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on Constitutional Case-Law

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THE BULLETIN

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts, courts of equivalent jurisdiction in Europe and North America and the European Court of Human Rights. The Bulletin is published three times a year, each issue reporting the most important case-law during a four months period.

Its aim is to allow judges and constitutional law specialists in the academic world to be informed quickly about the most important judgments in this field. The exchange of information and ideas among old and new democracies in the field of judge-made law is of vital importance. Such an exchange and such cooperation, it is hoped, will not only be of benefit to the newly established constitutional jurisdictions of Central and Eastern Europe, but will also enrich the case-law of the existing courts in Western Europe and North America. The main purpose of the Bulletin on Constitutional Case-law is to foster such an exchange and to assist national judges in solving critical questions of law which often arise simultaneously in different countries.

The Commission is grateful to liaison officers of constitutional and other equivalent courts, who regularly prepare the contributions reproduced in this publication. As such, the summaries of decisions and opinions published in the Bulletin do not constitute an official record of court decisions and should not be considered as offering or purporting to offer an authoritative interpretation of the law.

The decisions are presented in the following way:

1. *Identification*
    - a) *country*
    - b) *name of the court*
    - c) *chamber (if appropriate)*
    - d) *date of the decision*
    - e) *number of decision or case*
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    - g) *publication of the decision*
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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, on draft constitutional charters, electoral laws and the protection of minorities, as well as the collection and dissemination of case-law in matters of constitutional law from Constitutional Courts and other courts throughout Europe.

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Austria
Constitutional Court

Reference period:
Sessions of the Constitutional Court during December 1994, January 1995 and March 1995

The first judgment was rendered during the previous reference period.

Statistical data

December 1994 session

- Financial claims (Article 137 B-VG): 2
- Conflicts of jurisdiction (Article 138.1 B-VG): 3
- Review of regulations (Article 139 B-VG): 23
- Review of laws (Article 140 B-VG): 119
- Review of elections (Article 141 B-VG): 6
- Appeals against decisions of administrative authorities (Article 114 B-VG): 709 (310 declared inadmissible)

January 1995 session

- Appeals against decisions of administrative authorities (Article 144 B-VG): 42 (23 declared inadmissible)

March 1995 session

- Disputes between State bodies and the Auditor General's Department (Article 126a B-VG): 2
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- Review of elections (Article 141 B-VG): 2
- Appeals against decisions of administrative authorities (Article 144 B-VG): 824 (433 declared inadmissible)

Important decisions

Identification: AUT-95-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 30.11.1994 / **e)** G 91/93, V 46/93 / **f)** / **g)** to be published in the collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual – Profit-making corporate body.
Constitutional justice – The subject of review – International treaties.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
General principles – Rule of law.

Keywords of the alphabetical index:

Environment / Transit of goods by road and by rail.

Headnotes:

The Constitutional Court deals with the non-conformity of treaties with individuals' rights to make an application when they consider that their rights have been directly infringed by the unconstitutionality (treaties having the force of law) or by the illegality (all other treaties) of such treaties.

The case-law of the Constitutional Court relating to the admissibility of a direct appeal challenging a law or regulation also applies to treaties.

Only those treaties which are directly applicable can affect the rights of individuals.

Summary:

The Court declared inadmissible a direct appeal entered by a transport company challenging the agreement between the Republic of Austria and the European Economic Community relating to the transit of goods by road or by rail.

The provisions in question introduced a system of "ecopoints" as a measure for regulating traffic passing through Austria with a view to protecting public health and the environment. In order to cross Austria, each

lorry would have to have a certain number of ecopoints (representing its NOx emission level). The contracting parties agreed that the system of ecopoints should be applied with as much simplicity and as little bureaucracy as possible.

The applicant challenged the allocation of points to "old lorries" on the grounds that they were required to have a larger number of points than justified by the actual level of NOx emitted by them. Such points were therefore allocated according to a simplified procedure.

Although the rights of a transport company are directly and currently concerned by the said treaties, the Court did not declare the appeal admissible. It acknowledged – by interpreting the legal provisions in accordance with the principle of the rule of law – that the applicant could apply to the administrative authorities for a decision, which it could then challenge on grounds of unconstitutionality.

Languages:

German.

Identification: AUT-95-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 06.12.1994 / **e)** W I-5/94 / **f)** / **g)** to be published in the collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes.
Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.

Keywords of the alphabetical index:

Candidature, list / Interpretation in accordance with the Constitution.

Headnotes:

Under a liberal constitutional regime it is unacceptable to submit the candidature of persons who have not given their consent to their candidature if there is no law obliging them to accept the post.

Languages:

German.

Identification: AUT-95-1-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 14.12.1994 / **e)** B 711/94 / **f)** / **g)** to be published in the collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Right to life.
Fundamental rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Death penalty / Expulsion.

Headnotes:

The Austrian Federal Constitution secures to everyone, without exception, the subjective right not to be sentenced to death or executed.

Summary:

The decision of a Contracting State to extradite a foreigner can raise a problem in relation to Article 3 ECHR and therefore render the State liable under the terms of the Convention, if there are serious, well-founded reasons for believing that if the foreigner were returned to a particular country, he might genuinely risk being subjected to torture or to inhuman or degrading treatment. This judicial doctrine applies by analogy to the right safeguarded under the Constitution by Article 1 of Protocol no. 6 ECHR, in conjunction with Article 85 of the Federal Constitution relating to

the abolition of the death penalty. Accordingly, an administrative decision may infringe the fundamental right in question.

In the present case, the Constitutional Court set aside an administrative decision which had been challenged and in which the administrative authority had stated that a person who had refused to do his national service in the former "Federal Republic of Yugoslavia" could be deported: the applicant – an Albanian from Kosovo, who is a citizen of Yugoslav nationality – alleged that he ran a genuine risk of being subjected to torture and the death penalty. The administrative authorities neglected to study the evidence provided by the applicant and dismissed his appeal on the basis of information supplied by the Embassy of the former Republic of Yugoslavia in Austria. By reason of the obvious procedural defects, the applicant's fundamental rights had been infringed. Similarly, the administrative authorities should have examined whether the applicant, once deported, genuinely risked dying as a result of torture or inhuman or degrading treatment – without necessarily having been sentenced to death.

Languages:

German.

Identification: AUT-95-1-004

a) Austria / **b)** Constitutional Court / **c)** / **d)** 01.03.1995 / **e)** G 266,267/94 / **f)** / **g)** to be published in the collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Regional elections.
Sources of constitutional law – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
Fundamental rights – Civil and political rights – Electoral right – Right to be elected.

Keywords of the alphabetical index:

Elections, majority election / Parliament / Proportional representation.

Headnotes:

A law relating to the election of a federal *Land* parliament is incompatible with the principle of proportional representation laid down by federal constitutional law if it provides for an electoral system resulting in a change to a majority system, ie if it provides for an electoral system which is in fact very similar to a majority system.

Summary:

In its decision, the Constitutional Court set aside a provision of the constitution of a *Land (Kärnten)* and the provisions of its electoral code concerning constituencies and the distribution of parliamentary seats. The Court instituted the proceedings *ex officio* following an appeal lodged by an electoral party (*Wahlpartei* – a group putting forward a list of candidates for election). The application was based on the unconstitutionality of the provisions in question.

The Federal Constitution only lays down the general principle of proportional representation in the elections of *Land* parliaments. According to the Court's established case-law, this principle is freely applied by the *Länder* parliaments, which are responsible for the details of its application. In the present case the Parliament overstepped the limits of the freedom granted by the Constitution by deciding that more than 50% of the votes in a particular electoral district were required in order to be elected.

Languages:

German.

Identification: AUT-95-1-005

a) Austria / **b)** Constitutional Court / **c)** / **d)** 02.03.1995 / **e)** G 291/94 / **f)** / **g)** to be published in the collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Expropriation, annulment / Time-limits.

Headnotes:

Property rights include the right to the annulment of an expropriation order if the property which has been confiscated has not subsequently been used for the public purpose laid down by law.

It is contrary to the Constitution to maintain an expropriation if the property has not been used for the purpose specified by law.

Any legal provision setting a time-limit which is too short to allow owners to effectively exercise their right to seek annulment of an expropriation order is incompatible with property rights.

Languages:

German.

Belarus
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Important decisions

Summaries of important decisions will be published in the next edition of the Bulletin.

Belgium
Court of Arbitration

Reference period:
1 January 1995 – 30 April 1995

Statistical data

- 37 judgments
- 48 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension or interlocutory orders)
- 36 new cases
- Average length of proceedings: 10 months
- 18 judgments concerning applications to set aside
- 14 judgments concerning preliminary points of law
- 1 judgment concerning an application for suspension
- 4 judgments settled by summary procedure

Publication of the Court of Arbitration's judgments

All judgments are published in the *Moniteur Belge* in the three official languages (Dutch, French and German). Publication takes place on average two months after delivery of the judgment.

Judgments, preceded by keywords and summaries, are also published in a collection of decisions issued in two languages (French and Dutch) five times a year by S.A. Vanden Boerle, Stationsraat 23, 8200 Bruges (annual subscription approximately BEC 6,000).

Important decisions

Identification: BEL-95-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 02.02.1995 / **e)** 7/95 / **f)** / **g)** *Moniteur belge*, 01.03.1995; Judgments of the Court of Arbitration, 1995, 105 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Sources of constitutional law – Categories – Written rules – Community law.
General principles – Proportionality.
Institutions – Federalism and regionalism – Distribution of powers.
Institutions – Public finances – Taxation – Principles.
Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Economic and monetary union / Environment / Environment taxes / European Council, directive / Free movement of goods / Waste / European Community Treaty.

Headnotes:

Although policy in matters of the environment and waste management is the responsibility of the regions, the federal government may by virtue of its own power in matters of taxation introduce "ecotaxes" on goods put on the market on account of the ecological damage those goods are deemed to cause. When exercising its power in matters of taxation with the aim of changing manufacturers' and consumers' behaviour and thereby pursuing a policy in the environmental and waste management fields, the federal legislature must ensure that it does not make it impossible or unreasonably difficult for the regions to avail themselves of their own powers. The federal legislature's use of its powers of taxation is justified by the need to establish a uniform framework in the field of environment taxes, a framework which is consistent with economic union.

It is for the legislature to determine whether and, if so, to what extent concern for protection of the environment makes it necessary to impose sacrifices on economic agents. The choice of products subject to such taxes, fixing of the rate of taxation, deciding which taxpayers will be exempt and the date on which the new legislation comes into force are also matters for the legislature's discretion. However, the legislature would be breaching the constitutional rules of equality and absence of discrimination (Articles 10 and 11 of the Constitution) if, in deciding who was or was not liable for these taxes or in making certain taxpayers subject to different treatment, it made manifestly arbitrary or unreasonable distinctions. The rules on "ecotaxes" laid down in the Act of 16 July 1993 are not at variance with Articles 10 and 11 of the Constitution as such or with those articles taken together with Articles 30 and 95 of the EC Treaty and with EC Council Directive no. 83/189/EEC.

Freedom of trade and industry cannot be regarded as boundless. It does not prevent the law from regulating the economic activity of individuals and undertakings.

Although the legislation on "ecotaxes" will require companies producing and distributing mineral water to adapt to a new situation, the restrictions on freedom of trade and industry resulting from the impugned legislation have objective, reasonable grounds and are not disproportionate in view of the legislation's purpose.

Summary:

By adopting sections 369 to 401 of the Act of 16 July 1993, the federal legislature introduced so-called "ecotaxes" levied when a number of products such as drinks containers, disposable objects, batteries, pesticides and paper are put on the market in Belgium. These taxes are relatively high and the legislature deliberately intended them to have a prohibitive effect. Exemptions in the event of recycling or re-use are provided for with regard to most of the products concerned.

A number of manufacturers of products subject to these taxes applied to have the federal law declared void on account of a breach of the rules sharing powers between the federal government, the communities and the regions. On this issue the Court found that the regions' powers with regard to environmental and waste management policies had not been affected to a disproportionate extent.

The applicants also alleged a violation of the constitutional principles of equality and absence of discrimination as a further ground for declaring the legislation void. They complained of the fact that their products had been made subject to the taxes, whereas other products which, in their view, did greater environmental damage had not, and that depending on the type of product concerned there were unjustified differences in tax bases, tax rates, exemption possibilities, time-limits for beginning to levy the tax, etc. Following an in-depth examination, the Court found that there was no evidence of any arbitrary or unreasonable difference in this respect.

The applicants also contended, but to no avail, that the measures adopted were at variance with the provisions of Community law and the principle of freedom of trade and industry.

Supplementary information:

Thirteen different applications for judicial review were lodged in respect of the provisions on "ecotaxes" of sections 369 to 401 of the Act of 16 July 1993. The case summarised here is typical of a series of eight judgments (nos. 3/95 to 10/95, all dated 2 February 1995) dealing with these applications (certain cases were joined). Partial annulment was decided only in judgment no. 6/95; in that case it was not possible to ascertain why paper in general was subject to an "ecotax" whereas paper for use in magazines was exempt.

Languages:

Dutch, French, German.

Identification: BEL-95-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 02.03.1995 / **e)** 19/95 / **f)** / **g)** *Moniteur belge*, 11.05.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Legal aid.

Headnotes:

In providing that copies of case files shall be made available on payment of a fee, the law must not lead to what amounts to discriminatory treatment of certain defendants, regard being had to the nature of the principles involved. These principles are respect for the rights of the defence and the right to a fair trial, as secured in Article 6 ECHR. They entail a right for defendants to have adequate time and facilities for the preparation of their defence and submissions, a right covered by the constitutional principles of equality and absence of discrimination. By preventing defendants who receive legal aid and who by definition do not have sufficient resources from obtaining copies of case files free of charge under any circumstances, in that it does not even provide that the cost of copies should be advanced to them subject to its later reimbursement if they are found guilty, the legislature disproportionately impedes the exercise of the rights of the defence.

Summary:

People who do not have sufficient resources to cover the cost of legal proceedings are, as a rule, entitled to legal aid, entailing *inter alia* the right to request copies of and extracts from documents contained in the case file free of charge. The relevant provision of Article 671 of the Judicial Code is, however, construed to mean that such legal aid is not applicable in criminal proceedings. The court with jurisdiction in committals for trial sought a ruling from the Arbitration Court as to whether Article 671 was at variance with the constitutional principles of equality and absence of discrimination laid down in Articles 10 and 11 of the Constitution.

The Arbitration Court first pointed out that this problem did not relate to unequal treatment but to identical treatment of two different categories of people, namely those with sufficient financial resources to pay the fee for copies of the case file (BEC 30 per page for the first 1,000 copies and BEC 10 per page thereafter) and those without sufficient resources.

In the case under consideration the Court held that the rights of the defence and the right to a fair trial, as secured in Article 6 ECHR, were interfered with disproportionately on account of the fact that defendants qualifying for legal aid were generally and unconditionally deprived of the right to obtain copies of documents in their case files free of charge. The Court accordingly found that Article 671 of the Judicial Code was at variance with Articles 10 and 11 of the Constitution.

Languages:

Dutch, French, German.

Identification: BEL-95-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 25.04.1995 / **e)** 35/95 / **f)** / **g)** *Moniteur belge*, 24.05.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
General principles – Proportionality.
Institutions – Federalism and regionalism – Distribution of powers.
Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Economic and monetary union / Environment.

Headnotes:

The regional legislature, which is competent in matters of protection of the environment and, on an economic level, for safeguarding natural resources is also entitled to decide, by virtue of its powers, to dismantle gravel pit facilities so as to bring to an end the environmental damage caused by the increasing number of pits being excavated and the proliferation of the resulting bodies of water. It is for the regional legislature to weigh the environmental advantages and disadvantages arising from use of gravel pits and to take any necessary decision requiring that this activity be terminated as quickly as possible.

The desire to ensure that there continues to be uniform basic legislation organising the economy in an integrated market is reflected in the rules laid down pursuant to the Constitution which share powers between the Federal government, the communities and the regions. The existence of an economic union essentially means that there should be free movement of goods and production factors between the State's different components. Such economic union is not jeopardised by provisions which, in order to protect the environment, aim to exclude materials buried underground from the economic system by forbidding their extraction and thus preventing them from qualifying as business assets.

In exercising their powers, regions must at the same time uphold freedom of trade and industry. To ensure that the environment is suitably protected against the threat posed by use of gravel pits, the regional legislature is entitled to impose restrictions on the freedom of trade and industry of the companies concerned, in so far as this freedom is not restricted disproportionately. Such a disproportionate restriction did not occur in the case under consideration.

Summary:

A decree issued by the region of Flanders on 14 July 1993 banned all use of gravel pits in the province of Limbourg from 1 January 2006. In the meantime the existing facilities were to be dismantled. A number of companies engaged in extracting gravel applied to have certain of the decree's provisions declared void,

inter alia on the ground that they violated the rules sharing powers between the Federal government, the communities and the regions. The Cabinet, which intervened in the proceedings before the Court on behalf of the federal authorities, also requested that these provisions be declared void. The Court held that, by virtue of its powers in matters relating to the environment and natural resources, the regional legislature was entitled to rule that gravel pit facilities should be dismantled and that all related activities should be terminated. In the Court's view consideration was given to the restrictions imposed on regional powers, particularly, in the case before the Court, the duty to respect the economic union and freedom of trade and industry.

Languages:

Dutch, French, German.

Bulgaria
Constitutional Court

Reference period:
1 January 1995 – 30 June 1995

Statistical data

Number of decisions: 8

Important decisions

Identification: BUL-95-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 13.04.1995 / **e)** 2/95 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette) no. 39 of 28 April 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Parliamentary elections.
Institutions – Legislative bodies – Review of validity of elections.

Keywords of the alphabetical index:

Nationality, double / Parliament, members, incompatibilities.

Headnotes:

A candidate for member of Parliament is non eligible if at the time of registration as candidate he/she has double (Bulgarian and foreign) citizenship.

Summary:

A motion was brought by the Prosecutor General to establish the non-eligibility and to proclaim void the mandate of a member of Parliament on the grounds that his election violated Article 65.1 of the Constitution and Article 3.1 of the Election Law.

The Constitutional Court established that at the time of his registration as candidate, the elected member of Parliament had double (Bulgarian and foreign) citizenship.

For this reason, in accordance with Article 72.1.3 in conjunction with Article 65.1 of the Constitution, the Constitutional Court declared void the mandate of the elected member of Parliament.

Languages:

Bulgarian.

Identification: BUL-95-1-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 19.06.1995 / **e)** 8/95 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette) no. 59 of 30 June 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Land property.

Headnotes:

In regulating the purchase of agricultural land and its restitution/compensation, the Parliament has to respect the constitutional right to property.

Summary:

A claim was submitted by 51 MPs from the opposition faction in Parliament contesting the unconstitutional nature of certain provisions of the Law on the Amendment of the Law on Agricultural Land Ownership and Use passed by the 37th National Assembly on 10 May 1995. The following provisions were contested:

A land owner is obliged to offer his agricultural land first to the municipality and then to the government before he is free to choose a buyer.

There shall be no agricultural land restitution if a piece of land falls into the zoning plan of the community and if there are buildings on this land, even if these have been constructed without a permit and regardless of whether construction is still under way or the title is legitimate.

Land shall be restituted within real borders where such borders exist or can be surveyed, the restriction being that the survey shall be based on the land register or land consolidation plans only.

For land with buildings or other improvements on it, owners shall get land of equivalent quality in compensation only if the compensation due represents more than two thousand square meters.

Members of a co-operative or partners in a partnership shall be free to demand that their adjacent lands are pooled and that seisin is collective.

Citizens shall be free to use land only pursuant to statutory acts of the Presidency of the National Assembly, the State Council or the Council of Ministers and can acquire ownership on agricultural land only in certain statutory ways.

Dismissed members of the liquidation councils shall not be entitled to compensation under the Labour Code, even if they had a proven contract of employment.

In view of the citizens' Constitution-sanctioned principles and rights to private property, to free and equal enterprise and other rights, the Constitutional Court ruled the above provisions to be anticonstitutional. Some other claims of the Members of Parliament were dismissed as not disclosing any contravention of constitutional provisions.

Languages:

Bulgarian.

Canada
Supreme Court

Reference period:
1 January 1995 – 30 April 1995

The first judgment was rendered during the previous reference period.

Important decisions

Identification: CAN-95-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 08.12.1994 / **e)** 23403 / **f)** Dagenais v. Canadian Broadcasting Corp. / **g)** Supreme Court Reports, [1994] 3 S.C.R. 835 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Criminal proceedings / Canadian Charter of Rights and Freedoms / Publication bans.

Headnotes:

The traditional common law rule governing publication bans in criminal proceedings is inconsistent with the principles of the Canadian Charter of Rights and Freedoms and must be reformulated in a manner that reflects those principles and, in particular, the equal status given by the Charter to freedom of expression and the right to a fair trial.

Summary:

Four accused, former and present members of a religious order, were charged with physical and sexual abuse of young boys in their care at training schools in Ontario. They applied for an injunction restraining a television network from broadcasting a fictional account of abuse in a similar situation. A superior court judge granted the injunction, prohibiting the broadcast of the programme anywhere in Canada until the end of the four trials, and granted an order prohibiting publication of the fact of the application, or any material relating to it. The Court of Appeal affirmed the decision to grant the injunction against the broadcast but limited its scope to Ontario and reversed the order banning any publicity about the proposed broadcast and the very fact of the proceedings that gave rise to the publication ban.

In a majority decision, the Supreme Court of Canada set aside the publication ban.

The traditional common law rule governing publication bans – that there be a real and substantial risk of interference with the right to a fair trial – emphasized the right to a fair trial over the free expression interests of those affected by the ban and, in the context of post-Charter Canadian society, does not provide sufficient protection for freedom of expression. When two protected rights come into conflict, Charter principles require a balance to be achieved that fully respects the importance of both rights. A hierarchical approach to rights must be avoided, both when interpreting the Charter and when developing the common law. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, the common law rule must be adapted so as to require a consideration of both the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows: a publication ban should only be ordered when (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. In this case, the superior court judge committed an error of law in ordering the ban. While it was clearly directed toward preventing a real and substantial risk to the fairness of the trials of the accused, the initial ban was far too broad. It prohibited broadcast throughout Canada and even banned reporting on the ban itself. In addition, reasonable alternative measures were available to achieve the objective without circumscribing the expressive rights of third parties. The publication ban therefore cannot be upheld.

Languages:

English, French.

Identification: CAN-95-1-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 02.02.1995 **e)** 23581 / **f)** R. v. S. (R.J.) / **g)** Supreme Court Reports, [1995] 1 S.C.R. 451 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.

Keywords of the alphabetical index:

Compellability / Criminal proceedings / Right against self-incrimination / Right to remain silent.

Headnotes:

A person separately charged with an offence is compellable as a witness in the criminal trial of another person charged with the same offence, and is entitled to simple – and derivative – use immunity. Courts, however, retain the discretion to exempt such a person from being compelled to testify in appropriate circumstances.

Summary:

Two young offenders, M. and S., were separately charged with the same offence in accordance with the administrative procedure applicable in the youth court. The Crown subpoenaed M. as its main witness at S.'s trial but, following an application by M.'s counsel, the trial judge quashed the subpoena on the ground that to compel M.'s testimony would violate the principles of fundamental justice protected by Section 7 of the Canadian Charter of Rights and Freedoms. The trial judge found that, in the circumstances, M. had an absolute right to silence which made him non-compellable. At the trial, the charges against S. were dismissed and, subsequently, the charges against M. were stayed. The Crown appealed S.'s acquittal on the ground that the trial judge erred in quashing M.'s subpoena. The Court of Appeal allowed the appeal and ordered a new trial.

1. The Supreme Court of Canada ruled unanimously that M. was compellable at S.'s trial under the general rule applicable to all witnesses. M. did not have an absolute right to silence and the trial judge erred in quashing the subpoena.
2. In its decision the Court defined the scope of the protection against self-incrimination available to a witness under Section 7 of the Charter:

A first group of four judges found that the principle against self-incrimination, one of the principles of fundamental justice protected by Section 7 of the Charter, is satisfied when the persons compelled to testify receive the simple-use immunity provided by Section 13 of the Charter, together with a partial derivative-use immunity under Section 7. Derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness ought generally to be excluded under Section 7 in the interests of trial fairness. Such evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet. There should, however, be no automatic rule of exclusion in respect of any derivative evidence. Its exclusion ought to be governed by the trial judge's discretion. The exercise of the trial judge's discretion will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission.

A different group of four judges, in two separate opinions, rejected the derivative-use immunity approach and found that, in certain circumstances, a witness may claim an exception under Section 7 of the Charter from the general rule that the State is entitled to every person's evidence. The group, however, was divided on the applicable compellability test: an exception to the general rule should be made (1) when the right of the accused to remain silent is seen to outweigh the necessity of having that evidence, or (2) when the Crown is engaging in fundamentally unfair conduct. The issue of compellability of the witness may be raised when he is subpoenaed and later when he is tried.

The Chief Justice endorsed the availability of derivative-evidence immunity as a means of giving effect to the principle against self-incrimination under Section 7 of the Charter but found that, in certain circumstances, this section will provide additional protection beyond claims to immunity in order to safeguard adequately the right of individuals not to be compelled to incriminate themselves, and will mandate exceptions to the general rule that the State is entitled to every person's evidence.

Cross-references:

In a subsequent decision (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3), the Supreme Court of Canada clarified the rules to be applied in this area, offering additional comments on derivative-use immunity and the circumstances giving rise to exemptions from compulsion to testify.

Languages:

English, French.

Croatia
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

- Cases concerning the conformity of laws with the Constitution:
  received 42, resolved 6:
  in 1 case the provisions of a law were repealed; in 3 cases the motions to review the constitutionality of laws were not accepted; in 1 case the motion to review was rejected and in 1 case the procedure was terminated.

  In 2 cases the Court set in motion proceedings to review the constitutionality of laws.

  In 86 cases the Court was asked to temporarily suspend the execution of individual acts based on a provision the constitutionality of which was under review. In 58 cases the execution was suspended.

- Cases concerning the conformity of other regulations with the Constitution and laws:
  received 38, resolved 12:
  in 3 cases the provisions of regulations other than laws were repealed; in 1 case the motion to review the constitutionality and legality of such regulations was not accepted; in 5 cases the motion to review was rejected and in 3 cases the procedure was terminated.

  In 1 case the Court accepted the motion to review the constitutionality and legality of regulations.

- Cases concerning the protection of constitutional rights:
  received 223, resolved 109:
  in 29 cases the constitutional action was accepted; in 30 cases the claim was dismissed; in 47 cases rejected; in 2 cases the action was withdrawn and in 1 case the petitioner was instructed on the right to submit a constitutional action.

- Cases concerning jurisdictional disputes among legislative, executive and judicial branches:
  received 0, resolved 3.

Translations mentioned under *Languages* do not bind the Court.

Important decisions

Identification: CRO-95-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.01.1995 / **e)** U-I-46/1992 / **f)** / **g)** *Narodne novine*, 5/1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.
Fundamental rights – Economic, social and cultural rights – Scientific freedom.
Fundamental rights – Economic, social and cultural rights – Artistic freedom.

Keywords of the alphabetical index:

Media, publishing.

Headnotes:

An Act which allows private individuals to publish only their own original works, literary, scientific or other, or works whose publishing rights they acquired through inheritance, restricts unconstitutionally freedom of enterprise, market freedom and also artistic and scientific freedom.

An Act obliging the publisher to obtain before publication from two or more qualified persons a review of the work to be published restricts unconstitutionally freedom of enterprise and market freedom.

Summary:

The decision of the Court repealed two provisions in the Act regulating publishing activities on the grounds that entrepreneurial and market freedom, which are the basis of the economic system of the Republic, allow private individuals to publish works written by others, and to publish them also without obtaining prior favourable reviews.

The repealed provisions were adopted in 1983, before the Constitution of 1990.

Languages:

Croatian.

Identification: CRO-95-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 25.01.1995 / **e)** U-III-739/1994 / **f)** / **g)** *Narodne novine*, 9/1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Constitution.
General principles – Separation of powers.
Institutions – Executive bodies – Relations with the courts.

Keywords of the alphabetical index:

Courts, competence.

Headnotes:

Administrative bodies have no authority to proceed in cases where contracts on exchange of apartments are null and void nor to extend their jurisdiction either by extensive interpretation of rules or by their analogous application.

Summary:

The decision of the Court overruled a judgment of the Administrative Court and two decisions by administrative bodies and returned the case for reconsideration, having held that these decisions violated the constitutional principle according to which individual acts of state administration and bodies vested with public powers shall be based on law.

One dissenting opinion held that only the decision of the Administrative Court should be overruled, and that the other administrative decisions should be declared void.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-95-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 02.02.1995 / **e)** U-II-433/1994 / **f)** / **g)** *Narodne novine*, 9/1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Constitution.
Sources of constitutional law – Categories – Written rules – Quasi-constitutional enactments.
Fundamental rights – Civil and political rights – Linguistic freedom.
Fundamental rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Language rights / Local self-government / Local self-government, international relations / Minorities.

Headnotes:

The Republic of Croatia, as a State, is the sole and exclusive subject of international law. The State recognises and executes international agreements.

A county (*županija*, a unit of local administration and self-government) cannot establish its statute directly on the basis of international documents.

The territory of a county is defined by the Republic and its laws, not by a county and its statute.

The exercise and protection of national rights of minorities lies within the jurisdiction of the Republic, which regulates them by laws, it is not a subject-matter to be regulated by a county statute.

Only the units of local self-government (a municipality, a district and a township), and not a county, may introduce into official use two or more languages and scripts. Only under the conditions specified by law can official use of a language of the members of ethnic and national communities or minorities, along with the Croatian language, be specified.

The county does not have the authority to regulate the use of a minority language, to determine the kinds of county taxes, to designate the administrative procedure before its bodies, to prescribe the protection of "Istrianity" (as an expression of the Istrian pluriethnos), to stipulate that the right of consensus is guaranteed by the Commission for Issues and Protection of the Indigenous Italian National Community on matters within its self-governing competence which are of special interest to members of the Italian national community, to give to the representative body of the county a name differing from its legal definition, to determine a specific immunity for the members of the County Assembly, or to regulate the procedure for relieving the county prefect of his duty otherwise than regulated by law.

Symbols of a county, such as the anthem and the county day, lie within the self-governing competence of the county and can be regulated by the county statute.

The bodies of a local self-government and administration unit can, in accordance with its statute, have their seats outside the seat of the unit. It is in conformity with the Constitution that a county, within its self-governing competence, cooperates with other local units and associations, or cooperates with and joins international organisations of regional and local units and associations of the same kind.

The right to initiate the procedure for changing the territorial boundaries belongs to the county assembly, after consultation with the representative bodies of municipalities and townships or citizens.

It is not in discordance with the Constitution and the laws to guarantee to members of the Italian national community the right to university education in their own language according to special *curricula*.

A county may, within its self-governing competence, decide to hold a referendum.

A county may by its statute determine the cases in which the duty of members of the representative body of a local self-government unit is incompatible with another duty.

A county is allowed to provide in its statute for other sources of funds, apart from those specified by law; it is not in discordance with the law if a county prescribes that fines and property seized because of administrative offences, prescribed by the county itself, are the county's own revenue source.

