the "correctness" (in the general sense of "appropriate" or "fair") of the conclusion is debatable. This is especially true when a general clause in a law gives the judge a discretion to weigh conflicting interests and his or her exercise of the discretion appears questionable because too much importance was attached to the interests of one or other party.

If a court does not fulfil these standards then, as a holder of public office, it has violated fundamental rights by disregarding them. Its judgment must be overturned by the Federal Constitutional Court upon a complaint made to that court.

As part of a so-called "constitutional complaint against a judgment" the Federal Constitutional Court does not examine the decision in respect of every statutory breach, but instead in respect of "specific constitutional law". In this respect the limits for

intervention by the Federal Constitutional Court are not clearly delineated once and for all. All that can be said generally is that only those errors in applying the law or incorrect interpretations of statutes which result from a fundamentally erroneous view of the meaning of a fundamental right or, in particular, an erroneous view of the scope of its protection, will violate specific constitutional law and only such errors or incorrect interpretations will make a substantive difference to the actual case and will be of importance.

Incidentally, constitutional court judges must be left a certain amount of freedom of discretion, which permits the special circumstances in a particular case to be taken into account.

Upon application of these standards no violation of a fundamental right can be established in the specific case at hand. This is particularly true because no failure to recognise the complainant's fundamental right to property can be found in the way the Federal Patent Court weighed the patent applicant's interest in confidentiality against its competitor's interest in obtaining information from inspecting the file and in reaching its decision.

III. Pursuant to § 92 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act) the reasons for the complaint must specify the right which is claimed to have been violated and the act or omission by which the complainant claims to have been harmed. A complaint must be lodged and substantiated within the set time-limit (§ 93.1 of the Federal Constitutional Court Act). It will still be possible to later amend the reasons for the complaint by changing the factual and legal submissions made. However, this cannot lead to a new set of facts (here the Federal Patent Court's refusal of a hearing) being made the subject of the constitutional complaint after the time-limit for lodging a complaint has expired.

Therefore, the Federal Constitutional Court dismissed the constitutional complaint as inadmissible to the extent that it alleged that the complainant's right to a hearing had been violated.

Languages:

German.

Identification: GER-1974-C-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 29.05.1974 / **e)** 2 BvL 52/71 / **f)** Solange I / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 37, 271-305 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.
1.3.5.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law.
2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
2.2.1.6.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and constitutions.
3.9 **General Principles** – Rule of law.
3.26 **General Principles** – Principles of Community law.
5.1 **Fundamental Rights** – General questions.

Keywords of the alphabetical index:

Import, export, deposit / European Community, nature / European Court of Justice, human rights, protection / Community law, application, uniform, interpretation.

Headnotes:

Following a ruling of the European Court of Justice under Article 177 EC, referral by a court of the Federal Republic of Germany to the Federal Constitutional Court in proceedings that involve the review of statutes, is admissible and necessary if the German court regards the rule of Community law that is relevant to its decision as inapplicable in the interpretation given by the European Court of Justice because and in so far as it conflicts with one of the fundamental rights of the Basic Law. This will continue to be the case as long as the integration process of the Community has not progressed to the

point that Community law contains a codified catalogue of fundamental rights decided on by a Parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law.

Summary:

I. Pursuant to Article 12.1.3 of Council Regulation no. 120/67/EEC of 13 June 1967, exports of specified products from the European Economic Community shall be conditional on the payment of a deposit guaranteeing compliance with the attending obligation. The deposit shall be forfeited, in whole or in part, if importation or exportation is not effected, or is only partially effected, within the period of validity of the licence.

II. A German import/export company brought an action before the *Verwaltungsgericht* (Administrative Court) of Frankfurt am Main seeking the annulment of an order issued by the *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Import and Storage Agency for Grain and Fodder), in which an export deposit of DM 17 026,47 was declared to be forfeited after the firm had only taken advantage of part of the 20 000 tons of exported milled corn it had been granted by an export licence.

The Administrative Court first stayed the proceeding and obtained a preliminary ruling from the European Court of Justice (ECJ), pursuant to Article 177 EC, as to whether the rules outlined by these regulations are lawful under the law of the European Economic Community.

In its Judgment dated 17 December 1979, the ECJ confirmed the legality of the disputed regulations.

After the conclusion of the ECJ referral proceedings, the Administrative Court, by a decision dated 24 November 1971, stayed the proceedings again and requested the ruling of the Federal Constitutional Court as to whether the obligation to export existing under European Community law and the associated duty to pay an export deposit are compatible with the Basic Law, and if so, whether the rule that the deposit is to be released only in a case of *force majeure* is compatible with the Basic Law. The Administrative Court took the view that the provisions of Community law for which it sought the review of the Federal Constitutional Court, were, in the interpretation given to them by the European Court of Justice, incompatible with the Basic Law.

III. In its Order dated 29 May 1974, the Second Panel of the Federal Constitutional Court made the following decision:

The application, by German authorities or courts, of the EEC Regulations that had been submitted for review, does not, at least with respect to the interpretation given to them by the European Court of Justice, conflict with the fundamental rights guaranteed by the Basic Law.

In particular, there is no evidence of a violation of Article 12.1 of the Basic Law, as the regulation that had been referred for the Court's review constitutes a "pure system of rules on the exercise of a trade or occupation" and therefore only has to comply with a comparatively low standard of review. Apart from this, the principle of proportionality, which results from the principle of the rule of law, is respected, as the regulation provides for exemption clauses and hardship arrangements.

As regards the admissibility of the judicial referral, it was necessary to examine whether the Federal Constitutional Court has the competence to rule on the validity or applicability of Community law. In this respect, the Panel held as follows:

The Panel, in agreement in this respect with the case law developed by the European Court of Justice, adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source. The Panel held that the European Community is not a state, in particular not a federal state, but a "community *sui generis* in the process of progressive integration", an "interstate institution" within the meaning of Article 24.1 of the Basic Law.

It follows from this that, in principle, the two legal spheres stand independently and parallel to one another in their validity and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding effect, construction and observance of Community law; the competent national organs have to rule on the binding effect, construction and observance of the constitutional law of the Federal Republic of Germany.

A special relationship has arisen between the Community and its members as a result of the establishment of the Community. Out of this relationship has emerged, first and foremost, the duty of the competent organs, in particular for the two courts charged with reviewing the law (the European Court of Justice and the Federal Constitutional Court) to concern themselves in their decisions with the concordance of the two systems of law. Only to the extent that this is unsuccessful can there arise a conflict that requires that conclusions be drawn from

the fundamental interaction between the two legal spheres as set out above.

In this case, it is not enough simply to speak of the "precedence" of Community law over national constitutional law in order to justify the conclusion that Community law must always prevail over national constitutional law or otherwise risk calling the Community into question.

The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany, and one which forms part of the constitutional structure of the Basic Law. Article 24 of the Basic Law does not allow the qualification of the fundamental rights of the Basic Law. In this context, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimate parliament, directly elected by general suffrage, which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks, in particular, a codified catalogue of fundamental rights, the substance of which laws are reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law.

What is involved, therefore, is a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase. Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law, or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question regarding which system of law takes precedence or supersedes the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not remedied the conflict of norms in accordance with the mechanism provided in the Treaty.

In detail, judicial protection by the Federal Constitutional Court is measured exclusively according to the constitutional law of the Federal Republic of Germany and according to the more precise rules laid down in the Federal Constitutional Court Act:

a. In proceedings involving the review of statutes upon judicial referral, it is always a question of examining a provision of a statute. Since the traditional distinction in national law between provisions of a formal statute and provisions of a regulation based on a formal statute is unknown in Community law, every provision of a Community regulation is a provision of a statute within the meaning of the rules of procedure of the Federal Constitutional Court.

b. An initial barrier to the jurisdiction of the Federal Constitutional Court emerges from the fact that it can only make the subject of its review acts of German state power, that is:

1. decisions of the courts;

2. administrative acts of the authorities; and

3. measures of the constitutional organs of the Federal Republic. For this reason, the Federal Constitutional Court regards as inadmissible a constitutional complaint brought by a citizen of the Federal Republic of Germany directly against a Community regulation.

c. If a Community regulation is implemented by an administrative authority of the Federal Republic of Germany or dealt with by a court in the Federal Republic of Germany, this is an exercise of German state power and in this process, the administrative authority and the courts are also bound to the constitutional law of the Federal Republic of Germany. According to the procedural law of the Federal Constitutional Court, the protection of fundamental rights is carried out by way of judicial referral in so-called "review of statutes" proceedings, apart from the constitutional complaint, which is only admissible after all other legal remedies are exhausted; the exception in § 90.2 of the Federal Constitutional Court Act hardly comes into consideration in a case involving the referral for review by the Federal Constitutional Court of an administrative act based on a rule of Community law. In view of the special features, outlined above, of the relationship between national constitutional law and Community law, these proceedings require some modifications of the kind that have also been considered necessary in the past by the Federal Constitutional Court in its case law. Thus, for example, it has held, in the framework of "review of statutes" proceedings, that the existing legal situation with regard to a constitutional directive to the state organs is not in keeping with the Basic Law and the Court has set a time limit for remedying the deficiency. Moreover, the Federal Constitutional Court, in another set of proceedings, has developed the preventive review of statutes with respect to ratification statutes. It lies in the nature of these previous decisions for the Federal Constitutional Court to restrict itself in cases, like the present one, to determining the inapplicability of a rule of Community law by the administrative authorities or courts of the Federal Republic of Germany to the extent that it conflicts with a guarantee of fundamental rights in the Basic Law.

Therefore, the underlying idea of Article 100 of the Basic Law requires that the validity of Community Law should be protected from impairment in the Federal Republic of Germany in the same way as that of national law.

Languages:

German.

Identification: GER-1975-C-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.06.1975 / **e)** 2 BvR 1018/74 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 40, 88-95 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.
1.6.1 **Constitutional Justice** – Effects – Scope.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.1 **Fundamental Rights** – General questions.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Driving licence, use in foreign country / Time-limit, application, extension / Norm, sub-constitutional, interpretation.

Headnotes:

The interpretation and application of legal norms are matters for the competent courts which deal more directly with a case. The Federal Constitutional Court has the task of defining which constitutional law standards or limitations are binding for the interpretation of a legal norm.

In case the Federal Constitutional Court after examining whether a rule contained in a legal norm is in "conformity with the Basic Law" pronounces that certain possible interpretations of the rule would not be in conformity with the Basic Law, no other court may hold that those interpretations are in conformity with the Basic Law.

The same applies when as the result of a constitutional complaint in respect of a court decision, there is a finding that certain interpretations of a legal norm which are tenable and possible nonetheless lead to a violation of the Basic Law.

Summary:

The complainant, an Austrian citizen who had lived in the Federal Republic of Germany for five years, was in possession of a valid Austrian drivers' licence. On 5 April 1974 he drove his vehicle in the Federal Republic of Germany although he did not have a German drivers' licence. As a result the competent Local Court issued an order imposing a fine of DM 1 000,00 or as an alternative 50 days' imprisonment against the complainant on 28 May 1974. The order imposing punishment was served on 19 July 1974 by deposit at the post office. The complainant's solicitor lodged an objection on his behalf against the order imposing punishment, which was filed at the Local Court on 20 August 1974. The pleadings also contained an application to have the decision regarding his failure to lodge an objection on time reversed and the case reinstated. He submitted that he was a teacher at a Waldorf school and that at the time in question he was on vacation in his home country, Austria. He further stated that he had not appointed a person to accept service on his behalf nor arranged for the post office to forward his mail because as a rule in his profession no matters subject to time limits occurred during the general vacation period.

After his application to have his case reinstated was dismissed as inadmissible, the complainant filed an appeal and justified his claim for reinstatement on the basis of the relevant case law of the Federal Constitutional Court.

The appellate court departed from the case law of the Federal Constitutional Court and dismissed the appeal. In doing so it followed the "convincing case law" of another competent court (Court of Appeal in Berlin).

The complainant lodged a constitutional complaint against the refusal of his application for reinstatement and claimed that his fundamental rights under

Articles 19.4 and 103.1 of the Basic Law had been violated. He alleged that the Local Court and the Regional Court had overstretched the requirements which could be applied to the admissibility of a claim for reinstatement if the constitutional requirements were taken into account.

The Second Panel granted the constitutional complaint and referred the case to the Local Court for rehearing. Its reasoning was essentially as follows:

1. Persons who do not use their permanent home for only temporary periods during a vacation period are not obliged to take special precautions for possible service of documents during their absence even if they know there are legal proceedings pending against them. Instead they are entitled to rely on the fact that the case will later be reinstated if they miss the deadline for filing an objection because they did not know about the service of the order for punishment. If these standards are applied, there was already a violation of the basic right of a hearing in accordance with the law.

2. To the extent that the appellate court considered itself entitled to rely on the decision of another competent court to deviate from the principles established by the Federal Constitutional Court in its case law regarding reinstatement of cases of first instance to the courts, the appellate court acted unconstitutionally and misjudged the scope and binding effect of the principles established in the case law of the Federal Constitutional Court.

§ 31 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act) makes decisions of the Federal Constitutional Court binding on all courts covered by the Act. If the Federal Constitutional Court declares a law to be valid or invalid, its decision shall have the force of law. In other cases too, the decisions of the Federal Constitutional Court pursuant to § 31.1 of the Federal Constitutional Court Act have a binding effect beyond the individual case at issue. In particular, the courts must adhere to the principles regarding the interpretation of the *Grundgesetz* (Basic Law), which are evident from the operative part of the Federal Constitutional Court's decision and its main reasons in all future cases.

The binding effect is, however, restricted to those parts of the reasons for the decision that relate to the interpretation and application of the Basic Law. It does not extend to explanations that only relate to the interpretation of legal statutes. The interpretation and application of legal statutes are matters for the competent courts which deal more directly with a case. If the Federal Constitutional Court is examining a rule contained in a legal norm to see whether it is in "conformity with the Basic Law" and pronounces that certain possible interpretations of the rule would not be in conformity, then no other court may hold that those same possible interpretations are in fact in conformity. Rather, all courts are bound, pursuant to § 31.1 of the Federal Constitutional Court Act, to the Federal Constitutional Court's decisions on unconstitutionality. The same applies when – as occurred here – as the result of a constitutional complaint in respect of a court decision, there is a finding that certain interpretations of a legal norm which are tenable and possible nonetheless lead to a violation of the Basic Law. In both cases, all courts are prevented by § 31 of the Federal Constitutional Court Act from founding a decision on an interpretation of a statute that is unconstitutional. If they still do so, then they are in violation of Article 20.3 of the Basic Law, which decrees that the judiciary should be bound by law and justice.

3. The decisions challenged in the constitutional complaint had to be overturned and the case remitted to the court of first instance.

Languages:

German.

Identification: GER-1985-C-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 11.10.1985 / **e)** 2 BvR 336/85 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 73, 339 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.
5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Res iudicata / Drug, dealing / Defence counsel, criminal proceedings / Defence counsel, officially appointed / European Court of Human Rights, decision, effects in national law.

Headnotes:

Even if a judgment of the European Court of Human Rights holds that the European Convention for the Protection of Human Rights was violated in the proceedings that preceded a decision of a German court, this finding does not nullify the *res iudicata* effect of the challenged decision of the competent court.

Summary:

I. The complainant, a Turkish citizen who was born in 1937, lived and worked in the Federal Republic of Germany from 1964 to 1976. On 7 May 1974, he was arrested on account of a violation of the *Betäubungsmittelgesetz* (German Narcotics Act). In the attending criminal proceedings, the complainant was assigned a lawyer from Heilbronn as his court-appointed defence counsel, who represented the complainant in the criminal proceedings that took place in April 1976, before the Heilbronn Regional Court. This role was sometimes performed by the appointed lawyer's associate.

On 30 April, the Heilbronn Regional Court sentenced the defendant to 27 months in prison for violation of the German Narcotics Act and for tax evasion. The Court regarded it as established that the defendant, in the spring of 1972, illegally brought 16 kg of hashish, which he had hidden in his car, into the Federal Republic of Germany.

On 3 May 1976, the court-appointed defence counsel lodged an appeal from the judgment passed by the Regional Court, relying in particular on § 146 of the *Strafprozessordnung* (StPO, the Criminal Procedure Code), pursuant to which the same lawyer may not simultaneously represent several defendants in one case or whose cases arise out of the same set of events. The court-appointed defence counsel additionally argued that he had represented an accomplice of the defendant's. The appeal was dismissed as inadmissible on 22 October 1976, by the Federal Public Prosecutor.

On 19 November, the associate of the court-appointed defence counsel applied for reinstatement of the case, which was granted by the *Bundesgerichtshof* (BGH, Federal Court of Justice); at the same time, he lodged a new appeal. On 13 January 1977, the Regional Court appointed the associate as defence counsel for the submission of the pleadings in the appeal proceedings, as per his application. When substantiating the appeal, the newly appointed defence counsel raised challenges concerning only procedural errors, *inter alia*, the violation of § 146 of the Code of Penal Procedure (joint defence). The alleged error regarding § 146 StPO resulted, so it was argued in the appeal, from the fact that the former defence counsel had, on 21 June 1974, defended someone who had been convicted as an accomplice of the defendant, which, it was argued, constituted a prejudicial conflict with the defendant's interests.

The Federal Court of Justice fixed 29 November 1977 as the date for the *Hauptverhandlung* (oral argument on appeal); the defence counsel and the complainant, who had since returned to Turkey, were informed of the date on 17 October. On 24 October, the complainant's defence counsel applied for appointment by the Court to serve as defence counsel for the oral argument. The application was refused by the presiding judge of the Grand Criminal Senate of the Federal Court of Justice, who justified the refusal by stating that a defendant who is at large has no right to a court-appointed defence counsel for the oral argument in the appeal proceedings. The presiding judge stated that §§ 350.2 and 350.3 neither prescribed that the defendant appear in person nor that he be represented by defence counsel. The judge further stated that the court of appeal would examine the procedural objections on the basis of the pleadings; in the case of material objections, comprehensive investigation would be carried out *ex officio.*

On 29 November the oral argument took place; the complainant and his lawyer were not present.

After the appeal had been dismissed as inadmissible in its entirety, the court-appointed defence counsel lodged a constitutional complaint with the Federal Constitutional Court. The competent three-judge chamber, however, decided on 10 May 1980, that the constitutional complaint had no prospect of success because the presiding judge of the Grand Criminal

Senate of the Federal Court of Justice had not acted arbitrarily. The chamber stated additionally that the complainant could have stayed in the Federal Republic of Germany and could have participated in the oral argument before the Federal Court of Justice, with the help of an interpreter if necessary.

Thereafter, the court-appointed defence counsel invoked the jurisdiction of the European Court of Human Rights, asking that Court to review the decision of the Federal Constitutional Court. The European Court of Human Rights decided on 25 April 1983, that the decision of the Federal Court of Justice refusing to appoint defence counsel constituted an infringement of Article 6.3.c ECHR.

Relying on the judgment of the European Court of Human Rights, the court-appointed defence counsel filed an application to have the case re-opened before the German courts. This application, however, was refused in the last instance by the competent *Oberlandesgericht* (OLG, Higher Regional Court), which stated that the decision of the European Court of Human Rights had no immediate modifying influence on the domestic legal situation.

The complainant lodged a constitutional complaint against the denial of the request to re-open the proceedings, alleging, in essence, a violation of Article 2.1 of the Basic Law.

II. The Second Panel did not admit the constitutional complaint for decision as there was no reasonable prospect of success:

In principle, a court decision that burdens an individual and that is based on:

1. a provision of domestic law that is contrary to general international law, or

2. an interpretation and application of a provision of domestic law that is incompatible with general international law

infringes the right to free development of one's personality which is protected by Article 2.1 of the Basic Law. This applies independently of whether the general rule of international law, in its content, establishes rights or obligations for the individual or whether it exclusively addresses states or other subjects of international law.

In the case at hand, however, these prerequisites had not been met. The Higher Regional Court ruled that the conclusion, by a *res iudicata* decision, of the criminal proceedings against the complainant before the Federal Court of Justice had not been affected by the decision of the European Court of Human Rights. This ruling in particular, the Panel concluded, is not constitutionally objectionable.

The European Convention for the Protection of Human Rights proceeds on the assumption that – apart from decisions that grant an indemnification (Article 50 ECHR) – the decisions of the European Court of Human Rights are, in essence, of a declaratory nature, and that it is left to the state concerned to draw the necessary conclusions from such a decision.

Due to the nature of the Convention under European law, a state that is party to the convention, which the European Court of Human Rights has found to be in violation of the Convention, is to make compensation for the infringement, as far as possible, by restoration of the pre-violation situation. In the present case, such restoration would have to consist, first and foremost, in a re-opening of the proceedings against the complainant before the court of appeal and in a decision that is in conformity with the Convention about his application for the free-of-charge assignment of a defence counsel. In Article 50 ECHR, however, the Convention takes into consideration the possibility that the domestic laws of the states that are party to the Convention do not permit a “complete compensation” for the violation of international law which has occurred. In this case, this domestic prohibition on “complete compensation” has been assumed by the European Court of Human Rights and confirmed by the Higher Regional Court through the challenged decision. In such a case, the European Court of Human Rights has the option of granting the persons affected by the violation of the Convention a fair indemnification. This regulation has been modelled after classical provisions in arbitration agreements under international law, like, for instance, Article 10.2 of the Swiss-German Arbitration and Settlement Agreement of 3 December 1921.

Like this provision, Article 50 ECHR permits the states which are party to the Convention, specifically with regard to the institution of legal force and the high rank that is generally attributed to this institution in the domestic legal systems, to leave undisturbed *res iudicata* decisions which have been found to be the products of proceedings in which international law has been infringed.

Article 13 ECHR also does not create an obligation on the part of state parties, in those cases where the European Court of Human Rights has found a violation of the Convention in the proceedings at issue, to facilitate a re-opening of criminal proceedings that would nullify the *res iudicata* effect of the conclusion of the original proceedings. Certainly no

such obligation exists that takes precedence over Article 50 ECHR.

Moreover, the complainant had the possibility to assert before the Federal Court of Justice and the Federal Constitutional Court that the refusal of his application for the assignment of a court-appointed defence counsel violated his rights. At any rate, this fulfils the complainant's claim to an "effective complaint". Article 13 ECHR does not contain a more far-reaching claim that the grounds, provided by domestic law, for re-opening criminal proceedings that have been concluded and are *res iudicata*, must be expanded.

All aspects considered, no violation of Article 2.1 of the Basic Law can be ascertained.

Languages:

German.

Identification: GER-1986-C-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 22.10.1986 / **e)** 2 BvR 197/83 / **f)** Solange II / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 85, 365 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.
1.3.5.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.2.1.6.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and constitutions.
3.9 **General Principles** – Rule of law.
3.22 **General Principles** – Prohibition of arbitrariness.
3.26 **General Principles** – Principles of Community law.
3.26.2 **General Principles** – Principles of Community law – Direct effect.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Import licence, third country / Community law, interpretation, uniform / Community law, application, national courts.

Headnotes:

The Court of Justice of the European Communities (ECJ) is a "lawful judge" under the terms of Article 101.1.2 of the Basic Law. It is a sovereign organ of judicature established by the Community Treaties, which, on the basis and within the framework of legally established jurisdiction and procedures, in principle, makes final decisions in a status of judicial independence in accordance with legal rules and legal standards.

The procedural law rules of the ECJ meet the legal requirements of due process of law; in particular, they guarantee the right to be heard before the court, procedural means of challenging judgments and of defence which are adequate to the matter at issue, and the right to an expert counsel of choice.

As long as the European Communities, in particular ECJ case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities in a manner and degree which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its

jurisdiction to decide on the applicability of secondary Community legislation that is relied on as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany; the Federal Constitutional Court will also no longer review such legislation by the standard of fundamental rights contained in the Basic Law; referrals to the Federal Constitutional Court pursuant to Article 100.1 of the Basic Law for such purposes are therefore inadmissible.

Summary:

I. Based on Article 43 CE, the Council of the European Economic Community, in Article 7 of the fundamental Regulation no. 865/68/EEC of 28 June 1968, on the common organisation of the market in products processed from fruit and vegetables, reserved itself the right to enact "the necessary provisions about the co-ordination and unification of the import regulations that the member states apply *vis-à-vis* third countries." On this basis, the Council enacted, from 1974 onwards, several regulations on the basis of which protective measures could be taken in the case of serious disturbances of the fruit and vegetable market.

Against this legal background, the complainant, a company which, *inter alia*, imported preserved mushrooms from states which are not members of the European Community to the Federal Republic of Germany, filed an application with the *Bundesamt für Ernährung und Forstwirtschaft* (Federal Food and Forestry Agency), which is competent in such cases, for the granting of a licence for the import of 1,000 tons of preserved mushrooms from Taiwan. The application was refused with reference to the provisions of the relevant EEC Regulation.

After unsuccessful proceedings on appeal, the complainant brought an action before the *Verwaltungsgericht* (Administrative Court) arguing that, due to a shortage of preserved mushrooms in the Community market which could be observed when the application was filed, there was no serious danger of market disturbances.

During the action, the relevant regulation was suspended as from 1 January 1977, and the import licence was granted. In the plaintiff's view, however, the matter had not been dealt with on the merits, and it filed an application seeking the Administrative Court to state that the Federal Food and Forestry Agency had been obliged to grant the plaintiff's application.

In its judgment dated from 25 July 1978, the Administrative Court rejected the application as unfounded and declared that the refusal of the import licence had not been unlawful.

The complainant filed an appeal against this judgment before the *Bundesverwaltungsgericht* (Federal Administrative Court); with this appeal, the complainant bypassed the *Oberverwaltungsgericht* (Higher Administrative Court). In its Order dated 25 March 1981, the Federal Administrative Court, in response to the complainant's application, suspended the proceedings and took recourse to the Court of Justice of the European Communities (ECJ), pursuant to Article 177.3 EC. The Federal Administrative Court sought judicial examination of the question, whether basing the refusal of the import licence on the EEC Regulation at issue constituted a misapplication or misinterpretation of valid EC law.

The ECJ found that EC law had not been misapplied or misinterpreted. As a consequence of the ECJ's decision, the Federal Administrative Court, irrespective of an application of the complainant to refer the action again to the ECJ or to the Federal Constitutional Court, rejected the appeal as being unfounded. The complainant challenged this judgment of the Federal Administrative Court, claiming that it violated fundamental procedural rights under Articles 19.4, 103.1 and 101.1.2 of the Basic Law and material fundamental rights under Articles 12 and 2 in conjunction with Article 20.3 of the Basic Law.

II. The Second Panel of the Federal Constitutional Court held that the constitutional complaint was admissible but unfounded.

The argument that the challenged judgment constituted a violation of Article 101.1.2 of the Basic Law, in conjunction with Article 177.3 EC, presupposes that the Federal Administrative Court was obliged to make a new referral to the ECJ in spite of the ECJ's preliminary ruling made as a result of the Federal Administrative Court's previous order for referral. The denial of a request for an obligatory referral conflicts with Article 101.1.2 of the Basic Law, if the ECJ is a lawful judge under the terms of this provision, and if the refusal is based on arbitrary considerations.

Article 177 EC accords the ECJ the exclusive authority, in relation to the courts of the member states, to make decisions on the interpretation of the Treaty and on the validity and interpretation of instruments of secondary Community law.

In view of the extensive institutional guarantees that result from this (Articles 165, 166, 167, 168 and 188 EC and the Rules of Procedure of the ECJ) there can

be no doubt of the ECJ's character as a court under the terms of Article 101.1.2 of the Basic Law.

The ECJ's partial integration, as regards its functions, in the jurisdiction of the member states reflects the fact that the legal systems of the member states and the legal system of Community law do not stand next to one another in an unconnected and isolated manner but are in numerous ways related to each other, interconnected and open to reciprocal effects. This becomes particularly patent as regards the allocation of competencies pursuant to Article 177 EC, which is oriented towards co-operation between the courts of the member states and the ECJ. In the interest of the Treaty objectives of integration, legal certainty and uniformity of the application of the law, the allocation of competencies serves to bring about the highest possible degree of uniformity in the interpretation and application of Community law by all courts within the sphere of application of the EEC Treaty.

This objective is served in an especially apt manner by the inclusion of the European Court, within the framework of its jurisdiction pursuant to Article 177 EC, in the sphere of application of Article 101.1.2 of the Basic Law.

The fact that the referral procedure pursuant to Article 177 EC is an objective interim procedure in which the parties to the original proceedings have no right of application of their own, and the fact that the procedure primarily serves the purpose of interpreting, enforcing and examining the validity of Community law, do not conflict with the classification of the ECJ as lawful judge under the terms of Article 101.1.2 of the Basic Law as regards preliminary rulings pursuant to Article 177 EC.

The referral procedure to the ECJ pursuant to Article 177 EC forms part of a uniform legal dispute, the outcome of which is decisively dependent upon the validity of the answer to the question that is part of the referral. The right of an individual, who is party to the original proceedings, to the guarantees enshrined in Article 101.1.2 of the Basic Law also extends to the observation of the duty to institute the referral proceedings established by Article 177 EC. The protections secured by Article 101.1.2 of the Basic Law apply in this context regardless of the legal nature of the proceedings and of the norms that constitute their subject matter.

In the case at hand, the Federal Administrative Court cannot be reproached for acting arbitrarily as regards its decision not to institute a new referral procedure. The Federal Administrative Court's view, which is not constitutionally objectionable, does not provide any evidence for concluding that the ECJ did not take note of the complainant's submissions or did not take them into consideration. Therefore, there are no preconditions for a new referral pursuant to Article 177 EC. To the extent that a referral would have been required pursuant to the provisions of Community law applicable to the case at hand, the denial of a request for a referral could constitute a violation of Article 101.1.2 of the Basic Law.

The other parts of the constitutional complaint that concerned fundamental procedural rights were also rejected, because the Federal Constitutional Court held that the Federal Administrative Court had clearly taken the complainant's statement of facts into account and because, apart from this, no circumstances were discernible that indicated that the fundamental right to effective legal protection had been violated in the original proceedings.

Moreover, it could not be discerned, as concerns the substantive fundamental rights which had allegedly been violated, that the challenged Federal Administrative Court judgment violated the complainant's fundamental rights under Article 12.1 of the Basic Law and Article 2.1 in conjunction with Article 20.3 of the Basic Law (principles of proportionality and legal certainty). The complainant's claim that the ECJ's preliminary ruling about the subject matter of the proceedings and the Commission Regulation on which the dispute was based, in the ECJ's interpretation, violated the specified fundamental rights enshrined in the Basic Law and should therefore not have been applied by German authorities and courts in the period in question within the sphere to which the Basic Law applies. This claim was inadmissible; a judicial referral, by the Federal Administrative Court, of the EEC Regulations to the Federal Constitutional Court pursuant to Article 100.1 of the Basic Law would have been inadmissible:

In its order dated from 29 May 1974, ("*Solange 1*", "As long as ... Decision I", [GER-1974-C-001]) the Federal Constitutional Court held that, with a view to the state of integration that had been reached at that time, the standard of fundamental rights under Community law which was generally binding within the European Communities did not yet show the level of legal certainty to permit the Court to conclude that this standard would, on a permanent basis, be sufficiently adequate to the fundamental rights standard of the Basic Law, irrespective of possible modifications, that the limits imposed by Article 24.1 of the Basic Law on the application of secondary Community law within the sovereign area of the Federal Republic of Germany would not be transgressed. In the Federal Constitutional Court's view, the European Community still lacked a democratically

legitimate parliament, directly elected by general suffrage, which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacked, in particular, a codified catalogue of fundamental rights; the ECJ's case law, as it then stood, did not by itself guarantee the necessary legal certainty. Against this background, the Federal Constitutional Court, in the previous case, stated that the referral pursuant to Article 100.1 of the Basic Law was admissible but unfounded on the merits.

In the case at hand, the responsible Panel held that the protection of fundamental rights had meanwhile, within the sovereign jurisdiction of the European Communities, been established to such an extent that its concept, substance and effect was essentially comparable with the standard of fundamental rights provided for in the Basic Law. All the main institutions of the European Community have since acknowledged in a legally relevant manner, that in the exercise of their powers and in the pursuit of the objectives of the Community, they will be guided by the respect of fundamental rights, in particular as established by the constitutions of the member states and by the European Convention on Human Rights. There is no decisive evidence that leads to the conclusion that the standard of fundamental rights that has been achieved under Community law has not been adequately consolidated and is only of a transitory nature.

In particular, the ECJ, in its jurisprudence, has indirectly invoked fundamental rights as they are acknowledged in the constitutions of the member states, as binding standards of review for the sovereign acts of Community organs.

It is possible that in comparison with the standard of fundamental rights enshrined in the Basic Law, the guarantees for the protection of such rights that have been achieved thus far by the ECJ's case law, as they have naturally been developed on a case-by-case basis, still contain gaps to the extent that specific legal principles that are acknowledged by the Basic Law, and nature, content or scope of a specific fundamental right have not yet been specifically dealt with in a ECJ ruling. What is decisive, nevertheless, is the fundamental attitude that the ECJ at that stage maintains *vis-à-vis*:

1. the Community's obligation as regards fundamental rights;

2. the incorporation of fundamental rights in Community law; and

3. the normative connection (to that extent) of Community law with the constitutions of the member states and with the European Convention on Human Rights.

Languages:

German.

Identification: GER-1997-C-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 15.10.1997 / **e)** 2 BvN 1/95 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 98, 345-375 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3 **Constitutional Justice** – Jurisdiction.
1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.
1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
3.19 **General Principles** – Margin of appreciation.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Constitution, federal and regional / Constitutional Court, federal and regional, relation / Constitutional Court, decision, deviation / Constitutional jurisdiction, subsidiarity / Constitutional complaint, admissibility / Fundamental rights / Constitutional complaint, subsidiarity / Constitutional complaint, nature.

Headnotes:

A *Land* fundamental right, in principle effective pursuant to Article 142 of the Basic Law, will not be superseded by ordinary federal law as provided by Article 31 of the Basic Law as long as the Federal and *Land* fundamental rights regulate a specific subject matter in the same sense, with the same content and are identical.

A *Land* judge possesses the discretion to apply *Land* fundamental rights that are established by the *Land* constitution, rights that are parallel to the fundamental rights established by the Basic Law, even in the course of a process governed by federal law. The instance that applies the law bears an autonomous responsibility for the enforcement of the subjective constitutional rights.

The competence of a *Land* over its constitutional jurisdiction permits a regulation that provides for the filing of, and a reversal from, a constitutional complaint with the *Land* constitutional court in the case that a challenged *Land* court's decision, issued in the course of a process governed by federal procedural law, violated a *Land* fundamental right that addressed the same subject as a Federal fundamental right with identical content. This regulation may not go further than to the extent that is indispensable for realising the purpose of the constitutional complaint. Only to that extent is the scope of the Federal competence under Article 74.1.1 of the Basic Law limited by the competence of the *Land*.

This means that a constitutional complaint on the *Land* level filed against decisions of the courts of the same *Land*, is only admissible to the extent that:

1. the recourse to a court that is opened by the Federal procedural rules has already been duly exhausted; and

2. the complainant's remaining principal complaint is based on the exercise of state power by the *Land*, and not also by the exercise of state power at the Federal level.

The content of the *Land* fundamental right is identical to the content of the corresponding right in the Basic Law – which makes it an admissible standard for the *Land* constitutional court's review – if it, in the case that is to be decided, leads to the same result as the Basic Law.

When examining this preliminary question, the *Land* constitutional court is, pursuant to § 31 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act), bound by the jurisprudence of the Federal Constitutional Court and is subject to the obligation to obtain a decision from the Federal Constitutional Court pursuant to Article 100.3 of the Basic Law.

A legal standard from which the courts want to deviate, the scope of which is so broad that it also applies to other groups of cases that can be submitted for decision at the court that makes the referral to the Federal Constitutional Court, can also be the subject of a referral pursuant to Article 100.3 of the Basic Law.

Summary:

I. The subject of the proceedings was a referral of the *Sächsischer Verfassungsgerichtshof* (Constitutional Court of the *Land* of Saxony) concerning the question, which has been the subject of controversy in jurisprudence and literature for decades, whether the Basic Law prevents a *Land* constitutional court from deciding a constitutional complaint filed against the judgment of a court of the same *Land* if the constitutional complaint challenges the application of Federal procedural law (e.g., the Code of Civil Procedure, the Code of Criminal Procedure, the Rules of the Administrative Courts).

The original proceedings were based on the following facts.

In an action for the assertion of a claim concerning payment of a cheque, the plaintiff in the original proceedings prosecuted a claim to the amount of DM 1 436,00 against the defendant (who was the complainant in the Constitutional Court proceedings). In the civil law proceedings, the competent *Amtsgericht* (Local Court), pursuant to the Code of Civil Procedure (which is a Federal procedural law), rejected, as untimely filed, the defendant's offer to present evidence during the proceedings. The Local Court ordered the defendant to pay the claim.

The defendant regarded the rejection of her offer to present evidence as an infringement of the right to a hearing in court that is guaranteed in Article 78.2 of the *Land* Constitution, which has the same wording as Article 103.1 of the Basic Law. Because an appeal against the Local Court's decision was not possible, as the amount in dispute was not high enough to justify an appeal, the defendant lodged a constitutional complaint with the Constitutional Court of Saxony and with the Federal Constitutional Court.

The First Chamber of the Second Panel of the Federal Constitutional Court did not admit the constitutional complaint for decision, without considering its prospects of success, because the

complaint did not provide the conditions for admission pursuant to § 93a.2.b of the Federal Constitutional Court Act.

Because the procedural law of Saxony in constitutional matters does not specify conditions for the admission of constitutional complaints, the Constitutional Court of Saxony, contrary to the Federal Constitutional Court, had to consider the constitutional complaint's prospects of success. On this point, the Constitutional Court of Saxony was of the opinion that the Local Court, by rejecting the motions for the admission of evidence as untimely filed, had violated the right to a hearing in court.

The Constitutional Court of Saxony intended to reverse the judgment of the Local Court. The Constitutional Court of Saxony also found itself competent to review, in constitutional complaint proceedings, whether the courts of the *Land* of Saxony, when applying the Federal procedural law, had complied with the fundamental rights or rights that are equivalent to fundamental rights as guaranteed by the *Land* constitution and, with the same content, by the Basic Law.

The Constitutional Court of Hesse, however, was of the opinion that Article 31 of the Basic Law ("Federal law shall take precedence over *Land* law") precludes this approach. In light of this conflict, the Constitutional Court of Saxony referred this question of law to the Federal Constitutional Court pursuant to Article 100.3 of the Basic Law, in order to avoid diverging case law.

II. The Second Panel of the Federal Constitutional Court answered the question submitted to it as follows:

If specific preconditions are met, the Constitutional Court of a *Land* may take the fundamental rights and rights that are equivalent to fundamental rights of the *Land* constitution as a standard for assessing the application of Federal procedural law by a court of a *Land*, if the content of these rights is identical to the corresponding rights in the Basic Law.

Moreover, a *Land* has the competence to provide, in the *Land* constitutional jurisprudence, the possibility of a constitutional complaint with the *Land* constitutional court that can result in the reversal of the challenged decision of the *Land* court. The prerequisite for this, however, is that the complainant's main complaint under constitutional law is exclusively based on the decision of the *Land* court and not on a decision of a Federal Court. Moreover, the creator of a *Land* constitution can only grant a *Land* constitutional court this competence if the procedural rules of the *Land* require that the recourse to other courts must have been exhausted before a constitutional complaint is lodged with the *Land* constitutional court (subsidiarity of the constitutional complaint).

To explain its decision, the Panel stated the following:

1. The ruling refers only to the review of the application of Federal procedural law (e.g., the Code of Civil Procedure, the Code of Criminal Procedure, the Rules of the Administrative Courts). It does not refer to the application of substantive Federal law (e.g., the Civil Code, the Criminal Code).

2. The constitutional complaint is an extraordinary legal remedy. It is intended as a tool for the enforcement of fundamental rights and of rights that are equivalent to fundamental rights. The constitutional complaint should serve the realisation of an individual's right of recourse to a court. By its nature, a constitutional complaint creates the possibility that acts of state authority can be reversed when deciding upon the constitutional complaint if those acts are held to be unconstitutional. This also applies to court decisions that have been held to be unconstitutional. To the extent that it is indispensable for ensuring that the purpose of the constitutional complaint is achieved, the *Länder* can, as most have done, grant their *Land* constitutional court the authority to reverse non-appealable decisions of the courts of the respective *Land*.

Whether it is indispensable to reverse such a decision can, however, only be established after the recourse to the courts has been exhausted. As long as this is not the case, the violation of a fundamental right can, and must, be remedied by the other courts.

A constitutional complaint within a *Land*, filed against the decision of a court of the same *Land*, is precluded to the extent that such decision was entirely or partially confirmed on the merits by a Federal court. The same applies to the decision of a court of a *Land*, to the extent that this decision has been made after the case had been remanded back to the *Land* court by a Federal court, with the remand binding the *Land* court's decision to the standards outlined by the remanding Federal court. In such cases, not even the prerequisite that the main ground of complaint of the person concerned must be based on the exercise of the state power of the *Land* is met.

3. Articles 142 and 31 of the Basic Law provide for the review of the application of Federal procedural laws by a *Land* constitutional court only to the extent that the *Land* constitution and the Basic Law contain fundamental rights with identical content. This is the case if the fundamental rights in the *Land* constitution

regulate the same subject in the same sense and with the same content as the Basic Law.

If a case is of this nature, the judge is to comply with the relevant fundamental rights that are safeguarded in a parallel manner in the Basic Law and in the *Land* constitution. No conflict can arise out of this parallel obligation because the application of the fundamental rights, which are identical in their content, in the specific case must lead to the same result.

Such a double obligation can – as in the present case – result in an enhanced protection of fundamental rights if the *Land* constitutional courts, contrary to the Federal Constitutional Court, are to examine a constitutional complaint's prospects of success in each case because their relevant procedural rules differ from § 93a.2.b of the Federal Constitutional Court Act in that they do not provide any specific preconditions for the admission of a constitutional complaint.

4. This means that a *Land* constitutional court is to examine the following:

a. Does the respective case involve the application of a fundamental right that is enshrined in the *Land* constitution?

b. To what result does the application of the Basic Law lead? (In this context, the *Land* constitutional court is, pursuant to § 31 of the Constitutional Court Act, bound by the jurisprudence of the Federal Constitutional Court and is also obliged, pursuant to Article 100.3 of the Basic Law, to obtain a decision from the Federal Constitutional Court if it wants to deviate from a decision of the Federal Constitutional Court or of the Constitutional Court of another *Land*).

c. Does the examination of the challenged *Land* constitutional law lead to the same result?

