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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 and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. 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 elsewhere. 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 or organisation*
    - b) *name of the court*
    - c) *chamber (if appropriate)*
    - d) *date of the decision*
    - e) *number of decision or case*
    - f) *title (if appropriate)*
    - g) *publication of the decision*
    - h) *non-official publications*
2. *Keywords of the systematic thesaurus*
3. *Keywords of the alphabetical index*
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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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Albania
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Important decisions

Identification: ALB-95-2-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 23.02.95 / **e)** / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums and other consultations.
General principles – Sovereignty.
Institutions – Legislative bodies – Powers.

Keywords of the alphabetical index:

Legislature / Normative law / Popular approval.

Headnotes:

The approval of the Constitution by referendum without prior parliamentary approval is lawful.

Summary:

The parliamentary groups of the Social Democratic Party and the Socialist Party brought an action before the Constitutional Court arguing that Article 2 of the "Law on Referendums" (no. 7866), which permits the approval of the Constitution by referendum before parliamentary approval, was unconstitutional in the light of the provisions contained in Article 3.2 and Article 16.2 of the "Law on Major Constitutional Provisions" (no. 7491).

This claim was rejected by the Constitutional Court which said that Article 3.2 reflects the sovereign power of the people in that they exercise power through their representative organs and through referendums. While Article 16.2 provides that the Parliament has the power to adopt and amend the Constitution, the Court said that it was subject to the right of the people to approve the Constitution. As a result, the application to strike out Article 2 of Law no. 7866 as unconstitutional was rejected.

A strong dissenting judgment was delivered by two members of the Constitutional Court who argued that there was no constitutional basis for the majority's view.

Languages:

Albanian.

Austria
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995
Session of the Constitutional Court
during June and July 1995

Statistical data

- Financial claims (Article 137 B-VG): 4
- Conflicts of jurisdiction (Article 138.1 B-VG): 2
- Review of regulations (Article 139 B-VG): 167
- Review of laws (Article 140 B-VG): 1257 (1120 cases in series)
- Review of elections (Article 141 B-VG): 5
- Appeals against decisions of administrative authorities (Article 144 B-VG): 921 (658 declared inadmissible)

Important decisions

Identification: AUT-95-2-006

a) Austria / **b)** Constitutional Court / **c)** / **d)** 19.06.1995 / **e)** G 183/94, G 212/94 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of decisions and judgments of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Literal interpretation.
Institutions – Executive bodies – Relations with the courts.

Keywords of the alphabetical index:

Administrative authorities / Administrative Court / Administrative procedure / Independent administrative sections.

Headnotes:

The independent administrative sections in the *Länder*, fulfilling the tasks assigned to them by the Constitution, are not courts *(Gerichte)*; under the terms of the Federal Constitution they are administrative authorities whose members are not bound by instructions – *(weisungsfreie Verwaltungsbehörde)*.

Summary:

An independent administrative section instituted proceedings before the Constitutional Court in which it claimed that – according to the principle of the separation of powers – a provision of the law on general administrative procedure authorising an appeal court to change an administrative decision in any way was unconstitutional. The Administrative Court had quashed the decision of the independent administrative section on grounds of illegality, on account of its failure to establish the facts in proceedings relating to an administrative fine.

In its reasoning, the independent administrative section referred to its description in the Federal Constitutional Law: Part VI, "Constitutional and Administrative Safeguards", instructs "the independent administrative sections in the *Länder* and the Administrative Court to ensure that all public administration complies with the law". The independent administrative section, which is bound by the decisions of the Administrative Court, is obliged, in preliminary rulings, to fix penalties, i.e. to use its discretion and not to rely on that of the administrative authorities at first instance.

The federal government, which was invited to give its opinion, emphasised the fact that the aim of the Constitution in setting up independent administrative sections was to create an independent administrative authority – in pursuance of Article 6 ECHR – in matters of administrative criminal law.

Having noted that the independent administrative section clearly considered itself to be an administrative court *(Verwaltungsgericht)* the Constitutional Court acknowledged that the literal interpretation of the Federal Constitutional Law was perfectly clear, that the provisions on the Administrative Court – which in principle only hands down judgments on points of law – are not applicable to independent administrative sections (the aforementioned Part VI distinguishes between "A. the independent administratives sections in the *Länder*" and "B. the Administrative Court" and, moreover, the Administrative Court rules on appeals in which the illegality of "a decision taken by the administrative authorities, including the independent administrative sections" is alleged). The Court therefore declined to set aside the impugned provision.

Languages:

German.

Identification: AUT-95-2-007

a) Austria / **b)** Constitutional Court / **c)** / **d)** 29.06.1995 / **e)** B 2318/94 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of decisions and judgments of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Race.

Keywords of the alphabetical index:

Immigration / Residence permit.

Headnotes:

The principle of equality, which is binding on both the legislature and executive bodies, includes the absolute prohibition on discrimination as between foreigners; the law can prescribe different treatment in different cases only if such differences are justified and appropriate.

Summary:

In the existing Austrian constitutional order, the right to equality before the law is secured to all citizens (the Basic Law of 21 December 1867 on the general rights of citizens and the Federal Constitution of 1929). In 1973, in pursuance of the International Convention on the Elimination of All Forms of Racial Discrimination, the federal parliament passed an Act ranking as a constitutional law. In the Court's opinion, the said Act – with reference to the rules governing the Federal Constitution – obliges the law to treat foreigners in an equal fashion and to justify any distinction made between them. Subject to this, the law can provide for an immigration policy limiting the number of residence permits issued each year.

When interpreted in accordance with the Constitution, the irrevocability of an administrative decision refusing a residence permit on the grounds that it would exceed the set *quota* can only refer to the situation at the time of the decision. In other words, a foreigner who has been refused a residence permit can make a further application subject to the regulations in force the following year.

In the instant case a foreign national entered an application against an administrative decision refusing him the right to a residence permit on the grounds that the *quota* would be exceeded. He claimed that his constitutional rights had been violated by the application of an unconstitutional law and an illegal regulation. The Court declined to grant the application.

Languages:

German.

Belarus
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Introduction

Judges and court officers of the Constitutional Court of the Republic of Belarus are using the Computerised System of Legal Information, which contains more than 3000 legal documents including laws and resolutions of the Parliament of the Republic of Belarus, decrees of the President, resolutions of the government, and sub-legal acts.

The decisions and judgments of the Constitutional Court of the Republic of Belarus are accessible via the separate database "Constitutional Court. Decisions and Judgments".

As of December 1995, this database includes 36 documents, classified as follows:

– decisions on the institution of court proceedings
– judgments
– interpretations of judgments
– separate opinions

All documents in the database are indexed according to the official classification of legal acts (separated under the branches of law). Constitutional law, however, is not represented as a separate branch in the classification.

The System can search information on:

– legal thesaurus
– number of the document
– date of adoption
– date of coming into force
– any word or phrase of the name of the document
– any word or phrase of the text of the document

The Constitutional Court judgments were published ten days after their adoption in all government gazettes of the Republic of Belarus *Narodnaya Gazette*, *Zvazda*, *Respublika*, *Sovetskaya Belarusija* and in the Bulletins of the Supreme Council of the Republic of Belarus.

Important decisions

Identification: BLR-95-2-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 22.02.1995 **e)** J-11/95 / **f)** Denomination **g)** *Vesnik Kanstitucijnnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 2-3, 46 / **h)**.

Keywords of the systematic thesaurus:

General principles – Legality.
Institutions – Public finances – Currency.

Keywords of the alphabetical index:

Compensation / Currency, denomination / Inflation.

Headnotes:

The denomination of the belarussian rouble is a legal right of the National Bank.

Summary:

A Group of Parliamentary Deputies brought a motion to review the constitutionality of the Enactment "On the Denomination of the Belarussian Rouble" adopted by the Cabinet of Ministers and the National Bank on 12 August 1994. In their opinion it was due to this enactment that people's savings had depreciated. The Constitutional Court established that the aim of this action was to fix the value of the Belarussian rouble to the face-value of the calculations.

In accordance with Article 145 of the Constitution, it is the National Bank which governs credit relations, currency circulation, determines the rules on settlements and has the exclusive right to issue currency.

The Constitutional Court came to the conclusion that denomination, which falls within the competence of the National Bank and the Cabinet of Ministers, is a technical act and cannot influence the depreciation of people's savings.

A tenfold decrease in deposits together with a simultaneous tenfold decrease in prices, services, etc. would not alter the purchasing power of the deposits at the moment when denomination was effected.

In its judgment the Constitutional Court emphasised that inflation was the reason behind such a depreciation. Under conditions of inflation, State organs did not take appropriate measures to protect citizens' rights by compensating their deposits.

The Enactment "On the Denomination of Belarussian Rouble" was found to be constitutional and valid.

The Constitutional Court, in accordance with the Law "On Banks and Banks' Activities", proposed that the President of the Republic of Belarus, the Supreme Council, the Cabinet of Ministers and the National Bank evaluate and put into practice compensatory measures with regard to the population's pecuniary deposits, including the possibility of property compensation.

Supplementary information:

The commentary concerning this case can be found in Bulletin no. 2-3 of the Constitutional Court of the Republic of Belarus edited by V.V. Podgrusha, a member of the Court under the title "The decision has been given, the issues remain".

Languages:

Belarussian, Russian.

Identification: BLR-95-2-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 14.04.1995 / **e)** J-12/95 / **f)** Mass media / **g)** *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 2-3, 59 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
General principles – Democracy.
General principles – Legality.
Institutions – Head of State – Powers.
Fundamental rights – Civil and political rights – Freedom of the written press.
Fundamental rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, mass media, monopolisation.

Headnotes:

The President of the Republic of Belarus has the right to establish (by decree) a Presidential Administrative Department thereby bringing over the administration of the Belarussian Publishing House under his authority.

Establishing the Tele-Radio Company (the only electronic means of mass media in Belarus) as a central government organ means monopolising it. Monopolisation of mass media by the State is inadmissible.

Summary:

This case was a result of a constitutional motion filed by a Group of Parliamentary Deputies challenging the constitutionality of Presidential Decree no. 19 of 4 August 1994, "On the Establishment of the Presidential Administrative Department of the Republic of Belarus". This Decree provides for the handing over of the Belarussian Publishing House to the Presidential Administration without changing its legal status. The motion alleged that this publishing house holds a dominant position in the polygraphic services market in Belarus.

The Court emphasised that such a dominant position is not illegal in itself, but that any abuse of such a position would be illegal. In fact, interference by State officials in the activities of the publishing house was the reason for a number of newspapers being published in December 1994 with "blank spots".

The Court found that the constitutional right of citizens to receive, retain and disseminate complete, reliable and timely information on the activities of State organs had thus been violated.

The Court examined the legality of this decree which in the opinion of the deputies contradicted the Law "On Privatising State Property in the Republic of Belarus", and dismissed this argument. The Belarussian Publishing House is not an object to be privatised. Its ownership by the State, its tasks and its subordination to Executive organs had not been changed by the decree.

Another Decree by the President of the Republic of Belarus no. 27 "On the Establishment of National State Tele-Radio Company of the Republic of Belarus" of 5 August 1994 was also found to be in accordance with the Constitution.

According to presidential Decree no. 128 "Issues of National State Tele-Radio Company" of 28 September 1994, the Tele-Radio Company is paid, for by the

central State authority and is subordinate to the President of the Republic.

The Court ruled that the cumulation of two functions, the function of central authority and the function of mass media, under the authority of one person contradicts the Constitution.

The Court concluded that entrusting the Belarussian Tele-Radio Company with the functions of central authority, given its factual dominant position, would in effect amount to its monopolisation in the sphere of tele-radio broadcasting. The Regulation on the National State Tele-Radio Company of the Republic of Belarus therefore contradicts Article 33 of the Constitution.

In its judgment the Constitutional Court proposed that the Ministry for antimonopolistic policy of the Republic of Belarus examine the issues with respect to the dominant position of Belarussian Publishing House in the sphere of newspaper-magazine production and take relevant action.

Supplementary information:

A commentary concerning freedom of mass media can be found in Bulletin no. 2-3 of the Constitutional Court of the Republic of Belarus edited by M.I.Pastukhov (member of the Constitutional Court) and I.N. Lupsha (chief specialist in comparative law at the Belarussian Institute of State building and legislation) under the title "Freedom of Mass Media as a Necessary Condition of Democracy".

M.I. Pastukhov is also the author of the national report to the X. Conference of European Constitutional Courts to be held in Budapest on 5-10 May 1995 on the theme "Freedom of expression with special regard to mass media regulations in the jurisprudence of the Constitutional Court of the Republic of Belarus".

Languages:

Belarussian, Russian.

Identification: BLR-95-2-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 21.06.1995 / **e)** J-13/95 / **f)** Bonds / **g)** *Vesnik Kanstitucijnnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 2-3, 81 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Rules issued by the executive.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Statebonds, redemption.

Headnotes:

A citizen as a creditor has the right to claim on a bond certain goods or to receive their nominal cost.

A unilateral refusal to fulfil obligations and a unilateral alteration of the conditions of an agreement are inadmissible.

Those citizens who gave bonds on the conditions proposed by the Government thereby agreed to change them.

In respect of bondholders who did not agree with the conditions of bond redemption, the Court concluded that they reserve, as before, the right to claim conscientious loan observance by the State.

Summary:

A group of Parliamentary Deputies brought a motion to review the constitutionality of Resolution no. 186 "On the Government Securities of the Former USSR" adopted by the Council of Ministers on 6 April 1992 and Resolution no. 125 "On the Redemption of Purpose, Interest-free Bonds of the Year 1990 for the Purchase of Durable Goods", dated 5 March 1993.

The Court ruled that, in compliance with the conditions of loan issuance adopted by the Council of Ministers of USSR in 1989, a citizen as a creditor has the right to claim on a bond certain goods or to receive their nominal cost. After the dissolution of the USSR, the Republic of Belarus has become an assignee of these encumbrances as established in international arrangements.

The Government of the Republic of Belarus proposed its own conditions of bond redemption for repayment of this loan, based on a figure ten times the nominal cost.

The Court found these new conditions to be a unilateral proposal by the debtor (State). Under Ar-

ticle 194 of the Civil Code, a unilateral refusal to fulfil obligations and a unilateral alteration of the conditions of an agreement are inadmissible, except in cases envisaged by the law. In this particular case there was no such statement and therefore the Council of Ministers could change the conditions of conscientious observance only with the consent of the other party, i.e. the citizens.

The Court emphasised that those citizens who gave bonds on the conditions proposed by the Government thereby agreed to change them.

The Court concluded that the Government decisions did not contradict the norms of civil law.

Languages:

Belarussian, Russian.

Identification: BLR-95-2-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 06.07.1995 / **e)** J-14/95 / **f)** / **g)** *Vesnik Kanstitucijnnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 2-3, 104 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Local councils.

Headnotes:

Deputies of local councils retain their powers until the first session of the new local council.

Summary:

This case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. This motion challenged the constitutionality of the Law of 13 April 1995 "On Introduction of Amendments to the Law" on local government and self-government in the Republic of Belarus. This Law enacted that local councils of deputies retain their powers until the first session of the new local council of deputies is called.

The Court concluded that this law does not conflict with the Constitution.

Languages:

Belarussian, Russian.

Belgium
Court of Arbitration

Reference period:
1 May 1995 – 31 August 1995

Statistical data

- 26 judgments
- 74 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension or interlocutory orders)
- 49 new cases
- Average length of proceedings: 9 months
- 13 judgments concerning applications to set aside
- 7 judgments concerning preliminary points of law
- 2 judgments concerning an application for suspension
- 4 judgments settled by summary procedure

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

Bulgaria
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Summaries of important decisions of the reference period 1 January 1995 – 30 June 1995 have been published in the last Bulletin (95/1) and the others of the reference period 1 July 1995 – 31 December 1995 will be published in the next edition of the Bulletin (95/3).

Canada
Supreme Court

Reference period:
1 May 1995 – 31 August 1995

Important decisions

Identification: CAN-95-2-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 25.05.1995 / **e)** 23636 / **f)** *Egan v. Canada* / **g)** [1995] 2 *Supreme Court Reports* 513 / **h)** Internet: gopher.droit..un-montreal.ca/egan.en; (1995), 124 *Dominion Law Reports* (4th) 609; (1995), 182 *National Reporter* 161; (1995), 29 *Canadian Rights Reporter* (2d) 79.

Keywords of the systematic thesaurus:

General principles – Proportionality.
General principles – Reasonableness.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Sexual orientation / Spouse, definition.

Headnotes:

The old age security legislation provides for allowances for spouses of pensioners. The definition of "spouse", which is restricted to a person of the opposite sex, is constitutional.

Summary:

Under the Old Age Security Act, an allowance is available to spouses of pensioners between the ages of 60 and 65 whose combined income falls below a fixed level. The appellants are homosexuals who have lived together for over 40 years in a marriage-like relationship. Their application for a spousal allowance was rejected on the basis that the relationship between them did not fall within the definition of "spouse" in the Act, which includes "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife". The appellants argued that the definition infringed their right to equality guaranteed by Section 15.1 of the Canadian Charter of Rights and Freedoms on the ground that it discriminated on the basis of sexual orientation. While a majority of the Supreme Court of Canada held that the definition violated Section 15.1, a different majority found that it should be upheld under Section 1 of the Charter as a reasonable limit demonstrably justified in a free and democratic society.

In three separate opinions, five judges found that the distinction drawn between opposite-sex couples and same-sex couples in the impugned legislation was discriminatory under Section 15.1 of the Charter. As a result of the definition of a common law spouse as a "person of the opposite sex", homosexual common law couples are denied the benefit of the spousal allowance which is available to heterosexual common law couples. This distinction amounts to a clear denial of equal benefit of the law. The other four judges found that the legislation did not infringe Section 15.1. They noted that the singling out of legally married and common law couples as the recipients of benefits necessarily excludes all sorts of other couples living together. Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. Its ultimate *raison d'être* transcends all of these, however, and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. Many of the underlying concerns that justify Parliament's support and protection of legal marriage extend to heterosexual couples who are not legally married, and Parliament is wholly justified in extending support to such heterosexual couples. Neither in its purpose nor in its effect does the legislation constitute an infringement of the fundamental values sought to be protected by the Charter. The distinction adopted by Parliament is relevant to describe a fundamental social unit to which some measure of support is given.

A different majority of five judges found that the legislation could be justified under Section 1 of the Charter. The four judges who dissented on the discrimination issue would have upheld the legislation, even if they had found it infringed Section 15, for the reasons given in the discussion of discrimination. The fifth judge found that government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. Since the impugned legislation can be regarded as a substantial step in an incremental

approach to include all those who are shown to be in serious need of financial assistance due to the retirement or death of a supporting spouse, it is rationally connected to the objective. With respect to minimal impairment, the legislation represents the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being the protagonist of an individual. There is also proportionality between the effects of the legislation on the protected right and the legislative objective. The other four judges found that while the objective of the spousal allowance is of pressing and substantial importance, the means chosen to achieve this objective fails the proportionality test.

Cross-references:

Two other decisions dealing with the equality rights guaranteed by Section 15.1 of the Canadian Charter of Rights and Freedoms were rendered concurrently with this case: *Thibaudeau v. Canada*, [1995] 2 *Supreme Court Reports* 627, summarised in the Bulletin, and *Miron v. Canada*, [1995] 2 *Supreme Court Reports* 418.

Languages:

English, French.

Identification: CAN-95-2-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 25.05.1995 / **e)** 24154 / **f)** *Thibaudeau v. Canada* / **g)** [1995] 2 *Supreme Court Reports* 627 / **h)** Internet: gopher.droit.unmontreal.ca/thibaude.en; (1995), 124 *Dominion Law Reports* (4th) 449; (1995), 182 *National Reporter* 1; [1995] 1 *Canada Tax Cases* 382; 95 *Dominion Tax Cases* 5273; (1995), 29 *Canadian Rights Reporter* (2d) 1; (1995), 12 *Reports of Family Law* (4th) 1.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Institutions – Public finances – Taxation.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental rights – Civil and political rights – Equality – Affirmative action.

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Child support, amount / Child support, taxation / Family law.

Headnotes:

The tax provision which requires a separated or divorced custodial parent to include in computing income any amounts received as alimony for the maintenance of children does not infringe the equality rights guaranteed in the Constitution.

Summary:

Under Section 56.1.b of the Income Tax Act, a separated or divorced custodial parent must include in computing income the child support payments paid by the non-custodial parent, while the non-custodial parent may deduct these payments pursuant to Section 60.b of the Act. The claimant, a divorced wife, challenged the constitutionality of Section 56.1.b, arguing that by imposing a tax burden on money which she was to use exclusively for the benefit of her children Section 56.1.b infringed her right to equality guaranteed by Section 15.1 of the Canadian Charter of Rights and Freedoms. In a majority decision, the Supreme Court of Canada held that Section 56.1.b of the Income Tax Act is constitutional.

In separate opinions, the majority found that the group of separated or divorced custodial parents receiving child support payments is not placed under a burden by the inclusion/deduction scheme. Sections 56.1.b and 60.b operate at the level of the couple and are designed to minimize the tax consequences of support payments, thereby promoting the best interests of the children by ensuring that more money is available to provide for their care. The inclusion/deduction scheme confers in a majority of cases a benefit on the post-divorce "family unit". The purposes for which the scheme was created have thus been to a large extent achieved. The parents to whom the inclusion/deduction scheme applies enjoy an overall lessening of their tax burden since most of the parents receiving alimony for the children are subject to a marginal tax rate lower than that of the parents paying the maintenance.

Although there may be cases in which a portion of the taxpayer's liability is shifted upon the recipient spouse, one cannot necessarily extrapolate from this that a "burden" has been created, at least not for the purposes of Section 15.1 of the Charter. In addition, the fact that one member of the unit might derive a greater

benefit from the legislation than the other does not, in and of itself, trigger a Section 15.1 violation, nor does it lead to a finding that the distinction in any way amounts to a denial of equal benefit or protection of the law. Furthermore, Sections 56.1.b and 60.b incorporate federal and provincial statutes under which child support orders are issued. The amount of income taxable under Sections 56.1.b and 60.b is thus determined by the family law system and, unless it operates in a defective manner, the amount of child support will include grossing-up calculations to account for the tax liability that the recipient ex-spouse will incur on the income. If there has been an error, the family law system provides avenues to revisit the support order to correct the situation. Any disproportionate displacement of the tax liability between the former spouses lies in the family law system, not in the Income Tax Act. The concept of fiscal equity should not be confused with the concept of the right to equality.

In separate opinions, the minority found that Section 56.1.b infringes the equality rights guaranteed by Section 15.1 of the Charter. Although the inclusion/deduction scheme confers a net tax saving upon a majority of divorced or separated couples, its effect is not experienced equally by both members of the couple. The scheme imposes at the outset a tax burden uniquely on custodial spouses, and confers a tax benefit uniquely on non-custodial spouses. Where the scheme constitutes a benefit for the couple, the tax savings it generates often benefit only the non-custodial parent since there is nothing in the legislation to encourage an equitable division between family members of any benefits that may result from tax savings granted to the non-custodial parent by means of the deduction.

Furthermore, as a practical matter, the family law system is incapable of remedying the initial unequal distribution effectuated by the inclusion/deduction scheme. The distinction made by Section 56.1.b is discriminatory within the meaning of Section 15.1 and Section 56.1.b cannot be upheld under Section 1 of the Charter as a reasonable limit demonstrably justified in a free and democratic society. While Parliament does not have to choose the least intrusive means of all to meet its objective of increasing the resources of the family as a unit in order to increase child support, the inclusion/deduction scheme does not reasonably minimise the impairment of the equality rights of the claimant and persons in her situation. Alternatives less intrusive of that right protected by the Charter may be readily envisaged. The harmful effects of the scheme are disproportionate to the benefits it may produce. Accordingly, Section 56.1.b should be declared invalid in respect of child support payments. The declaration of invalidity should be suspended for a 12-month period to enable Parliament to implement a less discriminatory alternative. No pronouncement is made on the constitutionality of Section 60.b.

Supplementary information:

Following the Supreme Court's decision, the federal Minister of Justice has indicated that Sections 56.1.b and 60.b of the Income Tax Act might be amended.