Summary:

The government of the Republic of Croatia disputed the constitutionality and legality of the Statute of the County of Istria seeking a suspension, at the same time, of the execution of the Statute.

Eighteen provisions, and parts of the preamble, were repealed by the Constitutional Court's decision.

Languages:

Croatian, English and Italian (translations by the Court).

Identification: CRO-95-1-004

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

Keywords of the systematic thesaurus:

General principles – Separation of powers.
Institutions – Executive bodies – Relations with the courts.
Institutions – Courts – Supreme Court.
Institutions – Courts – Organisation – Members.

Keywords of the alphabetical index:

Judges, 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-95-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 15.02.1995 / **e)** U-II-30/1995 / **f)** / **g)** *Narodne novine*, 11/1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Democracy.
Institutions – Courts – Jurisdiction.
Institutions – Courts – Procedure.

Keywords of the alphabetical index:

Rules of procedure / State Judiciary Council.

Headnotes:

The Constitution and the Act on the State Judiciary Council do not give authority to the State Judiciary Council to prescribe in its Rules of Procedure the possibility of holding sessions which are not public and to give prevalence to the president's vote in case of a tie.

Summary:

The Court repealed 3 provisions in the Rules of Procedure of the State Judiciary Council.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-95-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.03.1995 / **e)** U-III-180/1995 / **f)** / **g)** *Narodne novine*, 21/1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of the written press.
Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Market equality / Media, written press / Taxes.

Headnotes:

An administrative act which, without legal grounds, fails to classify printed matter in the category of daily newspapers or periodicals – which are exempted from paying turnover tax – violates the constitutional fundamental rights of free enterprise, freedom of the written press and freedom of expression of thought.

Summary:

The Court accepted a constitutional action by the publisher of *Feral Tribune*. The principles of equality and equity on which, according to the Constitution, the tax system is to be based, demand that the obligation to pay a tax is equally and equitably determined for all taxpayers.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-95-1-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.03.1995 / **e)** U-III-1056/1994 / **f)** / **g)** *Narodne novine*, 23/1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Property, ownership transformation.

Headnotes:

All persons concerned by a process of transformation of ownership rights have the right to take part in an administrative dispute arising in the course of the transformation procedure. This includes previous owners and their heirs.

The constitutional provision which guarantees the right of ownership extends also to ownership in the nascent stage, to restitution, and to future ownership.

Summary:

The Court overruled a decision of the Administrative Court by which a claim of the daughter of previous owners of a hotel was rejected on the grounds that law on transformations did not extend to her rights or to her direct legal interests, as established by law.

Languages:

Croatian, German (translation by the Court).

Identification: CRO-95-1-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 29.03.1995 / **e)** U-III-188/1995 / **f)** / **g)** *Narodne novine*, 22/1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Jurisdiction.
Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Public.

Keywords of the alphabetical index:

Judges, appointment.

Headnotes:

A decision on the appointment of judges which was not adopted according to the procedure determined by law, was found to violate the constitutional rights of candidates.

Summary:

The Court accepted constitutional actions submitted by candidates not appointed as judges, repealed the decision of the State Council of Judiciary of 16 February 1995, on the appointment of all judges,

and returned the case to the State Council of Judiciary for reconsideration.

The legal effects of the decision were postponed until the adoption of a new decision of the State Council of Judiciary, such postponement being in no case longer than three months from the day of the publication of the decision in *Narodne novine*.

In a partly concurring opinion, one justice held that the Court had no grounds to repeal the entire decision concerning appointment of all judges, but only the part concerning candidates who were not appointed; that it had no grounds for postponement of the legal effects of its decision in constitutional action proceedings; and that there were no grounds to extend the protection of constitutional rights to persons who did not submit constitutional actions.

Languages:

Croatian, English (translation by the Court).

Cyprus
Supreme Court

Reference period:
1 January 1995 – 30 April 1995

Important decisions

Summaries of important decisions will be published in the next edition of the Bulletin.

Czech Republic
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

- Decisions by the plenary: 7
- Decisions by chambers: 15
- Number of other decisions by the plenary: 1
- Number of other decisions by chambers: 125
- Number of other procedural orders: 60
- Total number of decisions: 186

Important decisions

Identification: CZE-95-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 16.02.1995 / **e)** III.ÚS 61/94 / **f)** Position of the Constitutional Court in the system of courts / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions – Courts.
Constitutional justice – The subject of review – Court decisions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.

Keywords of the alphabetical index:

Evidence, submission / Review of decisions of ordinary courts.

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 which 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 et al. of the Charter of Fundamental Rights and Freedoms). 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 claim 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 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.

Languages:

Czech.

Identification: CZE-95-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 20.02.1995 / **e)** III.ÚS 97/94 / **f)** Decision of court taken without ordering a public hearing / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Court hearing, omission.

Headnotes:

The provision of the Code of Civil Procedure that allows for decisions without court hearings has to be interpreted very restrictively and may be applied only in simple cases without infringing upon the right to a fair trial.

Summary:

A claim was raised against a court decision which dismissed a private action for the setting aside of an administrative decision taken by Police Headquarters. This administrative decision cancelled an administrative act by which an identity card had been delivered. The action had been rejected by the court without ordering a court hearing. In doing so, the court had relied upon the provisions of Section 250f of the Code of Civil Procedure which allows – under specified circumstances – for decisions upon an action without ordering a court hearing.

The Constitutional Court annulled the part of the court decision in which a court hearing had been refused. The conditions for passing a decision without ordering a court hearing have to be interpreted strictly and in a restrictive way. These conditions are fulfilled only in simple cases, especially when it is obvious that the court based its decision on a correct statement of facts and was called upon to resolve only a legal question. Otherwise a decision passed without a previous court hearing violates the constitutional right of a party to a fair trial.

Languages:

Czech.

Identification: CZE-95-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 22.03.1995 / **e)** IV.ÚS 189/94 / **f)** Interpretation of the notion "gratuitous transfer of a piece of land" with respect to the property restitution / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Land, gratuitous transfer / Property restitution.

Headnotes:

Ordinary courts must not base their decisions on the title of a contract, but have to evaluate its contents. Otherwise, the right to a fair trial is infringed.

Summary:

For the interpretation of the term "transfer without consideration" with respect to a piece of land, the denomination of the contract shall not be decisive. A contract denominated as "contract of purchase" can therefore in fact contain a gratuitous transfer of cultivated pieces of land if this is manifestly the intention of the parties to the contract.

The Constitutional Court annulled a decision of a Regional Court dismissing an action for setting aside a decision invalidating a contract for the purchase of cultivated land concluded in 1975. The Court relied on the Act on modification of property rights in land and other agricultural property. The Constitutional Court found that the proceeding before the ordinary courts violated the principle of a fair trial before an impartial tribunal. It was stated explicitly in the contract under consideration that the vendor demanded no money for the cultivated pieces of land and that the purchase price had been modified by the contracting parties accordingly in such a way that it had been reduced exactly by the amount of the price of the land. Even if the contract of 1975 had been denominated as a "contract of purchase", it contained a gratuitous transfer of the cultivated pieces of land. It was to this gratuitous character of the transfer that the will of the parties of the contract has been directed. The cultivated pieces of land mentioned above had been included in the contract of purchase only for the reason that it had to be included in accordance with the policy pursued by the State organs at that time. The statement of facts thus falls without any doubt within the scope of the Act on modification of land property rights and other agricultural property, no. 22/1991 of the Collection. This Act was passed in order to mitigate the consequences of certain injuries to property rights during the period of 1948-1988 stemming from the fact that, due to the collectivization of agricultural property and land, the land integrated for purposes of collective farming has lost any real value to its owners.

Languages:

Czech.

Identification: CZE-95-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 28.03.1995 / **e)** Pl.ÚS 20/94 / **f)** Limitation of parental custody for children of minor age by administrative acts / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Institutions – Courts – Jurisdiction.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Parental rights, limitation.

Headnotes:

The separation of minor children from their parents against the parents' will can be imposed only by decision of ordinary courts but not by means of administrative decisions.

Summary:

Organs of the State administration decided against the will of the father on the placement of his minor son into a nursing home. This decision was based on Section 46 of the Family Code which, in urgent cases, provides for an obligation of the district administration organs to adopt a preliminary decision on measures that can normally be decided upon only by a court (the court shall subsequently decide on the validity of such a decision). Based on a claim raised by the father of the child, the Constitutional Court considered the constitutionality of this provision and declared it to be contrary to Article 32.4 of the Charter of Fundamental Rights and Freedoms. According to this Article, which reflects the obligations of the State established by the Convention on the Rights of the Child, parental rights can be limited and minor children can be separated from their parents against their will only by a decision taken by an ordinary court based on statutory provisions.

Languages:

Czech.

Denmark
Supreme Court

Reference period:
1 January 1995 – 30 April 1995

There was no relevant constitutional case-law during the reference period.

Estonia
National Court

Reference Period:
1 January 1995 – 30 April 1995

Statistical data

Number of Decisions: 3

Important decisions

Identification: EST-95-1-001

a) Estonia / **b)** National Court / **c)** Constitutional Review Chamber / **d)** 11.01.1995 / **e)** III-4/A-12/94 / **f)** Review of the Rules for the Issue and Extension of Foreigners' Residence and Work Permits / **g)** *Riigi Teataja* I 1995, no. 9, Article 112 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between State authorities.
Constitutional justice – Types of litigation – Litigation in respect of the formal validity of enactments.
Institutions – Executive bodies – Powers.

Keywords of the alphabetical index:

Delegation / Legislation, delegated / Review, scope.

Headnotes:

The Governments' power to delegate to a minister the enactment of orders of a legislative character must be provided by statute.

The question of the constitutionality of the substance of a statute or other legal act does not arise when it appears that the constitutional procedure for its enactment was violated.

The National Court's scope of review is limited to the extent of the referral even though it appears that the whole norm, and not just the single provision for which review was requested, is unconstitutional on procedural grounds.

Summary:

The lower court ruled unconstitutional and rendered inapplicable § 40 of the Rules for the Issue and Extension of Foreigners' Residence and Work Permits approved by order of the Minister of Internal Affairs. § 40 of the Rules provided that foreigners whose domicile under the laws of the former USSR has been registered as their employer's personnel department or some other non-residential place in Estonia would be considered on the same basis as applicants from outside Estonia, unless they had a permanent residence in Estonia before the aforementioned registration. The court held that this rule was in violation of Article 10 of the Constitution, which provides for the principle of the rule of law as a basis for the legal system of Estonia. Observance of the principle of the rule of law requires that people's confidence in the law and in the legality of government authorities be ensured and guaranteed.

Under the law, the constitutional review process in the National Court is initiated when a lower court holds that a statute or other legal norm is unconstitutional.

The National Court did not agree with the reasoning of the first instance court, but found nevertheless that the Rules had been approved without following the constitutionally established procedure. According to the Constitution, orders of a Minister will be issued on a statutory basis. The order of the Minister of Internal Affairs stated that the Rules were approved on the basis of § 1 of the Rules for the Issue of Foreigners' Residence and Working Permissions, approved by order of the Government. The power of the Government to give such order follows from the Foreigners Act. The Foreigners' Act, however, does not authorise the Government to delegate to a Minister the enactment of the rules which the Minister of Internal Affairs established. § 2 of the Foreigners' Act confers upon the Government an authority to determine what government agencies will execute the Foreigners' Act in specific but not in general cases.

The National Court also noted that the lower court had first to determine the formal constitutionality of the Rules. The need to review the constitutionality of the substance of a statute or other legal act arises only after it has been determined that the constitutional procedure of enactment was followed. Once it had become apparent that formal or procedural requirements had not been met, there would have been no need to examine the substantive constitutionality of the Rules.

Since the National Court's scope of review is limited to the extent of the referral, the Court declared only § 40 of the Rules null and void.

Languages:

Estonian.

Identification: EST-95-1-002

a) Estonia / **b)** National Court / **c)** Constitutional Review Chamber / **d)** 12.04.1995 / **e)** III-4/A-1/95 / **f)** Review of the Privatisation of Dwelling-Houses Act / **g)** *Riigi Teataja* I 1995, no. 42, Article 655 / **h)**.

Keywords of the systematic thesaurus:

General principles – Reasonableness.
Fundamental rights – Civil and political rights – Right to property – Expropriation.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Compensation, fair / Forced alienation / Property rights, equal protection / Property rights, inviolability / Public purpose.

Headnotes:

Property rights are inviolable and enjoy equal protection. Forced alienation may take place only for public purposes in return for fair and prompt compensation.

Summary:

The first instance court ruled unconstitutional and rendered inapplicable the Privatisation of Dwelling-Houses Act to the extent that it imposed on co-operative societies a duty to alienate their dwellings.

Under the law, the constitutional review process in the National Court is initiated when a lower court holds that a statute or other legal norm is unconstitutional.

The National Court found that the Privatisation of Dwelling-Houses Act provides for the forced alienation of dwellings owned by co-operatives without payment to them by the State. Under the Constitution, property rights are inviolable and enjoy equal protection. Forced alienation may take place only for public purposes in return for fair and prompt compensation. Transfer of property from one private person to another is not an alienation for public purposes. As the Act provides for a purchase price that is lower than the market price, it does not meet the constitutional requirement of fair compensation.

Languages:

Estonian.

France
Constitutional Council

Reference period:
1 January 1995 – 30 April 1995

The last judgment was rendered during the subsequent reference period.

Statistical data

30 decisions, including:

- 8 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution by members of Parliament or the Prime Minister
- 4 decisions on automatic normative review pursuant to Articles 46 and 61.1 of the Constitution referred by the Prime Minister
- 3 decisions appointing the Constitutional Council's deputies responsible for supervising the 1995 presidential election pursuant to the decree of 14 March 1964
- 12 decisions in response to applications from voters for rulings on proclamations of lists of candidates for the presidential election
- 3 decisions on the presidential election (lists of candidates for the first and second ballots, proclamation of the first ballot's results)

Important decisions

Identification: FRA-95-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 10.01.1995 / **e)** 94-355 DC / **f)** Institutional Act amending order no. 58-1270 of 22.12.1958 on the status of judges / **g)** *Journal Officiel de la République française – Lois et décrets* (Official Gazette of the French Republic – Acts and Decrees), 14.01.1995, 727 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Organisation – Members – Status.

Keywords of the alphabetical index:

Temporary judges.

Headnotes:

The office of judge in the ordinary courts must as a rule be held by persons who intend to devote their entire professional career to the judiciary. However, the Constitution does not bar persons who do not wish to pursue a judicial career from temporarily performing a limited share of the functions normally fulfilled solely by career judges, on condition that there are appropriate guarantees that the principle of independence, which is indissociable from judicial office, will be complied with. The persons concerned have the same rights and obligations as apply to all judges, subject only to the special provisions making it binding that they fulfil these functions temporarily.

Summary:

The status of judges is governed by Institutional Acts, which are subject to compulsory review by the Constitutional Council. The main legal difficulty in this case arose from the fact that persons who were not members of the judiciary were allowed to hold temporary office as presiding or non-presiding judges in the *tribunal de grande instance* for a non-renewable seven-year term or as judges on secondment in the Court of Appeal for a non-renewable five-year term. Subject to the special provisions covering such judges' remuneration and professional disqualifications, the Constitutional Council ruled that these specific arrangements for appointing judges were in compliance with the Constitution.

Languages:

French.

Identification: FRA-95-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 11.01.1995 / **e)** 94-353/356 DC / **f)** Institutional Act on

financing of presidential election campaigns – **g)** *Journal Officiel de la République française – Lois et décrets* (Official Gazette of the French Republic – Acts and Decrees), 14.01.1995, 731 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Presidential elections.
Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.

Keywords of the alphabetical index:

Campaign expenses / Presidential elections.

Headnotes:

If the Constitutional Council finds that a presidential candidate's campaign expenses have exceeded the upper limit, it is for the Council to determine the sum, equivalent to the excess amount, which such candidates, whether or not they are elected, are required to pay to the French Treasury.

Where the Constitutional Council rejects a candidate's campaign accounts following a review of their compliance with legal provisions, the share of expenses reimbursed by the State is withheld.

The fact that the advance on the flat-rate sum reimbursed by the State for each candidate's expenses was decreased from three million to one million francs, and that the upper limit on campaign expenses was reduced, did not infringe the principle of equality, since the legislature intended to make all candidates subject to the same rules.

Summary:

This legal issue concerning the entry into force of legislation was a particularly sensitive one because the Act provided for a decrease in the flat-rate amount reimbursed by the State and a reduction in the upper limit on campaign expenses five months before the scheduled date of the presidential election, whereas the candidates' campaign accounts must show income and expenses for a full year.

The Act also gave the Constitutional Council sole responsibility for reviewing presidential election candidates' campaign accounts, whereas for other elections – parliamentary, European or municipal – an initial review is performed by an independent authority, the National Campaign Accounts and Political Funding Review Board.

This is a new responsibility and its judicial nature remains to be defined.

The Constitutional Council criticised only one section of the Act on the ground of a technical inconsistency.

Languages:

French.

Identification: FRA-95-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 11.01.1995 / **e)** 94-354 DC / **f)** Institutional Act on declaration of assets by members of Parliament and on previous bulletins applicable to members of Parliament and of the Constitutional Council / **g)** *Journal Officiel de la République française – Lois et décrets* (Official Gazette of the French Republic – Acts and Decrees), 14.01.1995, 730 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Status of the members of the court – Professional disqualifications.
Institutions – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Declaration of assets.

Summary:

The Institutional Act on declaration of assets by members of Parliament and on professional disqualifications applicable to members of Parliament and of the Constitutional Council was held to be in compliance with the Constitution.

Headnotes:

The Institutional Act, which as such must obligatorily be reviewed, has little impact in terms of judicial practice but is decisive for the Constitutional Council in that the professional disqualifications applicable to its members, previously limited simply to the holding of parliamentary office, are now considerably extended.

Languages:

French.

Identification: FRA-95-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 18.01.1995 / **e)** 94-352 DC / **f)** General Policy and Planning Act on Security / **g)** *Journal Officiel de la République française – Lois et décrets* (Official Gazette of the French Republic – Acts and Decrees), 21.01.1995, 1154 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Freedom of movement.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Demonstrations / Freedom of expression of ideas and opinions, collective / Interpretation, attenuating / Searches of vehicles / Video surveillance.

Headnotes:

Except in defence-related matters, the opinion of a committee set up at *Département* level and chaired by a judge must be sought before a video surveillance system is installed. The Constitutional Council ruled that in view of the committee's role, its membership, which the legislature did not specify, must be such as to afford guarantees of independence.

The legislature was entitled to authorise prefects to ban the carrying or transport of objects which might constitute weapons in cases where there was cause to fear serious disturbances of public order. It must be considered that the legislature authorised such bans only on the site or in the immediate vicinity of demonstrations, save in exceptional circumstances.

Certain provisions were criticised because they failed to require that approval be sought from the judicial authorities, the guardians of personal liberty, before vehicles were searched with a view to the discovery and seizure of weapons.

The ban on taking part in demonstrations, which could be imposed by the criminal courts as an additional penalty for a maximum of three years and which applied only in locations specified in the sentence, did not infringe the principle of proportionality of punishments and was not such as to interfere with the requirements of personal liberty, freedom of movement and the collective freedom of expression of ideas and opinions.

An infringement of the right to respect for one's private life could be such as to interfere with personal liberty. The use of video surveillance systems must be subject to guarantees designed to protect the exercise of this right.

Any interested party was entitled to refer an issue relating to the workings of a video surveillance system to the *Département*-level committee. This administrative procedure must not bar the interested party from bringing the matter before the relevant court, if necessary under the urgent procedure.

Summary:

Five months before the presidential election the opposition groups in the National Assembly and the Senate filed two applications before the Constitutional Council, seeking the review of a law typifying the security policy pursued by the Prime Minister, himself a presidential candidate.

With regard to searches of vehicles the Council upheld case-law dating from 1977 and introduced many attenuating interpretations rendering the legal provisions largely inoperative. It also confirmed the right of appeal established on 13 August 1993 and reasserted the constitutional role conferred on the judicial authorities in safeguarding personal liberty by criticising two paragraphs of section 16 of the Act.

For the first time a link was established between the right to respect for one's private life and personal liberty. The Constitutional Council did not give its sanction to the right to demonstrate, but rather to the freedom of collective expression of ideas and opinions.

Languages:

French.

Identification: FRA-95-1-005

a) France / **b)** Constitutional Council / **c)** / **d)** 02.02.1995 / **e)** 95-360 DC / **f)** Act on Organisation of the Courts and on Civil, Criminal and Administrative Procedure / **g)** *Journal Officiel de la République française – Lois et décrets* (Official Gazette of the French Republic – Acts and Decrees), 07.02.1995, 2057 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Criminal proceedings, orders.

Headnotes:

Certain measures that may be ordered in criminal proceedings are such as to infringe personal liberty. When decided upon by the courts, they amount to a criminal penalty. In matters of punishment of offences under the ordinary law, such measures may not be ordered and enforced by the prosecuting authorities alone, even with the consent of a person liable to be prosecuted, but require a decision by a court.

Summary:

The legislation was criticised having regard to three texts: the Declaration of the Rights of Man of 1789 (presumption of innocence, Article 9), Article 66 of the Constitution (the judicial authority as the guardian of personal liberty) and a fundamental principle acknowledged in the laws of the Republic (the rights of the defence).

Languages:

French.

Identification: FRA-95-1-006

a) France / **b)** Constitutional Council / **c)** / **d)** 09.04.1995 / **e)** / **f)** Application by Ms Gisèle Néron / **g)** *Journal Officiel de la République française – Lois et décrets* (Official Gazette of the French Republic – Acts and Decrees), 11.04.1995, 5708 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums and other consultations.
Institutions – Executive bodies – Powers.

Keywords of the alphabetical index:

Presidential candidates.

Headnotes:

The Act on the election of the President of the Republic by universal suffrage was passed after being approved in a referendum. It is a direct expression of national sovereignty. Because the Act was passed in this way, the government acquired the most extensive powers to take all measures necessary to enforce it.

This being the case, the applicant's contention that the government was acting in excess of its powers by issuing decrees laying down rules for the submission of candidatures was ill-founded.

Languages:

French.

Identification: FRA-95-1-007

a) France / **b)** Constitutional Council / **c)** / **d)** 19.06.1995 / **e)** 94-359 DC / **f)** Act on diversity of housing / **g)** *Journal Officiel de la République française* (Official Gazette of the French Republic – Acts and decrees), 21.01.1995, 1166 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Quasi-constitutional enactments.
Fundamental rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
Fundamental rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Housing.

Headnotes:

The possibility for everyone to have a decent home is an objective that is supported by the Constitution.

Summary:

It can be seen from the preamble to the Constitution of 27 October 1946 that safeguarding the dignity of human beings against all forms of degrading treatment is a principle which ranks as constitutional law, that the nation must guarantee "individuals and families the conditions needed for them to develop" and, lastly, that "any human being who ... is unable to work is entitled to be afforded reasonable means of subsistence by the community".

This was the second time the Council had referred to the concept of human dignity founded on prohibition of all forms of degrading treatment (see decision no. 94-343/344 DC), and here found that the possibility for everyone to have a decent home was a constitutionally supported objective.

Languages:

French.

Germany
Federal Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

The first three judgments were rendered during the previous reference period.

Statistical data

17 decisions by a chamber *(Senat)* among them:

- 2 concerning the prohibition of a party
- 2 concerning the validity of elections
- 1 concerning a federal conflict
- 3 concerning a concrete norm control
- 7 concerning individual constitutional complaints
- 1 preliminary decision

15 cases dealt with (taking into consideration the joinder of cases)

1492 rejecting decisions of the sections (chambers), 42 cases dealt with (taking into consideration the joinder of cases), 38 granting decisions of the sections, 2 cases dealt with

1978 new cases

Important decisions

Identification: GER-95-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 17.11.1994 / **e)** 2 BvB 2/92, 2 BvB 3/93 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)** *Europäische Grundrechtezeitschrift* 1995, 184.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Restrictive proceedings – Banning of political parties.
Institutions – Legislative bodies – Political parties.

Keywords of the alphabetical index:

Party, definition.

Headnotes:

The Constitutional Court has the exclusive competence to prohibit a political association only if it constitutes a political party.

A party is defined as a political association which tries to exercise influence in the political field by participation in elections and by other political activities. It must have a structure which guarantees a certain stability of its organisation.

Summary:

The "Free German Workers Party" *(Freiheitliche Deutsche Arbeiterpartei) FAP* is a political extreme right-wing association which pursues radical – racist and totalitarian – ideas. The federal government brought an action before the Constitutional Court requiring the prohibition of the association. The Constitutional Court declared the action inadmissible as the *FAP* did not meet the requirements of a political party; therefore, it did not fall within the exclusive competence of the Constitutional Court to prohibit this association.

Supplementary information:

The government itself may prohibit the *FAP* which may initiate a proceeding against the prohibition before the competent administrative court. After the exhaustion of all remedies, the Party may bring an individual constitutional complaint before the Constitutional Court.

Cross-references:

There has been a second proceeding concerning the prohibition of the "National List" *(Nationale Liste)* (decision of 17 November 1994, 2 BvG 1/93, *Europäische Grundrechtezeitschrift* 1995, 189). The Constitutional Court declared the case inadmissible on the same grounds as in the case of the *FAP*.

Languages:

German.

Identification: GER-95-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 22.11.1994 / **e)** 1 BvR 351/91 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Maximum house rent, fixing by the State / Tenants, rights.

Headnotes:

The limitation of maximum house rents by the State is compatible with the right to property.

Summary:

A cooperative in the former German Democratic Republic (GDR) had become a private owner of some houses by way of privatisation. According to the law of the German Democratic Republic, it was owner only of the buildings, not of the ground. The rents paid by the tenants were quite low and did not cover the costs for the necessary renovation of the houses. In the 1990 Treaty on the Establishment of German Unity and a special statute on the matter, it was provided that the low rents would be upheld for a transitory period. The raising of rents was limited. The cooperative brought an action before the Constitutional Court challenging the statute which limited the possibilities of raising rents.

The Court decided that the cooperative enjoyed the protection of its private property notwithstanding the fact that it became full owner of the ground only following the unification of Germany. In the 1990 Treaty on the Establishment of German Unity, the State organs could not stipulate provisions curtailing the rights of ownership in contradiction to the guarantee of property, even if the property right in the given case is a consequence of unification.

A limitation of the level of rent does not violate the right to property. The legislator had to weigh on the one hand the rights of tenants, which are constitutionally protected and, on the other hand, the rights of owners. It has a large margin of appreciation in reconciling this conflict. Having regard to the small

incomes of most persons in the former German Democratic Republic, the level of the rents could be justifiably limited. On the other hand, in a period of transition from a centrally planned economy to a market economy, the State has no obligation to cover the costs incurred by owners in carrying out necessary renovations.

Languages:

German.

Identification: GER-95-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 07.12.1994 / **e)** 1 BvR 2011/94 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Type of review – Preliminary review.
Institutions – Courts – Legal assistance – The Bar.
Fundamental rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Bar, admission.

Headnotes:

The legislation limiting the admission of lawyers in civil law matters only to the court of appeal of the district in which they are residing should be suspended.

Summary:

Presently, a lawyer in civil law matters can only appear before the appeal courts of the district in which he has been admitted. In the new *Länder*, such a restriction did not exist until 1 January 1995. The Constitutional Court suspended the application of the law which extended the restriction to the new *Länder* on the grounds that the potential prejudice to the lawyer if the application of the law was later declared to be unconstitutional would be greater than any potential prejudice caused by a suspension of the law in circumstances where it is later found to be constitutional.

Languages:

German.

Identification: GER-95-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 10.01.1995 / **e)** 1 BvL 20/87 and 1 BvL 20/88 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Temporal effect.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Equality – Scope of application.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Scholarships / Spouses living separately.

Headnotes:

It is incompatible with the general principle of equality to take into consideration the income and the property of a separated spouse living permanently apart – independently of an obligation to pay alimony – when deciding on the needs of a student applying for a scholarship.

Summary:

The case deals with the question whether the authorities granting a scholarship may take into consideration the income of a spouse of the applicant student in circumstances where they are not yet divorced, but are separated and live permanently apart.

With reference to its settled case-law the Constitutional Court decided that the general principle of equality establishes different limits for the exercise of legislative discretion depending on the subject matter. The principle of equality ranges from the prohibition of arbitrariness to the requirement of proportionality. The differentiation between groups of persons is subject to

a close review as to its proportionality; any such different treatment provided by law has to be justified.

In general, the income of a spouse may be taken into consideration when deciding on granting a scholarship to a student. This is not the case when the spouses get divorced; only the alimony actually paid is taken into account. It violates the principle of equality to treat spouses who live permanently separated like married persons, as their economic situation is much more similar to that of divorced persons.

Cases pending before the administrative authorities will not be suspended – as usually occurs when a provision is declared incompatible with the Constitution – but decided according to the rules on the granting of scholarships to divorced persons.

Languages:

German.

Identification: GER-95-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 10.01.1995 / **e)** 1 BvR 718/89, 1 BvR 719/89, 1 BvR 722/89, 1 BvR 723/89 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Certainty of the law.
Fundamental rights – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Nullen crimen sine lege / Punishment fixed by law before the act.

Headnotes:

It violates the principle of legal certainty in criminal law *(Bestimmtheitsgrundsatz)* if the criminal courts construe the provision on compulsion by threat or force in the sense that "sit in" demonstrations which block a road or access to a building fall under this criminal prohibition.

Summary:

In the late sixties, seventies and eighties, some forms of demonstration aimed to block access to certain buildings, and later to military areas where Cruise and Pershing missiles had been installed. Many people taking part in such actions had been convicted for compulsion by threat or force (§ 240 of the Criminal Code). The ordinary courts, referring to case law dating back more than seventy years, had consistently held that the notion of violence in this criminal provision did not require the use of corporal force, but considered it sufficient for a conviction if the reaction of the victim had been determined by the behaviour of the offender.

The Constitutional Court decided that it violated Article 103.2 of the Constitution which also comprises the requirement of certainty of the law, that a "sit in" is qualified as violence in the sense of § 240 of the Criminal Code (compulsion by threat or force).

Supplementary information:

Three out of eight justices wrote a dissenting opinion declaring that a "sit in" may be qualified as violence. A punishment based on this construction does not violate the requirement of certainty, as it only applies the settled case-law of the ordinary courts.

The practical consequences of the decision are disputed. In general, a person convicted according to a law later declared unconstitutional must be retried, under § 79.1 of the Statute on the Constitutional Court. In the present case, the Constitutional Court did not declare a legislative provision unconstitutional, but only a certain construction of it, which had been declared constitutional nine years ago. Therefore, a dispute arose as to whether convicted persons have a right to a retrial of their case.

Cross-references:

In 1986, the Constitutional Court had already dealt with the question of the constitutionality of the provision of the Criminal Code on compulsion by threat or force (*Entscheidungen des Bundesverfassungsgerichts* 73, 206). In this decision, it had held by a vote 4:4 that a construction of the provision of the Criminal Code on compulsion by threat or force according to which a "sit in" falls under the notion of "violence" did not violate the Constitution.