An affirmative answer to this question establishes that the content of the fundamental right that is provided by the *Land* constitution is identical to the content of the respective fundamental right in the Basic Law, and that therefore the fundamental right in the *Land* constitution can be the standard of review for the *Land* constitutional court. This, at the same time, determines the result of the review: if the challenged decision stands up to the standards of the Basic Law, it also complies with the guarantee of the respective right provided by *Land* law. If, however, the act of judicial power violates fundamental rights, or guarantees that are equivalent to fundamental rights, of the Basic Law, it also infringes the corresponding rights in the *Land* constitution and can be reversed by the *Land* constitutional court.

A negative answer to this question (i.e., the *Land* constitutional law leads to a different result because it is, for instance, to be interpreted in a manner that deviates from the Basic Law), is that the guarantee of the respective right provided by *Land* law is identical, as regards its content, to the respective guarantee in the Basic Law; in this case, the application of Federal procedural law cannot be assessed in accordance with this standard. The constitutional complaint before the *Land* constitutional court which challenges the violation of this guarantee is impermissible.

Languages:

German.

Hungary
Constitutional Court

Important decisions

Identification: HUN-1991-C-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 08.11.1991 / **e)** 57/1991 / **f)** / **g)** *Magyar Közlöny* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
3.17 **General Principles** – Weighing of interests.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Paternity, right to know / Self-determination, right / Living law, concept.

Headnotes:

The Court established the right to self-identification. It annulled procedural rules that prevented a child from challenging the presumption of paternity. With this case, the court introduced the concept of living law into its practice. This means that the Court reviews not the normative text itself but the norm that prevails, becomes effective and is realised by the established practice of ordinary courts or administrative agencies.

The Court – overstepping the boundaries of its legal power – annulled the decision of an ordinary court based on an unconstitutional legal provision.

Summary:

According to the Act on the Constitutional Court, the Constitutional Court does not have jurisdiction to review the constitutionality of the judicial application of the law. On the one hand, this means that if a legal rule has several interpretations and even legal practice does not agree upon a single interpretation then the Constitutional Court cannot make a binding interpretive decision, for such a decision would encroach upon the jurisdiction of the Supreme Court. On the other hand, it also means that if a legal rule that has several possible interpretations is applied with one single content in legal practice then only that normative content may serve as the basis for constitutional review. In the event that a legal rule possessing a variety of possible interpretations gains a permanent and uniform interpretation in legal practice with an unconstitutional content, then the unconstitutionality of that content must be determined in proceedings before the Constitutional Court.

In the current case, the Court, for these reasons, examined the constitutionality of the challenged rules in the context of the meaning attributed to them by legal practice.

According to Article 43.5 of the Family Act IV of 1952 a challenge to the presumption of paternity may be brought by a child within one year of attaining majority and by other parties with standing to sue within one year of the notification of birth. Under Article 44.1 of this Act the action must be initiated personally by the party with standing to sue. A totally incapacitated person may be represented by a statutory agent, subject to the approval of the Court of Guardians. The statutory agent of a child under the legal age in a case whose subject matter is the determination of the child's family law rights may not be the father or the mother. The uniform legal practice has always been to interpret Article 44.1 of the Family Act to permit the guardian *ad litem* to have standing to sue – in practice upon the mother's initiative – in the name of the child under the legal age. As a consequence, the child and (in the interest of the child) the mother, who is legally not entitled to initiate the proceedings otherwise, have a nineteen year time frame from the birth of the child to bring suit, in contrast to other parties who only have one year from notification. In the event that the challenge to the presumption of paternity is successful and the court overturns the presumption, the part of the judgment declaring that the presumption of paternity is overturned may not be set aside on a retrial pursuant to Article 293.2 of the Code of Civil Procedure or by an appeal. This therefore means that the child has no legal possibility whatsoever upon reaching the age of majority to establish or clarify his or her family status.

The right to ascertain one's parentage, and to challenge and question the legal presumption relating to it, is a most personal right which falls within the scope of "general right of personality" found in Article 54.1 of the Constitution. According to it, everyone in Hungary has the inherent right to life and human dignity, of which no one can be arbitrarily deprived.

The Constitutional Court held that the irrevocable forfeiture of a child's right to ascertain his or her parentage by conferring upon the statutory agent an unqualified right to sue was unconstitutional.

Two Justices attached a separate opinion to the judgment. According to their opinion, if an unconstitutional interpretation of a legal rule by the courts places them in confrontation with the law, it is the courts which must be compelled by the use of appropriate legal instruments to interpret and apply the statute or some other legal rule in a constitutional manner, and it is not the legislature which is to be "punished" for the unconstitutional interpretation by the courts applying the law by declaring null a regulation which would not be unconstitutional according to a proper interpretation.

The legal rule is the text published in the Official Gazette and not the version corrected and thereby distorted by the practice of its application.

If the Constitutional Court accepts the theory of the "living law", the necessary repercussion of that will be that it can never decide on the basis of a published statutory text but will always be compelled to examine the application of the law in practice, at the very least with a view to determining whether or not such application is "permanent and uniform". The court has neither the competence nor the technical resources for this task.

Languages:

Hungarian.

Identification: HUN-1998-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.02.1998 / **e)** 793/B/1997 / **f)** / **g)** *Alkotmánybíróság Határozatai* (Official Digest), 2/1998 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.16 **General Principles** – Proportionality.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.

Keywords of the alphabetical index:

Criminal proceedings / Testimony, pre-trial, use in trial / Testimony, refusal.

Headnotes:

To read aloud the testimony of an accused person at a court hearing despite the fact that the accused has refused to testify during the trial does not mean a disproportionate restriction of the rights of the defence if this limitation complies with the following constitutional requirements:

- reading aloud and using the testimony made during the investigation can be constitutional if it is done in the interest of making clear the facts of the case or in the interest of another accused or the victim;

- the judge should examine whether during the investigation the accused was familiarised with the possibility of refusing to testify and its consequences, and whether the testimony was given under duress;

- the judge should obtain evidence from other sources even if the accused made a full confession.

Summary:

Upon the petition of a judge, the Constitutional Court examined the constitutionality of Article 83 of Act I of 1973 on the Code of Criminal Procedure (hereinafter: the Code) according to which the document containing the testimony could be used if the person who testified cannot be heard, the person refuses to testify or the document is contrary to the testimony. In the petitioner's opinion, that part of the challenged provision under which the testimony can be used in spite of the fact that the accused person later refuses to testify violates the rights of the defence ensured by Article 57.3 of the Constitution.

According to Article 57.3 of the Constitution, a person charged with a criminal offence is entitled to the rights of the defence in every phase of the criminal procedure. The Constitutional Court in this decision examined whether the contested provision of the Code infringes the fundamental rights of the defence.

Under Article 83 of the Code, the document containing the testimony is a piece of evidence, which, as a general rule, can be used only according to the provisions of this Code as direct evidence. According to Article 83.3, however, three cases are exceptions to the above-mentioned rule, one of which is the case where the accused refuses to testify.

The right not to incriminate oneself emerging from the fundamental right to human dignity guaranteed by Article 54 of the Constitution ensures for the accused the right to remain silent. In order for this right to be realised, under the Code the investigator is obliged to draw the accused's attention to the possibility of refusing to make a statement. But if the accused decides to make a statement despite the notice of the investigator, later on he/she does not have the right to decide whether this statement can be used at trial. Under the Code, however, both the defence counsel and the accused have the possibility of making a remark if the court decides on using the statement made during the investigation as evidence.

According to Article 50 of the Constitution, the courts punish the perpetrators of criminal offences. The restriction of the rights of the defence therefore can be justified by this obligation of the State if this restriction is necessary and proportionate to the purpose of the limitation. In answering the question whether in the instant case the restriction is necessary and proportionate, the Constitutional Court took into consideration the case-law of the European Court of Human Rights, especially the *John Murray v. the United Kingdom* Judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996, p. 30, *Bulletin* 1996/1 [ECH-1996-1-001]. In this case the European Court of Human Rights stated that the right to remain silent is a generally recognised international standard which lies at the heart of a fair trial. However, the European Court of Human Rights also held that the right to silence is not an absolute right, but rather a safeguard which might, in certain circumstances, be removed provided other appropriate safeguards for accused persons are introduced to compensate for the potential risk of unjust convictions. The court has a discretionary power to draw inferences from the silence of an accused, but this does not, in itself, violate the right to silence. Accordingly, the Court held that there had been no violation of Article 6.1 and 6.2 ECHR.

On the basis of the aforesaid considerations, the Constitutional Court held the contested provision restricting the rights of the defence to be constitutional, since according to the reasoning of the Court, this limitation is justified by the interest of another accused or the victim and the rights of the defence can be also restricted in the interest of making clear the facts of the case.

Languages:

Hungarian.

Identification: HUN-1998-C-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 09.06.1998 / **e)** 23/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 49/1998 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
1.6.1 **Constitutional Justice** – Effects – Scope.

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

Keywords of the alphabetical index:

Legislative task, performance, failure / Case, reopening / Legal remedy, essence.

Headnotes:

The Constitutional Court established unconstitutionality on the grounds of a lack of rules in the Act on Civil Procedure. In order for a constitutional complaint to be an effective legal remedy, Parliament should determine the legal consequences of a successful complaint to make it possible for petitioners to move for a new trial of their case by ordinary courts.

Summary:

The petitioner requested the Court to decide whether Parliament had created an unconstitutional situation by failing to perform its legislative tasks in order to make the constitutional complaint an effective legal remedy.

Under Article 43.2 of the Act on the Constitutional Court, the annulment of a legal rule affects neither legal relationships which developed prior to the publication of the decision nor the rights and duties which derived from them. However, Article 43.3 makes it possible for the Constitutional Court to order the revision of any criminal proceedings concluded by a final decision on the basis of an unconstitutional legal rule, if the convicted person has not yet been relieved of the detrimental consequences, and the annulment of the provision applied in the proceedings would result in a reduction or in the setting aside of the punishment, in the convicted person's release, or in a limitation of his or her responsibility. In addition, Article 43.4 gives the Constitutional Court the discretionary power to annul an unconstitutional provision retroactively or prohibit its application in the special case under consideration if it thinks that this decision would serve the stability of the legal order or an important interest of the applicant.

Under Article 48 of the Constitutional Court Act, a constitutional complaint may be lodged with the Constitutional Court where a constitutional right has been violated due to the application of a statute contrary to the Constitution, provided that all other means of legal remedy have already been exhausted. The constitutional complaint regulated by Article 48 of the Constitutional Court Act is a legal remedy under Article 57.5 of the Constitution. This follows from the fact that such a complaint can be lodged with the Constitutional Court after the exhaustion of other legal remedies. A legal remedy should have legal consequences, which should include the possibility for reopening a case. The constitutional complaint serves as a final legal remedy for those whose constitutional rights have been violated. It is the essence of every legal remedy that it should be able to redress the grievance. Without this possibility, there is no difference between the two competencies of the Constitutional Court: the *ex post facto* review and the constitutional complaint. In the latter case, the Constitutional Court reviews the constitutionality of the statute applied in the given case and not whether the given decision made by judges or state authorities violates any of the petitioner's constitutional rights. The legal regulation in force was absurd, since it made the constitutional complaint almost superfluous in relation to popular action. Hence, the constitutional complaint is meaningless from the petitioner's point of view if the Constitutional Court cannot remedy the petitioner's grievance.

The Constitutional Court can prohibit the application of the statute judged unconstitutional. The Code on Civil Procedure, however, did not make it possible for petitioners to reopen their case. The constitutional complaint, in its current state, was not an effective legal remedy. Consequently, the Constitutional Court established in its decision an unconstitutional omission in connection with the Civil Procedure Code and it called upon Parliament to regulate the legal consequences of a successful constitutional complaint.

Supplementary information:

The amendment in 1999 of the Act on Civil Procedure made it possible to move for a new trial of a case by ordinary courts provided that, on the basis of the complaint, the Constitutional Court establishes with retroactive effect the unconstitutionality of application in the given case of the contested statute. Thus, constitutional complaints have become an effective legal remedy.

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-1996-2-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 01/03/1996 / **e)** 48/96 / **f)** Hanafin v. Minister for Environment and Others / **g)** *Irish Reports* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Legislative bodies.
1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.3.4.8 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of jurisdictional conflict.
2.3.7 **Sources of Constitutional Law** - Techniques of review - Literal interpretation.
3.4 **General Principles** - Separation of powers.
4.5.8 **Institutions** - Legislative bodies - Relations with judicial bodies.
4.7.1 **Institutions** - Judicial bodies - Jurisdiction.
4.9.2 **Institutions** - Elections and instruments of direct democracy - Referenda and other instruments of direct democracy.

Keywords of the alphabetical index:

High Court, decision, appeal, right.

Headnotes:

An appeal lies from the High Court to the Supreme Court in that the legislative provisions in question do not set down in a clear and unambiguous way that such jurisdiction is excepted and regulated.

Summary:

The issue which the Supreme Court had to determine was whether or not a right of appeal lay to it from a decision of the Divisional High Court with regard to a petition challenging the validity of the Divorce Referendum.

Under the Constitution, the Supreme Court has, with such exceptions and subject to such regulations as may be prescribed by law, appellate jurisdiction from all decisions of the High Court. The Courts have construed this literally. Accordingly, it has been open to the *Oireachtas* (legislature) to exclude certain decisions of the High Court from the appellate jurisdiction of the Supreme Court. However, in doing this, legislation must be clearly and unambiguously intended to have this effect. It is open to the Supreme Court to interpret the legislative provisions as to whether or not their appellate jurisdiction has been denied.

In the present situation it had not been set down anywhere explicitly in the statute in question that a decision of the High Court was final and unappealable. Enshrined within the statue was a power conferred on the Supreme Court to determine at any stage of the trial, a case stated from the High Court. The Supreme Court found that the existence of such a right neither clearly nor unambiguously barred an appeal.

The Referendum certificate itself was found to be final and incapable of being further questioned in any court when it has been received by the Referendum Returning Officer from the High Court. The Supreme Court found that the order of the High Court could not be construed as being final in the sense of being unappealable.

Languages:

English.

Latvia
Constitutional Court

Important decisions

Identification: LAT-1998-2-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30.04.1998 / **e)** 09-02(98) / **f)** On Conformity of Paragraph 2 of the Resolution of the Supreme Council of 15 September 1992 on the Procedure by which the Law on Eminent Domain Takes Effect with Article 1 First Protocol of the Law of the Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** *Latvijas Vestnesis* (Official Gazette), 122, 05.05.1998 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.
5.3.37.2 **Fundamental Rights** – Civil and political rights – Right to property – Nationalisation.
5.3.37.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Real estate / Compensation, determination / State Land Service.

Headnotes:

The general principle of peaceful enjoyment of possessions is always to be considered in connection with the right of the State to limit the use of property in accordance with conditions envisaged by Article 1 Protocol 1 ECHR.

Summary:

On 19 December 1996, the Parliament *(Saeima)* passed the law "Amendment to the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect", supplementing paragraph 2 with the second, third and fourth parts in the following wording:

> "When expropriating real estate necessary for the State or public – needs for maintaining and operating specially protected natural objects, educational, cultural and scientific objects of State significance, State training farms, national sport centres, as well as objects of engineering and technical, energy and transportation infrastructure – according to which the ownership rights are renewed or shall be renewed in accordance with the law to former owners (or their heirs), the extent of compensation shall be determined in money by a procedure established by law, but shall be not more than the evaluation of the real estate in the Land Books or cadastral documents drawn up before 22 July 1940 in which the value of real estate is indicated. Coefficients for the recalculation of value of property according to prices in 1938-1940 (in pre-war lats) and present prices (in lats) shall be determined by the State Land Service.
>
> The fourth part stresses that the procedure for expropriation of real estate established by this paragraph shall also be applied to owners who have acquired the real estate from the former land owner (or his/her heir) on the basis of an endowment contract."

Taking into consideration that Article 64 ECHR (henceforth "the Convention") envisages the possibility of making reservations to any particular provision of the Convention where any law then in force in its territory is not in conformity with the provision, the *Saeima* included the following reservation in Article 2 of the Law on the Convention:

> "Claims under Article 1 Protocol 1 ECHR shall not relate to the property reform that

regulates restitution of property or paying compensation to former owners (or their heirs) whose property has been nationalised, confiscated, collectivised or otherwise unlawfully expropriated during the period of the annexation by the USSR or to the process of privatisation of agricultural enterprises, fishermen's collective bodies and State or municipal property."

The case was initiated by twenty deputies of the *Saeima* who asked that parts 2 and 4 of paragraph 2 of the Resolution be declared null and void from the day the Convention took effect in Latvia, i.e. from 27 June 1997.

The applicants pointed out that the procedure established by the second and fourth parts of paragraph 2 of the Resolution, when applied to persons mentioned there, makes them less equal before court than those whose property is expropriated in the public or State interest under general procedure, since the persons mentioned in paragraph 2 of the Resolution have no right or reason to protect their interests at the court as regards the amount of compensation for the expropriated property. Courts – in cases like this and according to the law – can only quite formally approve of the price, determined by the State Land Service.

They also pointed out that the second and fourth parts of paragraph 2 of the Resolution express the notion that evaluation of the property depends only on what basis or how the property has been obtained and on whether the property status of its owner has improved or become worse. The applicants are of the opinion that compensation for expropriated property should be reasonable and should not be determined merely on the basis of the manner of obtaining it. If for one and the same property two people are paid different sums of money just because the properties have been obtained differently, then that constitutes discrimination on the ground of property status.

The Constitutional Court concluded that the procedure for the evaluation and determination of compensation for immovable property, which is envisaged by the second part of paragraph 2 of the Resolution, has been determined taking into consideration State or public interests. The terms of the second part of paragraph 2 of the Resolution refer only to immovable properties that are necessary for State or public needs for the maintenance and operation of specially protected natural objects, educational, cultural and scientific objects of state significance, State training farms, national sport centres as well as objects of engineering and technical, energy and transportation infrastructure. Such a procedure is in conformity with the fundamental principle of denationalisation of property in the Republic of Latvia – "to denationalise the property or to compensate its value to the extent that has been indicated during nationalisation" and it has the objective – in the context of consequences of the policy of annexation by the USSR to re-establish social justice and to fairly balance interests of the individual and the society after completion of the property reform (conversion).

Although the amount of compensation is to be reasonably related to the value of the property to be expropriated, Article 1 Protocol 1 ECHR – as has repeatedly been shown in the practice of the European Court of Human Rights – does not envisage full compensation for the expropriated property, especially in cases when expropriation of property takes place for important public interests. The European Court of Human Rights has come to the conclusion that legitimate objectives of public interest, such as those pursued by measures of economic reform or measures designed to achieve greater social justice, may call for reimbursement of less than the full market value. Thus, the principle of fair balance not only establishes a certain boundary between an admissible and inadmissible expropriation of property but also invests the government with extensive rights when evaluating the property to be expropriated and determining the amount of compensation.

The second and fourth parts of paragraph 2 of the Resolution do not prevent the owner whose property is being expropriated in the public or State interest from appealing to a court to review the extent of compensation. The second part of paragraph 2 of the Resolution only establishes the maximum extent of compensation. Therefore the viewpoint of the applicants, that the above persons have been denied the right to protection by a court and equality before the court, is unfounded.

The Constitutional Court decided to declare the second and fourth part of Paragraph 2 of the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect as being in compliance with Article 1 Protocol 1 ECHR.

Cross-references:

On the question of reimbursement for less than full market value, see:

- Judgment J*ames and Others v. the United Kingdom*, 21.02.1986, paragraph 54;

- Judgment *Lithgow and Others v. the United Kingdom*, 08.07.1986, paragraph 121; *Special Bulletin ECHR* [ECH-1986-S-002];

- D.J.Harris, M.O'Boyle, C.Warbrick: Law of the European Convention on Human Rights; London, Dublin, Edinburgh, 1995, pages 532-534.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2000-3-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30.08.2000 / **e)** 2000-03-01 / **f)** On Compliance of the *Saeima* Election Law and the City Dome, Region Dome and Rural Council Election Law with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 307/309, 01.09.2000 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
3.3 **General Principles** – Democracy.
3.12 **General Principles** – Legality.
3.15 **General Principles** – Proportionality.
3.18 **General Principles** – Margin of appreciation.
4.6.11.2.1 **Institutions** – Executive bodies – The civil service – Reasons for exclusion – Lustration.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, candidacy, restriction / Organisation, anti-constitutional, participation / Social need, pressing / Morality, democracy protection.

Headnotes:

The right to be elected may be restricted for persons who have been active in organisations that tried to destroy the new democratic state and were recognised as anti-constitutional. Such restrictions are lawful where their aim is to protect the democratic state system, national security and the territorial unity of the state.

However, the legislator should determine the term of the restrictions; such restrictions may last only for a certain period of time.

Summary:

The case was initiated by twenty-three members of Parliament who claimed that provisions of the Parliament *(Saeima)* Election Law and of the City Dome, Regional Dome and Rural Council Election Law establishing various restrictions on the right to be elected contradicted Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR, and Article 25 of the International Covenant on Civil and Political Rights.

The laws established restrictions on the right of the following to be elected as deputies in Parliament and in the municipalities: those who after 13 January 1991 have been active in the Communist Party of the Soviet Union, the Working People's International Front of the Latvian S.S.R., the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees; those who belong or have belonged to the regular staff of the U.S.S.R., the Latvian S.S.R. or foreign state security, intelligence or counterintelligence services.

Article 101 of the Constitution establishes the right of every citizen of Latvia, prescribed by law, to participate in the activity of the state and local authorities. This right guarantees the democracy and legitimacy of the democratic state system.

However the right is not absolute; Article 101 includes the condition “in the manner prescribed by law”. The constitution leaves it for the legislature to make decisions limiting the right. By including the words “in the manner prescribed by the law” the legislature determined that in every case one should interpret the words “every citizen of Latvia” as including the limitations established by law. Article 101 of the Constitution shall be interpreted together with Article 9 of the Constitution: “Any citizen of Latvia, who enjoys full rights of citizenship and, who is more than twenty-one years of age on the first day of elections may be elected to the Parliament.” Article 9 of the Constitution authorises Parliament to specify the content of the notion of “a citizen of Latvia, who enjoys full rights of citizenship”; and this is done in the *Saeima* Election Law. The limitations of this right are permissible only if they do not contradict the notion of democracy, mentioned in Article 1 of the Constitution, other Articles of the Constitution and general principles relating to fair elections. Thus the legislature, in passing the disputed norms creating a necessary legal norm to be realised for the right to be elected, implemented the task of Article 101 of the Constitution.

Reasonable restrictions on the right to vote and to be elected at genuine periodic elections, established in Article 25 of the International Covenant on Civil and Political Rights, are permitted. Not all types of different treatment constitute prohibited discrimination. Reasonable and objective prohibitions with an aim that is considered as legitimate by the Covenant cannot be regarded as discrimination.

The restrictions to the election rights established in Article 3 Protocol 1 ECHR shall be established according to the universal procedure: although the states have “a wide margin of appreciation in this sphere”, any restrictions must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Rights may be restricted only to the extent the restrictions do not deprive the right of its essence and/or diminish its efficiency. The principle of equality of treatment shall be respected and arbitrary restrictions must not be applied. Article 14 ECHR does not establish a prohibition of all difference in treatment with regard to the realisation of the rights and freedoms provided by the Convention. The principle of equal treatment is considered violated only if the difference of treatment does not have a reasonable and objective justification.

The Court found that the statement of the applicants that the disputed norms discriminated against the citizens just because of their political membership was groundless. The disputed norms do not establish difference in treatment just because of the political opinion of the person, they establish a restriction for activities against the renewed democratic system. The words “to be active”, used in the disputed norms mean to continuously perform something, to take an active part, to act, to be engaged in. Thus the legislature has connected the restrictions with the degree of individual responsibility of every person in the realisation of the aims and programme of the organisations mentioned in the disputed norms. Formal membership of any of the mentioned organisations cannot alone serve as the reason for forbidding a person from being included in the candidate list and being elected. Thus the disputed norms are directed only against those persons who, with their activities after 13 January 1991 and in the presence of the occupation army, tried to renew the former regime, and are not applied just to those with different political opinions.

The norms of human rights included in the Constitution should be interpreted in compliance with the practice of application of international norms of human rights. To establish whether the disputed restrictions comply with Articles 89 and 101 of the Constitution, one has to evaluate whether the restrictions included in the disputed norms are determined by law, adopted under due procedure; justified by a legitimate aim, and necessary in a democratic society. As this case does not contain any dispute on whether the restrictions were determined by law or adopted under the due procedure, the two last issues have to be evaluated.

In 1990, although the democratic state and the first articles of the Constitution of 1922 were renewed, the Latvian Communist Party was not going to give up the role of the “leading and ruling force”. It started anti-state activities. With the efforts of the Latvian Communist Party and its satellite organisations the All-Latvia Salvation Committee was established. The aims of the activities of these organisations were connected with the destruction of the existing state power, and were therefore anti-constitutional. In August 1991 the legislature prohibited these organisations, evaluating them as anti-constitutional. Thus the aim of the restrictions of the election rights is to protect the democratic state system, national security and the territorial unity of Latvia. The disputable norms are not directed against a pluralism of ideas in Latvia or the political opinions of a person, but against persons, who with their activities have tried to destroy the democratic state system. Enjoyment of human rights must not be turned against democracy as such.

The essence and efficiency of rights lies also in morality. To demand loyalty to democracy from its

political representatives is within the legitimate interests of a democratic society. The democratic state system has to be protected from persons who are not ethically qualified to become the representatives of a democratic state on the political or administrative level. The state should be protected from persons who have worked in the former apparatus, implementing occupation and repression, and from persons who after the renewal of independence to the Republic of Latvia tried to renew the anti-democratic totalitarian regime and resisted the legitimate state power. The restrictions to the election right do not refer to all members of the mentioned organisations, but only to those who had been active in the organisations after 13 January 1991. Excluding a person from the candidates list if he has been active in the mentioned organisations is not administrative arbitrariness; it is based on an individual court decision. Thus the principle, requiring an equal attitude to every citizen has not been violated, the protection by a court is guaranteed, and the restrictions are not arbitrary. Consequently the aim of the restrictions is legitimate.

To establish whether the restrictions of the election right is proportional to the aims of protecting the democratic state system, national security and the territorial unity of Latvia, the legislature has repeatedly evaluated the political and historical conditions of the development of democracy in connection with the issues of the election right, adopting or amending the election law just before elections. The Court held that at the present moment there did not exist the necessity to doubt the proportionality of the applied restrictions. However, the legislature, in periodically evaluating the political situation in the state as well as the necessity of the restrictions, should decide on determining the term of the restrictions. Such restrictions to the election rights may last only for a certain period of time.

The Constitutional Court decided by a majority of four votes to three. The dissenting judges disagreed with the majority on several grounds. According to the dissenting opinion, restrictions to human rights in a democratic society were necessary not only if they had a legitimate aim, but also if there was a pressing social need to establish the restrictions and the restrictions were proportionate. Today, ten years after the re-establishment of independence, the election of the persons mentioned in the disputed norms would not threaten democracy in Latvia, and therefore the pressing social need to establish the restrictions does not exist. Restrictions of fundamental rights are proportionate only if there are no other means that are as effective but are less restrictive of the fundamental rights. The election rights are restricted so far that in fact the persons do not enjoy the right at all; the legislature has the possibility of using other “softer” forms, therefore the measure is not proportionate.

Cross-references:

In the Decision the Constitutional Court referred to the following Judgments of the European Court of Human Rights: *Mathieu-Mohin and Clerfayt*, 02.03.1987; *Belgian Linguistic* Case, 23.07.1968; *Karlheinz Schmidt v. Germany*, 18.07.1994; as well as to the Decision of the Federal Constitutional Court of Germany in Case 2 BvE 1/95, 21.05.1996, *Bulletin* 1996/2 [GER-1996-2-017].

In the dissenting opinion, the judges referred to the following Judgments of the European Court of Human Rights: *Dudgeon* Case, 22.10.1981; *Handyside* Case, 07.12.1976; *Barthold* Case, 25.03.1985; *Vogt v. Germany*, 26.09.1995; *Rekvenyi v. Hungary*, 20.05.1999; as well as to the Decision of the Constitutional Tribunal of Poland in Case no. K 39/97, 10.11.1998; *Bulletin* 1998/3 [POL-1998-3-018].

Languages:

Latvian, English (translation by the Court).

Lithuania
Constitutional Court

Important decisions

Identification: LTU-1999-3-014

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.12.1999 / **e)** 16/98 / **f)** The Law on Courts / **g)** *Valstybės žinios* (Official Gazette), 109-3192, 24.12.1999 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – Status.
4.7.4.1.5.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judiciary, independence / Judge, dismissal / Judiciary, self government.

Headnotes:

The independence of judges and courts is one of the essential principles of a democratic state governed by the rule of law. The role of the judiciary in such a state is, while administering justice, to ensure the implementation of the law expressed in the Constitution, laws and other legal acts, to guarantee the rule of law and to protect human rights and freedoms.

On the other hand, judges and courts are not sufficiently independent if the independence of courts (the institutions of judicial power) is not ensured. According to the principle of separation of powers, all powers are autonomous, independent and capable of counterbalancing each other. A further reason why the judiciary may not be dependent on other powers is the fact that it is the only power formed on a professional but not political basis. It is only when the judiciary is autonomous and independent of the other powers that it exercises its true function, which is the administration of justice.

Summary:

The petitioner – a group of members of parliament (Seimas members) – contested the compliance with the Constitution of the provisions of the Law on Courts regulating the relations of courts with other state institutions or officials.

The Court noted that Article 84.11 of the Constitution provides that the President of the Republic shall propose Supreme Court judge candidates to the parliament, and, upon the appointment of all the Supreme Court judges, recommend from among them the Supreme Court Chairperson to the parliament; appoint, with the approval of the parliament, judges of the Court of Appeal, and from among them, the Court of Appeal Chairperson; appoint judges and chairpersons of district and local courts, and change their places of office; in cases provided by law, propose the dismissal of judges to the parliament. Those provisions establishing the powers of the President in the sphere of the appointment and dismissal of judges are linked with Article 112.5 of the Constitution, wherein it is prescribed that a special institution of judges provided for by law shall submit recommendations to the President concerning the appointment of judges, as well as their promotion, transferral or dismissal from office. Under Article 30 of the Law on Courts, these functions are performed by the Council of Judges. Taking account of the procedure for the formation of courts established in the Constitution, as well as the constitutional regulation of the relations of the President with the special institution of judges, one is to conclude that the special institution of judges mentioned in Article 112.5 of the Constitution must give recommendations to the President concerning all questions as to the appointment of judges, their proffessional career and their dismissal from office. The recommendation of this institution gives rise to legal effects: where there is no such recommendation, the President may not adopt decisions on the appointment, promotion, transfer or dismissal of judges (33).

Thus, according to the Constitution, the special institution of judges not only helps the President to form courts but it also serves as a counterbalance to the President, who is a part of the executive branch of power, in the area of the formation of the body of judges. On the other hand, the special institution of judges provided for under Article 112.5 of the Constitution is to be interpreted as an important element of self-government of the judiciary, which is an independent state power (33).

However, the Law on Courts provided that the President may exercise his or her constitutional rights only if there was a proposal by the Minister of Justice. The Court therefore ruled that these provisions contradicted the Constitution (33).

In the ruling referred to, the Constitutional Court examined the provisions under which deputy chairpersons or court division chairpersons shall be appointed by the Minister of Justice; court division chairpersons of the Court of Appeal shall be appointed by the Minister of Justice from among the appointed judges; court division chairpersons of the Court of Appeal and deputy chairpersons or court division chairpersons of other courts shall be dismissed from office by the Minister of Justice; the number of judges in the divisions of civil and criminal cases of district courts and the Court of Appeal shall be set by the Minister of Justice on the proposal of the Director of the Department of Courts under the Ministry of Justice; and the provisions under which a judge of a local or district court, of the Court of Appeal or the Supreme Court of Lithuania, if he or she so agrees, may, by a decree of the President of the Republic, be delegated for a term of up to one year to the structures of the Ministry of Justice or those of the Department of Courts and for the term of the delegation the powers of the delegated judge shall be suspended. It also examined the competence of the Minister of Justice to arrange for the financial supply of local, district courts and the Court of Appeal. The Court ruled that all of these provisions contradicted the Constitution (33).

The Court also ruled that the following provisions were in conflict with the Constitution: those providing for a proposal by the Minister of Justice regarding the reappointment of judges after their five-year term of office has expired; those providing for a proposal by the Minister of Justice regarding the appointment of judges to the Court of Honour of Judges; those under which disciplinary action against the chairperson of a local or district court or the Court of Appeal, their deputies, division chairpersons and other judges may be instituted by the Minister of Justice on the proposal of the Director of the Department of Courts or on his own initiative; and those under which the judge against whom disciplinary action has been instituted may be removed from office on the proposal of the Minister of Justice until the outcome of the case becomes clear (33).

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-1-004

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

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
3.13 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Government, resolution / File, internal affairs.

Headnotes:

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

Summary:

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

Regulations that the procedures for compiling and making use of an operative record file had to be established by the Minister of Internal Affairs.

It must be stressed that the Law, which was adopted on 22 May 1997, did not abolish the Regulations. However, Sub-item 4.7 of the Regulations was amended by the 31 March 2000 Government resolution and it was provided for therein that the procedure for compilation and making use of an operative record file shall be established by the Government.

Article 69.4 of the Law on the Constitutional Court provides that the annulment of a disputable legal act shall be grounds to adopt a decision to dismiss the initiated legal proceedings. The Constitutional Court emphasised that the wording "shall be grounds to adopt a decision to dismiss the initiated legal proceedings" is to be construed as establishing the right of the Constitutional Court to dismiss the initiated legal proceedings while taking account of the circumstances of the case under investigation, but not as establishing that in every case when the disputed legal act is annulled the initiated legal proceedings are to be dismissed (16).

The Constitutional Court noted that after the Higher Administrative Court has appealed with the petition requesting to investigate whether Sub-item 4.7 of the Regulations is in compliance with the Constitution and the Law (even though the said sub-item has been amended), and unless the Constitutional Court decides the question in essence, the doubts of the court regarding the constitutionality of the legal act will not be removed. Unless the doubts regarding the constitutionality of the applicable legal act are removed and upon application of the legal act wherein this question has not been decided in the decision of the case, the constitutional rights and freedoms of the individual might be violated. So the Constitutional Court decided to investigate such a case in essence.

It also must be emphasised that Government Resolution no. 731-19 of 30 September 1993 was marked "top secret". The Constitutional Court noted that, under Article 105 of the Constitution, in case there is a petition grounded by legal motives by the subjects pointed out in Article 106 of the Constitution, the Constitutional Court enjoys the powers and has to consider and adopt decisions concerning the conformity of any laws and legal acts adopted by the Seimas with the Constitution, and regarding the conformity of any legal acts of the President of the Republic and any legal acts of the Government with the Constitution and the laws irrespective of the fact whether the legal act is (should be) marked "top secret", "secret", "confidential" or marked in any other way (40-42).

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

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

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 08.05.2000 / **e)** 12/99, 27/99, 29/99, 1/2000, 2/2000 / **f)** On undercover operations involving the simulation of a criminal act / **g)** *Valstybės Žinios* (Official Gazette), 39-1105, 12.05.2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
3.9 **General Principles** – Rule of law.
4.4.4.1.1 **Institutions** – Head of State – Liability or responsibility – Legal liability – Immunities.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Police, undercover operation / Agent provocateur.

Headnotes:

The Preamble to the Constitution, which states that the Lithuanian nation strives for an open, just and harmonious civil society and a state governed by the rule of law, pre-supposes that every individual and society as a whole must be safe from unlawful infringements. One of the duties of the state and one of its priority tasks is to ensure such safety. Therefore the state is compelled to implement various specific lawful means permitting the curbing of crime.

One of such lawful means is to undertake undercover police operations involving the simulation of a criminal act. This means undertaking authorised acts exhibiting criminal characteristics aimed at protecting the key interests of the state, the public or an individual. This method is a special form of operational activities. The undercover participants in such activities perform actions which formally correspond to the definitions of particular crimes. Using this method allows for more favourable conditions to be created for the detection or investigation of serious or complex crimes. Certain crimes, e.g. cases of corruption, would be extremely difficult to detect without using such methods.

Summary:

The petitioners – the Vilnius Regional Court and the Vilnius City Court of the First District – questioned whether undercover police operations involving the simulation of a criminal act could be carried out at all. The petitioners maintain that the Law on Operational Activities does not define the contents, intensity, mechanism of accomplishing such actions, as well as other issues: all this is left for the person and officers conducting the activities. Therefore, the disputed provisions of the law do not protect the person who is the object of such activities from provocation and active inducement. Furthermore, the petitioners were of the opinion that such methods might only be used with prior authorisation by a court or a judge, but not by the Prosecutor General or the Deputy Prosecutor General designated by him.

The group of Parliament *(Seimas)* members that also petitioned the Court argued that under the meaning of Article 11 of the law undercover police operations involving the simulation of a criminal act may be used against any person. The law therefore restricts the guarantees of personal immunity conferred on certain categories of persons. Under the law, such operations may be used against the President of the Republic as well as parliament members, whereas the provisions of the Constitution regarding immunity of these persons guarantee their protection against possible (unlawful) provocation. In the opinion of the petitioner, Article 11 of the law unreasonably narrows the immunity of the President of the Republic and of parliament members.

The Constitutional Court emphasised that such activities may only be carried out with the aim of "connecting oneself" to permanent or continuing crimes. Such criminal deeds continue without the efforts of participants in undercover police operations. The undercover participants only imitate the actions of preparation of a crime or those of a crime which is being committed. It is not permitted for undercover police operations to incite or provoke the commission of a new crime nor to incite the commission of a criminal deed which was merely prepared and only later terminated by an individual. Thus, under the law the actions performed by police in undercover operations are held to be lawful where the established limits of such actions are not overstepped. Disregard of these limits established in the law, provocation of the commission of a crime or any other abuse by means of such operations makes them unlawful. Thus the Court ruled that this type of action may be used.

The Constitutional Court also noted that according to the case-law practice of the European Court of Human Rights, in themselves secret methods of detection of crimes and offenders do not violate Article 8 ECHR (43). It emphasised that in its Judgment in the case of Klass and others vs. Germany of 6 September 1978, the European Court of Human Rights considered that the use of secret means is not incompatible with Article 8 ECHR, since it is the fact of not informing the individual that ensures the efficacy of this measure.

The Constitutional Court also noted that immunity of the President of the Republic is very broad while he or she is in office. Thus, the Constitutional Court concluded that no forms of police operations, including undercover operations involving the simulation of a criminal act, may be used against the President of the Republic. The provisions of the Constitution do not, however, prohibit the enactment of legal regulations providing for undercover and similar police operations to be used against other persons including members of the parliament.

Languages:

Lithuanian, English (translation by the Court).

Norway
Supreme Court

Important decisions

Identification: NOR-2000-3-003

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 16.11.2000 / **e)** lnr 49B/2000 / **f)** / **g)** *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.4 **General Principles** – Separation of powers.
4.5.2 **Institutions** – Legislative bodies – Powers.

Keywords of the alphabetical index:

Damages, reduction due to contributory negligence / European Economic Area, directive / Insurance, coverage.

Headnotes:

In a case concerning a conflict between provisions of the Motor Vehicle Liability Act and three European Economic Area (EEA) directives, a majority of the Supreme Court (10 justices) found that the statutory provision could not be disregarded. The minority of the Court (5 justices) found that the EEA directives should be given precedence.

Summary:

In 1995, A, who was 17 years and 10 months old, was seriously injured when the car in which she was a passenger left the road. The driver of the car was under the influence of alcohol, and had an alcohol concentration in his blood of 0.012 per litre. A's blood-alcohol level was slightly higher. Section 7.3.b of the Motor Vehicles Liability Act provides:

> "Damages cannot be awarded, unless special grounds prevail, if the victim voluntarily drove or allowed himself to be driven in the vehicle that was the cause of the injury in the knowledge or presumed knowledge that the driver was under the influence of alcohol or other intoxicating or anaesthetising substance (see the Road Traffic Act Section 22.1). This provision shall not apply to the extent that it must be assumed that the injury would have been inflicted even if the driver of the vehicle had not been under the influence as mentioned."

In the district court it was found that A knew the driver was under the influence of alcohol. However, the district court referred to the provision concerning "special grounds" in Section 7.3 of the Motor Vehicle Act and awarded damages with a 50% reduction due to contributory negligence. On appeal, the Court of Appeal awarded damages with a 30% reduction for contributory negligence. The car insurance company appealed to the Supreme Court against the decision of the Court of Appeal. The Supreme Court determined the case in plenary session.

Like the courts of lower instance, the Supreme Court found unanimously that A was fully aware that the driver of the car had been under the influence of alcohol.

Three EEA directives were crucial to the case. Council Directive 72/166/EEC of 24 April 1972, Council Directive 84/5/EEC of 30 December 1983, and Council Directive 90/232/EEC of 14 May 1990 imposed a duty to provide insurance coverage for the victims of road traffic accidents and limited the power to exclude certain groups of victims. At the request of the Supreme Court, the Court of the European Free Trade Area (EFTA) delivered an advisory opinion to the effect that a scheme similar to the one in section 7 of the Motor Vehicle Liability Act, whereby the right to damages was forfeited, was incompatible with EEA law. In passing judgment, all of the Supreme Court concurred with the opinion of the EFTA court.

In 1992, the three EEA directives were purportedly implemented into Norwegian law through certain amendments to the Motor Vehicle Liability Act. The Ministry of Justice assumed at the time that Section 7.3.b was not contrary to the directives and made no proposal for its amendment. The primary issue before the Supreme Court was what signifi-

cance to attach to the directives when interpreting the provisions of the Motor Vehicle Liability Act.

A majority of the Supreme Court (10 justices) pointed out that Norwegian law subscribes to a principle whereby there is a presumption that a statute shall, as far as possible, be interpreted compatibly with Norway's obligations pursuant to international law and, thus, EEA directives. However, in this particular case the domestic rule of law in question was unambiguous. It would go beyond what could reasonably be termed an interpretation of the rule to disregard it, and to do so would almost be tantamount to giving the non-implemented directives direct application in Norwegian law with precedence over formal law. It would also be problematic for private individuals if they could not rely on the domestic law in force. Although there were strong indications that Section 7.3.b of the Motor Vehicles Liability Act would have been repealed if the scope of the directives had been evident in 1992, it was the task of the legislature and not the courts to correct the errors that were later revealed.