Cross-references:

Two other decisions dealing with the equality rights guaranteed by Section 15.1 of the Canadian Charter of Rights and Freedoms were rendered concurrently with this case: *Egan v. Canada*, [1995] 2 *Supreme Court Reports* 513, summarised in the Bulletin, and *Miron v. Canada*, [1995] 2 *Supreme Court Reports* 418.

Languages:

English, French.

Croatia
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

- Cases concerning the conformity of laws with the Constitution:
  received 38, resolved 10; in 6 cases proposals to review the constitutionality of laws were not accepted, in 4 cases the procedure was terminated because the impugned law was either changed during the procedure before the Court or was no longer in force.

- Cases concerning the conformity of other regulations with the Constitution and laws:
  received 29, resolved 6: in 1 case the proposal to review the constitutionality and legality of regulations was not accepted, in 4 cases the motion was rejected, and in 1 case the procedure was terminated.

- Cases concerning the protection of constitutional rights:
  received 254, resolved 103: in 6 cases claims that an action was constitutional were accepted, in 66 cases claims were dismissed, in 28 cases claims were rejected, in 1 case the claim was withdrawn and in 2 cases the petitioners were instructed on their right to submit a constitutional action.

- Cases concerning jurisdictional disputes among legislative, executive and judicial branches:
  received 4, resolved none.

- Cases concerning suspension of implementation of individual acts before the case was finally decided:
  received 26, resolved 25: in 14 cases the claim was accepted, in 7 cases dismissed, in 4 cases rejected.

Important decisions

Identification: CRO-95-2-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.05.1995 / **e)** U-III-362/1994 / **f)** / **g)** *Narodne novine*, 34/1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Shares, offer to buy.

Headnotes:

Privatisation Acts influence, or may influence, the rights or direct legal interests of participants in the privatisation process; since only the administrative court may judicially review such Acts, this court, in rejecting all claims concerning these Acts, except those submitted by enterprises, violates the constitutional right to judicial review of the legality of individual Acts by administrative authorities and bodies vested with public powers, and the constitutional right to equality before law.

Summary:

A constitutional action was submitted by citizens who were offering to buy shares in an enterprise under privatisation. The law regulating the transformation of ownership entitles every person of full age to acquire a share in an enterprise, amounting to 50 % of the value of that enterprise, under the same conditions as persons who have worked in that enterprise, provided ownership is not acquired by persons specifically listed in the law. The administrative court held that Privatisation Acts concerned only the rights of enterprises the ownership of which was being transformed, and not the rights of individuals offering to buy shares in an enterprise.

The decision of the administrative court was repealed and the case returned for procedural renewal.

Languages:

Croatian.

Identification: CRO-95-2-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 16.05.1995 / **e)** U-I-35/1993 / **f)** / **g)** *Narodne novine*, 37/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
Sources of constitutional law – Categories – Written rules – Constitution.
Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Name, modification.

Headnotes:

Although there is a connection between a person's name and the constitutionally protected personality the legislator may regulate the use of a person's name in public communications and may regulate the right of a person to change his/her name, with a view to protecting other people and/or public order.

Summary:

A law concerning a person's name decrees that an application to change a name must specify reasons for the change; the change will be allowed if the claim is evaluated as justifiable and not contrary to the social rules and customs of the region in which the person lives.

A citizen who proposed that the Court review the constitutionality of this law deemed that what constitutes a justifiable reason for changing one's name is exclusively a matter of personal liberty of the person involved and is not subject to judgment by the state and state bodies.

The Court did not accept the proposal.

Supplementary information:

The same opinion appears in decision U-I-107/1993, also of 16 May 1995, in which the subject of review was the provision which prescribes that a name and surname used in legal transactions may each consist of no more than two words.

Languages:

Croatian.

Identification: CRO-95-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 16.05.1995 / **e)** U-I-252/1995 / **f)** / **g)** *Narodne novine*, 33/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Statute and organisation – Sources – Rules of procedure.

Keywords of the alphabetical index:

Act, suspension.

Headnotes:

Besides being authorised by the Constitution to regulate its internal organisation by its rules of procedure the Constitutional Court is also empowered to regulate issues of procedure before the Court which are not contained in the Constitutional Act on the Constitutional Court but are nevertheless indispensable for the efficient functioning of the Court; by adopting and publishing such rules the Court also restricts itself and guarantees the same treatment to everyone who submits a constitutional action to the Court.

Summary:

The Public Attorney of the Republic proposed the review of a provision in the Rules of procedure, adopted by the Constitutional Court itself, according to which the Court may, in the procedure following a constitutional action for the protection of fundamental rights, pending its decision, suspend the implementation of the act impugned by constitutional action if this implementation would cause irreparable damage to the petitioner, and if the suspension does not conflict with public interest and would not cause greater damage to other parties in the case.

The proposal to review the constitutionality of the provision was based on the fact that the Constitutional

Act on the Constitutional Court regulates such a suspension only in the procedure of the abstract review of laws and other regulations: before making a final decision the Court may temporarily stay the execution of individual judgments or any other activities based on laws or regulations, the constitutionality and legality of which are currently being reviewed, if their implementation would result in consequences which might be difficult to rectify.

The Court did not accept the proposal.

Languages:

Croatian.

Identification: CRO-95-2-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.06.1995 / **e)** U-I-815/1994 / **f)** / **g)** *Narodne novine* 43/1995 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Forwarding agencies, international.

Headnotes:

In addition to general conditions, the legislator may prescribe specific conditions as regards procedures to be followed by international forwarding agencies when submitting goods for customs inspection and sending them abroad. Such specific conditions may concern working space, professional qualifications and the obligatory deposit of funds at the bank whilst procedures are followed. Such a regulation does not violate constitutional principles of entrepreneurial and market freedom.

Summary:

Proposal to review the constitutionality of the act regulating specific conditions for international forwarding agencies claiming that such specific conditions violate freedom of enterprise.

The Court rejected the proposal.

Languages:

Croatian.

Identification: CRO-95-2-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.07.1995 / **e)** U-I-337/1994 / **f)** / **g)** *Narodne novine*, 49/1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance – The Bar.

Keywords of the alphabetical index:

Advocate, conditions for exercise of profession.

Headnotes:

Restrictions imposed by law regulating the legal profession and, dealing with the conditions under which a person may become an advocate, are not unconstitutional if they are prescribed by law and are made with a view to protecting the rights and freedoms of others, public order and morality.

The notion of worthiness encompasses an array of moral features, such as honesty, uprightness, virtue, devotion to duties, conscientiousness, discipline etc. The advocates' oath also refers to the performance of duties conscientiously, and in accordance with the Constitution, the laws of the Republic of Croatia, the Statute of the Bar and the Code of advocates' ethics, and to the obligation to uphold the reputation of the advocates' profession. Since maintaining this reputation is dependent also on new advocates accepted into the ranks it could be imperilled by persons whose previous behaviour and activities are demonstrated to be contrary to the notion of worthiness.

Summary:

In proposal to review the constitutionality of legal restrictions regulating entry to the profession of advocate it was alleged that those restrictions are not in conformity with the constitutional provision according to which only a penal judgment for a serious and exceptionally dishonourable criminal offence may, in conformity with law, have as consequence the loss of acquired rights or a ban on the acquisition of, certain rights to the conduct of specific affairs, for a specific period of time, if this is necessary to protect the legal order. According to the impugned provisions a person is not worthy of becoming advocate if he/she has been sentenced for a criminal act against the Republic of Croatia, be it an act against official duty, a criminal act done in self-interestedness or a criminal act involving dishonourable motives, and also any act which makes this person morally unworthy to be an advocate. Such a person has no right to be enlisted at the Bar for ten years after sentence for such acts, or for five years if the sentence was of pecuniary nature.

The Court did not accept the proposal.

Languages:

Croatian.

Identification: CRO-95-2-014

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.07.1995 / **e)** U-III-186/1995 / **f)** / **g)** *Narodne novine*, 47/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Decisions – Individual opinions of members – Dissenting opinions.
Institutions – Courts – Organisation – Members.

Keywords of the alphabetical index:

Judiciary, appointment of judges.

Headnotes:

The act on the appointment of a judge is an individual final act issued by a body of judicial power and since this act is not subject to any other legal remedy it is for the Constitutional Court to decide, via a procedure of constitutional action, whether this act violates constitutional rights and freedoms.

Constitutional provisions on the permanency of judicial office only concern judges appointed by the State Council of Judiciary, and not judges appointed on the basis of previous laws. Therefore judges appointed by the Parliament *(Sabor)* before 22 December 1990, that is before the establishment of the State Council of Judiciary, do not have the status of permanent judicial office, but were appointed by a temporary restricted mandate prescribed by laws valid at that time.

Summary:

A constitutional action was submitted by the president of a court who was not reappointed to office. He held that since he was appointed to his function after the Constitution became valid, the constitutional provision on the permanency of judicial office should apply in his case. He also held that the appeal to journalists present at the session of State Council of Judiciary to leave the session for a short time, whilst information on the private life of one of candidates was to be conveyed to members of the Council, violated the publicity of Council's work and also his equality of position in the procedure; and also that the disputed act does not contain reasons and thus renders impossible the protection of his rights before courts and the act's judicial review.

The action was dismissed.

Supplementary information:

Dissenting, one judge stated that the constitutional provision on the permanency of judicial office applies to all judges appointed after 22 December 1990 when the Constitution became effective because this provision needs no law to be directly applied.

Cross-references:

The Court held the same in case U-III-185/1995, also published in *Narodne novine* 47/1995.

Languages:

Croatian.

Identification: CRO-95-2-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.07.1995 / **e)** U-VIII-466/1995 / **f)** / **g)** *Narodne novine*, 47/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Decisions – Types – Suspension.

Keywords of the alphabetical index:

Temporary suspension of impugned act.

Headnotes:

The fact that the Constitutional Court has set in motion proceedings in which the constitutionality of a law is reviewed, is not in itself sufficient to stop the temporary implementation of individual judgments or activities which are based on that law. The Court may suspend this implementation if it would result in consequences which might be difficult to rectify. The Court will evaluate the existing and anticipated consequences and to what degree it might feasibly be difficult to rectify these.

Summary:

A weekly magazine sought suspending the execution of a court's final decision whereby it was obliged to pay damages.

The action was dismissed.

Languages:

Croatian.

Cyprus
Supreme Court

Reference period:
1 January 1994 – 31 August 1995

Important decisions

Identification: CYP-95-2-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 15.04.1994 / **e)** 285 / **f)** / **g)** to be published in the Cyprus Law Reports / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Detention, unlawful / Evidence.

Headnotes:

The constitutionally protected right of personal liberty renders inadmissible in evidence a statement given by a suspect for the commission of an offence taken whilst he was unlawfully detained.

Summary:

In the course of investigations for the commission of armed robbery, members of the police force without having reasonable suspicion that the accused committed the offence, stopped their car and asked them to go to the police station in order to be interrogated with regard to the commission of the above crime.

There, one of the accused made a written statement which he refused to sign. The above statement was held inadmissible in evidence by the Assize Court as it was taken in violation of the right of personal liberty safeguarded by Article 11.1 of the Constitution and by Article 5 ECHR. The decision of the Assize Court was upheld by the Supreme Court in a case stated.

Languages:

Greek.

Identification: CYP-95-2-002

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 29.11.1994 / **e)** 1912 / **f)** / **g)** to be published in the Cyprus Law Reports / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Judges.

Headnotes:

A previous judgment and the expression of views by a judge does not necessarily prejudge his opinion on constitutional and legal matters in a later judgment, especially in the case of judges of the Supreme Court, and it is not an impediment for the same judge to try a case between the same or other litigants in which the same legal point is raised.

Summary:

The case concerned an application for the exemption of a judge from the composition of the Court of Appeal when he had previously issued a judgment as a judge of first instance in another case on the same legal point which was raised on appeal.

The right to a fair trial is safeguarded by Article 30.2 of the Constitution and by Article 6.1 ECHR. Cyprus case-law coincides with the case-law of the European Convention on Human Rights on the matter.

Languages:

Greek.

Identification: CYP-95-2-003

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 27.03.1995 / **e)** 1207 / **f)** / **g)** to be published in the Cyprus Law Reports / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Capital gains tax.

Headnotes:

Article 35 of the Capital Gains Tax Law, 1980, is not contrary to any constitutional provision, nor is the connection of the imposition of capital gains tax to the market value of the property at the time of the transfer of the title contrary to Article 24.1 of the Constitution, which provides that the tax imposed must be according to the taxpayer's means.

Summary:

Article 35 of the law provides that agreements for the sale of immovable property which took place before the enactment of the law are ignored for the purposes of capital gains tax, unless a copy of the Agreement was deposited with the Director of Inland Revenue within two months of the above law coming into force.

Languages:

Greek.

Identification: CYP-95-2-004

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 10.03.1995 / **e)** 1510 / **f)** / **g)** to be published in the Cyprus Law Reports / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Religion.
Fundamental rights – Civil and political rights – Freedom of conscience.
Fundamental rights – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Co-existence of two laws / Laws / Marriage.

Headnotes:

The State determines the validity of marriages by laws enacted by the legislature. The characterisation of a marriage as valid in law, whether civil or ecclesiastical, refers to the nature of its ceremony.

Summary:

The decision of the Minister of Interior to strike out of the Annual Catalogue of Registered Ministers for the celebration of marriages, registered priests of the Church of Jehova's witnesses, was annulled for misconception of the law. It was held that the provisions of the Marriage Law Cap, 279, governing the matter are not inconsistent with the Civil Marriage Law enacted in 1990 (Law 21/90) and are in full agreement with the subsequent constitutional requirements concerning freedom of religion and marriage.

The term "marriage" in the Civil Marriage Law 21/90 means civil marriage between members of the Greek Community. The celebration of a civil marriage by virtue of the above law does not prevent the parties from having a church ceremony for their marriage according to their religion.

Languages:

Greek.

Identification: CYP-95-2-005

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 11.07.1995 / **e)** 305, 306 / **f)** / **g)** to be published in the Cyprus Law Reports / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Right to counsel.

Headnotes:

The right of an accused to be represented in court by an advocate of his choice is constitutionally safeguarded. The exercise of such a right is related to the right to a fair trial.

Summary:

The accused alleged that their privacy of communication with their advocates had been violated as a result of the seizure by a prison guard of the notes which they prepared as guidance for their advocates. This did not amount to a violation of their right to be represented by an advocate, safeguarded by Article 30.3.d of the Constitution, in the absence of other proof that the act of the prison guard had any adverse consequences on their right.

Languages:

Greek.

Czech Republic
Constitutional Court

Reference Period:
1 May 1995 – 31 August 1995

Statistical data

- Decisions by the plenary Court: 4
- Decisions by chambers: 19
- Number of other decisions by the plenary Court: 5
- Number of other decisions by chambers: 449
- Total number of decisions: 477

Important decisions

Identification: CZE-95-2-005

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 08.03.1995 / **e)** Pl.ÚS 14/94 / **f)** On the legality and legitimacy of Presidential decrees as a part of the Czechoslovak legal order / **g)** *Sbirka zákonů* (Official Gazette), no. 55/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
General principles – Rule of law – Certainty of the law.
General principles – Legality.

Keywords of the alphabetical index:

Presidential decrees, legitimacy.

Headnotes:

After more than forty years since its issue, the Presidential Decree of 1945 has no more constituent legal effect. A finding on his unconstitutionality under the present situation would be out of the question and endanger the principle of legal certainty.

Summary:

The Decree no. 108/1945 Gazette on confiscation of Enemy Property and Funds of National Restoration enacted by the President of the Republic was at the time of its issue not only legal but also a legitimate act. In view of the fact that this legal regulation has fulfilled its purpose, after more than forty years it no longer establish any legal relations and has no constituent effect. It cannot be, under these circumstances in question, proved whether it is contrary to a Constitutional Act or an international treaty according to Article 10 of the Constitution (Article 87.1 of the Constitution of the Czech Republic), because this finding would have no legal purpose. To proceed in any different way would bring the principle of legal certainty, one of the fundamental attributes of contemporary democratic legal systems, into question. Therefore the proposal to dismiss the above mentioned decree was rejected.

Languages:

Czech.

Identification: CZE-95-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 06.06.1995 / **e)** I.ÚS 30/94 / **f)** Placement of minor children in nursing homes without prior consent of their parents / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Referral by a court.
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:

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

Summary:

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

The appellant claimed that an order of the Court of Appeal rejecting his appeal from a decision of a first instance court should be set aside. The decision in question found the appellant guilty of a criminal offence in the provision of obligatory support to minors under Article 312.1 of the Penal Code since he failed to pay the nursing fee set by the Nursing institute for placing his son (a minor) in an institution following a decision by the municipal authority. In doing so, he alleged, the Court violated a fundamental right granted by Constitution as well as by international conventions. According to Article 32.4 of the Charter of Fundamental Rights and Freedoms, parents can be separated from their children against their will only by a court decision based on law. Article 91 of the Convention on the Rights of the Child contains a similar provision. The appellant had already objected on this basis in the course of earlier proceedings, but the administrative as well as the judicial bodies took no heed of his claim.

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

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

Languages:

Czech.

Identification: CZE-95-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 08.06.1995 / **e)** IV. ÚS 215/94 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Universally binding interpretation of laws.
Constitutional justice – Effects – Temporal effect – Retrospective effect.
General principles – Rule of law – Maintaining confidence.
General principles – Equality.

Keywords of the alphabetical index:

Property restoration, land / Rights of citizens of a State after its extinction.

Headnotes:

Application of property restoration Acts to former citizens of the common state cannot be refused on the basis that the common State no longer exists, since the very essence of these Acts should be to mitigate wrongs committed under the former communist regime.

Summary:

The principles of legal certainty and the protection of confidence in the law are characteristic features of a State governed by the rule of law. These principles also include a prohibition on the retroactivity of legal norms and/or their retroactive interpretation. If somebody acts in confidence in accordance with an Act which is in force, he or she should not be disappointed in this confidence. From this point of view, applying the law in a manner which would divide persons entitled to property restoration into two categories (i.e. those whose claims were decided before the common State was divided and those whose claims were brought before the court before 31 December 1992 but which

were decided only after 1 January 1993) cannot be held to conform with the Constitution.

Decisions of the District Land Office and judgments of the Regional Court have rejected claims by citizens of the Slovak Republic for restoration of real property in the territory of the Czech Republic under the Land Act (Act no. 229/1991 on Regulation of Ownership Rights with Respect to Land and Other Agricultural Property). The said decisions have been based on Article 1.2 of Constitutional Act no. 4/1994 which covers the bringing to an end of the Czech and Slovak Federal Republic and provides that Acts linking rights and duties to the territory of the former Czech and Slovak Federal Republic as well as State citizenship of the Czech and Slovak Federal Republic must, after 1 January 1993, be interpreted as relating to the territory of the Czech Republic and/or State citizenship of the Czech Republic unless the Act in question states otherwise. The grounds of the decision state that despite the fact that the Land Act contains no regulation for bringing a claim, a claimant who does not fulfil the conditions of State citizenship of the Czech Republic shall have no right to restoration of real property, irrespective of the fact that the claim was made at a time when he or she was a State citizen of the Czech and Slovak Federal Republic.

It is a specific circumstance of the case in question that even though no new legislation has been passed, nevertheless the division of the State is a new situation which has resulted in a circumstance whereby legal rules have begun to be interpreted differently. Legal opinions on this matter given by the Land Office as well as by the Court state that an Act which was originally relevant has become legally irrelevant under new legal circumstances. An unjustified inequality has therefore been established among persons entitled to property restoration. Constitutional principles on the protection of the confidence in law, the fact that the State is governed by the rule of law and the principle of equality laid down in Article 1 of the Constitution of the Czech Republic and Article 1 of the Charter of Fundamental Rights and Freedoms have thus been breached. The Acts on property restoration aim to mitigate the consequences of certain wrongs committed during the totalitarian communist regime. If the legislator was aware that it would be unrealistic to remedy all wrongs and that partial remedies would be held as satisfactory, it cannot be said that the interpretation of these rules should be dogmatic and in such strict conformance with the Constitution as to *de facto* give rise to new wrongs being committed against some people.

It was for these reasons that the chamber allowed the constitutional complaint in full and set aside the contested decision.

Languages:

Czech.

Identification: CZE-95-2-008

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 13.06.1995 / **e)** PL. ÚS 25/94 / **f)** Right to a cost-free providing of school aids / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of the formal validity of enactments.
Fundamental rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

School materials, cost-free provision.

Headnotes:

The right to free education does not relieve students and/or their parents or other persons from the obligation to contribute towards teaching aids.

Summary:

The right to a free education means that the State shall bear costs for establishing schools and school facilities and also for their operation. Primarily this means that no tuition fees shall be charged, i.e. primary and secondary education shall be provided free of charge.

The right to a free education cannot, however, mean that the State will bear all costs arising in connection with the implementation of the right to education. The specification of the extent to which schoolbooks and fundamental materials will be provided free of charge by the government cannot be subordinated to the notion of free education.

A group of members of the Parliament of the Czech Republic brought a claim for abrogation of Governmental Decree no. 15/1994, which specifies the extent to which students in primary and secondary schools are provided with free text-books and free fundamental

materials, reasoning that this legal rule is inconsistent with the Charter of Fundamental Rights and Freedoms (Article 33.2 – citizens shall be entitled to a cost-free primary and secondary education) and is also inconsistent with international conventions on human rights to the extent that the State should provide students with all texts and fundamental materials free of charge.

The plenary Court concluded that the right to a cost-free education does not relieve students and/or their parents or other persons from the obligation to contribute towards text-books and fundamental materials, and that the Government is entitled to specify the extent to which the State shall provide such materials for students free of charge.

The plenary Court stated that this rule does not contradict to the Constitution or international conventions, as claimed, and thus rejected the proposal for its abrogation.

Languages:

Czech.

Identification: CZE-95-2-009

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 22.06.1995 / **e)** PL. V 56/94 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
Institutions – Executive bodies – Application of laws.
Institutions – Courts – Procedure.

Keywords of the alphabetical index:

Presidential decrees, application / Property seizure under communist regime.

Headnotes:

Application of a decree on the confiscation of enemy property can be rejected for the decree has been issued outside of the period for property restoration claims, however the claimant must be given recourse to ordinary proceedings and provided with full court protection of his rights.

Summary:

There is a trend in the practice of commercial courts towards judging the fulfilment of legal conditions for State acquisition of property in accordance with Article 6.2 of Act no. 87/1991 on Extra-court Rehabilitation in cases where property has been confiscated under Presidential Decree no. 108/1945. This Act deals with the Seizure of Enemy Property and with Funds for National Reconstruction in cases where it was only after 25 February 1948 that the administrative body decided whether the conditions for confiscation under the above Decree had been fulfilled. The appellant claimed that the judgment of the Court of Appeal confirming the first instance court decision that rejected the action for the return of real property should be set aside, on the grounds that the confiscation had taken place outside the so called decisive period set down in Article 1 of Act no. 87/1991, i.e. the period between 25 February 1948 and 1 January 1990.

The plenary Court by its finding no. PL ÚS 14/94 of 8 March 1995 had rejected the claim for abrogation of Presidential Decree no. 108/1945 on the Seizure of the Enemy Property and on the Funds of National Reconstruction, stating that this legal rule was at the time of issue not only a legal but also a legitimate act. However, concerning constitutional complaints, the chamber found evident contradictions between the excerpts from the Land Register, with the result that it was not at all clear who owned the real estate before its confiscation. The ordinary courts were obliged to set aside these contradictions as the property had been confiscated according to Decree no. 108/1945. The ordinary courts should take on board the content of the confiscation decision and obtain supporting documents as to when and from whom the property was confiscated.

The Constitutional Court stated that the ordinary courts had not fulfilled their obligation to provide the claimant with the right to court protection under Article 36.1 of the Charter of Fundamental Rights and Freedoms, which provides that by way of specified proceedings anybody can vindicate his rights before an independent and impartial court. Therefore it allowed the complaint and set aside the contested decision.

Languages:

Czech.

Denmark
Supreme Court

Reference period:
1 May 1995 – 31 August 1995

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

Estonia
National Court

Reference period:
1 May 1995 – 31 August 1995

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

Finland
Supreme Administrative Court

Reference period:
1 May 1995 – 31 August 1995

Important decisions

Identification: FIN-95-2-001

a) Finland / **b)** Supreme Administrative Court / **c)** Fourth chamber / **d)** 27.06.1995 / **e)** 2743 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Freedom of movement.

Keywords of the alphabetical index:

Deportation.