Languages:

German.

Identification: GER-95-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 10.01.1995 / **e)** 1 BvF 1/90, 1 BvR 342/90, 1 BvR 348/90 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Private.
Fundamental rights – Economic, social and cultural rights – Freedom to choose one's profession.
Fundamental rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Foreign sailors / Foreign workers, remuneration / Merchant ships, second register.

Headnotes:

If the freedom of trade unions affects the legal order of other States and if contradicting interests of subjects of this fundamental right collide in a space which is not exclusively governed by the German legal order, the legislator enjoys more discretion to regulate the situation than in matters concerning exclusively domestic legal relations. But even in the first case, the legislator remains obliged to guarantee the most comprehensive application of the fundamental right under the given circumstances which are beyond his control.

The freedom of German sailors to choose their profession is not violated by the possibility – asserted by the law – of concluding labour contracts under foreign law on German merchant vessels registered in the International Ship Register.

It does not violate the principle of equality that foreign sailors can be employed on German merchant ships for a salary equivalent to the salary level in their home countries.

Summary:

In 1989, the legislature adopted a law which established an International Ship Register. It provided for the possibility of concluding labour contracts under foreign law. Two *Länder* brought an abstract review of the law before the Constitutional Court and a trade union brought an individual constitutional complaint against it.

The Constitutional Court decided that the regulation violates the Constitution insofar as it provides that foreign members of trade unions may be favoured by contracts concluded by the trade unions only to the extent that this has expressly been agreed upon; this provision weakens the position of trade unions in a constitutionally inadmissible way (violation of the freedom of trade unions under Article 9.3 of the Basic Law).

Apart from that provision, it does not violate the freedom of trade unions that ship-owners conclude contracts with foreign sailors which are beyond the influence of German trade unions. Since the labour market in international shipping is completely internationalised, ship-owners always have the possibility of evading German legislation by running a ship under another flag. The German legislator has only the alternative either to safeguard German fundamental rights standards without any restrictions and thus to deprive them from any meaningful application in the field of international shipping, or to keep a field where fundamental rights may be applied, but to reduce their standard of protection. The Constitution does not prevent the legislator from choosing the second option.

Languages:

German.

Identification: GER-95-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 23.01.1995 / **e)** 2 BvE 6/94, 2 BvE 7/94 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)** *Europäische Grundrechtezeitschrift* 1995, 193.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Failure to pass legislation.
Constitutional justice – Procedure – Grounds – Time-limits.

Headnotes:

If an organ claims to be violated by the omission of the legislator, the time-limit of six months, within which the organ must bring its claim before the Constitutional Court, starts to run from the time of the adoption of the law in which the alleged omission is to be found.

Languages:

German.

Identification: GER-95-1-008

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 24.01.1995 / **e)** 1 BvL 18/93 and others / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Institutions – Public finances – Taxation – Principles.
Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Gender.

Headnotes:

The imposition of mandatory service in fire-brigades and the imposition of substitute levies exclusively on men violates the prohibition of discrimination on the grounds of sex.

The principles concerning the admissibility of special taxes are applicable also to taxes levied by the *Länder*.

Summary:

In some German *Länder*, the statutes on fire-brigades provide for an obligation on men to do service in such units. As a matter of fact, nobody has been obliged to do so because there have always been sufficient volunteers. Some of the statutes on fire-brigades required men to pay a substitute levy if they fail to do service in the fire-brigade.

The Constitutional Court decided that these provisions violate the prohibition of discrimination on the grounds of sex. Referring to its settled case-law, the Constitutional Court declared that a differentiation of treatment between men and women is only admissible if it is unavoidable for the regulation of matters which by nature affect one of the sexes. The only exception concerns preferential treatment of one sex in order to compensate factual disadvantages. There are no sufficient reasons to except women from service in the fire-brigade because of their physical constitution. The Constitutional Court bases its motives on sociological and medical data. The discrimination against men with respect to service in fire-brigades is not justified by a compensation for factual disadvantages of women, as it is not aimed at overcoming a social differentiation between the sexes, but at establishing it in a special field.

Special taxes which are not levied for specific tasks of the State and which are imposed only on a certain part of the population are admissible only under very limited conditions, i.e. they must aim to establish an equality of the burden in cases where an obligation is imposed by law on a group of persons and not all members of this group fulfil this obligation. The substitute levy in question does not meet this requirement because nobody has in fact to do service in the fire-brigade. Therefore, money for the fire-brigade has to be paid out of the general budget.

Cross-references:

See, on the same problem, the judgment of the European Court of Human Rights in the case of *Karlheinz Schmidt v. Germany* (*Bulletin* no. 1994/2, 179).

Languages:

German.

Identification: GER-95-1-009

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 09.02.1995 / **e)** 2 BvQ 6/95 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)** *Europäische Grundrechtezeitschrift* 1995, 196.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Guarantees as to the exercise of power.
Institutions – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, right to information, members.

Headnotes:

In Thuringia, a member of Parliament has no right to information about a report of the audit office.

Summary:

In Thuringia, a federated country, the decision on the budget by Parliament must take into consideration the reports of the audit office. Some members of Parliament asked to be informed about a respective report. The Constitutional Court decided – in a proceeding in which it acted as Constitutional Court of a *Land* – that, in general, deputies have a right to receive information necessary for their work. However, such a right exists only *vis-à-vis* the government. According to the Thuringian Constitution, only Parliament as a whole, not each member, has a right to be informed about the reports of the audit office.

Cross-references:

Decisions concerning the rights of members of Parliament: *Entscheidungen des Bundesverfassungsgerichts* 45, 1; 70, 324.

Decisions concerning the right to information *vis-à-vis* the government: *Entscheidungen des Bundesverfassungsgerichts* 57, 1; 67, 100; 80, 188.

Languages:

German.

Identification: GER-95-1-010

a) Germany / **b)** Federal Constitutional Court / **c)** Second Section of the Second Chamber / **d)** 16.02.1995 / **e)** 2 BvR 1852/94 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)** *Europäische Grundrechtezeitschrift* 1995, 199.

Keywords of the systematic thesaurus:

Constitutional justice – Procedure – Interlocutory proceedings – Challenging of a judge.

Keywords of the alphabetical index:

Government criminality.

Headnotes:

A judge who in his or her former position as a minister took decisive steps to punish government criminality in the former German Democratic Republic cannot take part in a case concerning the question whether someone who killed a person trying to flee from the German Democratic Republic can be punished under the law of the Federal Republic of Germany.

Summary:

The current President of the Constitutional Court was a Minister of Justice in Berlin. In this capacity, she declared herself in favour of punishing German Democratic Republic government criminality and took steps to implement these ideas. Therefore, on her own initiative, she was excluded from participating in a case arising from an individual constitutional complaint by someone who killed a refugee trying to flee to the Federal Republic of Germany.

Languages:

German.

Identification: GER-95-1-011

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 21.02.1995 / **e)** 1 BvR 1379/93 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Economic, social and cultural rights – Freedom to choose one's profession.
Fundamental rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Employment, notice of termination / Policemen of the former GDR.

Headnotes:

The possibility of giving extraordinary notice of termination of employment for lack of personal aptitude – provided by the Treaty on German Unity – is compatible with the Basic Law.

The notice of termination of employment of a public servant of the former German Democratic Republic (GDR) requires an examination of his or her personality on the basis of individual behaviour before and after the accession of the German Democratic Republic to the Federal Republic of Germany. The loyalty and co-operation necessary for a career in the public service of the former German Democratic Republic does not in itself prove a lack of aptitude.

Summary:

A policeman of the former German Democratic Republic remained in his functions after the accession of the German Democratic Republic to the Federal Republic of Germany. He participated in a training course for police service in a democracy, and obtained good results in the examination. Nevertheless, he was dismissed because for a long time he was a loyal civil servant of the German Democratic Republic and for a certain time even a professional secretary of the Communist Party.

The Constitutional Court decided that professional qualification and adherence to democratic values are of utmost importance for the public service. These values had to be protected during the integration of the public service of the former German Democratic Republic into the public service of the Federal Republic of Germany. It is compatible with the Basic Law to require that a civil servant of the former German Democratic Republic show the necessary qualifications to serve this goal.

The Court stated that the labour court *a quo* violated the principle of freedom to choose one's profession and the right of access to the public service when it did not take into consideration the loyalty of the policeman to the Basic Law.

Languages:

German.

Identification: GER-95-1-012

a) Germany / **b)** Federal Constitutional Court / **c)** Second Section of the Second Chamber / **d)** 24.02.1995 / **e)** 2 BvR 345/95 / **f)** / **g)** / **h)** *Europäische Grundrechtezeitschrift* 1995, 138.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Capacity to stand trial.

Headnotes:

In proceedings on appeal confined to points of law, it is sufficient that the accused, on his or her own responsibility, can decide to appeal or not, provided that the accused understands the importance of the appeal and that he or she can come to an understanding with his or her lawyer, as to whether the appeal should be revoked or not.

Summary:

The constitutional complaint was brought by the former German Democratic Republic minister for State Security who was more than 85 years old at the time of the proceedings. An expert wrote a report that the appellant would not be able to continue to follow proceedings before the court; however, he could understand the importance of the appeal and come to an agreement with his lawyers as to whether he should revoke the appeal or not. The Supreme Court decided that this capability is sufficient for an appeal case which concerns only questions of law.

The Constitutional Court concurred, pointing out that the inviolability of human dignity requires that nobody may be the object of proceedings only. However, as the proceedings concerned only questions of law, the resolution of which did not require the participation of the appellant, his capabilities as stated by the expert were sufficient for the retrial of the case. There was consequently no violation of the principles of fair trial (Articles 1.1 and 20.3 of the Basic Law).

Languages:

German.

Identification: GER-95-1-013

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 07.03.1995 / **e)** 1 BvR 790/91 u.a. / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Children, custody / Fathers, unmarried.

Headnotes:

Fathers of illegitimate children enjoy parental rights irrespective of their relation to the mother, and whether they take care of the children together with her or not. However, the legislator is empowered to take into consideration the various factual circumstances when fixing the concrete rights of both parents.

It is incompatible with the Constitution that the adoption of an illegitimate child by its mother or her husband does not require the consent of the father or the respect of his interests.

The father must be heard in the proceedings for the adoption of an illegitimate child before the guardianship court.

Summary:

Under German Law, an illegitimate child can be adopted by its mother or her husband without any participation in the procedure by the natural father of the child. The adoption cuts any parental link between the father and the child. The Constitutional Court decided for the first time that an unmarried father generally – and not only under certain circumstances – is the subject of the parental rights guaranteed by Article 6.2 of the Basic Law. The Constitutional Court arrived at this decision on a consideration of the wording – the provision conveys parental rights to both parents – and not the historical intentions of the constituent body, which wanted to exclude any involvement of the unmarried father but did not lay it down in the wording of the provision. The Constitutional Court alluded to social development, and pointed out that nowadays unmarried fathers quite often have the care of children.

Languages:

German.

Identification: GER-95-1-014

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 07.03.1995 / **e)** 1 BvR 1564/92 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Identity, proof.

Headnotes:

It violates the right of personal liberty if the refusal to prove one's identity is punished without having regard to the legality of the order to identify oneself.

Summary:

A person attended a public party assembly and showed a scroll with a political statement attacking the party's opinion. The leaders of the assembly did not take notice of him. A policeman ordered him to prove his identity. He refused to follow this order, and was later punished for this refusal according to § 111 of the statute on administrative offences. The Constitutional Court decided that it does not violate the fundamental right to personal liberty (Article 2.1 of the Basic Law) if the law provides for the punishment of a person who refuses to prove his identity. However, such a punishment is unconstitutional if the ordinary court does not verify the legality of the order to identify oneself.

Languages:

German.

Identification: GER-95-1-015

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 22.03.1995 / **e)** 1 BvG 1/89 / **f)** / **g)** to be published in the official digest of the Federal Constitutional Court / **h)** *Europäische Grundrechtezeitschrift*, 1995, 125.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Distribution of powers – Co-operation.
Institutions – Federalism and regionalism – Distribution of powers – International relations – Participation in organs of the European Communities.
Institutions – Transfer of powers to international institutions.

Keywords of the alphabetical index:

European Communities and federated States.

Headnotes:

If the European Community claims a legislative competence, the federal State must safeguard the rights of the Federal Republic of Germany *vis-à-vis* the Community and its organs. If, on the level of domestic law, the Basic Law reserves the exclusive competence to regulate a certain matter to the legislators of the federated States, the federal State, acting for the federated States, must safeguard their rights *vis-à-vis* the Community.

This responsibility entails procedural obligations for the federal government to cooperate with the federated States and to take their interests into consideration.

Summary:

In 1989, the federal government decided to give its consent to a Council Directive on radiotelevision. In the following negotiations, it pointed out that any solution envisaged by the Council would require the consent of the federated States. The federated States and the federal government agreed that the European Community had no competence to fix quotas with respect to the countries of origin of the emissions. In the end, the Council Directive did contain regulations on such quotas.

The Constitutional Court decided that the principle of federal loyalty *(Bundestreue)* obliges the federal government to cooperate with the federated States within the organs of the European Community to the extent that the legislative competences of the federated States are implicated. It has to inform them about political plans within the European Community, to consult them and to defend their rights. If the federal government and the federated States agree that the European Community does not have legislative competences in a certain field, it is obliged to prevent the adoption of respective normative acts which could gradually extend the competences of the European Community. If an act exceeding the competences of the European Community is nevertheless adopted, the federal government must make every effort to have this act repealed, even by bringing a claim before the European Court of Justice. The Constitutional Court acknowledged that the federal government did all in its power to defend the principle according to which Community powers are exhaustively enumerated in the treaties. However, the federal government violated the rights of the federated States by accepting the provisions on quotas in the Council Directive without prior consultation of the federated States although they had previously agreed that such a competence of the European Community did not exist.

Supplementary information:

The rights of the federated States in the field of European integration have been regulated in Article 23 of the Basic Law, as adopted prior to the ratification of the Maastricht Treaty.

Languages:

German.

Languages:

German.

Identification: GER-95-1-016

a) Germany / **b**) Federal Constitutional Court / **c**) Second Chamber / **d**) 23.03.1995 / **e**) 2 BvR 492/95 / **f**) / **g**) to be published in the official digest of the Federal Constitutional Court / **h**) *Europäische Grundrechtezeitschrift* 1995, 172.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Expulsion of an alien / Guarantee of a home country.

Headnotes:

An individual constitutional complaint in respect of an alleged violation of the right to life is inadmissible if the appellant has the possibility to seek alternative redress for the alleged violation.

Summary:

The appellant was a Kurd who had been allegedly tortured in Turkey and had sought political asylum in Germany. When his claim for asylum was rejected, he was served a deportation order by the administrative authority. The administrative court rejected his claim for preliminary protection against this order. The Constitutional Court declared the individual constitutional complaint inadmissible. It quoted an exchange of letters between the Turkish Minister of the Interior and his German counterpart, in which the Turkish Minister declared in detail that the Turkish State would respect the principles of a State governed by the rule of law and would give information to the German government if a person who is to be expelled risked punishment in Turkey. The Constitutional Court underlined that the appellant had the possibility to claim preliminary protection before the administrative courts with reference to this exchange of letters until the guarantees are found to be honoured.

Hungary
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Number of decisions

- Decisions by the plenary published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 14
- Number of other decisions by the plenary: 15
- Number of other decisions by chambers: 15
- Number of other (procedural) orders: 32
- Total number of decisions: 86

Important decisions

Identification: HUN-95-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 08.02.1995 / **e)** 1/1995.(II.8.) AB *határozat* / **f)** / **g)** *Magyar Közlöny* (Official Gazette) no. 10/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Temporal effect – Postponement of temporal effect.
Fundamental rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Compensation for past injustices / Dignity.

Headnotes:

The Constitution requires that, when regulating the question of compensation for those wrongfully deprived of their life and liberty for political reasons, the law should specify the group of persons entitled to such compensation, respecting the equal dignity of each person.

Summary:

Act 32 of 1992 regulated the question of compensation for those wrongfully deprived of their life and liberty due to political reasons. Several petitioners challenged the law, especially because they claimed that the law specified in an arbitrary and discriminatory way those who were entitled to compensation.

The present case differed from all previous compensation cases introduced before the Court because it did not concern compensation for property losses or material damage, but compensation for personal injury. The issue was complicated further because the violations in question occurred under different political regimes. On a very broad generalisation, one previous regime perpetrated these violations on the ground of racism and nationalism, while the next regime followed mostly ideological and political motives. A further difficulty lies in the question how deprivation of life and liberty could be measured in money.

The Constitutional Court declared that this type of compensation is not based on a legal obligation emanating from the time before the transition; the Government compensates according to equity, thus nobody has a subjective right to compensation. Therefore, the Constitutional Court upheld the constitutionality of the general principles of the compensation process, including the fact that the legislature passes different compensation laws periodically. However, the Court revealed an omission on the part of the government and the legislature. The law provided for an additional legislative act that would cover those persons who did not fall under the previous law, and this obliged the government to present the draft as early as in 1992. The government did not comply with this obligation, thus creating an unconstitutional discrimination to the detriment of those who did not fall within the compensation law. The main concern of the petitioners was that the law restricted the possibility of compensation to those whose rights were arbitrarily violated in connection with a formal criminal procedure. Such a provision excluded from compensation those who were killed by Hungarian authorities without any formal judicial procedure (e.g. shot, or killed in forced labour camps). In order to redress this omission, the Court obliged the legislature to pass a further compensation law before the end of September 1995.

The Constitutional Court declared unconstitutional and annulled some specific provisions of the law. The law originally considered deportation as a mere form of deprivation of liberty. According to the Court, deportation during the Second World War meant far more, being an expulsion from the country by force, when

Hungarian authorities, on racial, religious or political grounds, handed their own citizens to foreign authorities, who carried them off to concentration camps. Leaving these historical circumstances out of consideration violates the constitutional requirement of treating everybody with equal dignity. Deported people form a clearly defined specific group that the legislature has to respect. Therefore, the provisions whereby deportation to Germany and to the Soviet Union were regarded as mere deprivation of liberty were declared unconstitutional.

Another provision of the law differentiated between people compelled to undergo forced labour service – a form of unarmed military service for those pursued by the regime during the Second World War. The criterion for the difference in treatment was whether the forced labour camps belonged to combat force units or not. The Constitutional Court held arbitrary, and thus unconstitutional, the discrimination between those who had served in combat and in non-combat forces, because those belonging to non-combat forces were compelled to live in closed camps and were deprived of their liberty.

The remaining provisions challenged by the petitioners were upheld by the Court.

Supplementary information:

The Constitutional Court had previously examined various questions on compensation for past injustices in six cases. In the present case, despite the abovementioned differences, the Court confirmed the principles laid down in its earlier judgments, e.g. the treatment of persons with equal dignity.

Languages:

Hungarian.

Identification: HUN-95-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 13.03.1995 / **e)** 14/1995.(III.13.) AB *határozat* / **f)** / **g)** *Magyar Közlöny* (Official Gazette) no. 20/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Decisions – Types – Suspension.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Gender.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Homosexual partnership / Marriage.

Headnotes:

Not allowing marriage between persons of the same sex does not amount to negative discrimination on the basis of sex. However, the enduring union of two persons may realise such values that it can claim legal acknowledgement irrespective of the sex of those living together. Therefore, the fact that respective legal regulations acknowledge only those partnerships outside marriage where a man and a woman live together in the same household and form an emotional and economic union, is contrary to the Constitution.

Summary:

The petitioner requested the constitutional review of Article 10.1 of Law IV of 1952 on Marriage, Family and Guardianship, according to which "men and women of legal age may get married". The petitioner also requested the review of Article 578/G of Law IV of 1959 on the Civil Code regulating the financial relations of those living in the same household and defining the notion of partners in a domestic partnership as "a woman and a man living together in the same household who form an emotional and economic community outside a marriage". In the petitioner's opinion, the two legal regulations in question negatively discriminate on the basis of sex by making it impossible for persons of the same sex to get married and by not acknowledging their domestic partnership.

In its proceedings, the Constitutional Court began with the idea that both in Hungarian culture and law, the institution of marriage is traditionally the union of a man and a woman. The ability to procreate and give birth to children is neither the defining element nor the condition of the notion of marriage, but the idea that marriage requires the partners to be of different sexes is a condition that derives from the original and typical designation of marriage. The institution of marriage is constitutionally protected by the State with respect also to the fact that it promotes the establishment of families with common children. This is the reason why

Article 15 of the Constitution mentions the two subjects of protection together: "The Hungarian Republic protects the institutions of marriage and the family."

Equality between man and woman has a meaning if we acknowledge the natural differences between man and woman, and equality is realised with respect to this. The Constitution only poses the requirement of equal regulation of the conditions of marriage between persons of different sexes, which excludes the legal possibility of marriage between persons of the same sex. On the basis of the above, the Constitutional Court has reached the conclusion that the challenged regulation does not discriminate either in terms of sex or in terms of other conditions, and thus does not violate Article 70/A of the Constitution.

The challenged regulation cannot be related to Article 66.1 of the Constitution, since the regulation has no reference to the equality of men and women. The regulation in the law on family rights denying marriage to persons of the same sex prohibits men and women equally from marrying persons of their own sex.

As regards partnerships outside marriage, the sole legal definition of domestic partnership can be found in Article 578/G.1 of the Civil Code. According to this definition, "the partners in a domestic partnership are a man and a woman living together in a common household and in an emotional and economic community, outside a marriage". It is a fact that domestic partnership exists typically between men and women and this is also what public opinion understands by this notion. But the legal acknowledgement of domestic partnership has an incomparably shorter history than that of marriage. Judicial practice began to acknowledge domestic partnerships in the 1950s and such partnerships were incorporated into important regulations only between 1961 and 1977. The cohabitation of persons of the same sex, which in all respects is very similar to the cohabitation of partners in a domestic partnership – involving a common household, as well as an emotional, economic and sexual relationship, and taking on all aspects of the relationship against third persons – brings up today, albeit to a lesser extent, the same necessity for legal acknowledgement just as in the fifties for those in a domestic partnership.

The sex of partners and relatives can, of course, be significant when the regulation concerns a common child or concerns a marriage with another person. However, where these considerations do not apply, the exclusion from domestic partnerships of persons of the same sex living in a common household and in an emotional and economic union, is arbitrary and thus violates human dignity.

The legally effective notion of partners in a domestic partnership is defined by the Civil Code. The constitutionality of this cannot be determined on its own, but depends on whether the distribution of rights and duties among those who are in the same situation is done in a manner that respects the right to equal human dignity, that is, permitting equal treatment of persons and evaluating their points of view with like circumspection, attention, impartiality and fairness. The legislator can create a situation that is in harmony with the Constitution while leaving untouched the legal notion of domestic partnership that is in effect now. Thus the Constitutional Court did not decide on the constitutionality of the definition in Article 578/G.1 of the Civil Code, but instead suspended its proceedings until 1 March 1996.

Languages:

Hungarian.

Ireland
Supreme Court

Reference period:
1 January 1995 – 30 April 1995

There was no relevant constitutional case-law during the reference period.

Italy
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Meetings of the Constitutional Court during the period from 1 January to 30 April 1995: 7 public hearings and 9 hearings in chambers. The court gave 142 decisions in all.

Decisions given in cases where constitutionality was a secondary issue: 54 judgments, 19 finding measures complained of unconstitutional, and 54 court orders

Decisions given in cases where constitutionality was the main issue: 6 judgments, 4 finding measures complained of unconstitutional

Decisions given in constitutional proceedings concerning conflicts of authority (a) between the State and the regions (or the autonomous provinces of Trento and Bolzano) over the definition of their respective powers: 9 judgments; (b) between State authorities in disputes between public bodies over the exercise of powers: 1 judgment and 2 court orders

Decisions given in constitutional proceedings on the admissibility of referendums for repeal of legislation: 13 judgments

Decisions correcting factual errors: 1 court order
Decisions referring cases back to the court below: 2 court orders
Decisions postponing consideration of a case: 1 court order

On 23 February 1995 the Court elected Judge Antonio Baldassarre as its President. He had been appointed as a judge in the Constitutional Court by the President of the Republic on 8 August 1986 and had taken office, after taking the oath, one month later. Mr Baldassarre's term of office as President and as judge expire on 8 September 1995.

Important decisions

Identification: ITA-95-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 12.01.1995 / **e)** 5/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 3 of 18.01.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums and other consultations.
Institutions – Legislative bodies – Parliaments.

Keywords of the alphabetical index:

Parliament, Chamber of Deputies / Referendum for repeal of legislation / Senate.

Headnotes:

Acts containing electoral provisions concerning constitutional institutions or those that are of constitutional importance may be made subject to a referendum concerning their repeal on two conditions:

- the questions asked must be uniform and follow a consistent logic; and
- if the vote is in favour of repeal, the remaining legislation must be immediately enforceable so as to guarantee that the institution concerned is in a position to function anyway, without further legislation being needed.

Constitutional institutions must not be exposed to the risk – if only theoretical – of paralysis, and the Acts governing elections to such institutions must accordingly be enforceable at all times.

Questions put to voters may include sentences and isolated words taken from the legislation which do not have any separate substantive meaning, where this is necessary to ensure the clarity, unambiguousness and uniformity of the question itself.

Even if it were to be acknowledged that, under constitutional law, Parliament has a duty to co-operate, in that, if the outcome of a referendum is in favour of repealing legislation, Parliament introduces legislation of its own motion to comply with the people's wishes as expressed in the referendum, it is important to note that, should the legislature fail to introduce new legislation making good electoral provisions which have been left incomplete following a referendum and which are deemed unenforceable, the system does not provide for any effective remedy, and this situation could lead to a crisis in the system of representative democracy.

It cannot be inferred from the constitutional provisions relating to Parliament that, without any express legislation to that effect, the applicability of new electoral provisions is automatically postponed until those provisions have been completed in such a way as to make them enforceable, and that in the meantime the earlier legislation remains valid. This also applies to electoral provisions repealed through a referendum.

Summary:

The Court declared inadmissible two applications for a referendum on the repeal of those parts of the legislation concerning elections to the Chamber of Deputies and the Senate which provided that a quota of 25% of the seats should be allocated under a system of proportional representation, rather than by a majority vote as for the remaining 75%.

According to proponents of the referendum, repeal of the legislation providing for the proportional representation quota would have resulted in the majority vote system being applied in respect of all seats.

Cross-References:

In its judgment no. 32/1993 the Court held that an application for a referendum on an Act making provisions for a system of proportional representation, which was in force at the time of elections to the Senate, was inadmissible. In the case under consideration the Court took note of the fact that the legislation which would have remained in force following a vote in favour of a repeal of the Act would in any case have made it possible for the electoral system to function (primarily on a majority vote basis) and for the Senate to be renewed if it were dissolved or if its term expired.

Languages:

Italian.

Identification: ITA-95-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 11.01.1995 / **e)** 8/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 3 of 18.01.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums and other consultations.
Fundamental rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Advertising / Dominant position / Media, television / Referendum for repeal of legislation.

Headnotes:

An application against a referendum on the repeal of legislation allowing a single operator to hold more than one nation-wide television broadcasting licence, provided that such operator does not control any press company publishing a daily paper with a circulation exceeding a predetermined limit, must be held to be admissible. If the referendum were to result in a "yes" vote, a private operator would not under any circumstances be entitled to hold more than one nation-wide television broadcasting licence (5.2). An application against a referendum on the repeal of legislation making it possible during television broadcasts of theatre productions, films, operas or concerts lasting more than 45 minutes to show advertisements at points other than those corresponding to the usual interval in theatres or cinemas, and even at the end of each Act or part of a work, must also be held to be admissible. In the event of a "yes" vote in the referendum, advertisements would only be allowed in the interval between the first and second parts of a performance (2 and 5.4).

Lastly, an application against a referendum on the repeal of legislation allowing companies selling advertising to obtain advertising business for more than two nation-wide television channels must also be held to be admissible. In the event of a "yes" vote, advertising agencies could not in any case obtain advertising business for more than two nation-wide television channels (3 and 5.4).

Summary:

The Court found that the provisions concerned by the referendums did not come within any of the categories of legislation excluded from the referendum procedure under Article 75.2 of the Constitution (fiscal and budgetary legislation, laws on amnesties or remissions of sentences, legislation giving permission to ratify international treaties); nor did they have any close connections with such legislation. Neither the existence nor the content of those provisions was mandatory under an international treaty, in which case any repeal of those provisions through a referendum would have given rise to State responsibility for Italy at the international level. Even the wording of those provisions in the event of a "yes" vote in a referendum would be in compliance with the European Communities Council Directive 89/552/EEC of 3 October 1989 and the European Convention on Transfrontier Television of 5 May 1989. In addition, the three questions raised in the referendums met the criteria of clarity, uniformity and unambiguousness laid down in the Court's case-law (5.1 and 5.2).

Supplementary information:

In the three referendums referred to above, which took place on 11 June 1995 along with nine other referendums on various subjects, the voters were not in favour of repealing the legislation. The provisions described above, repeal of which was put to the voters (57% of whom took part in the referendums), therefore remained in force.

Cross-References:

It should be noted that in its judgment no. 420/1994 (see *Bulletin* no. 3/1994, 258) the Court found that legislation permitting the same operator to own three television channels, subject to a limit of 25% of the total number of nation-wide channels provided for in the frequency band allocation plan, was unconstitutional. The Court left it to Parliament to use its discretionary powers to reduce the number of channels that could be allocated to a single operator, leaving unchanged the total number of channels for which licences could be granted, or to maintain the same number of channels but increase the number of frequency bands for private operators, in so far as technological progress made this possible.

Languages:

Italian

Identification: ITA-95-1-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 19.01.1995 / **e)** 28/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 4 of 25.01.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Family, reunion / Work within the family.

Headnotes:

Under Italian law immigrant workers not of European Community origin are entitled, in accordance with the concept of "family reunion", to have their family live with them, a right which entails the entry into and residence on Italian territory of their spouses and under-age children. In allowing families to live together, the law respects fundamental human rights such as the right (and the duty) to provide for, educate and bring up one's children, and accordingly to keep them with one, and the right of parents and under-age children to live together as a united family – rights which are also enjoyed by foreigners. The law may impose restrictions on these rights where such restrictions are necessary to maintain a balance with other constitutional principles. It is therefore permissible that, as a condition for family reunion, immigrants should be required to be capable of guaranteeing their families "normal living conditions".

However, the legislation dealt with in this judgment cannot be interpreted along the lines followed by the trial court, that is to say by recognising the right of reunion only in the case of immigrants of non-European-Community origin who work under instructions from an employer, and depriving those who work within their families of this right. Work done within the family may, on account of its social and economic value, also be deemed to come within the scope of the protection afforded by the Constitution to work "of all kinds". A woman of non-European-Community origin who is married to an Italian national and whose work is to look after her household must therefore be included among those workers who are entitled to benefit from the right of reunion with their under-age children living abroad. Any other interpretation of the legislation would undermine the constitutional rules protecting families, minors and work.