A minority of the Supreme Court (5 justices) were of the opinion that in this particular case the error that had been made in connection with the implementation of the three directives could be corrected by the courts. The presumption of compatibility with international law prevents Norway from committing this kind of breach of international law. The presumption is particularly strong within the area of EEA law, one of the major objectives of which is common interpretation and application of rules of law. Respect for the wishes of the legislature did not weigh against disregarding the domestic law; the Norwegian parliament had intended to implement the directives, and it was highly likely that the rule would have been amended if the parliament had been provided with the correct information. Considerations of predictability could not be conclusive.

Accordingly, the insurance company was found not to be liable for damages in this case.

Languages:

Norwegian.

Identification: NOR-2001-1-001

a) Norway / **b)** Appeals Selection Committee of the Supreme Court / **c)** / **d)** 19.01.2001 / **e)** 2000/1219 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2001, 85 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Surtax, administrative.

Headnotes:

Administrative imposition of surtax is no obstacle to subsequent criminal proceedings.

Summary:

Despite statements made by the Supreme Court in a plenary decision of 23 June 2000, the Court of Appeal dismissed a criminal prosecution against two private individuals charged with breach of tax legislation on the grounds that it would be contrary to Article 4.1 Protocol 7 ECHR – the *non bis in idem* principle – to convict them of a criminal offence after the tax authorities had already imposed an administrative surtax on them.

The prosecution appealed to the Appeals Selection Committee of the Supreme Court, which found that the Court of Appeal had erred in its application of law. The Appeals Selection Committee referred to the wording and purpose of Article 4.1 Protocol 7 ECHR. It also referred to the intention behind the two-track penalty system upon which Norwegian law is based, and which assumes that both criminal penalties and administrative surtaxes can be imposed for the same count of tax evasion. It also alluded to statements of the Supreme Court in its plenary decision of 23 June 2000. Further, it referred to a decision of the Swedish Supreme Court of 29 November 2000 which concerned the same issue as in the present case, where the Swedish Supreme Court concluded that the administrative imposition of surtax was no

obstacle to subsequent criminal proceedings. Reference was also made to the decision of the European Court of Human Rights in *R.T. v. Switzerland* (appl. no. 31982/96) wherein R.T.'s complaint was found to be "manifestly ill-founded".

The Appeals Selection Committee concluded that criminal proceedings could be pursued in the Court of Appeal.

Languages:

Norwegian.

Identification: NOR-2001-1-002

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.03.2001 / **e)** 2000/793 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
4.6.11.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Criminal record, access / Remedy, effective / Compensation, requirement.

Headnotes:

The unauthorised gathering of information from the Register of Criminal Records constituted a breach of Article 8 ECHR. The establishment of the fact of breach was sufficient to satisfy the right to an effective remedy in Article 13 ECHR. There was no requirement in Article 13 ECHR for the court had to make an award of compensation.

Summary:

In 1997, A. applied for the post of head of the execution and enforcement department of a District Court. After an interview with A., the chief judge suspected that A. had a criminal record. He asked A. whether this was the case, but A. refused to answer. The chief judge then contacted the Court Department of the Ministry of Justice. He spoke with a civil servant who was under the impression that the Ministry had the necessary authority to obtain information from the Register of Criminal Records. The civil servant then contacted KRIPOS, the National Criminal Investigation Service, and was given information over the telephone of the details registered against A's name. She passed the information on to the chief judge over the telephone, who in turn passed the information on to the appointments committee. A. was not given the job.

In the summer of 1997, A. took the matter up with the Ministry of Justice. In its reply, the Ministry acknowledged that it did not have the requisite authority to obtain information from the Register of Criminal Records, and apologised for what had happened. In the autumn of 1998, A. filed a civil suit against the chief judge and the Ministry of Justice on behalf of the State, claiming damages for economic and non-economic loss. In a decision of 15 March 2000, the Court of Appeal found in favour of the chief judge and the State. The chief judge died just seven days later. A. appealed against the decision of the Court of Appeal, directing the appeal against both the State and the chief judge's estate. The Appeals Selection Committee granted leave to appeal only in so far as the appeal was directed against the State, and only in respect of the claim for damages for non-economic loss. In the Supreme Court, the claim for damages for non-economic loss was based on Sections 3.5 and 3.6 of the Damages Act and Articles 8 and 13 ECHR. In the Supreme Court, the State argued that the authority that the civil servant at the Ministry of Justice believed she had to obtain information from the Register of Criminal Records was not tenable, but that the Ministry had an alternative tenable authority.

The Supreme Court found that the Register of Criminal Records contains sensitive information and that the gathering and transmission of information from the Register must be deemed to be an interference in the right to respect for private life protected by Article 8 ECHR. Reference was made to the decision of the European Court of Human Rights 26 March 1987 in *Leander v. Sweden* (Series A,

no. 116, *Special Bulletin ECHR* [ECH-1987-S-002]) paragraph 48. The pertinent issue was therefore whether the interference was justified in accordance with Article 8.2 ECHR.

The Supreme Court found that the Ministry did not have the necessary authority to obtain information from the Register of Criminal Records, and that the Ministry's action therefore constituted a breach of Article 8 ECHR. However, the Court was of the opinion that the transmission of the information did not constitute an unlawful defamation, since the purpose of the action was to provide the appointments committee with the best possible basis upon which to determine whether A. was a suitable candidate for the post, and the Ministry had proceeded as cautiously and carefully as possible. On these grounds, the Court found that the State was not liable to pay damages for non-economic loss pursuant to Section 3.6 of the Damages Act. Nor was it proven on a balance of probabilities that there was causation between the Ministry's unauthorised action and damage to A's person, and the Court therefore also found in favour of the State in the claim for non-economic loss pursuant to Section 3.5 of the Damages Act. In view of the Court's finding, it was unnecessary to consider the scope of the State's enterprise liability pursuant to these provisions.

With regard to the claim for compensation pursuant to Article 13 ECHR, the Supreme Court found that in order to satisfy A's right to an effective remedy, it was sufficient that the Supreme Court had made a finding that there had been a breach of the Convention. There was therefore no cause to award damages pursuant to this article.

Although the appeal was unsuccessful, the Supreme Court awarded A. costs for that part of the case concerning the Ministry's authority to obtain information from the Register of Criminal Records, and whether as a consequence of this had been a breach of the European Convention on Human Rights. The Court found that this was necessary in order to give A. an effective remedy in respect of the question of whether there had been a breach of the Convention.

Cross-references:

- *Leander v. Sweden*, 26.03.1987, *Special Bulletin ECHR* [ECH-1987-S-002].

Languages:

Norwegian.

Identification: NOR-2001-1-003

a) Norway / **b)** Supreme Court / **c)** / **d)** 28.03.2001 / **e)** 2001/83 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Public hearings.

Keywords of the alphabetical index:

Prosecution, unjustified / Criminal procedure, hearing.

Headnotes:

A person who claims damages for unjustified prosecution is entitled to an oral hearing pursuant to Article 6 ECHR.

Summary:

A. was arrested on 5 September 1997, suspected of being in possession of alcoholic drinks in breach of Section 10.1.2 of the Alcohol Act. The Court of Examination and Summary Jurisdiction ordered his release from custody. The prosecution appealed to the Court of Appeal, and a stay of execution was ordered. On 10 September 1997, he was again remanded in custody by the Court of Appeal, initially subject to a prohibition against receiving mail and visitors. The prosecution agreed to his release on 2 October 1997. In May 1999, the prosecution dropped the case due to lack of evidence.

A. then brought a claim for damages for economic and non-economic loss on the grounds of unjustified prosecution. After having considered the written proceedings, the Court of Examination and Summary Jurisdiction found in favour of the State. A. appealed, and the Court of Appeal quashed the decision of the lower court on the grounds that A's counsel had not had sufficient opportunity to prepare the case before the court had reached its decision. At the rehearing in the Court of Examination and Summary Jurisdiction, A. requested oral proceedings. Section 449.3 of the Criminal Procedure Act provides that the court may decide to conduct oral proceedings concerning such claims, and A's request was initially granted but later turned down by a court order. Thereafter, A. limited his claim to a claim for compensation pursuant to Section 444 of the Criminal Procedure Act. The Court of Examination and Summary Jurisdiction again found in favour of the State. A. appealed to the Court of Appeal and claimed that the order of the Court of Examination and Summary Jurisdiction should be quashed on the grounds of a procedural error, and that the case referred back to the lower court. Alternatively, A. claimed that the Court of Appeal should pronounce a declaratory judgment for damages. The Court of Appeal dismissed the appeal. In dealing with the alternative claim, the Court of Appeal stated that, like the Court of Examination and Summary Jurisdiction, it considered it unnecessary to conduct oral proceedings. A. appealed against the finding of the Court of Appeal to the Appeals Selection Committee of the Supreme Court.

The jurisdiction of the Appeals Selection Committee was limited to trying the Court of Appeal's interpretation of the law and procedure. A's appeal concerned the Court of Appeal's interpretation of the law. A. asserted that the Court of Appeal had erred in its interpretation of Section 449.3 of the Criminal Procedure Act, Section 3 of the Human Rights Act, and Article 6.1 ECHR. Section 449 was subordinate to the minimum requirements contained in Article 6.1 ECHR. The primary rule in Norwegian law whereby written proceedings shall be the norm, is contrary to Article 6.1 ECHR, which entitles a person who brings a claim for damages of the kind in question here, to oral proceedings.

The Appeals Selection Committee found that the Court of Appeal had correctly assumed that the right to a fair trial was fundamental in cases concerning damages for unjustified prosecution. In considering whether oral proceedings should be held in connection with a claim pursuant to Section 449.3 of the Criminal Procedure Act, the objective was to ensure that the case was dealt with fairly and properly. This had been expressed in various ways in the preparatory stages of the Act and in connection with other law reforms. The Appeals Selection Committee stressed that, in recent years, greater emphasis had been placed on the importance of oral proceedings in connection with such claims. Nevertheless, the Committee conceded that the Criminal Procedure Act had not as yet been interpreted such that it entitles a person who makes such a claim to oral proceedings in connection with the claim.

In the view of the Appeals Selection Committee, however, Article 6 ECHR and the practice of the European Court of Human Rights entitled the claimant to oral proceedings. The Committee pointed out that, in Norwegian law, a claim for damages for unjustified prosecution is by nature a civil claim, notwithstanding that it is dealt with in accordance with the rules of criminal procedure. The Committee found that such a claim must be deemed to be a "civil right" within the meaning of the Convention. The European Court of Human Rights had arrived at the same conclusion for similar claims in its judgment of 21 March 2000 in *Asan Rushiti v. Austria* (paragraphs 22 and 23) with references to earlier decisions.

Pursuant to the first sentence of Article 6.1 ECHR, a person who makes such a claim is entitled to a "public hearing". The Appeals Selection Committee found that the Convention's requirement of a public hearing entails that the hearing must be held in open court with oral proceedings, except in cases covered by the rule of exception in Article 6.1 ECHR, second sentence.

The Appeals Selection Committee referred to several decisions of the European Court of Human Rights where the Court had found that there had been a breach of the right to a public hearing, including *Rushiti*, which also referred to the judgment of 24 November 1997 in *Werner v. Austria*.

The Committee underlined that the right to oral proceedings was particularly important in cases such as this where charges were dropped in the course of the investigation, so that there were not even oral proceedings in the criminal case, and additionally where oral proceedings had been requested.

The Committee remarked that the European Convention of Human Rights is directly applicable as a matter of Norwegian law pursuant to Section 2 Human Rights Act no. 30 of 21 May 1999. In the event of conflict, the Convention shall be given precedence over other legislation, (Section 3 of the Act). The right to oral proceedings can therefore be founded directly upon the Convention. However, the Committee pointed out that the rule whereby the provisions of the Criminal Procedure Act shall apply

subject to such limitations as are recognised in international law or which derive from any agreement made with a foreign State, was introduced by statutory amendment to the former Criminal Procedure Act as early as 13 April 1962 and is now embodied in Section 4 of the current Act. Thus, even though Section 449.3 of the Criminal Procedure Act is phrased as a dispensable rule (the court "may" decide to conduct oral proceedings), it must be interpreted such that the court is obliged to conduct oral proceedings, since the applicant is entitled to oral proceedings pursuant to Article 6.1 ECHR.

The interlocutory orders of both the Court of Appeal and the Court of Examination and Summary Jurisdiction were quashed on the grounds that the respective courts had erred in their application of the law.

Languages:

Norwegian.

Poland
Constitutional Tribunal

All the decisions are published on the Tribunal's website (www.trybunal.gov.pl).

Important decisions

Identification: POL-1995-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.01.1995 / **e)** W 14/94 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 1995, no. 14, item 67; *The Collection of the Tribunal's Decisions*, 1995, part I, item 19 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Remuneration, delayed, interest.

Headnotes:

All claims of policemen and officers of the State Security Office and of the Border Guards for default interest due in connection with a delayed payment of remuneration should be decided by courts of general jurisdiction.

Summary:

The ombudsman requested a universally binding interpretation of provisions of statutes which entitle policemen and officers of the State Security Office and of the State Border Guards to receive a regular salary payable in advance. Up until the time of the case at issue, all claims of this group of officers for default interest relating to delays in the payment of their wages have been decided by means of an administrative

procedure and the actions against the decisions of the Chief Administrative Court had been dismissed. The Supreme Court had also been in favour of the concept that in administrative relations the interest may be paid only if this was expressly provided by the law.

The Constitutional Tribunal approved an idea presented in the motion submitted by the Ombudsman. It was confirmed in the decision that a delay in payment of remuneration constituted a civil action. Therefore, a complaint filed with the administrative court does not provide an interested party with a desirable protection of its rights (the Chief Administrative Court is a court of cassation and is not empowered to decide civil cases). Taking into account the constitutional right of access to court, the Tribunal stated that all claims for interest due in connection with a delayed payment of remuneration should be decided by courts of general jurisdiction.

Cross-references:

- Decision of Constitutional Tribunal of 07.01.1992 (K 8/91);
- Decision of Constitutional Tribunal of 25.02.1992 (K 3/91);
- Resolution of Supreme Court of 12.09.1984 (I PR 93/84);
- Resolution of Supreme Court of 05.12.1991 (I PZP 60/91);
- Resolution of Supreme Court of 18.12.1992 (III AZP 27/92).

Languages:

Polish.

Identification: POL-2000-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.01.2000 / **e)** P 11/98 / **f)** / **g)** *Dziennik Ustaw Rseczyposplitej Polskiej* (Official Gazette), 2000, no. 3, item 46; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Municipality, rent control / Lease, termination / Rent, control by municipality.

Headnotes:

Provisions introducing a controlled rent, determined by the local municipality, for leases of flats or houses owned by natural persons is discordant with a constitutional right to property and the rule of democracy. Whilst drafting the limitations introduced in such provisions, terms introduced by the Constitution were breached.

Summary:

The case was examined by the Tribunal as a result of a legal query introduced by the Supreme Court. In the Tribunal's opinion, there was a conflict of two interests – rights of the owner and of the lessee, where both are protected on the constitutional level (although not equally). The Tribunal did not deny the need for the protection of lessees and the introduction of provisions limiting the freedom of the owner in determining the amount of the rent. The Tribunal emphasised, however, that each particular provision which interferes with the right to property must be appraised with reference to all existing limitations on that right. Provisions in force significantly limit the right to use and dispose of premises by the owner. In particular, the right to terminate a lease relationship is possible only in situations where the lessee has clearly breached his duties. As a result of the foregoing, the provisions providing for the possibility of determination of the rent by local municipalities, and fixing the rates below the costs of maintaining the building, constitutes an excessive interference in property rights. Fixing rents at a figure which fell short of the amount needed to cover the owner's expenses of maintaining the building (and lack of any compensation for this loss) would result in a disproportionate burden on the owner, in order to ensure the lessee's protection and would be discordant with the rule of proportionality.

The Tribunal also emphasised that the Constitution provides for conditions of admissibility of any limitations of rights and liberties of individuals. These limitations may be introduced only in the form of a Law. It is not possible to adopt norms which would give executive and local authorities total freedom to

decide upon the final condition of such limitations and in particular, to decide upon the scope of the limitations. The provisions examined in this case introduced only a maximal amount of the controlled rent, giving the local municipalities freedom to fix the actual rents. Such a solution, in the Tribunal's opinion, gave rise to great doubts as to whether the constitutional requirement of enacting the limitation of rights and liberties only by a way of a Law is met.

Supplementary information:

One judge delivered a dissenting opinion (Biruta Lewaszkiewicz-Petrykowska).

Cross-references:

- Decision of 26.04.1995 (K 11/94);
- Decision of 02.06.1999 (K 34/98), *Bulletin* 1999/2 [POL-1999-2-019];
- Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002];
- First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Resolution of Supreme Court of 27.02.1996 (III CZP 190/95);
- Resolution of Supreme Court of 01.12.1998 (III CZP 47/98);
- Decision of Highest Administrative Court of 11.12.1997 (II SA/Gd 1703-1708/96);
- Resolution of Highest Administrative Court of 20.04.1998 (FPS 4/98);
- Resolution of Highest Administrative Court of 23.09.1997 (I S.A./Ka 391/96);
- *Spadea and Scalabrino v. Italy,* 28.09.1994;
- *Sporrong and Lönnroth v. Sweden,* 23.09.1982, *Special Bulletin ECHR* [ECH-1982-S-002];
- *Scollo v. Italy,* 28.09.1995, *Bulletin* 1995/3 [ECH-1995-3-018];
- *Velosa Baretto v. Portugal,* 21.11.1995, *Bulletin* 1995/3 [ECH-1995-3-020];
- *Mellacher and others v. Austria,* 23.11.1989.

Languages:

Polish.

Identification: POL-2000-2-012

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.04.2000 / **e)** SK 28/99 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2000, no. 30, item 380; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 3, item 88 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Customs, property, confiscation.

Headnotes:

Provisions of the Customs Law are discordant with the Constitution in that they provide for a right on the part of customs authorities to decide on the confiscation of property, even though a new Customs Code has now come into force.

Summary:

The case was examined before the Tribunal as a result of a constitutional claim brought by an individual. It concerned the possibility of customs authorities making the decision to confiscate property.

The examined provisions grant to the customs authorities a right to decide on the confiscation of property by a way of administrative decision issued on the grounds of the Administrative Procedure Code. The provisions introduce an exception to the rule of the exclusivity of the courts as having sole jurisdiction on deciding on the confiscation of property, and this exception was deemed to be discordant with the Constitution.

The Tribunal mentioned that the Constitution provides that confiscation of property can be performed only in situations described by law and on the grounds of a legally valid judgment of a court. The Constitution does not provide for any exception to this rule and does not provide for any possibility of introducing such an exception into law.

In the Tribunal's opinion, the purpose of such a resolution was to ensure that any interference by public authorities in the freedoms and property of citizens was carried out in a manner consistent with the law. The reason for courts deciding on such matters was to ensure a just and comprehensive examination of the case and to prevent unlawful decisions, as well as to protect people from illegal and excessive interference.

Cross-references:

- Decision of 06.10.1998 (K 36/97), *Bulletin* 1998/3 [POL-1998-3-017].

Languages:

Polish.

Identification: POL-2000-C-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.07.2000 / **e)** SK 12/99 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2000, no. 55, item 665; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 5, item 143 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Civil case / Administrative decision.

Headnotes:

Certain provisions of the Civil Procedure Code were discordant with the right to court guaranteed in the Constitution. The provisions at issue stated that the Code "relates to court proceedings concerning civil law, family law, employment and social security law matters, as well as other cases where provisions of the Code are applied on the grounds of secondary legislation (civil cases)", with the concept of "civil cases" being defined in such a way so as to exclude claims concerning financial obligations based on an administrative decision.

Summary:

The case was examined by the Tribunal as a result of constitutional claim.

The Tribunal remarked that the Constitution provides that the right to court covers "cases" concerning individuals and other subjects of law. Neither the constitutional legislator nor the jurisdiction has defined the concept of "the case". This concept has different meanings in particular branches of law. The Tribunal stated that it was not enough, however, to refer to them in order explain the concept of "the case" from the constitutional law point of view.

In the Tribunal's opinion the concept of "the case" should without doubt refer to legal disputes between natural and legal persons. It covers disputes arising from civil-legal relationships, administrative-legal relationships and judgments on criminal claims. In general, it refers to "judgments on the rights of a subject".

The Tribunal agreed with the position of the Supreme Court and other legal doctrine, which argue that a court action is always admissible when a plaintiff derives his claim from legal actions which may constitute a source of civil legal relationships. It is however, necessary to emphasise that the concept of the "civil case" covers claims relating to financial obligations, which are based on administrative acts, in particular claims for interest due and late payment considerations.

The Tribunal stated that the foregoing was confirmed by two kinds of argument. Firstly, administrative acts are treated as relating to legal actions, which cause the creation, change or termination of a civil legal relationship. The automatic exclusion of the possibility of the creation of a civil legal relationship between subjects connected in an administrative legal relationship should be treated as incorrect. Secondly, constitutional law arguments agreed with the above-mentioned understanding of the concept of "the case". If the possibility of vindication of the foregoing claims before common courts were excluded, the person entitled to a consideration would have no possibility of having his rights enforced. This, according to the Tribunal, derived from the fact that a model of administrative justice adopted in Poland does not provide for the possibility of examination by

the Highest Administrative Court of results of non-performance or improper performance of lawful and correct administrative decisions.

In the Tribunal's opinion, an automatic conclusion that in cases where an administrative decision is a source of creation of a legal relationship, such a relationship cannot be of a civil nature and consequently court actions are inadmissible in this respect, should be treated as discordant with the Constitution. Such a conclusion had no legal justification and would lead to a denial of juridical protection, which would be a clear breach of the Constitution.

Cross-references:

- Decision of 10.05.2000 (K 21/99), *Bulletin* 2000/2 [POL-2000-2-013];
- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-018];
- *Bruell Gomez de la Torre v. Spain*, 19.12.1997, no. 26737/95, Reports 1997-VIII.

Languages:

Polish.

Identification: POL-2000-C-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.12.2000 / **e)** SK 10/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 8, item 300 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.

Keywords of the alphabetical index:

Constitutional appeal / Admissibility, conditions / Lustration.

Headnotes:

The Tribunal decides to discontinue proceedings relating to a constitutional claim concerning concordance with the Constitution of provisions of an Act on disclosure by persons holding public office of their work or services in public security institutions or their co-operation with such institutions in the years 1944-1990.

Summary:

The case was examined by the Tribunal as a result of constitutional claim.

The Act on disclosure by public servants of their work or services in public security institutions or their co-operation with such institutions in the years 1944-1990 obliges persons applying to certain public posts to file a declaration concerning their work or services in public security organisations or their co-operation with such organisations in the above-mentioned years. The Act obliges the organisations accepting such declarations to publish their content immediately in an edition of the *Monitor Polski (*a legal journal) or in an electoral notice (depending on who filed the declaration).

The Tribunal remarked that the constitutional claim could concern a normative act, on the basis of which a court or a public administrative body issued a final decision on freedoms, rights or obligations of a complainant described in the Constitution. It noted that it should be mentioned that the constitutional notion of a "decision" on freedom rights or obligations covers decisions which impose, change, abolish, grant or annul powers. Factual activities of public authorities do not constitute such decisions, since they do not have a nature of legal acts even if they enter into a sphere of rights and obligations of an individual.

In the Tribunal's opinion, acts of the public bodies connected with the publication of the above-mentioned declarations do not form a legal situation in relation to an individual and therefore cannot constitute the decision in its constitutional meaning. The foregoing acts are of an accessory nature, which cannot be referred to administrative jurisdiction.

The Tribunal noticed that the Constitution suggests the possibility that the filing of the constitutional claim is limited to cases in which enforcement of the law or of another normative act leads to the adoption of individual legal acts, which apply legal provisions to individual situations. In the Tribunal's opinion, the Act on disclosure by public servants of their work or services in public security institutions or their co-operation with such institutions in the years 1944-1990 does not provide for the possibility of issuing decisions on rights, freedoms or obligations of individuals in the case of publication of information

confirming their work or services in public security institutions. The obligation to publish the declarations comes into existence by virtue of the law and its execution is not connected with issuing a decision concerning the legal situation of a person filing the declaration. As a result of the foregoing, the constitutional conditions required for admissibility of the constitutional claim were deemed not to have been met.

Cross-references:

- Decision of 05.12.1997 (Ts 14/97);
- Decision of 19.04.1999 (U 3/98);
- Decision of 10.05.2000 (K 21/99), *Bulletin* 2000/2 [POL-2000-2-013];
- Resolution of Supreme Court of 28.09.2000 (III ZP 21/2000).

Supplementary information:

Five dissenting opinions have been filed against the decision (judge Zdzisław Czeszejko-Sochacki, judge Lech Garlicki, judge Stefan J. Jaworski, judge Andrzej Mączynski, judge Janusz Trzcinski).

Languages:

Polish.

Portugal
Constitutional Court

Important decisions

Identification: POR-1990-C-001

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.05.1990 / **e)** 163/90 / **f)** / **g)** *Acórdãos do Tribunal Constitucional* (Official Digest), Vol. 16, 301-315 / **h)**.

Keywords of the systematic thesaurus:

1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.
2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Community law, interpretation / Preliminary question, conditions / Preliminary question, purpose.

Headnotes:

Preliminary rulings, provided for in Article 177 EC, serve to ensure the primacy of the Community legal system. Allowing national courts to interpret Community law independently would eventually undermine the unity of Community law, substituting for the “common rule” a whole series of rules distorted by national court practices. The purpose of preliminary rulings is to ensure that Community law is interpreted in the same way in all the member states.

Parties may raise the question of seeking a preliminary ruling in national courts, but only the latter may trigger the intervention of the Court of Justice of the European Communities, since the preliminary rulings procedure takes the form of dialogue between

the national and European courts. There are, in other words, no parties in preliminary rulings proceedings.

Applications for a preliminary ruling are admissible only when interpretation of a provision of Community law is deemed relevant, i.e. when the case in question must be decided in accordance with that rule, and the national court needs an opinion from the Court of Justice of the European Communities to decide it.

Summary:

In this case, concerning concrete review of constitutionality, the applicants wished to know whether Article 168a EC implied that Portuguese law must recognise the right of appeal to a higher court "for the protection of fundamental rights, and concerning points of law". The Constitutional Court ruled, first, that the "interpretation" of a Community law was not even at issue.

The fundamental question requiring a decision in the appeal challenging the constitutionality of Article 678.1 of the Civil Code was whether the rule laid down in this article, in accordance with which ordinary appeals were admissible only in cases where the amount in dispute took the case outside the jurisdiction of the court giving the impugned decision, was unconstitutional. However, any ruling by the Court of Justice of the European Communities as to whether Article 168a EC obliged member states – for the protection of fundamental rights and concerning points of law only – to make the right of appeal to a higher court a principle in domestic law would have no bearing on this question, since the dispute requiring a decision as to whether or not a right of appeal existed was concerned, not with fundamental rights, but with the meaning and scope of a negotiation clause.

Supplementary information:

This judgment was the first in which the Portuguese Constitutional Court acknowledged that it was also required to seek preliminary rulings from the Court of Justice of the European Communities in all cases where the interpretation (or validity) and consequent effectiveness of rules of Community law were at issue. This judgment was adopted unanimously and establishes the Constitutional Court's position on the intervention of the European Court of Justice, at least in connection with concrete review of constitutionality.

Languages:

Portuguese.

Identification: POR-1994-C-001

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 22.11.1994 / **e)** 606/94 / **f)** / **g)** *Acórdãos do Tribunal Constitucional* (Official Digest), Vol. 29, 161-171 / **h)**.

Keywords of the systematic thesaurus:

1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Tax, authority to levy taxes / Preliminary question, Court, jurisdiction / Preliminary question, referral.

Headnotes:

When an appeal argues that a domestic legal rule is incompatible with the Treaty of Rome or an EC Regulation and therefore unlawful, it is clear that a decision given by the Court of Justice of the European Communities in another case – even one in which the facts are similar or indeed identical – does not necessarily prejudge the decision required on the appeal to the Constitutional Court.

Summary:

This case concerns concrete review of the constitutional and legal validity of a domestic legal rule allegedly violating Articles 9, 12 and 95 EC. The appeal on ground of unlawfulness was brought under Article 280.2.a and 280.2.d of the Constitution, and Article 70.1.c and 70.1.f of the Constitutional Court Act.

The applicant submitted that the lawfulness of a rule laid down in the Customs Regulations should be

reviewed, on the ground that it violated Articles 9, 12 and 95 EC. She also applied for suspension of the proceedings before the Constitutional Court, arguing that the only question at issue in her appeal – namely, whether the payment of a percentage required by the said rule was compatible with the Treaty of Rome or EC Regulations – had already been raised as a preliminary question in another case pending before the Lisbon Fiscal Court, which has jurisdiction in customs matters. She argued that the proceedings before the Constitutional Court should be suspended, since that court would have to take account, in its judgment, of any decision given by the Court of Justice of the European Communities on the request for a preliminary ruling.

The Constitutional Court found that there might be grounds for suspending proceedings before it, if the decision pending on another case or an application for a preliminary ruling was necessary to the taking of its own decision – but that such was not the case in this instance. It accordingly rejected the request to stay proceedings.

Languages:

Portuguese.

Identification: POR-1998-C-001

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 03.11.1998 / **e)** 621/98 / **f)** / **g)** *Acórdãos do Tribunal Constitucional* (Official Digest), Vol. 41, 283-291 / **h)**.

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.
2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Community law, interpretation / Preliminary question, referral / Debt, enforcement / Marketing charge, payment / Turnover tax.

Headnotes:

The “double violation of Community laws” alleged by the applicant, resulting from the continued levying of a meat marketing charge in breach of Council Directive no. 17/378/EEC of 17 May 1977 (and which is not provided for in Article 378 of the Act of Accession of Portugal to the Communities), and of Article 8 of the Constitution, does not fall within the Constitutional Court’s jurisdiction.

Since Community law – which has been “extensively and comprehensively” incorporated into Portuguese law, *inter alia* by a clause in the Constitution itself – provides for a special court, with the task of protecting it (not only in terms of inter-governmental or inter-state relations), and ensuring that it is uniformly applied and takes precedence over national law, it would be absurd to entrust the same task to a court of the same or a similar kind (such as the Constitutional Court) at national level.

Summary:

A pig slaughterhouse objected to the enforcement of debts resulting from its failure to pay the marketing charge levied by the Agricultural Markets Control and Guidance Institute (IROMA), on the ground that this charge was unlawful and unconstitutional. One of its arguments in the constitutional proceedings was that Article 33 of the Sixth Directive of the Council of the European Communities of 17 May 1977 (Directive no. 17/378/EEC) prohibited member states from levying turnover tax in addition to value added tax. This Directive became law in Portugal on 1 January 1986. Article 378 of the Act of Accession of Portugal to the Communities to the EEC makes no mention of this measure, and so the levying of turnover tax after that date violates Article 8.3 of the Constitution, under which regulations formally laid down by international organisations of which Portugal is a member apply directly in Portuguese law, to the extent provided for by the relevant constitutive treaties.

There is, however, a special judicial procedure – the preliminary rulings procedure – for conflicts between domestic and Community law, and this is operated by the Court of Justice of the European Communities. The argument that incompatibility of domestic law with Community law is “unconstitutional”, and so

requires a ruling from the Constitutional Court, must therefore be rejected.

Supplementary information:

In its Decision no. 326/98 of 5 May 1998, the Constitutional Court had decided that it had no jurisdiction to rule on the unconstitutionality of this same domestic regulation in *direct relation* to Article 33 of the Sixth Directive of the Council of the European Communities (Directive no. 17/378/EEC). Concerning the claim that incompatibility with Community law constituted a direct violation of Article 8.3 of the Constitution, it upheld its earlier position that it must be asked for a ruling on the constitutional validity of any law alleged to violate a constitutional rule or principle directly (immediately). Indirect violations are not, therefore, included.

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-1995-C-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 15.02.1995 / **e)** II/1995 / **f)** Decision on the meaning of the term "courts of law" when examining an objection challenging constitutionality / **g)** *Monitorul Oficial al României* (Official Gazette), 47/1995 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.10 **Institutions** – Judicial bodies – Financial courts.

Keywords of the alphabetical index:

Preliminary question / Judicial authority, concept.

Headnotes:

The meaning of the term "courts of law" when examining an objection challenging constitutionality derives from the provisions of Article 125.1 of the Constitution, Law no. 92/1992 on the Administration of Justice and Law no. 54/1993 on the organisation of the military courts and prosecutors' offices.

By an interlocutory ruling, the judicial authority before which the objection challenging constitutionality had been made referred the case to the Court, in accordance with Article 23 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court.

The bodies of the Court of Audit are not entitled to submit objections challenging constitutionality to the Constitutional Court.

Constitutional Court decisions which remain final by virtue of failure to enter an appeal are binding and are enforceable on the merits.

The result of this decision shall be applied to future referrals from the Court of Audit to the Constitutional Court.

Summary:

After examining Decisions nos. 90/1994, 91/1994 and 92/1994, delivered on the merits benches composed of three judges of the Constitutional Court, the appeal entered by the Public Prosecutor's Office against Decision no. 90/1994 and the interlocutory ruling of 24 January 1995, the Constitutional Court, meeting in plenary session, held that:

Article 144.c of the Constitution establishes the Constitutional Court's jurisdiction to rule on objections entered before courts of law challenging the constitutionality of laws and orders.

In applying this constitutional provision, Article 23.1 and 23.4 of Law no. 47/1992 define those courts of law that may refer objections challenging constitutionality to the Constitutional Court by means of interlocutory rulings.

At the same time, consideration must be given to the provisions of Article 125.1 of the Constitution, entitled "Courts of Law", whereby "Justice shall be administered by the Supreme Court of Justice and other courts established by law", and of Law no. 92/1992 on the Administration of Justice, Article 10 of which states that the judicial authorities shall be: a. the civil courts of first instance; b. the courts; c. the appeal courts; d. the Supreme Court of Justice; as well as the military courts, the territorial military court and the military appeals court. In accordance with Law no. 54/1993, the Court of Audit is not a judicial authority, because Article 139 of the Constitution is not part of the chapter of the Constitution entitled "Judicial authority" and these bodies do not administer justice.

Further, the Constitutional Court held that Article 144.c of the Constitution rules on the Constitutional Court's jurisdiction to deal with objections challenging the constitutionality of laws and orders, but that according to this article such objections are to be made before the judicial authorities. Likewise, Article 23 of Law no. 47/1992 establishes the manner in which judicial authorities are to refer cases to the Constitutional Court, so that the question of referral to the Court must be resolved before examining the issue of jurisdiction.

In order to ensure that the constitutional and legal provisions are rigorously adhered to, in future, the Constitutional Court's benches must apply the interpretation in this decision when dealing with referrals by the Court of Audit.

Previous decisions delivered following referral by the bodies of the Court of Audit remain final in the absence of appeals against them, are binding, in accordance with Article 145.2 of the Constitution, and are enforceable on the merits.

Supplementary information:

The decision was adopted by a majority vote.

Law no. 47/1992 on the organisation and functioning of the Constitutional Court has since been amended.

Under the provisions of the Law prior to re-issue, Constitutional Court decisions delivered by three judges could be appealed against. The appeal was examined by a bench of five judges. The appeal bench's decision was final and published in the Official Gazette.

In accordance with these legal provisions and under the terms of the pre-1997 Law, Article 26.2, last sentence, of the Rules on the organisation and functioning of the Constitutional Court stated that "The Plenary Assembly's interpretation, delivered by a majority of judges' votes, shall be binding on the Court".

Law no. 47/1992, as amended in 1997, no longer sets out two levels of jurisdiction for ruling on objections challenging constitutionality.

Languages:

Romanian.

Identification: ROM-1995-C-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 23.03.1995 / **e)** 33/1995 / **f)** Decision on an objection challenging the constitutionality of the provisions of Article 229 of the Criminal Code / **g)** *Monitorul Oficial*

al României (Official Gazette), 105/30.05.1995 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.6.1 **Constitutional Justice** – Effects – Scope.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
1.6.8 **Constitutional Justice** – Effects – Consequences for other cases.

Keywords of the alphabetical index:

Judicial authority / Similar cases, solution.

Headnotes:

Under Article 145.2 of the Constitution, Constitutional Court decisions are binding and the judicial authorities have a constitutional duty to implement them when dealing with similar cases.

Summary:

The Petroşani Court asked the Constitutional Court to rule on an objection challenging the constitutionality of Article 229 of the Criminal Code.

In examining the objection challenging constitutionality, the Court noted that it had already delivered a final judgment on the constitutionality of Article 229 of the Criminal Code, and had found that these provisions were partially repealed, in accordance with Article 150.1 of the Constitution.

The grounds and interpretation given in that case remain valid, so that the objection is unfounded and should be rejected.

Languages:

Romanian.

Identification: ROM-1995-C-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 06.12.1995 / **e)** 126/1995 / **f)** Decision on the objection challenging the constitutionality of the provisions of Law no. 5/1973 on the administration of rental income and the regulations governing relations between landlords and tenants, of Council of Ministers Decree no. 860/1973 on introducing implementing measures for Law no. 5/1973 and of Local Public Administration Law no. 69/1991 / **g)** *Monitorul Oficial al României* (Official Gazette), 51/1996 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.10.4 **Constitutional Justice** – Procedure – Interlocutory proceedings – Discontinuance of proceedings.

Keywords of the alphabetical index:

Objection of unconstitutionality, withdrawal.

Headnotes:

Once a case has been referred to it, the Constitutional Court must examine the challenged text.

Summary:

By interlocutory ruling no. 14 of 26.10.1994, the Mediaş Court asked the Constitutional Court to rule on an objection challenging the constitutionality of the provisions of Law no. 5/1973, of Council of Ministers Decree no. 860/1973 and of Law no. 69/1991.

During the proceedings, the parties had withdrawn the objection challenging the constitutionality of Law no. 69/1991. The Court observed that, under Article 26.1 of the Rules on the Court's organisation and functioning, it was obliged to examine the constitutionality of the challenged text once a case had been referred to it, and that the provisions on suspension, termination or lapse of proceedings were not applicable.

Languages:

Romanian.

Identification: ROM-1996-C-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 04.06.1996 / **e)** 73/1996 / **f)** Decision on the objection challenging the constitutionality of the provisions of Article 330, 330.1, 330.2, 330.3 and 330.4 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 255/1996 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.10.4 **Constitutional Justice** – Procedure – Interlocutory proceedings – Discontinuance of proceedings.
3.18 **General Principles** – General interest.

Keywords of the alphabetical index:

Objection of unconstitutionality, public interest.

Headnotes:

Objections challenging constitutionality are a matter of public interest; consequently, parties raising them are not obliged to participate in their settlement by the judicial authority for constitutional disputes.

Summary:

By an interlocutory judgment of 23 November 1995, the Civil Section of the Supreme Court of Justice asked the Constitutional Court to rule on an objection challenging the constitutionality of the provisions of Article 330, 330.1, 330.2, 330.3 and 330.4 of the Code of Criminal Procedure.

During the proceedings, the objecting party withdrew the objection challenging constitutionality. In examining this, the Court held that an objection challenging constitutionality was a matter of public interest. Raising such an objection challenged the conformity of certain legal norms with the Constitution, and the settlement of the objection was a matter of general interest. Consequently, an objection challenging constitutionality does not remain the concern solely of the party having raised it, and cannot be put aside by means of express renunciation of its resolution by the court.

Languages:

Romanian.

Identification: ROM-1998-C-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 26.03.1998 / **e)** 59/1998 / **f)** Decision on the objection challenging the constitutionality of the provisions of Article I, point 111 of Emergency Government Order no. 32/1997, amending and supplementing Law no. 31/1990 on commercial companies / **g)** *Monitorul Oficial al României* (Official Gazette), 183/1998 / **h)**.

Keywords of the systematic thesaurus:

1.2.1.7 **Constitutional Justice** – Types of claim – Claim by a public body – Public Prosecutor or Attorney-General.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
3.18 **General Principles** – General interest.
4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.

Keywords of the alphabetical index:

Emergency order, unconstitutionality / Objection of unconstitutionality, prosecutor, obligation.

Headnotes:

In order to carry out the functions incumbent upon it under the Constitution, the Law on the Administration of Justice and the Code of Criminal Procedure, the Prosecutor's Office is entitled to raise objections challenging constitutionality, since it has the status of a party in the sense of Article 23 of Law no. 47/1992.

Summary:

During proceedings in the case registered as no. 13767/1996 at Bucharest District Court no. 2, the Prosecutor's Office attached to this Court entered an objection challenging the constitutionality of the provisions of Emergency Government Order no. 32/1997, concerning the repeal of Article 208 of Law no. 31/1990.

One of the accused claimed that the Prosecutor's Office was not entitled to raise such an objection because, under Article 23.2 of Law no. 47/1992, as re-issued, the objection had to be entered by the judicial body judging the case, at the request of one of the parties or of its own motion. Under Articles 23 and 24 of the Code of Criminal Procedure, the parties in a criminal case are the accused, the injured party, the civil party and the liable party from a civil law perspective.

In examining this claim, the Court held that the entitlement of the Prosecutor's Office to enter an objection challenging constitutionality arose from that Office's quality and duties as described in the Constitution, the Law on the Administration of Justice and the Code of Criminal Procedure.

Thus, Article 130 of the Constitution establishes that, through its judicial activity, the Public Prosecutor's Office shall represent the general interests of society and defend legal order, as well as citizens' rights and freedoms. Article 27.e of Law no. 92/1992, revised, on the Administration of Justice states that the function of the Public Prosecutor's Office is to participate, as provided for by law, in judicial hearings.

Finally, Article 315.2 of the Code of Criminal Procedure provides for compulsory participation by the prosecutor in all judicial hearings at first instance, with the exception of those taking place in district courts. Further, in accordance with Article 316 of the afore-mentioned Code, the Prosecutor's Office exercises its active role during judicial checking procedures and the proceedings, so as to determine the truth and observe the statutory provisions.

Having regard to these statutory provisions, the Prosecutor's Office must present its opinion on all questions raised by the parties and is required to draw up requests and enter objections; in this context, it is possible that the Prosecutor's Office will also enter an objection challenging constitutionality in all cases where this proves necessary in order to carry out the above-mentioned duties. Thus, in the sense of Article 23 of Law no. 47/1992 revised, the Prosecutor's Office has the status of a party.

Languages:

Romanian.

Identification: ROM-1999-C-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 02.11.1999 / **e)** 169/1999 / **f)** Decision on the objection challenging the constitutionality of the provisions of Article 9, last paragraph of Law no. 112/1995 on the rules governing the legal status of certain buildings intended for housing and taken into State ownership / **g)** *Monitorul Oficial al României* (Official Gazette), 151/2000 / **h)**.