Headnotes:

According to the Aliens Act all relevant facts and circumstances must be taken into account in their entirety whenever a foreigner's deportation from Finland is under consideration. The list of examples mentioned in the Act of facts and circumstances to be taken into consideration is not exhaustive. The existence, significance and effect of facts and circumstances concerned shall be decided on a case by case basis by means of a so called legal consideration in the administrative procedure as well as in the application of the law of the Supreme Administrative Court. Doctors' statements and information therein concerning the foreigner in question belong to such relevant facts and circumstances which, among others, must be taken into account when the foreigner's deportation is under consideration.

Summary:

The Ministry of the Interior had served a deportation order on the foreigner in question so that he would be deported to his home State. In his appeal to the Court, the foreigner demanded that the Ministry's decision by quashed. The Court found that the appellant had been staying in the country without a visa and residence permit. Therefore, according to Section 40.1.1 of the Aliens Act, there were grounds to deport him. However, according to doctors' statements, the appellant had been hospitalised in Finland at least ten times because of a severe depression. The appellant had been having thoughts of committing suicide and was in need of repeated periods of treatment. Those facts were to be taken into consideration under Section 41.1 of the same Act.

For these reasons, the Court held that the deportation of the appellant would have been inhuman. The Court ruled that, under the circumstances, there were not sufficient grounds to deport the appellant from the country. The Ministry's decision was thus found to violate the appellant's rights. Therefore, the Court quashed the decision by a majority of three votes in favour to one dissenting judgment.

Languages:

Finnish.

France
Constitutional Council

Reference period:
1 May 1995 – 31 August 1995

Statistical data

8 decisions, including:

- 1 decision on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.1 of the Constitution
- 1 decision on electoral matters, pursuant to Article 59 of the Constitution
- 1 decision on the disqualification of a member of parliament, taken under the institutional arrangements in the electoral code
- 1 decision downgrading a law, taken under Article 37.2 of the Constitution
- 2 decisions on the election:
  - proclamation of the results of the presidential election on 23 April and 7 May 1995
  - application lodged by Mr Louis Bayeurte
- 2 decisions on the internal workings of the Constitutional Council:
  - appointment of the representatives of the Constitutional Council
  - amendment of the rules governing the procedure followed in the Constitutional Council in disputes over election of members of parliament and senators.

Important decisions

Identification: FRA-95-2-008

a) France / **b)** Constitutional Council / **c)** / **d)** 28.06.1995 / **e)** 95-22 / **f)** Decision amending the rules governing the procedure followed in the Constitutional Council in disputes over the election of members of parliament and senators / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 29.06.1995, 9736 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Parliamentary elections.
Constitutional justice – Procedure – Hearing – Address by the parties.

Headnotes:

The Constitutional Council amended Article 17 of the rules governing the procedure of *plein contentieux* (full jurisdiction) in electoral matters.

The amended article makes it possible for both applicants and members of Parliament whose election has been challenged to ask to be heard by the Constitutional Council.

Summary:

This amendment of the rules of procedure makes it necessary to hold an oral but not a public hearing in an *inter partes* procedure which previously has been a purely written procedure.

The entry into force of new laws in 1995 now gives the Constitutional Council full discretion to determine the time-limits within which it must hand down its judgments. In view of the complexity of the facts and the law in the case of electoral disputes, particular with regard to campaign expenses, the Council considered it advisable to make it possible for the parties to be heard.

Supplementary information:

The question of the publicity of proceedings before the Constitutional Court, as far as electoral litigation is concerned, is the subject of an application before the European Commission of Human Rights (n° 24194/94 Pierre Bloch/France) which on the 30 June 1995 declared it admissible.

Languages:

French.

Germany
Federal Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

The first judgment was rendered during the previous reference period.

Statistical data

12 judgments of a chamber *(Senat)*, among them:

- 1 judgment concerning the conflict within a *Land*
- 1 judgment concerning a federal conflict
- 5 judgments concerning individual constitutional claims
- 1 judgment concerning proceedings for annulment
- 3 referrals by a court
- 1 preliminary judgment

13 cases dealt with (taking into account the joinder of cases)

1538 judgments of a section *(Kammer)*, among them 38 judgments which granted a request

1945 new cases

Important decisions

Identification: GER-95-2-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 26.04.1995 / **e)** 1 BvL 19/94, 1 BvR 1454/94 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift* 1995, 203.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Bankruptcy, late claims / Creditors, treatment in bankruptcy / German Democratic Republic.

Headnotes:

It is compatible with the guarantee of property if a claim which is proved too late is excluded from bankruptcy proceedings.

Summary:

In the former German Democratic Republic (GDR) a bankruptcy law has remained in force which excludes debt titles from bankruptcy proceedings if they are proved too late. The Constitutional Court has held this law to be constitutional, stating that it does not violate the principle of proportionality since such an exclusion is necessary in order to accelerate bankruptcy proceedings. The interests of the creditor are taken into account by fixing a time limit within which a creditor is normally able to prove his claim, and by admitting all titles which are proved too late in circumstances where the creditor is not responsible for the delay.

The relevant provision on the exclusion of respective claims was held not to violate the principle of equality notwithstanding the fact that in the western territories of the Federal Republic of Germany a creditor's title is not excluded when there is a delay, the only effect being that the creditor is obliged to pay the costs which such a delay provokes. The Constitutional Court justified the differentiation on the grounds of the special situation in the territories of the former GDR.

Languages:

German.

Identification: GER-95-2-018

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 15.05.1995 / **e)** 2 BvL 19/95, 2 BvR 1206/91, 2 BvR 1584/91, 2 BvR 2601/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Public international law, general principles / Spies, punishment of those of former GDR.

Headnotes:

No norm of public international law can be found which prohibits the punishment of espionage if such activities were conducted from the territory of a State which is later unified with the State subject to the espionage. Therefore, according to the Basic Law, such a norm cannot form part of Federal Law.

Members of the secret service of the former German Democratic Republic (GDR) cannot be punished under the law of the Federal Republic of Germany, for espionage activities conducted exclusively from the territory of the former GDR or from another State which would not have extradited them to the Federal Republic of Germany at the relevant time.

Summary:

After the unification of Germany members of the secret service of the former GDR were accused of espionage under the Federal Criminal Code. Some of them were convicted and brought a claim before the Constitutional Court. One criminal court referred the case to the Constitutional Court, firstly, because it held the criminal norm to be applied unconstitutional and, secondly, because it required verification that a norm of public international law existed which allowed for the punishment of spies where there had been a unification of States.

The Federal Constitutional Court came to the conclusion that it would not violate the principle of non-retroactivity if the criminal provisions on espionage which were in force before unification were applied to the spies of the former GDR. However, the punishment would violate the principle of proportionality.

The Federal Constitutional Court stressed that espionage has an ambivalent character, i.e. every State may practice espionage against other States but nevertheless punish any such activity directed against itself. Where a unification of States occurs, the legality of the espionage according to the laws of the State which undertakes it must be taken into consideration. Spies who acted exclusively in the territory of the GDR could in fact only be punished after unification, whereas spies of the Federal Republic of Germany who acted against the GDR would no longer be subject to punishment. According to the Constitutional Court the reasons against punishment prevail over the fact that it is in the interests of the State to punish spies.

Three justices dissented; they pointed out that such a decision would deviate from the principle of proportionality as developed by settled case-law; it was for Parliament to declare a general amnesty.

Languages:

German.

Identification: GER-95-2-019

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 16.05.1995 / **e)** 1 BvR 1087/91 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift* 1995, 359.

Keywords of the systematic thesaurus:

General principles – Relations between the State and bodies of a religious or ideological nature.
Fundamental rights – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Religion, freedom / Schools, crucifix.

Headnotes:

The Bavarian decree on elementary schools which prescribes that a crucifix must be hung in every classroom violates the Basic Law.

Summary:

In Bavaria, a decree made it mandatory for crucifixes to be hung in elementary school classrooms. The Constitutional Court held that although there is nothing obliging schools to set aside all cultural values, including Christian values in the education of children, they must nevertheless abstain from enforcing religious truth. In this sense the Constitutional Court considered exposure of children by the State to the crucifix in a locality which they are obliged to frequent to be a violation of the negative freedom of religion. The crucifix cannot only be interpreted as an element of occidental culture, since above all it is the expression of the Christian religion. The State cannot therefore require that it be hung in classrooms.

Three justices gave dissenting opinions in which they emphasised that according to the Basic Law the *Länder* are competent in cultural matters including the organisation of schools. They enjoy a great margin of appreciation in regulating this field. The law of the *Länder* is free to symbolise the values which are to be imparted by providing for the hanging up of crucifixes. By assuming responsibility for education, the State is obliged to allow for the development of certain freedoms including freedom of religion. It is up to the legislator to strike a balance between the positive and the negative aspects of freedom of religion. In any event, the negative aspects of freedom of religion are not paramount.

Cross-references:

Decision on crucifixes in court rooms: *Entscheidungen des Bundesverfassungsgerichts* vol. 35, 366.
Decision on Christian State schools: *Entscheidungen des Bundesverfassungsgerichts* vol. 41, 29 ss.; vol. 41, 65 ss.
Decision on prayers in schools: *Entscheidungen des Bundesverfassungsgerichts* vol. 52, 223.

Languages:

German.

Identification: GER-95-2-020

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 31.05.1995 / **e)** 1 BvR 1379/94 and 1 BvR 1413/94 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Sectoral decentralisation – Universities.
Fundamental rights – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Universities, autonomy.

Headnotes:

The freedom of science is not violated if a law assigns the power to adopt decrees concerning university examinations to the Ministry of Culture. The freedom to teach is not violated if the power to guarantee the obligatory content of lectures is vested in the dean.

Summary:

The subject of the individual complaint was a law of Nordrhein-Westphalia concerning universities. The Federal Constitutional Court held that it was constitutional, emphasising the fact that the legislator has to guarantee that universities will fulfil their obligation to give a professional grounding to students. By adopting decrees on examinations, the Ministry of Culture ensures that students will attain a certain level of knowledge within a reasonable time.

Languages:

German.

Identification: GER-95-2-021

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 20.06.1995 / **e)** 1 BvR 166/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfas-*

sungsgerichts (Official Digest of the Decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Right to appeal, legal instructions.

Headnotes:

The courts are not at present obliged to give the parties to a trial legal instructions on their right to appeal.

The court where a case has been pending is obliged to refer documents lodged with it for the appeal to the competent appeal court. These documents have to be submitted within a time-limit. If a document is lodged with the court early enough that it can be expected that the documents can be referred to the appeal court within the time-limits, a party may seek a leave to proceed out of time if they do not reach the appeal court in due time.

Summary:

One justice gave a dissenting opinion stating that the courts must give parties instructions on their right to appeal when they are not represented by a lawyer.

Languages:

German.

Identification: GER-95-2-022

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 22.06.1995 / **e)** 2 BvL 37/91 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift* 1995, 370.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Civil and political rights – Right to property.
Fundamental rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Property tax.

Headnotes:

The legislator must create equal criteria for the taxation of all types of property.

The guarantee of property limits the taxes which can be levied to the potential proceeds of property.

A property tax may only be levied if the total tax on the proceeds of the property leaves the owner with at least half of these proceeds.

Property used as an economic basis for guaranteeing private life must be exempt from property taxation.

With regard to taxpayers relying on larger economic basis in their private life, in accordance with the Basic Law, the legislator must respect the continuity of family property.

Summary:

According to a tax law, taxes on real estate were levied on the so called unified value *(Einheitswert)* of property, which was far below the real value, whereas on all other types of property, especially shares and assets, taxes were levied according to the real value. The Constitutional Court held this differentiation to be unconstitutional. Furthermore, the Constitutional Court established certain constitutional limits to the amount of property tax to be paid. It emphasised that taxation must not infringe on the substance of the property, but may be calculated only on potential gains made by the owner on the proceeds of the property. The economic basis which must be exempt from taxes is determined by the respective economic standard in the Federal Republic of Germany.

One justice gave a dissenting opinion; although in principle agreeing with the majority that the differentiation between real estate and other types of property in determining the values on which the tax is calculated was unconstitutional, he stated that the Constitutional Court was not empowered to give further directives to

the legislator as to how to regulate property tax. Furthermore, he said that the limits for property taxation as fixed by the majority did not follow from the Constitution. According to this dissenting vote the State is not confined to levying taxes solely on the potential proceeds of property, as distinct from the property itself.

Supplementary information:

By this decision, the Constitutional Court fixed specific limits to property taxation for the first time.

Languages:

German.

Identification: GER-95-2-023

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 22.06.1995 / **e)** 2 BvR 552/91 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Civil and political rights – Right to property.
Fundamental rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Death duties, Inheritance.

Headnotes:

The legislator must create equal criteria for the taxation of all types of property.

Death duties must respect the constitutional guarantee of the right to an inheritance.

Summary:

According to a tax law, taxes on real estate were levied on the so called unified value *(Einheitswert)* of property, which was far below the real value, whereas on all other types of property, especially shares and assets, taxes were levied according to the real value. The Constitutional Court held this differentiation to be unconstitutional.

Furthermore, the Constitutional Court established that death duties must be regulated in such a way that the majority of an inheritance is conveyed to the heir; small inheritances must even be exempt from taxes.

Languages:

German.

Identification: GER-95-2-024

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 04.07.1995 / **e)** 1 BvF 2/86, 1 BvF 1/87, 1 BvF 2/87, 1 BvF 3/87, 1 BvF 4/87, 1 BvR 1421/86 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Strikes and unemployment benefit / Industrial dispute, neutrality of the State.

Headnotes:

The law on labour promotion does not violate the freedom to strike if it excludes unemployment benefit claims by a person who is unemployed due to an industrial dispute in which he did not participate if he was employed by an enterprise which is situated in an area affected by the industrial dispute and whose workers will profit from the dispute, or which is situated in a different area in which, however, the workers are raising the same claims.

The legislator has great freedom in deciding how to regulate the conditions of industrial disputes.

Summary:

In 1986, the legislator adopted a law which excludes workers from claiming unemployment benefit if they become unemployed during an industrial dispute and belong to an enterprise which is not involved in the conflict, but is situated in an area affected by the dispute and whose workers may profit from the dispute, or which is situated in a different area if claims the same as those in the dispute are raised. The law is justified by the principle of the neutrality of the State. Workers in whose favour an industrial dispute is undertaken should not be supported by money from the State. This legislative measure was introduced in response to the Trade Union practice of organising strikes so that only certain "key enterprises" were affected by an act which would be sufficient to stop production in the whole of that sector of industry, resulting in workers of other enterprises becoming unemployed. The Constitutional Court held that the legislator has a large margin of appreciation in establishing the legal conditions for industrial disputes. Article 9.3 of the Basic Law, concerning labour disputes, limits the legislator only in so far as it must not make it impossible for any of the parties to take part in a labour dispute. The Constitutional Court decided that the legislator could adopt the above mentioned regulations in order to avoid State interference in labour disputes by paying unemployment benefit to persons affected by a strike.

Languages:

German.

Identification: GER-95-2-025

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 05.07.1995 / **e)** 1 BvR 2226/94 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift* 1995, 353.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Communications, surveillance / Counter-intelligence, data, collection, evaluation / Personal data.

Headnotes:

Whereas the application of the Law concerning the surveillance of telephone communications cannot be suspended in an application for an interlocutory injunction, the use and evaluation of collected personal data should be restricted to cases where a concrete suspicion exists that criminal acts are planned, are being committed or have been committed.

Summary:

According to Law G 10, counter-intelligence should be empowered to collect and evaluate information about phone calls via satellite if such information is necessary in order to prevent attacks on the Federal Republic of Germany, drug trafficking and counterfeiting.

A professor of criminal law felt that his right to confidentiality in his telephone communications had been violated. Doing research in the field of drug trafficking he heard that information could be collected on the basis of the new law. He requested an interlocutory injunction which would suspend the law. The Constitutional Court, referring to settled case-law, weighed up on the one hand the disadvantages for the State if the law were preliminarily suspended and then later in the main proceedings were considered constitutional and on the other hand the disadvantages which would arise if the law were not suspended and later were held to be unconstitutional. The Constitutional Court came to the conclusion that it would not be possible to suspend the power to carry out telecommunication surveillance since this would mean the disadvantages for public security would prevail over the disadvantages to private individuals on whom information is collected. However, the Constitutional Court did suspend the power of counter-intelligence to evaluate the information collected. It decided that the disadvantages for the State caused by the delay in evaluation if the suspension of the power to evaluate went ahead would be of less importance than the violation of the rights of persons whose telephone communications are evaluated on the basis of a law which would later be held to be unconstitutional.

Languages:

German.

Identification: GER-95-2-026

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 17.07.1995 / **e)** 2 BvH 1/95 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions.
Constitutional justice – Types of claim – Claim by a private body or individual – Political parties.
Constitutional justice – Procedure – Parties – *Locus standi.*
Institutions – Legislative bodies – Organisation.

Keywords of the alphabetical index:

Constitutional Courts, federal and regional / Parliamentary groups, rights / Subsidiary competence.

Headnotes:

When the law on regional constitutional courts limits standing in conflicts between governmental bodies to a certain parliamentary sector which excludes parliamentary groups, a parliamentary group can bring the case before the Federal Constitutional Court.

A person who is a witness in a case dealt with by a parliamentary commission may be excluded from the commission when questions are discussed to which that person must bear witness. This exclusion does not violate the rights of a parliamentary group even if it appoints the person in question to the commission.

Summary:

The Federal Constitutional Court is competent to decide on questions concerning conflicts between regional bodies only in so far as the Constitutional Court of the region concerned lacks competence. The general admissibility of conflicts between bodies before the regional Constitutional Court does not prevent the Federal Constitutional Court from deciding a case concerning a conflict between regional bodies if certain bodies which have a standing before the Federal Constitutional Court cannot bring the case before the regional Constitutional Court. This follows from the fact that the subsidiary competence of the Federal Constitutional Court guarantees that all bodies of a region enjoy protection against the violation of their constitutional rights.

Supplementary information:

Further decisions concerning the relation between federal constitutional jurisdiction and the constitutional jurisdiction of the *Länder*: *Entscheidungen des Bundesverfassungsgerichts* 4, 375 <377>; 60, 319 <323, 326>; 62, 194 <199>.

Languages:

German.

Identification: GER-95-2-027

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 18.07.1995 / **e)** 2 BvQ 31/95 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift* 1995, 357.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions.

Keywords of the alphabetical index:

Constitutional Courts, federal and regional / Parliamentary group, rights.

Headnotes:

The Parliament of Thuringia must not receive information concerning the collaboration of one of its members until one month after the day upon which the Thuringian Constitutional Court reached its *quorum*. Information already received should be kept under lock and key.

Summary:

A deputy required the Federal Constitutional Court to grant an interlocutory order prohibiting the Thuringian Parliament from accepting information on her collaboration with the secret service of the German Democratic Republic (GDR). The question concerned the relationship between regional bodies for which the Constitutional Court of the *Land* is competent in so far as such a Court exists. In Thuringia the justices of the Constitutional Court had been elected but not yet appointed at the time when the case was brought before the Federal Constitutional Court.

The Federal Constitutional Court granted an interlocutory order to take effect one month after the day upon which the Thuringian Constitutional Court reached its *quorum.*

Languages:

German.

Greece
State Council

Reference period:
1 May 1995 – 31 August 1995

Important decisions

Identification: GRE-95-2-001

a) Greece / **b)** State Council / **c)** 6th Section / **d)** 19.06.1995 / **e)** 3356/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Relations between the State and bodies of a religious or ideological nature.
Fundamental rights – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Religion and education of the child / Religious conscience / Religious education / Rights of the child / School punishment.

Headnotes:

Pupils must attend religious ceremonies in school (daily prayer, mass) and class in religion; the latter is taught in conformity with the principles of the Christian Orthodox faith.

Although constituting a de facto declaration of profession of faith, public participation by pupils in religious ceremonies and their mandatory attendance in classes on religion are not inconsistent with the Constitution.

If a pupil or pupils, or their parents, inform the school director that, for reasons of religious conviction, i.e. because they have other beliefs, are members of another faith or are atheists, such children do not wish to attend the classes in religion provided for under the school curriculum, the director must immediately take the necessary steps to comply with this request; the pupil must not incur any punishment for non-attendance.

A pupil may refuse to say prayers if other personal reasons so warrant (lack of courage, problems of a psychological nature etc.). The school director must

inquire into the real reasons for this refusal and take action accordingly.

Summary:

The Constitution provides that freedom of religious conscience is inviolable; the enjoyment of human and civil rights is not contingent upon religious beliefs; all religions are free, and worship is unfettered and protected by law. One of the purposes of education, a fundamental State duty, is to promote national and religious awareness.

Article 9 ECHR, which has supra-legislative value, guarantees freedom of religion; Article 2 of the First Protocol stipulates that no person shall be denied the right to education, and the State shall respect the right of parents to ensure such education and teaching of their children in conformity with their own religious and philosophical convictions.

As the above-mentioned provisions show, and having regard to the fact that the vast majority of the Greek people are of the Christian Orthodox faith, defined by the Constitution as the predominant religion, the aim of school education is, *inter alia*, "to promote" the religious awareness of Greek children, in line with the principles of Christian Orthodox teaching.

In one case, a school director imposed a punishment upon a pupil, one of the reasons given being the pupil's refusal to say prayers. The Teachers Board subsequently found that the pupil's conduct was reprehensible, a judgment that was based in part on the fact of the pupil's punishment. The State Council, before which an appeal was brought for abuse of power, ruled that the action of the Teachers Board was not legal and that the grounds for the legality of punishments imposed upon pupils, although constituting measures associated with internal regulations that are not subject to judicial review, may be reviewed following interlocutory proceedings if they serve as the basis for another enforceable act. In this particular case, the punishment imposed by the director because the pupil refused to say prayers did not justify the decision of the Teachers Board, since the director had not inquired into the reasons for the refusal. The decision of the Teachers Board was set aside.

Languages:

Greek.

Identification: GRE-95-2-002

a) Greece / **b)** State Council / **c)** 3rd Section / **d)** 29.06.1995 / **e)** 3704/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Relations between the State and bodies of a religious or ideological nature.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Freedom of conscience.
Fundamental rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Ineligibility / Clergy.

Headnotes:

The rule whereby the clergy of recognised religions are ineligible for, and prohibited from, standing in municipal elections is based on legitimate and objective *criteria*. Consequently, ineligibility constitutes a legitimate restriction on both the right to stand for public office and on religious freedom, in particular the freedom of the clergy of recognised religions to hold public employment or office.

Summary:

The purpose of ineligibility is to ensure a separation of church and State, thereby protecting the religious communities and their clergy from the dangers inherent in the exercise of public office. In order to guarantee that voters can form their opinion unhindered and express themselves freely, the rule also aims to avoid the dangers associated with the special spiritual relations between the clergy and members of religious communities.

Under a provision adopted shortly before the municipal elections of 1994, legislation was enacted to make certain public officials (members of the judiciary, officers in the armed forces and police officers) and the members of the clergy of recognised religions ineligible for a number of offices in local government (presidents of regions, prefects, mayors, town councillors etc.). Ineligibility is lifted if the persons concerned resign from their functions before declaring their candidature or, for officials or heads of institutional units, before 1 January of the year of the election; this rule does not, however, apply to members of the clergy, for whom ineligibility is absolute.

During the municipal elections of October 1994, a Muslim imam was elected mayor of a municipality. In an appeal to the administrative courts (first instance and appellate), his opponent argued that as members of the clergy are ineligible, the election was null and void. The court of first instance and the appellate judge rejected the appeal and ruled that ineligibility of members of the clergy was unconstitutional. Adjudicating in an appeal to set aside the judgment, the State Council found that the ineligibility at issue was not, in fact, unconstitutional, because the public interest was concerned. The question also arose as to whether the imam was really a clergyman of the Muslim faith. The rapporteur on the case consulted the mufti, who gives opinions *ex officio* on subjects concerning sacred Muslim law. In an opinion addressed to the State Council, the mufti defined the powers and duties of imams and their status in general and also noted that the relationship between imams and their congregations was of a spiritual nature. On the basis of these considerations, it was decided that imams were also ineligible; the application to set aside the ruling was granted and the case was returned before the appellate judge, who will have to examine whether the statement by the elected official, who denies that he is an imam, is true.

Languages:

Greek.