Summary:

The issue was raised by a Regional Administrative Court following an appeal by a Brazilian woman, whose son born out of wedlock had been refused permission to enter Italy by the Minister of the Interior because the applicant, as a housewife, "did not hold salaried employment" and accordingly did not comply with the conditions laid down by the law, which confers the right of family reunion with under-age children on "workers of non-European-Community origin who live in Italy and have an occupation."

The regional court found that workers having an occupation could not "include women whose activity was to keep house and that accordingly the rule in question was at variance with Article 29 of the Constitution, which protects families." The Constitutional Court dismissed the issue by giving a different interpretation of the impugned rule, consistent with the Constitution and in particular with the protection of work "of all kinds" provided for in Article 35 of the Constitution.

Languages:

Italian.

Identification: ITA-95-1-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 01.03.1995 / **e)** 68/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 68 of 08.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights.

Keywords of the alphabetical index:

Crime, organised / Prisoners co-operating with the judicial authorities / Prisoners, preferential treatment as a reward / Sentence, rehabilitative purpose.

Headnotes:

It is possible to consider that the *ratio* (editor's note: for allowing prisoners preferential treatment) is identical in cases where co-operation with the judicial authorities is objectively meaningless and in those where it is impossible since the facts and questions of criminal responsibility have already been fully clarified, while continuing to insist on compliance with the legal conditions established by law and whose constitutionality is here at issue (lack of a link with organised crime, compensation for damage, existence of specific circumstances).

Having held that prisoners whose knowledge of facts or persons was such that they were unable to co-operate usefully with the judicial authorities must also be allowed preferential treatment, the Court had to reach the same conclusion as in cases where such co-operation was impossible because the facts and questions of criminal responsibility had been fully established in the context of an irrevocable judicial decision. Cases where co-operation is meaningless and those where it is impossible both qualify as cases where co-operation cannot objectively be required. Requiring that a prisoner adopt an objectively impossible line of conduct in order to benefit from preferential treatment, treatment which also has a rehabilitative effect, is tantamount to depriving that prisoner arbitrarily of important opportunities and consequently violates the constitutional principle that sentences must have a rehabilitative purpose.

Supplementary information:

The provisions criticised in this decision are part of the legislation designed firstly to limit, to the point where it is completely ruled out, any form of preferential treatment rewarding prisoners convicted of and sentenced for offences connected with the serious phenomenon of the expansion of organised crime, particularly Mafia-type crime, and the increasing threat it represents, and secondly to allow an exception from such limitations in the case of prisoners who co-operate with the judicial authorities, commonly but incorrectly referred to as "penitents" *(pentiti)*.

Cross-References:

In its judgments nos. 306/1993 and 357/1994 the Court had already pointed out that cases where co-operation was meaningless and those where it was impossible could be handled in the same way.

Languages:

Italian.

Identification: ITA-95-1-005

a) Italy / **b)** Constitutional Court / **c)** / **d)** 30.03.1995 / **e)** 94/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 14 of 05.04.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Primary Community law and domestic non-constitutional legal instruments.
Institutions – Transfer of powers to international institutions.

Keywords of the alphabetical index:

Community legislation / Constitutionality as the main issue / Region, legislative decision.

Headnotes:

In a situation where the sources of Community law and those of the law of the member States are not yet combined in a single system, it follows from the fact that a Community rule overrides a domestic rule that a conflict of laws between a domestic provision and a Community rule does not entitle a domestic court to raise the question of whether the domestic provision is unconstitutional on the ground of alleged breaches of the constitutional rule that Community obligations must be fulfilled, in so far as the Constitutional Court cannot hold the question to be *rilevante*, that is material to the settlement of the dispute brought before the trail court. Conversely, where such a conflict of laws arises and the decision on constitutionality is the main issue, the requirement that provisions incompatible with the Community rule should be eliminated from the domestic legal system (a requirement of constitutional rank encompassing the requirements that legislation must be clear and that those who are subject to the law must be left in no doubt that it will be applied) can be satisfied by holding those provisions to be unconstitutional. In such circumstances, given the special nature of the judgment on the main issue (which does

not of course invalidate the application of the impugned provisions in other court proceedings), a ruling that the domestic provisions at variance with the Community rule were inapplicable, assuming that it was evident from the judgment that there was indeed a conflict of laws, would not be a sufficient measure in view of the need for full, proper compliance with Community obligations.

Summary:

In the decision under consideration the Court allowed only one of a series of applications by the State Commissioner *(Commissario dello Stato)* for the region of Sicily and ruled that a legislative provision (adopted by the Regional Assembly) regularising the situation with regard to fishing offences was unconstitutional. An application relating to the alleged conflict between the Sicilian regional legislation and the Community rule was held to be unfounded, as were all the other applications.

Cross-References:

With reference to the points raised in the summary the Court cites the specific precedent of judgment no. 384/1994 (see *Bulletin* no. 3/1994, 258), which is not in contradiction with the fundamental judgment (no. 170/1984) on the power of the ordinary courts to order that a domestic provision at variance with a Community rule should not be applied.

With respect to the obligation, which is also binding on the authorities, to refrain from applying a domestic provision which conflicts with a Community rule, reference is made to judgment no. 389/1989 and the almost concurrent judgment of 22 June 1989 handed down by the CJEC (no. 103/88).

Languages:

Italian.

Identification: ITA-95-1-006

a) Italy / **b)** Constitutional Court / **c)** / **d)** 06.04.1995 / **e)** 108/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 15 of 12.04.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Procedure – Parties – *Locus standi.*
Fundamental rights – Civil and political rights – Right to property.
Fundamental rights – Economic, social and cultural rights – Freedom to work for remuneration.
Fundamental rights – Economic, social and cultural rights – Right to intellectual property.
Fundamental rights – Economic, social and cultural rights – Right to culture.
Fundamental rights – Economic, social and cultural rights – Scientific freedom.
Fundamental rights – Economic, social and cultural rights – Artistic freedom.

Keywords of the alphabetical index:

Compact disc, rental.

Headnotes:

On a number of occasions the Court has held that parties to proceedings in which a decision on constitutionality is sought as a secondary issue must be the same as the parties to the proceedings in which the main issue is decided; this includes parties who intervened in the proceedings *ad adiuvandum.* However, a further departure from this principle may be allowed in cases where there is a substantial, direct link between a party's interests and a constitutionality decision and where that decision is of such importance that it would irretrievably undermine that party's own position. It cannot be accepted that a judgment by the Court should have direct consequences for other parties' own positions without their being legally entitled to defend them as parties to the proceedings.

On the basis of the principle that the various rights to make use of creative works are separate and independent, mere authorisation to sell such works does not confer a right to rent them out.

Protection of the pecuniary and non-pecuniary rights to any scientific, literary or artistic production is justified by the need to recognise the fruit of human beings' creative capacities, thereby encouraging the production of other works, in the general interests of culture.

The constitutional justification for intellectual property, a concept which is recognised in both international and Community law, is reflected in the case-law of the Constitutional Court, which has deemed the protection and the assertion of copyright to be of "importance for the general, and therefore the public, interest".

Protection of copyright, which must be extended to all creative works and not be restricted to a mere right to receive some form of payment, is of prime importance compared with other rights, also worthy of suitable protection, in respect of which the legislature attempts to strike a proper balance of interests in harmony with the constitutional principles designed to safeguard art and science, intellectual property and work of all kinds. The purpose of such a balance of interests is to promote the development of human beings and of culture.

Protection of authors and protection of culture, which are closely interlinked, can be reconciled, as the Court has already pointed out, with freedom of enterprise, with everyone's right to enjoy works of art and with the benefits to be derived from the dissemination of culture.

Cross-References:

With regard to the application to be joined to the constitutionality proceedings filed by persons who were not parties to the proceedings on the main issue, the precedents in favour of a further departure from the principle that the parties to both sets of proceedings must be the same include judgments nos. 314 and 315/1992.

In respect of the finding that an author's consent to the making of a sound recording does not also entail the right to broadcast it, judgment no. 215/1986 should be referred to.

With regard to protection of intellectual property under the Constitution, reference must be made to judgments nos. 25/1968, 65/1972 and 110/1978, and to the Court's order no. 361/1988, which also has a bearing on the possibility of reconciling protection of authors and of culture (on the subject of the close link between the two see judgment no. 241/1990) with freedom of economic initiative.

Languages:

Italian.

Identification: ITA-95-1-007

a) Italy / **b)** Constitutional Court / **c)** / **d)** 14.04.1995 / **e)** 127/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 16 of 19.04.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Constitutional justice – The subject of review – Acts of government.
Constitutional justice – Types of claim – Claim by a public body – Organs of regional authorities.

Keywords of the alphabetical index:

Health situation, worsening / Infectious diseases / Order establishing a departure from the law / State of emergency.

Headnotes:

The power to institute a departure from primary legislation, conferred on the administrative authorities through a special legislative authorisation, is exceptional in nature and limited in time, given that it cannot entail the repeal or amendment of legislation in force. It follows from the exceptional nature of this authorisation that the powers of the administrative authorities must be clearly defined as to their content, their duration and the way in which they are exercised. For this reason such authorisation cannot be given in approximately defined fields without any indication as to how the state of emergency and the legislation which the authorities are authorised to suspend are interrelated.

An emergency does not legitimate complete disregard for regional autonomy on grounds of serving the general interest, however important these grounds may be. An emergency does not suffice in itself to justify encroaching upon this sphere of interest, which is safeguarded under the Constitution. The power to issue orders of the kind under consideration must remain limited so as to avoid interfering with the main core of the regions' powers.

In the light of the unequivocal, corroborative evidence that the situation was dangerous for public health, it can be held that the government did not act arbitrarily in approving the decree which was the first measure complained of in this appeal by the region of Puglia. The relatively long period for which the measure was in force (27 October to 31 December 1994) was

justified by the continued existence of the state of emergency, and the fact that it could not be considered that there was a genuine cholera epidemic in the region was not material.

The order establishing a departure from the primary legislation, issued by the Prime Minister pursuant to the above decree, contained provisions which interfered with several regional powers, since, although not all of the region's complaints concerning the government's measure instituting a departure from the law were founded, the order did not define the powers of the appointed Commissioner in such a way as to allow a balanced relationship with the region in that it simply provided that the region's opinion, and not its consent, must be sought (when planning the necessary action).

Summary:

As indicated above in the headnotes, the governmental measures complained of by the region of Puglia were taken in November 1994 following the confirmation of several cases of cholera in the region. Serious shortcomings in health and hygiene arrangements and in environmental facilities undoubtedly contributed to these outbreaks.

The two governmental measures complained of were authorised under the Act of 24 February 1992 (no. 225), section 2 of which indicates the circumstances in which the government may order a departure from primary legislation. In this respect the Act in question refers not only to natural catastrophes or disasters, but also to "other occurrences which, on account of their intensity and extent, have to be tackled with special resources and powers".

Cross-References:

With regard to the temporary nature of measures which, in the circumstances referred to above, may institute a departure from primary legislation but on no account repeal or amend it, reference should be made to judgments nos. 8/1956, 26/1961, 4/1977 and 201/1987.

With regard to the need for administrative bodies' powers to be well defined and circumscribed, see judgment no. 418/1992.

Judgment no. 307/1983 can be cited with regard to the fact that a state of emergency does not justify complete disregard for regional autonomy.

As to the need for proportionality between the occurrence and the measure, see also judgments nos. 4/1977, 201/1987 and 100/1987.

With regard to the need for an agreement between the State and the region over the planning of emergency action, on the understanding that the State can in any case intervene should the region fail to take action, reference is made to judgments nos. 355/1993 and 116/1994.

Languages:

Italian.

Lithuania
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Total: 3 final decisions including:

- 2 rulings concerning the compliance of laws with the Constitution;
- 1 final decision (conclusion) concerning the compliance of the European Convention on Human Rights with the Constitution of the Republic of Lithuania.

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

Important decisions

Identification: LIT-95-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.01.1995 / **e)** 22/94 / **f)** European Convention on Human Rights / **g)** to be published in *Valstybės žinios* (Official Gazette), 9-199 of 27.01.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Executive bodies.
Constitutional justice – The subject of review – International treaties.
Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
General principles – Democracy.
Fundamental rights – Civil and political rights.

Headnotes:

The European Convention for the Protection of Human Rights and Fundamental Freedoms performs the same function as constitutional guarantees for human rights, but the Constitution establishes guarantees within a State, the Convention on the international plane. In order to avoid obstacles in the application by courts and other authorities providing legal protection, the provisions of the Convention must become a constituent part of the domestic law of a State. Because the Convention itself does not provide any mechanisms for the implementation of these rights, it is necessary that some human rights guaranteed by the Convention are given effect by a direct application of domestic law.

The fact that fundamental rights, freedoms and guarantees are formulated in one or another verbal form in the Constitution does not mean that such wording is in all cases to be applied in an absolute manner. A law may provide for a more extensive formulation of human rights, freedoms and guarantees than their literal expression in a concrete article or part of the Constitution. Therefore, their broader application is possible only if it is provided for in another legal act which has the status of law (in this case, by the Convention and its Protocols).

In all cases, the Constitution shall have determining significance because it establishes the principle of incorporation of international agreements ratified by the *Seimas*, which have to be applied on an equal rank with laws in the legal system of the Republic of Lithuania.

It is in many cases impossible to interpret the contents of constitutional provisions concerning concrete human rights and freedoms separately from other provisions of the Constitution.

Summary:

The case was brought as a result of a petition submitted by the President of the Republic of Lithuania concerning the question whether Articles 4, 5, 9 and 14 ECHR, as well as Article 2 of Protocol no. 4 ECHR, are in compliance with the Constitution.

On 14 May 1993, the Minister of Foreign Affairs of the Republic of Lithuania signed the Convention and its Protocols nos. 1, 4 and 7. Before the ratification of those documents in the Lithuanian Parliament, a special working group was formed to conduct a comparative analysis of the Convention and its Protocols and the Constitution of Lithuania. When some doubts arose, the petitioner requested the Constitutional Court to give an opinion on the matter. The Constitutional Court concluded that Articles 4, 5, 9 and 14 of the Convention, and Article 2 of Protocol no. 4 to the Convention, were in compliance with the Constitution of the Republic of Lithuania.

Languages:

Lithuanian, English (translation by the Court).

Identification: LIT-95-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 08.03.1995 / **e)** 20/94, 21/94 / **f)** Restoration of the Rights of Ownership / **g)** to be published in *Valstybės žinios* (Official Gazette), 22-516 of 11.03.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Social State.
Institutions – Economic duties of the State.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Denationalisation / Property, private, restoration.

Headnotes:

Restoration of ownership rights to land is not the only goal of agrarian reform since the rational use of land must be guaranteed at the same time.

One of the main goals of law, as a regulation of social life, is justice. It is impossible to attain justice by satisfying the interests of only one group or one person and by denying the interests of others. While behaving one-sidedly, the human purpose of law would be disregarded, and the probability of conflicts would increase. Law cannot be based only on the interests of the majority or minority. Therefore, an adjustment of interests, by using optimum possibilities for agreement between parties, is strived for in law-making. This principle of law-making is particularly important when questions of a person's natural rights in general and separately – the implementation of rights of ownership, protection of rights to ownership – are being resolved.

Without buying land from former owners, it would be impossible to provide land to persons who utilise it, and this would prevent the implementation of land reforms. The State must use such property to sell it to its users or, in case the users do not express the desire to acquire it for private ownership, to guarantee them termless utilisation of the land allotted.

Summary:

The case was initiated by two classes of applicants, a local court and a group of *Seimas* members. They requested an examination of the constitutionality of some provisions of the law which amended the law "On the Procedure and Conditions of the Restoration of the Rights of Ownership in Existing Real Property".

The Court ruled that the provision, whereby providing that land required for State needs as well as other land shall be bought from former owners in a manner specified by law, does not contradict the Constitution.

The Constitutional Court ruled unconstitutional a provision establishing that "an area of up to three hectares of agricultural land may be left to the persons residing in individual farmsteads located in these territories for the restoration of land in kind, provided that the residents, having land plots allotted for their personal holding, agree to use land in other places".

Languages:

Lithuanian, English (translation by the Court).

Identification: LIT-95-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.04.1995 / **e)** 19/94 / **f)** Statute of Radio and Television / **g)** to be published in *Valstybės žinios* (Official Gazette), 34-847 of 26.04.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Democracy.
Fundamental rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Broadcasting / Distribution of frequencies / Media, television.

Headnotes:

Not only freedom of information in general, but also freedom of the mass media, as an expression of freedom of information in its objective form has to be protected. Freedom of information is not absolute or all-encompassing since its use must be reconciled with requirements which are necessary in a democratic society for the protection of the constitutional order and of the freedoms and rights of individuals. Restrictions on freedom of information may be established by law,

and these may also regulate the activities of the mass media.

Restrictions on freedom of information and the regulation of the mass media must comply with the principle of a pluralistic democratic society. This operates to prohibit the monopolisation of the mass media, as well as the censorship of information by means which would otherwise be legal.

Summary:

A group of *Seimas* members asked the Constitutional Court to examine whether some provisions of the Statute on Radio and Television of Lithuania are in compliance with the Constitution.

The Constitutional Court ruled that the provision of the Statute whereby the Board of the Lithuanian Radio and Television "shall confirm the decisions of the Commission for the Competition as far as programmes broadcasting facilities are concerned" is unconstitutional. Since such a right of the Board is not bound by any legal condition, the results of the competition may be established in an arbitrary and unilateral way. This may prevent private media companies which have participated in the competition from exercising their activities, thus depriving them of their constitutional rights.

Languages:

Lithuanian, English (translation by the Court).

The Netherlands
Supreme Court

Reference period:
1 January 1995 – 30 April 1995

I. Introduction

1. A brief history

The Republic of the United Provinces (1581-1795), which covered most of the territory that is now the Netherlands, grew out of a military alliance against Spanish efforts to establish central control of the Dutch provinces. In terms of the legal system, there were significant differences between – and even within – the provinces. Only two – Holland and Zeeland (the most important provinces) – had a common court of appeal, the Supreme Court of Holland and Zeeland, established in 1581. At the same time, the Council of State, which until that time had been no more than an advisory body to the sovereign, acquired judicial powers in important administrative matters involving the Republic.

In 1795 the Republic was overthrown and replaced by the Batavian Republic, a French vassal state, which in 1806 made way for the Kingdom of Holland under Louis Napoleon. A National Court of Appeal was set up in the Batavian Republic and the Kingdom of Holland, based on the *Tribunal de cassation* (later the *Cour de cassation*). After the restoration of Dutch independence in 1813, a constitutional monarchy – the Kingdom of the Netherlands – was established. The Hague Court of Appeal became the Supreme Court of Appeal of the Kingdom of the Netherlands, and thus the highest court of appeal for the entire country.

Since 1838, on the basis of the constitution of 1814-1815, the Supreme Court of the Netherlands has acted as a court of cassation in civil and criminal cases; its remit was later extended to include fiscal cases. Its chief task is to safeguard the uniformity and quality of the application of the law. Since 1815 the Council of State's main purpose has been to advise the Crown and the government. The Council gives its opinion on legislation before it is submitted to parliament. In the course of the twentieth century the Council of State has been accorded judicial powers in the field of administrative law. Prior to that, it had acted in an advisory capacity in administrative appeals to the Crown.

During the XIX^{e} and early XX^{e} centuries, the Netherlands was gradually transformed into a parliamentary democracy. The Kingdom of the

Netherlands presently comprises the Netherlands (in Europe), the Netherlands Antilles and Aruba (in the Caribbean), which all have equal status. Relations between the countries of the Kingdom are regulated by the Charter for the Kingdom of the Netherlands.

2. The judiciary: Articles 112-122 of the Constitution

The administration of justice in criminal and civil cases largely occurs at two instances (usually the district court and court of appeal, sometimes at the sub-district court and district court) which are responsible for hearing the facts, after which there is the possibility of appeal in cassation to the Supreme Court. Tax cases are heard at first instance by a division of the court of appeal, again with the subsequent possibility of appeal in cassation to the Supreme Court.

Various procedures are possible in administrative cases. Sometimes there are two instances (the district court and Central Appeals Tribunal in social security cases and cases involving public servants; the district court and the Administrative Law Division of the Council of State in other cases); sometimes there is just one, in which event cases are heard by the Administrative Law Division of the Council of State, the Central Appeals Tribunal, the Trade and Industry Appeals Tribunal, the Tariffs Commission, or the Student Finance Appeals Tribunal.

In some administrative law cases, there is no immediate option of appeal from a decision by an administrative authority to a court; appeal lies initially to another, usually higher, administrative authority. In cases where an administrative appeal lies to the Crown, the Council of State issues an advisory opinion before the Crown's decision. The Council of State also hears disputes between administrative authorities which are not brought to court.

II. Main legislation

Article 116 of the Constitution charges the legislature with responsibility for the organisation of the judiciary. This is regulated by the Judiciary (Organisation) Act (sections 83-107 of which apply to the Supreme Court) and by the Council of State Act.

- Members of the judiciary responsible for the administration of justice and the procurator general at the Supreme Court are appointed for life (Constitution, Article 117).
- Members of the Supreme Court are appointed from a list of three persons drawn up by the Lower House of Parliament (Constitution, Article 118).
- The members of the Council of State are also appointed for life (Constitution, Article 74).
- The constitutionality of Acts of Parliament and treaties may not be reviewed by the courts (Constitution, Article 120).
- Except in cases laid down by Act of Parliament, trials are held in public and judgments must specify the grounds on which they are based. Judgments are pronounced in public (Constitution, Article 121).

III. Organisation

1. Composition of the Supreme Court

The Supreme Court has a President, a maximum of seven vice-presidents and up to 26 justices. The average age on appointment is around 50, and the maximum age for a member of the court is 70. The public prosecutions department at the Supreme Court is represented by a procurator general, a deputy procurator general and a maximum of 12 advocates general. The average age on appointment is around 45, and again the maximum age is 70.

Members of the Supreme Court are appointed by the Crown, i.e. the government and the Queen. When a vacancy arises, the Supreme Court submits to the Lower House of the States General a non-alphabetical list of six candidates nominated by majority vote by the members of the Court and the procurator general. The Lower House, which is not obliged to appoint one of the individuals on the list, usually nominates the first three names on the list. The Crown – government and Queen – chooses one of these three individuals, and usually appoints the first name on the list. The Supreme Court is thus supported by controlled cooption, as it were. The most senior vice-president, in terms of years of service, is usually appointed president and the most senior justice vice-president. The members of the public prosecutions department are appointed by the Crown on the recommendation of the Minister of Justice, who usually follows the recommendation of the procurator general, made in consultation with the Supreme Court. It is not possible to apply for an appointment to the Supreme Court or its public prosecutions department; appointments are made by selection and do not form part of a normal career on the bench or in the prosecutions department. Approximately half the members of the Supreme Court and public prosecutions department have been members of the judiciary. The others have been practising lawyers or academics.

2. Procedure and organisation at the Supreme Court

The Supreme Court has three divisions: one for civil cases, one for criminal cases and one for fiscal cases, compulsory purchase and enterprise section cases. Each division, which comprises some ten justices,

appoints sections in which five or three justices sit. When a division makes a decision, it has the status of a Supreme Court decision. There are no formal arrangements for consultation between the divisions before a decision is made, since Dutch law does not provide for plenary sessions except on ceremonial occasions. However, the divisions do hold informal consultations on important judgments that have implications for the entire legal system, such as when the law is being reviewed in the light of a treaty. In this way, legal uniformity is guaranteed wherever possible within the Court, without any need for statutory provisions to that end.

Cases are brought before the Supreme Court by summons or a petition for cassation; the defendant in cassation proceedings may conduct a defence; there is an opportunity for opening statements by counsel or written explanation of the positions in cassation and reply and rejoinder. The public prosecutions department then presents its advisory opinion. (The public prosecutions department always submits an advisory opinion in civil and criminal cases, and in fiscal cases if necessary, prior to the Supreme Court decision. This is an independent opinion issued by the Supreme Court, tailored specifically to the case in question, supported by reasons and based on case law and the literature. The Supreme Court and public prosecutions department are supported by a research department consisting of around 45 mainly younger lawyers, and by some 45 administrative staff.) The Court then considers the case. Its judgments are handed down in public, except in fiscal proceedings instituted prior to 1 January 1994 in which no fine was imposed. Judgments are given in public in fiscal cases brought since 1 January 1994. Cassation in the interests of the uniform application of the law is possible on the recommendation of the procurator general. This type of cassation has no bearing on the legal position of the parties.

a. Composition of the Council of State

Apart from the Queen, who is the president, the Council of State has a vice-president and a maximum of 28 Council members. The vice-president and members are appointed for life by the Crown, on the recommendation of the Minister of the Interior, with the approval of the Minister of Justice. The Council of State's opinion is sought before the appointment of the vice-president; the latter makes recommendations for appointments of Council members.

b. Procedure and organisation at the Council of State

The Council of State in plenary session deliberates and decides on opinions to be issued regarding matters of legislation. The Administrative Law Division of the Council of State is responsible for the Council's judicial functions. The Division administers justice in sections comprising one or three members. It hears administrative law disputes, sometimes being the court of first and final instance, sometimes the court of second and final instance. It should be noted that in many administrative disputes a notice of objection has first to be submitted to and dealt with by the appropriate administrative authority before the case can be brought to court.

The case is brought before the Administrative Law Division by means of a notice of appeal. The party of the second part may conduct a defence. The facts of the case are usually examined during the hearing, which interested parties, witnesses, experts and interpreters can be summoned to attend. The parties are given an opportunity to explain their positions. The Division then deliberates on the case and pronounces judgment in public (usually in writing).

IV. Powers of the Supreme Court and the Council of State

The Supreme Court reviews the judgments of lower courts in the light of the law, including treaties, in virtually every conceivable type of dispute between parties. This includes disputes involving the government, provided no other court has been declared the highest court responsible for setting such a dispute. If no other legal procedure with sufficient safeguards is available, or has been available, the civil courts regard themselves as competent to hear any case where it is established that the government has committed a tort. In this way, the civil courts afford additional legal protection. Here too, appeal in cassation lies to the Supreme Court.

The Council of State *in pleno* explains, in its opinions, any unconstitutionality in draft legislation, so that questions on this subject can be raised during the parliamentary debate. The Administrative Law Division passes judgment as the court competent to hear the facts at first or second instance and also as the highest court in administrative law disputes between members of the public and the authorities. This Division thus reviews the legality of decisions of administrative authorities and the judgments of administrative courts at first instance.

Neither the Supreme Court nor the Council of State may review the constitutionality of legislation in the formal sense, i.e. Acts of Parliament enacted by the Crown and the States General (Constitution, Article 120). However, the courts must review the constitutionality of regulations issued by the Crown (such as Royal Decrees and orders in council) and local

authority bye-laws. They must also establish that legislation is in line with the provisions of treaties, including the European Convention on Human Rights and the International Convention on Civil and Political Rights. Under Article 93 of the Constitution, statutory regulations that contravene any binding provisions in treaties to which the Kingdom is party are inapplicable. In this way, therefore, there is a form of judicial review of legislation or its application, in the light of fundamental rights.

V. Decisions

1. Supreme Court

The Supreme Court may declare itself incompetent to pass judgment or declare inadmissible the appeal in cassation submitted by either party. It may dismiss the appeal. It may quash the disputed judgment and refer the case back to the court that dealt with the facts of the case to settle the dispute, or settle the matter itself after it has quashed the judgment. As with all court judgments, the Supreme Court must explain the grounds on which its judgment is based. However, the reasons given may be brief if the appeal is unlikely to succeed and the case does not require legal questions to be answered in the interests of the uniform application or development of the law.

Civil appellants wishing to gain access to the Supreme Court must describe in detail their objections to the judgment of the lower court in the summons or petition for cassation. Cassation is possible on the grounds submitted only if, in short, insufficient reasons were given for the disputed judgment or if the law was violated. The same grounds for cassation apply in criminal and fiscal cases, although the party in question is not obliged to specify his objections to the judgment in order to institute the proceedings. The facts are not examined in cassation proceedings. Parties may not appear on their own behalf in civil cases, but must appoint legal counsel. This is not necessary in fiscal and criminal cases, but only a lawyer may appear in the appellant's defence. Court fees are payable for access to the Supreme Court.

2. Council of State

The Administrative Division may declare itself incompetent or declare an appeal inadmissible. Acting as the court of second instance competent to hear the facts, it may also uphold or quash a judgment by a district court. If the Administrative Division quashes a judgment, it may if necessary refer the case back to the district court or settle the matter itself. If the Division is acting as the court of first instance competent to hear the facts, it may also dismiss an appeal or quash a decision by an administrative authority. In the latter case it may call upon the administrative authority to take a new decision, or settle the matter itself. Here, too, the notice of appeal must state the grounds for appeal, although the Council of State is not bound to take them into consideration in its decision. Access to the Council of State is also subject to the payment of court fees.

Important decisions

Identification: NED-95-1-001

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 06.01.1995 / **e)** 15.549 / **f)** / **g)** RvdW 1995, 20 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Freedom of opinion.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of the written press.
Fundamental rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Media, press / Right to be "left in peace" / Second World War, actions during.

Headnotes:

Concerning protection of the rights of a person who had been the victim of defamation, two opposing fundamental rights were balanced: the right to freedom of expression and the right to an unblemished name and reputation, and above all the right to be "left in peace", which latter right prevailed in this case.

The interference with the right to freedom of opinion was permissible, as the requirements of the European Court of Human Rights had been met.

Summary:

The questions to be resolved in this case were whether three articles that had been published in a national daily newspaper were defamatory, and whether the suit brought by the person offended was admissible, in the light of the right to freedom of expression. The articles suggested that V. had murdered a Jewish person who was living in hiding during the Second World War. However, a District Court acquitted V. of murder in 1944, and in 1946 he was rehabilitated when it was established that he had been acting in the interests of the resistance to the oppressor.

The Supreme Court began by observing that the suit had been brought against a journalist and a newspaper, so that allowing it would constitute interference with the freedom of expression to which this journalist and this newspaper are entitled. This interference was justifiable, however, as the conditions set out in Article 10.2 ECHR, namely that the interference must be prescribed by law and necessary for the protection of the reputation or rights of the person insulted, had been met.

In this case, it was not only this person's reputation that was at stake, but also – and indeed primarily – his right not to be publicly confronted yet again, over forty years later, with the actions he had taken in the past, in the form of offensive and defamatory accusations. The Supreme Court held that the only way to assess whether allowing the suit was necessary in a democratic society for the protection of the defamed person was by weighing the opposing fundamental rights against each other, taking all the details of the case into account.

The Supreme Court ruled that in this case the right to an unblemished name and reputation and above all the right to be "left in peace" prevailed over the right of the press to freedom of expression. One of the consequences of respect for the private individual is that a person who has been convicted of an offence should not in principle be held to account for his actions after he has paid the penalty for them. This implies that making an accusation of this nature after such a long period of time and giving to this accusation wide publicity would only have a valid justification in special circumstances in which such information would serve a justifiable public interest. Therefore, to justify publication in such a case, compelling reasons related to the public interest must exist, and it is legitimate to require that the accusation be based on extremely meticulous research.

Languages:

Dutch.

Identification: NED-95-1-002

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 13.01.1995 / **e)** 15.542 / **f)** / **g)** RvdW 1995, 28 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Private.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Gender.
Fundamental rights – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Discrimination, age / Dismissal on grounds of age.