Keywords of the systematic thesaurus:

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.4 **Constitutional Justice** – Effects – Effect *inter partes*.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Decision, authority, implementation / *Res iudicata*, principle.

Headnotes:

In accordance with the provisions of Article 144.c of the Constitution and Article 23.3, second sentence, and 23.6 of Law no. 47/1992, revised, on the organisation and functioning of the Constitutional Court, decisions delivered by the Court when dealing with issues of constitutionality have universal effects *(erga omnes)*.

The content of Article 23.3 and 23.6 of Law no. 47/1992, revised, indirectly mean that those decisions by which the Court rejects the objection challenging constitutionality have *inter partes* effects.

As a consequence of the binding *erga omnes* nature of such decisions, the statutory provision concerned may no longer be applied.

Summary:

By an interlocutory judgment of 5 May 1999, the Braşov Court asked the Constitutional Court to rule on an objection challenging the constitutionality of the provisions of Article 9, last paragraph, of Law no. 112/1995 on the regulations governing the legal status of certain buildings intended for housing and taken into State ownership.

The challenged provisions provide that "apartments acquired under the conditions set out in paragraph 1

may not be disposed of for ten years from the date of purchase".

It is alleged that these provisions are in breach of the first sentence of Article 41.1 of the Constitution, which states that "the right of property, and debts incurring *[sic]* on the State, are guaranteed".

In expressing its opinion on the effects of decisions delivered by the Court, the Braşov Court, before which the objection challenging constitutionality was raised, considered that the principal effect of decisions regarding constitutionality was *res iudicata*. This concerns only the parties to the case for which the Court has examined the objection, and has no effect with regard to other cases that have not been referred to the Court.

It was claimed that the Court's decisions do not result in annulment of the statutory text submitted for supervision of constitutionality, but only in annulment of its application in the specific case before the judicial authority.

In examining these arguments, the Court held that, under Article 144.c of the Constitution and Article 23.3, second part, and 23.6 of Law no. 47/1992, revised, its decisions when settling objections challenging constitutionality had absolute and universal effects *(erga omnes)*.

The *erga omnes* nature of Court decisions in settling objections challenging constitutionality also follows from the provisions of the first part of the first sentence of Article 145.2 of the Constitution, and of Articles 16.1 and 51 of the Constitution, since these provisions do not make a distinction and are therefore also applicable to decisions made under Article 144.c of the Constitution; if the Court's decisions did not have *erga omnes* effect, a situation could arise where the same statutory provision which had been declared constitutional as a matter of principle was not applied in the trial in which the objection challenging constitutionality was raised, but was applied in any other trial or in circumstances where the question of a trial before a judicial authority did not arise; that a law which has been declared unconstitutional was not applied with regard to legal persons involved in the statement of the Court's decision, but was applied to other legal persons; that the public authorities implemented the Court's judgments in different ways depending on whether the legal persons were parties in the trial in which the objection challenging constitutionality was raised; that it is impossible for a legal provision which has been definitively declared unconstitutional to continue to be applied.

The Court also concluded, indirectly, from the content of Article 23.3 and 23.6 of Law no. 47/1992, that the Court's decisions rejecting objections challenging constitutionality have only *inter partes* effect. However, the same parties may not bring the objection challenging constitutionality again on the same grounds, since the authority of *res iudicata* would not be respected.

As a consequence of the binding *erga omnes* nature of Constitutional Court decisions stating that a law or order is unconstitutional, delivered in accordance with Article 144.c of the Constitution, the statutory provision may no longer be applied by any legal person, and automatically ceases to have effect in future, particularly from the date of the decision's publication in the Official Gazette.

In consequence of a decision finding that a law or an order is unconstitutional, Parliament or, if appropriate, the Government, is obliged to amend or repeal the normative text.

Where such an intervention does not take place or is delayed, the Court's decision continues to have effect, since it is binding *erga omnes*.

Languages:

Romanian.

Identification: ROM-2000-2-010

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.11.1999 / **e)** 186/1999 / **f)** Decision on the constitutionality of the provisions of Article 278 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 213/16.05.2000 / **h)**.

Keywords of the systematic thesaurus:

1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes – Stare decisis*.
1.6.4 **Constitutional Justice** – Effects – Effect *inter partes*.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
1.6.8 **Constitutional Justice** – Effects – Consequences for other cases.

2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Constitution, direct application, objection on grounds of unconstitutionality / *Inter partes* / Judicial authority, constitutional provisions, direct application.

Headnotes:

1. Anyone dissatisfied with the response to his application under the procedure before the public prosecution services is entitled to apply to the trial court, in accordance with Article 21.1 of the Constitution, which lays down the principle of unrestricted access to justice and is directly applicable. Consequently, the provisions of Article 278 of the Code of Criminal Procedure are unconstitutional in that they do not allow persons dissatisfied with state prosecution services, response to their application to turn to the courts.

2. Judicial authorities are bound to apply the provisions of the Constitution directly where there are no statutory implementing regulations or the unconstitutionality of the existing regulations is established. Constitutional provisions can and must be directly applied by judicial authorities, also in the event that the unconstitutionality of the existing statutory provisions has been established by a Constitutional Court decision and the legislator has not yet acted to amend or if necessary to repeal those provisions.

3. Constitutional Court decisions delivered in connection with the settlement of issues of unconstitutionality are universally binding *(erga omnes)*.

4. Judicial authorities are empowered by law to make a reasoned interlocutory decision declaring admissible or inadmissible a party's or the prosecutor's request to lodge an objection on grounds of unconstitutionality. The consequences of such a decision are a stay of proceedings and referral of the objection to the Constitutional Court for decision.

Summary:

1. By interlocutory decision of 18 May 1999, the Satu Mare Court asked the Constitutional Court to rule on an objection challenging the constitutionality of the provisions of Article 278 of the Code of Criminal Procedure.

The Constitutional Court ruled on the constitutionality of the provisions of Article 278 of the Code of Criminal Procedure in Decision no. 486/1997. In hearing the objection of unconstitutionality it found Article 278 of the Code of Criminal Procedure constitutional in the strict sense of not impeding action before a court, in accordance with Article 21 of the Constitution, which was directly enforceable, by a person dissatisfied with the outcome of his complaint against the measures or acts ordered by or performed as instructed by the prosecutor and not coming before the courts. The objection to Article 278 of the Code of Criminal Procedure on constitutional grounds was rejected as inadmissible.

2. Even the court before which the issue of unconstitutionality was raised, in expressing its opinion, held that Article 257 of the Code of Criminal Procedure contravened the provisions of Article 21 of the Constitution but did not abide by Constitutional Court Decision no. 486/1997 and asked the Constitutional Court to settle the issue.

In so doing, the court did not directly apply the provisions of Article 21 of the Constitution, did not comply with the provisions of the first part of the first sentence of Article 145.2 of the Constitution, or with the provisions of Section 23.3 and 23.6 of Act no. 47/1992 on the organisation and functioning of the Constitutional Court. The claimed exclusion of direct application of the constitutional provisions by judicial authorities relied on arguments relating to the special nature of the action of justice, as provided by Articles 123.1, 123.2 and 125.3 of the Constitution, and on contentions that the decisions of the Constitutional Court were actually an overture to the legislator to make appropriate changes in the current legislation criticised by the Constitutional Court decisions. Therefore the decisions of the Constitutional Court allegedly could not be raised against the judicial authorities directly but only through the incorporation of these rulings into positive law by the legislator.

The Court held that constitutional provisions could and must be applied directly by judicial authorities where the legislator had not enacted laws laying down a detailed procedure for the application of the constitutional text. Enactment of such laws by the legislator was necessary as a rule, but their absence must not prevent immediate fulfilment of the constituent legislator's intention.

As to the nature of the effects of Constitutional Court decisions delivered in order to resolve issues of

unconstitutionality raised before judicial authorities, the Court held that such decisions did not merely have relative effects *(inter partes)* for the purposes of the proceedings in which the issue was raised, but also absolute, or universally binding, effects *(erga omnes).*

The Court further held that, as could be inferred from Section 23.3 and 23.6 of Act no. 47/1992, purely *inter partes* effects (relative effects) arose from Constitutional Court decisions dismissing objections of unconstitutionality. In further proceedings, the objection could be raised once again, thereby enabling the Constitutional Court to reconsider the same issues of unconstitutionality following submission of fresh grounds or the occurrence of new developments prompting change in the Court's practice.

As a consequence of the universally binding character of the Constitutional Court's decisions declaring a law or an order unconstitutional, the impugned statutory provision may no longer be applied by any legal person, its subsequent effects automatically lapsing as from the date of publication of the decision in the *Monitorul Oficial al României* (Official Gazette).

Likewise, having regard to the provisions of Articles 11 and 20 of the Constitution, legal responsibility for non-compliance with a decision of the Constitutional Court may be determined in a European Court of Human Rights judgment against the state authorities, in so far as the conditions prescribed by the European Convention on Human Rights are fulfilled.

As to the question regarding the manner in which judicial authorities should proceed when the statutory provisions crucial to the settlement of the case have previously been ruled unconstitutional by the Constitutional Court, the judicial authorities are competent to find a request by the prosecutor or by a party to enter a constitutional objection admissible or inadmissible, as provided by law, in a reasoned interlocutory decision, with the effect of staying the proceedings and bringing the issue of unconstitutionality before the Constitutional Court for settlement. In the event that a judicial authority allows a request which is inadmissible, the Court finds that the referral is not lawful and by a decision of its own motion dismisses the objection as inadmissible. Where the referral to the Court is in order because the objection was admissible, its competence to declare the objection admissible or inadmissible is exclusive, in accordance with Section 23.3 and 23.6 of Act no. 47/1992.

Languages:

Romanian.

Identification: ROM-2001-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 25.10.2000 / **e)** 208/2000 / **f)** Decision on a charge of unconstitutionality brought in respect of Act no. 105/1997 (amended by Government Order no. 13/1999) for the resolution of objections, disputes and complaints concerning sums calculated and levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance / **g)** *Monitorul Oficial al României* (Official Gazette), 695, 27.12.2000 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Administration, internal administrative appeals / Tax, assessment, objection / Constitutional Court, legislative role.

Headnotes:

1. The statutory establishment of an administrative appeals procedure is not in itself unconstitutional.

2. Use of the preliminary administrative appeals procedure, as laid down in Sections 2-7 of Act no. 105/1997, to resolve objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance, is contrary to the principle of "reasonable time" set out in the first sentence of Article 6.1 ECHR. The provisions of Sections 2-7 of Act no. 105/1997 are therefore unconstitutional.

3. The rules governing the Court's jurisdiction specify that it is not expected to play a "proactive" legislative role. Legislators, however, while exercising their constitutional powers, may make regulatory changes to preliminary quasi-judicial procedure.

Summary:

By an interlocutory judgment of 8 March 2000, the administrative disputes section of the Supreme Court of Justice brought a question of unconstitutionality before the Constitutional Court in respect of Act no. 105/1997 for the resolution of objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance.

It was claimed that the provisions of Act no. 105/1997, which established an internal administrative appeals procedure to resolve objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance, breached Articles 11, 16.2, 21, 24, 48.1, 48.2 and 49 of the Constitution and Article 6 ECHR, in that the administrative appeals procedure delayed to an unacceptable degree the period during which a party could complain to a court concerning violation of his rights. Consequently, there was no guarantee that judgment would be delivered within a reasonable time.

I. The Plenary Assembly of the Court ruled in its landmark Decision no. 1 of 8 February 1994 that the establishment of administrative appeals procedures did not breach constitutional provisions.

The Court also found that the existence of a preliminary internal administrative appeals procedure was accepted, with reference to Article 6 ECHR, in the case-law of the European Court of Human Rights (case of *Le Compte, Van Leuven and De Meyere v. Belgium*, 1981).

II. From the standpoint of the guarantee as to the delivery of judgment within a reasonable time, however, the Court observed that the administrative appeals procedure introduced through Sections 2-7 of Act no. 105/1997 was unconstitutional.

Under the terms of Articles 11 and 20.2 of the Constitution, this procedure contravened the first sentence of Article 6.1 ECHR.

In this connection, concerning the application of Article 6 ECHR, the Court found as follows: it had been established in the case-law of the European Court of Human Rights that the requirement to settle cases "within a reasonable time" included the length of such procedures prior to referral to a court, and that the expression "reasonable time" referred to the period until the *dies ad quem*, i.e. the final decision in the case.

Delivery of a judgment which did not also establish the precise amount of a monetary sum was not deemed to be the final settlement of a case.

The guarantee of "reasonable time" did not extend to procedures for a judgment's implementation. The "reasonable time" requirement attached considerable importance to the circumstances in which penalties were collected on the monetary sum in dispute.

Finally, the Court found that the expression "reasonable time" was to be understood as also signifying "as reasonably appropriate".

From a different standpoint, in accordance with paragraphs 10.1 and 10.2 of Government Order no. 11/1996, subsequently amended, in most cases collection of tax debts is enforced before preliminary administrative appeals procedures are exhausted. As a result, when agencies of the Ministry of Finance implement these procedures, the legal person lodging the objection, claim or complaint has already been deprived, as the case may be, of sums seized from his bank account or other fixed or moveable property identified for execution by force.

III. The Court is not expected to play a legislative role, nor is it expected to take the place of the legislative bodies by partly or totally replacing the unconstitutional provisions of Sections 2-7 of Act no. 105/1997 or determining which of the three legal instruments governing the three stages of the preliminary administrative appeals procedure should be declared unconstitutional.

Correspondingly, the legislator is empowered under the Constitution to draft new regulations governing the procedure prior to referral to the courts, thereby ensuring that cases are settled "within a reasonable time".

Supplementary information:

Act no. 105/1997 was subsequently repealed by Emergency Government Order no. 3/2001.

Cross-references:

- *Le Compte, Van Leuven and De Meyere v. Belgium*, 23.06.1981, *Special Bulletin ECHR* [ECH-1981-S-001].

Languages:

Romanian, French (translation by the Court).

Identification: ROM-2001-1-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.02.2001 / **e)** 70/2001 / **f)** Decision on a charge of unconstitutionality brought in respect of the final provisions of Section 19.3 of Act no. 85/1992 (republished) governing the sale of housing and other property built with public money or with that of State economic or budgetary entities / **g)** *Monitorul Oficial al României* (Official Gazette), 236, 27.02.2001 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.2 **Fundamental Rights** – Equality.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Housing / Sale, contract / Nullity, absolute / Expenditure, recovery / Expenditure, adjustment / Interest, compensation, non-payment / *Restitutio in integrum*.

Headnotes:

The final part of Section 19.3 of Act no. 85/1992, concerning the non-payment of interest and the non-adjustment of recovered expenditure following a ruling that a housing sale contract is null and void *ab initio*, is unconstitutional and breaches the first sentence of Article 41.2 of the Constitution, according to which private property enjoys equal protection irrespective of its owner.

Summary:

By an interlocutory judgment of 21 September 2000, the civil section (Section IV) of Bucharest Court of Appeal brought a question of unconstitutionality before the Constitutional Court in respect of the final provisions of Section 19.3 of Act no. 85/1992 governing the sale of housing and other property built with public money or with that of State economic or budgetary entities.

Section 19 of Act no. 85/1992 renders null and void *ab initio* contracts of sale of housing or other property which are concluded in breach of the provisions of this Act and of Legislative Decree no. 61/1990.

Section 19.3 provides that nullity is determined by the courts, which also rule on restoration of the former position and on restitution of the sale price, less any rent received during the period between conclusion of the contract and recovery.

It was alleged that the final part of Section 19.3 of the Act was unconstitutional. According to this provision recovered expenditure did not include interest or other adjustments.

It was claimed that these provisions breached Articles 16.1, 16.2, 41.1, 41.2, 135.1, 135.2 and 135.3 of the Constitution. While only one of the contracting parties had failed to comply with the civil law, the other was penalised although not guilty of non-compliance and despite the fact that all civil sanctions are founded on the notion of liability attaching to the parties to a legal relationship.

On examining the text in question in the light of Article 41.1 and 41.2 of the Constitution, the Court held that terminating a contract of sale by declaring it

null and void *ab initio* required a return to the position prior to the date on which the contract was concluded and application of the principle of *restitutio in integrum*. This implied that everything transferred by virtue of the annulled contract would be restored to each party in full and at its real value. The final part of Section 19.3 of the Act conformed to this principle only as regards the rights of vendors which were also commercial companies, which recovered both the property and any rent, while the purchaser received only the unadjusted price paid, less the rent for the period in question. The purchaser had no entitlement to unrealised earnings in the form of interest for the period during which this money was not accruing.

Accordingly, the Court found that the final part of Section 19.3 of Act no. 85/1992 favoured State private-property ownership above individual property-owners and consequently breached the first part of Article 41.2 of the Constitution, according to which "private property shall be equally protected by law, irrespective of its owner".

In accordance with Article 20.1 of the Constitution and Article 1.1 Protocol 1 ECHR, the Court found that the constitutional principle that private property should be protected equally, as laid down in Article 41.1 and 41.2, must be honoured whatever the property rights and "possessions" concerned.

In this connection, in the case of *The former King of Greece and others v. Greece*, Judgment of 23.11.2000, the European Court of Human Rights ruled that the notion of "possessions" was not limited to ownership of moveable assets, and that certain property rights and interests served to constitute a "right of property" and were consequently "possessions".

Similarly, in the case of *Pressos Compania Naviera S.A. and others v. Belgium*, 1995, it was decided that the right to compensation was generated when damage occurred. A claim for damages of this sort constituted a "possession" and was therefore a right of property within the meaning of the first sentence of Article 1.1 Protocol 1 ECHR.

The Court found that this provision applied in the case in question. It therefore ruled that the charge of unconstitutionality was well-founded and must be accepted.

Cross-references:

- *Pressos Compania Naviera and others v. Belgium*, 20.11.1995, *Bulletin* 1995/3 [ECH-1995-3-019];
- *The former King of Greece and others v. Greece*, 23.11.2000.

Languages:

Romanian, French (translation by the Court).

Russia
Constitutional Court

Important decisions

Identification: RUS-1998-2-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 16.06.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.06.1998 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
4.7 **Institutions** – Judicial bodies.
4.7.4.6 **Institutions** – Judicial bodies – Organisation – Budget.
4.10.2 **Institutions** – Public finances – Budget.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Judicial system, financing / Court, independence / Budget, courts, reduction.

Headnotes:

The government cannot have the right to reduce budget allocations for the operation of the federal judicial system in accordance with actual receipts from the federal budget.

Summary:

At the request of the Supreme Court, the Constitutional Court considered a case relating to verification of the constitutionality of Article 102.1 of the federal Law “on the 1998 federal budget”.

The Constitutional Court found that, according to the contested rule, in the event of rejection of the accumulated receipts of the federal budget on the basis of the amounts provided for in the present law, the expenditure of the federal budget is financed by the government in a manner strictly proportional to the annual appropriation, taking into account the actual budget receipts. This means accepting a discrepancy with regard to proportional financing by items of a maximum of five per cent for each quarter (with the exception of seasonal or lump-sum payments), provided that federal law does not contain a provision to the contrary. In the opinion of the applicant, this rule permits the government to reduce on its own initiative the size of federal budget allocations earmarked for the judicial system as a function of the situation of budget receipts, and is therefore in conflict with Articles 10, 76.3 and 124 of the Constitution.

The Constitutional Court noted that, pursuant to Article 124 of the Constitution, the courts are financed solely from the federal budget, and their financing must ensure the possibility of administering justice fully and independently in conformity with federal law. Such financing must be in keeping with the provisions and resources required to ensure that the economic conditions for the exercise of judicial authority exist.

Specifying the constitutional guarantees, the federal constitutional law “on the judicial system of the Russian Federation” provides that financing for the federal courts is based on the rules approved by federal law and is broken down by separate headings in the federal budget. The amount of budgetary resources earmarked for the courts in the current budget year or planned for the coming budget year cannot be reduced without the approval of the Congress of Judges of All Russia or the Council of Judges of the Russian Federation. The absence of rules approved by federal law on the financing of the courts cannot in itself justify allowing such financing to be left to the discretion of the legislature or the executive, because the federal budget allocations needed for the courts are directly protected by the Constitution itself and cannot be cut below the level required to ensure that the requirements of Article 124 of the Constitution are met.

Thus, the provisions of the Constitution, together with the implementing rules in Article 33 of the federal constitutional Law “on the judicial system of the Russian Federation”, create the means of protecting the financing of the judicial system that is mandatory for both the Federal Assembly, which approves the budget for the corresponding year, and the government, which is responsible for implementing it.

So in adopting Article 102 of the contested Law, the Federal Assembly gave the government the right to reduce allocations for operating the federal judicial system and regarded this as coming under an expenditure heading not protected in the same way as the other headings. The proposals of the Russian Federation's Supreme Court, the Supreme Court of Arbitration and the Council of Judges on maintaining allocations for the judiciary for 1998 as a protected heading were not approved by the State Duma.

It emerges from the case-file that in applying the contested rule, in April 1998 the government and the Ministry of Finance reduced by 26.2% the allocations in the federal budget earmarked for operating the federal judicial system. The reduction was carried out under the provisions of the contested rule.

By reducing federal budget expenditure for the judicial system, the Government and the Ministry of Finance fail to guarantee the complete and independent administration of justice and the smooth functioning of the judiciary, thereby diminishing the confidence of the Russian people in the state and ultimately jeopardising the human and civil right to judicial protection guaranteed by the Constitution, because the realisation of the constitutional provisions on ensuring the judicial protection of human and civil rights and freedoms is inseparably linked to the creation by the state of the necessary conditions for the functioning of the courts.

The contested rule, which permits the reduction in allocations for the judicial system in violation of Article 124 of the Constitution, is also at variance with the federal constitutional Law “on the judicial system of the Russian Federation” and thus infringes Article 76.3 of the Constitution, which states that federal laws may not be contrary to federal constitutional laws.

Moreover, given the principle universally recognised in international law of the independence of the courts, it should be borne in mind that the Vienna Declaration and Action Programme adopted at the Second World Conference on Human Rights (June 1993) consolidates this principle of the need for proper financing of institutions responsible for the administration of justice. Article 2 of the federal Law of 30 March 1998 “on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto” stipulates that as from 1998, the federal budget must provide for the necessary increase in allocations for the operation of the federal judicial system for the purpose of applying legal rules fully in keeping with the Russian Federation's commitments arising from its accession to the Convention and its Protocols.

The Constitutional Court annulled the contested provision, finding it unconstitutional. It required the Government to ensure the financing of the courts and ruled that it was the Federal Assembly's responsibility to adopt appropriate rules to that effect.

Languages:

Russian, French (translation by the Court).

Identification: RUS-1998-2-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.07.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.07.1998 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.3.5.5.1 **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.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.4 **Institutions** – Judicial bodies – Organisation.

Keywords of the alphabetical index:

Court, verification of the constitutionality of laws / Court, delimitation of powers / Constitutional Court, exclusive jurisdiction.

Headnotes:

Ordinary courts do not have a right, but rather an obligation, to request the Constitutional Court to verify the constitutionality of a law applied or to be applied

in a specific case if they find that law to be unconstitutional. Only in such cases will an unconstitutional provision be denied the force of law in accordance with the constitutionally established procedure, thereby ruling out its future application. This also ensures compliance with the constitutional principle that laws must be applied in a uniform manner throughout the territory of the Russian Federation, as well as the primacy of the Constitution, which cannot be guaranteed if different courts are allowed to interpret constitutional provisions in divergent ways.

Summary:

In this case, the Constitutional Court interpreted several articles of the Constitution at the request of the legislative assembly of the Republic of Karelia and the State Council of the Republic of Komi.

The subject of the interpretation in this case are the provisions of Article 125 of the Russian Constitution, pursuant to which the Constitutional Court is required to verify the constitutionality of the normative legal acts enumerated in this article and which, if they are found unconstitutional, cease to have force of law in respect of the provisions of Articles 126 and 127 of the Constitution; the latter provisions set out the powers of the Supreme Court as the supreme judicial authority in civil, criminal, administrative and other matters, and the Supreme Court of Arbitration as the supreme judicial authority ruling on economic disputes and other matters, and thus determine in general the relevant powers of the ordinary courts and the arbitration courts. The Constitutional Court was required to consider whether the powers of the ordinary courts and arbitration courts to verify the constitutionality of normative legal acts and to declare them null and void, i.e. as being no longer in force, flow from the above-mentioned provisions.

Of fundamental importance for this interpretation are the provisions of the Constitution laying down the superior legal force of constitutional provisions and the direct force of the Constitution (Article 15 of the Constitution), *inter alia* in the area of the rights and freedoms guaranteed by law (Article 18 of the Constitution), in which their legal protection is guaranteed (Article 46 of the Constitution). It follows that the requirement of the direct application of the Constitution applies to all courts.

At the same time, Article 125 of the Constitution contains special provisions giving a special judicial body, the Constitutional Court, power to verify the constitutionality of normative legal acts with the result that such acts may lose the force of law. The Constitution does not attribute such powers to the other courts.

In defining the powers of the Constitutional Court, the Constitution takes as a basis the obligation to exercise this power in a particular way, namely via constitutional judicial procedure. For this reason, it determines the main aspects of this procedure, i.e. what decisions may be challenged and who may appeal, as well as the types of procedures applicable and the legal effects of decisions rendered. For the other courts, there are no such regulations at constitutional level. Consequently, the Constitution does not contemplate verification by these courts of the constitutionality of normative acts.

This is also in conformity with the general legal principle that a court which was established and functions on a lawful basis (Article 6 ECHR) is considered to be competent to hear the case, which presupposes that the powers of the various courts are set forth in the Constitution and in the law adopted in keeping with the Constitution. This principle is expressed in Articles 47, 118, 120 and 128 of the Constitution of the Russian Federation and is at the basis of the definition of absolute territorial power and of the jurisdiction of the court hearing the case as well as the categorising of types of court jurisdiction. With regard to the exercise of the power to verify the constitutionality of acts, provision is made for the relevant court only in the Constitution; such provision may not be made by another law.

Articles 125, 126 and 127 of the Constitution develop the logic of Article 118, according to which judicial authority is exercised through constitutional, civil, administrative and criminal proceedings. It is precisely because the constitutional proceedings are the responsibility of the Constitutional Court, in accordance with Article 125, that Articles 126 and 127 give other courts jurisdiction in civil, criminal, administrative matters and economic disputes.

The decisions of the Constitutional Court pursuant to which unconstitutional normative legal acts lose the force of law produce the same general effects in respect of time, of territory and of the number of persons concerned as do normative legal acts that are decisions of the body creating the rules. Consequently, they also have the same general effects as these acts. Those effects are not unique to the decisions of ordinary courts and arbitration courts, which by nature are acts in application of the law designed to apply legal rules. The Constitutional Court alone takes official decisions of general application. Hence, its decisions are final and cannot be reviewed by other bodies or overruled by the adoption for a second time of an act which has been found unconstitutional, and require all those who apply the law, including other courts, to act in conformity with the legal positions of the Constitutional Court.

The decisions of the ordinary courts and the arbitration courts do not have such force of law. They are not binding on other courts in other cases, because the courts interpret independently the normative provisions which must be applied. The decisions of the ordinary courts and the arbitration courts may be challenged in accordance with established procedures. Moreover, no provision is made for the mandatory official publication of these decisions, which, by virtue of Article 15.3 of the Constitution stipulating that only officially published laws are applicable, also excludes other bodies applying the law from the obligation to follow suit when settling other cases. In view of the above, the decisions of courts of ordinary law and arbitration courts are not recognised as an appropriate way of depriving of the force of law normative legal acts which have been found unconstitutional.

The fact that courts of ordinary law and arbitration courts do not have the power to find the above-mentioned normative legal acts unconstitutional and thus without direct effect also flows from Article 125.2 of the Constitution, pursuant to which the Supreme Court and the Supreme Court of Arbitration are both bodies which may request the Constitutional Court to verify the constitutionality of normative legal acts (unrelated to the consideration of a specific case, i.e. verification of rules *in abstracto*). Upon the request of courts, the Constitutional Court also verifies the constitutionality of the law applied or applicable in a specific case.

Hence, it has been established at constitutional level that rulings of other courts on the unconstitutionality of a law cannot in themselves serve as a basis for officially finding that law unconstitutional and depriving it of legal effect. From the point of view of the interaction of courts with different types of jurisdiction and the definition of their power to find laws unconstitutional, the exclusion of such laws from a number of acts in force is the joint result of the obligation on the ordinary courts to question the constitutionality of the law before the Constitutional Court and the obligation of the latter to render a final ruling on the question.

Appeals by other courts, provided for in Article 125 of the Constitution relating to verification of the constitutionality of the law applied or applicable in a specific case if the court finds the law to be unconstitutional, cannot be regarded as a right only: the court must lodge an appeal requesting that the unconstitutional act lose its force of law according to the constitutionally established procedure, which may rule out its future application.

Refusal to apply in a specific case a law found unconstitutional by the court, without an appeal having been lodged on this occasion before the Constitutional Court, would be at variance with the constitutional provisions according to which laws apply uniformly throughout the entire territory of the Russian Federation (Articles 4, 15 and 76), and would probably also cast doubt on the primacy of the Constitution, because it cannot be applied if conflicting interpretations of constitutional rules by different courts are allowed. This is precisely why an appeal to the Constitutional Court is also obligatory in cases in which the court, when examining a specific case, finds unconstitutional a law which was adopted prior to the entry into force of the Constitution and whose application must be ruled out in conformity with paragraph 2 of its Concluding and Interim Provisions.

In cases in which they find a law to be unconstitutional, the obligation on the courts to apply to the Constitutional Court for official confirmation of unconstitutionality does not restrict their direct application of the Constitution, whose purpose is to ensure the application of constitutional rules above all when they have not been given specific legislative form. If, in the view of the court, the law which should be applied in a specific case is unconstitutional and its provisions therefore cannot be applied, that law may cease to have statutory force in accordance with constitutional procedure, so that the Constitution has direct effect in all cases in which the court rules on the basis of a specific constitutional rule.

Article 125 of the Constitution does not limit the powers of other courts to decide which law is applicable in a given case, where laws contradict each other or gaps are revealed in the legal regulations, or rules which have actually lost their effect have not been abrogated in accordance with the established procedure. However, the court may refrain from applying the federal law or the law of a constituent entity of the Russian Federation; but it does not have the power to find them null and void.

Nor does the power of the federal courts to declare the normative legal acts of the constituent entities of the Russian Federation to be inconsistent with their constitutions (statutes) follow from Article 76 of the Constitution, which lays down the principles for settling conflicts between normative legal acts at various levels. Only the bodies of the constitutional court system, if such is provided for by the constitutions (statutes) of the constituent entities of the Russian Federation, may perform the above-mentioned function, which leads to the loss of force of law of those entities' normative legal acts.

The Constitutional Court has decided that it alone shall rule on the constitutionality of the laws of the Federation and its constituent entities. The ordinary courts of law are bound to appeal to the Constitutional Court if they believe such a rule to be unconstitutional. A federal constitutional law may require the ordinary courts to rule on the legality of normative legal acts below the level of statute law.

Languages:

Russian.

Identification: RUS-2001-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.04.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 27.04.2000 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
3.6 **General Principles** – Federal State.
3.9 **General Principles** – Rule of law.
4.7.1.3 **Institutions** – Judicial bodies – Jurisdiction – Conflicts of jurisdiction.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.

Keywords of the alphabetical index:

Law, federal / Law, regional / Law, inapplicable.

Headnotes:

An ordinary court can, upon application by the prosecutor, rule that the law of a subject (constituent entity) of the Federation is contrary to federal law and therefore inapplicable, thereby requiring that it be made to comply with federal law by the legislature of the constituent entity of the Federation. This does not affect the right to apply to the Constitutional Court for verification of the constitutionality of the law of the constituent entity of the Federation. If the latter is ruled unconstitutional, it becomes null and void and must be regarded as having been repealed.

Summary:

Under the 1992 Federal Law on the *Prokuratura*, the latter was responsible for supervising compliance with the law by measures enacted by the legislatures of the constituent entities of the Federation and for applying to the court to have them declared null and void where appropriate.

In its application to the Constitutional Court, the Civil Division of the Supreme Court asked the following question: Is the prosecutor entitled to ask an ordinary court to declare a law of a constituent entity of the Federation null and void because it contradicts federal law and does the ordinary court have jurisdiction in such cases?

First, the Constitutional Court noted that the federal legislature could grant the prosecutor power to make application to the court and in particular to ask it to verify the conformity with federal law of a law of a constituent entity of the Federation. However, in granting this power to the prosecutor, thereby confirming the corresponding power of the court, the federal law on the *Prokuratura* did not define the manner of its exercise.

The Constitution did not specifically empower the ordinary courts to deal with cases involving verification of the conformity with federal law of laws of constituent entities of the Federation and to take decisions concerning the annulment of laws of constituent entities of the Federation.

The primacy of the Constitution and the supremacy of federal laws as components of a single principle were one of the foundations of the constitutional regime and must be guaranteed by the judicial system, not only through constitutional proceedings, but also by means of other judicial proceedings.

According to Article 125 of the Constitution, verification of the constitutionality of legislative

measures and their annulment if they are contrary to the Constitution were effected through constitutional court proceedings. However, the compliance with federal law of the laws of constituent entities of the Federation, where their constitutionality was not at issue, was verified by the ordinary courts, which were responsible for guaranteeing the primacy of federal laws in carrying out their function of applying the law.

The federal legislature could provide for the verification by the ordinary courts of the compliance with federal law or with other major legislation other than the Constitution, of lesser legislative measures (including the laws of constituent entities of the Federation). This doctrine had been stated previously in the Constitutional Court's decisions of 16 June 1998 and 30 April 1997. However, as the Constitutional Court had stated, the ordinary courts could not declare laws of constituent entities of the Federation unconstitutional and hence without legal force. According to Article 125 of the Constitution, this was the exclusive prerogative of the Constitutional Court. An ordinary court, having reached the conclusion that a law of a constituent entity of the Federation did not comply with the Constitution, must not apply it in an actual case but must apply to the Constitutional Court for verification of the law's constitutionality.

Article 22.3.3 of the federal law on the *Prokuratura*, both literally and as interpreted in practice, enabled republic, territorial and regional courts, after examining a case at the request of the prosecutor, to declare a legislative measure, including a law of a constituent entity of the Federation, null and void, having no legal effect as from its enactment and hence not needing to be repealed by its enacting body.

However, that went beyond the bounds set by the Code of Civil Procedure. According to the code, once the court's decision finding all or part of the legislative measure illegal had acquired legal force, that measure or part of a measure must be regarded as inapplicable.

A law could lose its legal force, as followed from Article 125.6 of the Constitution and from the Federal Constitutional Law on the Constitutional Court of the Russian Federation, only after it had been declared unconstitutional. Such a declaration, pronounced in constitutional court proceedings, had direct effect; for that reason repeal of the unconstitutional law by its enacting body was not necessary since it was considered repealed, i.e. null and void, as from the pronouncement of the Constitutional Court's decision.

The difference in legal consequences between declaring a law of a constituent entity of the Federation null and void or inapplicable occurred due to the difference between its being contrary to the Constitution and contrary to federal law.

The ordinary court's examination of a case concerning the conformity of a law of a constituent entity of the Federation, as a result of which it could be declared contrary to federal law, did not preclude subsequent consideration of its constitutionality in constitutional court proceedings. Consequently, the ordinary court's decision declaring the law of a constituent entity of the Federation contrary to federal law did not in itself constitute confirmation of the law's nullity or its repeal by the court, still less its loss of legal force from the very moment of its promulgation, but simply recognition of its inapplicability. The law could be deprived of its legal force only by a decision of its enacting body or through constitutional court proceedings.

Most of the examined provisions of the federal law on the *Prokuratura* were not contrary to the Constitution.

Article 22.3.3 provided that, if a law of a constituent entity of the Federation contradicted federal law, the ordinary court, at the prosecutor's request, had to declare the law null and void; this was not in accordance with the constitutional principles of the exercise of the power of the people through the legislature, the separation of powers and the guaranteeing of the primacy of the law and Constitution by the judicial system.

Articles 5.3, 66.1 and 66.2 of the Constitution, which defined the federal structure, justified the hierarchy of laws which was the basis for determining the cases in which a law of a constituent entity of the Federation was contrary to federal law and the federal law was applicable, or in which the contradiction could not serve as a basis for declaring the law of a constituent entity of the Federation inapplicable.

According to Article 72.1 of the Constitution, ensuring conformity between the laws of constituent entities of the Federation and federal laws was the joint responsibility of the federation and its constituent entities. The settlement of public law disputes between the federal organs of state power and those of the constituent entities of the Federation had to be based primarily on the interpretation of the rules of competence contained in the Constitution though constitutional court proceedings.

An ordinary court's declaration that a law of a constituent entity of the Federation was null and void was at variance with its constitutional function of asking the Constitutional Court to verify the constitutionality of a law. However, a decision by an ordinary court declaring a law of a constituent entity

of the Federation inapplicable did not rule out the possibility of verification by the Constitutional Court of the constitutionality of the federal law and the law of a constituent entity of the Federation.

The Constitutional Court had jurisdiction to examine such cases referred to it by the relevant authorities of constituent entities of the Federation, by the courts or, where the public law dispute over the division of powers between different levels of state authority affected constitutional rights and freedoms, by ordinary citizens. The Constitutional Court acted in such cases as a judicial body making final rulings on such public law disputes.

At the same time, alongside the above-mentioned constitutional jurisdiction of the Constitutional Court, the legislature could make additional provisions in the federal constitutional law to regulate the prerogatives not only of the ordinary courts, but also of the (statutory) constitutional courts of the constituent entities of the Federation in matters relating to verification of conformity between the laws of constituent entities of the Federation and federal law.

Languages:

Russian.

Slovakia
Constitutional Court

Important decisions

Identification: SVK-1995-C-001

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 10.01.1995 / **e)** II. ÚS 1/95 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.3.2.4 **Constitutional Justice** - Jurisdiction - Type of review - Concrete review.
1.3.5.12 **Constitutional Justice** - Jurisdiction - The subject of review - Court decisions.
5.3.13.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Administration of justice, definition / Administration of justice, non-interference / Evidence, free evaluation, principle / Judicial authority, exclusive jurisdiction, principle.

Headnotes:

The Constitutional Court lacks the authority to annul decisions of the ordinary courts or to suspend their enforceability.

Since constitutional and ordinary courts are separate and equal modes of administration of justice, there is no hierarchical relationship between them, and the Constitutional Court is neither an alternative nor an extraordinary instance designed to adjudicate in matters that fall within the competence of ordinary courts.

Summary:

The petitioner alleged that various constitutional rights related to judicial protection had been violated by the failure of respective ordinary courts to properly

assess the available evidence and to draw proper legal conclusions from it. The matter concerned claims related to restitution for the protection of which she had applied to the competent ordinary courts.

The Constitutional Court rejected the petitioner's claims by pointing out the lack of competence to review the merits of the petition. The Constitutional Court held that to furnish a legal opinion on the matter it would have to review whether the ordinary courts had assessed all available evidence and whether they had drawn proper legal conclusions from it. However, the Constitutional Court does not have jurisdiction to review the facts of a case and its legal essence in those matters in which evidence was gathered and assessed by the ordinary courts. Most importantly, the Constitutional Court held that it lacked the authority to annul any decisions of the ordinary courts even if it had doubts about the correctness of the ordinary courts' factual assertions and, by extension, of their decisions *per se*.

According to the Constitutional Court, it would be at odds with the autonomous and procedurally self-contained administration of justice through ordinary adjudication to appropriate for itself the authority to annul decisions of the ordinary courts. The performance of any such power by the Constitutional Court would have to be based on a constitutional and statutory regulation, which would have to make sure that constitutional review would not become an additional appellate or cassation instance.

Languages:

Slovak.

Identification: SVK-1995-3-006

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 25.10.1995 / **e)** II. ÚS 26/95 / **f)** Case of right to trial within reasonable time / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.3.2.4 **Constitutional Justice** - Jurisdiction - Type of review - Concrete review.
1.3.5.12 **Constitutional Justice** - Jurisdiction - The subject of review - Court decisions.
1.4.4 **Constitutional Justice** - Procedure - Exhaustion of remedies.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.13.12 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Trial within reasonable time.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

Keywords of the alphabetical index:

Constitutional Court, pending case, effects / Constitutional Court, trial within reasonable time / Judge, independence.

Headnotes:

Only an instruction or an order given to a judge constitutes an interference with judicial independence. The review of objections regarding unreasonable delays in judicial proceedings cannot be deemed an interference with these proceedings.

The independence of a judge in his/her decision-making cannot be made superior to the constitutionally guaranteed rights of natural and legal persons. The exercise of judicial independence has to be in balance with constitutionally guaranteed rights.

In those matters in which, by virtue of the commitments made by the Slovak Republic, proceedings can be instituted by the respective authorities of the Council of Europe and the United Nations in addition to the proceedings before the Constitutional Court pursuant to the European Convention of Human Rights or other international treaties, the Constitutional Court is to proceed so as to provide a timely remedy through national instruments.

Summary:

The petitioner filed a complaint with the Constitutional Court, alleging that his right to trial within a reasonable time (Article 48.2 of the Constitution) had been violated by the respective courts of general jurisdiction, which commenced the proceedings in 1977 but failed to complete them before the petition was filed in

1995. The petitioner filed a parallel complaint with the European Court of Human Rights, which rejected it as inadmissible due to the petitioner's failure to exhaust all domestic remedies. The matter concerned a paternity dispute instituted against a foreign national.

The respective domestic court rejected the petitioner's arguments and, in addition, argued that the Constitutional Court lacked the authority to proceed in the matter, as it would thus interfere with the principle of judicial independence in Article 141.1 of the Constitution. The Constitutional Court held that to review a constitutional challenge against unreasonable delays in ordinary court proceedings could not be deemed an interference with judicial proceedings. According to the Constitutional Court, a person entitled by the Constitution to contest unreasonable delays in judicial proceedings has the right to do so at any moment and, consequently, may demand that the authorities competent to protect his/her rights review his/her allegations. Further, the Constitutional Court does not protect constitutionality only by making factual assertions about past events, but is to guarantee the protection of the Constitution at any moment so that the Constitution is effectively implemented both by the relevant government agencies and the citizens.

On the other hand, the Constitutional Court only protects rights if other government authorities do not fulfil their obligations with respect to the given right. The Constitutional Court neither protects rights that the petitioner does not assert against the government, nor adjudicates upon claims of rights infringements resulting from private transactions. The Constitutional Court is also only competent to act when it is obvious that the petitioner was unable to effectively apply for the protection of his/her right, or that by such application he/she could not achieve an effective protection of his/her right.