Hungary
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

Number of decisions

- Decisions by the Plenary Court published in the Official Gazette: 15
- Decisions by chambers published in the Official Gazette: 12
- Number of other decisions by the Plenary Court: 9
- Number of other decisions by chambers: 14
- Number of other (procedural) orders: 11
- Total number of decisions: 61

Important decisions

Identification: HUN-95-2-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.06.1995 / **e)** 42/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette) no. 56/1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Certainty of the law.
General principles – Publication of laws.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Acquired rights / Economic stability / Laws, drafting and editing / Laws, reasons for annulment.

Headnotes:

Deficiencies in the drafting or editing of a law are not sufficient reason for the annulment of that law. The Constitutional Court may annul a law only on the grounds that it is unconstitutional. If a contested Act is not contrary to any provision of the Constitution, it is not legally possible to annul it.

Summary:

The government's austerity plan passed by the legislature as Act 48 of 1995 on the Amendment of Certain Laws to promote Economic Stabilisation is a loose set of amendments to laws. The Act, indeed, made amendments to a significant number of laws, some of which were substantial whereas others only affected a single provision. Frequently, the amendments had no substantial interrelation with one another. Nevertheless, these facts were not contrary to any specific provision of the Constitution.

The Constitutional Court emphatically pointed out that constitutionality also includes the requirement that various bodies operate efficiently (including Parliament, *inter alia*), something which is inconceivable without a rational system of legal editing and drafting. In the interests of legal certainty and voluntary observance of the law, the valid text of the amended legal regulations must be uniformly published as soon as possible.

Supplementary information:

The government introduced an austerity package affecting a series of laws with a view to economic stabilisation. The Court unanimously, in this and in four consequent decisions, struck down critical sections of the austerity plan.

Languages:

Hungarian.

Identification: HUN-95-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.06.1995 / **e)** 43/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette) no. 56/1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Social State.
General principles – Rule of law – Certainty of the law.
General principles – Rule of law – Maintaining confidence.
Fundamental rights – Civil and political rights – Right to property.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Family life / Motherhood / Social welfare / Acquired rights.

Headnotes:

The Constitutional Court declared that legal certainty, as the most significant conceptual element and theoretical basis for the protection of acquired rights, is of particular significance for the stability of welfare systems.

Where there is a shift to a new system of welfare benefits, the constitutional requirement which relates to the element of legal certainty is that there be a guaranteed changeover period to afford those concerned the necessary time to adjust to the amended provisions and to allow for family finances to be adjusted to the new conditions.

Summary:

Under the previous system of childcare, families raising children were supported through a system of several different interrelated institutions. The Economic Stabilisation Act annulled or altered the conditions of child care benefits (virtually overnight). As a result of the change in the law, a certain proportion of families were no longer eligible under the new system. The provisions of the Act altered the benefit system by transforming it into a so-called aid system based on the principle of need. These changes were very substantial since they replaced the familiar benefit system that families had grown accustomed to and also affected vested rights acknowledged by the former system.

The Constitutional Court stressed that the benefits and their related expectations could not be substantially altered overnight or without sufficient reason. Special reasons were needed for changes to be instigated without a transition period.

In the case of social security benefits where the insurance element has a role to play, the constitutionality of the reduction or termination of benefits should be evaluated according to the criteria of protection of property.

Mothers and children are especially protected by the Hungarian Constitution. The termination of maternity grants and childcare allowances violates the State's obligation to protect mothers and children.

In implementing the legal regulations aimed at transforming the welfare benefit system, it is a constitutional requirement that the State's actions be calculable, so that people can plan economic or family-related decisions.

The Constitutional Court found the entry into force on 1 July of a law promulgated on 15 June to be unconstitutional.

The Court ruled that in the interest of protecting vested rights, legal certainty requires that the benefits be guaranteed under conditions no less favourable than those specified in legal regulations in force with respect to children already born by or to be born within 300 days of 15 June 1995.

One judge gave a concurring opinion emphasising that aggravating the conditions for raising children, especially for the sake of budget savings of negligible importance, can hardly be harmonised with the Constitution.

Supplementary information:

One of five interrelated decisions examining the constitutionality of the Government's austerity plan.

Languages:

Hungarian.

Identification: HUN-95-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.06.1995 / **e)** 44/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette) no. 56/1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Social State.
General principles – Proportionality.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Sickness benefit / Social welfare.

Headnotes:

The Constitutional Court declared that the partial shifting of burdens to insured persons and to employers on the grounds of difficulties encountered in the operation of the social security system, provided that it is proportionate and that the reasons behind it are constitutional, is not necessarily unconstitutional. In such matters, however, it is a constitutional requirement that those concerned learn of the risk of such a shift in burdens early enough to be able to calculate further risks and to make arrangements for insurance cover.

Summary:

According to the amendments to the Economic Stabilisation Act, anyone who is not eligible for sick leave under the Labour Code shall be entitled to sickness benefit at the earliest following the twenty-fifth day of his/her certified disability in a calendar year. The Labour Code amended by the same Act entitles the employee to 25 working days' sick leave in each calendar year for the period of disability due to sickness, during the first five days of which the employee shall not be entitled to remuneration, whereas the employer must pay 75 % of the absence fee to the employee for the remaining period of the sick leave.

The Constitutional Court did not examine the merits of the petitions because, in the Court's opinion, the provisions providing for the immediate entry into force of the law promulgated on 15 June 1995 as from 1 July are in themselves unconstitutional. The Court therefore annulled these provisions and declared that the amendments should not come into force on 1 July.

As a matter of principle, the Constitutional Court pointed out that irrespective of whether the shift of coinsurance to the insured was strikingly disproportionate, the introduction of the rules with immediate effect constituted such a significant withdrawal of guarantees with respect to the insured that their social security entitlements were weakened to a constitutionally unacceptable extent. The State guarantees the disbursement of social security benefits even if its expenditure exceeds its revenue. This underlying State guarantee would be terminated owing to the fact that the change also has an unexpected effect on employers, and there is no assurance that employers will actually fulfil their obligation to pay employees. The change also amounts to a withdrawal of the rights of the insured, because its unexpectedness endangers their social security rights as guaranteed by the Constitution.

Supplementary information:

One of five interrelated decisions examining the constitutionality of the Government's austerity plan.

Languages:

Hungarian.

Identification: HUN-95-2-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.06.1995 / **e)** 45/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette) no. 56/1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Social State.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Right to property.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social insurance, mandatory.

Headnotes:

Mandatory insurance limits both an individual's autonomy to act and the traditional material base of such autonomy, which is the right to property. This does not imply an unconstitutional limitation on the right to property, if it is necessary and proportionate and does not affect the essential content of the right to property.

Summary:

The Economic Stabilisation Act provides for an obligation to pay social security contributions at 44 % with respect to payment of author's fees, remuneration of performing artists and fees for intellectual property.

According to Article 70/E of the Constitution, "the citizens of the Republic of Hungary are entitled to social security; they are entitled to receive benefits necessary to sustain themselves in old age, sickness, disablement, widowhood, orphanhood and if they become unemployed as a result of circumstances beyond their control. The right to benefits is satisfied through social insurance and the system of social security institutions".

The Constitutional Court decided that in the case of social security contributions paid after fees for intellectual property, where the insurance component is absent, this obligation falls outside the scope of social insurance, the employees have no related interest, and it does not give rise to any kind of social security benefit. The provisions in question therefore attach the payment obligation not to an insured status but to certain kinds of contracts and services imposed by the law that place a unilateral burden on the rights of the payer. Such a payment obligation imposes a disproportionate constraint on the right to property without promoting the realisation of any other right or obligation. The Court therefore declared the provision unconstitutional.

Supplementary information:

One of five interrelated decisions examining the constitutionality of the Government's austerity plan.

Languages:

Hungarian.

Identification: HUN-95-2-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.06.1995 / **e)** 46/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette) no. 56/1995 / **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:

Data protection / Personal identification number.

Headnotes:

The universal personal identification number (PIN) is in conflict with the right to self-determination of information and implies a direct and significant restriction on the basic rights protecting personal data. The extension of the validity of the personal identification number is unconstitutional because it is avoidable and constitutes a disproportionate constraint on a fundamental right.

Summary:

The Economic Stabilisation Act includes several provisions on the amendment of Act 52 of 1992 which deals with the Registration of the Personal Data and the Addresses of Citizens. The validity of the PIN, currently extending to 31 December 1995, would be extended to 31 December 1999. Legislators had provided no proof whatsoever that there was a compelling reason for so extending the validity of the PIN number. Constitutionally, it is not justifiable to severely limit fundamental rights over a ten year period, having regard to the declaration of the Rule of Law in the Constitution. The Court therefore declared that the extension of the validity of the PIN number was unconstitutional.

Supplementary information:

One of five interrelated decisions examining the constitutionality of the Government's austerity plan.

The decision built upon a 1991 decision of the Constitutional Court that declared unconstitutional the unlimited, general and uniform use of the personal identification number (PIN), and decision no. 29/1994 of 20 May 1994 that declared unconstitutional the use of the PIN number in specific areas.

Languages:

Hungarian.

Ireland

Supreme Court

Reference period:
1 May 1995 – 31 August 1995

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

Italy
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

Meetings of the Constitutional Court during the period from 1 May to 31 August 1995: 7 public hearings and 7 hearings in chambers. The court gave 275 decisions in all.

Decisions given in cases where constitutionality was a secondary issue: 129 judgments, 31 finding measures complained of unconstitutional and 113 court orders.

Decisions given in cases where constitutionality was the main issue: 22 judgments, 11 finding measures complained of unconstitutional, and 4 court orders.

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: 14 judgments and 1 court order; (b) between State authorities in disputes between public bodies over the exercise of powers: 3 judgments and 4 court orders.

Important decisions

The following decision, published in Bulletin 1995/1, contained some errors. It is being published again in its corrected version.

Identification: ITA-95-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 11 January 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 – Admissibility of referendums and other consultations – Referendum on the repeal of legislation.

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:

A petition for 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, a petition for 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-95-2-008

a) Italy / **b)** Constitutional Court / **c)** / **d)** 04.05.1995 / **e)** 149/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* n° 19 of 10.05.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Relations between the State and bodies of a religious or ideological nature.
General principles – Proportionality.
General principles – Reasonableness.
Institutions – Courts – Ordinary courts – Civil courts.
Fundamental rights – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Civil proceedings / Oath / Witnesses.

Headnotes:

Individual conscience, as the Court has already pointed out on several occasions, is safeguarded by the Constitution in order to ensure that the expression and exercise of fundamental freedoms and inalienable human rights – of which individual conscience is the underlying principle and to which it contributes – are not unreasonably hindered by estoppels and impediments imposed on the self-determination of conscience. It therefore follows that the protection of the freedom of conscience must be proportional "to the absolute priority and fundamental character" attributed to it on the scale of values established by the Italian Constitution.

As regards the oath taken by witnesses: as a result of the legislator's choice in the new Code of Criminal Procedure of 1988, witnesses are now no longer expected, as in other systems, to take an oath but to make a statement in which they solemnly undertake to tell the truth. This gave rise to an unreasonable difference, since only witnesses in civil proceedings were obliged to take an oath, amounting to discrimination in the protection of the witness's freedom of conscience compared to criminal proceedings. This difference can only be justified by the different structure of the two types of proceedings, particularly as the "*ratio legis*", which consists in inciting witnesses to tell the truth, is the same.

Although it should, for the purposes of the application, only rule on the constitutional legitimacy of the oath taken by witnesses in civil proceedings, the Court nevertheless notes that the legislator's choice with regard to criminal proceedings implements the principle of the secular nature of the State, which is one of its formal attributes established by the Constitution of the Republic.

Summary:

In the course of civil proceedings in which a witness refused to take the oath because of his religious beliefs, a Turin district judge raised the problem of the constitutionality of Article 251 of the Code of Civil Procedure in so far as unlike the new Code of Criminal Procedure which only requires witnesses to solemnly undertake to tell the truth, it obliges witnesses to take the oath. This rule was objected to as being contrary to Articles 3, 19 and 24 of the Constitution relating respectively to the principle of equality and reasonableness, religious freedom and the right to defence. The Court, recalling some of its previous judgments, reasserted the importance within the constitutional framework of freedom of conscience – which is considered to underlie all other human rights – and consequently the particular protection that should be attributed to it. Moreover, the Court referred to its 1979 judgment in which it acknowledged the right of unbelievers to take the oath only before men and not before God, thus amending the original rule which was the subject-matter of this judgment on constitutionality.

Taking into consideration the wording of the new 1988 Code of Criminal Procedure, which no longer requires that witnesses swear an oath but only "undertake" to tell the truth, the Court found that there was no justification for the obligation on witnesses to take an oath in civil proceedings, as stipulated in the disputed rule, and that the choice made by the legislator in the Code of Criminal Procedure was equally appropriate for civil proceedings.

Finally, the Constitutional Court, although conscious of the importance of the request made by the referring judge concerning the problem of the constitutional legitimacy of the oath in general, noted that the legislator's choice constituted "one of the possible means of implementing the principle of the secular nature of the State", an essential characteristic of the form of State established by the Constitution.

Cross-references:

With regard to the particular value attached to individual conscience and the protection that should be attributed to this freedom, the Court quoted several passages from judgments no. 467/1991 and no. 422/1993, concerning conscientious objection and refusal to do military service.

As regards the possibility already available to unbelievers to take the oath without referring to God, reference is made to judgment no. 117/1979.

In judgment no. 234/1984, which it described as a specific precedent, the Court acknowledged the existence of a conflict between a witness's duty to take the oath and freedom of conscience when his religion forbids him to do so, even if the judge declared on that occasion that the question put to him was inadmissible, arguing that a decision on admissibility would have led to a plethora of alternative solutions and that the choice could only be made by the legislator (the new provision of the Code of Criminal Procedure introduced in 1988 serves as a model). As regards the principle of the secular nature of the State as an essential characteristic of the form of State, reference is made to judgments nos. 203/1989, 195/1993 and 259/1990.

Languages:

Italian.

Identification: ITA-95-2-009

a) Italy / **b)** Constitutional Court / **c)** / **d)** 10.05.1995 / **e)** 161/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* n° 20 of 20.05.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between State authorities.
Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Advertising / Propaganda / Referendum, campaign.

Headnotes:

Although an appeal relating to disputes between public authorities and calling for the examination of rules contained in a law is generally inadmissible, the same cannot be said for an appeal concerning rules contained in a legislative decree. This is due to the

provisional character of the latter, which makes constitutional review by way of an interlocutory application more or less impossible if the decree has not become a law, whereas the legislative decree may have had irreversible effects, for which it should be possible to hold the approving government liable.

It is also the responsibility of the Court to review the legitimacy of legislative decrees, their necessity and urgency, by verifying the existence of essential grounds for the measure.

No obstacle or limit on the scope of legislative decrees relating to referendums can be inferred from the Constitution; at all events, even if one wished to give equal recognition to referendums and elections – for which limits may, on the contrary, be inferred from the constitutional rules – the disputed legislative decree was intended to settle a matter (namely, the arrangements for the referendum campaign) that must be distinguished from the actual referendum campaign itself which concerns the vote and the referendum procedure.

There is no doubt that there are differences between referendum campaigns and electoral campaigns, but these do not oblige the legislator to draw up different rules in sectors with common characteristics.

As the legislative decree in question is designed to regulate the ways in which fundamental political rights are exercised, the limits to which the appellants have drawn attention must be subjected to rigorous examination, especially as the rules concerned were approved by a provisional measure (viz a legislative decree).

In electoral campaigns the existence of a time-limit on advertising can be justified by the desire to favour propaganda so as to protect voters from short, peremptory messages. In referendum campaigns messages tend, on the contrary and in view of the dual nature of the question, to be simplified, which means that there is no longer a clear distinction between propaganda and advertising. Accordingly, the limits imposed on advertising in referendum campaigns must be considered to be particularly serious and unreasonable. This reasoning applies above all to those provisions of the disputed decree which prohibit advertising in periods when there is a succession of elections and referendums, particularly as this prohibition can lead, as in the instant case, to the practical elimination of advertising as such. Consequently, these provisions must be set aside on the grounds that they are unreasonable and excessive and therefore limit the powers which the Constitution attributes to the appellants (the proponents of the referendum).

Summary:

The proponents of certain referendums (whom the Court has long recognised as having the status of public authorities for the purposes of the admissibility of appeals on disputes to which they are party) have raised the problem of the attribution of powers concerning the rules contained in the legislative decree of 20 March 1995 no. 83 "Urgent measures for parity of access to information channels during electoral and referendum campaigns". The present challenge to both the government and the controller for broadcasting and publishing concerned a measure introduced on 22 March 1993 which the Court described in one of its orders as not having the effect of restricting the powers assigned to the appellants. It thus declared the appeal inadmissible.

As regards the admissibility of appeals relating to conflicts between authorities concerning legislative rules, see the first principle mentioned in the "Headnotes".

In substance, the appellants challenged various rules contained in the legislative decree approved by the government to regulate access to the media during electoral and referendum campaigns. The particular aspects disputed were the extension of the rules laid down for electoral campaigns to referendum campaigns and the prohibition on advertising on the assumption that there would be a succession of electoral and referendum campaigns (which turned out to be the case). It was argued that such rules would prevent those in favour of or against the referendum proposals from expressing their points of view.

Supplementary information:

This decision by the Court partially allowing the appeal by some referendum committees was widely accepted by both the public and politicians, in particular with regard to the resumption of advertising for the referendum requiring that the number of private national television channels that could be controlled by the same operator (specifically the Fininvest group owned by Mr Berlusconi) be reduced from three to one.

Cross-references:

As regards the requirement that the number of private national television channels controlled by one and the same operator be reduced to a maximum of two, in accordance with the existing number of channels, see Court judgment no. 420/1994 (Bulletin 3/1994).

As regards the most negative aspect of the practice of renewing non-converted legislative decrees, the Court

also cited judgment no. 302/1988. As regards the possibility for the Court to review the existence of the need and urgency – as fundamental requirements in terms of their constitutionality – of legislative decrees, see its recent judgment no. 29/1995.

With regard to the inadmissibility of appeals on disputes between public authorities with regard to legislative acts, the Advocate-General and the Constitutional Court also referred to judgment no. 400/1989.

Languages:

Italian.

Identification: ITA-95-2-010

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.07.1995 / **e)** 356/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* n° 31 of 26.07.1995 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Defence counsel / Disciplinary procedure / Army, members of the armed forces.

Headnotes:

The fact that it is not obligatory for an officer to represent the accused in disciplinary proceedings before the Disciplinary Board for non-commissioned officers of the Army, Navy and Air Force is not contrary to either the principles of reasonableness and equality (Article 3 of the Constitution) or the right to defence (Article 24 of the Constitution).

Regarding Article 24 of the Constitution, which safeguards the right to defence, it is necessary to explain that this right does not fully extend beyond the sphere of Court jurisdiction to cover all administrative disputes. The adversarial principle must, however, still prevail in such disputes so as to safeguard the essential values inherent in the inalienable rights of the person, particularly if there is a possibility that the sanctions imposed have an effect on individual constitutional rights, such as the continuation of service or working relations.

The provision of the law on disciplinary proceedings which forbids defence counsel appointed by the accused or nominated by the President of the Disciplinary Board from defending the accused before the Board in the latter's absence is contrary to Article 24 of the Constitution.

The principle of the obligatory prior legislative definition of illegal acts enshrined in Article 25.2 of the Constitution refers to the criminal field, and may not be immediately extended to all fields of illegality and in particular to the disciplinary field. However, if the principle underlying this provision, which is designed to protect the individual from arbitrary punishment, must be applied to the specific legislative definition of forbidden conduct and corresponding penalties, it must also apply to the disciplinary powers of the public administration by requiring at least that punishable conduct be legally defined.

Summary:

The trial judge claimed that it was unlawful not to have made provision for the obligatory presence of a defence counsel in proceedings concerning disciplinary measures (e.g. demotion), and in order to illustrate this point, he compared the instant proceedings with those provided for in the law on "confinement to barracks (close arrest)" (*consegna di rigore)*, in which it is obligatory to appoint a counsel for the defence.

Referring to the principle of equality (Article 3 of the Constitution), the Court found that the circumstances are not comparable. It is only in relation to penalties of "close arrest" for up to 15 days that the principle of personal freedom safeguarded by Article 13 of the Constitution is not observed.

In order to bring an NCO before the disciplinary board, this law requires that "the grounds for disciplinary action" on which the accused may be lawfully demoted under the law be connected to "liability for acts incompatible with the status of NCO". The Court therefore dismissed the allegation that there had been a violation of Article 25.2.

In order for the penalty to be imposed, the soldier must therefore have committed acts which constitute a failure to perform his duties and make it impossible to maintain his status.

Cross-references:

With regard to the need to uphold the adversarial principle in administrative disputes with a view to safeguarding the essential values inherent in the inalienable rights of the person, see judgments nos. 71/1995 and 57/1995. As regards the applicability of Article 25.2 of the Constitution to the criminal field to the exclusion of illegal disciplinary acts, see judgments no. 100/1981 and order no. 541/1988.

Languages:

Italian.

Identification: ITA-95-2-011

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.07.1995 / **e)** 358/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* n° 34 of 16.08.1995 / **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 – Affirmative action.

Keywords of the alphabetical index:

Income tax / Household, one-income.

Headnotes:

The current system of income tax is disadvantageous for one-income households and large families whose members do not all have a profession or an earned income. These families, who should be granted fiscal advantages, within the meaning of Article 31 of the Constitution, are on the contrary obliged, on account of the principle of progressive increase in taxation, to pay much higher income tax than other households consisting of the same number of persons and with the same total income but earned by more than one family member.

Although the Constitutional Court accepted the terms of the application, it could not take measures to establish fiscal equity for families, as this would entail a plurality of difficult choices which only the legislator can make.

Summary:

The question of legitimacy concerned a provision in the consolidating Act on direct taxation challenged on grounds of being contrary to Articles 3, 29, 31 and 53 of the Constitution in that it did not provide that, for the purposes of taxation, the income of one spouse be considered to be partly that of the other spouse if the latter has no personal income, instead of being considered to be only the income of the earning spouse.

The Court declared the question of constitutional legitimacy inadmissible as it was for the legislator to use its discretionary power to redress this situation of inequality.

Supplementary information:

The Court had already unsuccessfully endeavoured to incite the legislator to introduce measures in favour of the family "*favor familae*", as provided for in Article 31 of the Constitution, with a view to redressing the inequitable fiscal situation of families in which only one of the spouses has a taxable income, compared to families in which the spouses have a joint income equal to that of the family with only one income, the latter being subject to separate assessments and contributions. See judgments nos 179/1976 and 76/1983.

Languages:

Italian.

Lithuania
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

Number of decisions: 4 final decisions including:

- 2 rulings concerning the compliance of laws with the Constitution;
- 2 final decisions concerning the compliance of governmental resolutions with the laws;
- 1 final decision was adopted to cancel judicial proceedings.

All cases are cases of *ex post facto* review and abstract review.

The content of the cases was the following:

- privatisation of buildings (1);
- restoration of the rights of ownership (2);
- agricultural reform (1);

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

Important decisions

Identification: LTU-95-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 16.05.1995 / **e)** 1/95 / **f)** Privatisation of buildings / **g)** *Valstybės žinios* (Official Gazette) 42-1040 of 16.05.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Administrative acts.
Institutions – Executive bodies – Application of laws.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Flats, privatisation.

Headnotes:

It is established in Article 94 of the Constitution that the Government implements laws. Thus, legal acts adopted by the Government must not contradict laws, or after their provisions or substance. Therefore the Government by its resolutions may not change the procedure for privatisation of hostel premises established by law.

Summary:

The case was referred by a district court requesting an examination of whether a governmental resolutions was in compliance with the Constitution and the Law on Privatisation of Apartments. The Constitutional Court established that the government by the challenged resolution had exceeded its competence under the Law on Privatisation of Apartments and then transgressed Part 2 of Article 94 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-95-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 01.06.1995 / **e)** 4/95 / **f)** Restoration of the Rights of Ownership / **g)** *Valstybės žinios* (Official Gazette) 47-1154 of 07.06.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Adopted children, legal status.

Headnotes:

The terms "children (adopted)" and "parents (foster parents)" which are used in the concept of law and legislation mean that the concept of "children" includes the concept of "adopted children" and that the concept of "parents" includes the concept of "foster parents". Therefore when legislation has provided that "upon the death of the former owner the right of ownership to his portion of existing real property is restored to his spouse and children", it means that the same rights shall be applied to adopted children as well.