Headnotes:

The dismissal of 65-year-old employee during her probationary period does not constitute discrimination on the grounds of age or sex.

Summary:

An employee had entered into an employment agreement for an indefinite period of time. The contract stipulated that the first two months would be a probationary period. At the head office it was discovered that the employee had been 65 years old when she took up her duties. She was then immediately dismissed, as this company did not allow persons aged 65 or over to be taken into service.

The Supreme Court held that it cannot be said that the rule that employment generally ends when the employee reaches 65 years of age no longer accords with the sense of justice of a large proportion of the population. Nor can it be said that the customary arguments used to justify dismissal on reaching the

age of 65 can no longer serve as a reasonable and objective justification for the dismissal in question. The dismissal did not, therefore, contravene the law against unequal treatment on account of age.

The employee's contention that the company's attitude amounted to a discrimination on the grounds of sex was also rejected, since it was deemed implausible that dismissal of employees at the age of 65 affects proportionately more women than men.

Languages:

Dutch.

Identification: NED-95-1-003

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 31.01.1995 / **e)** 237-94 t/m 252-94 / **f)** / **g)** DD 95.196 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Security, prohibitive.

Headnotes:

The requirement that security must be given for the payment of an administrative fine may constitute an unacceptable impediment to access to an independent tribunal, in contravention of the European Court of Human Rights.

The assessment of this impediment should be based on the total amount of the security.

Summary:

The person concerned lived on social security benefit and could not pay the cumulative sum required by way of security in connection with several cases (NLG 800). Therefore, the sub-district court declared inadmissible all the cases she had introduced.

The Supreme Court ruled that the rigid application of the requirement of security as a condition for admissibility may in a particular case constitute a contravention of the right laid down in Article 6.1 ECHR to have one's case heard by an independent tribunal. The test is whether the amount of security demanded constitutes such a barrier for the person concerned, having regard to the person's financial capacities, that application of the system of security would amount to an unacceptable restriction of the aforementioned right as enshrined in Article 6.1 ECHR.

The assessment of whether the security requirement raises an unacceptable barrier to a person's access to an independent tribunal should be based on the total sum requested in security. This is not affected by the fact that in each separate case the sum imposed as a fine – and hence also the security – remains within acceptable limits, nor by the fact that the person concerned has caused the cumulative increases himself. After all, the total sum could be so prohibitive for the person concerned as to effectively bar his passage to the courts in each separate case. If the person concerned argues that he cannot reasonably be required, given his lack of financial resources, to stand security for the total amount, the sub-district court must give his case a hearing in open court.

Languages:

Dutch.

Identification: NED-95-1-004

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 17.03.1995 / **e)** 8604 / **f)** / **g)** RvdW 1995, 70 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Disciplinary code / Medical profession.

Headnotes:

An investigation concerning a medical practitioner's activities under the profession's disciplinary code did not constitute an unjustifiable interference with his fundamental right to respect for his private life.

Summary:

A medical practitioner had sexual intercourse with a psychiatric patient under his care, after they had expressed their feelings for one another and the medical practitioner had stated that he would therefore have to cease treating her. The health inspector lodged a complaint against the medical practitioner. The latter was of the opinion that this complaint was inadmissible because the patient had not submitted a complaint against him, and the doctor-patient relationship had been broken off.

The Supreme Court rejected this argument. The point at issue under the disciplinary code of the medical profession is not the attitude of the patient but the question whether the medical practitioner acted in accordance with prescribed standards of professional conduct. General interests are at stake in the latter connection, and with a view to safeguarding these interests the health inspector is competent to lodge a complaint on his own initiative, even if this would be contrary to the patient's wishes.

The medical practitioner's view that the sexual intercourse took place within the context of the personal lives of those concerned did not alter this competence. The complaint necessitated an assessment of the medical practitioner's actions in the light of the disciplinary norms, namely whether the doctor-patient relationship had indeed been severed, and if so, whether this had been done in a way that was in accordance with responsible medical procedure, and whether the patient, despite the severing of the doctor-patient relationship, was in a position of dependency in relation to the medical practitioner. An investigation of this kind did not constitute unwarranted interference with the fundamental rights safeguarded by Article 8 ECHR and Article 17 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

Identification: NED-95-1-005

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 18.04.1995 / **e)** 99.320 / **f)** / **g)** DD 95.289 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Army and police forces – Army.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Religion.
Fundamental rights – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Conscientious objection, discrimination.

Headnotes:

Exemption of Jehovah's Witnesses from military and alternative service does not constitute discrimination against other persons who object to both military and alternative service.

Summary:

The defendant in these proceedings refused to perform military service and was convicted by the military division of the Court of Appeal. In cassation proceedings, the defendant argued that Article 26 in conjunction with Articles 8 and 18 of the International Covenant on Civil and Political Rights had been violated, because the defendant – who also refused to perform alternative service – had suffered discrimination in comparison to Jehovah's Witnesses by having been prosecuted for his refusal to perform military service.

The Supreme Court observed that, in accordance with the case-law of the European Court of Human Rights, the exemption of Jehovah's Witnesses from military service does not constitute discrimination in comparison to other persons who refuse to perform both military and alternative service. Even if it is accepted, following the Commission of Human Rights, that the exemption of a single group of conscientious objectors – Jehovah's Witnesses – from both military and alternative service cannot be deemed reasonable, and that the State must ensure that persons with equally compelling objections to both military and alternative service are treated equally, this still does not necessarily mean that the defendant was a victim of a violation of Article 26 of the International Covenant on Civil and Political Rights. For this, the objections of the defendant to performing military or alternative service

would have to be just as serious as those advanced by Jehovah's Witnesses.

Given that the accused objected only to the performance of military service and not to an alternative form of service, his objections could not be considered comparable to those of Jehovah's Witnesses, as the latter reject alternative service as well. The Supreme Court held the Court of Appeal's judgment to be not unreasonable, and dismissed the appeal.

Languages:

Dutch.

Identification: NED-95-1-006

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 21.04.1995 / **e)** 15.645 / **f)** / **g)** RvdW 1995, 100 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Consultation of accused by legal counsel.

Headnotes:

The right to free consultations between an accused detained in a maximum security establishment and his legal counsel is governed by Article 6.1 ECHR, read together with the provisions of Article 6.3, which determine the admissibility of restrictions.

A detained accused has the right to conduct personal consultations with his legal counsel in such a way that he can express himself fully and without feeling constrained. This right may be restricted, however, by the legally competent authorities, provided that such restrictions do not go so far as to undermine its essential features. The latter would in any case apply if the consultations could be monitored by or on behalf of the authorities. Furthermore, restrictions of this kind must serve a legitimate purpose – e.g. preventing a detainee from escaping – and must comply with the requirement of proportionality.

Summary:

C. was detained in a maximum security establishment, where several general rules applied to visits of legal counsel to detainees classified as posing a high escape risk, such as C. These rules required both C. and his counsel to submit to a prior body search to detect any undesirable objects. In addition, C. and his counsel were required to conduct their consultations in one of three set ways:

- in a room, under the supervision of a prison officer behind a two-way transparent wall;
- under supervision in the same room in the presence of a second lawyer; or
- without supervision in two rooms separated by a two-way transparent wall in which C. and his counsel could communicate by intercom.

In none of these cases would the discussion be monitored or recorded. C. contended that the visiting rules described above constituted an unacceptable violation of the right to free consultations between him and his legal counsel necessary for the proper preparation of his case, in breach of Article 6.3 ECHR.

The Supreme Court ruled that the restrictions imposed in this case did not contravene Article 6 ECHR.

Languages:

Dutch.

Norway
Supreme Court

Reference period:
1 January 1995 – 30 April 1995

Important decisions

Identification: NOR-95-1-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.03.1995 / **e)** Lnr 31/1995, jnr 415/1994 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Organisation – Members – Status.
Institutions – Courts – Ordinary courts.

Keywords of the alphabetical index:

Judge, temporarily appointed / Judges, independence / Judges, irremovability.

Headnotes:

According to the Constitution, court judges will be appointed by the King in Council, and they can only be dismissed by court judgment.

According to the Civil Service Act, judges can be appointed temporarily in special situations and for special purposes. These special temporary appointments do not violate the Constitution's principle that judges should be independent and irremovable.

Summary:

According to Article 21 of the Constitution, judges – being senior State officials – are appointed by the King in Council; and according to Article 22 of the Constitution, senior State officials can only be dismissed by a court judgment.

The Civil Service Act § 3.1.a, b and c stipulates that a judge can be temporarily appointed under certain, special circumstances when he/she is needed only for a short period. The Civil Service Act § 7.2 provides that the temporarily appointed judge must resign when the temporary period has expired.

A jurist had been temporarily appointed as a judge at the Court of Appeals according to the Civil Service Act § 3.1.a. The appointment was meant to last one year. It was prolonged twice, first for another year and then for a half year.

At the end of the last period the Court of Appeals expanded. Five new judges were permanently appointed and another judge was temporarily appointed. The jurist had applied for one of the new offices, but he was not appointed. He was ordered to resign his office at the end of the temporary period. The jurist brought a petition for a provisional order asserting that he should be allowed to continue his office as a temporarily appointed judge. He pleaded that his removal from office was contrary to the principle that judges should be independent and irremovable.

The petition was rejected by the City Court and by the Court of Appeals. The Supreme Court's competence was limited to an examination of the application of the law and errors of procedure.

The Supreme Court found that there was no error in the application of the law when the Court of Appeals had found that the rules of temporary appointment of judges in special situations and for special purposes did not violate the principle that judges should be independent and irremovable.

It was stressed by the Supreme Court that temporary appointments of judges should be limited as far as possible.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Types of review:
- *Ex post facto* review: 7
- Preliminary review: 2
- Abstract review (Article 22 of the Constitutional Tribunal Act): 9
- Tribunals' referrals ("legal questions", Article 25 of the Constitutional Tribunal Act): 0

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 7
- Cases on the legality of other normative acts under the Constitution and statutes: 2

Decisions:
- Cases decided on their merits: 9
- Cases discontinued: 2

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 4
- Upholding the constitutionality of the provisions in question: 5

Resolutions containing universally binding interpretations of laws (Article 13 of the Constitutional Tribunal Act):

- Binding interpretations of laws issued: 6

Subject matter of important decisions:

Legal status of public officers
(Case no. W 17/94 – Resolution of 11 January 1995)

Local self-government
(Case no. K 5/94 – Decision of 24 January 1995)

State and public employees' remunerations
(Case no. W 17/94 – Resolution of 11 January 1995)
(Case no. W 14/94 – Resolution of 25 January 1995)
(Case no. K 13/94 – Decision of 14 March 1995)*

State Budget
(Case no. K 16/93 – Decision of 10 January 1995)
(Case no. W 2/95 – Decision of 11 April 1995)

Taxation – governing principles
(Case no. K 12/94 – Decision of 12 January 1995)
(Case no. K 1/95 – Decision of 15 March 1995)*

Right of access to courts
(Case no. W 14/94 – Resolution of 25 January 1995)

Rules of issuing the universally binding interpretation of law
(Case no. W 9/94 – Resolution of 7 March 1995)

* decisions not reported to the Centre

Other information

Within the reference period, the *Sejm* upheld the following decisions on the unconstitutionality of statutes:

- decision of 12 December 1994 (Case no. K 3/94) concerning the law on public transportation fares discounts;
- decision of 20 December 1994 (Case no. K 8/94) concerning the 1994 amendment to the law on duties and rights of deputies and senators. In its ruling the Tribunal had declared unconstitutional the provision granting deputies and senators seeking reelection the right to keep their monthly compensations during the interval between parliamentary terms. In the Tribunal's opinion the provision in doubt had violated the equality of citizens' rights to be elected for public office (both decisions have not been reported to the Centre).

On 27 April 1995 the *Sejm* rejected the Tribunal's decision of 15 March 1995 (Case no. K 1/95) on the unconstitutionality of certain provisions of the 1994 law amending the Personal Income Tax Act (decision not reported). The provision in doubt sustained for 1995 last year's tax rates (21%, 33%, 45%), originally introduced for 1994 only. The law was published in *Dziennik Ustaw* (Journal of Laws) on 20 January 1995, but became effective as of 1 January 1995. In its ruling, the Tribunal declared the provision in question contrary to the rule that tax regulations should be modified and announced before the beginning of a tax year. In the Tribunal's opinion, it also infringed upon the prohibition against ex post facto laws (*lex retro non agit* principle), as well as the principles of legal stability (certainty) and citizens' confidence in State actions.

On 4 January 1995 the *Sejm* amended its 1985 resolution on the mode of proceedings before the

Constitutional Tribunal (Article 31). According to the amendment, in cases where a petitioner or its empowered representative fails to attend the hearing, the new date of the hearing may be fixed by the Tribunal within a period not longer than 14 days (the resolution was published in *Dziennik Ustaw* (Journal of Laws) no. 2, item 7).

Important decisions

Identification: POL-95-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.01.1995 / **e)** K 16/93 / **f)** / **g)** to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Maintaining confidence.
Institutions – Public finances – Budget.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Acquired rights, protection / Budget, State / Citizens' confidence in the State.

Headnotes:

The constitutionally established procedure of enacting the State Budget (Article 21 of the Constitutional Act) may not be used in order to enact or modify other statutes.

Summary:

The decision concerned certain provisions of the 1993 State Budget modifying the rules for the calculation of pensions.

The Tribunal concluded that the Council of Ministers, in proposing the provisions in question in the 1993 draft Budget Act, violated the constitutional rules determining the scope of the Budget. Subsequently, the statute was accepted by Parliament infringement of Article 21 of the Constitutional Act, which provides for detailed rules of budget composition. It was stressed by the Tribunal that the Budget Act – a financial plan of the State – cannot comprise provisions not relating to State revenues and expenditure. Nor may certain rules for the enactment of the State Budget be used in order to modify other statutes. In the Tribunal's opinion, the provisions in question also violated the constitutional principle of the protection of justly acquired rights. Moreover, they entered into force as of the day of their proclamation, and they therefore violated the principle of citizens' confidence in the State's actions, being a fundamental principle of the social security system.

Cross-references:

In the decision, the Tribunal implemented the rules on enacting the State Budget as specified in its decision of 8 November 1994 (Case no. P 1/94).

Languages:

Polish.

Identification: POL-95-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.01.1995 / **e)** W 17/94 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 4, item 23; to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Universally binding interpretation of laws.
Institutions – Executive bodies – The civil service.

Keywords of the alphabetical index:

Public officers, legal status.

Headnotes:

A person holding a key public office, who in parallel represents the State Treasury, other State legal person, a commune or an association of communes in a commercial company with the participation of those entities as a member of the company's board, may be remunerated only from one source.

Summary:

According to Article 2 of the Constitutional Act of 17 October 1992, and in compliance with the "anti-corrup-

tion law" of 1992, a person who holds an office or performs a public function specified in the Constitution is forbidden to be a member of the board of a commercial company (management board, supervisory board, etc.) unless he/she has been appointed to represent the State Treasury, other state legal persons, a commune or an association of communes in a commercial company with the participation of those entities. The Tribunal decided that such persons are subject to all restrictions concerning compensation of public officers and ruled that it is not permissible for them to obtain compensation from more than one source. Consequently, public officers serving on the boards of commercial companies have to choose between the sources of compensation.

Having considered, however, that as recently as the beginning of 1994 different State authorities had been allowing their officers to be compensated in parallel by commercial companies, the Tribunal did not question that those officers had acted in good faith.

Languages:

Polish.

Identification: POL-95-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.01.1995 / **e)** K 12/94 / **f)** / **g)** to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Executive bodies.
Constitutional justice – Types of claim – Type of review – Preliminary review.
Constitutional justice – Procedure – Documents lodged by the parties – Time-limits.
General principles – Rule of law.
Institutions – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Acquired rights, protection / Law-making rules / President / Taxation, rules.

Headnotes:

The legislature – provided it acts within the limits of law – may expand tax privileges (e.g. in order to promote new activities of taxpayers), or limit or even liquidate them.

In the preliminary review procedure, the Constitutional Tribunal is unconditionally bound by the limits of the application submitted by the President.

Summary:

A provision of the 1994 law on amending tax collection rules was questioned by the President on the basis that it suspended for 1995 the calculation of amounts which may be deducted by taxpayers for housing expenditure. In the Tribunal's opinion, the provision in question did not violate principles of a democratic State ruled by law, including the principle of protection of rights acquired justly. The Tribunal found that it neither created a new tax obligation nor extended the pre-existing scope of tax obligations. On the contrary, the provision in question established certain privileges, and could be seen as an element of State investment policy.

The petitioner (the President) had tried to modify his application before the case was decided by the Tribunal. He argued that other provisions of the statute were also contrary to the Constitution. The Tribunal, however, concluded that since the application referred to a statute not yet in force (preliminary review), the applicant could not amend it after the expiry of the seven days' period provided for in Article 18.4 of the Constitutional Act. Therefore, the Tribunal found itself bound by the limits of the original application.

Supplementary information:

The decision was handed down by the Tribunal in plenary. Two dissenting opinions were delivered.

Languages:

Polish.

Identification: POL-95-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.01.1995 / **e)** K 5/94 / **f)** / **g)** to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Provinces.
Institutions – Federalism and regionalism – Budgetary and financial aspects – Budget.
Institutions – Federalism and regionalism – Distribution of powers – System.

Keywords of the alphabetical index:

Local self-government / Supervising body.

Headnotes:

The constitutional principle of independence of local self-government does not conflict with the establishment of a body grouping several self-government units in order to represent them *vis-à-vis* the government and to oversee their activities. The financing of such a body must be borne by the self-governing unit.

Summary:

The Act on Local Self-Government of 1990 provides for establishing a joint representation of communes within one province in the form of a Provincial Assembly (Polish: *sejmik samorządowy*). The scope of Assembly competences covers e.g. representing member-communes towards governmental agencies and overseeing activities of member-communes. It was decided by the legislator that all communes should financially contribute to the Assembly's activities proportionally to the number of their inhabitants. The exact amount of the contribution is determined by the Assembly itself.

In the applicant's (The City Council of Olsztyn) opinion, the calculation of contributions by an entity which does not have legal personality and which is "external" in character to the communes infringes upon the constitutional principle of the independence of the communes.

It has been confirmed by the Tribunal that the principle of independence of self-government units is based on constitutional provisions in force. These are not, however, of an absolute character, and may be subjected to limitations provided for by law. Neither the institution of the Provincial Assembly itself nor its authority have been found by the Tribunal to constitute a violation of the principle of independence of self-government units. The purpose of Provincial Assembly cannot be perceived as a limitation of communes' functions; on the contrary, its competences and scope of activities provided for by the law guarantee the enforcement of the principle of communes' independence. Since the Act on Local Self-Government assures direct and obligatory participation of communes' representatives in the process of determining the amount of contributions, this procedure cannot either be found contrary to the principle of communes' independence.

Cross-references:

The reasoning refers to the European Charter of Local Self-Government of 1985, ratified by Poland in 1993.

Languages:

Polish.

Identification: POL-95-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.01.1995 / **e)** W 14/94 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 14, item 67; to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Ombudsman.
Constitutional justice – Types of litigation – Universally binding interpretation of laws.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
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 or State Borders Guard for default interest due in connection with a delayed payment of

remuneration are to be decided by courts of general jurisdiction.

Summary:

The Tribunal was called upon to interpret certain statutory provisions which entitle policemen and officers of the State Security Office and the State Borders Guard to receive a regular salary payable in advance. So far, all claims of this group of officers for default interest on delayed remuneration have been decided by means of an administrative procedure, and actions against the decisions, to the Chief Administrative Court, have been dismissed. The Supreme Court had also been in favour of the finding that in administrative relations, interest may be paid only if 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 grounds for 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.

Languages:

Polish.

Identification: POL-95-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.02.1995 / **e)** U 2/94 / **f)** / **g)** to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Organs of decentralised authorities.
Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Institutions – Federalism and regionalism – Budgetary and financial aspects – Finance.
Institutions – Federalism and regionalism – Distribution of powers – Co-operation.

Keywords of the alphabetical index:

Local self-government.

Headnotes:

The obligation of communes to provide information to the military about real estate and movables that could be used for defense purposes free of charge does not infringe the constitutional rules of financing the local self-government activities.

Summary:

The Law on State Defence (the "Law") imposes upon communes a duty to report on real estate and movables which could be used for defence purposes. A regulation of the Council of Ministers provides that relevant commune authorities should deliver such information to military authorities free of charge, in a manner agreed upon between the commune authorities and an appointed military officer.

In the Tribunal's opinion, the provisions in question did not conflict with the arrangement provided for in the Law. In addition, it complies with the constitutional principle that units of local self-government, for the purpose of exercising powers of governmental administration, shall be provided with appropriate financial resources. It was concluded by the Tribunal that a duty to provide information free of charge excludes only the possibility of demanding compensation from military authorities. Gathering and transferring information on objects of military importance should be financed in compliance with general rules governing the financing of tasks delegated to a commune, namely from governmental sources.

Languages:

Polish.

Identification: POL-95-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.03.1995 / **e)** W 9/94 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 39, item 198; to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Ombudsman.
Constitutional justice – Types of litigation – Universally binding interpretation of laws.
Constitutional justice – The subject of review – Laws and other rules having the force of law.
Constitutional justice – Effects – Determination of effects by the court.
Constitutional justice – Effects – Temporal effect – Retrospective effect.
Constitutional justice – Effects – Influence on State organs.
Constitutional justice – Effects – Influence on everyday life.
Sources of constitutional law – Techniques of interpretation.

Headnotes:

A universally binding interpretation of laws by the Constitutional Tribunal aims only at determining the correct understanding of certain provisions of statutes and other norms having the force of law. In delivering its interpretation, the Tribunal does not interfere with the exercise of legislative power.

Summary:

The decision adopted, upon a motion by the Ombudsman, clarifies certain doubts regarding the universally binding interpretation of laws by the Tribunal pursuant to Articles 5 and 13 of the Constitutional Tribunal Act.

The Tribunal decided that:

- the interpretation by the Tribunal of certain provisions of a statute binds all organs and authorities applying these provisions as well as persons and entities obliged to comply with these provisions;

- unless decided otherwise by the Tribunal, its interpretation determines the correct understanding of certain provisions effective as of the date such provisions entered into force, regardless of the time when the interpretation was issued or officially announced; it was stressed by the Tribunal that any decision based upon such provisions adopted prior to the definitive interpretation might subsequently be verified and modified provided that all circumstances of the case were examined;

- final court judgments and administrative decisions that had been adopted upon an interpretation of the law inconsistent with the interpretation subsequently issued by the Constitutional Tribunal are to be corrected in accordance with the relevant legal procedures;

- the Tribunal is authorised to interpret provisions of legal acts having the force of law, including regulations of the Council of Ministers issued under Article 23 of the Constitutional Act of 17 October 1992.

According to the Tribunal, it is possible to change the currently binding interpretation of a law upon a motion by an authorised State organ, provided that the legal context of the provision subject to the previous interpretation has been changed and that the new interpretation is justified.

It was stressed in the reasoning given by the Tribunal that the universally binding interpretation aims only at determining the correct meaning (understanding) of certain provisions of statutes and cannot be qualified as law-making (i.e., it is not attaching additional contents to the provisions subject to interpretation).

Languages:

Polish.

Identification: POL-95-1-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.04.1995 / **e)** W 2/95 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 48, item 255; to be published in the collection of the Tribunal's decisions of 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Universally binding interpretation of laws.
Constitutional justice – The subject of review – Failure to pass legislation.
Institutions – Public finances – Budget.

Keywords of the alphabetical index:

Budget, State.

Headnotes:

In the event that the draft Budget Act (or interim Budget Act) has been introduced to the *Sejm*, but the legislative procedure was not completed by the beginning of the budget year by signing the Budget Act by the President and promulgating it in *Dziennik Ustaw* (Journal of Laws) the Council of Ministers should conduct the State's finances pursuant to the draft Budget Act.

Summary:

The application filed by the Prosecutor General requested a universally binding interpretation of a provision of the 1991 Budgetary Law specifying the constitutional rule that in the case of "a failure to pass" the Budget Act, the State's revenues and expenditures are to be administered pursuant to the draft Budget Act (Article 21.3 of the Constitutional Act dated 17 October 1992, hereinafter referred to as the "Small Constitution").

Having analysed the constitutional provisions on the legislative procedure, the Tribunal remarked that the phrase "to pass statute", repeated several times in the constitutional act, was of equivocal meaning and its interpretation considerably depended on the context. In particular – according to the Tribunal – "a failure to pass" the Budget Act, as specified in Article 21.3 of the "Small Constitution", is not equivalent to the situation provided for in Article 21.4 of the "Small Constitution" that the Budget Act "has not been passed". According to the latter, the President may dissolve Parliament if the State Budget "has not been passed" within a period of three months following the submission of a draft fulfilling the requirements of a budgetary law.

Cross-references:

See decision of 21 November 1994 (Case no. K 6/94, Bulletin 3/1994, 277).

Languages:

Polish.

Portugal
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Total of 224 judgments, of which:

- Preliminary review: 3 judgments
- Subsequent scrutin *in abstracto*: 5 judgments
- Appeals: 194 judgments, of which:
  - Substantive issues: 109
  - Applications for a declaration of unconstitutionality: 1
  - Procedural matters: 84
- Complaints: 18 judgments
- Political parties and coalitions: 3 judgments
- Declarations of assets and of income: 1 judgment

Important decisions

Identification: POR-95-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 25.01.1995 / **e)** 13/95 / **f)** / **g)** Official Gazette (Serie II) no. 34 of 09.02.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Decisions – Deliberation.
General principles – Separation of powers.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Media, Press Act / Media, press, liability of a newspaper director / Preliminary review / Presidential *veto* / Right of reply.

Headnotes:

The President of the Republic cannot apply to the Constitutional Court for preliminary review of the constitutionality of a law which he has vetoed and

which the Assembly of the Republic approves on a second reading unless the law is amended during the second reading or unless grounds for such review become apparent after the *veto*.

The Constitution guarantees freedom of expression, of information and of the press and entitles journalists to access to information, protection of their independence, and confidentiality. It also recognises everyone's right to his or her good name and to protection of privacy and family life. The Act must therefore assert and safeguard both freedom of and freedom *vis-à-vis* the press.

Under the Constitution the right of reply and to rectification of misinformation derive from the right to reputation, and its purpose is to protect the individual's personal rights and to secure the adversariality and plurality of information in society, which are likewise enshrined in the Constitution.

Summary:

Having exercised his right to *veto* a first version of a law amending the Press Act, the President of the Republic applied for a preliminary review of a new version of the law because he had doubts about the constitutionality of the following changes to the Press Act:

- restriction on newspapers' right to refuse to publish replies;
- prohibiting newspapers from adding notes or comments to a reply;
- increasing the fine for newspaper contraventions of the right of reply.

These changes purported to protect the right of reply more effectively. The question was whether the restrictions on press freedom were not disproportionate.

The Constitutional Court did not find the provisions to be unconstitutional but in each case there were dissenting opinions.

The Court based its decision mainly on two considerations. Firstly it took the view that restricting the cases in which newspapers may refuse to publish a reply was not a disapportionate restriction on press freedom or editorial freedom, and derived from the Constitution's recognition of all natural and legal persons' right of reply. Secondly, it held that the effective safeguarding of the right of reply required the availability of penalties of some severity.

Supplementary information:

The President of the Republic challenged the decision on the ground of the deliberation procedure, but in judgment no. 58/95 of 16 February 1995 the Court confirmed its previous judgment, ruling that, on each issue put before it, an unconstitutionality decision by the Court required a majority vote both on the decision itself and on its legal basis.

Languages:

Portuguese.

Identification: POR-95-1-002

a) Portugal / **b)** Constitutional Court / **c)** 2nd Chamber / **d)** 01.02.1995 / **e)** 41/95 / **f)** / **g)** Official Gazette (Serie II) no. 98 of 27.04.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights.

Keywords of the alphabetical index:

Expulsion / Foreigners / Penalties, limits / Specific review.

Headnotes:

Under the Constitution, there is no criminal penalty that necessarily entails the loss of civic, professional or political rights. Automatically applying such additional penalties to certain offences is thus unconstitutional.

As expulsion from the country is classified as an additional penalty *(pena acéssoria)*, it cannot automatically be imposed where a foreigner is given a prison sentence, and can be imposed only where a foreigner seriously contravenes his obligations as an alien.

Summary:

The case involved a Cape Verdean who had been resident in Portugal for fifteen years and was

sentenced to five years' imprisonment and expulsion from the country for five years.

The Court ruled to be unconstitutional the provision whereby a foreigner sentenced to more than three years' imprisonment and who had been resident in Portugal for more than five years and less than twenty years automatically received the additional penalty *(pena acéssoria)* of being expelled from the country. Automatic imposition of that penalty was incompatible with Article 30.4 of the Constitution.

Cross-references:

Develops the case-law laid down in judgment no. 442/93 of 14 July 1993 (*Bulletin on Constitutional Case-Law*, no. 93/2, 49).

Languages:

Portuguese.

Identification: POR-95-1-003

a) Portugal / **b)** Constitutional Court / **c)** 2nd Chamber / **d)** 21.02.1995 / **e)** 83/95 / **f)** / **g)** to be published in the Official Gazette (Serie II) / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – General questions – Basic principles – Nature of the list of fundamental rights.

Keywords of the alphabetical index:

Driving licence / Motorist.

Headnotes:

Protecting the lives and safety of road users by means of criminal law provisions was in accordance with the Constitution. Driving a motor car without a driving licence was a serious offence which endangered the safety (and lives) of everyone who used the public highway.

In making driving without a licence a criminal offence, however, the law must take into account other constitutional principles such as the principle of justice, the principle of humanity and the principle of proportionality.

Summary:

Until 1990 driving without a licence had been a minor offence punishable by a fine and up to three months' imprisonment. A new law then made it a major offence punishable by up to one year's imprisonment and a fine.

The Court ruled on the constitutional limits to criminalisation of behaviour and decided that the law in question was not unconstitutional. In particular it held that treating driving a motor car without a driving licence as a major offence was not unreasonable and was justified by the rise in road accidents and the injuries and loss of life which it caused.

Languages:

Portuguese.

Identification: POR-95-1-004

a) Portugal / **b)** Constitutional Court / **c)** 1st Chamber / **d)** 23.02.1995 / **e)** 107/95 / **f)** / **g)** Official Gazette (Serie II) no. 78 of 01.04.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Political parties.
Fundamental rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Political party, acronym / Political party, emblem / Political party, name / Political party, registration.

Headnotes:

Under the Constitution a political party – regardless of the philosophy or ideology underlying its political programme – is not allowed to use a name which directly refers to a religion or church or to use emblems which are liable to be mistaken for national

or religious emblems. The purpose of this provision is to protect the people against misrepresentations, to ensure transparency of participation in political life, and to safeguard freedom of conscience and the separation of church and State.

Summary:

The Constitutional Court is responsible for registration of political parties and decides whether parties' names, acronyms and emblems are legally acceptable.

It refused to register a political party which wanted to call itself the Social Christian Party *(Partido Social Cristão)*, to use the acronym *PSC* and to have as its emblem a white fish on a blue background.