Relying on various decisions of the European Court of Human Rights, the Constitutional Court pointed out that the respective bodies of the Council of Europe may, and often do, commence proceedings to protect the right contained in Article 6.1 ECHR even before the challenged domestic proceedings are completed. Accordingly, in those matters in which, by virtue of the commitments made by the Slovak Republic, proceedings can be instituted by the respective authorities of the Council of Europe and the United Nations in addition to the proceedings before the Constitutional Court pursuant to the European Convention of Human Rights or other international treaties, the Constitutional Court is to proceed so as to provide a timely remedy through national instruments. Therefore, the scrutiny by the Constitutional Court of whether the respective ordinary courts have sufficiently observed rights related to judicial proceedings cannot be deemed an interference with judicial independence even if such scrutiny takes place during the course of these proceedings.

Languages:

Slovak.

Identification: SVK-1996-C-001

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 18.12.1996 / **e)** Pl. ÚS 14/96 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.2.3 **Constitutional Justice** - Types of claim - Referral by a court.
1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
1.4.9.1 **Constitutional Justice** - Procedure - Parties - *Locus standi*.
1.4.10.4 **Constitutional Justice** - Procedure - Interlocutory proceedings - Discontinuance of proceedings.

Keywords of the alphabetical index:

Preliminary question, discontinuance of proceedings in the originating case.

Headnotes:

Any referral by a court of general jurisdiction to the Constitutional Court of a question of law is to be deemed a motion for review of compatibility of legal acts.

The discontinuance of proceedings in connection with which a court of general jurisdiction referred to the Constitutional Court a question of law deprives such court of standing in proceedings before the Constitu-

tional Court and constitutes grounds for rejecting the referral as inadmissible.

Summary:

The petitioner, a district court, applied to the Constitutional Court for a binding statement on the conformity to the Constitution of a provision of the Civil Procedure Code, concerning the distribution of the burden of proof between litigants in civil proceedings. After the referral but before the Constitutional Court issued a decision on whether to admit the referral for further proceedings, the applicant in the original civil proceedings withdrew his claim and the proceedings were discontinued.

The Constitutional Court dismissed the referral. It pointed out that any referral by an ordinary court of a question of law was to be deemed a motion for abstract review of compatibility of legal acts, regardless of the description by the referring authority. Any such referral must also be connected with the decision-making activity of the ordinary court. The Constitutional Court held that since the original proceedings had been discontinued in response to a motion by the competent party, there ceased to be the requisite link between the referral and the ordinary court's decision-making activity. Accordingly, the petitioner lost its standing in the proceedings before the Constitutional Court and the referral therefore had to be dismissed.

Languages:

Slovak.

Identification: SVK-1997-C-001

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 23.01.1997 / **e)** I. ÚS 6/97 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** - Constitutional jurisdiction - Relations with other institutions - Courts.
1.3.2.4 **Constitutional Justice** - Jurisdiction - Type of review - Concrete review.
1.3.5.12 **Constitutional Justice** - Jurisdiction - The subject of review - Court decisions.
3.13 **General Principles** - Legality.
5.1.1 **Fundamental Rights** - General questions - Entitlement to rights.

Keywords of the alphabetical index:

Administration of justice, non-interference / Remedy, exhaustion / Judicial authority, exclusive jurisdiction, principle.

Headnotes:

The Constitutional Court lacks the authority to proceed with a petition regarding the constitutionality of a decision of an ordinary court if a review of the legality of either the procedure or the decision of the ordinary court would have to precede such finding.

Summary:

The petitioner filed with the Constitutional Court a petition in which he alleged that various constitutional rights, including the right to personal integrity, the protection of privacy, the right to choose and exercise a profession and the right of access to a court, had been violated by the Slovak Supreme Court in a dispute over the validity of a business contract.

The Constitutional Court dismissed the petition, in part because of a *prima facie* lack of merits of the claim, in part because of a lack of competence to review it. The Constitutional Court held that it was authorised to adjudicate upon petitions filed under Article 130.3 of the Constitution even if they concerned a review of the procedure or decisions of ordinary courts if such procedure or decisions resulted in the violation of constitutionally guaranteed rights of natural and legal persons. Given the independence and institutional separation of constitutional and ordinary courts, however, the Constitutional Court does not have the authority to review the observance of statutory law by the ordinary courts in matters which fall within the exclusive competence of the ordinary courts. It could do so only if the alleged infringement concerned rights for which there was no other means of protection available under the law in force.

Supplementary information:

The Constitutional Court has relied on the same reasoning in a vast number of other decisions, and in the Decision registered as I. ÚS 36/97 it enriched the attending qualification by holding that it also lacked the authority to decide which provision of substantive

law the competent court should take to be determinant, to annul or affirm the affected decision, or to set a particular date by which an ordinary court is obliged to issue a final ruling.

Languages:

Slovak.

Identification: SVK-1997-2-003

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 12.05.1997 / **e)** II. ÚS 28/96 / **f)** Petition from a natural person / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
2.1.1.4.2 **Sources of Constitutional Law** - Categories - Written rules - International instruments - Universal Declaration of Human Rights of 1948.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** - Categories - Written rules - International instruments - International Covenant on Civil and Political Rights of 1966.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
3.19 **General Principles** – Margin of appreciation.
5.1.3 **Fundamental Rights** - General questions - Limits and restrictions.
5.3.20 **Fundamental Rights** - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Court session, public, tape recording, right / International law, status / Procedural ruling / Right to information, condition / Right to information, exception.

Headnotes:

An allegation of a violation of the Universal Declaration of Human Rights cannot be the subject matter of proceedings at the Constitutional Court.

The criteria for the restriction of the right to information acknowledged by the European Convention on Human Rights but not by the Constitution are not to be deemed a source of law in the Slovak Republic, as the Convention is superior to the laws of the Slovak Republic only if it provides for a more extensive protection of rights and freedoms than the relevant national legislation.

Summary:

The petitioner filed a petition with the Constitutional Court alleging that his freedom of speech as well as his right to information under Article 26.1 and 26.2 of the Constitution, Article 19 of the Universal Declaration of Human Rights, Article 19.2 of the International Covenant on Civil and Political Rights and Article 10 ECHR had been violated by a procedural decision of the Supreme Court not to allow audio recordings of the proceedings.

The Constitutional Court found a violation of the relevant provisions of the Constitution, the International Covenant on Civil and Political Rights and the Convention. Before dealing with the merits of the case, the Constitutional Court had to address the objection voiced by the defendant (the Supreme Court) that it lacked the authority to review the contested decision, as it was a procedural decision of an ordinary court adopted in the course of its proceedings. The Constitutional Court held that although it lacked the authority to either remedy deficiencies in the decision-making activities of government authorities or to substitute their omissions with instructions to act in a particular way, it was competent to review whether the constitutionally guaranteed rights were violated or not in the proceedings carried out by the relevant government authorities, including ordinary courts.

Assessing the facts of the case in light of the criteria that the Constitution explicitly lists as admissible for the restriction of the right to information, the Constitutional Court held that even though implemented for a legitimate aim, the ban on audio recordings did not fulfil the “necessary in a democratic society” requirement. It therefore held the contested ban to be in violation of Article 26.4 of the Constitution. With respect to Article 10 ECHR, the Constitutional Court noted that it allowed for more extensive restriction of the right to information than

did the parallel provision of the Constitution. Referring to Article 11 of the Constitution, the Constitutional Court pointed out that any international treaty, including the Convention, was to be deemed superior to national legislation only if offering a more extensive protection of rights and freedoms.

Further, the Constitutional Court noted that the available international standard concerning Article 10 ECHR concerned only the receipt and dissemination of information with respect to judicial proceedings preceding the actual trial, and that there lacked any firmly established opinion as to the extent of the right to receive and impart information with respect to publicly held trials. In this vein, the Constitutional Court stated that national authorities were entitled to freely comment upon the implementation of the Convention on their territory. Therefore, where there was no international standard stemming from the implementation of the Convention that would specify the affected right or freedom, it was the role of the national authorities of the Slovak Republic to specify the conditions under which rights and freedoms contained in the Convention are guaranteed in the Slovak Republic.

Languages:

Slovak.

Identification: SVK-1999-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 11.03.1999 / **e)** Pl. ÚS 15/98 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** - Categories - Written rules - International instruments.
2.1.1.4.3 **Sources of Constitutional Law** - Categories - Written rules - International instruments - European Convention on Human Rights of 1950.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.9 **General Principles** – Rule of law.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.3.20 **Fundamental Rights** - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Election, Parliament, Central Committee, decisions / Election, campaign, access to media / Election, electoral coalition, definition / International law, status.

Headnotes:

The rights and freedoms guaranteed by international treaties on human rights and fundamental freedoms have a supportive relevance, especially with respect to the interpretation of the Constitution.

The Constitution cannot be interpreted in a manner that would result in the violation of an international treaty on human rights as long as the Slovak Republic is a party to such treaty.

Summary:

Through a motion for abstract review, a faction of members of Parliament challenged several provisions of the amendment to the Act on Elections to the National Council of the Slovak Republic, alleging a violation of various constitutional provisions, including freedom of expression, the right of equal access to elected offices, the principle of free political competition and the right of access to a court, as well as Articles 6.1 and 10 ECHR.

The Constitutional Court upheld several of the contested decisions, but held that the limitations imposed upon the access of a political party to judicial proceedings in electoral matters and upon the right of private TV stations to broadcast political campaign advertisements were unconstitutional. Most importantly from the vantage point of the topic of this Special Bulletin, the Constitutional Court reaffirmed one of its early decisions when it stated that international treaties on human rights and fundamental freedoms were to be approached as a source of interpretive support in the judicial application of the Constitution. Moreover, according to the Constitutional Court the Constitution cannot be interpreted in a manner that would result in the violation of an international treaty on human rights if the Slovak Republic was a party to such treaty.

Languages:

Slovak.

Identification: SVK-1999-C-002

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 27.04.1999 / **e)** II. ÚS 4/99 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.9 **General Principles** - Rule of law.
3.10 **General Principles** - Certainty of the law.
5.3.5.1 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty.
5.3.13.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Appeal, extraordinary, exclusion / Court, decision, stability / Decision, final and binding, appeal / *Res iudicata*, exception.

Headnotes:

In light of the principle of legal certainty and the rule of law, it is possible to allow for the submission of appeals against enforceable rulings only in exceptional circumstances and under strictly determined conditions.

The failure of the Supreme Court to observe the statutorily determined conditions in dealing with appeals against enforceable rulings results in the violation of the freedom from unlawful detention or prosecution.

Summary:

The petitioner filed a petition with the Constitutional Court in which he alleged that his freedom from unlawful detention as well as his right of access to a court had been violated when the Supreme Court annulled the decision of the prosecutor to discontinue criminal proceedings instituted against him. Pursuant to the applicable regulations, the Supreme Court was authorised to annul the contested decision only if an appeal had been filed within six months of the contested decision. In the case at hand, however, the competent public prosecutor had filed the appeal only after the above period had expired.

In response to the Constitutional Court's request for submission of an official statement on the petition, the Supreme Court argued that it lacked the authority to comment on any of its decisions and, moreover, could not be made a defendant in the proceedings at the Constitutional Court. The Constitutional Court, however, pointed out that the Constitution did not give the government authorities any competence which they could apply to the detriment of the citizens' rights and freedoms. Therefore, if any agency by means of its action, or failure to act, infringes upon a given right, it performs its competencies in violation of the Constitution and, consequently, the Constitutional Court is competent to review any such issue. In conclusion, the Constitutional Court referred to the standards adopted by the European Court of Human Rights which were applicable to the case at hand, held that the petitioner's freedom from unlawful detention had been violated, and emphasised the obligation of the national authorities concerned to remedy the situation in accordance with its findings.

Languages:

Slovak.

Identification: SVK-2001-2-003

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 12.07.2001 / **e)** ES 3/01 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Admission, prerequisite / Constitutional jurisdiction, subsidiarity / European Court of Human Rights, complaint, proceedings, parallel.

Headnotes:

To proceed upon an application found admissible by the European Court of Human Rights, regardless of the will of those who have exercised their right to file individual complaints as provided for by Article 34 ECHR, could amount to an unacceptable interference with this right.

The relationship between a national constitutional court and the European Court of Human Rights is based on a functional division characterised by the principle of their co-operation, and not competition between the two judicial authorities. To launch parallel proceedings before the Constitutional Court on the basis of a notice by the Cabinet, which is the defendant in the proceedings at the European Court of Human Rights, can serve to weaken the Convention-based protection mechanism.

Summary:

Pursuant to Article 75 of the Act on the Constitutional Court of the Slovak Republic, if the European Court of Human Rights (“European Court of Human Rights”) admits an individual complaint against any decision of a Slovak public authority, and the Slovak Cabinet receives notice of such an admission, it is bound to inform the Constitutional Court, which then proceeds upon the notice as if a constitutional complaint were filed.

The Cabinet informed the Constitutional Court of the admission by the European Court of Human Rights of an application filed by a group of Slovak citizens. The Constitutional Court, however, stayed the proceedings, stating that it lacked competence to proceed upon applications filed by persons other than those who alleged that their own rights were violated. According to the ruling, the applicant's procedural autonomy is a fundamental principle of judicial decision-making and entails the right to abstain from filing a claim as much as to file it.

In addition, Article 34 ECHR precludes the High Contracting Parties from obstructing the exercise of their constituents' right to file individual complaints with the European Court of Human Rights. To proceed upon an application found admissible by the European Court regardless of the will of the applicants could amount under the circumstances to an unacceptable interference with this right and would create the risk of conflict between the subsidiary application of international law and the national rights protection mechanisms.

The relationship between the Constitutional Court and the European Court of Human Rights is, the Court held, based on the principle of cooperation between them, and not on competition. Any ruling by the European Court of Human Rights is binding for all Slovak authorities, regardless of the disposition by the Constitutional Court of the respective claim. The parallel proceedings at the Constitutional Court therefore appear redundant and without legal relevance to the legal situation of the applicants.

The Constitutional Court subsequently followed this decision in three other applications based on different factual but identical legal situations (ES 1/01, ES 5/01, ES 6/01).

Languages:

Slovak.

Slovenia
Constitutional Court

Important decisions

Identification: SLO-1995-C-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 08.06.1995 / **e)** Up-13/94 / **f)** / **g)** *Odločbe in sklepi ustavnega sodišča* (Official Digest), IV/2, 128 / **h)**.

Keywords of the systematic thesaurus:

1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
1.4.12 **Constitutional Justice** – Procedure – Special procedures.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Languages.
5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.

Keywords of the alphabetical index:

Law, former federal, applicability / Evidence, free consideration, principle / Mental disturbance, diminished responsibility.

Headnotes:

The Constitutional Court held that the Court is obliged to call a witness with expertise in psychiatry if the defendant proposes expert testimony to describe the circumstances indicating the probability of the existence of a mental disease, temporary mental disorder or mental retardation, at the time the criminal offence was committed. The failure to hear the proposed expert witness even though the defendant proved the probability of his insanity at the time of the offence, is unconstitutional inasmuch it violates the defendant's right to produce evidence in favour of the defendant, guaranteed by Article 29.3 of the Constitution. The same right is also violated when the Court fails to examine the alibi, which the defendant relied on during the course of investigation, in the objection against the indictment and in the trial, and therefore fails to form an opinion of such a defence in its reasons for judgment.

Summary:

In his constitutional complaint, the complainant challenged the judgment of the Supreme Court, referring to the judgment of the High Court of Maribor and the judgment of the Court of Murska Sobota. He stated that:

1. the law pursuant to which he was convicted was not valid as it was enacted in the former Yugoslavia;

2. he was not granted the opportunity to be heard in the Hungarian language;

3. the Court failed to allow him to be represented by his attorney;

4. the Court failed to hear the witness B.B. called for the defendant;

5. the Court acted illegally since it did not allow the defendant to be examined by the psychiatrist;

6. on 2 March 1993, when the criminal offence is alleged to have been committed, the defendant was in Z. He proposed the setting aside of the challenged judgment and a retrial.

The Court set the challenged judgments aside and returned the case to the circuit Court for retrial. It reasoned as follows.

According to the principle of free consideration of evidence, the Court of criminal jurisdiction has the discretion to decide which evidence to produce and how to consider its authenticity. In doing so, the Court has to comply with the guiding maxim under which it is obliged to ensure that the case is thoroughly clarified and that the truth is established. However, it may omit evidence that might delay the proceedings or is irrelevant for the clarification of the case (Article 292.2 of the 1977 Code of Criminal Procedure (1977 ZKP), and Article 299.2 of the Code of Criminal Procedure now in force (ZKP)). The court's concern that proceedings be conducted without unnecessary delay does not imply any disrespect of the constitutional rights of the complainant. Namely, under the provisions of Article 15.1 of the Constitution, the courts are bound to apply directly those provisions of the Constitution referring to human rights and fundamental liberties. One of the rights granted to the defendant by the Constitution is the right to produce evidence in his favour (Article 29.3 of the Constitu-

tion). The Court is obliged to comply with the defendant's proposals on evidence which, according to his allegations, confirm or deny the existence of the facts of legal relevance, i.e. facts upon which the immediate application of the substantive and procedural criminal law is dependent.

One such fact concerns the issue of the defendant's criminal responsibility. In respect of this element of criminal liability, the Code of Criminal Procedure introduces the presumption of responsibility. Thereby, the Code also determines the degree of probability which the defendant has to prove in order to achieve the orders for the examination by a psychiatrist. Pursuant to Article 265.1 of the Code (and the identical contents of Article 258.1 of the 1977 Code), the proof of the probability of irresponsibility or diminished responsibility is a sufficient basis for the Court to be bound to examine the existence of this element of crime by the calling of an expert witness.

The Code of Criminal Procedure provides for different degrees of probability. The police are authorised to carry out certain acts pursuant to Article 151 of the Code (Article 148 of 1977 Code) even if there is the slightest suspicion that a criminal offence has been committed. The investigation may be instituted if a reasonable suspicion exists that a certain person has committed a criminal offence (Article 167.1 of the Code; Article 157.1 of the 1977 Code). The indictment may be filed if the defendant is reasonably suspected of having committed the indicted criminal offence (*argumentum a contrario* with respect to Article 277 of the Code; Article 270 of the 1977 Code). In the specification of the judgment the facts have to be established completely and correctly (*argumentum a contrario* with respect to Article 373 of the Code; Article 366 of the 1977 Code).

However, the term 'suspicion' denotes one of the lowest degrees of probability or doubt which the circumstances of the case have to support before the Court is obliged to call an expert psychiatrist as a witness. In the opinion of the Constitutional Court, the complainant has already fulfilled this requirement. After filing the indictment he asked the Court to allow him to be examined by the psychiatrist. He stated that he had already been hospitalised twice in the psychiatric clinic in V., that as a minor he had been subjected to electro-convulsive therapy, that he had not served in the army and that he had suffered from suicidal thoughts quite frequently in the past. Hence, even before the trial, the complainant proposed the hearing of the expert psychiatrist and stated the circumstances with respect to which the Court should have acceded to that proposal on evidence. However, the Court not only rejected the production of such evidence, but also entirely omitted any reference to it. Such decision of the Court violates the right of defendant to produce evidence in his favour, as laid down by Article 29.3 of the Constitution.

The defendant also requested the calling of a witness with expertise in psychiatry. There he stated that the Court failed to call an expert neuro-psychiatrist even though he suffered neuro-psychiatric disorders. He restated the fact that, as a minor, he had been subjected to electric shock treatment. He also described the conditions in which he had served his previous sentences of imprisonment: he alleged that was kept in solitary confinement for months, and exposed to psychological torture. The appellate Court, taking into account the health of the defendant, reduced the sentence, yet it did not say anything about his proposal with respect to the introduction of evidence.

Since the violation of the defendant's constitutional right was not remedied by the judgment delivered at second instance, though this should have been the case, the Constitutional Court concluded that the defendant's right to produce evidence in his favour was also violated by that judgment.

The Court is obliged to examine thoroughly the existence of an alibi, if such defence is proved at least to be feasible (cf. Decision no. Up-34/93, of 8 June 1995). Therefore, the complainant correctly asserted that the Court also violated his right to produce evidence in his favour by the failure to investigate his defence of having an alibi. At the trial hearing the defendant stated that the time he had spent in Z. was evident from his passport. In his objection against the indictment, he reasserted that he possessed evidence proving his stay in Z. at the time of the explosion. At the trial he again denied having had any involvement with the explosion of the hand grenade at the bus station in V.v.

Hence, the defendant was not able to present his passport because he was kept in detention during the whole course of criminal proceedings. If the stamps in the passport had confirmed the defendant's assertions, he could have been acquitted for one of the indicted criminal offences. Therefore, the Court of first instance should have procured the defendant's passport and examined the asserted alibi. Since it failed to act in that manner, the defendant's right to produce evidence in his favour was violated.

Although the defendant did not repeat the proposal for the production of proof of his alibi in the complaint, the Constitutional Court had to remedy the violation of the Court of first instance by virtue of its office (Article 376.1 of the 1977 Code of Criminal Procedure). The Court of first instance did not refer to the

alibi in the reasons of the judgment, even though the complainant drew attention to this defence on many occasions. Thereby, the Court of first instance violated Articles 292.5 and 357.7 of the 1977 Code in what represents an essential violation of the rules of criminal procedure pursuant to Article 364.1.11 of the 1977 Code. Since the Court of second instance also failed to remedy this violation, although it could have done so, the Constitutional Court found that the defendant's right to produce evidence in his own favour was also violated by that judgment.

In deciding on the petition for special review of judgment, the Supreme Court could only examine those violations asserted (Article 429 relating to Article 420.1 of the 1977 Code). Since the complainant had only alleged violations in the establishment of facts and not the violation of his right to produce evidence in his favour, the Supreme Court could not remedy that latter violation. However, the complainant alleged this violation in his constitutional complaint. Establishing that the case did involve a flagrant violation of a constitutional right, the Constitutional Court decided to examine, even though the defendant had not exhausted all the complaint legal remedies available regarding that violation. The Court's conduct was further justified by the fact that it was a criminal case which was the subject of the judicial examination. The value of the doctrine of finality is diminished to a far lesser extent by interventions into final judgments passed in criminal cases than in civil or administrative cases. The Court applied *mutatis mutandis* the provisions of Article 51.2 and of Article 52.3 of the Constitutional Court Act (ZUstS), which in special cases of flagrant violations of human rights enable the Court to consider constitutional complaints, notwithstanding the absence of certain procedural preconditions. Such an extensive application of those provisions of the Constitutional Court Act in the review of the first constitutional complaints is justified since, at the time when the use of a constitutional complaint is only gradually gaining recognition as a new legal remedy for the protection of constitutional rights, the potential parties to proceedings before the Constitutional Court are not sufficiently aware of rulings on the constitutional and statutory preconditions for the lodging of a complaint. However, at a later time, the Constitutional Court will probably have to deliver a more definitive opinion on this subject. These exceptional decisions are further justified by the fact that the scope of jurisdiction in proceedings before ordinary courts and before the Constitutional Courts cannot be identical: under the provision of Article 1 of the Constitutional Court Act, the Constitutional Court is specifically obliged to exercise the protection of human rights and fundamental liberties which cannot always be assured given the framework of existing procedural rules which apply to the administration of justice by other tribunals.

Supplementary information:

Legal norms referred to:

- Articles 15, 29 and 62 of the Constitution;
- Articles 151, 157, 167, 258, 265, 270, 292, 299, 357, 364, 366, 373, 376, 420 and 429 of the Code of Criminal Procedure (ZKP);
- Articles 51.2 and 52.3 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to Case no. Up-34/93 (OdlUS IV, 129) of 08.06.1995.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1999-C-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25.11.1999 / **e)** U-I-49/98 / **f)** / **g)** *Uradni list RS* (Official Gazette), 101/99; *Odločbe in sklepi ustavnega sodišča* (Official Digest), VIII/2, 266 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Employment, contract, termination, conditions / Employment, fulfilment of conditions for full old age

pension / ILO Convention no. 111 / ILO Convention no. 158.

Headnotes:

The Court struck down Article 101 of the Labour Relations Act, which provided that the employment rights of workers are terminated *ex lege* when they fulfil the conditions for obtaining the right to a full old-age pension (males after 40 years, females after 35 years of employment). The article was struck down since it was held that it discriminated against women.

Summary:

The petitioner, whose right to work had ceased when she obtained the right to a full old-age pension, did not get consent from the employer to continue her work. She asserted that Article 101 of the Labour Relations Act discriminated between men and women, thus violating Article 14 of the Constitution. In her opinion, women were restricted from continuing in work after 35 years of working and paying national insurance. Whether women were allowed to stay on at work was, according to the petitioner, left to the good will of their employers.

The Court found the challenged article inconsistent with the Constitution and ordered the National Assembly to remedy the established unconstitutionality within a time limit of one year from the publication of its decision in the Official Gazette.

The Court held that the reasons that justify different regulation in determining the conditions for acquiring an old-age pension cannot be equally considered when it comes to determining the reasons for the termination of employment rights.

In its reasoning, the Court referred also to Case no. C-137/94 (of the Court of Justice of the European Communities) dated 19 October 1995. In that case, the Court of Justice had decided that Article 7 of Directive 79/7/EEC does not allow those States which have determined in conformity with this provision different retirement ages for men and women to apply such differentiation also to other areas.

Supplementary information:

Legal norms referred to:

- Articles 14, 49, 50, 66 and 87 of the Constitution;
- Article 4 of the Convention of the International Labour Organisation no. 158 on Termination of a Labour Relation at Request of the Employer;
- Article 4 of the Convention of the International Labour Organisation no. 111 on Discrimination Concerning Employment and Profession;
- Articles 39 and 262 of the Pension and Disability Act (ZPIZ);
- Article 48 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its Cases nos. U-I-32/94 (OdlU III, 82) of 30.06.1994, U-I-22/94 (OdlUS IV, 52) of 25.05.1995, *Bulletin* 1995/2 [SLO-1995-2-007] and U-I-298/96 of 11.11.1999, *Bulletin* 1999/3 [SLO-1999-3-007].

Languages:

Slovene.

Identification: SLO-2000-C-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.06.2000 / **e)** Up-132/2000 / **f)** / **g)** *Uradni list RS* (Official Gazette), 81/2000; *Odločbe in sklepi ustavnega sodišča* (Official Digest), IX, 2000 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Price, gas, supply / Price list, legal nature.

Headnotes:

The Constitutional Court granted a petition setting aside a Supreme Court order, for it held, in contrast with the Supreme Court, that the challenged price lists did not contain any provisions relating to the establishment and calculation of prices. Thus the lists were too abstract and general legal rules to be considered as regulations.

Summary:

The Constitutional Court set aside a Supreme Court order and returned the case to the Supreme Court for further adjudication. By the challenged order, the Supreme Court set aside the Administrative Court order temporary suspending the application of the price list for certain tariff categories of gas and the price list for certain tariff categories of heating fuel. The complainant asserted that, in violation of Article 23 of the Constitution ensuring the right to judicial protection, the Supreme Court's position that the disputed price lists were regulations of a general character was erroneous. For this purpose the complainant referred to Constitutional Court Order no. U-I-54/00 dated 23 March 2000.

The Constitutional Court granted the constitutional complaint. It held that the Supreme Court's position was erroneous, for the challenged price lists do not contain any provisions for establishing and calculating prices, which would make these two lists too abstract and general to be thought of as regulations. Thus they are merely legislative acts by which prices of heating fuel and gas are determined.

Supplementary information:

Legal norms referred to:

- Article 23 of the Constitution;
- Article 91 of the Energy Act (EZ);
- Article 59.1 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its Case no. U-I-54/00 of 23.03.2000.

In a similar Case, no. Up-209 dated 13.07.2000, the Constitutional Court set aside a Supreme Court judgment and remanded the case to the Supreme Court for further adjudication. In this case the Administrative Court temporarily suspended the price list for special tariff groups of heating fuel.

Languages:

Slovene.

Identification: SLO-2002-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.05.2001 / **e)** Up-232/2000 / **f)** / **g)** *Uradni list RS* (Official Gazette), 15/01 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
3.22 **General Principles** – Prohibition of arbitrariness.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Inheritance / Parent, right / Parent, duty / Legal remedy, revision, situation, factual.

Headnotes:

In the framework of revision proceedings, the Supreme Court may only evaluate substantive and procedural legal issues, and may not make an assessment of the facts. By interfering with the factual situation as ascertained by the courts of first and second instances, the Supreme Court exceeded its authority pursuant to the relevant provisions of the Civil Procedure Act. It thus violated the complainants' right to the equal protection of rights determined in Article 22 of the Constitution.

Summary:

In this case, the Constitutional Court set aside the judgment and order of the Supreme Court and returned the case to the Supreme Court for new adjudication.

The case concerned a claim for the rescission of an agreement on the dissolution of joint property, made by the plaintiff and her ex-husband (who died during

the proceedings and was subsequently substituted by the complainants). Dismissing the claim, the Court of first instance held that:

1. the case did not concern a fixed contract that could be rescinded without giving an additional time-limit for performance; and

2. the matter did not involve a situation in which the debtor's activity implied that he would not perform the agreement within the additional time limit.

The appellate Court dismissed the plaintiff's appeal. The Supreme Court, in deciding on the request for revision filed by the plaintiff, changed the first and second instance judgments and rescinded the agreement on the dissolution of joint property. It held that, from the very beginning, the debtor had not intended to perform the agreement since he had offered the plaintiff only co-owned property, which was not sufficient to fulfil his contractual obligations. In order to do that, he would have needed to offer her full ownership of the property. It was not enough that she just took the keys of the property, which, according to the Supreme Court, only meant that she expected the negotiations to continue. Thus, given the intended non-performance by the defendant, the plaintiff did not need to give the defendant an additional time-limit for performance.

In their constitutional complaint, the complainants asserted that the Supreme Court had violated their right to the equal protection of rights determined in Article 22 of the Constitution. By establishing a violation of substantive law, it in fact changed the facts of the case, which the Supreme Court cannot do according to revision proceedings set out in the Civil Procedure Act.

The Constitutional Court granted the petition and set aside the challenged judgment.

Supplementary information:

Legal norms referred to:

- Articles 22, 23, 33, 53.3, 56.1 and 157 of the Constitution;
- Articles 358 and 370 of the Civil Procedure Act (ZPP);
- Articles 10, 99, 127 and 308 of the Code of Obligations Act (ZOR);
- Article 12 of the Convention on the Rights of the Child;
- Article 59.1 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its Cases nos. Up-369 of 21.01.1998 (OdlUS VII, 116) and Up-73/97 of 07.12.2000.

Languages:

Slovene.

South Africa
Constitutional Court

Important decisions

Identification: RSA-2001-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 01.12.2000 / **e)** CCT 25/2000 / **f)** Allan Aubrey Boesak v. The State / **g)** 2001 (1) *South African Law Reports* (Official Gazette) 912 (CC) / **h)** 2001 (1) *Butterworths Constitutional Law Reports* 36 (CC); 2001 (1) *South African Criminal Law Reports* 1 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.

Keywords of the alphabetical index:

Appeal, jurisdiction / Constitutional matter / Right to silence, negative inference / Evidence, circumstantial.

Headnotes:

The Constitutional Court is the highest court in "constitutional matters", while the Supreme Court of Appeal (SCA) is the highest court in all other matters. Though not decisive, a "constitutional matter" is a threshold requirement for leave to appeal to the Constitutional Court to be granted. An assertion that the SCA was merely incorrect on the facts does not raise a "constitutional matter".

Summary:

The applicant was convicted on one count of fraud and three counts of theft in the High Court and sentenced to six years' imprisonment. On appeal, the SCA set aside one count of theft, altered the amount involved in another count of theft and reduced the sentence to three years' imprisonment. The applicant then applied for special leave to appeal to the Constitutional Court, alleging that his conviction violated his constitutional rights not to be deprived of freedom and security without just cause (Section 12.1.a of the Constitution) and to be presumed innocent, to remain silent and not to testify (Section 35.3.h of the Constitution).

In terms of Sections 167.3.a and 168.3 of the Constitution, the Constitutional Court is the highest court in "constitutional matters", while the SCA is the highest court of appeal in all other matters. Therefore, in deciding whether leave to appeal should be granted from the SCA to the Constitutional Court, a threshold question was whether the case raised "constitutional matters". Section 167.3.c of the Constitution leaves it to the Court to determine whether a matter is a "constitutional matter".

Deputy President Langa, writing for a unanimous Court, drew some guidelines in this regard. If the SCA develops, or fails to develop, or applies a common-law rule inconsistently with rights or principles in the Constitution, that may raise a "constitutional matter". But a challenge to a decision of the SCA solely on the basis that it is wrong on the facts is not a "constitutional matter". To hold otherwise would be to make all criminal cases "constitutional matters", making the constitutional differentiation between the Constitutional Court and the SCA illusory.

The Court applied these principles to the case. On two of the counts, the SCA had relied on the contents of a letter (purportedly written and signed by the applicant) to the donor.

Applicant's counsel first argued that the authenticity of the letter had not been proved and therefore the SCA ought to have had a reasonable doubt as to his guilt. Accordingly, it was contended that the applicant's conviction violated his constitutional right to be presumed innocent (Section 35.3.h of the Constitution). The Court noted that it was not argued that the SCA had applied some standard other than the usual criminal *onus*. The question whether a court ought to have had reasonable doubt is a factual matter and, as such, does not raise a "constitutional matter".

Applicant's counsel further noted that the SCA had given significant weight to their failure to challenge the authenticity of the letter and, moreover, drawn inferences from the applicant's failure to testify on the matter. This, counsel argued, violated the applicant's right to silence (Section 35.3.h of the Constitution). The Court held that in the absence of other evidence a court may rely upon circumstantial evidence. This is precisely what the SCA did in this case. Whether the evidence as a whole (including the negative inference) is sufficient, is a factual question and not a "constitutional matter".

With regard to the negative inference drawn from applicant's silence, the Court held that the fact that an accused is under no obligation to testify does not mean that no consequences attach to the decision to remain silent. If there is evidence calling for an answer which the accused chooses not to explain, a court is entitled to conclude that the unchallenged evidence is sufficient. Whether such a conclusion is justified depends on the facts of the case and is not a "constitutional matter".

In relation to the further charge of theft, it was first argued that as the evidence did not support the SCA's conclusion, the applicant's constitutional right to be presumed innocent was violated. The argument was not that the SCA had misapplied or misinterpreted the criminal *onus*, but only that it had erred in its assessment of the evidence. The Court dismissed this as an attempt to clothe a non-constitutional challenge in constitutional garb. A final argument was that the applicant's conviction deprived him of freedom without just cause (Section 12.1.a of the Constitution). The Court held that this right contains both a substantive and a procedural element. On a substantive level, it was universally accepted that theft of a serious nature was a sufficient reason to deprive accused of their liberty. On a procedural level, no unfairness in the trial had been established. Accordingly, the Court concluded that there was substantive and procedural just cause for the applicant's imprisonment.

The application for leave to appeal was refused.

Cross-references:

Leave to appeal: *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others,* 2000 (2) *SA* 837 (CC), 2000 (5) *BCLR* 465 (CC).

Presumption of innocence: *S v. Manamela and Another (Director-General of Justice Intervening),* 2000 (3) *SA* 1 (CC), 2000 (5) *BCLR* 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-005]; *S v. Baloyi (Minister of Justice and Another Intervening),* 2000 (2) *SA* 425 (CC), 2000 (1) *BCLR* 86 (CC), *Bulletin* 1999/3 [RSA-1999-3-011]; *Scagell and Others v. Attorney General, Western Cape and Others,* 1997 (2) *SA* 368 (CC), 1996 (11) *BCLR* 1446 (CC), *Bulletin* 1996/3 [RSA-1996-3-017]; *S v. Bhulwana; S v. Gwadiso,* 1996 (1) *SA* 388 (CC), 1995 (12) *BCLR* 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008].

Right to silence: *Osman and Another v. Attorney-General, Transvaal,* 1998 (4) *SA* 1224 (CC), 1998 (11) *BCLR* 1362 (CC), *Bulletin* 1998/3 [RSA-1998-3-008].

Deprivation of Freedom: *S v. Coetzee and Others,* 1997 (3) *SA* 527 (CC), 1997 (4) *BCLR* 437 (CC), *Bulletin* 1997/1 [RSA-1997-1-002]; *Bernstein and Others v. Bester and Others NNO,* 1996 (2) *SA* 751 (CC), 1996 (4) *BCLR* 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002]; *De Lange v. Smuts NO and Others,* 1998 (3) *SA* 785 (CC), 1998 (7) *BCLR* 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004].

Languages:

English.

Sweden
Supreme Court

The relations between the constitutional courts and the other national courts, including the influence in this area of the action of the European courts

In Sweden there are no specific constitutional courts. A Council on Legislation, comprising justices of the Supreme Court and the Supreme Administrative Court, normally pronounce an opinion on draft legislation, concerning *inter alia* the way in which the draft law relates to the fundamental laws.

If a court or other public body finds that a provision conflicts with a rule of fundamental law or finds that a procedure laid down in a fundamental law has been disregarded in any important respect when the provision was made, the provision may, according to Chapter 11 Article 14 of the Instrument of Government, not be applied. However, the provision has been approved by the Parliament or by the Government, it shall be waived only if the error is manifest.

Pursuant to these rules, constitutional questions may arise in any court.

While constitutional questions are not so often handled within the courts, questions connected with the European Convention on Human Rights (ECHR) are more frequent. Parties often invoke this Convention, especially in criminal cases. The European Convention on Human Rights is in Sweden not a fundamental but an ordinary law. However, in practice it can be said that the Convention is often regarded as superior to other laws.

Questions connected with the European Convention on Human Rights may arise in any court and in any public body. The Supreme Court and the Supreme Administrative Court often consider such questions, trying to follow the case law from the European Court of Human Rights. This case law is subsequently published in Swedish and is in practice not questioned. There are several leading cases from the Supreme Court, mainly regarding the right to a fair trial according to Article 6 ECHR.

In this respect, the Convention and the case-law of the European Court of Human Rights has been of great importance and has changed Swedish practice especially as regards the obligation for the courts to arrange for oral hearings in certain cases where oral hearings previously seldom took place in practice. Some examples from the Supreme Court are: compulsory sale (NJA 1991, p. 186), different executive cases (NJA 1992, p. 362, p. 513, 2000, p. 111), authorisation of a trustee (NJA 1993, p. 109), declaring somebody bankrupt (NJA 1999, p. 113), civil cases concerning petty values (NJA 1994, p. 287), fee for official receivers in bankruptcy cases (NJA 1997, p. 579), termination of tenancy agreements (NJA 1997, p. 597) and claims on persons during bankruptcy (NJA 1998, p. 232 and 1999, p. 544). Such cases have been considered to concern civil rights and obligations.

Evidence before the police of persons who are abroad and not able to appear before a Swedish court have in accordance with the case-law of the European Court of Human Rights in some cases been considered to be insufficient evidence in criminal cases (NJA 1991, p. 512 I and II, 1992, p. 532).

The case-law of the European Court of Human Rights has been considered in some cases concerning the competence of judges (eg NJA 1998, p. 82).

The principle of *"ne bis in idem"* from Article 4 Protocol 7 ECHR has been considered in NJA 2000, p. 622, where a person, prior to being sentenced for tax fraud, had got an administrative sanction. In this case, the Supreme Court held that the said principle had not been set aside, since the prerequisites of tax fraud are not the same as those which regulate administrative sanctions.

The Court of Justice of the European Communities has so far been of much less practical significance for the Supreme Court of Sweden, though its case law is of course carefully studied. Questions for preliminary rulings have been submitted only twice.

If the case law of the European Court of Human Rights or the Court of Justice of the European Communities were to conflict with a rule of Swedish fundamental law, in a particular case before a Swedish court, a difficult situation would occur. So far we have no experience of this sort of conflict, though the problem has been discussed in legal literature.

Switzerland
Federal Court

Important decisions

Identification: SUI-1984-C-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 09.03.1984 / **e)** P.1317/1982 / **f)** Dr. X v. Canton of Zurich and Cantonal Court of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 110 Ia 1 / **h)** *Journal des Tribunaux* 1985 I 469.

Keywords of the systematic thesaurus:

1.4.6.2 **Constitutional Justice** – Procedure – Grounds – Form.

Keywords of the alphabetical index:

Public law appeal, grounds / Law, application, complaint / *Iura novit curia*, application.

Headnotes:

In public-law appeals, the Federal Court only examines complaints that are sufficiently argued; requirements relating to the grounds of appeals based on violation of constitutional rights (Article 90.1.b of the Federal Judicature Act).

Summary:

Under Article 90.1.b of the Federal Judicature Act, the notice of appeal must set out the essential facts and a brief account of the constitutional rights and legal principles that have been violated, specifying where the violation has occurred. In the public-law appeal procedure, the Federal Court only examines complaints set forth in a clear and detailed fashion and, as far as possible, with documentary support. Applicants must indicate what individual constitutional rights, written and unwritten, they consider to have been breached. For example, if an applicant claims that a cantonal authority has violated Article 4 of the Federal Constitution by applying cantonal law, it is not sufficient simply to assert that the contested decision was arbitrary. When the complaint concerns the application of the law, the applicant must also cite, with reasons, the legal rule that it is claimed has been incorrectly applied or should not have been applied and, relying on the conclusion that is being challenged, show how the decision is manifestly unjustifiable, is clearly and manifestly incompatible with the state of affairs, flagrantly breaches an undisputed legal rule or principle or is blatantly inconsistent with the sense of justice. The principle whereby the courts must apply the law *(iura novit curia)* does not therefore apply in public-law appeals for violation of constitutional rights. The court confines itself exclusively to an examination of complaints for which sufficient legal grounds are presented.

Languages:

German.

Identification: SUI-1989-C-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 22.03.1989 / **e)** 1P.76/1989 / **f)** Jean and Barkev Magharian v. Prosecutor of the Sopraceneri Court and Criminal Appeals Division of the Ticino Cantonal Appeal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 115 Ia 293 / **h)** *Journal des Tribunaux* 1991 IV 108; *La Semaine judiciaire* 1989 439.

Keywords of the systematic thesaurus:

2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.25 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to be informed about the reasons of detention.

Keywords of the alphabetical index:

Detention pending trial, extension, demand / Fundamental right, more favourable protection.

Headnotes:

Personal freedom; extension of remand in custody.

Right to consult the case file; Article 4 of the Federal Constitution and Article 5.4 ECHR.