Summary:

The case was referred by a district court requesting an examination of whether Article 2 of the Law "On the Procedure and Conditions of Restoration of the Rights of Ownership to Existing Real Property", which did not state that the rights of children extend to adopted children, violated the constitutional rights of ownership of the latter. The Constitutional Court held that such failure in the Law did not mean that adopted children have less rights than lineal relatives. Therefore there was no ground for considering that the said norms contradict the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-95-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.06.1995 / **e)** 25/94 / **f)** Restoration of the rights of Ownership / **g)** *Valstybės žinios* (Official Gazette) 52-1284 of 23.06.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Nationals / Ownership, restoration of rights.

Headnotes:

It is the special laws that are applied to specific, non-traditional situations. Such special ad hoc law in Lithuania was adopted with the aim of eliminating the consequences of the occupation, to return to an economy based on rights of private ownership, and at least
partly to reconstruct the system of former property relations which had existed before the occupation. The Law in dispute helped to restore rights of ownership which had been violated during the occupation and there was therefore no legal ground for maintaining that this law, in general, infringed upon the fundamental rights proclaimed in Article 18 of the Constitution.

In addition, due to the very hard political and social conditions the legislator could not affect a complete restitution, i.e. implement an overall restoration of the rights of ownership that had been violated. When the rights of ownership were restored on the basis of the special *ad hoc* law, the norms of Article 23 of the Constitution and those of the Civil Code would be applied in their full scope to the protection of the said rights.

A condition pertaining to the restoration of rights of ownership to existing real property, prescribed by the said special Law, was that the owner should be a citizen of Lithuania "permanently residing in the Republic of Lithuania". This provision was not of a universal, general nature, but applied only in the implementation of a concrete special right – the restoration of the right of ownership to existing real property. Thus, citizens may freely choose in this case: either to meet the conditions set forth by the Law and to realise their subjective right to restore their right of ownership to existing real property, or not to realise this specific subjective right. The said condition therefor may not be interpreted as a violation of the principle of equality of citizens or as a restriction on their freedom to move freely.

Summary:

The case was referred by a district court, requesting an examination of whether the provision of Article 2 of the Law "On the Procedure and Conditions of Restoration of the Rights of Ownership to the Existing Real Property" established that the rights of ownership to existing real property shall be restored to citizens of Lithuania, who are "permanent resident[s] of the

Republic of Lithuania", was in compliance with the Constitution.

The Constitutional Court established that nationalisation and other unlawful socialisation of property in Lithuania was started by the occupation government more than 50 years ago. Neither the Supreme Council, elected by the people in 1990, nor the executive authorities formed by it were responsible for the occupation of Lithuania, executed half a century ago, or for its consequences. The Supreme Council had an unquestionable right to choose a concrete variant of the solution to the said problem: it had chosen limited restitution. The Law in dispute was to be evaluated as a compromise solution determinated by social and legal realities in Lithuania, whose aim was to ensure that upon restoration of the rights of one group of persons, rights of other persons were not violated. The Constitutional Court ruled that the provision of the said Law in dispute did not contradict the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-95-2-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.07.1995 / **e)** 8a/94 / **f)** Reorganisation of agricultural enterprises / **g)** *Valstybės žinios* (Official Gazette) 57-1433 of 12.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Legislative bodies.
Constitutional justice – The subject of review – Rules issued by the executive.
Institutions – Executive bodies – Application of laws.
Fundamental rights – General questions – Basic principles – Equality and non-discrimination.

Keywords of the alphabetical index:

Agricultural enterprises / Privatisation / Reform.

Headnotes:

There is no legal possibility for testing the conformity with the Constitution of governmental resolutions which have been passed in a time of transition prior to the adoption of a new Constitution as *ad hoc* acts and which have lost their validity since their implementation.

Summary:

The case was initiated by a group of *Seimas* (Parliament) members, who requested an examination of the constitutionality of two government resolutions concerning the reorganisation of agricultural enterprises in the transitional period of economic reform in Lithuania. The Constitutional Court established that the resolutions in dispute were adopted as *ad hoc* reserves, that they had been implemented, and that they had since lost their validity until a new Constitution was adopted. Therefore the Constitutional Court decided to dismiss the case.

Languages:

Lithuanian, English (translation by the Court).

The Netherlands
Supreme Court

Reference period:
1 May 1995 – 31 August 1995

Important decisions

Identification: NED-95-2-007

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 16.05.1995 / **e)** 98.804 / **f)** / **g)** DD 95.341 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Tribunal, impartial trial.

Headnotes:

In case of a lack of a challenge to the Court of Appeal's impartiality, an appeal in cassation alleging a contravention of the right to a fair trial by an impartial tribunal cannot be upheld.

Summary:

In this case the accused complained in cassation proceedings that the Court of Appeal had displayed bias during the trial, and thus he had not been tried by an impartial tribunal within the meaning of Article 6.1 ECHR.

The Supreme Court held that the accused could have challenged the Court of Appeal on the grounds of bias, as soon as he had become aware of facts or circumstances which could impair judicial impartiality. As the accused failed to do so, despite the fact that the Appeal Court had expressly apprised him of his statutory right to enter a challenge, it was not possible to sustain a defence to this effect in cassation proceedings. The only exception would have been if special circumstances had existed that provided compelling reasons to believe that one or more of the judges of the Court of Appeal had been biased against the accused, or at any rate that a concern to this effect on the part of the accused could be justified objectively, which did not apply in the case at hand.

Languages:

Dutch.

Identification: NED-95-2-008

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 06.06.1995 / **e)** 99.663 / **f)** / **g)** DD 95.384 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Video surveillance.

Headnotes:

in the absence of any special circumstances video surveillance is not incompatible with Article 8 ECHR.

Summary:

The police suspected that serious criminal offences were being committed in a lock-up being used by the accused. Acting on this suspicion, the police set up a surveillance operation using video cameras placed outside the lock-up, i.e. surveillance in an area that was accessible to persons other than the accused and his accomplices. The accused alleged that the use of this mode of investigation constituted a serious violation of the right to respect for his private life.

The Supreme Court held that there had been no violation of Article 8 ECHR.

Languages:

Dutch.

Identification: NED-95-2-009

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 16.06.1995 / **e)** 15.664 / **f)** / **g)** RvdW 1995, 135 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Abortion / Pregnancy, termination.

Headnotes:

The protection of the right to life enshrined in Article 2 ECHR did not extend so far as to render the termination of pregnancy inadmissible.

Summary:

In the proceedings at issue, a foundation contended that the State should be forbidden from refunding expenses incurred for the termination of pregnancy in special clinics, and that the Health Insurance Funds Council should be forbidden from subsidising these terminations of pregnancy. The foundation claimed that the regulation governing the termination of pregnancy constituted a contravention of the right to life as enshrined in Article 2 ECHR.

The Court of Appeal had held that the foundation's argument could not necessarily be endorsed, as it was uncertain whether the above-mentioned provision of the European Convention of Human Rights extends to the protection of developing human life, i.e. human life before birth.

Upon appeal in cassation instituted by the foundation, the Supreme Court held that whatever the validity of the arguments that the Court of Appeal had advanced for its judgment, the foundation's contention could not be accepted. The Supreme Court ruled that the protection of the right to life enshrined in Article 2 ECHR did not extend so far as to prevent States Parties to the Convention from enacting a statutory regulation that permitted the termination of pregnancy on certain conditions.

Supplementary information:

On the entry into force on 1 November 1984 of the Termination of Pregnancy Act ("TPA"), an article was added to the Criminal Code determining that the termination of pregnancy is not an offence if the procedure is conducted by a medical practitioner in a hospital or clinic in which treatment of this kind may be given under the terms of the TPA. The procedures required to terminate pregnancy are paid for by the State, the funds concerned being managed by the Health Insurance Funds Council.

Languages:

Dutch.

Identification: NED-95-2-010

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 23.06.1995 / **e)** 8627 / **f)** / **g)** RvdW 1995, 143 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Social parenthood.

Headnotes:

In assessing an application to determine access arrangements for a "social parent" (in the case at hand, a partner from a former non-cohabitational relationship, referred to as a "Living-Apart-Together" or "LAT" relationship) there are strict requirements concerning the existence of family life within the meaning of Article 8 ECHR between a man who is not the child's biological father and the child.

Summary:

The applicant and the mother, who has a child from a previous marriage, had a LAT relationship from 1987 to 1993. During that period, the mother and the child spent all weekends and holidays at the applicant's home. The man was not the child's biological father. When the LAT relationship was severed, access arrangements were determined by the parties. In 1994 the mother refused to continue implementing these arrangements into practice. The applicant then brought

proceedings to request that access arrangements be determined by the Court.

The Court of Appeal ruled that his application was inadmissible. In the Court's opinion, the man had brought insufficient evidence to show that a sufficient personal relationship between him and the child existed so as to constitute family life within the meaning of Article 8 ECHR. The parties at no time lived together. Although the applicant contended that he undertook activities that contributed to the child's care and upbringing, this had not been objectively established, as there was insufficient indication that the behaviour alluded to by the applicant was perceived as such by the child.

In cassation proceedings, the applicant argued that the Court of Appeal had applied unduly strict criteria in assessing whether or not family life had existed between him and the child. The Supreme Court held that as the case at hand was one involving social parenthood, the Court of Appeal had been right to require that the specific circumstances to be advanced relating to the existence of family life within the meaning of Article 8 ECHR between him and the child would have to fulfil strict criteria. The appeal was therefore dismissed.

The Supreme Court also ruled that the Court of Appeal had not violated any rule of law by taking into account the way in which the child had perceived the contact with the applicant when deciding whether there had been family life between the two.

Languages:

Dutch.

Norway
Supreme Court

Reference period:
1 May 1995 – 31 August 1995

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

Poland
Constitutional Tribunal

Reference period:
1 May 1995 – 31 August 1995

Statistical data

Decisions:
- Cases decided on their merits: 3
- Cases discontinued: 1

Types of review:
- *Ex post facto* review: 4
- Preliminary review: 0
- Abstract review (Article 22 of the Constitutional Tribunal Act): 4
- Courts' referrals ("legal questions", Article 25 of the Constitutional Tribunal Act): 0

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 3
- Cases on the legality of other normative acts under the Constitution and statutes: 1

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 2
- Upholding the constitutionality of the provisions in question: 1

Resolutions containing universally binding interpretations of laws (Article 13 of the Constitutional Tribunal Act):
- Binding interpretations of laws issued: 3

Subject matter of important decisions

Universally binding interpretation of law
(Case no. W 19/94 – Resolution of 14 June 1995)

Presidential elections
(Case no. W 7/95 – Resolution of 26 June 1995)

Other information

On 27 May 1995 Constitutional Tribunal Judge Janina Zakrzewska died. On 21 July 1995 the *Sejm* elected Jadwiga Skórzewska-Łosiak (former deputy Minister of Justice) to the vacant post (her term expires in 1997).

Important decisions

Identification: POL-95-2-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 14.06.1995 / **e)** W 19/94 / **f)** / **g)** *Dziennik Ustav* (Journal of Laws), n° 78, point 396; to be published in *Orzecznictwo Trybunału Konstytucyjnego* (Collection of decisions of the Tribunal), 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Determination of effects by the court.
Constitutional justice – Effects – Consequences for other cases – Decided cases.

Keywords of the alphabetical index:

Laws, enforceability, loss / Court proceedings, reopening.

Headnotes:

Loss of enforceability by any legal provision resulting from a decision of the Constitutional Tribunal declaring it to be contrary to the Constitution, constitutes a legal basis to re-open any court proceedings that were previously completed and where a judgment was made on the basis of an unconstitutional provision.

Summary:

The resolution, adopted upon a motion by the President of the Chief Administrative Court, provides the basis for re-opening the court proceedings in cases when the final decision was based on provisions subsequently declared to be contrary to the Constitution.

The Tribunal has declared that a loss of enforceability of a legal provision, resulting from a decision on its unconstitutionality, constitutes a sufficient basis for re-opening any court proceedings in which the invalid provisions were applied. In addition, it is irrelevant whether a void provision was revoked or amended by the original decision-taking organ or whether it became invalid *ipso jure*, because the decision of the Tribunal had not been implemented within time limits specified in the Constitutional Tribunal Act.

The scope and deadline for re-opening proceedings are specified in the provisions of the Constitutional Tribunal Act (a civil case may for instance be re-opened within five years of the day that a decision became irrevocable). Other procedural issues are regulated by provisions of relevant codes.

Languages:

Polish.

Identification: POL-95-2-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.06.1995 / **e)** W 7/95 / **f)** / **g)** *Dziennik Ustav* (Journal of Laws), n° 78, point 398; to be published in *Orzecznictwo Trybunału Konstytucyjnego* (Collection of decisions of the Tribunal), 1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Head of State – Appointment.

Keywords of the alphabetical index:

Presidential elections.

Headnotes:

According to the Constitution, a candidate for the post of the President of the Republic should be a Polish citizen, who has attained the age of 35 years and holds full electoral rights. He/she does not necessarily need to have been permanently resident in Poland for the previous five years.

Summary:

There were doubts as to the correct interpretation of the 1990 Act on the Election of the President, which was enacted prior to the Constitutional Act being in force. These had to be clarified as soon as possible, especially since the next election is approaching. In the resolution adopted upon the motion of the President of the Supreme Administrative Court the Tribunal held as follows:

1. The State Electoral Committee is empowered to verify whether presidential candidates fulfil the requirements laid down in the Constitution, i.e. whether he/she is a citizen of the Republic of Poland, who has attained the age of 35 years and holds full electoral rights. As opposed to parliamentary elections, the right to be elected President does not require that the candidate must have been permanently resident in Poland for at least 5 years.
2. Rules regarding registered presidential candidates' access to public radio and television shall be issued by the National Council of Radio and Television.

Languages:

Polish.

Portugal
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

Total of 250 judgments, of which:

- Preliminary review: 1 judgment
- Subsequent scrutin *in abstracto*: 6 judgments
- Appeals: 224 judgments, of which:
  - Substantive issues: 166
  - Applications for a declaration of unconstitutionality: 4
  - Procedural matters: 54
- Complaints: 14 judgments
- Political parties and coalitions: 5 judgments

Important decisions

Identification: POR-95-2-007

a) Portugal / **b)** Constitutional Court / **c)** 1st Chamber / **d)** 30.05.1995 / **e)** 267/95 / **f)** / **g)** *Diário da República* (Official Gazette), (Serie II) of 20.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Lease / State property / Tenancy.

Headnotes:

Social requirements have conferred upon tenancy certain normative aspects typical of the system of a right *in rem*, but the legal system of tenant rights continues to retain, under present legislation, the basic traits of the rules relating to the law of obligations.

Irrespective of the juridical nature (real or personal) of the right to residential or business tenancies, this right benefits to a certain extent from the constitutional guarantee of the right of private property, from which it would appear to follow that any restriction on the free disposal of property by the owner gives rise to an expropriation of sorts, presupposing the payment of compensation. Yet notwithstanding the possibility of a "loose expropriation concept" comprising either property in the broad sense or any other individual right of a proprietary nature, for the Portuguese lawmakers only immovable property or rights thereto may be the subject of expropriation.

The principle of mandatory lease renewal, as an exception to the rule of freedom to contract and the right of the owner to terminate the contract (denunciation), has its constitutional basis in the social function of property, which is necessary to protect the needs of the tenant. Hence, the exceptional recognition of the right of denunciation does not violate property rights.

The principle of public burden sharing means that restrictions which the general interest imposes on individual rights must normally be borne by all citizens to a similar degree. If someone must bear a special burden, he or she must receive compensation. The provision concerned does not impose different burdens in identical situations, however, because it treats all tenants possessing a commercial lease for immovable property owned by the State in the same way and does not draw any materially unjustified or discriminatory distinction.

Summary:

At issue was the constitutionality of a provision which allowed the State to terminate leases relating to State-owned immovable property, even if it had already been rented prior to purchase by the State, whenever the State wished to place services on that property or to use it for other reasons in the public interest.

The applicant was a commercial company that had rented the building prior to its purchase by the State, which immediately gave notice of termination of the lease. In the view of the company, the provision that allowed termination of leases on State-owned property was unconstitutional, because in addition to the violation of the principle of equality, it was also in breach of the right to enjoy private property because the constitutional guarantee of that right, in the broadest sense, must also include the proprietary value stemming from the right to non-termination of the lease. For the commercial company, its right to renewal of the contract was tantamount to a right *in rem*.

The Court found that this norm was not unconstitutional, however, and upheld the case law on the personal nature of a lease, while recognising that the rights of the tenant implied certain typical manifestations of a real contract.

Languages:

Portuguese.

Identification: POR-95-2-008

a) Portugal / **b)** Constitutional Court / **c)** 2nd Chamber / **d)** 31.05.1995 / **e)** 278/95 / **f)** / **g)** *Diário da República* (Official Gazette), (Serie II) of 28.07.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Institutions – Legislative bodies – Powers.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Bank secrecy / Private life, privacy.

Headnotes:

Concerning bank secrecy, Portuguese legislation dates back to 1967 and has found expression in several texts adopted by the Government. The currently valid legal rules on bank secrecy stem from a law of December 1972 which regulates the scope of bank secrecy, the extent of the obligation of secrecy and its exceptions. The penal sanction for the violation of bank secrecy is similar to that imposed for the violation of professional secrecy.

Under "other personal rights" in its list of fundamental rights, the Constitution states that everyone shall enjoy "the right to his or her personal identity, civil capacity, citizenship, good name and reputation, image, the right to speak out and the right to the protection of the intimacy of his or her private and family life". Although the right to the protection of private life is constitutionally protected, neither its content and scope nor the concept as such are clearly defined.

The regulations governing bank secrecy are designed to safeguard both public or collective interests (in respect of the smooth functioning of banking activities and the natural climate of confidence) and personal interests (by ensuring complete discretion regarding the private life of citizens in their business and attendant commercial activities).

Summary:

The question of constitutionality concerned the provision that allows the General Inspectorate of Finance to review, as part of an investigation, all data in the possession of banking establishments regarding notably customer names, bank accounts and banking, currency and financial transactions where such data is essential for inspections within the framework of a public finance audit. At issue was whether the data concerning the economic situation of a citizen in possession of an account with a banking establishment, and in particular his or her bank account and financial and currency transactions, fell within the scope of the constitutionally protected right to private life.

The economic situation of a citizen, revealed by his or her bank account, including assets and liabilities, constitutes an essential dimension of the constitutionally guaranteed right to the protection of private life. Thus, restrictions on bank secrecy must necessarily emanate from an Act of the Assembly of the Republic (or a legislative decree promulgated by the Government with the authorisation of the Assembly) and must be in compliance with the proportionality principle in the broadest sense of the term, i.e, it must be necessary, appropriate and proportional, must have a general and abstract character, must not have retrospective effect and must not restrict the scope and application of the essential content of constitutional norms.

The provision in question was ruled unconstitutional.

Supplementary information:

The decision cites ruling no. 100/84 of 26.10.1984 of the Constitutional Court of Spain and also the "the right to personal and family privacy" in Article 18.1 of the Spanish Constitution.

Languages:

Portuguese.

Identification: POR-95-2-009

a) Portugal / **b)** Constitutional Court / **c)** 1st Chamber / **d)** 22.06.1995 / **e)** 338/95 / **f)** / **g)** *Diário da República* (Official Gazette), (Serie II) of 01.08.1995 / **h).**

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
Fundamental rights – Civil and political rights – Equality – Scope of application.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Administrative court / Political refugee / Asylum, right.

Headnotes:

The right of asylum is guaranteed by the Constitution for foreigners and stateless persons who are persecuted or in serious danger of persecution on account of their activities in favour of democracy, social or national liberation, peace among peoples and human rights and freedoms; the status of political refugee is defined by law. The right of asylum has three dimensions: an international dimension, through the commitment of a third State, a subjective dimension, for the person persecuted, and an objective dimension, as a means of protecting constitutional values.

The denial of legal aid to a foreigner who wishes to enter an appeal against a ministerial decision turning down that foreigner's request for asylum strikes at the practical core of the fundamental right of appeal as a means of having one's case heard before the administrative courts, in that it discriminates against persons in a situation of financial need.

The right to have one's case heard in court is inherent in the principle of equality.

Summary:

The Constitutional Court was asked to review a judgment of a court that had found unconstitutional those provisions of the Legal Aid Act which prevented the granting of legal aid, i.e, bearing the lawyer's fee, to a foreigner who, having requested political asylum, wishes to appeal against the administrative decision denying refugee status.

As a result, in practice asylum-seekers in economic or social need are deprived of the right to appeal against an unfavourable administrative decision, given that the presence of a lawyer in the administrative proceedings is obligatory. What is more, the right of appeal is frequently the applicant's last chance to acquire the status of political refugee.

The Constitutional Court ruled that the provision in question was unconstitutional because it violated the principles of equality and of the extension of rights – and above all fundamental rights – to foreigners staying or residing in Portugal, as well as being a breach of the right to have one's case heard in court.

Supplementary information:

Decisions 316/95, 317/95, 318/95, 339/95 and 340/95 are in line with this decision.

Languages:

Portuguese.

Identification: POR-95-2-010

a) Portugal **b)** Constitutional Court / **c)** Plenary / **d)** 04.07.1995 / **e)** 417/95 / **f)** / **g)** to be published in *Diário da República* (Official Gazette), (Serie II) / **h).**

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.

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

Keywords of the alphabetical index:

Death penalty / Extradition / Macao.

Headnotes:

Under the Portuguese Constitution, no one may be extradited for crimes which carry the death penalty "under the law of the requesting State". This prohibition stems from the absolute protection afforded to the right to life. The petition of the requesting State must be reviewed in the light of the Constitution and the nature of the offence and penalty, from both the substantive and procedural points of view, under the domestic legal systems of the two States concerned by the extradition. Consequently, any case in which Portugal may cooperate in an extradition for the purposes of applying and executing a penalty – the death penalty – which could not be imposed under any circumstances or for any type of crime upon any person in Portugal, whether citizen or foreigner, is automatically unconstitutional.

The words in the Constitution "under the law of the requesting State" refer to the domestic law in force in the latter State, composed solely of its code of penal norms, including the possibility of the death penalty in the abstract, and the mechanisms – and only those mechanisms – that belong imperatively to criminal law and procedure, from which it should follow that the death penalty will never be executed in reality because it can never be applied.

Summary:

The applicant, arrested in Macao (which is a territory under Portuguese administration subject to a special status but in which the norms of the Portuguese Constitution relating to fundamental rights are directly applicable), was sought by the police authorities of the People's Republic of China for the intentional homicide of his fiancee. The Macao High Court of Justice granted the extradition request, considering, in short, that the People's Republic of China had committed itself, through the promises of its Ministry of State Security, forwarded by the Xinhua press agency – which has quasi-diplomatic functions in Macao – not to sentence the suspect to death or life imprisonment or to extradite him to a third country. According to the Macao Court, these promises became obligations of an international legal nature and had force of law in the People's Republic of China.

In its final decision, the Constitutional Court ruled that the legal norm in question was unconstitutional (violation of Article 33.3 of the Constitution), in that it allowed extradition for crimes punishable by the death penalty under the law of the requesting State, the guarantees given for its commutation notwithstanding. In the Court's view, the guarantee provided by the requesting State was above all of a political and diplomatic character and, although obligatory from the international viewpoint, was not binding on the Chinese courts.

Supplementary information:

A number of procedural questions concerning the admissibility of this appeal were treated in decision no. 481/94 of 12.07.1994.

This case aroused public interest in Portugal, Macao and Hong Kong (and also in the British embassy in Lisbon, because the refugee was in possession of a British passport). Given the nature of the question, the judgment took place in plenary. Two judges expressed a dissenting opinion.

In decision no. 474/95 of 17.09.1995, following the same case law, the Court also ruled unconstitutional the provision that failed to prohibit extradition in cases in which the application of a penalty of life imprisonment is legally possible even if its application is unlikely because of guarantees given (in the specific case, the American embassy had requested the extradition of a Brazilian citizen to be judged for trafficking in cocaine between Brazil and the United States).

Languages:

Portuguese.

Romania
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

- 10 decisions on the constitutionality of legislation prior to its enactment
- 26 decisions on objections alleging unconstitutionality
- 2 decisions on the review of conditions to be fulfilled for holding a popular legislative initiative.