The Court ruled that the word "Christian" in the name could create confusion on account of its obvious religious connotations. It further held that it was not permissible for Christian doctrine, as invoked in the party's programme, to be appropriated by any one political party.

It refused the emblem on the ground that the fish was a symbol of Christ and that its historical significance might mislead the electorate.

Supplementary information:

The political party changed its name, acronym and emblem within the legally prescribed two-day time limit. In judgment no. 118/85 of 8 March 1995 the Court found the new name, acronym and emblem to be legally acceptable and therefore agreed to register the party.

Languages:

Portuguese.

Identification: POR-95-1-005

a) Portugal / **b)** Constitutional Court / **c)** 1st Chamber / **d)** 23.03.1995 / **e)** 161/95 / **f)** / **g)** to be published in the Official Gazette (Serie II) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Criminal procedural guarantees / Disciplinary procedural guarantees / Offences, multiple / Prisoners.

Headnotes:

Criminal procedural guarantees are not directly applicable to disciplinary procedure. Under the Constitution anyone who has disciplinary proceedings taken against him is entitled to a hearing and to defend himself. He is also entitled to adversarial proceedings, to consult the file and to a court or tribunal.

Imposing two different penalties, one disciplinary, the other criminal, for the one offence did not contravene the *ne bis in idem* principle.

Summary:

The Court decided that a legal provision whereby a prisoner found guilty of a criminal offence inside the prison likewise incurred a disciplinary penalty was not constitutional. Under the provision in question the disciplinary punishment may be carried out before the prisoner is convicted of the criminal offence.

The Court held that, under the Constitution, punishment for a disciplinary offence which was also a criminal offence could be effected separately from the criminal proceedings. Criminal procedural guarantees were not all applicable to disciplinary proceedings. In addition, disciplinary punishment and criminal punishment for one and the same offence was not contrary to the *ne bis in idem* rule in that criminal liability and disciplinary liability were two separate matters.

Cross-references:

Confirms judgment no. 263/94.

Languages:

Portuguese.

Identification: POR-95-1-006

a) Portugal / **b)** Constitutional Court / **c)** 1st Chamber / **d)** 20.04.1995 / **e)** 212/95 / **f)** / **g)** to be published in the Official Gazette (Serie II) / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Maintaining confidence.
Fundamental rights – General questions – Entitlement to rights – Legal persons – Private law.

Keywords of the alphabetical index:

Legal persons, criminal responsibility / Public health offences.

Headnotes:

Criminal responsibility of legal persons for economic or public health offences is not contrary to the constitutional provision whereby legal persons have only such rights and duties as are compatible with their nature.

Protection of confidence is of fundamental importance in the economic sphere. Effective prosecution of most economic crime necessitates punishing not only the enterprises or entities involved but also the individuals who represent them or of whom they are composed.

Summary:

The rule is that only natural persons can be held criminally responsible. Punishment of legal persons for criminal offences is exceptional, and require to be justified by practical considerations of law enforcement or crime prevention.

In the Court's view the constitutional permissibility of making legal persons responsible for criminal offences had to be assessed essentially from the standpoint of the rule of law in a democratic society. That principle, in so far as it required that confidence be protected in the economic sphere, justified punishment of legal persons for certain economic offences.

Languages:

Portuguese.

Romania
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

- 3 decisions on the constitutionality of legislation prior to its enactment
- 1 decision on the constitutionality of the rules of procedure of the two houses of Parliament
- 36 decisions on objections alleging unconstitutionality
- 1 judgment on the supplementary regulatory act on the organisation and functioning of the Constitutional Court of Romania.

Important decisions

Identification: ROM-95-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 04.01.1995 / **e)** 1 / **f)** / **g)** *Monitorul Oficial* no. 66/11.04.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Organisation – Prosecutors / State counsel.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Scope.

Keywords of the alphabetical index:

Civil procedure, guarantees.

Headnotes:

In that it limits State Counsel's right to take part in proceedings solely to cases relating to "the defence of the rights and lawful interests of minors and persons deprived of legal capacity and other cases provided for by law", Section 45.1 of the Code of Civil Procedure is at variance with the Constitution. This being the case, Article 130.1 of the Constitution, whereby "in the judicial field State Counsel represents the general interests of society and defends the rule of law and

citizens' rights and freedoms" is directly applicable in such matters.

The requirements of the Constitution are no less binding than directly applicable provisions of a law or contract, even where constitutional law makes reference to ordinary law. The legislator cannot exceed the constitutional limits set in this way without adversely affecting the very scope of the provisions of the Basic Law.

Summary:

The Constitutional Court was asked to rule on the constitutionality of Section 45 of the Code of Civil Procedure, which states:

> "The public prosecutor may bring any action, other than those that are strictly personal, and participate at any stage in any proceedings, should this be necessary to protect the rights and legal interests of minors and persons subject to a guardianship order and in other cases provided for in law.
>
> In cases where the public prosecutor has brought the action, the holder of the disputed right shall participate in the proceedings and, where appropriate, have recourse to Articles 246 following and 271 following of the present code.
>
> The public prosecutor may, in circumstances provided for in law, use available remedies and apply for decisions to be implemented."

The aforementioned article was found to conflict with the Constitution, since it limits the public prosecutor's participation in proceedings, whereas Article 130.1 of the Constitution provides that, in judicial proceedings, the public prosecutor shall protect the legal system and citizens' rights and freedoms.

The public prosecutor's participation in civil proceedings does not affect the courts' power to decide cases brought before them, judicial independence or the fact that the courts are subject only to the law. The relevant constitutional provision does not consider the public prosecutor to be the advocate of one of the parties to the proceedings. His task is to ensure and supervise respect for the law, particularly in cases affecting citizens' interests. The provisions of Section 45.1 of the Code of Civil Procedure are therefore unconstitutional in that they restrict the public prosecutor's right to participate in all proceedings and at all stages of the proceedings. As a result, the provisions of Article 130.1 of the Constitution shall be directly applicable in these circumstances.

Cross-references:

In decision no. 26 of 21 March 1995 (*Monitorul Official* no. 66/11.04.1995) the Court dismissed an applicant's appeal.

Languages:

Romanian, French (translation by the Court).

Identification: ROM-95-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 14.02.1995 / **e)** 19 / **f)** / **g)** *Monitorul Oficial* no. 39/23.02.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Civil and political rights – Equality – Affirmative action.

Keywords of the alphabetical index:

Legislation, interpretive / Parliament, members, allowances / Tax, income.

Headnotes:

The introduction of income-tax exemptions based on an office held violates the principle that all citizens are equal before the law and constitutes an unfair allocation of the tax burden in breach of Article 23.2 of the Constitution. Allocation of the tax burden must be balanced and fair and must not result in different taxes for different groups or categories of citizens. Hence, tax exemptions allowed on part of the income of Members of Parliament, on account of the duties involved in their office, result in tax relief that cannot be justified by their status as members of the lower or upper chambers of Parliament.

The Romanian Constitution neither expressly provides for, nor rejects, the principle of interpretive legislation; the Constitution simply precludes the notion of legisla-

tion that interprets the Constitution. It is universally recognised that interpretive legislation shall not modify or supplement the legislation that it interprets but simply clarify points rendered obscure by inadequate drafting and that it must comply with the Constitution. In this context, whether a statute so deemed by parliament really is interpretive legislation, rather than amending existing legislation under the guise of interpretation, is irrelevant.

Summary:

Article 71 of the Constitution provides that deputies and senators shall be paid a statutorily defined monthly allowance. In so doing, the constituent assembly wished to emphasise, through the very choice of the term to describe parliamentarians' remuneration, that theirs was a public law or authority-based relationship rather than a legal employment relationship governed by the principles of the Labour Code. However, the fact that the constituent assembly avoided using the term "salary" to describe parliamentarians' remuneration does not eliminate all resemblance between their allowance and other statutory financial entitlements on the one hand and a salary on the other. As a result, while there are no special rules governing parliamentarians' liability to pay income tax, the ordinary rules will apply. In any case, the special legislation providing for parliamentarians to receive monthly allowances and other entitlements cannot be used to justify exceptions to constitutional principles.

In this context, it should be noted that, bearing in mind the scale used to calculate parliamentarians' monthly allowances and all the entitlements provided for in Section 21 of Act no. 53/1991, the fact that session allowances are non-taxable appears to be socially unjust, particularly since all the other types of allowance paid to public sector workers are taxable.

Languages:

Romanian, French (translation by the Court).

Russia
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Important decisions

Summaries of important decisions will be published in the next edition of the Bulletin.

Slovakia
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Number of decisions taken:

- Decisions on the merits by the Plenum of the Court: 14
- Decisions on the merits by the Panels of the Court: 4
- Number of other decisions by the Plenum: 11
- Number of other decisions by the Panels: 41
- Total number of cases brought to the Court: 221

Important decisions

Identification: SLK-95-1-001

a) Slovak Republic / **b)** Constitutional Court / **c)** / **d)** 27.01.1995 / **e)** PL.ÚS 14/94 / **f)** Distribution of powers through differences in remuneration / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Separation of powers.
Institutions – Courts – Organisation – Members – Status.
Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Public.

Keywords of the alphabetical index:

Judiciary, independence / Public office, salaries.

Headnotes:

The principles of the separation of powers and of the independence of the judiciary, taken together, mean that decisions of the judicial power may not be substituted by decisions of bodies belonging to any other power, and that judges are not subordinate to any other public authority. The Slovak Constitution contains no provision on salaries of persons holding public office. Thus, the absence of a statute on salaries for judges may contradict the Constitution.

Summary:

The Bratislava District Court no. 1 submitted a petition to the Constitutional Court claiming that a decision of the National Council of the Slovak Republic on salaries of judges and those persons awaiting an appointment as a judge was contrary to the Slovak Constitution. It maintained that the principle of the separation of powers within a State system was violated since the position of persons in judicial power was not equal to the position of persons in the legislative and executive branches of government.

According to Article 144.3 of the Slovak Constitution "in cases where the court establishes that a generally binding rule contradicts the law, the proceedings shall be postponed and a petition filed in the Constitutional Court. The finding of the Constitutional Court of the Slovak Republic shall be binding on the original court and all other courts". This provision of the Constitution was invoked in a petition by a judge of a district court, who requested a salary increase on the grounds that his salary was inferior to those in the ministries of the Slovak Government as well as those of the Members of the Slovak Parliament. The judge agreed that there was a violation of the constitutional principle of the separation of powers between State bodies. He also stated the reasons why the legal grounds for paying different salaries – Statute no. 420/1991 as amended by Statute no. 148/1993 – would be contrary to the Constitution. The proceedings before the District Court were accordingly postponed, and a petition to the Constitutional Court was filed.

The Constitutional Court ruled that the principle of the separation of powers leaves no possibility to substitute a decision adopted by an authorised body by a decision of another body, which is not authorised to make the decision. The constitutional principle of equality of elements of the State mechanism ensures that no branch is subordinate to another.

Languages:

Slovak.

Identification: SLK-95-1-002

a) Slovak Republic / **b)** Constitutional Court / **c)** / **d)** 31.01.1995 / **e)** I. ÚS 58/94 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Relations with executive bodies.
Institutions – Executive bodies – Composition.
Institutions – Executive bodies – Relations with legislative bodies.

Keywords of the alphabetical index:

Caretaker government / Conflict of powers / Vote of no-confidence.

Headnotes:

The necessity of Parliament's confidence in the Government ceases to exist when a Government resigns due to the election of a new Parliament. A caretaker government or its members cannot be subject to a vote of no-confidence by the newly-elected Parliament.

Summary:

The President of the Slovak Republic submitted a petition requesting an interpretation of Article 117 of the Constitution in the light of Article 116 of the Constitution. The President asked for a decision on whether the National Council of the Slovak Republic is vested with the power to pass a vote of no-confidence in an individual member of the Government of the Slovak Republic even after acceptance of the resignation of the entire government by the President of the Republic, and on whether this power is also vested in Parliament against the whole caretaker Government holding office in accordance with the Constitution.

According to Article 114.1 of the Constitution, the Government shall be collectively responsible for the exercise of governmental powers to the National Council of the Slovak Republic which may take a vote of confidence at any time. According to Article 116 of the Constitution: "Members of the Government shall be individually accountable to the National Council of the Slovak Republic". According to Article 116.3, "The National Council of the Slovak Republic may also pass a vote of no-confidence in an individual Member of the Government; in such a case the Member shall be dismissed." According to Article 116.7, in a case where the President has dismissed a Member of the Government, he shall designate another Member to be temporarily responsible for fulfilling the duties of the dismissed Member. According to Article 117, "The incumbent government shall submit its resignation after the opening session of the newly-elected National Council of the Slovak Republic. The former Government shall, however, remain in office until the new government is formed."

During a plenary session of the National Council on 4 November 1994, which was the very first session of a new Parliament established following general elections held on 30 September and 1 October 1994, a constitutional dispute arose. The old Government established before the election had submitted its resignation, and the newly-elected Parliament passed a vote of no-confidence in two members of the recently resigned Government. Parliament asked the President of the Republic to dismiss both Ministers. However, as the President of the Republic was of the opinion that Parliament is not vested with the authority to control an ex-Member of the Government, he brought the case before the Constitutional Court.

The Constitutional Court decided that the National Council is vested with the authority to pass a vote of confidence in a Government or one of its Members, but solely during that Government's term of office. The Constitution contains no provision on "inheritance of confidence", and there is no regulation according to which confidence vested in one Government could be transferred to a future Government. The newly-elected National Council has no right to express its confidence in a former Government because the constitutional ground for the existence of the confidence notion relates solely to the Government and Parliament issuing from the same election. In Article 117, the Constitution provides for the manner of terminating the activity of a Government established by former elections by means of resignation of the Government. As the newly-elected National Council is vested neither with the authority to pass a vote of no-confidence nor the right to build a mutual relationship between itself and a Government or one of its Members approved by a Parliament established by a previous election, this new Parliament may not exercise the authority under Article 114.1 of the Constitution against a caretaker Government. Thus the President of the Republic is not obliged to dismiss a Member of a Government established by a previous election, after this Government has submitted its resignation.

Languages:

Slovak.

Identification: SLK-95/1-003

a) Slovak Republic / **b)** Constitutional Court / **c)** / **d)** 28.03.1995 / **e)** II. ÚS 10/95 / **f)** Right of access to courts of persons with restricted legal capacity / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual – Natural person.
Constitutional justice – Procedure – Parties – *Locus standi.*
Fundamental rights – General questions – Entitlement to rights – Natural persons – Incapacitated.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Legal capacity, restricted.

Headnotes:

To deal with public authorities, persons of either restricted legal capacity or no legal capacity, may institute proceedings before the Constitutional Court. They cannot be regarded as persons who are evidently unauthorised to present their case before the Constitutional Court.

Summary:

A person whose legal capacity had been restricted through verdicts rendered by district and regional courts petitioned the Constitutional Court to restore his full legal capacity.

According to Article 130.3 of the Slovak Constitution, the Constitutional Court may commence proceedings upon receipt of a petition presented by an individual claiming to have his rights violated. According to Article 25.2 of Statute no. 38/1993 on Proceedings before the Constitutional Court, the latter court may refuse a petition brought by "a person evidently unauthorised to present his case." A petitioner who, on account of his mental illness, was restricted in legal capacity by the ordinary courts in that he was deprived of his right to deal in person – in written as well as in oral form – with law courts, bodies of state administration and other public authorities, claimed to have his rights violated through these court decisions.

The Constitutional Court ruled that if a person of either restricted legal capacity or no legal capacity claims to have had his/her fundamental rights violated, and their petition shows that the claimed right might, in fact, be threatened, then an individual either restricted in his/her legal capacity or with no legal capacity is "not a person evidently unauthorised to present his case at the Constitutional Court" as stated by Statute no. 38/1993. Such a person has the same right to initiate such proceedings as anyone else. However, this does not result in additional rights for persons who are restricted in their legal capacity.

Supplementary information:

In this case, the petition in question was judged to exceed the authority of the Constitutional Court, and the petition was dismissed.

Languages:

Slovak.

Slovenia
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Number of decisions:

The Constitutional Court held 12 sessions during the above period. It dealt with 109 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 10 cases in the field of protection of human rights and basic freedoms (cases denoted Up- in the Constitutional Court Register and submitted to the plenary session of the Court; other Up- cases were processed by a senate of three judges at sessions closed to the public). There were 155 U- and 148 Up-unresolved cases from the previous year at the start of the period (1 January 1995). The Constitutional Court accepted 71 U- and 60 Up- new cases in the period of this report, confirming the trend of a steady increase in the number of new cases over the last five years.

In the same period, the Constitutional Court resolved a total number of 57 cases (U-), as follows:

- 34 cases (U-) in the field of protection of constitutionality and legality, of which there were 18 decisions taken by the plenary and 16 resolutions
- 23 cases (U-) joined to the above mentioned cases for common treatment and decision.

In the same period, the Constitutional Court resolved 48 cases (Up-) in the field of protection of human rights and basic freedoms (2 decisions taken by the plenary, 46 decisions taken by a Senate of three Judges).

All decisions have been published in the Official Gazette of the Republic of Slovenia. Resolutions of the Constitutional Court are not as a rule published in an official bulletin, but only handed over to the participants in the proceeding.

However, all decisions and resolutions:

- are published in an official yearly collection (Slovene full text version with English abstracts) and
- are available:
  - since 1 January 1987 via on-line databases STAIRS, ATLASS and TRIP (full text in Slovene and English)
  - since September 1995 on Internet (slovene constitutional case law from 1994 in full text and english abstracts "www.sigov.si").

Important decisions

Identification: SLO-95-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.01.1995 / **e)** U-I-47/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 13/95; to be published in the official digest of the Constitutional Court of RS, IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Legality.
Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Law-making procedure.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Legislative initiative / Referendums.

Headnotes:

The abrogation of a law can be achieved by a referendum which adopts another law abolishing the existing one.

When the Constitution provides for the regulation of a specific right by law, this laws must not restrict the right but only define the manner of its exercise.

The legislator may regulate the way referendums are held but must not restrict the right to request the holding of a referendum in such a way that certain types of laws could not be changed by way of referendum.

A law providing for the assessment by the National Assembly of whether a question put to a referendum is clear enough is unconstitutional in circumstances where such an assessment is not subject to judicial review.

Summary:

The provisions of Article 90 of the Constitution do not require that the Law on referendums and popular initiatives (Official Gazette of the Republic of Slovenia, no. 15/94) envisage all known forms of referendums (preliminary, supplementary, abrogative). An arrangement which does not expressly provide that a law may be abrogated by referendum is not in conflict with the Constitution. In fact, the annulment of a valid law may also be achieved by means of a legislative initiative for adopting another law on the abrogation of this law, and to this is bound the demand for the holding of a preliminary referendum on the proposal of such a law.

Article 90.5 of the Constitution, which provides that referendums shall be regulated by law, does not allow for the restriction of the constitutional right to request the holding of a referendum in such a way that this right would be totally abolished in respect of specific types of law. Article 90.1 of the Constitution itself determines the scope of this right, and provides that referendums may be held on (all) matters regulated by law. Therefore, any restriction on the right under Article 90 of the Constitution indirectly also limits the constitutional right under Article 44 to directly or indirectly participate in the administration of public affairs. Nor does the provision in Article 44 of the Constitution, that this right shall be exercised "in accordance with the law", give the legislator the authority to restrict it, but only the authority to regulate the manner of its implementation.

Under Article 15.3 of the Constitution, the law may only restrict a constitutional right when this is crucial for the protection of the rights of others in accordance with the principle of proportionality, or in cases where the Constitution so determines, by legislative proviso using the formulations "under conditions set by law", "in the cases which are defined by law", "within the boundaries of the law", "restricted by law", etc. Where the content and extent of a right is already determined in the Constitution, the proviso that this right shall be exercised "in accordance with the law" or that it "shall be regulated by law" means that the legislator, in accordance with Article 15.2 of the Constitution, has the power to prescribe the way in which this right can be exercised but has no authority to restrict it.

A legal provision which authorises the National Assembly to assess the clarity of a question put to referendum, enables the National Assembly to decide that a referendum will not be held because of the unclarity of the question which is intended to be put. However, such a provision does not provide sufficient judicial protection, as required by Article 157.2 of the Constitution, for the effective safeguarding of affected constitutional rights (if such a case is in fact conceivable – this question has remained open).

Supplementary information:

By resolution of the Constitutional Court of 5 May 1994, the case under consideration was joined to case U-I-66/94 for common treatment and decision.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.01.1995 / **e)** U-I-147/93 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 18/95; to be published in the official digest of the Constitutional Court of RS, IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Legality.
General principles – Proportionality.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Companies, regulation, public interest / Denationalisation.

Headnotes:

The legislator determines the rights of legal subjects by abstract and general legal norms. The exercise of these rights and their limits are dependent on the social intention of the legal norm. Since the rights of legal subjects are conditioned by the economic and political interests of society, the form of protection of rights varies.

The legislator sets time limits for the exercise of these rights and for the performance of acts in procedures for asserting these rights. The legislator thus guarantees legal protection as an essential element of a State based on the Rule of Law. With the expiry of the time limit, the right of a legal subject, which is a specific right on the basis of abstract and general norms, is either extinguished or its validity becomes obsolete.

The legislator may also lay down time limits in procedures for validating abstractly defined rights. Rules on time limits are generally of a mandatory character and are not subject to agreement by the parties in proceedings.

Summary:

The law on the transformation of ownership of companies (Official Gazette of the Republic of Slovenia, nos. 55/92, 7/93 and 31/93) regulates the transformation of companies with socially owned capital into companies with known owners. Its social aim is that the process of transformation starts and is completed as quickly as possible. In order to protect the rights of denationalisation claimants in these processes, and to enable at the same time the implementation of the law, it required that claims for the return of assets of companies which are being privatised be protected on application by the claimant. The consequence of a claim remaining unprotected is the loss of rights to companies. However, the right to validation of denationalisation claims does not as such cease but is converted into a right to compensation which is assessed in accordance with the Law on denationalisation and the regulations to which this law refers.

The Constitutional Court further finds that, with the impugned provisions of the Law on the ownership transformation of companies, the legislator seeks to facilitate the process of ownership transformation of companies. Without the regulation of questions expressly related to denationalisation, claimant companies would be entirely unable to start the procedure of ownership transformation and, in view of the legal time limit set for the transformation, would not be privatised at all.

Therefore, the Constitutional Court finds that the impugned regulation pursues the aims of the law on the ownership transformation of companies, which are in accordance with social needs and interests. Restricting the rights of denationalisation claimants by imposing strict time limits is a measure which is necessary in order to ensure the undisturbed and timely flow of privatisation. The measure only requires specific action by the party to the proceedings, and is proportional to the aims it pursues and necessary for the undelayed and undisturbed transition from the system of economic subjects with social capital to a system of subjects with known owners.

Supplementary information:

The decision was taken by the Court with 1 concurring opinion.

By resolution taken by the Court of 14 July 1994, the case in question was joined to case number U-I-149/93 for common treatment and judgment.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 23.02.1995 / **e)** U-I-24/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 15/95; to be published in the official digest of the Constitutional Court of RS, IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
General principles – Legality.

Keywords of the alphabetical index:

Transport of dangerous goods / Treaty, compatibility.

Headnotes:

The European Agreement on International Road Transport of Dangerous Goods contains the minimum standards for the transport of hazardous substances and binds the States parties to it not to fall below these standards in their legislation. States parties may prescribe in their legislation additional conditions and stricter standards for the transport of dangerous substances. The Law on the transport of dangerous substances, which prescribed such additional conditions and higher standards, is not in conflict with the Agreement.

Summary:

That both the impugned Law on transport of dangerous substances and the European Agreement on International Road Transport of Dangerous Goods are still part of the law of the Republic of Slovenia derives from the Constitutional Law for implementing the Charter on the Sovereignty and Independence of the Republic of Slovenia, the Constitutional Law for implementing the Constitution and from the Act on notification of succession. Their hierarchical relation is determined in Article 153.2 of the Constitution, which states that laws shall be in accordance with valid international treaties which have been ratified by the National Assembly. Although the Federal Executive Council of the Assembly of the Social Federal Republic of Yugoslavia ratified the Agreement by decree, the National Assembly adopted the Act of notification which includes the Agreement, and thus the latter acquired the status of an international treaty ratified by the legislator.

The Agreement was concluded "desiring to increase the safety of international transport by road". In accordance with such an intention, the Agreement determines the most important rules and standards intended to increase the safety of international road transport of hazardous goods. The Agreement itself does not prevent States from applying stricter standards through their legislation. In Article 4, the Agreement determines that each party shall retain the right, for reasons which do not relate to safety during the journey, to regulate or forbid the handling of dangerous goods on its territory. Article 5 provides that transport to which the Agreement refers is still bound to national or international regulations which mainly relate to road traffic, international road transport or international trade. The articles of the impugned law, which the applicant considers in conflict with the Agreement, determine some additional obligations for transport, professional qualification and age of personnel handling dangerous substances, and for the fitting of vehicles which perform such transport. These simply contribute further to achieving the basic aim of the Agreement and are therefore not in conflict with it.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-1-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 23.02.1995 / **e)** U-I-209/93 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 18/95; to be published in the official digest of the Constitutional Court of RS, IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Rule of law.
General principles – Legality.
Institutions – Courts – Organisation.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Tribunal, impartial.

Headnotes:

The provisions of the civil and criminal court rules, and the schedule of work of the judges, which regulate the assignment of individual civil cases to individual judges are not in conflict with the Constitution in that they fail to provide that a case concerning an action which has been withdrawn and then instituted again will be reassigned to the same judge to which it had been assigned at the time it was initially instituted.

Summary:

The principal aim of the provision of Article 23.2 of the Constitution (Due Process of the Law) is to prevent any arbitrary influence on the courts as regards the assignment of a particular case to a judge. The said

provision does not prevent the parties to a case from having any influence whatsoever on who will be the judge dealing with their case. Such an arrangement, which would in advance make impossible for either one or both parties in all instances to have any influence on the selection of the judge, is itself impossible, even conceptually. The parties know who are the judges who have been appointed in a particular court of justice and assigned to particular fields of work. If only by the application of agreed-upon jurisdictional rules, both parties can exercise indirect influence also on the circle from which the judge who will decide on a particular case is to be selected. By the use of the rules of optional jurisdiction, each party may exercise influence on who will be the judge that will decide on his or her case. Such possibilities of exercising influence on the assignment of the judge in a particular case by a party do not, however, jeopardise the constitutional guarantees contained in Article 23 of the Constitution. Neither will any such action be in violation of the same right of the opposite party, since the matter will still be tried by a judge who has been selected on the basis of such rules as have been prescribed in advance by statute and judicial practice, and not by a judge having been selected on an *ex post* basis by the court of justice or any other body.

A rule whereby a civil case which is filed again after having been withdrawn would be assigned to the judge to whom it was previously assigned would in any case require a decision on the merits as to whether the civil case is the same as the one previously submitted and withdrawn. The question of the identity of a case or claim in a lawsuit is known to be one of the most difficult practical and theoretical questions, the resolution of which would introduce in the process of assignment of cases to individual judges numerous criteria and, consequently, uncertainty. In addition, the plaintiff who has withdrawn his action and has filed it again with a view to excluding the judge having been initially assigned to the case would not be prevented even by such an arrangement from making such a manoeuvre: for, in filing an action again, the plaintiff always has the possibility of partly modifying the action and, consequently, the identity of the claim, without running any other risk than that of the rejection of the part of the claim newly introduced.

It is therefore evident that such a solution would introduce into the process of assignment of cases uncertainty and would consequently decrease the accountability and automatic nature of the assignment of cases. It is true that the possibility for a party to exercise influence by certain procedural acts on the assignment of judges may jeopardise the principle of trial by an impartial judge. If, however, a judge who is not impartial has been selected, the other party may enforce his or her right to an impartial court on the basis of the rules on the disqualification of judges.

Supplementary information:

The decision was taken by the Court with 1 concurring opinion and 1 dissenting opinion.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-1-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.03.1995 / **e)** U-I-158/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 18/95; to be published in the official digest of the Constitutional Court of RS, IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Separation of powers.
General principles – Rule of law.
Institutions – Executive bodies – Powers.
Institutions – Public finances – Principles.

Keywords of the alphabetical index:

Decision, interpretative / Property, socially-owned control.

Headnotes:

The organisation of the Agency for Payment Operations as a public institution, the specific forms of subordinating the Agency to the Government and the management and control of its activities through its board, which have all been provided for as if the Agency were a public institution, are contrary to the constitutional concept of an autonomous and independent entity whose duties under the Constitution and its statute are to control and audit the manner of disposing of socially-owned property in the process of ownership transformation.

In a State governed by the rule of law, statutory provisions must be drafted in such a way as to make possible their effective implementation.

Summary:

The essence of the constitutional provision dealing with the separation of powers lies not in the manner of organising the relationships between individual branches of government or government organisations, but in its fundamental function of protecting individual freedom and dignity in relations with the government. Democratic efficiency of separation of powers depends primarily on the quality of mutual controls and restrictions, as well as on co-operation in the collective, balanced and efficient attainment of national objectives. This is why it is possible to have, and why indeed there are, various organisational forms of implementation of the principle of horizontal, vertical and functional separation of powers in accordance with specific historical and cultural circumstances of the constitutional system actually in force.

Modern constitutional systems also incorporate bodies and organisations which, due to their organisational characteristics and formal powers, cannot be ranged among any of the three branches of government. Such constitutional institutions include for example: the central bank ("monetary authorities"), the ombudsman, and the Court of Auditors.

In constitutional systems, where they exist, all these bodies and organisations are indisputably highly autonomous in relation to each branch of government. Their autonomy on the one hand, and their responsibility on the other are ensured by specific institutional requirements governing their independence, such as the professional and technical responsibility of holders of relevant public powers, procedural working rules prescribed by statute, a system of legal remedies against illegal acts, responsibility within the organisation, stability and transparency of the mandate of holders of responsible positions, a system of financing, etc.

The mere fact that in the former system the Public Audit Service was autonomous and that its independent status was provided for in the Constitution would be a sufficient reason for this status to be maintained while still dealing with socially-owned property. This is even more so because it is obvious that in the field of control over government expenditure in the new constitutional system, the Public Audit Service has been replaced by the Court of Auditors, which has also been granted an independent status by the Constitution. Nor is the Court of Auditors part of either judicial or of executive authorities, but is an institution *sui generis*, whose function of controlling government expenditure makes it essential for it to be able to control financial aspects of all three branches of the State.

On the basis of the foregoing it was the duty of the National Assembly to provide the Agency for Payment Operations, Control and Information with an autonomous status and to make it bound by the Constitution. This is why the organising of this service as a "public institution", the specific forms of subordinating the Agency to the Government and the management and control of activities of the Agency through its board, which have been provided for as if the Agency were a public institution, are contrary to the constitutional concept of an autonomous and independent entity whose duties under the Constitution and statute are to control and audit the manner of disposing of socially-owned property in the processes of ownership transformation.

Supplementary information:

The decision was taken by the Court with 2 dissenting opinions.