Relationship between the fundamental rights embodied in the Constitution and the principles enshrined in the European Convention on Human Rights.

Summary:

The applicants complained about the proceedings which culminated in the contested decision. They considered that they did not satisfy the requirements of Article 4 of the Federal Constitution and Article 5.4 ECHR on the right to consult the record of proceedings, prepare their own defence and therefore respond effectively to the prosecutor's application for an extension of their remand in custody.

With regard to the principles instituted by the European Convention on Human Rights should be noted, firstly, that when these principles do not offer remand prisoners greater protection than that already afforded by domestic law they are still taken into consideration in interpreting and applying the fundamental rights embodied in the Constitution, in so far as these principles give these rights practical form, and, secondly, that the Federal Court must take account of the relevant case-law of the Convention bodies.

Languages:

Italian.

Identification: SUI-1991-C-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 31.05.1991 / **e)** 2P.156/1990 / **f)** Y and others v. Canton of Basel City and the Basel City Appeal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 Ia 262 / **h)** *Journal des Tribunaux* 1993 I 98; *La Semaine judiciaire* 1992 71.

Keywords of the systematic thesaurus:

1.1 **Constitutional Justice** – Constitutional jurisdiction.
1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
3.6 **General Principles** – 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:

Cantonal law, constitutionality, examination / Constitutional control, federal entity, exception.

Headnotes:

Obligation of cantonal courts to examine the constitutionality of applicable cantonal legislation.

Summary:

The Federal Court has already stated frequently that the cantonal courts have an obligation, stemming directly from the Federal Constitution, to examine the constitutionality of cantonal legislation that they are required to apply. From this derives in principle an obligation not to apply legal provisions in particular cases, when these have been recognised to be incompatible with the Constitution, since otherwise the principle of the primacy of federal constitutional law would be breached.

However, there are certain particular exceptions. For example, cantonal provisions that are incompatible with the Constitution must be applied if the setting aside of a decision would inevitably entail still more serious unequal treatment, because the administrative authorities could not restrict the effects of this setting aside to a tolerable level and because, for example, in many cases it could no longer collect taxes until parliament had enacted fresh legislation.

Languages:

German.

Identification: SUI-1991-C-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 15.11.1991 / **e)** 2A.120/1991 / **f)** Federal tax authorities v. heirs of X and Administrative Court of the Canton of Lucerne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 Ib 367 / **h)** *Journal des Tribunaux* 1993 I 273; *Archives de droit fiscal suisse* 61 779; *Der Steuerentscheid* 1992 B 101.6 4; *Revue fiscale* 47 1992 390; *La Semaine judiciaire* 1992 448; *Revue de droit administratif et de droit fiscal* 1992 324; *Europäische Grundrechte-Zeitschrift* 1992 416.

Keywords of the systematic thesaurus:

1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.8 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, fine, heir, liability / Criminal law, fiscal / International law, domestic law, relationship.

Headnotes:

Article 114bis.3 of the Federal Constitution (under which the Federal Court applies federal legislation and treaties approved by the Federal Assembly), Article 130.1 of the decree of the Federal Council on the levying of a direct federal tax (AIFD), Article 6.2 ECHR; fiscal criminal law; liability of heirs; presumption of innocence; examination of federal legislation. Examination of the constitutionality of provisions of the AIFD is excluded by Article 114bis.3 of the Federal Constitution (recital 1).

Is it possible to examine the provisions of the AIFD in terms of their compatibility with the European Convention on Human Rights (recital 2)?

The heirs' liability for taxes withheld and fines incurred by the deceased – as stipulated in Article 130.1 of the AIFD – is not incompatible with the presumption of innocence in Article 6.2 ECHR (recitals 3-5).

Summary:

X died on 18 October 1988. His legal heirs discovered that he had not declared the whole of his fortune and income to the tax authorities. They informed the tax authorities of this and the latter commenced proceedings for tax evasion and to secure an order for the heirs to pay the taxes withheld and a fine.

The heirs applied to the Cantonal Administrative Court, which set aside the tax fine. The Federal Court admitted the federal tax authorities' appeal and confirmed the heirs' obligation to pay the missing taxes and the fine.

The heirs did not dispute their obligation to pay the taxes withheld by the deceased. Their action was solely concerned with whether the provision of the AIFD that required the heirs jointly to pay the fine incurred by the deceased, in proportion to their share of the estate and irrespective of any fault on their part, infringed the principle of the presumption of innocence enshrined in Article 6.2 ECHR.

According to the Federal Constitution, the Federal Court shall apply federal legislation and treaties approved by the Federal Assembly. The European Convention on Human Rights is also part of Swiss law, since the Federal Assembly has approved Swiss accession to this treaty. Like all other authorities, the Federal Court is thus bound by this Convention.

The Convention has a higher status than a simple federal law. Under public international law (Vienna Convention on the Law of Treaties of 23 May 1969, to which Switzerland is a party), international law in conventions takes precedence over domestic law. The Federal Constitution does not prohibit the Federal Court from examining the compatibility of federal legislation with the Convention, it only prohibits it from annulling or modifying such

legislation. On the other hand, it may refrain from applying it in a particular case, if this infringes international law and thus exposes Switzerland to a finding that it has violated the Convention. In deciding whether a provision of Swiss federal law is compatible with the European Convention on Human Rights the Federal Court must first establish whether such a provision can be interpreted in a way that is compatible with the Convention.

In this case, the provision of the AIFD making the heirs liable to pay the fine incurred because of infringements of ordinary tax law previously committed by the deceased was not incompatible with the European Convention on Human Rights. Although the heirs were not liable for fines incurred by the deceased under ordinary criminal law, this did not apply in the tax field, because of the particular features of the latter (the heirs must not benefit in any way from a more favourable situation than that of the deceased from whom they inherited, and the heirs could in any case repudiate their inheritance). The heirs' presumption of innocence was in no way infringed.

The fine was not based on any fault of theirs, only on that of the deceased. Besides, in this particular case, the fine had been reduced to a quarter because the heirs had spontaneously informed the tax authorities of the withholding of tax committed by the deceased. The purpose of such a reduction was to prevent the heirs from being treated less well than the deceased who, in his lifetime, could have informed the tax authorities of the withholding of tax and thus secured for himself a reduction in the fine.

Languages:

German.

Identification: SUI-1993-C-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 30.06.1993 / **e)** 1P.667/1992 / **f)** D and others v. Grand Council of the Canton of Valais / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 119 Ia 321 / **h)** *Journal des Tribunaux* 1995 I 511; *La Semaine judiciaire* 1994 49; *Revue Universelle des Droits de l'Homme* 1994 204.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
1.4.7.1 **Constitutional Justice** – Procedure – Documents lodged by the parties – Time-limits.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Land, use, plan, legal protection.

Headnotes:

Admissibility of a public-law appeal against an order of general application.

Federal Court's right of examination in a so-called abstract review of legislation.

Summary:

The Federal Court examines of its own motion and with full jurisdiction to consider all aspects of the case the admissibility of appeals filed with it.

a. Public law appeals against orders of general application are subject to the requirement that all cantonal legal remedies have been exhausted (Article 86 of the Federal Judicature Act (OJ). Since the law of the Canton of Valais does not provide for any body to review the constitutionality of cantonal legislation *in abstracto*, direct applications to the Federal Court are admissible.

b. Anyone to whom allegedly unconstitutional provisions might apply one day is entitled to appeal against an order of general application. It is therefore sufficient for an applicant to establish a virtual infringement of his or her legally protected interests, on condition however that there is a certain likelihood that such an infringement could occur in practice (Article 88 OJ).

The three applicants resided in the Canton of Valais. They were also owners of property in this canton and might therefore be affected by the adoption of a land-use plan, a land improvement scheme or even a decision concerning the location of a waste disposal or treatment facility. They were thus entitled to challenge the new regulations on grounds that in the proceedings leading to the adoption of the development measures concerned, in which they could participate, they would be deprived of the safeguards laid down in constitutional law or international conventions.

Under Article 89.1 OJ, the appeal must be filed with the Federal Court within thirty days of the communication, according to cantonal law, of the order or decision concerned.

When the public-law appeal concerns an order of general application that has to be submitted to a referendum, the thirty-day period provided for under Article 89.1 OJ does not start with the publication of the text for the purposes of a referendum or the publication of the result of the referendum. Under normal circumstances, the relevant date is the one on which the relevant authorities publish the order stating that the result of the referendum is final because it has not been challenged or any challenges have been withdrawn.

When it is required to rule on a public-law appeal against an order of general application, the Federal Court is free to consider the order's compatibility with federal and cantonal constitutional law and any similar safeguards embodied in Article 6.1 ECHR. However, it only annuls the order if the latter cannot be interpreted in any respect as being compatible with constitutional law. In the so-called abstract review of legislation procedure, it is rarely possible to foresee, from the outset, all the effects of the application of a legal text, even if it sufficiently precisely worded to offer the implementing authorities scarcely any margin of discretion. If a law or regulation appears to be compatible with the Constitution, having regard to the normal circumstances that the enacting authority must take into account, the constitutional court will not annul it solely because it cannot be ruled out that it might be applied unconstitutionally in particular cases. It will only be annulled if the prospect of subsequent practical review does not offer sufficient safeguards to those at whom the particular measure is aimed. The rejection of a complaint that a provision is unconstitutional as part of a direct review of that provision does not prevent the applicant from lodging another complaint against the same provision when it is applied in a particular case. To that extent, the decision handed down under the abstract review procedure is only binding on the parties. Nevertheless, those who enact legislation or issue regulations still have a duty to ensure that, as far as possible, there is no subsequent violation of fundamental rights. Account must therefore be taken of the circumstances in which the relevant rules will be applied and, in particular, the bodies responsible for applying them. The constitutional judge cannot therefore permit the continuation of a law or regulation whose content opens up the prospect, with a certain probability and in view of the circumstances, that it will be interpreted in the future unconstitutionally.

Languages:

French.

Identification: SUI-1996-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 27.10.1995 / **e)** 2P.418/1994 / **f)** V v. municipality X and the Executive Council of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 121 I 367 / **h)** *Journal des Tribunaux* 1997 I 278; *La Semaine judiciaire* 1996 389; *Europäische Grundrechte-Zeitschrift* 1996 207; CODICES (German).

Keywords of the systematic thesaurus:

2.1.2 **Sources of Constitutional Law** – Categories – Unwritten rules.
2.1.3 **Sources of Constitutional Law** – Categories – Case-law.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Assistance, benefit / Minimum conditions of existence, right.

Headnotes:

Right to minimum conditions of existence.

Unwritten federal constitutional law embodies a right to minimum conditions of existence (recital 2a-2c).

Foreign nationals may also rely on this right, irrespective of their status *vis-à-vis* the immigration authorities (recital 2d).

Refusal to grant assistance benefits because of abuse of entitlement. Case of former refugees who refused to apply to their former country/country of origin to re-establish their nationality (recital 3).

Summary:

The three brothers V. (born in 1955, 1958 and 1960) had lived with their mother as refugees in Switzerland since 1980. Following a criminal conviction they were deported to Czechoslovakia in 1991, but returned illegally to Switzerland the same year. For various reasons, a further deportation to the Czech Republic was then no longer possible. Since they were not entitled to enter into gainful employment the brothers applied to their municipality of residence for social assistance. The municipality rejected the application and the Executive Council of the Canton of Bern upheld this decision. The brothers V filed a public-law appeal with the Federal Court on grounds of violation of their constitutional rights.

The Federal Constitution contained no explicit entitlement to minimum conditions of existence. However, the Court had recognised the existence of unwritten constitutional rights in previous decisions. If the necessary conditions were met, the Federal Court recognised that the individual concerned had a right to minimum conditions of existence. This right could be invoked by Swiss citizens and foreign nationals. Notwithstanding the opinion of the municipal and cantonal authorities, the brothers could not be held to have abused their rights for failing to apply for Czech nationality, which would have enabled them to return to that country. The applicants had left Czechoslovakia in 1980 and been admitted to Switzerland as refugees, since they were being charged with offences in their own country, whose nationality they had lost. Apart from a short interruption, they had lived since then in Switzerland.

Languages:

German.

Identification: SUI-1996-C-001

a) Switzerland / **b)** Federal Court / **c)** First Civil Chamber / **d)** 23.10.1996 / **e)** 4C.97/1996 / **f)** Chanel SA v. EPA AG / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 122 III 469 / **h)** *Die Praxis* 1997 91 491; *La Semaine judiciaire* 1997 129; *Pratique juridique actuelle* 1997 747; *sic!* 1 1997 80.

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.
2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.

Keywords of the alphabetical index:

Federal law, interpretation / Law, preparation, consideration.

Headnotes:

Interpretation of federal law in general and interpretation in accordance with the Constitution in particular.

Summary:

In this particular case, it is not possible to deduce how the relevant federal legislation should be applied from its wording. In the absence of express provisions in the legislation, it has to be interpreted.

Where possible, the law should be interpreted according to the letter (literal interpretation). If the legal text is not absolutely clear and several interpretations are possible, the court must seek to

establish the real scope of the law, in terms of how it relates to other legal provisions, its context (systematic interpretation), the objective sought, particularly the interests it seeks to protect (teleological interpretation) and the intentions of Parliament, particularly as they emerge from the preparatory documents (historical interpretation). However, the preparatory documents will only be taken into account if they offer a clear response to an ambiguous legal provision and have been embodied in the actual wording of the law.

In addition, if several interpretations are possible, the one chosen must be compatible with the Constitution. Although it cannot examine the constitutionality of federal legislation (Article 113.3 of the Federal Constitution), the Federal Court starts from the assumption that Parliament does not enact legislation incompatible with the Constitution, unless the letter or the spirit of the law show that this is clearly not the case.

Languages:

French.

Identification: SUI-1996-C-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 11.12.1996 / **e)** 2A.288/1995 / **f)** C. v. Tax Authority and Tax Appeals Board of the Canton of Basel-Land / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 123 II 9 / **h)** *Archives de droit fiscal suisse* 66 563; *Revue de droit administratif et de droit fiscal* 1997 2 457; *Revue fiscale* 52 1997 190; *Der Steuerentscheid* 1997 A 21.11 41.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.
3.17 **General Principles** – Weighing of interests.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

Keywords of the alphabetical index:

Federal law, constitutionality / Tax, direct, collection.

Headnotes:

Article 4 of the Federal Constitution and Article 23 of the decree on the collection of direct federal taxes (AIFD); individual income.

Under Article 23 AIFD, rent on a flat cannot be deducted from net income. Constitutionality of this provision.

Summary:

Under the AIFD (as under cantonal tax law) income tax is payable in respect of owner occupation of a house or flat. Treating the use value of a dwelling as income of the owner-occupier offsets the financial advantage to the owner-occupier of being able to deduct, for tax purposes, mortgage interest and upkeep expenses on the property. In contrast, a tenant cannot, for tax purposes, deduct rent from income.

The appellant contended that this system was contrary to the Constitution because it led to unequal treatment of tenants and owner-occupiers in that for tax purposes the tenant was not allowed to deduct the rent he/she paid whereas the owner-occupier of a house or flat was liable for tax only on the difference between the rental value on the one hand and the costs resulting from mortgage interest and upkeep and management of the property on the other. In his view this was unequal treatment contrary to Article 4 of the Federal Constitution.

The Federal Court found that a complaint alleging breach of a constitutional right was in principle admissible in an administrative-law appeal. However, Article 114bis.3 of the Federal Constitution had to be complied with.

Under Article 114bis.3 the Federal Court could not refuse to apply a federal law on the ground that it was inconsistent with the Constitution. However, interpretation of that law by generally recognised methods, such as interpretation in a manner consistent with the Constitution, was not disallowed – Article 114bis.3 required that the legislation be

applied but did not prohibit scrutinising it. Interpretation in a manner consistent with the Constitution was nevertheless constrained by the wording and actual meaning of the piece of legislation, even if the latter was plainly unconstitutional.

The AIFD formed part of the legislation binding on the Federal Court under Article 114bis.3. Under Article 23 AIFD upkeep expenses of the taxpayer and family in respect of their flat could not be deducted from income for tax purposes, and nor could the rent which the taxpayer paid on the flat. The letter and meaning of that provision were clear. Under Article 114bis.3 deductibility of rent for tax purposes as requested by the appellant was impossible. On that ground alone, the appeal must be dismissed.

Nor could taxation of rental value, as criticised by the appellant, be considered unconstitutional. The principle of equal treatment laid down in Article 4 of the Federal Constitution required that similar situations be treated similarly according to the degree of similarity and that different situations be treated differently according to the degree of dissimilarity.

The principle of equal treatment was breached if two similar states of affairs were treated differently for no objective reason. First and foremost was the question of equal treatment, in terms of tax justice, of owner-occupier and tenant. Under the Swiss system, the owner-occupier was allowed to deduct, for tax purposes, a large proportion of his/her expenses in respect of the house or flat (mortgage interest and upkeep and management expenses). A tenant, in contrast, was in no circumstances allowed to make such deductions in respect of housing expenses even though he/she did actually have the expense of rent on accommodation. Income and deductions being equal, a tenant would be taxed on a larger amount of income than the owner-occupier of a flat or house. This was incompatible with equal treatment of taxpayers and must be corrected by taxing that part of the owner-occupier's income which was equal to the rental value, as assessed according to local rent levels. Taxing the owner-occupier on the rental value of the house or flat was intended to repair the imbalance, as required by the Constitution.

From the standpoint of Article 4 of the Federal Constitution, other arrangements would be consistent with equal treatment of tenants and owner-occupiers. The Federal Court had never ruled them out. What it had said was that it was contrary to the Constitution simply not to tax rental value without any offsetting measure. Which arrangement was chosen depended, among other things, on political and administrative considerations.

Languages:

German.

Identification: SUI-1997-3-008

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 20.10.1997 / **e)** 1P.689/1996 / **f)** Walter Stürm v. Canton of Valais Prosecutor and Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 123 I 283 / **h)** *Journal des Tribunaux* 2000 IV 7; *Die Praxis* 1998 36 250; *Europäische Grundrechte-Zeitschrift* 1998 32; *Revue de droit administratif et de droit fiscal* 1998 1 510; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
1.4.3.1 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Ordinary time-limit.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.
3.16 **General Principles** – Proportionality.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Council of Europe, Committee of Ministers / Satisfaction, just / Review, time-limit / Review, grounds.

Headnotes:

Article 139.a of the Federal Judicature Act (OJ); review on the ground of breach of the European Convention on Human Rights.

Start of the period referred to in Article 141.1.c OJ (recital 2).

Relationship of Article 139.a OJ to Article 50 ECHR (recital 3a).

The compensation awarded in the case by the Committee of Ministers of the Council of Europe covered, in addition to injury caused by breach of the Convention, the procedural costs at national level and in Strasbourg. Seeking any further costs by applying for a review was thus precluded (recital 3b).

Summary:

The First Public Law Chamber of the Federal Court dismissed four public-law appeals by Walter Stürm concerning his remand in custody. The Criminal Court of Cassation of the Federal Court then delivered two judgments maintaining the prison sentence of ten and a half years imposed by the Valais Cantonal Court.

Mr Stürm lodged various applications with the European Convention on Human Rights bodies. In its report of 16 January 1996, the Commission upheld his complaint of an infringement of Articles 5.3 and 6.1 ECHR, finding the length of remand and of the criminal proceedings to have been excessive. The Committee of Ministers confirmed the finding of an infringement of the European Convention on Human Rights in an interim resolution of 13 September 1996 and, in a final resolution of 17 September 1997, ordered Switzerland to pay Walter Stürm a total of 10 000 Swiss francs in just satisfaction.

On 20 November 1996 Mr Stürm had applied to the Federal Court for review of the four judgments. He had referred to the Committee of Ministers' resolution and Article 139.a of the Federal Judicature Act. The First Public Law Chamber dismissed the application in a judgment of 20 October 1997.

Under Article 139.a OJ, an application for review of a Federal Court judgment is admissible where the European Court of Human Rights or the Council of Europe Committee of Ministers has upheld an individual complaint of breach of the European Convention on Human Rights or its protocols and compensation is obtainable only by means of review. The 90-day period for lodging such an application runs from the date on which the Federal Office of Justice notifies the parties of the European authorities' decision (Article 141.1.c OJ). The review application of 20 November 1996 had been based on the interim Committee of Ministers Resolution and had therefore been premature; the Federal Court waited for communication of the final resolution of 17 September 1997 before determining the case.

On the substance of the application the Federal Court found some inconsistency between Article 50 ECHR and Article 139.a OJ. Under Article 50 ECHR award of just satisfaction could be contemplated only where internal law allowed only partial reparation for the consequences of the violation finding; the Federal Judicature Act, on the other hand, provided for review only as a subsidiary remedy. Which rule took precedence depended on the circumstances of the particular case.

In the present case the application was for review of the four judgments of the First Public Law Chamber. As the sentence was not affected by those judgments the applicant could not ask for any reduction of it; the Criminal Court of Cassation of the Federal Court would deal with that matter in separate proceedings. Under the final Resolution of the Committee of Ministers the overall sum paid as just satisfaction covered injury caused by the breach of the European Convention on Human Rights and legal costs in Strasbourg and in the domestic courts. At national level the Federal Court had granted the appellant legal assistance in all the cases. He accordingly could not use the review channel to claim compensation over and above the sum awarded by the Committee of Ministers.

Languages:

German.

Identification: SUI-1999-C-001

a) Switzerland / **b)** Federal Court / **c)** Second Civil Chamber / **d)** 23.03.1999 / **e)** 5P.30/1999 / **f)** X. v. Zug Register Office and the Canton of Zug Internal Affairs Department and Administrative Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 III 209 / **h)** *Journal des Tribunaux* 1999 I 321; *Revue de droit administratif et de droit fiscal* 2000 1 587.

Keywords of the systematic thesaurus:

1.1.2.6 **Constitutional Justice** – Constitutional jurisdiction – Composition, recruitment and structure – Subdivision into chambers or sections.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.3.4.10 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Citizenship, cantonal and municipal, acquisition / Federal law, constitutionality.

Headnotes:

Articles 161 and 271 of the Swiss Civil Code; compliance with the Constitution and the European Convention on Human Rights in the matter of acquisition of cantonal and municipal citizenship by marriage or descent in civil law.

The provisions of civil law on the acquisition of cantonal and municipal citizenship by marriage or descent contravene the principle of equal treatment of men and women; they are, however, binding on the administrative and judicial authorities.

Summary:

Ms X. and Mr Y. had married and been allowed to take Ms X.'s surname. Through her marriage Ms X. had acquired citizenship of the city of Winterthur and the canton of Zurich, without losing citizenship of the city and canton of Zug, which she had held before marrying. After the birth of X. and Y.'s son, C., all three applied to the canton of Zug to be entered in the city of Zug family register so as to gain cantonal and municipal citizenship and thus be eligible for membership of the Zug “korporation”. The Canton of Zug administrative authorities and administrative court dismissed the application.

The contested decision refused entry in the family register. There exists a right of administrative-law appeal to the Federal Court against last-instance decisions of the cantonal courts in civil matters (Article 43.2 of the Swiss Civil Code and Article 20 of the order on civil status). In a case where an administrative-law appeal is admissible, the appellant may also rely on federal constitutional law in so far as the alleged breach of it has a bearing on the application of federal law (Article 104.a of the Federal Judicature Act); to that extent the administrative-law appeal has the same function as a public-law appeal alleging infringement of the individual's constitutional rights under Article 84.1.a of the Federal Judicature Act.

Similarly when an appellant relies on the European Convention on Human Rights: infringement of Convention rights is treated, in procedural law, as equivalent to infringement of constitutional rights.

In adopting Articles 161 and 271 Civil Code, the legislature had been aware that the family right to citizenship was not fully reconcilable with the requirement that husband and wife receive equal treatment. An interpretation contrary to the wording of the legislation was not permissible in such circumstances. The Civil Code provisions on cantonal and municipal citizenship are binding on the Federal Court by virtue of Articles 113.3 and 114bis.3 of the Federal Constitution. The Federal Court consequently dismissed the administrative-law appeal.

Languages:

German.

Identification: SUI-1999-2-006

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.07.1999 / **e)** 1A.178/1998, 1A.208/1998 / **f)** A. v. Federal Prosecutor, Federal Department of Justice and Police, and Federal Council / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 II / **h)** *Pratique juridique actuelle* 1999 1491; *La Semaine judiciaire* 2000 I 202; *Europäische Grundrechte-Zeitschrift* 1999 475; *Revue de droit administratif et de droit fiscal* 2000 1 589; CODICES (German).

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.8 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.
2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

International law, primacy / Propaganda, material, confiscation / Security, external and internal / Security, national.

Headnotes:

Article 98a and Article 100.1a of the Federal Judicature Act (OJ); Article 6.1 ECHR; admissibility of an administrative-law appeal against confiscation of propaganda material belonging to the Kurdistan Workers Party.

Once a confiscation order has been made, there ceases to be any interest in contesting a seizure which preceded the order (recital 2).

Confiscation of propaganda material for reasons of external or internal security affects civil rights and obligations within the meaning of Article 6.1 ECHR (recital 4b).

In conflicts of law, international law in principle takes precedence over national law, in particular where the international rules seek to protect human rights. Thus, despite the letter of Article 98a and 100.1.a OJ and by virtue of Article 6.1 ECHR, an administrative-law appeal to the Federal Court against a confiscation order of the Federal Council is admissible (recital 4c-e).

Article 55 of the Federal Constitution (freedom of the press) and Article 10 ECHR; Article 102.8, 102.9 and 102.10 of the Federal Constitution; Article 1.2 of the Federal Council decree on subversive propaganda; confiscation of propaganda material for reasons of internal or external security.

The Federal Council decree on subversive propaganda constitutes, when taken together with Article 102.8, 102.9 and 102.10 of the Federal Constitution, a sufficient legal basis for a serious interference with freedom of expression and freedom of the press (recital 6).

In the circumstances of the case, the confiscation of written material belonging to the Kurdistan Workers Party (PKK) was consistent with the proportionality principle in that, in furtherance of the PKK's cause, the material incited violence and exerted pressure on emigrants living in Switzerland (recital 7).

Summary:

In 1997, the customs authorities intercepted 88 kg of propaganda material which the PKK had sent to A., who was resident in Switzerland. The federal prosecutor seized the material on grounds of internal and external security. A. appealed to the Federal Department of Justice and Police, which treated the appeal as a report to the surveillance authority and dismissed it. Under the 1948 decree on subversive propaganda the Federal Council then ordered the confiscation and destruction of the material.

A. lodged administrative-law appeals with the Federal Court to have the seizure decision and confiscation order set aside. He also requested that the material be returned to him. He relied, in particular, on Article 6.1 ECHR.

As the seizure decision had become devoid of purpose, the Federal Court decided not to go into the first appeal. It did, however, consider the appeal against the confiscation order, dismissing it on substantive grounds.

Under the Federal Judicature Act, decisions of the Federal Council cannot, in principle, be referred to the Federal Court, with one exception which did not apply in the present case.

The issue was whether the confiscation order fell under Article 6.1 ECHR. Confiscation is a serious interference with the appellant's property rights. According to legal theory, government measures taken on grounds of internal or external security do not fall within the ambit of the Convention. The European Court of Human Rights has never taken a clear position on the subject. In view of the seriousness of the interference, there could be no denial that Article 6.1 ECHR was applicable. The appellant's further reliance on Articles 10 and 13 ECHR did not have a decisive bearing.

In the present case, the provisions of the Federal Judicature Act could not be interpreted in a manner consistent with the European Convention on Human Rights. Swiss law here clashed with the Convention's requirements, and Articles 114bis.3 and 113.3 of the Federal Constitution did not resolve the matter. General principles of international law and the Vienna Convention on the Law of Treaties require that states honour their international undertakings. The federal authorities thus had a duty to set up judicial authorities that met the requirements of Article 6 ECHR, and the Federal Court was required to deal with A.'s appeal against the Federal Council decision.

The 1948 decree on subversive propaganda was an independent decree of the Federal Council directly based on Article 102.8, 102.9 and 102.10 of the Federal Constitution. It was thus a sufficient legal basis to justify interfering with freedom of expression and freedom of the press, notwithstanding that the international situation had altered appreciably in recent years, and that, with the entry into force of a new federal law introducing internal security measures, the decree had been repealed.

The confiscated material contained PKK propaganda openly calling for armed resistance to the Turkish state; it went well beyond mere propaganda for the Kurdish movement. The material inciting violence was capable of endangering the peaceful co-existence of different groups living in Switzerland and seriously interfering with Switzerland's neutrality and external relations. These dangers justified confiscating the propaganda material.

Languages:

German.

"The Former Yugoslav Republic of Macedonia"
Constitutional Court

There was no relevant constitutional case-law.

Turkey
Constitutional Court

Important decisions

Identification: TUR-1989-C-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 28.02.1989 / **e)** 1989/10 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.4.1.5.3 **Institutions** – Judicial bodies – Organisation – Members – Status – Irremovability.
4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

Keywords of the alphabetical index:

Judge, appointments board / Judge, authority, impartiality / Judge, qualifications.

Headnotes:

Exchange of judges and public prosecutors between ordinary and administrative courts is contrary to the Constitution.

Summary:

Law 3446 amended some rules to Law 2802 (the Law on Judges and Public Prosecutors). The main opposition party applied to the Constitutional Court to annul the related provisions because of their unconstitutionality.

According to the disputed provisions, it was possible that the judges and public prosecutors of ordinary courts be appointed as administrative judges and public prosecutors and vice versa. Article 140 of the Constitution provides that judges and public prosecutors shall serve as judges and public

prosecutors of courts of justice and of administrative courts and these duties shall be carried out by professional judges and public prosecutors.

The Constitutional Court found that the Turkish judicial system was divided into two systems of private and public law. This division necessitates the division of judges and public prosecutors, each of whom are trained and experienced in their own fields. If it was possible to exchange judges and prosecutors between these two systems, the Constitution would have provided rules on this issue. Security of tenure of judges and public prosecutors ensures the independence of the courts. The disputed provision was in contrast with the security given to judges and public prosecutors. The Constitution envisages two main judiciary systems, and this requirement should be respected. The concern related to appointment to another post or place may effect the judges or prosecutor's capacity to perform his or her duties in accordance with the principle of justice. On the other hand, Articles 138 and 139 of the Constitution regulate the independence of the courts. The disputed rule is not compatible with the independence of the judiciary. Articles 154 and 155 of the Constitution provide rules on the Court of Cassation and on the Council of State respectively. The appointment procedures of the members of these two high courts and their sources are different. If it were possible to pass from one judicial system to another, there would be a danger of judicial corruption. Therefore the disputed provision was annulled by a majority vote.

Supplementary information:

- Case no. E.1988/32, K.1989/10, Official Gazette, 22.06.1989 - 20202.

Languages:

Turkish.

Identification: TUR-1997-C-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 15.05.1997 / **e)** 1997/51 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.7.1.3 **Institutions** – Judicial bodies – Jurisdiction – Conflicts of jurisdiction.
4.7.8.1 **Institutions** – Judicial bodies – Ordinary courts – Civil courts.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.

Keywords of the alphabetical index:

Fine, administrative court, objection / Civil court, administrative court, relationship.

Headnotes:

The case concerns the jurisdiction of judicial and administrative courts. Since fines given by administrative authorities are administrative acts, objections regarding these types of fines are within the competence of the administrative courts.

Summary:

The Ankara Administrative Court no. 7 referred a provision of Law 3194 to the Constitutional Court for it to be annulled. The disputed provision stipulated that it was possible to object to fines imposed under the Law 3194, in an action before Turkish civil or criminal courts of first instance. The Administrative Court claimed that this competence belongs to the administrative courts since these acts are administrative in nature. Under Article 125 of the Constitution, recourse to judicial review is available against all actions of administrative bodies. According to the Constitutional Court, that review included all actions of public authorities. However, as a rule, it is clear that judicial courts have competence over administrative actions in the field of private law. On the other hand, administrative courts have competence over administrative actions in the field of public law. According to the Law 3194, claims related to decisions on demolition activities were within the competence of administrative justice, but claims related to fines given by the same administrative authorities were within the competence of judicial courts. Since the act was administrative and there was no justifiable reason or public interest, the act should have been contested before the administrative courts. Therefore, the disputed provision was contrary to the Constitution. According to Article 155 of the Constitution, "the Council of State is the last instance for reviewing decisions and judgments given by administrative courts which are not referred by law to other administrative courts". The Constitutional Court decided that the disputed provision of Law 3194 left claims which are within the competence of the

administrative courts to judicial courts. Therefore, the fact that the division of the administrative and civil court systems was adopted by the Constitution was disregarded. The disputed provision was annulled by a majority vote.

Supplementary information:

- Case no. E.1996/72, K.1997/51, Official Gazette, 01.02.2001 - 24305.

Languages:

Turkish.

Identification: TUR-1998-C-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 16.01.1998 / **e)** / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
4.5.10.4 **Institutions** – Legislative bodies – Political parties – Prohibition.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Expression of ideas and opinions, collective, freedom / Freedom of association, entitlement / Secularism, principle.

Headnotes:

Demonstrations and other activities against secularism which aim to eliminate democratic rights and freedoms may not be protected by Article 68 of the Constitution, Article 30 of the Universal Declaration of Human Rights and Article 17 ECHR.

Summary:

On 21 May 1997, the Chief Public Prosecutor of the Court of Cassation brought a case before the Constitutional Court against the Welfare Party. The indictment was mainly based on the allegations that the Party had become the focus of the activities contrary to the principle of secularism. According to Article 68.4 of the Constitution and Article 78 of the Law on Political Parties, "the statutes and programmes, as well as the activities of political parties, shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, [or] the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime". On the other hand, Article 69.6 of the Constitution (as amended on 23 July 1995) provides that "the decision to dissolve a political party permanently owing to activities violating the provisions of Article 68.4 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities".

The Constitutional Court found that the President, Vice President and some deputies of the Welfare Party had used democratic rights and freedoms in order to eliminate democracy and to establish Islamic Sharia Law in their statements and activities. Those kinds of statements and activities may not be protected according to Article 68.4 of the Constitution, Article 30 of the Universal Declaration of Human Rights and Article 17 ECHR. In Articles 13 and 26.2 of the Constitution it is explained that rights and freedoms may be limited in certain situations by law. The European Court of Human Rights, and the Commission in some of their judgments and decisions, accepted that political statements and activities aimed at abolishing democracy were among the grounds for abolishing political parties. Article 11.1 ECHR stipulates that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his or her interests".

It was understood that the President, Vice President and some deputies of the Welfare Party had used democracy as a tool in order to destroy democracy and to restore Islamic Law. It was impossible that this kind of political statements and activities could be

protected under Article 68.4 of the Constitution, Article 30 of the Universal Declaration and Article 17 ECHR. Prohibiting political parties should be considered appropriate if they attempt or threaten to destroy democracy. Therefore, the allegations of the defendant political party that these activities and statements should be considered within the freedom of expression and dissemination of thought could not be accepted.

The President of the Welfare Party supported the use of the turban in universities, and multi-juridical legal system within the country, and gave the Ramadan meal to certain religious leaders. The Vice President of the Party had visited a mayor who was arrested because of the allegations related to activities against secularism. Another vice president made a speech against the principle of secularism in Mecca in 1993. Those activities and statements amount to opposition against secularism, one of the pillars of the Republic. Therefore, it was suggested that the defendant party be permanently dissolved. The statements and activities of three deputies and one mayor were contrary to the principle of secularism. In spite of the continuity, intensity and decisiveness of those activities, the Welfare Party did not take any measures against them. This was an indication that the activities were approved by the Party. For those reasons, it was held the Welfare Party should be dissolved according to Articles 68 and 69 of the Constitution and Article 103 of the Law 2820 (Law on Political Parties). Moreover, the Constitutional Court decided that parliamentary membership of the deputies whose activities and statements were the causes of the dissolution of the Party should be terminated. These deputies were prevented from becoming founding members, administrators or controllers of a new political party for five years. Some of the members of the Court had dissenting opinions.

Supplementary information:

The Welfare Party, the President and others applied to the European Court of Human Rights on freedom of expression, right of association and other associated grounds. The European Court of Human Rights delivered its judgment on 1 July 2001 and did not find there to have been any violation of the Convention.

Cross-references:

- Case no. E.1997/1 (dissolution of political parties), K.1998/1, Official Gazette, 22.02.1998 - 23266.
- European Court of Human Rights, *Case of Refah Partisi (Prosperity Party) and others v. Turkey* of 31.07.2001, not yet published.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-1999-2-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 24.06.1999 / **e)** 6-rp/99 / **f)** Constitutionality of Articles 19 and 42 of the Ukrainian Law on the 1999 state budget (case on the funding of courts) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 28/99 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.4 **General Principles** – Separation of powers.
4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
4.7.4.6 **Institutions** – Judicial bodies – Organisation – Budget.
4.10.2 **Institutions** – Public finances – Budget.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

Keywords of the alphabetical index:

Court, independence / Justice, administration, non-interference / Expenditure, not provided for by law / Judiciary, budget, necessary amount.

Headnotes:

The aim of the functional separation of public authorities into legislative, executive and judicial branches is the delimitation of responsibilities between the different organs of the public authorities and the prohibition of the appropriation of full state powers by any one of these authorities.

In Ukraine, justice is dispensed exclusively by the courts. The Constitution embodies the principles of the independence of judges as the organs of the judicial authority and of non-interference in the administration of justice.

The special arrangements for the funding of the courts represent one of the constitutional guarantees for the independence of judges. This guarantee mechanism is represented by the State's duty to ensure the proper financial and material conditions for the functioning of the courts and the judges by making provision in the national budget for the expenditure pertaining to the maintenance of the courts. The centralised procedure for the funding of the judicial organs by means of the national budget to a level which guarantees the necessary economic conditions for the full and independent administration of justice and the financing of the needs of the courts (expenditure for trials, running costs, maintenance and repairs, security, logistics, postal expenses etc) is designed to ensure the freedom of the courts from any outside influence. This procedure is aimed at ensuring judicial activity on the basis of the principles and provisions of the Constitution.

The absence of established criteria for the financing of the courts by the central government cannot serve as a justification for the legislative or executive authorities to define the relevant figures arbitrarily, since the necessary amounts in the national budget for the upkeep of the courts cannot be reduced to a level which fails to comply with the constitutional provisions regarding the funding of the judicial system. The budgetary appropriations for the maintenance of the judiciary are directly protected by the Constitution and cannot be reduced by the organs of the legislative or executive authorities below the level which ensures the complete and independent administration of justice in accordance with the law.

The Constitution defines the mechanism for securing the funding of the judicial authorities, to be used by the parliament *(Verkhovna Rada)*, which is responsible for approving the national budget, amending it and monitoring its execution. The execution of the budget comes within the sphere of competence of the Cabinet of Ministers of Ukraine.

Summary:

Article 19 of the Ukraine Law on the 1999 state budget establishes the list of items of expenditure in the national and the local budgets for 1999, on the statutory basis of the economic distribution of costs: the emoluments for staff of the budgetary institutions; supplementary remuneration etc. The financing of the requisite expenses by the national and local budgets is effected primarily by the treasury paymasters of the appropriate budgetary resources.

The Law does not protect the circle of subjects of the budgetary relations (the budgetary institutions themselves), but the objects of these relations (items of budgetary expenditure according to the economic distribution of costs). Since the subjects of these relations are the budgetary institutions, the list of statutory items of expenditure is limited to the remuneration of staff in general, including those of the judicial organs and the judges, as members of the staff of the budgetary institutions.

By authorising the Cabinet of Ministers, under certain conditions and at the proposal of the Finance Ministry, to limit the expenditure ordered by the treasury paymasters while taking account of the paramount importance of financing in full the expenditure provided for by law, the parliament *(Verkhovna Rada)* enabled the Cabinet of Ministers to reduce the funds made available for the maintenance of the courts in the same manner as non-statutory expenditure.

The restriction in the funds available to the judicial authorities fails to guarantee the necessary conditions for the full and independent administration of justice and the functioning of the courts. Moreover, the restriction undermines the confidence of citizens in the public authorities and impairs the promotion and protection of human rights and freedoms.

Furthermore, the independence of the judicial power is recognised under international law.

The provisions of the contested legislation which relate to expenditure provided for under the Law (Article 19 of the Law on the 1999 state budget) are in conformity with the Constitution.

The provisions of Article 42 of the disputed Law in which the Cabinet of Ministers is authorised to restrict the expenses in the national budget earmarked for the judicial authorities, without taking into account the guarantees for their payment incorporated in the provisions of the Constitution, are thus unconstitutional.

Supplementary information:

Legal norms to which the Court referred:

- Articles 6, 85, 116, 124, 126, 129 and 130 of the Constitution;
- Articles 19 and 42 of the Law on the 1999 state budget;
- Articles 1 and 3 of the Law on the status of judges;
- Article 6.1 ECHR;
- Paragraphs 1 and 7 of the Basic Principles on the Independence of the Judiciary (UN General Assembly Resolutions 40/32 and 40/146 of 29 November and 13 December 1985);
- Principle I.2.b of Recommendation no. R (94) 12 of the Committee of Ministers of the Council of Europe to member states on the independence, efficiency and role of judges (adopted on 13 October 1994);
- Item 27 of the Programme of Action adopted by the Second World Conference on Human Rights on 25 June 1993.

Languages:

Ukrainian, French (translation by the Court).

Identification: UKR-2001-C-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.05.2001 / **e)** 6-rp/2001 / **f)** Constitutionality of the provisions contained in the third, fourth, and fifth paragraphs of Article 248-3 of the Code of Civil Procedure of Ukraine (case: Constitutionality of Article 248-3, CCP of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 22/2001 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Court, civil, jurisdiction / Administrative act, judicial review / Association / Political Party.

Headnotes:

In the case of disputes regarding violations of human rights and freedoms by civic associations, or their officials and servants, everyone shall have the right, based on Article 55 of the Constitution, to apply for these rights and freedoms to be protected in court. The determination of matters belonging to internal

organisation activities or to the exclusive competency of the civic associations in each particular case shall be made by the court, wherever citizens are appealing against the acts and actions of such associations.

Summary:

In settling a dispute on the constitutionality of the provisions laid down in Article 248-3.3, 248-3.4 and 248-3.5 of the Code of Civil Procedure, the Constitutional Court came to the following conclusions:

Human rights and freedoms, and the need to guarantee these, delimits the contents and parameters of the activities of the state (Article 3.2 of the Constitution). The state, by employing different legal means, provides for the protection of human rights and freedoms via legislative, executive, judicial and other public authorities, which exercise their powers in the framework specified by the Constitution and according to the laws. The provisions laid down in Article 8.2 of the Constitution specify that these norms have direct effect.