Important decisions

Identification: ROU-95-2-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.07.1995 / **e)** no. 72 / **f)** / **g)** *Monitorul Oficial* no. 167/31.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – Civil and political rights – Freedom of conscience.
Fundamental rights – Civil and political rights – Linguistic freedom.
Fundamental rights – Civil and political rights – Protection of minorities and persons belonging to minorities.
Fundamental rights – Economic, social and cultural rights – Freedom to teach.
Fundamental rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

Education / Minorities, education, languages / Religion, mandatory subject.

Headnotes:

As part of the preliminary review by the Constitutional Court of the Education Act, objections were examined alleging the unconstitutionality of the manner in which persons belonging to minority groups exercise the right to learn and be educated in their mother tongue as guaranteed under Article 32 of the Constitution. The Court rejected the objections.

Concerning the teaching of religion as a mandatory subject, the law does not make religion or worship mandatory for pupils in elementary school or disregard freedom of conscience and the right of parents to have their children educated in conformity with their own convictions; religion is, however, a mandatory subject in school curricula.

Summary:

Given that the presentation and the line of reasoning of the objections alleging unconstitutionality contain a procedural defect that is incompatible with the strict requirements of legal interpretation, namely the fact that the texts being reviewed were taken from a system of rules of a global nature, thus leading to partial and one-sided conclusions, the Court analysed the main provisions of Chapter XII of the new Education Act on the basis of the education of persons belonging to national minorities.

This Act, among others, enshrines and guarantees equality of opportunity with regard to admission to all levels and forms of education; the right to study and to be educated in one's mother tongue; and the necessary religious and linguistic organisation of educational units and institutions in order that teaching many take place in conformity with the choice of the parents or guardians of the pupils. It also makes provision for testing, at secondary-school level, on language and literature in the mother tongue for classes held in the language of the national minority; elaborating curricula and teaching manuals specially conceived and designed for national minorities; teaching the history and geography of Romania and including the history and traditions of minorities in the curricula and in books on world history and the history of Romania; and, upon request, introducing at secondary-school level the subject "History and Traditions of the National Minorities of Romania". These institutions ensure that if they so wish, pupils who are members of national minorities are taught the following subjects: the Romanian language, the language and literature of their mother tongue and the history and traditions of the minority. In public vocational education, secondary schools with a technical, economic, administrative or agricultural focus and post-secondary school education, the possibility of courses being taught in the mother tongue is likewise guaranteed. In higher education, it is also possible to create mother-tongue groups and sections in order to train personnel for artistic or cultural activities; the law requires a propor-

tional representation of professors and teachers of the national minority in the administrative body of educational institutions.

The new Public Education Act established a numerical criterion for the creation of study and training facilities and, subsequently, for teaching posts – hardly a discriminatory application of the principle of the equality of all citizens, because Article 8 of the Act guarantees persons belonging to national minorities the right to learn and be educated in their mother tongue. In the absence of such a criterion, the justification and purpose of study and training facilities would cease to exist, because no other criterion, being by its very nature uncertain, could serve as a basis for their creation.

None of the provisions of Chapter XII of the Education Act stipulates or even intimates the existence of a linguistic privilege that might be taken as a criterion or serve as a basis for organising and running the educational system. Article 118 provides that persons belonging to national minorities have the right to learn and be educated in their mother tongue, irrespective of the level and form of education.

On the contrary, the provisions of Article 118 are consistent with both the Constitution and the Convention against Discrimination in Education, ratified by Romania in decree no. 149/14.12.1960, as well as with the Framework Convention for the Protection of National Minorities, ratified by Romania in act 33/29.04.1995.

Going beyond the provisions of Article 4 of the Convention against Discrimination in Education, which compels States having ratified the Convention to provide training for the teaching profession without discrimination, the Education Act also makes provision for training in artistic and cultural activities and for the organisation, on request and in conformity with the law, of teacher traing groups and sections taught in the mother tongue. The Act cannot therefore be regarded as restricting the right to be taught in the languages of the national minorities, considering that, firstly, the Constitution takes actual specific needs into account and, secondly, because every person belonging to a national minority may freely choose whether or not to be considered as such.

Likewise, admissions to competitions and final examinations in the Romanian language are no obstacle to school attendance at various levels. In accordance with Article 14.2 of the Framework Convention, the measures provided for therein are to be applied without adversely affecting the teaching of the official language, examinations in the Romanian language being guaranteed for all in conformity with the principle of equal opportunity.

Concerning Article 9.1 of the Act, it should be pointed out that the timetables and curricula for primary and secondary schools and vocational training that make provision for classes in religion must be interpreted in conformity with Article 29 of the Constitution, the pupil retaining the possibility of choosing religion and belief, with parental approval. Pursuant to Article 29.1, no one may be compelled to embrace an opinion or religion contrary to his own convictions. Paragraph 6 of the same article stipulates that the parents or legal tutors have the right to ensure, in accordance with their own convictions, the education of the minor children whose responsibility devolves on them.

Languages:

Romanian.

Russia
Constitutional Court

Reference period:
1 January 1995 – 31 July 1995

Statistical data

Total number of decisions: 9

Types of decision:

- Rulings: 7
- Advisory opinions: 0
- Decisions on dismissal of claims: 2

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 9
- Conformity with the Constitution of international treaties: 0
- Competence: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:

- Claims by state bodies: 3
- Complaints of individuals: 5
- Inquiries of courts: 1

Important decisions

Identification: RUS-95-2-001

a) Russia / **b)** Constitutional Court / **c)** 17.05.1995 / **d)** / **e)** / **f)** / **g)** *Sobraniye Zakonodatelstva Rossiyskoy Federatsii* (Collection of Laws), 1995, 2/01/8; *Rossiyskaya Gazeta*, 25.05.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual – Trade unions.

Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Strike, civil aviation companies / Public safety / Public service / Strike, illegal.

Headnotes:

The right to strike as a way of settling collective labour disputes may be limited by law with respect to vital public interests. At the same time the limitation of the right to strike for specific categories of workers cannot extend to all companies or indeed to all categories of workers in any sector.

Summary:

A strike of flight personnel in certain civil aviation companies was ruled illegal by several courts of general jurisdiction on the grounds that it contravened the Law "On the procedure of settling collective labour disputes (conflicts)". The Trade Union of Flight Personnel of the Russian Federation, considering that a prohibition on strikes at civil aviation companies as a means of settling collective labour disputes contradicted the Constitution, submitted a claim to the Constitutional Court challenging the constitutionality of the above-mentioned legal norm.

The Constitutional Court stated that the Constitution recognised the right to strike as a means of settling collective labour disputes on terms established by federal law. In establishing such terms, including terms restricting the right to strike, full account should be taken of the need to respect vital public interests which could be damaged by the strike. The limitations on possible legislative restrictions were defined by the Constitution.

The Constitutional Court also stated that the norm in question was formulated in such a way as to eliminate the possibility of strikes at civil aviation companies by any category of staff, i.e. there was no difference between the various categories of civil aviation workers with regard to the nature and public significance of their duties. As a result, a considerably wider circle of workers had their right to strike restricted, and to a greater degree, than was necessary to achieve the aims stated in the Constitution.

On the basis of the above reasoning, the Constitutional Court recognised that the prohibition on strikes at civil aviation companies established by the law in question

conformed with the Constitution to the extent that it followed other constitutional provisions. Only one aspect of the prohibition on strikes at such companies failed to conform with the Constitution, namely that the people involved belonged to a specific sector. Taking into account the fact that international treaties on human rights brought the regulation of the right to strike within the sphere of national legislation, the Constitutional Court advised the Federal Assembly of the Russian Federation to pass a federal law on this point. Pending adoption of the federal law, the legal norm in question should be applied in conciliatory and judicial procedures when resolving questions relating to strikes with regard to constitutional provisions. The Constitutional Court ruled that the decision of the Moscow City Court should be subject to review on the question of whether it had been adopted on the basis of legal norms which the present ruling had recognised as unconstitutional.

Languages:

Russian, French (translated by Court).

Identification: RUS-95-2-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 23.06.1995 / **e)** / **f)** / **g)** *Sobraniye Zakonodatelstva Rossiyskoy Federatsii* (Collection of Laws), 1995, 27; *Rossiyskaya Gazeta*, 04.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights – Freedom of movement.
Fundamental rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Criminal conviction / Expulsion.

Headnotes:

It is impossible to limit a citizen's right to use his/her accommodation on the sole grounds of his/her temporary absence, even in cases where he/she is serving a custodial sentence.

Summary:

No one may be arbitrarily deprived of his or her accommodation. Legal provisions allowing the courts to acknowledge that a tenant and the members of his her family have lost the right to use their accommodation following a temporary absence of six months, and the loss of this right as a result of the enforcement of a prison sentence imposed by a court, constitute a violation of the constitutional right to accommodation. These legal provisions also infringe a citizen's rights to freedom of movement and his/her choice of place of residence which are in no way subject to a time-limit. Moreover the implementation of these provisions entails discrimination against certain categories of citizens in respect of the right to accommodation on the grounds that they have been sentenced to imprisonment. It also violates the principle of equality with regard to human rights and the freedoms of citizens. The Constitutional Court has ordered a review, by the usual channels, of the cases brought before it by citizens.

Languages:

Russian, French (translated by Court).

Identification: RUS-95-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 31.07.1995 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 11.08.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
Constitutional justice – The subject of review – Rules issued by the executive.
General principles – Territorial principles – Indivisibility of the territory.

Institutions – Army and police forces – Army – Functions.
Fundamental rights – General questions – Emergency situations.
Fundamental rights – Civil and political rights.
Fundamental rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Army, use within the country / Expulsion / Minorities, national minorities / State security.

Headnotes:

The outbreak of a major domestic armed conflict on Russian territory was found to be giving rise to widespread violation of the constitutional rights and freedoms of citizens and to constitute a threat to State security and territorial integrity. In the absence of legislation governing the acts of State organs in such cases, the President, as the guarantor of the Constitution, can and must, within the limits of his constitutional powers, determine, by issuing regulations, all the measures necessary – including the use of the armed forces – to settle such a conflict. Questions concerning the practical application of these measures fall within the jurisdiction of other courts and are not subject to review by the Constitutional court.

Summary:

The Federal Council and the State *Duma* of the Federal Assembly lodged applications concerning the constitutionality of several presidential and governmental decisions which, in their opinion, led to the unlawful use of the armed forces to settle the domestic conflict on the territory of the Chechen Republic in the absence of a state of emergency or of martial law. This led to a limitation and widespread violation of the constitutional rights and freedoms of citizens as well as to substantial losses among the civilian population, which is unconstitutional and incompatible with Russia's international commitments.

Examination of the evidence by the Constitutional Court has showed that the regime in Chechnya had been established in an unconstitutional fashion and had more or less led to the invalidity of the Constitution and of federal laws, to the destruction of the parliamentary system, to the creation of illegal regular armies equipped with the latest war equipment, and to armed conflicts between opposing groups which might develop into civil war and to widespread violations of the rights and freedoms of citizens. As the many attempts to put an end to the crisis had not led to a peaceful political solution, the President and the Government had enacted laws prescribing the application of coercive State measures so as to ensure State security and the territorial integrity of the Russian Federation as well as the disarmament of the armed groups illegally formed on the territory of the Chechen Republic.

The Constitutional Court acknowledged that the Presidential Decree "on measures to put an end to the activities of illegal armed groups on the territory of the Chechen Republic and in the Ossetia-Ingushia area of conflict" was enacted within the limits of his constitutional powers.

The provisions on the expulsion from the Chechen Republic of persons constituting a threat to public security as well as to the individual safety of citizens and on the refusal to accredit journalists working in the area of armed conflict, contained in the Government's Decree "on guaranteeing State security and the territorial integrity of the Russian Federation, compliance with the law, the rights and freedoms of citizens, and the disarmament of illegal armed groups on the territory of the Chechen Republic and of the adjacent regions of Northern Caucasia" were found to be unconstitutional.

The Constitutional Court terminated the proceedings concerning the review of the constitutionality of the Presidential Decree "on measures to be taken to restore constitutional legality and legal order on the territory of the Chechen Republic" because the Decree was declared invalid by the President and the measures contained in the Decree which could have constituted an infringement of the constitutional rights and freedoms of citizens had not been implemented. The Court also terminated the proceedings in the case concerning the review of the constitutionality of the Presidential Decree "on the main principles of military doctrine in the Russian Federation". This Decree and the main principles of military doctrine contained therein did not prescribe regulations and there was therefore no need to review their constitutionality.

When examining this case, the Constitutional Court did not review the actual acts of the parties to the armed conflict from the point of view of the Additional Protocol to the Geneva Conventions, relating to the protection of victims of non-international armed conflicts, as this did not fall within its jurisdiction.

Languages:

Russian, French (translated by Court).

Slovakia
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

- Decisions on the merits by the Plenum of the Court: 2
- Decisions on the merits by Panels of the Court: 0
- Number of other decisions by the Plenum: 9
- Number of other decisions by Panels: 72
- Total number of cases brought to the Court: 402

Important decisions

Identification: SVK-95-2-004

a) Slovak Republic / **b)** Constitutional Court / **c)** Plenum / **d)** 24.05.1995 / **e)** PL.ÚS 16/95 / **f)** Case of unconstitutional restriction on property rights under an Act of the Parliament / **g)** Collection of Laws of the Slovak Republic no. 126/1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
General principles – Separation of powers.
General principles – Rule of law.
Fundamental rights – Civil and political rights – Right to property.

Headnotes:

An Act relating to the privatisation of enterprises, parts of enterprises and property shares of the State through direct sales is unconstitutional if it attempts to restrict property rights, limit fundamental rights and freedoms or otherwise infringe constitutional principles such as the separation of powers or indeed international treaties. A finding of unconstitutionality sets a six month limitation period for realignment with the Constitution of Slovakia.

Summary:

A group of 40 members of the National Council of the Slovak Republic filed a complaint with the Constitutional Court claiming the unconstitutionality of Act no. 370/1994 which overrides decisions previously adopted by the Government of the Slovak Republic in matters of privatisation of enterprises, the parts of enterprises and of property shares of the State through direct sales, which the members complained was in direct conflict with Article 13.2 and 13.4 of the Slovak Constitution and also Article 1 Protocol 1 ECHR.

According to Article 20.4 of the Slovak Constitution: "Property rights shall only be expropriated or subject to restrictions to the extent that such measures can be legally justified to protect the public interest and in all events shall be justly compensated". All of these constitutional requirements must be carried out simultaneously. The petitioners were of the opinion that Act no. 370/1994 did not meet these requirements, and furthermore that Act no. 370/1994 infringed Article 13.2 and 13.4 of the Constitution.

According to Article 13.2 "Limitations on fundamental rights and freedoms shall only be imposed under the conditions set out in this Constitution", and Article 13.4 states that "when imposing restrictions on constitutional rights and freedoms, respect must be given to the essence and meaning of these rights and freedoms, and such restrictions must be used only for specifically defined purposes".

The Constitutional Court declared that the constitutional principles of the separation of powers within the State, and the relationship between governmental bodies and their competences should be the utmost consideration when deciding this case. According to Article 2.2 of the Constitution, State bodies may only act in accordance with the Constitution. Their actions are subject to its limitations, must come within its scope and are governed by procedures determined by law. In observing the constitutional principles of separation of powers and the equality of the organs of State authority, the National Council of the Slovak Republic is not vested with the power to act as a substitute for the general courts in civil and criminal matters. From close observation of the relationship between the National Council and the courts it is evident that the power to determine on the validity of acts lies exclusively with the courts and is subject to conditions laid down by the law. When the National Council adopts a statute in which some acts which were passed before the statute came into force are declared to be invalid, the National Council is assuming power belonging to the courts. What is more, this is also contrary to the principle of a State governed by

the rule of law as provided for in Article 1 of the Slovak Constitution, because such a statute has a retrospective effect.

The Constitutional Court found conflicts between Act no. 370/1994 and Articles 12.1, 13.2, 13.4, 20.1, 20.4 of the Slovak Constitution, and also a conflict with Article 1 Protocol 1 ECHR. This means that according to Article 132.1 of the Slovak Constitution the National Council is obliged to bring the Act into line with the Constitution and the European Convention on Human Rights within six months of the finding of the Constitutional Court. Otherwise the statute shall become ineffective after this six month deadline.

Languages:

Slovak.

Identification: SVK-95-2-005

a) Slovak Republic / **b)** Constitutional Court / **c)** Plenum / **d)** 24.05.1995 / **e)** PL.ÚS 18/95 / **f)** Case of unconstitutional restriction of religious faith in relationship to the military service / **g)** To be published in the Collection of Laws of the Slovak Republic / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Military service, freedom of conscience.

Headnotes:

It is possible to reconcile the constitutional principle that an individual may refuse military service if contrary to his conscience or religious beliefs with the principle that an individual's freedoms in this respect may be restricted by law if the aim is to protect public order, health, morality or the rights and freedoms of others.

For this reason an Act providing for a right to refuse military service if the refusal is in writing and in accordance with specified terms, conforms to the Slovak Constitution and does not discriminate against an individual whose grounds of conscience fall outside the limits specified in those terms.

Summary:

The Military Circuit Court filed with the Constitutional Court a petition claiming that Act no. 18/1992 on the civil service was in conflict with Articles 12.1 and 12.2, 13.1, 24.1 and 25.2 of the Constitution.

According to Article 2.2 of Act no. 18/1992, recruits may withdraw from military service or alter their status providing their actions fall within the grounds permitted by Article 1; the wish to withdraw from military service must be given in writing, and in terms provided for by Act no. 18/1992. The petitioner considered these terms unconstitutional as being discriminatory against recruits who change religion or conscience after the elapse of terms provided for this end.

The petitioner's claim was based on Article 25.2 of the Constitution. According to this "No person may be forced to perform military duties if it is contrary to his or her conscience or religious faith or conviction. Further details shall be specified by statute".

The Constitutional Court stressed that the fundamental issue in this case was the conflict of interests between recruits having an objection of conscience as provided for in Article 25 of the Constitution and the State. A person's constitutional right to refuse military service conflicted with the Government's pressing need to maintain the Slovak army in readiness for effective combat. To this end the government needs information on the number of persons who could be conscripted if necessary. This governmental necessity could be very seriously affected if the right to refuse military service were readily exercisable and not subject to any limits or conditions. In order to settle this conflict of interests the key question was whether the constitutional right conferred by Article 25.2 can be reconciled with Article 24.4 of the Constitution. According to this provision, freedom of thought, conscience, religion and faith can be legally restricted in a democratic society only in the interests of protecting public order, health, morality, and the rights and freedoms of others. If Article 25.2 was continuous to Article 24.4, the right conferred provided for by Article 25.2 could to some extent be subordinated to the interests of the State. If not, this interest would have nothing in common with the right under Article 25.2, and the reasoning behind the grounds for the petition would be correct.

The Constitutional Court ruled that Article 25.2 can be reconciled with Article 24.4 of the Constitution. For this reason the provisions of Article 2.1 and 2.2 of Act no.

18/1992 were found to conform with the Constitution and the petition was dismissed.

Supplementary information:

The case-law of the Commission of Human Rights: X v. Austria (Application no. 5591/72), X v. FRG (7705/76), N v. Sweden (10410/83), etc. was taken into consideration as well as the regulations on an identical matter in force in Austria, Belgium, Denmark, France, Italy, Germany and the Netherlands. Last but not least Article 9 was included in the analysis in conjunction with Article 14 ECHR.

Languages:

Slovak.

Slovenia
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

The Constitutional Court held 10 sessions during this period, in which it dealt with 54 cases on the subject of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 17 cases on the subject of the 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 160 U- and 162 Up- unresolved cases from the previous year at the start of the period (1 May 1995). The Constitutional Court accepted 93 U- and 61 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:

- 30 cases (U-) on the subject of protection of constitutionality and legality, of which there were (taken by Plenary Court):
  – 13 decisions and
  – 17 resolutions

- 23 cases (U-) were added to the above mentioned cases because of similarities in their method of treatment and their decisions; accordingly the total number of resolved cases (U-) is 53.

- In the same period, the Constitutional Court resolved 26 cases (Up-) on the subject of the protection of human rights and basic freedoms (6 decisions taken by the Plenary Court, 20 decisions taken by a Senate of three judges).

- 27 decisions have been published in the Official Gazette of the Republic of Slovenia, while the Resolutions of the Constitutional Court are not as a rule published in an official bulletin, and are only handed over to the participants in the proceedings.

However, all decisions and resolutions:

- are published in an official yearly collection (Slovene full text version with English abstracts) and

- have been submitted to users:
  - since 1 January 1987 via on-line databases STAIRS, ATLASS and TRIP (Slovene and full text English language version)
  - since August 1995 on the Internet (Slovene constitutional case-law of 1994 full text in Slovene as well as in English "http://www.sigov.si/us/eusds.html").

Important decisions

Identification: SLO-95-2-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25.05.1995 / **e)** U-I-22/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 39/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV/2 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Social State.
General principles – Rule of law.
Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Public.
Fundamental rights – Economic, social and cultural rights – Right to work.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Universities, autonomy / University professor, age limit / Temporary decree.

Headnotes:

The legal provision on higher education according to which a regular professor may occupy a specific working post only to the age of 65, irrespective of whether or not he fulfils the prescribed conditions for obtaining the right to a full retirement pension, is not in accordance with the Constitution because in so far as it discriminates against regular professors as compared to all other employees it violates the Constitution, and in so far as it places regular professors in a privileged position it violates the constitutional provision on the autonomy of universities and other schools of higher education (tertiary education).

Summary:

In cases in which some regular professors are discriminated against, the impugned provision removes the right of those regular professors (who have not yet fulfilled the conditions for obtaining the right to a full retirement pension) to occupy a working post, and the first paragraph of the impugned provision even prevents their appointment to the post of research worker and (university) associate, posts for which no such age limit is prescribed. This provision thereby, unlike any other provision of this or any other law, does not thereby determine that such a professor has the right to early retirement. Nor does the law provide that the resulting circumstance is a basis for establishing that such a professor has been made redundant. In such cases, the impugned provision leaves the legal employment position of such a professor entirely unclear and is thus in conflict with the principle that Slovenia is a State governed by the rule of law and a social State (Article 2 of the Constitution), as well as at the same time violating the guaranteed freedom to work (Article 49 of the Constitution) and the right to social security (Article 50 of the Constitution) for regular professors over the age of 65.

In cases in which the effect is discriminatory, the impugned provision is also in conflict with the principle of equality before the law which is determined by Article 14 of the Constitution. Persons holding the title of regular professor, after reaching the age of 65, would not be able to occupy a working post which could be occupied by another worker of the same age, and even by (university) teachers (senior lecturers, associate professors), research workers (research associate, higher research associate and scientific advisor) and (university) associates (assistant, lecturer, technical advisor, higher technical associate, technical associate and science teacher). It is impossible to find any comprehensible reason for such discrimination, so arbitrary, that it is clearly in conflict with the constitutional principle of equality.

In some cases the impugned legislative provision even places regular professors in a privileged position. Placing specific groups in a more favourable, above average position in relation to specific rights does not in itself signify a violation of the principle of equality when comparison is made with other groups who find themselves in the standard position, providing such special privileges have a logical basis and to do not go beyond the limit justified by the reasons for their existence. Such a special arrangement must also be acceptable in relation to the general arrangement of rights and to arrangements to date in such a special field as well as to general and special social relations in the field which the law regulates. The Constitutional

Court finds that the legislator has not from this point of view violated the provisions of Articles 2, 14, 49 and 50 of the Constitution. The fact that regular professors are workers on whom the teaching process at universities and colleges relies, and particularly the training of new teaching staff, means that such special reasons exist.

However, the question of whether and in what circumstances (university) teachers, research workers and (university) associates who have fulfilled the conditions for obtaining the right to a full pension can for special reasons continue in their employment, should be regulated within the framework of the autonomy of universities and colleges. In Article 101, the Employment Act determines that a worker who has fulfilled the conditions for obtaining the right to a full pension may continue in employment if the competent body of the organisation or the employer so decides in accordance with conditions determined by collective labour agreement or general act. The possibility for individual workers to continue in employment after meeting the conditions for full pension is thus already validated in the system. A possible arrangement would be to introduce this possibility for individual categories of workers at universities as a general obligation on employers. On the other hand the rights of workers, could be based on respecting the particularities of the teaching process, and staff structures in universities and colleges. Precisely such a respect for these principles belongs among those questions which are the content of the autonomy of universities defined in Article 58 of the Constitution. The legislative provision which raised such a question is therefore in conflict with the constitutional provision on the autonomy of the university.