For reasons of joint consideration and adjudication, this case was joined with case U-I-162/94 (resolution of 13 September 1994).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-1-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.03.1995 / **e)** U-I-285/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 20/95; to be published in the official digest of the Constitutional Court of RS, IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Separation of powers.
General principles – Rule of law – Certainty of the law.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

European Charter on Local Government / Local government.

Headnotes:

The transfer of all the powers of the former municipalities to the State by a general legal provision is incompatible with the rule of law and the separation of powers, which require a normative arrangement of powers in one or several laws because provisions on powers include powers to take decisions on individual administrative matters.

The legal provision whereby the competences of the former municipalities – including their original powers – were transferred to the State was found to be unconstitutional on the grounds that the concept of "matters within State competency" was not defined by any regulation.

Summary:

The principle of local government is included among the basic constitutional provisions and analysed in detail in a special chapter on local and other self government. The basic constitutional guarantee on local government ("The autonomy of local government shall be guaranteed in Slovenia", Article 9 of the Constitution) is the institutionalised framework for decision-making on local public matters and also a reflection of the basic constitutional right of each person to participate in the administration of public affairs (Article 44 of the Constitution). Similarly, the European Charter on Local Government, in the preamble, directly juxtaposes the following three provisions:

- that local authorities are one of the main foundations of every democratic government,
- that the citizens' right to participate in public matters is one of the democratic principles common to all member States of the Council of Europe, and
- that this right can be most directly exercised at the local level.

Based on these key principles the European Charter, in Article 3, develops a definition of local government as "the right and the ability of the local authority to regulate within the limits of the law and to carry out an essential part of public affairs within its own jurisdiction and for the benefit of the local population".

The takeover by the State of administrative tasks that are connected with the execution of local government or local public matters, and which the municipalities perform as an authority, would be contrary to Article 140 of the Constitution. In relations between the State and its inhabitants, the municipality is the local authority. This is also indirectly confirmed by the three provisions of the European Charter on Local Government referred to. The first refers to local authorities as one of the main foundations of any democratic government, the second and the third to the democratic principle of citizens' participation in the administration of public matters, both at the central and the local level, the difference being that at the local level it is done "more directly".

The Constitutional Court has clearly stated that in the transition to a system of local government, the National Assembly must separate and define the powers of the State and of the local communities (Decision no. U-I-13/94 of 20.01.1994).

However, this was not done by the National Assembly. Instead of a clear division of powers and a definition of the functions to be taken over by the State, it passed the impugned provision (Article 101.1 of the Law on Administration, Official Gazette of the Republic of Slovenia, no. 67/94) with its unclear content, which according to the explanation of the National Assembly means that with this provision all State functions in the field of administration previously performed by the municipalities are to be transferred to the State administrative bodies. Its decision originated in the presumption that the mere fact that the powers of the old municipalities were prescribed by law means that they are State and not local matters. In so doing, the National Assembly interfered with the powers of the municipalities in a manner inconsistent with Article 140 of the Constitution.

Supplementary information:

The decision was taken by the Court with 1 dissenting and 1 concurring opinion.

In the reasons explaining the Resolution the Constitutional Court refers to Decree U-I-13/94 of 20 January 1994.

For reasons of joint deliberation and adjudication, this case was joined with case U-I-297/94 (resolution of 1 December 1994).

Languages:

Slovene, English (translation by the Court).

Spain
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

Statistical data

Type and number of decisions:

- Judgments: 64
- Decisions: 126
- Procedural decisions: 1244

Cases submitted: 1580

Important decisions

Identification: ESP-95-1-001

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 10.01.1995 / **e)** 6/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 36 of 11.02.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Labour contract / Occupational sanctions.

Headnotes:

The existence of a contractual relationship between a worker and the head of an undertaking creates a series of reciprocal rights and obligations that affect, *inter alia*, the exercise of the right of freedom of expression. The good faith of the two parties to the relationship places an additional restriction on the exercise of this right, which is inherent in the contract. However, citing the interests of the undertaking does not, by itself, constitute sufficient grounds for restricting workers' fundamental rights. Thus, undertakings' requirements that would restrict fundamental rights must be strictly necessary and must be justified by those seeking to impose them.

Summary:

The applicant – a professional footballer – contested the sanction that had been imposed on him by his club and subsequently confirmed by the courts. The sanction followed statements in which he expressed dissatisfaction with his treatment by the club under the terms of his contract. He argued that this treatment infringed his right of freedom of expression (Article 20.1.a of the Spanish Constitution).

The Constitutional Court concluded that the applicant's statements had been expressed in a completely neutral tone and could not possibly be considered an insult to the club, since their only purpose was to express his discontent with his treatment by the club under the terms of the contract. It was therefore impossible for such declarations to pose any threat to the head of the enterprise's legitimate interests concerning the enterprise's activities or to cause specific damage such that the limits of freedom of expression could be deemed to have been exceeded. Moreover, the very nature of the applicant's work and the public impact of professional sport made the trials and tribulations of the applicant's contractual relationship newsworthy events.

Languages:

Spanish.

Identification: ESP-95-1-002

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 24.01.1995 / **e)** 18/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 50 of 28.02.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Criminal procedure.

Headnotes:

The right to the assistance of a lawyer means, in principle and above all, the right to the assistance of a lawyer chosen by the defendant. In criminal proceedings, therefore, the judicial authorities may only appoint a lawyer for the accused of their own motion if the former's assistance is mandatory and the accused, having been given the opportunity to do so, has not appointed a lawyer of his choice or has expressly asked for one to be appointed *ex officio*. Moreover, whatever the circumstances, the judicial authorities may make such an appointment in any case where, whether or not a lawyer's assistance is mandatory, the accused lacks the financial means to appoint one and asks the authorities to do so, or the latter consider a lawyer's presence necessary.

Summary:

The applicants complained to the Constitutional Court that after being acquitted at first instance, they had been convicted by the Supreme Court following an appeal lodged by the prosecuting party, without being summoned to appear before the court of second instance. At the proceedings at second instance, a lawyer had been appointed *ex officio* to represent them, in their absence.

The Constitutional Court found that the failure to summon the applicants to appear before the Supreme Court had prevented them, in the event of their considering it necessary, from appearing before the court of second instance and being assisted by a lawyer of their choice, as they had been at first instance. They had thus been deprived of one of the accused's fundamental safeguards in criminal proceedings, which must be respected at all levels of jurisdiction.

Languages:

Spanish.

Identification: ESP-95-1-003

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 30.01.1995 / **e)** 22/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 50 of 28.02.1995 / **h)**.

Keywords of the systematic thesaurus:

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

Headnotes:

Only information on matters of public concern that has been secured and checked with a certain minimum of care, in other words veracious information, can be protected by the right to communicate information freely. Once such protection is granted, it takes precedence over the right to honour. The required veracity is synonymous not with objective truth but with the taking of a certain minimum of care in the search for that truth.

Summary:

In its judgement, the Constitutional Court considered the criteria for determining the veracity of information with regard to two newspaper reports concerning certain persons' involvement in a crime which caused great public interest.

When – as was the case with one of the published reports – an organ of the media confined itself to reporting statements by third persons that could infringe the right to honour, safeguarded in Article 18.1 of the Spanish Constitution, it was sufficient to establish and verify that a particular individual had made certain statements.

If, however, the media organ offered its own version of the facts – as was the case with the other report – it must establish the truth of the content of the published information. It must therefore prove that a certain minimum of care had been taken to secure the information and ensure that it was accurate.

Languages:

Spanish.

Identification: ESP-95-1-004

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 06.02.1995 / **e)** 29/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 59 of 10.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Right to defend oneself in person.

Headnotes:

The right to defend oneself, even in the context of a legal culture in which professional defences predominate, forms part of the right to a fair hearing. In accordance with the case-law of the European Court of Human Rights concerning Article 6.3.c ECHR, this right entitles accused persons to defend themselves, to be defended by a lawyer of their choice and, under certain circumstances, to receive free technical assistance, without the choice of one of these three possible forms of defence precluding them from opting for the others if this is necessary to ensure that the right to a fair hearing in criminal proceedings is upheld.

Summary:

The person lodging the application for constitutional protection complained that judicial decisions preventing him from defending himself, without the assistance of a lawyer, against criminal charges that he had failed to perform civilian service as a substitute for military service, constituted a violation of his right to a fair hearing (Article 24.2 of the Spanish Constitution).

The Constitutional Court found that the right to defend oneself did not entitle defendants to waive mandatory professional assistance, whose primary legal justification was that it benefited defendants themselves but which also helped to ensure that criminal proceedings were properly conducted, thus ensuring that defendants could not be deprived of a defence.

It also found that the rules of domestic law governing the proceedings respected his right to defend himself, without excluding the assistance of a lawyer, since they allowed him to explain directly, rather than through an intermediary, the grounds of conscience for the conduct for which he was being tried.

Languages:

Spanish.

Identification: ESP-95-1-005

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 06.02.1995 / **e)** 35/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 59 of 10.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.

Keywords of the alphabetical index:

Criminal procedure / Hearsay evidence.

Headnotes:

Evidence supplied by indirect witnesses, or hearsay evidence, can never totally take the place of direct evidence, other than in the case of evidence taken in anticipation of the judicial investigation or when it is physically impossible for a direct witness to events to attend the hearing.

Summary:

The Constitutional Court found that the right to be presumed innocent (Article 24.2 of the Spanish Constitution) had been violated, because the evidence for one of the essential elements of the criminal offence of which the applicant for constitutional protection had been convicted – in this case, robbery with violence – could not be accepted as adequate evidence for the prosecution.

The Constitutional Court justified its decision by arguing that the hearsay evidence of the police could not be regarded as evidence taken in anticipation of the judicial investigation since the victim of the offence – who lived in the United States – had only made her statement to the police and had not confirmed it in the

presence of a judge. Nor was it physically impossible for the victim to attend the hearing since she was identified in all the case documents and her address was also recorded in them.

Moreover the indirect witnesses reported facts that they had not heard directly from the victim but from an unidentified third person – in this case, her husband – who had translated her statement in a version whose accuracy could not be checked, since interpreters were not used and there was no record of the victim's command of Spanish.

Languages:

Spanish.

Identification: ESP-95-1-006

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 06.02.1995 / **e)** 36/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 59 of 10.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.

Keywords of the alphabetical index:

Criminal procedure / Identification from photographs.

Headnotes:

Identification from photographs can offer the police a valuable means of inquiry. The results of such identifications may also be admissible in court, alongside other forms of evidence that satisfy the requirements of the physical presence of those concerned and oral hearings. When identification from photographs is presented in court as incriminating evidence, the identification procedure must be such as to obviate any possible police influence on the person making the identification.

Summary:

In this judgment, the Constitutional Court found that the right to be presumed innocent (Article 24.2 of the Spanish Constitution) had been violated, in so far as the victim's statement in court could not be deemed incriminating evidence since it referred to the results of an identification from photographs that had not been accompanied by all the necessary safeguards in that, before it was carried out, the victim had the opportunity to see the accused and had been informed by the police that the individual concerned had already been arrested for offences very similar to that of which she complained.

Languages:

Spanish.

Identification: ESP-95-1-007

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 13.02.1995 / **e)** 39/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 66 of 18.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Precautionary measures / Judgments, Right to the execution.

Headnotes:

The right to the protection of the courts includes, as a general principle, the right to have the precise terms of a judgment executed, a right that is different from, but closely associated with, the right to have judgments executed without unreasonable delay, since unreasonable delays in their application clearly adversely affect the effectiveness of this fundamental right.

Summary:

This application for constitutional protection was lodged against a decision of the Supreme Court to suspend the execution of a judgment on appeal awarding an injured child and its parents compensation for the serious consequences of an accident suffered by the child on a school trip. The suspension followed proceedings initiated by the insurance company with direct civil liability that had been ordered to pay the compensation, on the grounds of an alleged miscarriage of justice. The applicants had complained of a violation of their right to have the case heard without unreasonable delays (Article 24.2 of the Spanish Constitution) and to effective judicial protection (Article 24.1 of the Spanish Constitution), on the grounds that the contested decision prevented, albeit not definitively, the execution of the precise terms of the judgment, resulting in clear damage to their interests on account of delays in the payment of the agreed compensation.

In its decision, the Court considered whether or not the Supreme Court was empowered to suspend a judgment in the course of proceedings to determine whether there had been a miscarriage of justice, the purpose of which, should such a miscarriage be found, was to offer any injured party grounds for claiming compensation from the State for any damage suffered. It was clearly inappropriate to order precautionary measures whose consequences could never arise from the final decision. The suspension decision therefore entailed an unjustified and arbitrary delay in the judgment's execution, thus infringing the applicants' right to execution of the decision without unreasonable delay.

Languages:

Spanish.

Identification: ESP-95-1-008

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 13.02.1995 / **e)** 44/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 66 of 18.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Parliaments – Organisation.
Institutions – Legislative bodies – Status of members of legislative bodies.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Parliament, decisions / Parliament, rules of procedure / Parliamentary groups / Public functions, right to continue to exercise them.

Headnotes:

Modifications made by a parliamentary chamber's bureau to the chamber's rules of procedure, by means of a supplementary rule that exceeds its interpretative powers and imposes different treatment and restrictions on a particular member of parliament without first submitting the relevant decision to the full chamber for approval by an absolute majority, constitute a violation of the deputy's right to exercise his representative functions on an equal basis, in accordance with the law.

Summary:

This application for constitutional protection was lodged by a deputy from the Catalan parliament against a decision of the bureau of the autonomous community's parliament, approving a supplementary rule governing the application of one of the chamber's rules of procedure concerning the cross-bench group's participation in the chamber's activities, according to which the group's participation in the chamber's activities was "analogous" to that of other groups. The bureau justified the decision on the grounds that for the first time during that parliament the cross-bench group had comprised just one deputy, who had voluntarily left his group of origin, composed of political forces on whose lists he had stood for election, and that it was therefore necessary to clarify and restrict the powers of the cross-bench group, since its membership differed from that envisaged in the rules of procedure. The applicant complained of a violation of his fundamental rights laid down in Article 23.1 and 2 of the Spanish Constitution.

After rejecting the parliament's preliminary objections to the application for constitutional protection on the grounds of the alleged criminal status of the disputed rule, the Court found that the introduction of discriminatory treatment through a supplementary rule creating a rule of procedure *ex novo*, based on a criterion introduced for the first time in the rule itself and directly harming the interests of the only member

of the cross-bench group by reducing his rights, not only constituted an unwarranted modification of the chamber's rules of procedure and an infringement of the formal safeguard of the absolute majority requirement but also directly breached the deputy's right to exercise his representative functions on an equal basis, in accordance with the law.

Languages:

Spanish.

Identification: ESP-95-1-009

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 16.02.1995 / **e)** 49/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 66 of 18.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Constitutional justice – The subject of review – Regional measures.
Institutions – Federalism and regionalism – Distribution of powers.
Institutions – Public finances.

Keywords of the alphabetical index:

Autonomous communities, tax law / Lottery.

Headnotes:

The State has exclusive jurisdiction to manage and operate the national lottery, in accordance with its constitutional responsibilities for public finances. These responsibilities are not confined to tax revenues but also include other sources of income organised and managed by the State under its taxation monopoly.

The autonomous communities' powers to institute tax laws are not grounded in the Spanish Constitution but are subject to both intrinsic and extrinsic limits. Certain of the latter flow from the respective areas of responsibility – material and financial – of the State and the autonomous communities.

Summary:

In this decision, the Constitutional Court declared unconstitutional and null and void an autonomous community's legislation and implementing decree introducing a tax on participation in State lotteries.

By taxing participation in State lotteries, the autonomous community was not only limiting and making it more difficult to obtain income from the national lottery but also imposing a tax on an activity designed to produce revenue for the State and operated in the form of a tax monopoly. The autonomous community was thus encroaching on the State's jurisdiction over this tax monopoly, under the terms of Article 149.1.14 of the Spanish Constitution.

Languages:

Spanish.

Identification: ESP-95-1-010

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 23.02.1995 / **e)** 50/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 77 of 31.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Institutions – Public finances.
Fundamental rights – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Tax inspections.

Headnotes:

Responsibility for maintaining fundamental rights in general cannot be left to the unilateral discretionary powers of public authorities. More specifically, judicial decisions suspending the right to the sanctity of the home must be taken individually. Responsibility for crucial aspects of such measures cannot therefore be tacitly delegated, making it impossible for individuals to appeal to the courts, as is their inalienable right.

Summary:

The application was lodged against a judicial decision authorising tax inspectors to make further searches of the applicant's home, following various previous visits during which they had discovered – with the applicant's cooperation – numerous works of art that he had inherited and that had not been included in the declaration for the payment of inheritance tax. According to the applicant, the disputed decision infringed, *inter alia*, his right to the sanctity of his home, on account of the search warrant's failure to specify a considerable number of details.

The Court found that although the search had a legal basis in the Constitution itself, which authorised searches in general if a legal warrant had been issued (Article 18 of the Spanish Constitution), and in the general taxation legislation, such searches – which necessarily limited the sanctity of the home – were themselves subject to the proportionality principle as laid down in the case-law of the European Court of Human Rights, according to which the legal warrant must specify the period of validity and its duration and the number of persons who could enter the home, even if they were not identified individually at the outset. Having regard to this principle and in accordance with the application of corresponding provisions of the Code of Criminal Procedure, the Court found that the disputed decision had omitted a number of time-related factors of clear constitutional importance, thereby triggering an individualised suspension of the fundamental right concerned. It also delegated powers to the public financial authorities that tacitly authorised them to take decisions on crucial aspects of the measure, thus excluding the courts from acting as guarantors of citizens' freedoms.

Languages:

Spanish.

Identification: ESP-95-1-011

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 06.03.1995 / **e)** 56/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 77 of 31.03.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Political parties.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Political parties, democratic organisation.

Headnotes:

In the case of political parties, the fundamental right of association entails a series of subjective rights designed to ensure members' participation in decision making, but does not include any rights conferred by their statutes, in particular those stemming from a party's particular structure (in this case a confederal structure).

Summary:

Following disputes in the Basque nationalist party *(Partido Nacionalista Vasco – PNV)* concerning the powers of some of the regional bodies of the party, whose statute lays down a confederal structure, the *PNV*'s national assembly approved a resolution under which members and organisations that had supported certain decisions of one of the regional councils were expelled from the party. The application for constitutional protection was lodged by certain expelled members against successive judicial decisions rejecting the applicants' request for the national assembly's resolution to be declared null and void. They argued that these decisions violated the rights of freedom of expression (Article 20.1) and of association (Article 22 of the Spanish Constitution).

The decision first considered whether the constitutional requirement for political parties to have a democratic internal structure and working (Article 6 of the Spanish Constitution) bestowed on members a subjective right *vis-à-vis* the party to which they belonged and, if so, what it entailed and whether it could be considered to form part of the right of association laid down in Article 22 of the Constitution. The Court found that the aforementioned requirement took the form of a series of subjective rights, designed to ensure members' participation in decision making. In applying them, parliament enjoyed a wide measure of discretion, even though it had to respect parties' right to organise themselves, a right that – in contrast to what was generally the case with other types of organisation – was limited by members' right to participate in their organisation and workings. However, rights and

powers conferred by parties' statutes did not form part of this constitutional right. The violation of a fundamental subjective right arising from the *PNV*'s confederal structure therefore had to be rejected, since this structure was outside the scope of the fundamental right of association. The court also rejected the alleged violation of the right of democratic participation, which could only have occurred if the applicants' expulsion had not complied with the procedures laid down in the statute.

With regard to the alleged violation of freedom of expression, the Court found that even though party members did enjoy such a right, to establish a violation it would be necessary to show that the expulsion decision imposed by the *PNV*'s supreme body had been adopted in response to ideas or opinions expressed in the course of the process that led to the applicants' approving decisions considered to be contrary to the statute; these resolutions had certainly been the fruit of the opinions of those adopting them, but, as it was the decisions that were in question, the only relevant criterion was whether they complied with the relevant legal or statutory provisions.

Languages:

Spanish.

Identification: ESP-95-1-012

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 17.03.1995 / **e)** 60/1995 / **f)** / **g)** Supplement to the *Boletín Oficial del Estado* no. 98 of 25.04.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Institutions – Courts – Procedure.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Impartiality.

Keywords of the alphabetical index:

Juveniles, jurisdiction.

Headnotes:

In accordance with the case-law of the European Court of Human Rights in the *Nortier* case, the Constitutional Court found that the objective impartiality of a juvenile judge was not infringed by the fact that he had been concerned in certain aspects of the investigation as well as in the "principal hearing", even though he had imposed certain restrictions on a child at the public prosecutor's request, since the rule that both parties should be heard was respected.

Summary:

The case concerned a constitutional issue relating to certain provisions of implementing Act 4/1992 governing the functions and procedure of the juvenile courts. The Constitutional Court considered whether the procedures laid down in the Act could infringe the right to a trial with all accompanying safeguards, particularly the right to an impartial judge (Article 24.2 of the Spanish Constitution), since the legislation made it possible for a juvenile judge who had previously imposed restrictions on the fundamental rights of a child against whom proceedings were being taken or who had examined the child before the court hearing to hear and decide the case proper. In the decision the Court referred to its principles concerning this fundamental right, which were based on two key elements:

1. If the judge responsible for deciding a case was familiar with the facts that necessitated the trial, this might predispose him to draw conclusions about the guilt of the accused, thus violating the objective impartiality that the separation of the investigation and trial functions was intended to safeguard;

2. Cases must be examined individually to determine whether or not they appeared to disclose impartiality. The decision also referred to the case-law of the European Court of Human Rights regarding judges' impartiality, which had been somewhat refined since the *Haudschildt* judgment in the sense that impartiality was to be determined not abstractly but on a case by case basis. As a result, in the *Nortier* case, the European Court of Human Rights had decided that there had not been a violation of Article 6.1 ECHR since a distinction could be drawn between the material grounds for the interim measures imposed and the merits of the case, while the child's lawyer had a right of appeal to a higher court.

Having confirmed, in accordance with its established case-law, the requirement that the accusatory principle

should be applied in juvenile proceedings, the Court found that the implementing act, the constitutionality of certain provisions of which were being questioned, had sought to separate the investigation from the trial and judgment functions, the former being the public prosecutor's responsibility and the latter that of the juvenile judge, thereby restoring the accusatory element to juvenile proceedings that had hitherto been conducted according to the inquisitorial approach.

In this context, although juvenile judges were not totally exempted from involvement in certain aspects of the investigation before conducting the "principal trial hearing" and handing down the final decision, this "subjective" appearance of partiality was not sufficient to infringe their "objective" impartiality, since these aspects were not properly speaking measures of investigation, which were the public prosecutor's responsibility, but purely judicial measures that the Constitution expressly allocated to the judges and courts. In contrast to the traditional model, a judge could detain a child in custody at the public prosecutor's express request but never of his own motion. In addition, the appointment of a lawyer was mandatory in such cases, which meant that the juvenile judge could not be considered an "investigating judge" but rather one concerned with young persons' freedoms; quite apart from the fact that the public prosecutor undertook the investigation, if the principle that both parties should be heard was fully respected before a decision was taken to deprive a young person of his liberty, the judge would have the necessary impartiality to assess the evidence submitted by the public prosecutor and the defence. Finally, the Court also found that the judge's involvement in the pre-trial hearing did not compromise his impartiality, since the legal form of this hearing was peculiar to what was called the "intermediate phase" of the criminal proceedings, which presupposed that the investigation phase had been concluded.

Languages:

Spanish.

Sweden
Supreme Court
Supreme Administrative Court

Reference period:
1 January 1995 – 30 April 1995

There was no relevant constitutional case-law during the reference period.

Switzerland
Federal Tribunal

Reference period:
1 May 1994 – 31 December 1994

Statistical data

2 387 decisions of a constitutional nature, including:

- 71 based on rights derived from Article 4 of the Constitution (excluding arbitrary decisions)
- 38 based on personal liberty
- 54 concerning political rights
- 173 based on the guarantee of enjoyment of property
- 337 concerning civil procedure
- 451 concerning criminal procedure
- 19 based on the guarantee of a fair trial
- 143 concerning taxation
- 61 concerning commercial and industrial freedom and the freedom to practise one's profession
- 544 concerning civil law
- 170 concerning criminal law

Important decisions

Identification: SUI-95-1-001

a) Switzerland / **b)** Federal Tribunal / **c)** First Civil Chamber / **d)** 31.05.1994 / **e)** 4P.22/1994 / **f)** *Saddik X. v. the Court of Appeal of the Canton of Bern* / **g)** ATF 120 Ia 217 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Civil courts.
Fundamental rights – Civil and political rights – Equality – Scope of application.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Scope.

Keywords of the alphabetical index:

Foreigner living abroad / Legal aid / Reciprocity.

Headnotes:

Recognition of the constitutional right to legal aid in the case of a foreigner living abroad must not be conditional on the existence of an international treaty with the plaintiff's State of residence or be conditional on a guarantee of equality of treatment in that State.

Summary:

Mr X., a Libyan national, underwent several operations in a Bern clinic. Considering that the results were unsatisfactory and that his doctor had been negligent and could be held professionally liable, he initiated proceedings against that doctor. In connection with those proceedings he petitioned the Court of Appeal of the Canton of Bern to allow him legal aid.

The court refused this request, relying on the Code of Civil Procedure of the Canton of Bern, according to which legal aid is granted to foreigners living abroad only if their country of origin grants or guarantees reciprocal treatment for people living in Bern, without prejudice to international treaties.

Mr X. filed a public-law appeal with the Federal Tribunal, alleging a violation of Article 4 of the Federal Constitution. The Federal Tribunal allowed the appeal; it held that granting of legal aid could not be subject to the conditions set out above.

Languages:

German.

Identification: SUI-95-1-002

a) Switzerland / **b)** Federal Tribunal / **c)** Second Public-law Chamber / **d)** 18.07.1994 / **e)** 2P.395/1992 / **f)** *E.Z. and Others v. the Administrative Court of the Canton of Valais* / **g)** ATF 120 Ia 190 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Institutions – Courts – Administrative courts.
Fundamental rights – Civil and political rights – Freedom of expression.

Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Capacity to appeal at the cantonal level / Censorship, film.

Headnotes:

The potential audience of a film which a canton's Board of Censors has banned from being shown in public are entitled to bring an action based on freedom of information (encompassed in freedom of expression), which guarantees *inter alia* the right to receive information or ideas without any supervision being exercised by the authorities and the right to form an opinion. As the target audience of the film in question, they have the capacity to appeal at the cantonal level against the Board's decision (recital 2).

Summary:

The distributor of Martin Scorcese's film "The Last Temptation of Christ" applied to the authorities of the Canton of Valais for approval to show the film in public. The Cantonal Board of Censors banned screenings of it. Some private individuals appealed against this decision to the Department of Justice, Police and Military Affairs of the Canton of Valais. Their appeals were dismissed by that Department and an administrative-law appeal was likewise dismissed by the Administrative Court, which held that the Department had breached the rules of cantonal procedure in deciding that the appeals lodged with it were admissible. In the view of the Administrative Court, the Cantonal Board of Censors' decisions related solely to public showings of films in cinemas and not to private showings; the Department therefore should not have acknowledged that members of the potential audience had the capacity to lodge an appeal within the meaning of the cantonal Administrative Procedure and Courts Act. The Administrative Court did not consider the applicants' grounds of appeal against the principle of censorship *per se*.

The applicants then lodged a public-law appeal with the Federal Tribunal; they alleged that the provisions on cantonal administrative procedure had been applied arbitrarily and that their freedom of expression had been infringed.

The Federal Tribunal allowed their appeal and set aside the impugned decision. It held that private showings of a film were no substitute for showings in a cinema and that, consequently, the ban on showing the film encroached upon the potential audience's freedom of information. The applicants therefore had the capacity to lodge an appeal with the Department at cantonal level.

Languages:

French.

Identification: SUI-95-1-003

a) Switzerland / **b)** Federal Tribunal / **c)** Second Public-law Chamber / **d)** 27.10.1994 / **e)** 2A.75/1994 / **f)** V. v. the *Conseil d'Etat* of the Canton of St. Gallen / **g)** ATF 120 Ib 360 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.
Fundamental rights – Civil and political rights – Rights of domicile and establishment.
Fundamental rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

Establishment, permission / Foreigners, establishment / Treaty, international, validity / Vienna Convention.

Headnotes:

A court is bound by a treaty concluded by the Federal Council, whether or not that treaty should have been approved by the Federal Assembly (recital 2).

Summary:

The case concerned the right of an Austrian citizen to obtain permission to settle in Switzerland on the basis of the Agreement of 14 September 1950 between the Swiss Federal Council and the Austrian Government making additional arrangements governing the conditions of settlement of nationals of the two States.

V., an Austrian national, arrived in Switzerland with his wife and children in 1980. The authorities of the canton of St. Gallen issued them with residence permits, which were renewed several times. On renewing the permits in 1990, the authorities expressed a reserva-

tion on account of V.'s conduct and the bankruptcy of a company he had managed.

In 1991, V. applied for permission to settle in Switzerland; the relevant authorities treated this application as a request for extension of his residence permit, turned it down and forced V. and his family to leave Switzerland. The decision was upheld by the *Conseil d'Etat* of the Canton of St. Gallen in view of the fact that V. had been convicted and sentenced in criminal proceedings and that he had significant outstanding debts. V. lodged an administrative-law appeal with the Federal Tribunal, relying *inter alia* on an agreement between the Swiss Federal Council and the Austrian Federal Government making additional arrangements governing the conditions of settlement of nationals of the two States. According to this agreement, Austrian citizens were entitled to receive permission to settle in Switzerland after having lived there permanently and lawfully for ten years.

The Federal Tribunal raised the issues of whether the Swiss Federal Council had the power to conclude the above-mentioned agreement without Parliament's approval, of how valid the agreement was and of whether it was binding on the courts. It decided that the answer to the last question was in the affirmative, allowed the administrative-law appeal and referred the case back to the *Conseil d'Etat* of the Canton of St. Gallen for a new decision.

Languages:

German.

Identification: SUI-95-1-004

a) Switzerland / **b)** Federal Tribunal / **c)** First Public-law Chamber / **d)** 27.12.1994 / **e)** 1P.670/1994 / **f)** G. v. the prosecuting authorities and the Criminal Cassation Division of the Cantonal Court of the Canton of Fribourg / **g)** ATF 120 Ia 314 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Criminal procedure / Evidence obtained by chance / Telephone conversations, confidentiality / Telephone tapping.

Headnotes:

A person with whom another person under lawful surveillance holds a telephone conversation is individually protected under the Constitution and can, in principle, require that a telephone conversation should not be disclosed or used against him or her (recital 2c).

For such telephone conversations to be used against that person as evidence obtained by chance, the criteria governing surveillance of telephone conversations must also be fulfilled in respect of that person, a question which must be considered in the context of later criminal proceedings brought against him or her (recital 2c).

In the instant case use of the evidence obtained by chance did not constitute a substantive or technical breach of the Constitution (recital 2d).

Summary:

Article 36.4 of the Constitution and Article 8 ECHR safeguard the confidentiality of telephone conversations and determine the conditions governing limitations of this guarantee (recital 2a).