Petitions to the Court for protection constitutional and human rights and freedoms are directly based on the Constitution and are guaranteed thereby. This constitutional right may not be abolished (Article 22.2 of the Constitution).

According to Article 55.1 of the Constitution, human rights and freedoms are protected by the Court. Everyone has the right to appeal to the Court for protection of his or her rights and freedoms.

The right to judicial protection is a fundamental, inalienable human right and freedom, and no limitation of this right is allowed even under a condition of military or emergency law (Articles 8, 55 and 64 of the Constitution). This conforms to Article 8 of the Universal Declaration of Human Rights, whereby any person, in the case of violation of his or her fundamental rights, provided by the Constitution and the law, shall have the right to effective remedy by the competent national court.

An analysis of Article 124.2 of the Constitution, which provides that the jurisdiction of the courts shall cover any and all legal relations arising in the state, and Article 55.1 and 55.2 of the Constitution, gives grounds for making a conclusion that the courts have jurisdiction over any petition of a person as to the protection of his or her rights and freedoms. Therefore, the court may not refuse to exercise justice, if a citizen of the Ukraine, an alien, or a stateless person believes that his or her rights and freedoms are being violated or infringed, or that there are obstacles to being able to exercise them, or where there are any other infringements of their rights and freedoms.

The Constitution, having specified the right to judicial protection of their rights and freedoms, guarantees to any person the right to appeal to the Court against any judgment, activity or inactivity of public authorities, local government authorities, officials or civil servants.

According to Article 248-1.3 of Chapter 31-A of the Code of Civil Procedure, those subjects whose decisions, activities or inactivity may be appealed against in court, shall include: “central government public authorities and their servants; local government authorities and their servants; managers of institutions, organisations, companies and associations, irrespective of their ownership structures; government authorities and managers of civic associations; and servants performing organisational, governmental, administrative or business duties or carrying out such responsibilities according to special powers”. The subjects of judicial appeal under this Chapter may be both collegiate or individual.

The provisions laid down in Article 55 of the Constitution, regarding the ability of citizens to appeal against infringements of their rights and freedoms, apply equally to judicial review situations, activities or inactivity of officials of investigative authorities, and preliminary investigations by the Office of the Prosecutor, as such acts may violate citizens’ rights and freedoms. Imperfections of judicial control institutions in pre-judicial investigations may not prevent appeals being made against the acts or omissions of the officials of these institutions.

Procedural acts and actions of judges, concerning issues of jurisdiction of courts over disputes, violations at every stage of litigation in such matters, belong to the sphere of justice and may be appealed against only subject to the judicial procedure set out under the procedural law of Ukraine. No extra-judicial procedure for appealing against the acts and actions of judges concerning the application of justice is allowed.

In conformity with Article 248-3.5 of the Code of Civil Procedure, no court shall be eligible to accept petitions “on acts and actions of civic associations, which for the purposes of the law, relate to their internal organisational activities or come under their exclusive competence”.

According to Article 92.1.11 of the Constitution, the laws of Ukraine set out the grounds for the organisa-

tion and activities of political parties and other civic associations.

No intervention of public authorities and civil servants in the activities of civic associations is allowed, except for cases stipulated by extraordinary laws (Article 8.2 of the Law of Ukraine on Civic Associations). Such prohibition on intervention into the activities of political parties and their local units, with some exceptions, is provided also by Article 4.3 of the Law on Political Parties in Ukraine. Civic associations are to act according to prescribed laws, statutes, or regulations. Therefore, internal organisational matters, relationships between the members of the civic associations, their subdivisions, and statutory responsibility of the members of these associations are governed by the corporate norms set forth by these same civic associations based on the law; they shall specify the matters which belong to their internal activities or exclusive competency and those which are subject to independent judgment. Therefore, no intervention in the activities of the civic associations carried out in the framework of the law is allowed.

The provisions of Article 248-3.5 of the Ukrainian Code of Civil Procedure were recognised as being in conformity to the Constitution. The provisions state that the courts have no jurisdiction over petitions "on acts and actions of civic associations, which for the purposes of the law, statute, or by-laws, belong to their internal organisational activities or their exclusive competence".

Article 248-3.3 and 248-3.4 of the Code of Civil Procedure was recognised as unconstitutional.

Languages:

Ukrainian.

Identification: UKR-2001-C-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.07.2001 / **e)** 3-v/2001 / **f)** Conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 28/2001 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
4.16 **Institutions** – Transfer of powers to international organisations.

Keywords of the alphabetical index:

Prosecution, criminal / Treaty, constitutional requirements / Court, international jurisdiction / International Criminal Court / Extradition, national, possibility / Immunity of office.

Headnotes:

In Ukraine, delegating the functions of the courts, or assignment of such functions to any other authority or official is not allowed. However, in accordance with the Constitution, everyone may appeal to the European Court of Human Rights for the protection of his/her human rights and freedoms (Article 55.4 of the Constitution).

As regards the International Criminal Court, there is no constitutional basis allowing it to complement the national criminal justice authorities.

Summary:

The President submitted a petition to the Constitutional Court to examine the constitutionality of the Rome Statute of the International Criminal Court ("the Statute").

According to Article 124.1 of the Constitution, justice shall be provided exclusively by courts. The organisation of extraordinary and special courts (Article 125.5 of the Constitution) is also prohibited.

Article 1 of the Statute, indicating that the International Criminal Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern", at the same time emphasises that the Court "shall be complementary to national criminal jurisdictions". This complementary nature of the International Criminal Court is set out in a number of different articles of the Statute.

This essentially distinguishes the International Criminal Court from international courts of justice, in

particular the European Court of Human Rights, the right to apply to which for the protection of rights and freedoms is specified in Article 55.4 of the Constitution. No possibility of a similar means of complementing the judicial system is stipulated by Chapter VIII Justice of the Constitution.

Stating that "the International Criminal Court ... complements the national criminal justice authorities", the Rome Statute of the International Criminal Court, signed on behalf of the Ukraine on 20 January 2000, and submitted to the parliament *(Verkhovna Rada)* for ratification, is inconsistent with Article 124.1 of the Constitution that prohibits delegating of functions of the courts, or assignment of such functions to any other authority or official.

By its nature, the International Criminal Court is an international and legal judicial institution established with the consent of the member states of the constituent document, namely the Statute, whose provisions are based on the principle of respect for human rights and freedoms. Therefore, the International Criminal Court may not be referred to as an extraordinary or special court, whose establishment is not allowed according to Article 125.5 of the Constitution.

According to Article 27.1 of the Statute, "this Statute shall apply equally to all persons without any distinction based on official capacity". The provisions of the Statute do not prohibit the establishment and do not cancel the provisions of the Constitution regarding immunity of the people's deputies, the President and judges, and only proceed from the fact that immunity of such persons is a matter for national jurisdiction and that this will not bar the Court from its jurisdiction over those amongst them who have committed crimes stipulated by the Statute.

In conformity with the Statute's fundamental principle of acting in a complementary capacity to national courts (Article 17), the International Criminal Court shall not undertake proceedings if the accused has already been convicted under the proper legal procedure by another court (including but not limited to national courts) for actions prohibited by the Statute (Article 20).

According to other international and legal documents which have had binding effect on Ukraine, even before its Constitution took effect, it is an international legal obligation of Ukraine to ensure that all its citizens are held fully responsible if they commit any of the overwhelming majority of crimes stipulated by the Rome Statute.

The foreign policy activities of Ukraine are based upon universally recognised principles and norms of international law (Article 18 of the Constitution). One such principle is the diligent performance of international obligations which came into existence in the form of international and legal norms which were first elaborated in the early stages of the development of the concept of the nation state, and which are today embodied in a number of international treaties.

The Statute effectively reproduces the overwhelming majority of the provisions, which define criminal activities, contained in the conventions to which Ukraine acceded. This is in complete conformity to the international and legal obligations of Ukraine.

In conformity with Article 25.2 of the Constitution, the citizens of Ukraine may not be extradited to another state. This interdiction concerns only matters of a national rather than an international jurisdiction. This is intended to guarantee fair judicial proceedings and the legitimacy of punishments for the citizens of Ukraine.

The International Criminal Court may not be equated to a foreign court. The issue which explains the prohibition of extradition of citizens from one state to another is broached in the International Criminal Court by application of the relevant provisions of the Statute developed (or approved) by the member states. These provisions are based on international conventions on human rights, and Ukraine has already given its consent to be bound by such conventions.

Therefore, the constitutional provisions as to the interdiction of extradition of the citizens of Ukraine (even in view of a broad interpretation of the concept of extradition) may not be considered separately from the international legal obligations of Ukraine.

International treaties, the consent to be bound by which was given by the parliament, become a part of the national legislation of Ukraine. This is how national sovereignty as to distribution of the jurisdiction of international courts of justice on the territory Ukraine is assured (provided that the provisions of these courts' statutes do not contradict the Constitution). Therefore, if the Ukraine signs up to these statutes, it will not contradict the requirements laid down in Articles 75 and 92.14 of the Constitution.

While Article 120 of the Statute prohibits amendments to this international treaty, its Articles 103 and 124 allow the member states to make declarations, which allow for derogations from their obligations under individual provisions of the Statute for a certain period

of time, or which set out special conditions for co-operation within the framework of the treaty.

This allows for limitations on the rights and freedoms of the citizens of Ukraine in connection with serving sentences subject to other laws, different from sentences specified in the laws of Ukraine. Such rights may be removed under a procedure whereby a state (the Ukraine in this case) makes a declaration on its readiness to receive citizens, sentenced by the International Criminal Court, and to allow them to serve their sentence in that country. Moreover, it is necessary to consider the provisions laid down in Article 103.3 of the Statute, which provide that the International Criminal Court, in determining the state in which the person convicted by the Court may serve his sentence, shall consider, among other things, the opinion of the person, on which the sentence was made, his/her citizenship, and also the standards of treatment of prisoners as recognised by international treaties.

Article 121.1 of the Constitution sets out that support of the charges brought by the state in court is delegated to the Office of Prosecutor, which is a unified system. According to the Statute, the International Criminal Court has a separate authority of the Office of the Prosecutor responsible for obtaining justified information on crimes which fall under the jurisdiction of the court, and for the implementation of the investigation and criminal prosecution in the Court. Settling this dispute, the Constitutional Court proceeded, first, from the fact that support by the Office of the Prosecutor of the charges brought by the state in court, for the purposes of Article 121 of the Constitution, is a matter of internal rather than international legal jurisdiction. Secondly, according to Article 42.4 of the Statute, the Court Prosecutor conducting the actual criminal prosecution in the Court shall be elected by the member states of the Statute, and their declaration of intent is not limited here. Therefore, the relevant provisions of the Statute, which concern the support of the charges in the International Criminal Court, may be implemented in the law of Ukraine without making amendments to the Constitution.

Languages:

Ukrainian.

Identification: UKR-2001-C-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.10.2001 / **e)** 14-rp /2001 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.4.1.3 **Institutions** – Judicial bodies – Organisation – Members – Election.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
4.7.8 **Institutions** – Judicial bodies – Ordinary courts.

Keywords of the alphabetical index:

Judge, appointments board / Judge, appointment, commission, power of proposal.

Headnotes:

In the Constitution, the dichotomy between election and appointment of a professional judge designates different procedures for holding an office of judge and different forms of acts on this matter, which are ratified accordingly by the President of Ukraine or the parliament *(Verkhovna Rada)*.

The concept of “appointment of judges to hold office”, as used in Article 131.1.1 of the Constitution, shall be understood as relating to those persons appointed by the President of Ukraine for the first time as a professional judge of a court of general jurisdiction for the term of five years.

Summary:

According to Article 131.1.1 of the Constitution the Supreme Council of Justice shall, amongst other, make submissions on the appointment of judges.

Article 85 of the Constitution, as it relates to the competences of the parliament *(Verkhovna Rada)* for staff matters, mentions the concepts of appointment and election. Judges for courts of general jurisdiction are to be elected (Articles 85.1.27, 127 and 128 of the Constitution) while other officials are to be appointed. The decisions on appointment and election are to be executed as a decree of the parliament.

The Constitutional Court concluded that the concepts of appointment and of election for judges in courts of general jurisdiction are different.

As regards the appointment of judges for courts of general jurisdiction, it is the Supreme Council of Justice that makes a submission to the President of Ukraine on the first appointment of professional judges for five years.

The mechanism of electing the citizens of Ukraine to hold the office of judge is implemented by the Supreme Council of Justice and the Qualification Commission of Judges.

The functions of the Qualification Commission of Judges and the Supreme Council of Justice for the first appointment and election demonstrate that they are assigned different procedures for selecting judges for courts of general jurisdiction. This highlights the difference in the authorities of the Qualification Commission of Judges and the Supreme Council of Justice as to the candidates to hold an office of judge. The Supreme Council of Justice, on recommendation of the Qualification Commission of Judges, makes a submission to the President on the appointment of a citizen to hold an office of judge for the first time. The election process of judges is permanently provided by the parliament as a collegiate body of legislative authorities considering the conclusions made by the Qualification Commission of Judges.

The Supreme Council of Justice makes submissions for appointment of judges, chairpersons for courts of general jurisdiction, their deputies and their dismissal from these offices. An analysis of the Constitution revealed that it contains no provisions on the appointment or election of the chairperson for courts of general jurisdiction, vice-chairpersons and their dismissal. Appointment for the administrative offices of chairpersons for other courts of general jurisdiction and their deputies may be defined exclusively by legislation (Article 92.1.14 of the Constitution).

Languages:

Ukrainian.

European Court of Human Rights

Important decisions

Identification: ECH-1998-C-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 30.07.1998 / **e)** 58/1997/842/1048 / **f)** Valenzuela Contreras v. Spain / **g)** *Reports* 1998-V / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.10 **General Principles** – Certainty of the law.
5.3.34.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Telephone, tapping.

Headnotes:

Spanish law provided a legal basis for telephone tapping but did not indicate with sufficient certainty at material time the extent of the authorities' discretion or the manner in which it was to be exercised. The legal basis was thus not foreseeable enough.

Summary:

Following the tapping of two people's telephone lines with a view to identifying the author of harassment, and the subsequent tapping of the applicant's telephone during a month, the latter was convicted of making threats.

The Court found that at the time when the telephone tapping in question was ordered, the Spanish legislation did not set out adequately the extent of the authorities' discretion in the domain concerned or the way in which it should be exercised. The Court therefore found a violation of Article 8 ECHR.

Supplementary information:

See Appendix to Resolution DH (99) 127, adopted by the Council of Europe's Committee of Ministers on 19 February 1999 at the 659th meeting of the Ministers' Deputies. Information provided by the government of Spain during the examination of the *Valenzuela Contreras case* by the Committee of Ministers:

"The legislation in force at the time of the events that led to the judgment by the European Court of Human Rights was amended by Implementing Act no. 4/1988 of 25 May 1988, which governs telephone monitoring in Spain. Since its judgment (Auto) of 18 June 1992, the Supreme Court has applied and interpreted the new version of Article 579 of the Code of Criminal Procedure introduced by that act in accordance with the meaning of the judgments of the European Court of Human Rights.

The Supreme Court's case-law on Article 579 of the Code of Criminal Procedure cannot be modified or altered, as it is based on the case-law of the European Court of Human Rights, pursuant to Article 10.2 of the Spanish Constitution, which requires fundamental rights to be interpreted in accordance with the relevant international instruments. In its judgment no. 303/93 of 25 October 1993, the Spanish Constitutional Court made clear that "the case-law of the European Court … shall constitute a criterion for the interpretation of constitutional norms which protect fundamental rights". In that judgment, the Constitutional Court also concluded that the case-law of the European Court of Human Rights was directly applicable in the Spanish legal order (see also the *Castells case* (Resolution DH (95) 93)).

In addition, a Spanish translation of the judgment of the European Court of Human Rights has been published in the *Boletín de Información del Ministerio de Justicia* and also forwarded to the Constitutional Court and the General Judicial Council."

Languages:

English, French.

Identification: ECH-1998-C-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 02.09.1998 / **e)** 53/1997/837/1043 / **f)** Vasilescu v. Romania / **g)** *Reports* 1998-III / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
3.13 **General Principles** – Legality.
4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Seizure, restitution / Tribunal, independent, lack.

Headnotes:

The proceedings before State Counsel in relation to an application for restitution of confiscated property items violate the right to a decision by an independent tribunal.

Summary:

In 1966, the police had seized 327 gold coins from the applicant's husband. No charges had been brought against him. In 1990, the applicant applied for restitution of the coins. At the end of a complex set of proceedings before the civil courts in which the applicant had been partly successful, the Supreme Court quashed all decisions by the civil courts and held that State Counsel, a member of the Procurator-General's department, was solely competent.

The Court found that a claim for restitution of confiscated property falls within the scope of application of Article 6 ECHR. It considered that State Counsel, which is subordinated firstly to the Prosecutor-General and secondly to the Minister of Justice, did not constitute an "independent tribunal". Accordingly, Article 6 ECHR had been violated. Article 1 Protocol 1 ECHR had also been violated on account of the lack of legal basis for the confiscation of the applicant's property.

Supplementary information:

See Appendix to Interim Resolution DH (99) 676, adopted by the Council of Europe's Committee of Ministers on 8 October 1999 at the 680th meeting of the Ministers' Deputies. Information provided by the government of Romania during the examination of the *Vasilescu case* by the Committee of Ministers:

"The Government of Romania recalls that according to Article 20.2, taken together with Article 11.2 of the Romanian Constitution, human rights which are guaranteed by international treaties are pre-eminent over internal law. The European Convention on Human Rights and the judgments of the European Court of Human Rights in Romanian cases have accordingly a direct effect in Romanian law.

The Government of Romania wishes to point out that a positive development has taken place within the Romanian courts as regards the problem of lack of access to an independent tribunal (violation of Article 6.1 of the Convention). On 2 December 1997, the Constitutional Court of Romania rendered a decision (no. 486) declaring that in order to comply with the Constitution, Article 278 of the Code of Criminal Procedure – concerning the right to appeal decisions of the public prosecutor – shall only be interpreted to the effect that a person who has an interest can challenge before a court any measure decided by the prosecutor. This decision became final and binding under Romanian law (Article 25.2 and 25.3 of Law no. 47 of 1992) with its publication in the Official Journal of Romania (no. 105 of 6 March 1998) and accordingly enforceable *erga omnes*. The government considers that similar cases – where the valuables in question have been confiscated without any order from a competent judicial authority – are not likely to recur: under Romanian law, investigation measures such as the seizure and retention of valuables can only be taken following an order by the prosecutor and, accordingly, those who are subject to these measures can challenge their lawfulness before an independent tribunal."

Languages:

English, French.

Identification: ECH-1998-C-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 02.09.1998 / **e)** 4/1998/907/1119 / **f)** Lauko v. Slovakia / **g)** *Reports* 1998-VI / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Offence, minor, review by court / Offence, administrative.

Headnotes:

The proceedings before the administrative bodies competent to decide on minor offences in Slovakia

violate the right to a decision by an independent and impartial tribunal.

Summary:

The applicant was convicted of a minor offence by the competent local administrative office and ordered to pay a fine. His appeal was refused by the district office. His application to the Constitutional Court was rejected, that Court having no jurisdiction to review the case, the amount of the fine being too small.

The Court considered that the accusation against the applicant was "criminal" within the meaning of Article 6.1 ECHR. Noting that the applicant's case had been decided by administrative offices under government control (the heads of the offices are appointed by the executive and their officers have status of salaried employees) and that the applicant had been unable to have these decisions reviewed by an independent and impartial tribunal, the Court found that Article 6 ECHR had been violated.

Supplementary information:

See Appendix to Resolution DH (99) 554, adopted by the Council of Europe's Committee of Ministers on 8 October 1999 at the 680th meeting of the Ministers' Deputies. Information provided by the government of the Slovak Republic during the examination of the *Lauko case* by the Committee of Ministers:

> "The violation of the Convention found in this case was due to a provision contained in Section 83.1 of the 1990 Minor Offences Act (no. 372) which prevented the courts from reviewing administrative decisions in cases where a fine of less than 2 000 Slovak crowns had been imposed. In a judgment published on 23 October 1998, the Slovak Constitutional Court granted a direct effect to the judgments of the European Court of Human Rights in the *cases* of *Lauko* and *Kadubec* of 2 September 1998, and declared this provision contrary to Article 6.1 of the Convention and to the Constitution of the Slovak Republic.
>
> On 23 April 1999, six months after the publication of the Constitutional Court's decision, this provision became null and void *ex lege* (Article 132 of the Slovak Constitution). As a result, all administrative decisions concerning minor offences may now be subject to a judicial review whatever be the amount of the fine imposed.
>
> The *Lauko* judgment (in Slovak translation) and the concluding part of the above-mentioned judgment of the Constitutional Court were published together in *Justicnà revue* (nos. 8-9/1999), a journal which is widely distributed in legal circles."

Cross-references:

See also *Kadubec v. Slovakia*, European Court of Human Rights, 02.09.1998, *Reports* 1998-VI.

Languages:

English, French.

Court of Justice of the European Communities

Important decisions

Identification: ECJ-1974-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 16.01.1974 / **e)** C-166/73 / **f)** Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel / **g)** *European Court Reports*, 33 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Community law, interpretation, uniform, national court.

Headnotes:

The powers of a national court to refer to the Court of Justice, either of its own motion or at the request of the parties, questions relating to the interpretation or the validity of provisions of Community law in a pending action are very wide. They cannot be taken away by a rule of national law whereby a court is bound on points of law by the rulings of superior courts. It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.

Summary:

The *Bundesfinanzhof* (German Federal Tax Court) asked the Court in accordance with Article 177 EC whether, under Article 177.2 EC, "courts against whose decisions there is a judicial remedy under national law have a completely unfettered right to refer questions to the Court of Justice", or whether this provision should be construed as "leaving unaffected the rules of domestic law to the contrary whereby a court is bound on points of law by the judgment of the superior court" and thus raising an impediment to such an extensive right.

At the time of submitting these questions, the *Bundesfinanzhof* was to rule on an appeal against a referral to the Court of Justice made by the *Finanzgericht* of Hessen, requesting an interpretation of a Council regulation deemed necessary by that court for resolving a dispute on which it had initially delivered judgment but which the *Bundesfinanzhof* had returned to it after reversing its judgment.

In particular, the Court was asked whether German law, in binding the referring court to the ruling on points of law which is the basis for the decision to make the referral, may prevent that court from referring to the Court of Justice a request for interpretation which concerns the compliance with Community law of the grounds invoked by the *Bundesfinanzhof* for setting aside the earlier judgment of the referring court (the *Finanzgericht*).

Emphasising the aims of Article 177 EC, namely to ensure that Community law has the same effect in all Community member states and to guard against divergences in the interpretation of the Community law which the national courts have to apply, the Court held that this article afforded national courts the "widest discretion in referring matters to the Court" in cases requiring them to rule on the interpretation, or consider the validity, of provisions of Community law. In the Court's view, it follows that a rule of national law under which the national courts are bound on points of law by the rulings of a superior court cannot deprive them of their power, in accordance with Article 177 EC, to refer matters to the Court of Justice. Thus a lower court, if it considers that the ruling on law made by the superior court could prompt it to deliver a judgment contrary to Community law, must be free to refer questions which concern it to the Court of Justice.

Languages:

English, French, German, Italian, Dutch, Finnish, Swedish.

Identification: ECJ-1977-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 24.05.1977 / **e)** C-107/76 / **f)** Hoffmann-La Roche AG v. Centrafarm

Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH / **g)** *European Court Reports*, 957 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Summary proceedings, re-examination / Order, interim, request.

Headnotes:

The summary and urgent character of proceedings in the national court does not prevent the Court from regarding itself as validly seized under Article 177.2 EC whenever a national court or tribunal considers that it is necessary to make use of that paragraph.

Article 177.3 EC must be interpreted as meaning that a national court or tribunal is not required to refer to the Court a question of interpretation or validity mentioned in that article when the question is raised in interlocutory proceedings for an interim order *(einstweilige Verfügung)* even where no judicial remedy is available against the decision to be taken in the context of those proceedings, provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177 EC.

Summary:

The Court had before it a request from the Karlsruhe *Oberlandesgericht* for a preliminary ruling in accordance with Article 177 EC on various questions regarding the interpretation of the EEC Treaty, one relating to Article 177.3 EC.

These questions were raised in proceedings brought before the German courts by a firm which, alleging that its trademark rights in respect of a certain pharmaceutical product had been infringed by the conduct of another firm, called for an interim order *(einstweilige Verfügung)* to prevent the latter from using the trademarks at issue. The judgment to that effect at first instance was appealed before the *Oberlandesgericht* which, before giving judgment, wished to ascertain whether Article 177.3 EC required a national court to ask the Court of Justice to rule on the interpretation of Community law where the question was raised during interlocutory proceedings and where the decision delivered by the Court entertaining these proceedings was no longer subject to appeal, although the parties could introduce an ordinary action in which a reference under Article 177 EC could be made.

The Court stressed the inherent purpose of Article 177 EC, especially paragraph 3, namely to prevent a body of national case-law inconsistent with Community law from coming into existence in any member state. It observed that the requirements arising from that purpose were met as regards summary and urgent proceedings if ordinary proceedings in the main action, permitting re-examination of any question of law provisionally decided upon in the summary proceedings, were instituted either in all circumstances or when the unsuccessful party so required. This reply made it unnecessary for the Court, in view of the referral decision, to rule on the other questions which related to Articles 36 and 38 EC construed as affecting the protection of trademark rights.

Languages:

English, French, Danish, German, Italian, Dutch, Finnish, Swedish.

Identification: ECJ-1978-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 29.11.1978 / **e)** C-83/78 / **f)** Pigs Marketing Board v. Raymond Redmond / **g)** *European Court Reports*, 2347 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Transport, Community provision, interpretation / Referral, relevance.

Headnotes:

As regards the division of jurisdiction between national courts and the Court of Justice under Article 177 EC the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which has to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment.

In the event of questions' having been improperly formulated or going beyond the scope of the powers conferred on the Court of Justice by Article 177 EC, the Court is free to extract from all the factors provided by the national court and in particular from the statement of grounds contained in the reference, the elements of Community law which, having regard to the subject-matter of the dispute, require an interpretation or, as the case may be, an assessment of validity.

Summary:

The Court had before it a request from the Magistrate's Court of County Armagh (Northern Ireland) for a preliminary ruling on the interpretation of several EEC provisions and regulations on the common organisation of markets in the pigmeat sector, in relation to the national legislation applying in Northern Ireland to the transport and sale of pigs.

The various questions were raised in the context of the prosecution of a pig farmer, Mr Raymond Redmond, for offences against the provisions in force in Northern Ireland under local legislation known as the Pigs Marketing Scheme and administered by a body known as the Pigs Marketing Board instituted under the same legislation. Before the Magistrate's Court, the accused pleaded that the provisions of national law under which he was being prosecuted were contrary to several provisions of the EEC Treaty and of the regulations on the common organisation of the market in pigmeat. The Board contended that the national regulations were compatible, invoking Article 37 EC on state monopolies of a commercial character. In the light of this contention, the national court considered it expedient to establish whether the conviction of the accused under the legislation applicable in Northern Ireland was in accordance with Community law. In its observations, the United Kingdom Government submitted first that the questions put by the Magistrate's Court involved the application rather than the interpretation of Community law, and as such could not be resolved by the Court, and second that the other questions formulated by the national court in the written proceedings, described by the court itself as having arisen only incidentally, could not be deemed validly referred to the Court of Justice.

The Court's reply on this point defines the division of jurisdiction between the national court and the Court of Justice under the terms of Article 177 EC. Considering its direct knowledge of the proceedings and responsibility for the judicial ruling to be made, the national court possesses considerable independence in assessing the relevance of the questions raised by the dispute before it, whereas the Court of Justice retains the right to consider these questions, even if improperly formulated, in order to identify and specify the elements of Community law requiring interpretation or assessment of validity. Consequently, the Court considers that it should have regard to all questions put by the national court in order to single out the problems of interpretation raised by the proceedings in question.

Languages:

English, French, Danish, German, Italian, Dutch, Finnish, Swedish.

Identification: ECJ-1981-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 13.05.1981 / **e)** C-66/80 / **f)** SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato / **g)** *European Court Reports*, 1191 / **h)**.

Keywords of the systematic thesaurus:

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Purchase, compulsory, surety, reimbursement / Export, refund.

Headnotes:

Although a judgment of the Court given under Article 177 EC declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national Court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 EC and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier (cf. paragraphs 13-14, 18, disp. 1).

Summary:

The *Tribunale civile di Roma*, in accordance with Article 177 EC, had referred to the Court for preliminary ruling several questions concerning the interpretation of Article 177 EC and the interpretation or validity of various Council or Commission regulations, one relating to compulsory purchase of powdered skim milk and the other to export refunds for compound animal feed products.

The dispute in the main proceedings was between the Italian finance department and a producer of compound animal feed who claimed reimbursement of sureties deposited personally in respect of the obligation to purchase powdered skim milk in accordance with Council Regulation 536/76 of 15 March 1976, which amounts had been declared forfeit to the finance department for failure to honour the purchase obligation. He also claimed payment of export refunds which he had been refused in connection with the export of certain compound feed products. As the claim in the main proceedings was founded on Regulation 563/76 as the legal basis for the sureties and refunds and this instrument had been declared invalid by the Court's preliminary ruling on 5 July 1977, the national court raised the question whether the declaration of a Community regulation's invalidity is effective *erga omnes* or is only binding on the referring court.

As the Court pointed out, in the case of preliminary rulings where an act of the Community institutions is declared invalid, the requirements concerning uniform application of Community law are compounded by very stringent requirements of legal certainty. It is therefore inconceivable that a national court could apply an act which has been declared invalid, without raising further serious uncertainties as to the applicable Community law.

It follows that even if the declaration of invalidity is not tantamount to annulment of the act in question, its effect is not confined to the case in point. Any other court may deem the act invalid in the context of other proceedings, even though it remains competent to determine whether there is good cause to resubmit a question on the validity of the act to the Court.

Languages:

English, French, Danish, German, Greek, Italian, Dutch, Finnish, Swedish.

Identification: ECJ-1981-C-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 06.10.1981 / **e)** C-246/80 / **f)** C. Broekmeulen v. Huisarts Registratie Commissie / **g)** *European Court Reports*, 2311 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
4.7.13 **Institutions** – Judicial bodies – Other courts.

Keywords of the alphabetical index:

Medical practitioner, practise, right / Diploma, recognition / Referral, criteria.

Headnotes:

If, under the legal system of a member state, the task of implementing provisions adopted by the institutions of the Community is assigned to a professional body acting under a degree of governmental supervision, and if that body, in conjunction with the public authorities concerned, creates appeal procedures which may affect the exercise of rights granted by Community law, it is imperative, in order to ensure the proper functioning of Community law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings.

It follows that in the absence, in practice, of any right of appeal to the ordinary courts, the appeals committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are in fact recognised as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a member state within the meaning of Article 177 EC (cf. paragraphs 16-17).

Summary:

The Court had before it a request from the Appeals Committee for General Medicine *(Commissie van Beroep Huisartsgeneeskunde)*, a body instituted by the Royal Netherlands Society for the Advancement of Medicine, for a ruling on a preliminary question under Article 177 EC. The question related first to the interpretation of Council Directive 75/362 of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, and second to Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or other administrative measures in respect of activities of doctors.

The question was raised in the context of an appeal lodged by a doctor of Netherlands nationality, Dr Broekmeulen who, having taken his degree as doctor of medicine, surgery and obstetrics in Belgium, was authorised by the Netherlands Secretary of State for Health and the Environment to practice medicine in the Netherlands but was refused registration as a Huisarts (general practitioner) by the general practitioners' registration committee *(Huisarts Registratie commissie)*.

Before ruling, the Court considered the applicability of Article 177 EC and especially whether the body referring the question was a court or tribunal. To begin with, it noted that the composition of the appeals committee entailed a significant degree of involvement on the part of the Netherlands public authorities. It then observed that that the committee ruled according to an adversarial procedure, that the authorisation on which it decided was indispensable for any doctor taking up residence in the Netherlands for the purpose of practising medicine, and that its decisions were in fact recognised as final.

In the light of these considerations, it acknowledged that the committee was a court within the meaning of Article 177 EC. Consequently, the Court had jurisdiction to answer the preliminary question referred, and did so in the latter part of the judgment.

Languages:

English, French, Danish, German, Greek, Italian, Dutch, Finnish, Swedish.

Identification: ECJ-1981-C-003

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 16.12.1981 / **e)** C-244/80 / **f)** Pasquale Foglia v. Mariella Novello / **g)** *European Court Reports*, 3045 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Court, role, fulfillment / Court, power of appraisal / Referral, hypothetical question / Referral, abuse.

Headnotes:

According to the intended role of Article 177 EC it is for the national court – by reason of the fact that it is for the national court to deal with the substance of the dispute and that it must bear the responsibility for the decision to be taken – to assess, having regard to the facts of the case, the need to obtain a preliminary ruling to enable it to give judgment. In exercising that power of appraisal the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the treaty the law is observed. Accordingly the problems which may be entailed in the exercise of its power of an appraisal by the national court and the relations which it maintains within the framework of Article 177 EC with the Court of Justice are governed exclusively by the provisions of Community law (cf. paragraphs 15-16, disp. 1).

The duty assigned to the Court by Article 177 EC is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the member states. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under Article 177 EC for purposes other than those appropriate for it.

Furthermore, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential, it must be in a position to make any assessment inherent in the performance of its own duties, in particular in order to check, as all courts must, whether it has jurisdiction (cf. paragraphs 18-19).

In the case of preliminary questions intended to permit the national court to determine whether provisions laid down by law or regulation in another member state are in accordance with Community law the degree of legal protection may not differ according to whether such questions are raised in proceedings between individuals or in an action to which the state whose legislation is called in question is a party, but in the first case the Court of Justice must take special care to ensure that the procedure under Article 177 EC is not employed for purposes which were not intended by the Treaty (cf. paragraph 31, disp. 3).

The conditions in which the Court of Justice performs its duties under Article 177 EC are independent of the nature and objective of proceedings brought before the national courts. Article 177 EC refers to the judgment to be given by the national court without laying down special rules as to whether or not such judgments are of a declaratory nature (cf. paragraph 33).

Summary:

This case arose following an initial dispute between a Mr Foglia and a Mrs Novello in which the French system of taxation on liqueur wines was at issue. On that occasion the *Pretura* (district court) of Bra asked the Court to make a preliminary ruling on a series of questions concerning the interpretation of Article 95 EC and incidentally Article 92 EC. The main proceedings concerned the dispatching costs incurred by the applicant, Mr Foglia, a wine-dealer trading in Piedmont (Italy) for sending some cases of Italian liqueur wines purchased by the defendant, Mrs Novello, and delivered on her instructions to a consignee in Menton, France. The contract of sale between Foglia and Novello stipulated that Mrs Novello should not be liable for any duties claimed by the Italian or French authorities contrary to the provisions on the free movement of goods between the two countries or which were at least not due. Mr Foglia adopted a similar clause in his contract with the Danzas undertaking, to which he entrusted the transport of the cases of liqueur wine to Menton (providing that Foglia should not be liable for such unlawful charges or charges which were not due). When Mr Foglia sent Mrs Novello his bill of costs including the amount of the tax paid by Danzas to the French authorities by way of “consumption tax”, Mrs Novello refused to pay that amount, invoking their agreement and especially the illegality of levying consumer tax in France and its non-compliance with Article 95 EC. In its initial judgment of 11 March 1980, *Foglia v. Novello* (104/79, *Reports*, p. 745), the Court did not consider itself competent to rule on these questions, on the ground that in this case it was unnecessary to interpret Community law as the dispute was essentially an artificial one. The Court had indeed observed that the parties in the main proceedings sought to obtain a ruling invalidating the French tax system for liqueur wines by the expedient of proceedings before an Italian court between two private individuals in agreement as to the result to be achieved.

Mrs Novello challenged the Court's reply, claiming that such an application of Article 177 EC raised a

constitutional issue at national level. Accordingly, the *Pretura di Bra* again put a question to the Court regarding the interpretation of Article 177 EC in order to obtain a more precise and definite appraisal of the scope and meaning of the judgment of 11 March 1980. In this case, the Court gave a more extensive statement of grounds confirming the reply in its earlier judgment. While restating the precedent that the need to raise a question for preliminary ruling is for the national court to assess on the facts of the case, it is emphasised that the use of that discretion is part of the exercise of a function jointly assigned to the national court and the Court of Justice, namely to ensure that in the interpretation and application of the Treaty, the law is observed. In particular, the duty assigned to the Court is not to deliver abstract opinions but to assist in the administration of justice in the member states. Consequently, the Court cannot be induced by the expedient of an artificial dispute to rule on issues of Community law which do not correspond to an objective requirement inherent in an actual dispute. The Court infers from the foregoing that while assessment of the need for resolution of a preliminary question rests with the national court, the Court may of its own motion verify whether the dispute brought before the national court is artificial, and should therefore scrutinise the conditions of the referral made to it in order to verify its own jurisdiction. Regarding the level of protection secured to individuals against a national provision contrary to the Treaty, the Court's reply was that such protection is the same in principle whether or not the member state whose legislation is at issue is a party to the proceedings in question. It nonetheless added that in a case of this kind it must exercise special vigilance to guard against the parties diverting the procedure under Article 177 EC from the purposes for which it was intended by the Treaty.

Languages:

English, French, Danish, German, Greek, Italian, Dutch, Finnish, Swedish.

Identification: ECJ-1982-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 06.10.1982 / **e)** C-283/81 / **f)** Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health / **g)** *European Court Reports*, 3415 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Case-law, discrepancies / Referral, obligation.

Headnotes:

The obligation to refer to the Court of Justice questions concerning the interpretation of the EEC Treaty and of measures adopted by the Community institutions which Article 177.3 EC imposes on national courts and tribunals against whose decisions there is no judicial remedy under national law is based on co-operation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the member states, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the aforesaid provision seeks to prevent the occurrence within the Community of discrepancies in case-law on questions of Community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other (cf. paragraphs 6-7).

Article 177 EC does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of that article. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion (cf. paragraph 9).

It follows from the relationship between the second and third paragraphs of Article 177 EC that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give

judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case. If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 EC imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise (cf. paragraphs 10-11).

Although Article 177.3 EC unreservedly requires national courts or tribunals against whose decisions there is no judicial remedy under national law to refer to the Court every question of interpretation raised before them, the authority of an interpretation already given by the Court may however deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, and even though the questions at issue are not strictly identical. However it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in Article 177.3 EC, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so (cf. paragraphs 13-15).

Article 177.3 EC is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the correct application of community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of differences in case-law within the Community (cf. paragraph 21).

Summary:

The Court was requested by the *Corte suprema di cassazione* (Italy) to make a preliminary ruling in accordance with Article 177 EC on a question relating to the interpretation of the third paragraph of that provision. The question was raised in proceedings on a dispute between some wool importing companies and the Italian Health Ministry concerning the payment of a standard fee for a health inspection of wool products imported from Community non-member countries. The companies invoked the Community regulations preventing member states from imposing a tax equivalent to customs duty on imported animal products. The Health Ministry objected that wool products were not subject to any common organisation of agricultural markets. The companies nevertheless put a question on the interpretation of the relevant Community regulation to the *Corte suprema di cassazione*, an authority whose decisions are not open to domestic legal remedies and which consequently, under the terms of Article 177.3 EC, would be required to refer the question to the Court of Justice. The Minister contended that the answer to the question of interpretation was so obvious that, there being no doubt as to the appropriate reply, it ought not to be put to the Court. In order to settle the dispute, the *Corte suprema di cassazione* asked the Court of Justice whether, under the system established by Article 177 EC, the obligation for courts of last instance to refer to it precluded any appraisal by the national court regarding the propriety of the question raised.

The Court, after outlining the system of referral for preliminary ruling as a means of co-operation between itself and the national courts for ensuring due application and uniform interpretation of Community law in all member states, drew attention to the fact that Article 177 EC does not allow the parties in the main proceedings to compel the national court to raise a preliminary question, whereas the national court might if appropriate refer such a question of its own motion. The Court went on to observe that courts of last instance are not required to refer a question for preliminary ruling where it is not material, or where the Community provision at issue has already been interpreted by the Court, as it held in the judgment of 27 March 1963, *Da Costa* (28 to 30/62, *Reports*, p. 75), or where the proper application of Community law is so patent as to leave no reasonable doubt. Lastly, the Court made it clear that the existence of an eventuality like this should be determined according to the specific features of Community law, the special difficulties raised by its interpretation, and the risk of divergent practice within the Community. The Court concluded that only if able to substantiate in the light of the specific characteristics of Community law that they need not resolve a true problem of interpretation crucial to the settlement of the dispute before them, could courts of last instance such as the Italian Court of Cassation dispense with a referral under Article 177.3 EC when faced with a question of Community law.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Finnish, Swedish.

Identification: ECJ-1987-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 30.09.1987 / **e)** C-12/86 / **f)** Meryem Demirel v. City of Schwäbisch Gmünd / **g)** *European Court Reports*, 3719 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

European Community, Turkey, agreement / Worker, movement, freedom / Agreement, mixed / Visa, expiry / Expulsion.

Headnotes:

An agreement concluded by the Council under Articles 228 and 238 EC is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of Article 177.1.b EC, and, as from its entry into force, the provisions of such an agreement form an integral part of the Community legal system; within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.

In the case of provisions in an association agreement concerning the free movement of workers, doubt cannot be cast on that jurisdiction of the Court by the argument that, in the case of a "mixed" agreement, its powers do not extend to provisions whereby the member states have entered into commitments in the exercise of their own powers. Since freedom of movement for workers is, by virtue of Article 48 EC *et seq.*, one of the fields covered by that treaty, commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238 EC.

Nor can the jurisdiction of the Court be called in question by virtue of the fact that in the field of freedom of movement for workers, as Community law now stands, it is for the member states to lay down the rules which are necessary to give effect in their territory to the provisions of the agreement or the decisions to be adopted by the association Council. In ensuring respect for commitments arising from an agreement concluded by the Community institutions the member states fulfill, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (cf. paragraphs 7, 9-11).

Summary:

The Court was requested by the *Verwaltungsgericht* (Administrative Court) of Stuttgart to make a preliminary ruling under Article 177 EC on two questions concerning the interpretation of Articles 7 and 12 of the Association Agreement of 12 September 1963 between the EEC and Turkey and Article 36 of the additional protocol signed in Brussels on 23 November 1970.