Supplementary information:

By resolution of 17 February 1994, the case being dealt with was joined to case no. U-I-27/94 because of common treatment and decision.

Concurring opinion of a constitutional judge.
Dissenting opinion of a constitutional judge.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-2-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25.05.1995 / **e)** U-I-323/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 42/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV/2 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Rule of law.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Compensation / Denationalisation / Retroactivity of law.

Headnotes:

The manner and extent of compensating denationalisation claimants and those bound to return denationalised property is regulated in relation to the actual circumstances and in relation to prevailing economic conditions in society. The conflicting interests of claimants to denationalisation and those bound to return denationalised property is regulated in accordance with the principle of proportionality, and does not violate the Constitution.

Summary:

Denationalisation is not based on dispositive norms but on norms of a compulsory character. Denationalisation claimants obtain rights on the basis of decisions by state bodies. The intention of the Denationalisation Act is to repair the injustices committed on the part of the state against affected owners of private property during and after the Second World War. The legal regulations which were the basis for nationalisation, are not annulled and this is not envisaged by procedures for denationalisation. For economic and political reasons (privatisation and remedying injustice), the law redefines ownership with retrospective effect (*ex nunc*). The Denationalisation Act is based on the principle of justice as an expression of a legal state, so in addition to protecting the rights and legal interests of denationalisation claimants it also protects the specific legal benefits and interests of those with rights to social property who face denationalisation and thus indirectly also the interests of claimants to privatisation.

Denationalisation and the privatisation of social capital, as legitimate interests of Slovene society, are based on the transformation of the legal and political system in Slovenia. These two processes are taking place in parallel, so this transformation, because of the conflicting interests between claimants to denationalisation and those owning property which is to be denationalised, could be obstructed or even prevented. In this process of transformation of the economic and legal system, the legislator has justifiably adopted measures which will ensure the swiftest and most effective transition of Slovene society to a market-orientated and democratic social order. The Denationalisation Act has not been based on the institution of civil law – the reestablishment of the former state. With denationalisation, it is not possible to validate claims to compensation according to general rules of civil law, since nationalisation has no elements which are based on liability to compensation according to the Law on Compulsory Relations. Denationalisation is a special case which the legislator codified with individual laws. In this case, it is essentially the return of assets, which prior to their return were in social ownership. In the restitution of real estate to claimants to denationalisation it is necessary to respect the institution of social ownership and the holder of rights to social property, although these are not valid in the system for protecting ownership rights under the new Constitution. The fact is, that legal categories exist presently in Slovenia which have not been adjusted to the new constitutional system. Legislative measures which are introduced through denationalisation and the privatisation of social capital are urgent in order to establish the economic and legal system determined by the Constitution. In judging the constitutionality of the measures taken by the legislator, in order to establish the economic and legal order itself in accordance with the Constitution, the legislator must regulate conflicting interests as one of the basic principles of a State governed by the rule of law. Since in regulating these relations, public and individual interests are often in conflict, the legislator must protect essential constitutional rights and freedoms. It is precisely this standpoint which conditions the specifically regulated transition to a valid constitutional system. The legislator has regulated such contentious relations using a special Denationalisation Act, so as not to violate basic constitutional principles.

The intention of the Denationalisation Act is to remedy injustices which were committed against affected owners of private property during and after (the Second World War) in the name of the revolution and the systemic transformation of the then society. At the same time, the Law, in accordance with the principle of a State governed by the rule of law, protects the public interest of Slovene society and the rights of legal subjects via a series of institutions and legal mechanisms. On this basis, it ensures the undisturbed performance of the activities of state bodies, public services and the use of infrastructural facilities and prevents encroachment into the performance of the activities of economic subjects whose activities would have been essentially prejudiced. The criteria by which the Act determined those bound by it is the protection of public interest, private property and a prohibition on curtailing essential activities of legal subjects with social capital, who own real estate which must be returned to claimants in the procedure of denationalisation. Thus whilst the Denationalisation Act thus protects the public interest, private property and the specific rights of economic subjects from the rights of claimants to denationalisation, it does not violate the Constitution. The Act is a result of a compromise between the political parties and the legislator weighing up the constitutionally protected rights of legal subjects, so that the rights of claimants to denationalisation are regulated in accordance with these rights. Legal subjects, in possession of nationalised assets, are bound by the Act irrespective of whether these resources were obtained with or without payment. Differentiating between claims by subjects with social capital who hold real estate which was obtained on payment and others who hold real estate obtained without payment, is well founded when looked at from the constitutional principle of a State governed by the rule of law (the principle of justice), and is in accordance with the Constitution. The legislator has regulated this matter so that in creating a balance he has respected the interests of both claimants and those bound to return property, and among the latter he has equally respected the individual nature and the general nature of their actual and legal situation.

The Denationalisation Act, as has been said, does not annul the regulations which were the basis for nationalisation and does not encroach on the validity of legal business dealing with nationalised real estate. The Denationalisation Act is a specific law with which the legislator regulates the remedy of injustices of nationalisation and the transition of the Slovene society to a democratic and market system. From this it follows that the initiator's claims about the profiting of those legal subjects who with receipt of payment gave up real estate obtained without payment, are not acceptable. In neither denationalisation nor privatisation of social capital is it possible to respect and impose different legal rules to cover all the numerous legal and actual situations which have emerged over a period of almost fifty years, first of state and then of social ownership.

Supplementary information:

Concurring opinion of a constitutional judge.

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its decision in case no. U-I-72/93.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-2-009

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 01.06.1995 / **e)** U-I-344/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 41/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV/2 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance – Assistance other than by the Bar – Legal assistance bodies.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental rights – Economic, social and cultural rights – Right to work.
Fundamental rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Notary, exercise of profession / Quality, moral-political suitability.

Headnotes:

The restriction of the constitutional right to work and the freedom to choose one's profession by ascribing special conditions to notary work, is permissible because of the protection of the rights of others to enjoy legal security in legal traffic, which a notary guarantees by his or her knowledge, experience and personal characteristics. It is in accordance with the Constitution if such restrictions include the demand for demonstrating public confidence in the ability to perform notary work.

It is in conflict with the presumption of innocence and the prohibition on the impermissible restriction of constitutional rights if the legislator denies public confidence only on the basis of the existence of criminal proceedings, because with this it prescribes a ban on obtaining a profession or damaging consequences of a criminal offence without a legally binding judgment.

Legal consequences may follow from a court judgment on a criminal offence which would render a candidate for the position of notary unworthy of public trust, but neither this or the requirement that enquiries be made into a candidate's previous life history and behaviour, with a view to determining whether he will perform his professional duties as notary conscientiously and honestly, mean that the law is in conflict with the Constitution.

Summary:

The office of notary is a public service, and its purpose is the security of legal business. This is an important collective good, due to which it is permissible – in accordance with the principle of comparativity – to restrict the constitutionally guaranteed right to work, in this case the right to freely carry on work or a profession (Article 49.1). The Constitution determines in Article 15.3 that human rights and fundamental freedoms shall be restricted only by the rights of others and in cases determined by the Constitution. The right to freely carry on the notary profession is restricted by the rights of others, in order for them to enjoy legal security in legal business, and this is something which a notary guarantees by his knowledge, experience and personal character. Free choice of profession also applies to a notary, although this freedom is restricted by the right that everyone shall have access to public service under the same conditions (Article 25.c of the International Covenant on Civil and Political Rights; Official Gazette of the SFRY, no. 7-35/71). The legislator is justified in determining limiting conditions of either an objective (e.g. business premises) or subjective nature for professions which are performed as a public service. Included among those of a subjective nature are requirements of personal character, and personal suitability, which provide a specific guarantee that the public service will be carried out honestly and conscientiously and that there will be no abuse of the profession on behalf of clients. These restrictions are determined for individual professions, so such an arrangement is not in conflict with the Constitution, if and in so far as individual restrictions or conditions are

determined in such a way as allows judicial review, since a decision on whether a person meets legislatively prescribed conditions for performing a service means a decision on their rights determined in Article 49.3 of the Constitution and the already cited International Covenant. So determining conditions of public confidence for performing notary work is not in itself in conflict with the Constitution, in so far as they are determined in accordance with the above guidelines and do not represent criteria for moral-political suitability. This was defined under the previous system such that it allowed privilege or discrimination in relation to ideological or political convictions and activity.

The institution of "socio-political suitability" was a key and indispensable instrument of repression for maintaining the authority of the political party which had the monopoly in the former totalitarian system. In procedures for deciding on entry to working posts and to public positions, it was compulsory for candidates to demonstrate their suitability in relation to "socio-political criteria". The collective agreement on implementing personnel policies in SR Slovenia (Official Gazette SRS, no. 20(79) became the principle and the standard for staff appointments to the most responsible functions in socio-political organisations, socio-political communities, basic organisations of associated labour, self-management interest groups, local communities, social organisations and societies and in all other organisations and communities (Article 22). It is clear from this Article that this agreement covers practically all forms of activity in society. In the choice of personnel, it was in particular necessary to bear in mind that candidates had to demonstrate an ideological commitment to socialism in their work, to the realisation of the historical interests of the socialist democratic system, and a positive attitude towards the socialist revolution, realisation of the concept of social self-protection, and a creative commitment to building the socialist self-management system (Article 24). Individual topical questions and proposals for concrete personnel solutions and for defining the wider socialist interest in concrete staff solutions were dealt with and adjusted by the coordination committee for personnel questions at the presidency of conferences of the Socialist League of Working People of Slovenia (Article 28). The cited social contract was defined in a similar way to the content of the notion of socio-political suitability, as was defined contextually both in the decision on the initiative of some citizen, who impugned the constitutionality of the Social Agreement on basic personnel policies on the territory of the Ljubljana municipality (Official Gazette SRS, no. 11/76), and by the Constitutional Court of SRS in the reasoning of Resolution no. U-I-110/77-18 of 2 April 1981, that the initiative was not accepted. It is cited in the reasoning that social standards are one of the elements guiding personnel policies. Also mentioned is the attitude of the candidate to the socialist revolution, to the brotherhood and unity of the Yugoslav nations and nationalities and commitment to the development of self-management relations and the division of labour. These standards in the opinion of court had their foundation in basic constitutional principles, in the first and second section of the basic principles of the then Constitution.

The Constitution of the Socialist Republic of Slovenia (Official Gazette SRS, no. 6/74) in Article 285.2 requires in the procedure for the appointment of judges a finding of their moral-political suitability for performing the judicial function. The Law on Regular Courts (Official Gazette SRS, no. 10/77, 4/82, 37/82, 7/86, 41/87 and 24/88) realised the constitutional principle such that socio-political suitability is defined as a mandatory condition for the appointment of a judge (Article 65). It was possible to remove a judge before the end of his term of office if it was established that he was morally-politically unsuitable (Article 75). Moral-political suitability was also a mandatory condition for the appointment of juries (Article 83). If they became socially-politically unsuitable, they could be removed (Article 85). Entirely identical conditions were determined by the Law on Courts of Associated Labour (Official Gazette SRS, no. 38/74, 7/86 and 41/87) for the appointment of judges in these courts (Article 31) and for their removal before the expiry of their term (Article 41), by the law on the public prosecutor's office (Official Gazette SRS, no. 10/77, 7/86 and 41/87) for a Public Prosecutor (Article 31), for their premature removal (Article 33), by the Law on the Public Defender (Official Gazette SRS, no. 19/76 and 31(84), for the appointment of the public defender (Article 12) and his premature removal (Article 17), to mention only the most important public legal functions.

The demonstrated normative arrangement, in which "morality was changed into a tool of politics" and "idealism was reduced to the level of institutionalised hypocrisy" (cf. *Zbigniew Brzezinski, Izven nadzora* Ljubljana, 1995, 56), meant partly a direct, partly a hidden form of permanent threat to human rights. From no point of view is it possible to equate it with criteria, generally valid in democratic countries, which persons in public positions must meet in order for people to trust them.

It is a requirement that notaries be conscientious and honest. This requirement is expressed in the form of a general clause, since it is a generally accepted value which crystallises in an individual case. It is not a closed catalogue of values, but its content is supplemented with practice. In legal relations it is the establishment of realisable, legislative and morally acceptable legal business, preventing harm to the participants in legal business and the abuse of rights,

ensuring the balance of interests between the interests of the parties to a contract. A notary is not a representative of a particular party, but a person who can be trusted by both contracting parties (thus the requirement of "public" trust). In accordance with the above cited, individual elements which bind the competent body in establishing the conditions for a notary in assessing whether such a condition is met, must also be determined.

Conditions of conscientiousness and honesty are undoubtedly conditions for the exercise of the profession of a notary, as well as other professions in which, it is permissible to prescribe such conditions because of the need to safeguard the general well-being or to protect a wider circle of third persons. Capacity and reliability, conscientiousness and honesty are criteria which are also demanded in other countries for such professions as notary, attorney, tax inspector, auditor, etc. According to the law of the European Union, the findings of state bodies on these criteria are also respected in other countries and are not established anew. This is not a criterion which can be identified with moral-political suitability as was recognised in the former legal system and which can be used as political criteria for personnel selection. Guaranteed legal certainty in an administrative dispute on the basis of Article 157.2 of the Constitution and in a constitutional appeal is the guarantee that the use of the criteria of conscientiousness and honesty will not be abused to the detriment of human rights.

Supplementary information:

Concurring opinion of a constitutional judge.
Dissenting opinion of a constitutional judge.

Cross-references:

In the reasoning of the decision, the Constitutional Court refers to resolution U-I-110/77 of 2 April 1981.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-2-010

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.06.1995 / **e)** U-I-38/95 / **f)** / **g)** not published in the Official Gazette of the Republic of Slovenia; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV/2 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

General principles – Separation of powers.
General principles – Legality.
Institutions – Legislative bodies – Relations with executive bodies.
Institutions – Public finances – Taxation.

Keywords of the alphabetical index:

Law, precedence / Tax, Value Added Tax.

Headnotes:

The obligation to pay V.A.T. (Value Added Tax) may be introduced only by law. Regulations as a sub-legislative act must be in accordance with the Constitution and law. They may not contain provisions for which there is no basis in law, and in particular they may not independently determine rights and obligations, such as for example the introduction of V.A.T..

Summary:

The obligation to pay V.A.T. may only be introduced by law. The regulations, as a sub-legislative act, must be in accordance with the Constitution and law (Article 153 of the Constitution), may not contain provisions for which there is no basis in law, and in particular may not independently determine rights and obligations such as the introduction of the obligation to pay sales tax. Sub-legislative regulations may supplement legislative norms only in so far as they do not regulate conditions independently (circumventing the legal framework) and do not introduce new obligations.

According to the Constitution (Article 120) administrative bodies must comply, which includes the issuing of regulations within their competence, with the framework determined by the Constitution and Law. The constitutionally validated principle of the division of among the legislature, executive and judiciary means among other things that administrative bodies do not have the right to issue general norms which have no basis in law. This principle excludes the possibility that administrative bodies might adopt or independently arrange legislative matters. The

provision of Article 79 of the Law on V.A.T. gives sole authorisation to the director of the Republican Administration Body for Finance only to issue more detailed regulations on the manner of calculating and paying sales tax. With the introduction of taxation, the disputed paragraph of Article 39 encroaches on the domain of the Law on V.A.T., although there is no basis for such an encroachment. When the regulations in Article 1 (introductory provisions) enumerate the areas which this Article regulates on the basis of Article 79 of the Law on V.A.T., among other things it is stated that "it prescribes the use of levels, reliefs and exemptions in V.A.T.". It is necessary to understand this citation in the context of legal authority – that is, that the provisions of the regulations are only of an implementing or clarifying nature, which the formulation "use" indicates. The legislative arrangement can be supplemented and explained only in so far as the contents are not changed.

Cross-references:

The Constitutional Court has already adopted a similar standpoint in cases U-I-1/92, U-I-72/92 and U-I-82/92 (published in the official collection of the Constitutional Court no. 48/I, 56/II and 101/II) and decision no. U-I-73/94 of 25 May 1994, except that in some of these cases it annulled impugned provisions of executive regulations.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-2-011

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.06.1995 / **e)** U-I-32/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 44/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV/2 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.
Fundamental rights – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Environment, protection / Legal concept, undefined / Licence, geographic restriction / Natural resources, right to use or exploit / Temporary order.

Headnotes:

The Law on the Protection of the Environment is in conflict with the Constitution in so far as it does not define the legal position of subjects who, on the basis of valid legislation, have existing rights to use or exploit natural resources owned by the state, and in so far as it does not define the concept or content of the legal term "geographic restriction on the licence".

Summary:

Article 17 of the Law on the Protection of the Environment determines that water, mineral deposits, freely reproducing wild animals, fish and other freely reproducing or free growing water animals and plants are the property of the Republic. State ownership has replaced the social ownership of natural resources. The consequence of the transfer of part of the natural resources into State ownership is that a licence is required for their use or exploitation by other legal or physical persons, as well as there being an obligation on the part of the State to produce a balance sheet detailing the natural resources and establishing both the actual and legal state of these resources. The State has assumed ownership of these natural resources with all their burdens and must respect the existing rights of subjects with respect to individual natural resources. In addition to administrative tasks relating to the use of natural resources and undertaken by the State on the basis of the Law on the Protection of the Environment, with the validation of the Law on Functions taken over by the State which had been performed until 31 December 1994 by municipalities (Official Gazette RS, no. 29/95), the State also assumed those administrative tasks which had until then been performed by municipalities on the basis of regional legislation. Legal acts (administrative decisions), giving rise to the subjective rights to use natural resources, now bind the State.

For legal relations which derive from administrative decisions which have been taken, before the adoption of new regional legislation, the applicable provisions of existing regional legislation shall be used. In so far as the State decides to award licences with regard to natural resources, it must behave according to the provisions of the Law on the Protection of the Environment and respect the applicable provisions of regional legislation in so far as these determine the conditions of use of natural resources which the licence holder

will have to respect. In awarding licences for the use of natural resources, the State must respect acquired rights. To do otherwise would be in conflict with Article 2 of the Constitution, which determines that Slovenia is a State governed by the rule of law.

The Law on the Protection of the Environment has determined a new legal regime for obtaining the right to use, manage or exploit natural resources. The third sentence of the seventh paragraph of Article 21 of the Law on the Protection of the Environment states that existing licence rights shall be respected in determining the criteria for validating priority rights. These are held by the owner of the land on which the natural resource is found, but can be validated only by the owner obtaining a licence on the basis of a public call for applications. The provision that in determining criteria for validating priority rights, existing licence rights shall also be respected is not entirely clear, especially when there is competition between holders of existing licence rights and the owner of the land. These provisions also provide that a holder of existing licence rights must make an application in a public tender.

With the cited provisions, the Law on the Protection of the Environment does not annul these rights, but it does place the holders in a position, as the initiator claims, in which they must again apply for rights which have already been recognised with a legally binding administrative decision. The legislator should have regulated the transfer of existing licence rights into the new legal regime (licence relations) in the transitional provisions. Since the Law on the Protection of the Environment does not regulate the transformation of these relations, there is an anti-constitutional legal lacuna, which is in conflict with the constitutional principle of a State governed by the rule of law. The Constitutional Court thus found on the basis of Article 48.1 of the Constitutional Court Act that the Law on the Protection of the Environment is in conflict with the Constitution.

The legislator must regulate the position of subjects whose right to use or exploit natural resources is based on valid administrative decisions in accordance with the principle of a State governed by the rule of law until 1 December 1995.

The Constitutional Court determined the implementation of this decision on the basis of Article 40.2 of the Constitutional Court Act. The established conflict with the Constitution means that the Government must respect existing licence rights and that it cannot therefore start or continue procedures for awarding licences in respect of those natural resources to which licence rights already exist, until it regulates by law the means of transferring existing licence rights into the legal regime of licensing. Until an appropriate legislative arrangement for transferring existing licence rights into the new legal regime is in place, the holder of such rights is entitled to use or exploit natural resources, and the Government must allow the exercise of such rights.

Languages:

Slovene, English (translation by the Court).

Spain
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

Type and number of decisions:

- Judgments: 64
- Decisions: 111
- Procedural decisions: 990

Cases submitted: 1589

Important decisions

Identification: ESP-95-2-013

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 08.05.1995 / **e)** 66/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 13.06.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Right of assembly, exercise / Public order, protection.

Headnotes:

The right of assembly (Article 21.1 of the Spanish Constitution) safeguards the collective exercise of freedom of expression by a gathering of people formed to promote the exchange or expression of ideas, defend certain interests or publicise problems and demands. Under the Constitution it is permissible to place restrictions on this right in order to protect public order, people and property. Thus a gathering may be prohibited only if such a measure is necessary – i.e. if there is no less restrictive and equally effective measure – and proportionate in the strict sense of the term, i.e. carefully weighed up or balanced, in that the benefits or advantages of the measure in terms of the public interest must outweigh the harm caused to the assets or values at stake.

Summary:

Following a call by the Federation of Banking Trade Unions for a demonstration in support of the demand for the negotiation of a new collective agreement, the prefectural authorities decided to ban the demonstration on the grounds that it would seriously affect traffic and public order. This decision, which was appealed against through administrative channels, was subsequently upheld by a court decision, which was in turn the subject of the present constitutional appeal, based on the following three grounds: the ban was misconceived; the placing of restrictions on the exercise of the right of assembly provided for in the State Authorities Act governing that right (L.O. 9/1983) was unconstitutional; and the measure adopted was disproportionate. Having held that the allegation that the prefectural decision was misconceived was constitutionally inadmissible, as it had not been proved in the case in question that the decision had been an obstacle to the exercise of the right of assembly, the Constitutional Court focused its analysis on the restrictive interpretation of the exercise of the right of assembly reflected in the decisions and on the proportionate nature of the measure adopted.

To this end, having considered the content of the right of assembly and analysed its components, the Court pointed out that, in the case of many social groups, this right was the main means by which to express ideas and put forward demands in public. That said, as in the case of any other right, the Constitution placed limits on its exercise. In this case, these limits applied when the exercise of this right on a public thoroughfare could cause "public order disturbances which could endanger persons and property". Having specified that the concept of public order referred to a practical situation and that it could not under any circumstances be applied in order to discriminate against the messages it was planned to put across in the course of such a demonstration, the Court added that the application of the prescribed restriction was admissible only if there were well-founded reasons to believe that there was a possibility of a practical disturbance likely to undermine public order within the meaning of the Constitution. In short, in order to restrict the exercise of the right of assembly, it was necessary, in each case, to weigh up all the specific circumstances in order to determine whether there were in fact well-founded reasons for believing that the traffic problems would have the features and effects described above.

Accordingly, any prefectural decision banning a gathering must state the reasons for this ban and show why it was impossible to take the precautions needed to allow the exercise of the right of assembly. Given the constitutional nature of the right, the authority had, before banning a gathering, to apply criteria of proportionality and make use of its powers to suggest changes in the date, venue or duration of the gathering so that it could take place, even though in some cases such changes could, admittedly, make the exercise of the right meaningless. In the present case, the Court considered that the decisions appealed against were sufficiently well-founded, that sufficient reasons had been given for them and that they were proportionate since they fulfilled the minimum conditions that could be laid down. One judge expressed a dissenting opinion on the grounds that the ban was based on an abstract assessment of the effect of the demonstration on traffic.

Languages:

Spanish.

Identification: ESP-95-2-014

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.05.1995 / **e)** 70/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 13.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual – Political parties.
Constitutional justice – Types of litigation – Electoral disputes.
Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – Civil and political rights – Electoral rights.
Fundamental rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Electoral candidature / Elections.

Headnotes:

No political party, electoral coalition or group of voters may exclusively appropriate terms that genuinely represent widespread concepts ("socialist", "liberal", "greens"), and the corresponding electoral candidature must contain sufficient distinctive elements to avoid the risk of confusion among the electorate, which is prohibited by law, so as to ensure that citizens can exercise their right of access to representative office under equal conditions.

Summary:

After elections had been called in the Autonomous Community of Madrid, one of the parties standing ("The Alternative Greens") appealed against the proclamation by the Electoral Commission of the candidature of another political group ("The Greens – Green Group" electoral coalition). "The Alternative Greens" based their appeal mainly on the fact that the name, initials and symbols of the "The Greens – Green Group" electoral coalition were identical or similar to theirs.