The Criminal Court of the district of Singine (Canton of Fribourg) convicted G. of repeated breaches of the Federal Narcotics Act and sentenced him to seven years' imprisonment. It found that G. had supplied X. with large quantities of heroine and cocaine. It based this finding *inter alia* on the results of surveillance of telephone conversations between G. and X., which had been ordered by the Neuchâtel prosecuting authorities in respect of X.

G. lodged an appeal against this judgment with the Criminal Cassation Division of the Cantonal Court, but to no avail. G. then filed a public-law appeal with the Federal Tribunal, complaining that the results of tapping of X.'s telephone line had been used against him.

The Federal Tribunal dismissed the appeal. It acknowledged that G. could rely on the confidentiality of telephone conversations held with X. Evidence obtained by chance in this way could only be used against G. if the criteria governing surveillance of telephone conversations were also fulfilled in respect of G.

In the case under consideration, use of this evidence was not at variance with the Constitution or the Convention.

Languages:

German.

Turkey
Constitutional Court

Reference period:
1 January 1995 – 30 April 1995

The two judgments were rendered during the previous reference period.

Statistical data

Number of decisions: 20

20 decisions were handed down between 1 January 1995 and 30 April 1995. Four of them declared the respective appeals inadmissible; three appeals were dismissed and only some provisions of one law were annulled. Seven decisions concerning the auditing of political parties were handed down. One official warning was given to a party and one party was dissolved on procedural grounds. These decisions are not published in the Official Gazette because the written statement of their reasons have not yet been prepared. The summaries that follow concern decisions published in the period 1 January to 30 April, but handed down before.

Important decisions

Identification: TUR-95-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.11.1994 / **e)** 1994/80 / **f)** / **g)** Official Gazette, 10.02.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Constitutional justice – The subject of review – Rules issued by the executive.
Constitutional justice – Effects.
Institutions – Legislative bodies – Relations with executive bodies.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Decrees having force of law / Legislation, delegated.

Headnotes:

Decisions of the Constitutional Court are binding on legislative, executive and judicial organs, on administrative authorities, and on individuals and corporate bodies. According to the above rule, the legislative organ must take into consideration the decisions of the Constitutional Court and must not enact laws in a way that would to render the judgments of the Court ineffective. Not only the judgment but also the written statement of reasons are binding for the legislative organ.

An empowering law must define the purpose, scope, principles and operative period of decrees having the force of law, and whether more than one decree may be issued within the same period. The above elements must be made concrete in the empowering law which should provide for a framework for the Council of Ministers by limiting the powers conferred.

Legislative power itself cannot be delegated. Admittedly, the Council of Ministers can be authorised to issue decrees having force of law on certain matters. However, where the limits set for the issuing of the decrees having force of law are exceeded, this amounts to an unauthorised delegation of legislative power.

Summary:

The case was brought by the main opposition party in the Grand National Assembly demanding annulment of the Empowering law no. 3991, dated 7 June 1994. This empowering law authorised the Council of Ministers to issue decrees for amending some articles of the Turkish Commercial Code, the Act on Banks and the Act on the Inspection of Insurances.

The Court found Articles 1, 2 and 3 of the empowering law unconstitutional. According to the Court, these Articles were in violation of Article 91 of the Constitution because the purpose, scope and principles which regulate the issuing of decrees were indefinite. In addition to the above observation, the Court held that the above articles of the empowering law resulted in the delegation of legislative power to an executive body and for this reason those articles were incompatible with Article 7 of the Constitution.

Articles 4, 5 and 6 of the empowering law were not in violation of the Constitution. However, after the annulment of Articles 1, 2 and 3 the application of those articles became impossible and, for this reason, they were also annulled in accordance with Article 29 of the Law of the Organisation and Trial Procedures of the Constitutional Court.

The decision was unanimous.

Supplementary information:

Settled case law.

Languages:

Turkish.

Identification: TUR-95-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.11.1994 / **e)** 1994/79 / **f)** / **g)** Official Gazette, 16.02.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
Constitutional justice – The subject of review – Parliamentary rules.
Institutions – Legislative bodies – Parliaments – Organisation.
Institutions – Legislative bodies – Relations with executive bodies.

Keywords of the alphabetical index:

Executive, control / Parliamentary inquiries.

Headnotes:

In order to be valid as rules of procedure, decisions of the Grand National Assembly must concern principles and procedures of the Assembly.

The Constitutional Court can examine the constitutionality of decisions of the Assembly in respect of both form and substance, if they concern the functions of the Assembly.

Summary:

The case was filed by the main opposition party in the Assembly.

According to the Constitution, parliamentary inquiries may be initiated by a decision of the Assembly to ascertain criminal responsibility of the Prime Minister

or individual ministers on matters connected with their office. These inquiries are carried out by a parliamentary committee composed of fifteen members. At the end of the inquiry, the Assembly decides whether or not to impeach the Minister concerned.

According to Article 95 of the Constitution, the Grand National Assembly carries out its activities in accordance with the provisions of the Rules of Procedure drawn up by itself. However, the Assembly formed in accordance with the new Constitution was not able to adopt new Rules of Procedure. For this reason, the Assembly governs its sessions and proceedings according to the provisions of the old National Assembly Rules of Procedure which preceded the entry into force of the new Constitution.

In the Constitution of 1961, the Grand National Assembly was a bicameral legislature and it consisted of the National Assembly and the Senate of the Republic. Hence, in the period of the 1961 Constitution, three rules of procedure existed. One for the National Assembly, one for the Senate and one for the joint proceedings of the two chambers.

In the Rules of Procedure of the old National Assembly there are no provisions concerning the "parliamentary inquiry" foreseen by the new Constitution. Therefore, the Assembly decided that until it adopts new rules of procedure, the Rules of Procedure for the joint proceedings of the Grand National Assembly would govern such inquiries.

The Constitutional Court held that this decision of the Assembly could be accepted as a rule of procedure of the Assembly because it only concerns the application of the old rules of procedure of the Grand National Assembly. Furthermore, the Court stated that it is impossible to examine the constitutionality of the decision of the Assembly.

The Court dismissed the case unanimously.

Languages:

Turkish.

United States of America
Supreme Court

Reference period:
1 January 1995 – 30 April 1995

Important decisions

Identification: USA-95-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.01.1995 / **e)** 93-1543 / **f)** *McKennon v. Nashville Banner Publishing Co.* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Discrimination, age.

Headnotes:

An employee discharged in violation of a law prohibiting age discrimination in employment is not barred from all relief when, after his or her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to his or her termination on lawful and legitimate grounds had the employer known of it.

Summary:

Alleging that her discharge by respondent *Nashville Banner Publishing Company* violated the Age Discrimination in Employment Act of 1967 (ADEA), petitioner McKennon filed suit seeking a variety of legal and equitable remedies available under the ADEA, including backpay. After she admitted in her deposition that she had copied several of the Banner's confidential documents during her final year of employment, the District Court granted summary judgment for the company, holding that McKennon's misconduct was grounds for her termination and that neither backpay nor any other remedy was available to her under the ADEA.

The Supreme Court revised the judgment. According to the Court, such after-acquired evidence is not a complete bar to ADEA recovery. Even if the

employee's misconduct may be considered to be supervening grounds for termination, the ADEA violation that prompted the discharge cannot be altogether disregarded. The Act's remedial provisions, 29 U.S.C. § 626.b; see also 29 U.S.C. § 216.b, are designed both to compensate employees for injuries caused by prohibited discrimination and to deter employers from engaging in such discrimination. The private litigant who seeks redress for his or her injuries vindicates both of these objectives, and it would not accord with this scheme if after-acquired evidence of wrongdoing barred all relief. *Mt. Healthy City School District Bd. of Ed. v. Doyle*, 429 U.S. 274, 284-287, distinguished.

Languages:

English.

Identification: USA-95-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.01.1995 / **e)** 93-7901 / **f)** *Schlup v. Delo, Superintendent, Potosi Correctional Centre* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Fundamental rights – Civil and political rights – Right to life.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus*.

Keywords of the alphabetical index:

Criminal proceedings / Death penalty / Miscarriage of justice.

Headnotes:

The standard which requires a habeas petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent governs the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.

Summary:

Petitioner Schlup, a Missouri prisoner, was convicted of participating in the murder of a fellow inmate and sentenced to death. In this, his second federal habeas petition, he alleged that constitutional error at his trial deprived the jury of critical evidence that would have established his innocence. The District Court declined to reach the petition's merits, holding that Schlup could not satisfy the threshold showing of "actual innocence" required by *Sawyer v. Whitley*, 505 U.S. __, __, under which a petitioner must demonstrate "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found" him guilty.

In a trio of cases, the Supreme Court had firmly established an exception for fundamental miscarriages of justice. *Carrier*, 477 U.S., at 495; *Kuhlmann v. Wilson*, 477 U.S. 436; *Smith v. Murray*, 477 U.S. 527. In this case, the Court held that *Carrier*, rather than *Sawyer*, properly strikes the balance between the societal interests and the individual interest in justice, when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent. Though challenges to the propriety of imposing a death sentence are routinely asserted in capital cases, a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare and must be supported by new reliable evidence that was not presented at trial, evidence obviously unavailable in the vast majority of cases. Thus, the threat to judicial resources, finality, and comity posed by actual innocence claims is significantly less than that posed by sentencing claims. More importantly, the individual interest in avoiding injustice is most compelling in the context of actual innocence, since the quintessential miscarriage of justice is the execution of an innocent person.

To satisfy *Carrier*'s "actual innocence" standard, a petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.

Languages:

English.

Identification: USA-95-1-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 21.02.1995 / **e)** 93-1525 / **f)** *Lebron v. National Railroad Passenger Corporation* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies.
Fundamental rights – General questions – Effects – Vertical effects.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Media, political advertisement.

Headnotes:

Where the government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of that corporation's directors, the corporation is part of the government for the purposes of the guarantee of free speech.

Summary:

Petitioner Lebron, who creates billboard displays that comment on public issues, filed suit claiming, *inter alia*, that respondent National Railroad Passenger Corporation (Amtrak) had violated his First Amendment rights by rejecting a display for an Amtrak billboard because of its political nature.

Amtrak was created by the Rail Passenger Service Act of 1970 (RPSA) to avert the threatened extinction of passenger trains in the interest of "the public convenience and necessity." The legislation establishes detailed goals for Amtrak, sets forth its structure and powers, and assigns the appointment of a majority of its board of directors to the President.

The Supreme Court held that it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions. The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken.

Amtrak is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution. This conclusion accords with the public, judicial, and congressional understanding over the years that Government created and controlled corporations are part of the Government itself.

Languages:

English.

Identification: USA-95-1-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 22.02.1995 / **e)** 93-1170 / **f)** *United States et al. v. National Treasury Employees Union et al.* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Institutions – Executive bodies – The civil service.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Ethics in government / Honoraria ban.

Headnotes:

A honoraria ban imposed on government employees constitutes an interference with the freedom of speech. In order justify such a ban, government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the government.

Summary:

After § 501.b of the Ethics in Government Act of 1978 was amended to prohibit a Member of Congress, federal officer, or other Government employee from accepting an honorarium for making an appearance or speech or writing an article, respondents – including individual members of, and a union representing, a class composed of all Executive Branch employees

below grade GS-16 who, but for § 501.b, would receive honoraria – filed a suit challenging the statute as an unconstitutional abridgment of their freedom of speech. The Supreme Court held that § 501.b violates the First Amendment.

Where government employees seek to exercise their right as citizens to comment on matters of public interest, and are not attempting simply to speak as employees upon personal matters, the Government must be able to satisfy a balancing test of the type set forth in *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, in order to maintain a statutory restriction on the employees' speech. See *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 564. However, because § 501.b constitutes a wholesale deterrent to a broad category of expression by a massive number of potential speakers, the Government's burden here is even greater than it was in *Pickering* and its progeny, which usually involved individual disciplinary actions taken in response to particular government employees' actual speech.

The Government has failed to show how the interests it asserts to justify § 501.b are served by applying the honoraria ban to respondents. *United Public Workers v. Mitchell*, 330 U.S. 75, distinguished. Although the asserted concern that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities is undeniably powerful, the Government cites no evidence of misconduct related to honoraria by the vast rank and file of federal employees below Grade GS-16. The limited evidence of actual or apparent impropriety by Members of Congress and high-level executives cannot justify extension of the honoraria ban to that rank and file, an immense class of workers with negligible power to confer favours on those who might pay to hear them speak or to read their articles.

Languages:

English.

Identification: USA-95-1-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 01.03.1995 / **e)** 93-1660 / **f)** *Arizona v. Evans* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Institutional aspects – Courts.
Institutions – Army and police forces – Police forces – Functions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.

Keywords of the alphabetical index:

Exclusionary rule / Fruit of the poisonous tree-doctrine.

Headnotes:

The Supreme Court has jurisdiction to review a State Supreme Court's decision. When a state court's decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state-law ground is not clear from the opinion's face, the Supreme Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

It is not required to suppress evidence seized in violation of the right against unreasonable searches and seizures when the violation was due to erroneous information resulting from clerical errors of court employees.

Summary:

Respondent was arrested by Phoenix police during a routine traffic stop when a patrol car's computer indicated that there was an outstanding misdemeanour warrant for his arrest. A subsequent search of his car revealed a bag of marijuana, and he was charged with possession. Respondent moved to suppress the marijuana as the fruit of an unlawful arrest, since the misdemeanour warrant had been quashed before his arrest.

The Supreme Court confirmed the standard given in *Michigan v. Long*, 463 U.S. 1032. This standard for determining whether a state-court decision rests upon an adequate and independent state ground was adopted (1) to obviate the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to this Court's satisfaction and (2) to provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference and yet preserve the federal law's integrity. State courts are free both to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution and

to serve as experimental laboratories. However, in cases where they interpret the United States Constitution, they are not free from the final authority of this Court. In this case, the State Supreme Court based its decision squarely upon its interpretation of federal law when it discussed the appropriateness of applying the exclusionary rule, and it offered no plain statement that its references to federal law were being used only for the purpose of guidance and did not compel the result reached.

The exclusionary rule is a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through its deterrent effect. However, the issue of exclusion is separate from whether the Amendment has been violated. The Amendment does not expressly preclude the use of evidence obtained in violation of its commands, and exclusion is appropriate only where the rule's remedial objectives are thought most efficaciously served. The same framework that this Court used in *United States v. Leon*, 468 U.S. 897, to determine that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers responsible for issuing search warrants applies in this case. The exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. See *id.*, at 916. In addition, respondent offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. See *ibid.* In fact, the Justice Court Clerk testified that this type of error occurred only once every three or four years. Finally, there is no basis for believing that application of the exclusionary rule will have a significant effect on court employees responsible for informing the police that a warrant has been quashed.

Languages:

English.

Identification: USA-95-1-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 19.04.1995 / **e)** 93-986 / **f)** *McIntyre, executor of estate of McIntyre deceased v. Ohio Elections Commission* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Electoral campaign, literature / Exacting scrutiny / Freedom to publish anonymously / Political speech.

Headnotes:

The freedom to publish anonymously is protected by the freedom of speech and extends beyond the literary realm to the advocacy of political causes.

When a law contains a regulation of core political speech, the Supreme Court applies exacting scrutiny, upholding the restriction only if it is narrowly tailored to serve an overriding state interest.

A broad prohibition of anonymous campaign literature cannot be justified by asserting interests in preventing fraudulent and libelous statements and in providing the electorate with relevant information.

Summary:

After petitioner's decedent distributed leaflets purporting to express the views of "CONCERNED PARENTS AND TAX PAYERS" opposing a proposed school tax levy, she was fined by respondent for violating § 3599.09.A of the Ohio Code, which prohibits the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature.

The Supreme Court held that § 3599.09.A's prohibition of the distribution of anonymous campaign literature abridges the freedom of speech in violation of the First Amendment. Section 3599.09.A is not simply an election code provision subject to the "ordinary litigation" test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, and similar cases. Rather, it is a regulation of core political speech.

The claimed informational interest is plainly insufficient to support the statute's disclosure requirement, since the speaker's identity is no different from other components of a document's contents that the author is free to include or exclude, and the author's name and address add little to the reader's ability to evaluate the document in the case of a handbill written by a private citizen unknown to the reader. Moreover, the state interest in preventing fraud and libel (which Ohio

vindicates by means of other, more direct prohibitions) does not justify § 3599.09.A's extremely broad prohibition of anonymous leaflets. The statute encompasses all documents, regardless of whether they are arguably false or misleading. Although a State might somehow demonstrate that its enforcement interests justify a more limited identification requirement, Ohio has not met that burden.

Languages:

English.

Identification: USA-95-1-007

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.04.1995 / **e)** 93-1260 / **f)** *United States v. Lopez* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Distribution of powers.

Keywords of the alphabetical index:

Commerce clause / Criminal law / Firearms.

Headnotes:

The prohibition of the possession of firearms in local school zones exceeds Congress' Commerce Clause authority. It is neither an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce, nor is it an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.

Summary:

After respondent, then a 12th-grade student, carried a concealed handgun into his high school, he was charged with violating the Gun-Free-School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows ... is a school zone", 18 U.S.C. § 922.q.1.A.

The Supreme Court held that § 922.q is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms are defined. It cannot, therefore, be sustained under the Court's cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. Second, § 922.q contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearms possession in question has the requisite *nexus* with interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Languages:

English.

European Court of Human Rights

Reference period:
1 January 1995 – 30 April 1995

Important decisions

Identification: ECH-95-1-001

a) / **b)** European Court of Human Rights / **c)** Chamber / **d)** 09.02.1995 / **e)** 44/1993/439/518 / **f)** *Vereniging Weekblad Bluf!* v. The Netherlands / **g)** to be published in volume 306-A of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Media, seizure of journal / Security service.

Headnotes:

The seizure and withdrawal from circulation of a magazine publishing confidential information on the activities of the Internal Security Service and which had lost this character at the time of its publication was held to violate the right to freedom of expression and to impart information.

Summary:

The weekly journal *Bluf!* proposed to publish a report by the Internal Security Service, by then almost six years old, marked "confidential" and revealing that the above-mentioned service was interested in the Communist Party of The Netherlands and the anti-nuclear movement. In pursuance of a search warrant, the police seized all the copies but not the offset plates. Unknown to the authorities, *Bluf!* managed to reprint the issue and sell it in the streets. A year later, the competent court ordered the withdrawal from circulation of the above-mentioned issue.

According to the Court, the impugned measures amounted to interferences by a public authority in the applicant association's exercise of its freedom to report information and ideas; these interferences were "prescribed by law" and pursued a legitimate aim under the Convention, namely the protection of national security.

However, the Court noted that the document in question was six years old at the time of the seizure, was of a fairly general nature and was marked simply "confidential", which represented a low degree of secrecy. In addition, the information in question had already been widely distributed when the journal was withdrawn from circulation and had been made accessible to a large number of people. Furthermore, the events had been commented on by the media. In short, as the measure had not been necessary in a democratic society, there had been a violation of Article 10 ECHR.

Languages:

English, French.

Identification: ECH-95-1-002

a) / **b)** European Court of Human Rights / **c)** Chamber / **d)** 09.02.1995 / **e)** 1/1994/448/527 / **f)** *Welch v. the United Kingdom* / **g)** to be published in volume 307-A of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Confiscation / Criminal offense / Drug trafficking / Penalty.

Headnotes:

The imposition of a confiscation order retrospectively following conviction for drug offences violates the principle according to which no heavier penalty shall be imposed than the one that was applicable at the time the criminal offence was committed.

Summary:

Charged with drugs offences allegedly committed between 1 January 1986 and the day of his arrest, the applicant was convicted and sentenced to several years' imprisonment. In addition, the judge made a confiscation order against him for £66,914 under the Drug Trafficking Offences Act 1986. The operative provisions of that Act had only come into force on 12 January 1987, that is after the dates on which the offences were committed.

The starting point in any assessment of the existence of a penalty is whether the measure was imposed following conviction for a "criminal offence". Under the 1986 Act the accused must have been convicted of one or more drug related offences before an order could be made.

The following elements provide a strong indication that the confiscation order amounted to a "penalty": the sweeping statutory assumption that all property passing through the offender's hands over a six year period is the fruit of the drug trafficking unless he can prove otherwise; the fact that the order is directed to the proceeds and is not limited to actual enrichment or profit; the discretion of the trial judge to have regard to culpability in fixing the amount of the order and the possibility of imprisonment in default of payment.

Looking beyond appearances at the realities of the situation, the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences.

The order thus amounted to a penalty and there had accordingly been a violation of Article 7.1 ECHR.

Languages:

English, French.

Identification: ECH-95-1-003

a) / **b)** European Court of Human Rights / **c)** Chamber / **d)** 10.02.1995 / **e)** 3/1994/450/529 / **f)** *Allenet de Ribemont v. France* / **g)** to be published in volume 308 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Identity, disclosure.

Headnotes:

The arrest and detention in police custody of a person described as guilty by senior police officers at a press conference with the Minister of the Interior violates the principle of the presumption of innocence.

Summary:

Following the murder of a former minister and MP, the Minister of the Interior, assisted by the Director of the Criminal Investigation Department and the Head of the Crime Squad, held a press conference during which he mentioned the name of the applicant, who had been arrested that day. Charged with aiding and abetting intention of homicide and placed in custody, the applicant was released soon afterwards and the investigating judge eventually ruled that there was no case to answer. The applicant maintained that the remarks made at the press conference had infringed his right to the presumption of innocence.

According to the Court, Article 6.2 ECHR does not prevent the authorities from informing the public about criminal investigations in progress but requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected. As to the content of the statements complained of, the Court held that reference to the applicant by high-ranking police officers, without qualification or reservation, as an accomplice to murder, amounted to a declaration of guilt which, firstly, encouraged the public to believe him guilty, and, secondly, prejudged the assessment of the facts by the competent judicial authority. There had therefore been a breach of Article 6.2 ECHR.

Languages:

English, French.

Identification: ECH-95-1-004

a) / **b)** European Court of Human Rights / **c)** Chamber / **d)** 24.02.1995 / **e)** 51/1993/446/525 / **f)** *McMichael v. the United Kingdom* / **g)** to be published in volume 307-B of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Equality of arms.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Files, access.

Headnotes:

The inability of a mother to consult certain confidential reports and other documents submitted in case proceedings concerning her child born out of wedlock violates her right to a fair trial and also her right and the right of the natural father to family life.

Summary:

The Court held that a fair (adversarial) trial, as guaranteed by Article 6.1 ECHR, extends to the opportunity to have knowledge of and comment on observations filed or evidence adduced by the other party. The lack of disclosure to the applicant of such vital documents as social reports affected her ability not only to influence the outcome of the children's hearing (although it cannot be regarded as a court of law of classic kind) but also to assess prospects of making an appeal to the Sheriff Court. In addition, the requirements of an adversarial trial had not been fulfilled before the latter court because documents lodged with it had not been made available to the appellant parent. Consequently, there had been a violation of the above-mentioned Article.

Concerning Article 8 ECHR, the Court held that whilst this Article contains no explicit procedural requirements, a decision-making process leading to measures of "interference" must be fair and afford due respect to the interests safeguarded by the Article. The Court stated that despite the difference in nature of the rights protected by Articles 6 and 8 in this connection and the Court's finding of a violation under Article 6, an examination of the same set of facts under Article 8 was also justified. The Court concluded that the decision-making process determining custody and access arrangements in regard to the child did not afford adequate protection to both parents' interests and therefore there had been a violation of Article 8.

Languages:

English, French.

Identification: ECH-95-1-005

a) / **b)** European Court of Human Rights / **c)** Chamber / **d)** 26.04.1995 / **e)** 52/1993/447/526 / **f)** *Fischer v. Austria* / **g)** to be published in volume 312 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Administrative Court / Oral hearing / Tribunal.

Headnotes:

During administrative proceedings to challenge revocation of a tipping licence, the Administrative Court's review fulfilled the requirements of the right of access to a court. Refusal by the Administrative Court to hold a public hearing violated, however, the right to a fair trial.

Summary:

The applicant had at first appealed, unsuccessfully, to the administrative authorities and after to the Administrative Court and the Constitutional Court complaining of a breach of his right to be heard. His complaints before the European Court concerned his right of access to a court invested with full jurisdiction as well as the complete lack, throughout the proceedings, of any oral hearing.

As to the right of access to a court, the Court held that the Constitutional Court did not have the requisite jurisdiction since its review was confined to ascertain-

ing whether the administrative decision was in conformity with the Constitution.

As to the scope of the Administrative Court's review, the Court noted that the Administrative Court considered all the applicant's submissions on the merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining facts. Regard being had to the nature of the applicant's concrete complaints as well as to the scope of review necessitated by such complaints, the Administrative Court's review fulfilled the requirements of Article 6.1 ECHR.

As to the lack of a hearing, the Court found that because of the importance of the proceedings in question for the very existence of the applicant's business, his right to a "public hearing" included an entitlement to an "oral hearing". The refusal by the Administrative Court to hold such a hearing amounted therefore to a violation of Article 6.1 ECHR.

Languages:

English, French.

Identification: ECH-95-1-006

a) / **b)** European Court of Human Rights / **c)** Chamber / **d)** 26.04.1995 / **e)** 13/1994/460/541 / **f)** *Prager and Oberschlick v. Austria* / **g)** to be published in volume 313 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Judge, defamation / Media, defamation.

Headnotes:

The judiciary must enjoy public confidence in carrying out its duties: it may be necessary to protect such confidence against destructive attacks that are unfounded and to infringe upon the task of the press to impact information on the functioning of the system of justice.

Summary:

Mr Prager, a journalist, published in *Forum*, a magazine owned by Mr Oberschlick, a report criticising the attitudes of judges sitting in Austria's criminal courts. He referred in particular to nine judges of the Vienna Regional Court, including Judge J., who instituted criminal proceedings for defamation. The Eisenstadt Regional Court convicted the applicants, and ordered them, to pay a fine and to pay compensation to Judge J. The Court further ordered confiscation of the remaining copies of the magazine.

According to the Court, Mr Prager's conviction for defamation and the other measures of which the applicants complained amounted to an "interference" with the exercise by them of their right to freedom of expression. The interference was "prescribed by law" and pursued a legitimate aim set out in Article 10.2 ECHR: protection of the reputation of others and upholding the authority of the judiciary. However, the Court found that some of the allegations had been of an extremely serious nature and thus could have damaged the reputation of those concerned and undermined public confidence in the integrity of the judiciary as a whole. The research conducted was not sufficient to substantiate such serious allegations, resulting in a lack of good faith and failure to respect ethics of journalism. In the absence of a sufficient factual basis, and having regard to the excessive breadth of the accusations, the Court held that the impugned interference was not disproportionate to the legitimate aim pursued.

Languages:

English, French.

Identification: ECH-95-1-007

a) / **b)** European Court of Human Rights / **c)** Chamber / **d)** 27.04.1995 / **e)** 5/1994/452/531-532 / **f)** *Piermont v. France* / **g)** to be published in volume 314 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Freedom of movement.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Balancing of interests / Expulsion order.

Headnotes:

A measure expelling a German national, a member of the European Parliament, from French Polynesia and prohibiting her from re-entering that territory, and a measure prohibiting her from entering New Caledonia, was found to infringe the right to freedom of expression but not the right to liberty of movement. The freedom of expression is especially important for an elected representative, hence the necessity for close scrutiny of interferences with that freedom.

Summary:

At the invitation of leading figures in the local independence movement, the applicant took part in an independence and anti-nuclear demonstration and spoke during it. As she was about to leave French Polynesia, she was served with an expulsion order which also banned her from re-entering the territory. Continuing her journey, she travelled to New Caledonia. At the airport, she was taken to the Office of the airport and border police where she was served with an order excluding her from the island.

The Court concluded that there had been no interference with the exercise of the applicant's right to liberty of movement (Article 2 of Protocol no. 4 ECHR) arising from the measures taken either in French Polynesia or in New Caledonia.

Under Article 10 of the Convention, the Court held that the expulsion and the exclusion amounted to interferences with the exercise of the right to freedom of expression. However, these interferences were not "necessary in a democratic society" because a fair balance had not been struck between, on the one hand, the public interest requiring the prevention of disorder and the upholding of territorial integrity and, on the other, Mrs Piermont's freedom of expression. In this respect, the Court noted that the utterances held against Mrs Piermont had been made during a peaceful authorised demonstration, that her speech had been a contribution to a democratic debate in Polynesia, that there had been no call for violence and that the demonstration had not been followed by any disorder.

Languages:

English, French.

Systematic thesaurus

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[1] *Including the conditions and manner of such appointment (election, nomination, etc.).*
[2] *Including the conditions and manner of such appointment (election, nomination, etc.).*
[3] *Vice-presidents, presidents of chambers or of sections, etc.*
[4] *E.g. State Counsel, prosecutors etc.*
[5] *Registrars, assistants, auditors, general secretaries, researchers, other personnel, etc.*
[6] *E.g. assessors.*
[7] *Registrars, assistants, auditors, general secretaries, researchers, other personnel, etc.*

pages

1.2 Types of claim

1.3 Types of litigation

[8] *Preliminary references in particular.*

[9] *Horizontal distribution of powers.*

[10] *Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.*

[11] *Decentralised authorities (muncipalities, provinces, etc.).*

[12] *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 (No. 1.3.3)).*

pages

1.4 The subject of review

1.5 Procedure

[13] *Local authorities, municipalities, provinces, departments, etc.*
[14] *Or: functional decentralisation (public bodies exercising delegated powers).*
[15] *Political questions.*
[16] *Unconstitutionality by omission.*
[17] *Pleadings, final submissions, notes, etc.*

pages

pages

[18] *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.).*

pages

[19] *Presumption of constitutionality, double construction rule.*
[20] *Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.*

pages

[21] *Only where not applied as a fundamental right.*
[22] *Bicameral, monocameral, special competence of each assembly, etc.*
[23] *This keyword concerns the possible specialisation of the powers of the Parliament and their scope. The aspects of the powers of the legislative bodies as such are to be found further down, under "Legislative bodies - Powers".*
[24] *Presidency, bureau, sections, committees, etc.*
[25] *State budgetary contribution, other sources, etc.*
[26] *For procedural aspects see the key-word "Electoral disputes" under "Constitutional justice - Types of litigation".*
[27] *For example incompatibilities, parliamentary, exemption from jurisdiction and others.*
[28] *Derived directly from the constitution.*

pages

[29] *Local authorities.*
[30] *The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.*
[31] *Civil servants, administrators, etc.*
[32] *Comprises the Court of auditors insofar as it exercises jurisdictional power.*

pages

[33] *E.g. Court of Auditors.*
[34] *Ombudsman, etc.*
[35] *E.g. Court of Auditors.*

pages

4.11 Institutions of the European Union

5. FUNDAMENTAL RIGHTS

5.1 General questions

[36] *Open-ended or finite.*
[37] *If applied in combination with another fundamental right.*
[38] *The question of "Drittwirkung".*
[39] *Used independently from other rights.*
[40] *Includes for example identity checking, personal search and administrative arrest. Detention pending trial is treated under "Procedural safeguards - Detention pending trial".*

[41] *Including the right of access to a tribunal established by law.*
[42] *Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.*
[43] *Militia, conscientious objection, etc.*
[44] *Aspects of the use of names are included either here or under "Right to private life".*

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