The questions were raised in connection with an action for the annulment of an order to leave the country, accompanied by the threat of expulsion, which the city of Schwäbisch Gmünd had issued against Mrs Meryem Demirel, a Turkish national, on the expiry of her visa. Mrs Demirel is the wife of a Turkish national resident and employed in the Federal Republic of Germany since his entry in 1979 for the purpose of family reunification. She had come to rejoin her husband with a visa which was valid only for the purposes of a visit. Pursuant to the *Ausländergesetz* (aliens law), amendments had been introduced to tighten the conditions of family reunification in the case of nationals of non-member countries having themselves entered the Federal Republic of Germany for purposes of family reunification, in that the period during which the foreign national was required to have resided continuously and lawfully on German territory was raised from three to eight years. Mrs Demirel's husband did not fulfil this condition at the time of the events that led to the main proceedings. The Stuttgart *Verwaltungsgericht*, hearing the application for annulment of the order that Mrs Demirel leave the country, referred to the Court of Justice the preliminary questions concerning the interpretation of Articles 7 and 12 of the Association Agreement between the EEC and Turkey and Article 36 of the additional protocol thereto. Before addressing these questions, the Court considered the extent of its own jurisdiction to rule on the interpretation the provisions of the agreement and the protocol regarding workers' freedom of movement. As it found in the judgment of 30 April 1974, *Haegeman* (171/73,

Reports, p. 449), an agreement concluded by the Council under Articles 228 and 238 EC is an act of one of the institutions of the Community within the meaning of Article 177.1.b EC, so that the Court has jurisdiction to give preliminary rulings concerning the interpretation of the agreement. More specifically, the Court stressed that in this instance the agreement at issue was an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, and thus in freedom of movement for workers too. This is an area where the Community is fully empowered to conclude agreements under Article 238 EC with non-member states. Lastly, the Court confirmed that it had jurisdiction for the purpose of interpreting the provisions of the agreement and the protocol, even though it was for the member states to lay down the necessary rules for giving effect in their territory to the provisions of the agreement or the decisions to be adopted by the Association Council. Indeed, as was acknowledged in the judgment of 26 October 1982, *Kupferberg* (104/81, *Reports*, p. 3641), in ensuring respect for commitments arising from an agreement concluded by the Community institutions the member states fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Identification: ECJ-1987-C-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 22.10.1987 / **e)** C-314/85 / **f)** Foto-Frost v. Hauptzollamt Lübeck-Ost / **g)** *European Court Reports*, 4199 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.
1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Community, measure, validity, examination / Import, duty / Customs, duty / Community, law, interpretation, uniform.

Headnotes:

National courts against whose decisions there is a judicial remedy under national law may consider the validity of a Community measure and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. In contrast, national courts, whether or not a judicial remedy exists against their decisions under national law, themselves have no jurisdiction to declare that acts of Community institutions are invalid.

That conclusion is dictated, in the first place, by the requirement for Community law to be applied uniformly. Divergences between courts in the member states as to the validity of Community measures would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.

Second, it is dictated by the necessary coherence of the system of judicial protection established by the treaty. In Articles 173 and 184 EC, on the one hand, and in Article 177 EC, on the other, the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Since Article 173 EC gives the Court exclusive jurisdiction to declare void an act of a community institution, the coherence of the system requires that where the validity of an act is challenged before a national court the power to declare the act invalid must also be reserved for the Court of Justice.

That division of jurisdiction may have to be qualified in certain circumstances where the validity of a Community act is contested before a national court in proceedings relating to an application for interim measures (cf. paragraphs 14-20, disp. 1).

Summary:

The *Finanzgericht* (taxation court) of Hamburg referred to the Court for a preliminary ruling on the interpretation of Article 177 EC, Article 5.2 of Council Regulation no. 1697/79 of 24 July 1979 on the post-clearance recovery of import or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, on the interpretation of the Protocol of 25 March 1957 on German internal trade and connected problems, and on the validity of a Commission decision, addressed to the Federal Republic of Germany, that the post-clearance recovery of import duties must be effected in a particular case.

These questions were raised in the course of proceedings in which Foto-Frost, Ammersbek, an importer, exporter and wholesaler of photographic goods, sought the annulment of a notice issued by the *Hauptzollamt* (principal customs office) of Lübeck-Ost for the post-clearance recovery of import duties following a Commission decision addressed to the Federal Republic of Germany ordering it not to refrain from post-clearance recovery.

The *Finanzgericht* enquired of the Court as to its own competence to declare invalid a Commission decision of the type at issue. It considered the validity of the Commission's decision of 6 May 1983 dubious on the ground that all the requirements set out in Article 5.2 of Council Regulation no. 1679/79 for refraining from the post-clearance recovery of duty were fulfilled in this case. However, it considered that in view of the division of jurisdiction between the Court of Justice and the national courts stipulated in Article 177 EC, the Court alone was competent to declare acts of the Community institutions invalid.

After observing that Article 177 EC did not settle the question whether national courts were empowered to make their own finding as to the invalidity of measures of the Community institutions, the Court clearly stated that they were not empowered to do so. The Court nevertheless emphasised that they could examine the validity of a Community measure and, if the grounds of invalidity presented to them by the parties were deemed unfounded, could reject them, concluding that the measure was completely valid. This unique system is the upshot of examining a combination of factors including the need for uniform application of Community law, which does not admit of divergences between national courts as to the validity of Community acts, and the coherence of the system of judicial protection established by the Treaty which prescribes requests for preliminary rulings on validity as one of the means for reviewing the legality of acts of the Community institutions. The sole competence conferred on the Court of Justice by Article 173 EC to annul the acts adopted by the Community institutions must have as its corollary sole jurisdiction to find these acts invalid in litigation before a national court.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Identification: ECJ-1988-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 02.02.1988 / **e)** C-309/85 / **f)** Bruno Barra v. État belge et Ville de Liège / **g)** *European Court Reports*, 355 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Limitation on retrospective effect.
3.10 **General Principles** – Certainty of the law.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.

Keywords of the alphabetical index:

Relationship, legal, questioning.

Headnotes:

The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 EC, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied.

It is only exceptionally that the court may, in application of the general principle of legal certainty inherent in the community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships entered into in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships. However, such a restriction may be allowed only in the judgment ruling upon the interpretation sought (cf. paragraphs 11-13).

Summary:

The President of the *Tribunal de première instance* of Liège referred to the Court in accordance with Article 177 EC two questions as to whether a national law restricting the possibility of obtaining reimbursement of enrolment fees was compatible with Community law, it having been found contrary to Article 7 EC in an earlier preliminary ruling.

These questions were raised in the course of summary proceedings introduced by Mr Barra and sixteen other applicants, challenging the refusal of the Belgian state authorities to refund to them additional enrolment fees paid up to 13 February 1985, the date of delivery of the *Gravier* judgment (293/83, *Reports*, p. 606). In that judgment, the Court held that to require only students from other member states to pay enrolment fees for access to vocational training courses constituted discrimination on grounds of nationality, contrary to Article 7 EC.

The issue before the Court concerned the temporal effects of preliminary rulings and particularly their retroactivity. Here the Court referred to the solution formalised in its judgment of 27 March 1980, *Amministrazione delle finanze dello Stato v. Denkavit italiana* (61/79, *Reports*, p. 1205), which is that the rule interpreted may and must be applied by the national court even to legal relationships arising and established before the judgment that rules on the request for interpretation. Uniform application of Community law nevertheless requires the Court alone to decide, by way of an exception and for reasons of legal certainty, that the interpretations which it delivers should be limited to the future, but it can so decide only in the actual judgment making the interpretation, any subsequent request by the national court on this specific point being inadmissible.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Identification: ECJ-1992-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 16.07.1992 / **e)** C-163/90 / **f)** Administration des douanes et droits indirects v. Léopold Legros e.a. / **g)** *European Court Reports*, I-4625 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Limitation on retrospective effect.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
3.10 **General Principles** – Certainty of the law.
3.17 **General Principles** – Weighing of interests.
3.26 **General Principles** – Principles of Community law.
4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Department, overseas.

Headnotes:

In exercising the power of interpretation which Article 177 EC confers upon it, it is only exceptionally, and only in the actual judgment ruling upon the interpretation sought, that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned, who intends calling in question legal relationships established in good faith, the possibility of relying upon the provisions thus interpreted. It is, in this respect, necessary to bear in mind that although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future

application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision.

Given that the specific identity of the French overseas departments and the particular characteristics of the dock dues have created a situation of uncertainty regarding the lawfulness of the charge at issue under Community law, an uncertainty which, as regards Community institutions, was reflected in conduct which may have led the French authorities to believe that the levying of the charge was in conformity with Community law, overriding considerations of legal certainty preclude legal relationships whose effects have been exhausted in the past from being called into question, which would retroactively upset the system for financing the local authorities concerned.

It is for that reason that it must be held that neither the provisions of the EEC Treaty nor Article 6 of the Agreement between the Community and Sweden may be relied upon in support of claims for refund of amounts paid by way of charges such as dock dues before the date of the judgment declaring such charges to be impermissible under Community law, except by claimants having, before that date, initiated legal proceedings or raised an equivalent claim, it being understood that limitation of the temporal effects of that judgment does not apply to claims for refunds of amounts paid after delivery thereof in respect of earlier imports (cf. paragraphs 30-36, disp. 3).

Summary:

The Court was asked by the Court of Appeal of Saint-Denis (Réunion) to make preliminary rulings under Article 177 EC on three questions regarding the interpretation of this treaty, particularly Articles 9, 13 and 95, and on Article 6 of the free trade agreement between the Community and the Kingdom of Sweden.

These questions were raised in connection with a dispute between the *Administration des Douanes et Droits Indirects* (customs and indirect levies administration) and Mr Léopold Legros and other taxpayers concerning a request for the refund of certain sums paid to that administration. These were payments by way of dock dues charged for the landing of goods in the Réunion region, in connection with the customs clearance of certain cars purchased in mainland France and produced in another member state. The national court to which an application for the refund of these dues was made enquired of the Court whether this levy constituted a charge having an effect equivalent to customs duty and should as such be declared incompatible with Community law.

In their written and oral observations, the French authorities raised the problem of the disastrous financial consequences which would ensue for the French overseas departments from a judgment requiring the repayment of amounts incorrectly charged up to that point in time, and raised the possibility of limiting the temporal effect of a judgment declaring the dock dues incompatible with Community law.

In deciding whether or not it was expedient to limit the temporal effect of its judgment, the Court first pointed out that it could only do so exceptionally, and then only having regard to a general principle of legal certainty inherent in the Community legal order. It went on to note the situation of uncertainty which obtained regarding the lawfulness of the charge at issue under Community law. Accordingly, it conceded that in such circumstances overriding considerations of legal certainty precluded calling into question legal relationships whose effects had been exhausted in the past and, in order to avoid retroactive disruption of the system for financing the local authorities of the French overseas departments, decided that its declaration concerning the incompatibility of the charge at issue with Community law was non-retroactive in effect.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Identification: ECJ-1992-C-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 16.07.1992 / **e)** C-343/90 / **f)** Manuel José Lourenço Dias v. Director da Alfândega do Porto / **g)** *European Court Reports*, I-4673 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
3.26.3 **General Principles** – Principles of Community law – Genuine co-operation between the institutions and the member states.

Keywords of the alphabetical index:

Referral, context / Referral, reasons / Referral, hypothetical question.

Headnotes:

In the framework of the procedure for co-operation between the Court of Justice and the courts of the member states provided for by Article 177 EC, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment. Consequently, where the questions put by the national court concern the interpretation of a provision of Community law, the Court is, in principle, bound to give a ruling.

Nevertheless, it is a matter for the Court of Justice, in order to determine whether it has jurisdiction, to examine the conditions in which the case has been referred to it. The spirit of co-operation which must prevail in the preliminary-ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the member states and not to deliver advisory opinions on general or hypothetical questions (cf. paragraphs 14-17).

In order to enable the Court of Justice to provide a useful interpretation of Community law under Article 177 EC, it is appropriate that, before making the reference to the Court, the national court should establish the facts of the case and settle the questions of purely national law. By the same token, it is essential for the national court to explain the reasons why it considers that a reply to its questions is necessary to enable it to give judgment (cf. paragraph 19).

Summary:

The Court was requested by the *Tribunal Fiscal Aduaneiro do Porto* (Portugal) to make preliminary rulings on several questions relating to the interpretation of the EEC Treaty provisions on charges having equivalent effect to customs duty on imports and discriminatory internal taxation, in order to determine the compatibility of national regulations introducing a motor vehicle tax.

These questions were raised in litigation between Mr Manuel José Lourenço Dias and the Director da Alfândega do Porto (Oporto Head of Customs). The latter had accused Mr Lourenço Dias of modifying some of the technical characteristics of a motor vehicle without paying the tax levied for that modification. During the proceedings, doubts were raised as to the relevance of the preliminary questions before the Court to the dispute to be settled by the national court.

In response to the objections, the Court specified its guidelines regarding its jurisdiction within the meaning of Article 177 EC. First, it recalled the set precedent (cf. in particular the judgments of 29 November 1978, *Pigs Marketing Board*, 83/78, *Reports*, p. 2347 and of 28 November 1991, *Durighello*, C-186/90, *Reports*, p. I-5773) that its jurisdiction is shared with the national court in such a way that it rests with the latter to determine the expediency of a preliminary ruling, so that once the question is referred to the Court it is in principle bound to give a ruling (judgment of 8 November 1990, *Gmurzynska*, C-231/89, *Reports*, p. I-4003). In its judgment of 16 December 1981, *Foglia* (244/80, *Reports*, p. 3045), the Court nevertheless considered that, in order to determine whether it had jurisdiction, it was required to examine the conditions in which the case had been referred to it by the national court. The function of the Court is to assist in the administration of justice in the member states and not to deliver advisory opinions on general questions. Consequently, the Court must be able to provide a "useful interpretation" of Community law. For that purpose, it must be in possession of a series of elements provided by the national court, such as the facts of the case (judgment of 10 March 1981, *Irish Creamery Milk Suppliers Association*, 36/80 and 71/80, *Reports*, p. 735) and the reasons why that court deems replies to its questions necessary for resolving the dispute before it (judgment of 12 June 1986, *Bertini*, 98/85, 162/85 and 258/85, *Reports*, p. 1885). Once the relevance of the question to the resolution of the dispute has been ascertained by the Court in the light of this information, the Court can either deliver the interpretation requested of it, as it did regarding some of the provisions submitted to it in this case, or declare that there is no need to proceed to judgment, as it did for other provisions.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Identification: ECJ-1994-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 26.04.1994 / **e)** C-228/92 / **f)** Roquette Frères SA v. Hauptzollamt Geldern / **g)** *European Court Reports*, I-1445 / **h)**.

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
1.6.5.1 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect *(ex tunc)*.
1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.

Keywords of the alphabetical index:

Judgment, annulment / Community law, application, uniform.

Headnotes:

Although a judgment of the Court in proceedings for a preliminary ruling declaring a Community act invalid in principle has retroactive effect, like a judgment annulling an act, it is, however, open to the Court to limit the temporal effect of such a ruling. That is justified by the interpretation of Article 174 EC, having regard to the necessary consistency between the procedure for a preliminary ruling and the action for annulment, which are two mechanisms provided by the Treaty for reviewing the legality of acts. The possibility of limiting the temporal effect of the invalidity of a Community regulation, whether under Article 173 EC or Article 177 EC, is a power conferred on the Court by the Treaty in the interest of the uniform application of Community law throughout the Community.

It is for the Court, where for reasons of legal certainty it makes use of the possibility of limiting the effect on past events of a declaration in preliminary ruling proceedings that a Community regulation is invalid, to decide whether an exception to that temporal limitation of the effect of its judgment may be made in favour of the party to the main proceedings which brought the action before the national court against the national measure implementing the regulation, or whether, conversely, a declaration of invalidity applicable only to the future is an adequate remedy even for traders who have taken steps at the proper time to protect their rights.

In the case of a party to the main proceedings who has brought an action before the national court challenging a notice to pay monetary compensatory amounts adopted on the basis of an invalid Community regulation, such a limitation of the effect on past events of a declaration of invalidity in a preliminary ruling would have the consequence that the national court would dismiss the action brought against the notice in question, even though the regulation on the basis of which that notice was adopted had been declared invalid by the Court in the same proceedings. A trader would thereby be deprived of his right to effective judicial protection in the event of a breach of Community law by the institutions, and the practical effect of Article 177 EC would be jeopardised. Consequently, a trader who before the date of the Court' s judgment has brought an action before a national court challenging that notice is entitled to rely on that invalidity in the main proceedings.

Traders who before the said date have submitted an administrative complaint, seeking reimbursement of the monetary compensatory amounts paid by them on the basis of such a regulation, are also so entitled (cf. paragraphs 17-20, 25-30, disp. 2-3).

Summary:

The *Finanzgericht* of Düsseldorf had raised two preliminary questions under Article 177 EC concerning the validity of Commission Regulation (EEC) no. 2719/75 of 24 October 1975 fixing the monetary compensatory amounts and certain rates for their application and also concerning the temporal effect of a declaration of its invalidity.

These questions were raised in connection with litigation between the Roquette company and the *Hauptzollamt* (principal customs office) of Geldern over the latter's collection of monetary compensatory amounts (MCAs) founded on the aforementioned regulation and alleged unlawful by the company.

The Court, after declaring the regulation in question invalid, addressed the issue of the temporal effect of that declaration, asserting firstly that the declaration had a retroactive effect in principle. It observed, however, that in the interest of uniform application of Community law, it could limit the temporal effect of the invalidity of a Community regulation. As in previous judgments, such as *Providence Agricole de la Champagne* of 15 October 1980 (4/79, *Reports*, p. 2823), *Maïseries de Beauce* (109/79, *Reports*, p. 2883), and *Roquette Frères* (145/79, *Reports*, p. 2917), in this case the Court excluded the possibility of challenging the charging or payment of MCAs by the national authorities on the basis of a regulation declared invalid by the present judgment, in respect of periods prior to the judgment. However, the Court acknowledged that an exception to that retroactive limitation of the effect of its judgment could

be made in favour of a trader, such as the party to the main proceedings which brought the action before the national court against the national measure implementing the invalid regulation, or laid an administrative complaint, seeking reimbursement of the amounts paid.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese.

Identification: ECJ-1994-C-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 27.04.1994 / **e)** C-393/92 / **f)** Commune d'Almelo e.a. v. NV Energiebedrijf Ijsselmij / **g)** *European Court Reports*, I-1477 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
3.23 **General Principles** – Equity.
4.7.13 **Institutions** – Judicial bodies – Other courts.

Keywords of the alphabetical index:

Community law, application, uniform, primacy / Arbitration, quality of court / Court, nature.

Headnotes:

A national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of Article 177 EC, even if under the terms of the arbitration agreement made between the parties that court must give judgment according to what appears fair and reasonable. In accordance with the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5 of the Treaty, such a court must observe the rules of Community law, in particular those relating to competition, even where its ruling must be based on considerations of equity (cf. paragraphs 23-24, disp. 1).

Summary:

The Court had before it a request referred by the *Gerechtshof te Arnhem* in accordance with Article 177 EC for a preliminary ruling on two questions relating to the interpretation of Articles 37, 85, 86, 90 and 177 EC.

These questions were raised in connection with a dispute between the municipality of Almelo, together with other local electricity distributors, and N. V. *Energiebedrijf Ijsselmij* (hereinafter "IJM"), a regional electricity supply corporation, concerning an extra cost equalisation charge for which it had billed the local distributors.

They had reacted to this increase by lodging a complaint before the Commission of the European Communities followed by an appeal against its decision, dated 16 January 1991, relating to a proceeding under Article 85 EC [IV/32.732-IJsselcentrale (IJC) and Others, OJ L 28, p. 32], and furthermore by initiating arbitration proceedings for a decision on the legality of the aforesaid surcharge.

The application for annulment of the Commission's decision was dismissed by the judgment of the Court of First Instance of 18 November 1992, *Rendo and Others v. Commission* (T-16/91, *Reports*, p. II-2417), subsequently set aside at appeal by the Court which referred the case back to the Court of First Instance by judgment of 19 October 1995, *Rendo and Others v. Commission* (C-19/93 P, *Reports*, p. I-3319).

The arbitration concluded with an award against the local distributors who therefore appealed to the *Gerechtshof te Arnhem* as conciliator. The national court considered it plausible that IJM could not have imposed the surcharge had there been no ban on importing electricity (regarding which the Commission had not adopted a position) and therefore asked the Court for a preliminary ruling on questions relating to the interpretation of the aforementioned treaty articles, particularly the question whether a national court ruling in a case provided for by law on an appeal against an arbitration award can be regarded as a national court within the meaning of Article 177 EC where, under the terms of the arbitration agreement reached between the parties, this court is required to rule as conciliator.

In order to answer this question, the Court firstly referred to the judgment of 30 June 1966, *Vaassen-Göbbels* (61/65, *Reports*, p. 377) in which it had circumscribed the concept of a court for the purposes of Article 177 EC by defining a number of criteria to be met by such a body, then the judgments of 11 June 1987, *Pretore di Salò* (14/86, *Reports*,

p. 2545), 21 April 1988, *Pardini* (338/85, *Reports*, p. 2041) and 30 March 1993, *Corbiau* (C-24/92, *Reports*, p. I-1277) in which the Court elaborated on these criteria by stressing in particular the need for every judicial authority to be independent.

Concerning the arbitration, the Court held in the judgment of 23 March 1982, *Nordsee Deutsche Hochseefischerei* (102/81, *Reports*, p. 1095) that the concept of a court or a tribunal within the meaning of Article 177 EC covered ordinary courts reviewing an arbitration award or entertaining an appeal, objection or a request for leave to issue execution or any other remedy afforded by the applicable national legislation.

The Court's interpretation is not affected by the circumstance that a court such as the *Gerechtshof* rules as conciliator. Indeed, according to the principles of the primacy of Community law and the uniformity of its application, in conjunction with Article 5 EC, a national court to which an appeal against an arbitration award is referred in a case provided for by law is required to comply with the rules of Community law even when deciding *ex aequo et bono.* The Court concluded that the *Gerechtshof* was to be regarded as a national court or tribunal within the meaning of Article 177 EC, and replied to the two other preliminary questions.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Identification: ECJ-1997-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 17.07.1997 / **e)** C-28/95 / **f)** Leur-Bloem v. Inspecteur der Belastingdienst / Ondernemingen Amsterdam 2 / **g)** *European Court Reports*, I-4161 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.

Keywords of the alphabetical index:

Situation, internal, Community law, application / Community law, application, context / Law, national, aligned to Community law.

Headnotes:

The Court of Justice has jurisdiction under Article 177 EC to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation with Community law.

Where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

However, in such a case, pursuant to the distribution of judicial functions between national courts and the Court of Justice under Article 177 EC, it is for the national court alone to assess the precise scope of such a reference to Community law, the jurisdiction of the Court being confined to considering provisions of Community law only. Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the member state (cf. paragraphs 32-34, disp. 1).

Summary:

Under Article 177 EC, the Court had before it a question referred by the *Gerechtshof te Amsterdam* for a preliminary ruling on the interpretation of Articles 2.d and 11.1.a of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member states.

The dispute in the main proceedings was between Ms Leur-Bloem, sole shareholder of two companies, and the *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* (Amsterdam Inspector of Corporate Taxation) concerning the refusal of the Netherlands tax authorities to treat the transaction for purchase of shares of another company as a "merger by exchange of shares" within the meaning of Netherlands legislation. This designation of the transaction would have resulted in tax exemption on any gain made on the transfer of shares, as provided by Netherlands legislation. The *Gerechtshof* held that the provision of Netherlands law inserted when the Directive was transposed into domestic law required interpretation. However, it first raised the question whether the Court had jurisdiction under Article 177 EC to interpret Community law where Community law does not directly govern the situation in question but the national legislature has chosen, in transposing provisions of a directive into domestic law, to treat purely internal situations and those governed by the Directive in the same way, so that it has aligned its legislation to Community law. In accordance with the case-law derived from the judgments *Dzodzi* of 18 October 1990 (C-297/88 and C-197/89, *Reports*, p. I-3763) and *Gmurzynska-Bscher* of 8 November 1990 (C-231/89, *Reports*, p. I-4003), the Court has repeatedly declared itself competent to determine requests for preliminary rulings on Community provisions in situations where the principal facts are outside the scope of Community law but the said provisions have been rendered applicable either by domestic law or by the effect of ordinary contractual provisions. Only in its judgment of 28 March 1995 in *Kleinwort Benson* (C-346/93, *Reports*, p. I-615) did the Court hold that it had no jurisdiction to give a preliminary ruling on the Brussels Convention of 27 September 1968, on the ground that the provisions of the Convention which the Court was asked to interpret had not been rendered applicable as such by the law of the contracting State concerned, having merely been taken as a model by national law which only partially reproduced their terms. On the other hand, the Court held that provisions or concepts taken from Community law in order to give purely domestic circumstances the same interpretation as circumstances governed by Community law should receive a uniform interpretation; consequently, it had jurisdiction under Article 177 EC to interpret Community law in such a context. It therefore answered the questions put to it.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Identification: ECJ-1998-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 22.10.1998 / **e)** C-9/97, C-118/97 / **f)** Raija-Liisa Jokela and Laura Pitkäranta, Joined Cases / **g)** *European Court Reports*, I-6267 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
4.7.13 **Institutions** – Judicial bodies – Other courts.

Keywords of the alphabetical index:

Court, nature / Court, definition.

Headnotes:

In order to determine whether a body is a court or tribunal for the purposes of Article 177 EC, which is a question governed by Community law alone, account must be taken of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether procedure before it is adversarial, whether it applies rules of law, and whether it is independent. The Finnish Rural Businesses Appeals Board satisfies those conditions, since it is established by law and composed of members appointed by public authority and enjoying the same guarantees as judges against removal from office; it has jurisdiction by law in respect of aid for rural activities, gives legal rulings in accordance with the applicable rules and the general rules of procedure, and, under certain conditions, an appeal lies against its decision to the Supreme Administrative Court (cf. paragraphs 18-24).

Summary:

Maaseutuelinkeinojen Valituslautakunta (Rural Businesses Appeals Board, Finland) had asked the Court for a preliminary ruling on the interpretation of Articles 17 and 18 of Council Regulation (EEC) no. 2328/91 of 15 July 1991 on improving the efficiency of agricultural structures and Article 1 of Council Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in certain less-favoured areas.

The questions were raised in connection with two sets of proceedings instituted respectively by Ms Jokela and Laura Pitkäranta after the administrative authorities refused to grant them a compensatory allowance intended to offset the handicap caused by farming in less-favoured agricultural areas.

The two cases were brought before the *Maaseutuelinkeinojen Valituslautakunta* (Rural Businesses Appeals Board) which decided to stay the proceedings and to refer the two questions mentioned above to the Court of Justice for a preliminary ruling.

Before answering the questions referred, the Court had to determine whether the *Maaseutuelinkeinojen Valituslautakunta* was to be regarded as a court or tribunal within the meaning of Article 177 EC.

The Court firstly recalled the factors to be taken into account in determining whether a body is a court, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether procedure before it is adversarial, whether it applies rules of law, and whether it is independent, as established by its case-law (*Vaassen-Göbbels)*, judgment of 30 June 1996 (61/65, *Reports*, p. 377), *Dorsch Consult* judgment of 17 September 1997 (C-54/96, *Reports*, p. I-4961) and *Garofalo and Others*, judgment of 16 October 1997 (C-69/96 to C-79/96, *Reports*, p. I-5603).

It then went on to make a specific examination of this body, noting that it was established under Finnish law, furthermore defining its jurisdiction and rules of procedure, and was composed of members appointed by public authority and enjoying the same guarantees as judges against removal from office. It further observed that this body gave legal rulings as a court of appeal against decisions by the municipal administration in rural matters and that in certain circumstances an appeal lay against its decision to the Supreme Administrative Court.

The Court concluded from the foregoing that the *Maaseutuelinkeinojen Valituslautakunta* must be regarded as a court or tribunal within the meaning of Article 177 EC, and that the preliminary questions referred were therefore admissible. It accordingly undertook to answer them.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish.

Identification: ECJ-2000-C-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 28.06.2000 / **e)** C-116/00 / **f)** Criminal proceedings v. Claude Laguillaumie / **g)** *European Court Reports*, I-4979 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
2.2.1.6.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and domestic non-constitutional legal instruments.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Court, national, referral / Referral, decision, notification / Law, Community, interpretation / Referral, wording / Referral, context, factual and legislative / Referral, observation by member states.

Headnotes:

Under the procedure prescribed in Article 234 EC, the sharing of jurisdiction between the Court of Justice and the national court or tribunal referring a preliminary question to it means that it is not for the Court to ascertain whether the decision referring the question has been taken in accordance with the rules of judicial organisation and procedure laid down by national law (cf. paragraph 10).

Although, where the application of Article 234 EC is concerned, the Court does not have jurisdiction to rule on the compatibility of a domestic provision with Community law it has regard to the facts stated by the national court in order to infer from the wording of the questions asked by the latter the elements relating to interpretation of Community law enabling it to resolve the legal issue before it (cf. paragraphs 11-12).

The need to arrive at an interpretation of Community law which will be of use to the national court makes it necessary for the national court to define the factual and legislative context of the questions it is asking, or

at the very least to explain the factual circumstances on which those questions are based. Those requirements are of particular importance in the field of competition, which is characterised by complex factual and legal situations.

In this respect, the information provided in decisions to make referrals serves not only to enable the Court to give useful replies but also to enable the governments of member states as well as other interested parties to submit observations in accordance with Article 20 of the Statute of the Court. Given that according to this provision only decisions referring cases to the Court need be notified to the interested parties, the above possibility cannot be secured merely by the fact that the national court makes reference to the observations of the parties in the main proceedings, which may furthermore contain different presentations of the facts in the proceedings before that court. It is furthermore indispensable that the national court give a minimum of explanations as to the choice of the Community provisions which it asks to have interpreted, and as to the connection which it establishes between these provisions and the legislation applicable to the proceedings before it.

Consequently, a request from a national court which does not clarify the connection of each provision to be interpreted with the factual situation or the applicable national legislation is manifestly inadmissible in that it does not contain sufficient indications to meet these requirements (cf. paragraphs 14-19, 25-26).

Article 234 EC institutes a procedure of direct co-operation between the Court of Justice and national courts or tribunals in which the parties are merely invited to submit observations within the legal framework established by the referring authority. Within the limits set by Article 234 EC, it consequently rests strictly with the national courts to decide on the principle and the subject-matter of any referral to the Court (cf. paragraphs 21-22).

Summary:

The Court of Appeal of Paris (France), pursuant to Article 234 EC (formerly Article 177) had referred to the Court of Justice for preliminary ruling a question concerning the interpretation of Articles 28 and 30 (previously Articles 30 and 36 EC), Articles 81 and 82 (previously Articles 85 and 86 EC), and Council Directive 83/189/EEC of 28 March 1983 prescribing an information procedure in respect of technical standards and regulations, Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, and European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste.

This question was raised in connection with criminal proceedings against Mr Laguillaumie, charged with having wittingly and deliberately omitted to ensure the disposal of waste-generating products sold by his firm. This offence is prescribed and punished by Sections 6-2 and 24 of Act no. 75-633 of 15 July 1975 on disposal of waste and recovery of materials, as specified in Decree no. 92-377 of 1 April 1992 applying the aforementioned act in respect of waste generated by discarding the packaging specified in Act 75-633. Before the Court of Appeal, the accused alleged in his defence that the French regulations which were the basis for the proceedings against him were contrary to the principles laid down by Articles 28 and 30 EC and that Decree no. 92/377 was still imprecise regarding certain measures required to assist waste disposal. The national court referred the question to the Court of Justice in an unusual manner, by lodging an undated document headed “Application in the interests of the law” to which it appended the statutory texts, the memorial in defence presented by accused, and a copy of the prosecution records.

The Court considered the admissibility of such a preliminary question, and this prompted it to recall the sharing of its jurisdiction with national courts for the application of Article 234 EC, according to its set precedent. As acknowledged in the judgment of 14 January 1982, *Reina* (65/81, *Reports*, p. 33), it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure. Nor, according to the judgment of 11 June 1987, *Pretore di Salò v. X* (14/86, *Reports*, p. 2545), may the Court rule on the conformity of national measures with Community law, but it may extract from the wording of the questions formulated by the national court elements relating to the interpretation of Community law which enable that court to resolve the legal problems before it. The Court emphasises that it is important, on the other hand, to ascertain whether the decision referring the question contains all the requisite elements for the Court to arrive at an interpretation of Community law that is of use to the national court. According to its case-law in the matter (judgment of 26 January 1993, *Telemarsicabruzzo and Others*, C-320/90 to C-322-90, *Reports*, p. I-393; orders of 19 March 1993, *Banchero*, C-157/92, *Reports*, p. I-1085, 30 April 1998, *Testa and Modesti*, C-128/97 and C-137/97, *Reports*, p. I-2181, 8 July 1998, *Agostini*, C-9/98, *Reports*, p. I-4261, and 2 March 1999, *Colonia Versicherung and others*, C-422/98, *Reports*, p. I-1279, and judgment of 13 April 2000, *Lehtonen and Castors Braine*, C-176/96), it is for the court making the referral to explain in the referral order itself the factual and regulatory context

of the main proceedings, the reasons which prompted it to raise the question of the interpretation of certain Community provisions in particular, and of the connection that it makes between those provisions and the national legislation applicable to the proceedings in question.

In the light of the foregoing considerations, the Court observed that in the instant case the decision to make the referral did not contain adequate indications such as would meet the aforementioned requirements, so that the actual problem of interpretation was impossible to circumscribe. Consequently, the question raised must be considered manifestly inadmissible.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Portuguese, Finnish, Swedish.

Identification: ECJ-2000-C-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 30.11.2000 / **e)** C-195/98 / **f)** Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v. Republik Österreich / **g)** *European Court Reports*, I-10497 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Jurisdiction, compulsory / Proceedings, adversarial, nature / Court, definition.

Headnotes:

In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC (previously Article 177), which is a question governed by Community law alone, the Court takes account of a number of factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is adversarial, whether it applies rules of law and whether it is independent.

In discharging functions like those prescribed in a specific procedure whose purpose is the abstract determination of a right in the absence of any individual dispute, the Austrian *Oberster Gerichtshof* (Supreme Court) constitutes a court within the meaning of Article 234 EC. Indeed, notwithstanding that the Supreme Court does not rule on litigation in a specific case involving identified persons, that it must base its legal assessment on the facts alleged by the applicant without any further examination, that the decision is of a declaratory nature and that the right to take part in proceedings is exercised collectively, the procedure in question is nonetheless meant to result in a decision of a judicial nature. More specifically, the final decision is binding on the parties, who cannot bring a second application for a declaratory decision in respect of the same factual position and raising the same legal issues (cf. paragraphs 24, 29 and 30, 32, disp. 1).

Summary:

The Austrian Supreme Court raised three preliminary questions concerning the interpretation of Article 39 EC (previously Article 48), Article 234 EC (previously Article 177) and Article 7 of Council Regulation (EEC) no. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.

These questions were raised in connection with litigation between the *Österreichischer Gewerkschaftsbund* (Austrian Federation of Trade Unions), the *Gewerkschaft öffentlicher Dienst* (Public Service Union) and the Austrian State authorities concerning the compatibility of the rules for the determination of certain teachers' pay, set out in the 1948 Federal Act on Contractual Public Servants, with Article 39 EC and Article 7 of the Regulation. The State Secretary for the Public Service had rejected an application by the Federation asking for account to be taken of periods of previous employment spent by contractual teachers or teaching assistants in other member states, and the Federation took the matter to the Supreme Court.

The first question is whether the Supreme Court, in cases like the present one where it is not required to rule on a dispute relating to a specific case involving identified persons but must deliver a declaratory decision, can refer the case to the Court of Justice under the terms of Article 177 EC. The Court of Justice will consider this question both from the institutional angle and in the light of the characteristics of the proceedings instituted by the Federation.

From the institutional point of view, the Court notes that the Supreme Court fulfils all the criteria to be a court or tribunal within the meaning of Article 177, which are established by its settled practice, in particular the judgments of 30 June 1966, *Vaassen-Göbbels* (61/65, *Reports*, pp. 377, 394 and 395); 19 October 1995, *Job Centre* (C-111/94, *Reports*, p. I-3361), 17 September 1997, *Dorsch Consult* (C-54/96, *Reports*, p. I-4961), and 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, *Reports*, p. I-1577). It is indeed a body established by law which is independent and discharges its functions permanently.

As regards the characteristics of the proceedings brought, the Court notes firstly that most elements thereof are typical of judicial proceedings. For instance, jurisdiction is compulsory in the sense that either party to the dispute may bring a case before the Supreme Court regardless of the objections of the other. The procedure is governed by law and is adversarial, the parties determining the scope of the proceedings. Next, the procedure does not entail the referral of purely hypothetical questions to the Supreme Court. Finally, the procedure is intended to result in a decision that is judicial in character.

The Court therefore concludes that the referring body, in discharging the described functions, constitutes a court or tribunal within the meaning of Article 177 EC and is therefore entitled to raise a preliminary question. This enables the Court to address the questions relating to the free movement of workers put to it by the Supreme Court.

Languages:

English, French, Spanish, Danish, German, Greek, Italian, Dutch, Portuguese, Finnish, Swedish.

Systematic thesaurus *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Court or equivalent body (constitutional tribunal or council, supreme court etc).
2 E.g. Rules of procedure.
3 Including the conditions and manner of such appointment (election, nomination etc).
4 Including the conditions and manner of such appointment (election, nomination etc).
5 Vice-presidents, presidents of chambers or of sections etc.
6 E.g. State Counsel, prosecutors etc.
7 Registrars, assistants, auditors, general secretaries, researchers etc.
8 E.g. assessors, office members.
9 Registrars, assistants, auditors, general secretaries, researchers etc.
10 Including questions on the interim exercise of the functions of the Head of State.

11 Referrals of preliminary questions in particular.
12 Enactment required by law to be reviewed by the Court.
13 Review *ultra petita*.
14 Horizontal distribution of powers.
15 Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.
16 Decentralised authorities (municipalities, provinces etc).
17 This keyword concerns decisions on the procedure and results of referenda and other consultations.
18 This keyword concerns decisions preceding the referendum including its admissibility.

19 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.

20 As understood in private international law.

21 Including constitutional laws.

22 For example organic laws.

23 Local authorities, municipalities, provinces, departments etc.

24 Or: functional decentralisation (public bodies exercising delegated powers).

25 Political questions.

26 Unconstitutionality by omission.

27 For the withdrawal of proceedings, see also 1.4.10.4.

28 Pleadings, final submissions, notes etc.
29 May be used in combination with Chapter 1.2 Types of claim.
30 For the withdrawal of the originating document, see also 1.4.5.
31 Comprises court fees, postage costs, advance of expenses and lawyers' fees.

[32] For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

[33] 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).

[34] Including its Protocols.

35 Presumption of constitutionality, double construction rule.
36 Including the principle of a multi-party system.
37 Includes the principle of social justice.
38 See also 4.8.
39 Separation of Church and State, State subsidisation and recognition of churches, secular nature etc.
40 Including maintaining confidence and legitimate expectations.
41 Principle according to which sub-statutory acts must be based on and in conformity with the law.
42 Prohibition of punishment without proper legal base.

43 Including compelling public interest.
44 Only where not applied as a fundamental right. Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.
45 Including questions of treason/high crimes.
46 Including prohibition on monopolies.
47 For the principle of primacy of Community law, see 2.2.1.6.
48 Including the body responsible for revising or amending the Constitution.

49 For example presidential messages, requests for further debating of a law, right of legislative veto, dissolution.
50 For example nomination of members of the government, chairing of Cabinet sessions, countersigning of laws.
51 For example the granting of pardons.
52 Bicameral, monocameral, special competence of each assembly, etc.
53 Including specialised powers of each legislative body and reserved powers of the legislature.
54 In particular commissions of enquiry.
55 For delegation of powers to an executive body, see keyword 4.6.3.2.
56 Obligation on the legislative body to use the full scope of its powers.
57 Representative/imperative mandates.
58 Presidency, bureau, sections, committees etc.
59 Including the convening, duration, publicity and agenda of sessions.
60 Including their creation, composition and terms of reference.
61 State budgetary contribution, other sources etc.
62 For the publication of laws, see 3.15.

63 For example incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility see 4.9.5.
64 For local authorities see 4.8.
65 Derived directly from the constitution.
66 See also 4.8.
67 The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.
68 Civil servants, administrators etc.
69 Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.
70 Other than the body delivering the decision summarised here.

71 Positive and negative conflicts.
72 For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.
73 Comprises the Court of Auditors in so far as it exercises judicial power.
74 See also 3.6.

75 And other units of local self-government.
76 See also keywords 5.3.39 and 5.2.1.4.
77 Proportional, majority, preferential, single-member constituencies, etc.
78 For aspects related to fundamental rights, see 5.3.39.2.
79 E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.
80 Tracts, letters, press, radio and television, posters, nominations etc.
81 Impartiality of electoral authorities, incidents, disturbances.
82 E.g. signatures on electoral rolls, stamps, crossing out of names on list.
83 E.g. in person, proxy vote, postal vote, electronic vote.

84 E.g. Panachage, voting for whole list or part of list, blank votes.
85 E.g. Auditor-General.
86 Parliamentary Commissioner, Public Defender, Human Rights Commission etc.
87 E.g. Court of Auditors.
88 Institutional aspects only: questions of procedure, jurisdiction, composition etc are dealt with under the keywords of Chapter 1.

89 Including state of war, martial law, declared natural disasters etc; for human rights aspects, see also keyword 5.1.4.
90 Positive and negative aspects.
91 For rights of the child, see 5.3.42.
92 The question of *"Drittwirkung"*.
93 See also 4.18.
94 Taxes and other duties towards the state.
95 Here, the term "national" is used to designate ethnic origin.

96 For example, discrimination between married and single persons.
97 This keyword also covers "Personal liberty" It includes for example identity checking, personal search and administrative arrest.
98 Detention by police.
99 Including questions related to the granting of passports or other travel documents.
100 May include questions of expulsion and extradition.
101 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.
102 This keyword covers the right of appeal to a court.
103 Including the right to be present at hearing.

104 Covers freedom of religion as an individual right Its collective aspects are included under the keyword "Freedom of worship" below.
105 This keyword also includes the right to freely communicate information.
106 Militia, conscientious objection etc.
107 Aspects of the use of names are included either here or under "Right to private life".
108 Including compensation issues.
109 For institutional aspects, see 4.9.5.

110 This keyword also covers "Freedom of work".
111 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.

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