In establishing whether Article 23.2 of the Constitution had been violated, the Constitutional Court reiterated its opinion (Judgment no. 107/1991) that the right of access of citizens, under equal conditions, to representative office included the right to preserve their identity in the eyes of the electorate. It was therefore a question of determining whether the names and symbols used by the parties standing and involved in the dispute infringed Section 46.4 of the General Electoral System Act, which prohibited parties which were standing from having names, initials or symbols likely to give rise to confusion with those of other parties. This rule did not, according to the Court, in any way authorise a particular group to appropriate for its exclusive use terms which genuinely represented widespread concepts (for example, "socialist", "liberal", "greens"). No one, therefore, could appropriate such terms for their exclusive use. Consequently, since the two parties, although they both used the term "The Greens", could be adequately identified by means of the word "Alternative" in one case and the addition "Green Group" in the other – quite apart from the fact that the graphics were different – it had to be concluded that, when both forms of identification (names and graphics) were assessed together, there was absolutely no risk of the confusion which the Act was designed to prevent.

Languages:

Spanish.

Identification: ESP-95-2-015

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.05.1995 / **e)** 78/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 21.06.1995 / **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 expression.
Fundamental rights – Civil and political rights – Right to information.
Fundamental rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Personal dignity / Public figures, status.

Headnotes:

In the event of a conflict between two fundamental rights (in this case, between the right to one's reputation and freedom of expression), the court must weigh up the interests involved. On the other hand, if either right is infringed, the Constitutional Court has jurisdiction to review the lower court's assessment of the relative importance of the interests in question.

Summary:

Further to a series of judgments acquitting the accused of the criminal charge of insult brought by the appellants against the writer of a newspaper article who alluded in it to their careers and their influence on the town's politics and community life in terms that tarnished their reputation and were, moreover, acknowledged to be unnecessary in the judgment appealed against, the appellants appealed for constitutional protection.

Here again, the issue is a conflict between freedom of expression and freedom of information, both provided for in Article 20 of the Spanish Constitution, and the right to one's reputation (Article 18.1), which the Constitutional Court is responsible for upholding. In a long line of earlier decisions, that Court had reserved the right to review the lower court's assessment of the relative importance of the conflicting rights. Having analysed the facts, which were declared proven in the judgments appealed against, the Constitutional Court held that the conflict was not between the right to one's reputation and freedom of information, but between the right to one's reputation and freedom of expression, since features characteristic of the latter were predominant in the case in question, in so far as the author was seeking solely to make value judgments reflecting an unfavourable opinion of the appellants. Even if the public-figure status of the appellants and the public interest connected with their occupation were acknowledged, their right to their reputation must be protected against all the pejorative or outright hurtful comments that had undoubtedly been made throughout the newspaper article in question – comments which were, moreover, quite unnecessary for the purpose of expressing a critical view of their public activities and had no connection with the latter. As the Court said, the Constitution in no way upholds the "right" to insult someone, which would be incompatible with personal dignity as provided for in Article 10.1 of the Constitution.

In the judgments appealed against, therefore, the conflicting constitutional rights were not properly weighed up, since the judgments should have refused to allow any arguments attempting to justify the exercise of freedom of expression. In fulfilling its function of safeguarding fundamental rights, the Constitutional Court was therefore bound to quash the contested judgments on the grounds that they had failed to uphold the right to their reputation of the persons who had applied for constitutional protection.

One judge expressed a dissenting opinion on the ground that acquittal decisions taken by the criminal courts should not be quashed by the Constitutional Court.

Languages:

Spanish.

Identification: ESP-95-2-016

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 06.06.1995 / **e)** 88/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 08.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual – Natural person.
Constitutional justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.
Constitutional justice – The subject of review – Administrative acts.
Fundamental rights – Civil and political rights – Freedom of expression.
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:

Media, television / Local television, legal system.

Headnotes:

The facilities provided for in Judgment no. 31/1994 for local cable television should not be extended to local television broadcasting over the air because of the greater complexity of the medium: the Court does not have jurisdiction to regulate frequencies and power – a task which presupposes in degree of regulation, which does not yet exist.

Summary:

This appeal for constitutional protection was lodged against several decisions taken by the authorities and upheld by the courts, which led to disciplinary proceedings against a local television channel and to seals being placed provisionally on its equipment. The appellant contended that there was a violation of the fundamental right to freedom of expression and freedom of communication (Article 20.1.a and d of the Spanish Constitution) as a result of the partial enforcement of Acts which were not institutional Acts, and which prevented the exercise of these rights but did not contain any provisions specifically concerning local television.

Having analysed the argument that the Private Television Act (no. 10/1988) was not sufficiently high in the hierarchy of laws to be enforced in this way, the Constitutional Court pointed out that it had taken a negative stand on this issue in an earlier judgment and held that the regulation of the legal system governing the public television service was not really a direct extension of these fundamental rights, either in their entirety or in respect of essential aspects, as these rights were the preserve of institutional Acts. There was therefore no case for inferring from the above-mentioned Act that forms of television that were not regulated by the Act were necessarily excluded.

The court concentrated on the crux of the appeal, ie the scope of public freedom of expression and communication and its effects on the right to set up the media necessary for the exercise of this freedom, in particular television, by obtaining the various technical facilities and geographical coverage. The court pointed out in this connection that its own views on the subject had evolved since 1982. In its first judgment it had focused on a circumstance crucial to the constitutional interpretation of this freedom, namely "changes" in technology and society's values in so far as such changes would alter the justification for, and restrictions on, *publicatio*. The court went on to state that Article 20 of the Spanish Constitution did not directly provide for the right even to be allocated frequencies on which to broadcast, even locally. Lastly, the court acknowledged, in accordance with the principle of rationality, the right to make local television broadcasts specifically by cable, and held that the fact that the law did not mention this type of television meant purely and simply that individuals were prohibited from running such a television channel, and that this prohibition was a violation of the above-mentioned freedom. In such a decision it was important to take account of the relative simplicity of cable as a medium – a simplicity which made it possible, temporarily, to make good the law's failure to provide for the regulation of private television with regard to territorial coverage. In this case, the technical restrictions stemming from the limitations of television air space necessitated; in the case of local television broadcasts over the air, a different approach, since it was in any event essential to regulate the medium first, and this could be done only by the legislature, whose undeniable freedom of choice must not be unnecessarily restricted.

One judge expressed a dissenting opinion on the grounds that the technical medium needed to broadcast and receive programmes over the air was simpler, at local level, than that needed to broadcast and receive programmes by cable, and that this should have prompted the court to afford constitutional protection.

Languages:

Spanish.

Identification: ESP-95-2-017

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 06.06.1995 / **e)** 89/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 08.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Court decisions.
Constitutional justice – Procedure – Documents lodged by the parties.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Judgment as to relevance / Subsidiarity, principle.

Headnotes:

The right of a litigant to adduce evidence authorised under the legal system is subject to the court's judgment as to whether the evidence is relevant – a judgment for which detailed reasons must be given in accordance with procedural laws and, in particular, the Constitution.

Summary:

When the Supreme Court handed down its decision concerning the appellant's administrative appeal against disciplinary decisions taken by the authorities, it declared some of the evidence inadmissible and delivered a judgment dismissing the appellant's claim. This judgment was the subject of the present appeal for constitutional protection. The Supreme Court of Cassation dismissed the appeal on the ground that the sum involved was to small. The appellant considered that during the proceedings his right to adduce relevant evidence (Article 24.2 of the Spanish Constitution) was infringed.

It appeared that in its decisions the court declared the evidence inadmissible without the least reason for doing so, and without explaining why it considered that the rejected evidence bore no relation to the facts. Moreover, the court informed the appellant of its decision when it made the judgment final, whereas it could have done so at the start of the stage at which the evidence was submitted, in which case he could have appealed. In doing so, it left him no alternative but to apply for constitutional protection. This entailed a serious breach of the constitutional principle of subsidiarity. It is therefore necessary to return to the evidence stage so that the court can restore the right which was infringed.

Languages:

Spanish.

Identification: ESP-95-2-018

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.06.1995 / **e)** 92/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 24.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance – The Bar – Discipline.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Barristers and solicitors / Submissions, freedom of expression.

Headnotes:

The fact of bringing criminal proceedings against solicitors and barristers in respect of actions which do not constitute an offence and have been subject only to disciplinary proceedings since the Judiciary Act was passed infringes the rights of the defence (Article 24.2 of the Spanish Constitution).

Summary:

In the performance of his duties as a barrister during preliminary proceedings against his client before an investigating court, the appellant barrister, in response to a court official's refusal to disclose these proceedings, uttered words whose use was subsequently designated as misconduct by a decision of the court, and caused criminal proceedings to be brought against him. In the present appeal for constitutional protection, the appellant contended that his right to freedom of expression and the right not to be deprived of a defence were violated, on the grounds that the disciplinary proceedings provided for in the Judiciary Act (Sections 448ff) provide a better safeguard for barristers and solicitors than the petty offences procedure.

The Constitutional Court held that, even though the barrister's actions in the registry were not such as to constitute the exercise of his right to true freedom of expression in putting forward his arguments, they nevertheless had the features provided for in Article 24.2 of the Spanish Constitution, in so far as his actions took place in the context of the defence of the interests of his client, who was present at the time. In this case, therefore, the Constitutional Court's established view prevails: in the case of actions which do not constitute an offence, the disciplinary system applicable to barristers and solicitors in respect of their submissions is that laid down in the aforesaid Act, and not that laid down in general in respect of actions constituting misconduct. Consequently, since the judicial authorities did not abide by the requirements stemming from the new disciplinary regime designed to decriminalise certain offences, the contested judgments should be quashed.

Languages:

Spanish.

Identification: ESP-95-2-019

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.06.95 / **e)** 94/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 24.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade unions, activities.

Headnotes:

The content of the right to organise (Article 28.1 of the Spanish Constitution) cannot be restricted solely to matters of organisation or association, in so far as it also has a functional aspect, namely the right to engage in trade union activities, i.e. the right of trade unions to engage in all forms of activities designed to defend, protect and promote workers' interests: in short, the right to use the means necessary to fulfil the functions attributed to them by the Constitution.

No fundamental right, not even the right to organise, is absolute and unlimited. Trade union information and propaganda activities must, in accordance with the Act elaborating on the above-mentioned fundamental right, be carried out outside working hours and without disrupting the firm's normal activities.

Summary:

The question raised in this appeal for constitutional protection was whether the right to organise had been infringed by a firm's decision to prevent shop stewards from collecting, during the time set aside for their activities, signatures for a petition against a proposal to alter working hours. The firm considered that the places chosen for this trade union activity – the staff canteen and the staff entrance – were not appropriate.

The Constitutional Court held that, if the method chosen to pass on information to workers was used outside working hours and did not disrupt the firm's activities, it constituted a legitimate exercise of the right to organise. It therefore considered that this fundamental right had been infringed since it had been proved that the appellant trade unionists had not carried out their union activities during their actual working hours but had used the time off given to them for this purpose. It was also proved that the workers who received the information did not do so during their working hours, since the petition was signed in the staff canteen at mealtimes, i.e. during their break, with the result that the trade union activities in no way disrupted the firm's normal production activities.

Languages:

Spanish.

Identification: ESP-25-2-020

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.06.1995 / **e)** 96/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 24.07.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Detention ordered by the authorities / Expulsion procedure.

Headnotes:

The right to personal liberty (Article 17 of the Spanish Constitution) is infringed when someone is deprived of freedom in cases and circumstances not prescribed by law.

The decision to place a foreigner who is the subject of expulsion proceedings in detention must be taken by a court; reasons for the decision must be given, the rights of the defence must be respected and account must be taken *inter alia* of the circumstances surrounding the reason for the expulsion, the legal and personal situation of the foreigner, the likelihood of his or her absconding and any other matters considered relevant to the decision by the court, given that foreigners may be detained only in exceptional circumstances and that their freedom must be respected unless the loss of that freedom is considered indispensable for precautionary or preventive purposes.

Summary:

This appeal for constitutional protection was lodged against court decisions authorising the detention of two foreigners during proceedings for their expulsion from Spain.

The Constitutional Court held that the court had given no reasons for the contested decisions: it had not justified the detention measure and had not taken account of the personal circumstances of the persons placed in detention. The decision to deprive them of their liberty was therefore an infringement of their fundamental right to effective judicial protection (Article 24.1 of the Spanish Constitution) and to personal liberty (Article 17 of the Spanish Constitution). The Constitutional Court also held that the absence of a hearing and the fact that the appellants were unable to defend themselves before the court which had authorised the deprivation of their freedom during administrative expulsion proceedings also infringed the above-mentioned fundamental rights.

Languages:

Spanish.

Identification: ESP-95-2-021

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 04.07.1995 / **e)** 111/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 03.08.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Right to counsel / Criminal proceedings, safeguards / Judicial protection, effective.

Headnotes:

The right to effective judicial protection (Article 24.1 of the Spanish Constitution) comprises, firstly, the right to institute legal proceedings, since the right of the injured party to apply for the State's *ius puniendi* to be put into effect is a right worthy of protection. This *ius ut procedatur* enjoyed by the injured party does not, however, consist of an absolute right to institute criminal proceedings and have them run their full course, but only a right to a reasoned decision concerning the complaint, which may give rise to the suspension of proceedings, a discharge by the investigating judge or even a declaration to the effect that the complaint is inadmissible.

The right to the assistance of a barrister and solicitor appointed by the court (Article 24.2 of the Spanish Constitution) is fully effective only in the case of a person accused in the context of criminal proceedings. In all other cases, it is a right which is subject to various procedural and substantive conditions.

Summary:

The question raised in this appeal for constitutional protection was whether the right to effective judicial protection (Article 24.1 of the Spanish Constitution) had been infringed by a court decision suspending criminal proceedings brought by the person appealing for constitutional protection – a prison inmate – in respect of the prison management's liability for opening correspondence between the prisoner and his lawyer.

The Constitutional Court held that the injured party's right to bring criminal liability proceedings, irrespective of the outcome, was part of the right to effective judicial protection in so far as it was exercised logically and chronologically, as in the case in question. According to the judgment, the appellant's right to effective judicial protection was infringed, since the court never gave him the opportunity, during its investigations, to describe in detail the circumstances he considered important to his case. Moreover, it did not take a statement from him and did not give him the opportunity to sue for damages, il he so wished, or to otherwise defend his interests.

In addition, the Constitutional Court pointed out that, once investigations had taken place, the opening of proceedings was subject to two conditions: first, the injured party must sue for damages and, second, being of slender means, he must be entitled to have lawyers appointed by the court to represent and defend him.

Languages:

Spanish.

Identification: ESP-95-2-022

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 06.07.1995 / **e)** 113/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 03.08.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Jurisdiction.
Institutions – Courts – Military courts.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards.

Keywords of the alphabetical index:

Fundamental rights, preferential procedure / Fundamental rights, summary procedure / Judicial unity, principle.

Headnotes:

Article 53.2 of the Spanish Constitution provides that any citizen may apply to the ordinary courts for protection of his other fundamental rights and freedoms and rights by means of a procedure based on the principles of preference and brevity. In effect, the abovementioned constitutional provision gives the legislature a mandate to lay down rules governing a quick procedure for ensuring the protection of fundamental rights and freedoms; it does not attribute responsibility for this protection to a particular court; still less does it exclude the military court from responsibility for the protection provided by all courts.

Summary:

The judicial body which raised the question of unconstitutionality had doubts about the constitutionality of certain provisions of the Military Procedure Act, on the grounds that military courts could not be considered to be included in the term "ordinary courts" in Article 53.2 of the Spanish Constitution, and that they could not therefore be attributed, as was the case in the con-

tested legal provisions, responsibility for ensuring preferential, summary protection of fundamental rights and freedoms in certain areas, such as military discipline. It thus drew a distinction between military courts and so-called ordinary courts.

The Constitutional Court held that the question of unconstitutionality should be dealt with by comparing Article 53.2 and Article 117.5 of the Constitution, the latter being the provision specifying that the military courts deal with strictly military matters. It took the view that there was no case for inferring that the reference to ordinary courts in Article 53.2 of the Spanish Constitution appreciably altered the organisation of the judiciary as provided for in the Constitution as a whole. While it was true that Article 117.5 of the Spanish Constitution enshrined the principle of judicial unity as the basis for the organisation and workings of the courts, and stipulated, "The law shall govern the exercise of military jurisdiction in strictly military matters and in the event of a state of emergency, in accordance with the principles of the Constitution", this constitutional rule could not be disregarded when it was a question of protecting fundamental rights and freedoms violated in a strictly military context. Once the military courts had been acknowledged to have jurisdiction to hear ordinary military disciplinary cases, in which the fundamental rights in question could, and should, naturally be protected, the fact that disciplinary proceedings of this kind were subjected to the principles of preference and brevity under Article 53.2 of the Spanish Constitution, for the purpose of upholding fundamental rights and freedoms, could not, in the name of a constitutional requirement, be considered as grounds for taking away from the court competence to deal with strictly military matters, as provided for in Article 11.5 of the Spanish Constitution. In short, according to the Constitutional Court, there was no case for contending that military courts could not be considered to be included in the reference to ordinary courts in Article 53.2 of the Spanish Constitution since, as fundamental rights and freedoms could be infringed in an area which the Constitution itself had designated as being the preserve of the military courts, these courts could be considered, from this point of view and in this area, to be included in the term "ordinary courts".

The distinction drawn in Article 53.2 was a distinction between the ordinary courts and the Constitutional Court. The former were entrusted, in a general capacity, with upholding fundamental rights and freedoms, notably by means of a procedure which was preferential and quick – commonly described as ordinary judicial protection for fundamental rights – whereas the Constitutional Court was responsible for upholding fundamental rights and freedoms in response to an appeal for protection – known as an appeal for constitutional protection.

Supplementary information:

Three judges expressed a dissenting opinion.

Languages:

Spanish.

Identification: ESP-95-2-023

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 17.07.1995 / **e)** 119/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 22.08.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Social State.
Fundamental rights – Civil and political rights – Procedural safeguards.
Fundamental rights – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Local government / Right to take part in public affairs.

Headnotes:

Citizens have the right to take part in public affairs, directly or through representatives freely elected during periodic elections by universal suffrage (Article 23.1 of the Spanish Constitution). With regard to the right to take part through representatives, the Constitution specifies that the representatives in question are those elected in periodic elections by universal suffrage. It therefore undoubtedly refers to political representation, i.e. to participation on the occasion of the elections of Members of Parliament and of the territorial authorities through which the State is organised (autonomous communities, municipalities and provinces), and does not include other possible forms of representation of a corporate or professional nature.

The direct participation in public affairs enjoyed by citizens is that exercised through the referenda

provided for in the Constitution. It includes the various types of referenda listed and, ultimately, what are traditionally considered as forms of direct democracy, i.e. cases in which political decisions are taken by means of a direct appeal to the holders of sovereignty (popular proposal for legislation, general assembly of citizens).

Summary:

The question raised in this appeal for constitutional protection was whether a local government body's failure to inform the public prior to the approval of a town planning scheme interfered with the right of direct participation in public affairs (Article 23.1 of the Spanish Constitution).

The Constitutional Court held that not all the forms of participation in matters of social, economic and professional interest provided for by law came within the scope of the constitutionally protected right to take part in public affairs. To determine whether it was in fact the right to political participation in accordance with Article 23.1 of the Spanish Constitution that was at stake, account had to be taken not only of the nature and form of the demand for participation but also of its purpose. In the final analysis, it was only when the demand for participation entailed the exercise, direct or through representatives, of political power that the right in question coincided with the right to take part in public affairs, as enshrined in Article 23.1 of the Spanish Constitution.

The right of the public to be informed, as provided for in town planning rules, was not a right to political participation within the meaning of Article 23.1 of the Spanish Constitution. It was a case of participation in an administrative decision, which was not, strictly speaking, an example of the exercise of popular sovereignty, but rather the exercise of one of the means available to citizens in a democratic State to make their voices heard when decisions concerning them were taken, and one that ensured that the proper procedure was followed and that the legitimate rights and interests of the public were upheld. Its purpose was not to call on the electorate to ratify a decision already taken, but rather to encourage anyone who had a particular interest in the matter, or had expressed the wish to do so, to express his or her opinion. This provided the authorities with information, helped to ensure that the measure to be taken was just and well-founded, and established a means of defending the individual or collective interests of persons potentially affected by the decision.

Languages:

Spanish.

Identification: ESP-95-2-024

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.07.1995 / **e)** 124/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 22.08.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Law-making procedure.
Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – Civil and political rights – Right to participate in political activity.
Fundamental rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Parliament, members / Parliamentary groups / Parliament, proceedings / Private Members' Bills.

Headnotes:

Bills put forward by parliamentary groups are not only a means by which parliamentarians share in the legislative power of Parliament, but also instruments that serve the representative function characteristic of Parliament; they are effective instruments in the hands of various parliamentary groups, enabling them to force the plenary Parliament to express an opinion on the expediency of the initiative in question, and thus oblige the various political and parliamentary forces to take a stand in public.

A refusal by Parliament to examine a Private Members' Bill strikes at the very heart of representation since, by preventing the parliamentarians who tabled the bill from lawfully exercising their right of initiative as part of their *ius in efficium* (Article 23.2 of the Spanish Constitution), it also affects citizens' right to be represented and to participate indirectly in public affairs (Article 23.1 of the Spanish Constitution).

Summary:

This appeal for constitutional protection contended the decision by the Bureau of the Parliament of an Autonomous Community declaring a Bill put forward by a parliamentary group inadmissible, despite the fact that it fulfilled all the formal conditions laid down in the Rules of Procedure, on the grounds that part of its content, being outside the scope of the legislative powers of the Autonomous Community, was unconstitutional.

The Constitutional Court, having examined the parliamentary Rules of Procedure, first pointed out that the Bureau had the power to assess and admit documents submitted to Parliament and that this scrutiny, which concerned the technical regularity of such documents, merely entailed checking whether the document in question fulfilled the conditions laid down in the Rules of Procedure. Although it was sometimes essential to examine the substance of parliamentary documents, there was no case for carrying out such an examination in the case of Private Members' Bills. In respect of such bills, the Bureau should merely ascertain that the technical requirements had been fulfilled and refrain from any consideration of their content, in so far as Private Members' Bills were an appropriate means of provoking political debate and obliging the various political groups to take a stand on the advisability of passing a law on a particular subject.

The Court concluded that the Parliamentary Bureau's Rules of Procedure did not entitle it to pass judgment on the constitutionality of a Private Member's Bill, establishing whether or not it was beyond the scope of the legislative powers of the Autonomous Community. It was up to the plenary Parliament to reject it on this or any other ground and, ultimately, if it was passed following the removal of the allegedly unconstitutional provisions, it was up to the Constitutional Court, if citizens so entitled so requested, to decide whether or not the prospective law was constitutional or unconstitutional.

Languages:

Spanish.

Identification: ESP-95-2-025

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 26.07.1995 / **e)** 128/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin) of 22.08.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
General principles – Reasonableness.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Detention on remand.

Headnotes:

If detention on remand is to be lawful under Article 17 of the Spanish Constitution, there must be, as a prerequisite, rational evidence that an offence has been committed; the objective of detention must be constitutionally legitimate and in keeping with the nature of the detention measure; and the detention order must, when issued or renewed, be considered to be an exceptional, provisional measure subject to the principle of subsidiarity and proportionate to the above-mentioned objectives.

Summary:

This appeal for constitutional protection was lodged against court decisions refusing to allow the provisional release of the appellant, who had been detained on remand for eight months. The risk that he would abscond was given as justification for this precautionary measure.

The Constitutional Court declared that the decision to detain someone on remand must be subject to strict necessity and respect for the principle of subsidiarity, which implied not only that the measure was effective but also that other, less coercive measures would be ineffective. Furthermore, the measure must be temporary, in that it must be reviewed if the circumstances behind it changed, and must be proportionate; there must be provision for a maximum, and the seriousness of the offences to which it was applicable or which it was designed to prevent must be specified. Lastly, with regard to its purpose, detention on remand met the need to avert certain risks impor-

tant for the purpose of the trial and, where applicable, the enforcement of the judgment, and the risk of recidivism. Detention on remand must not on any account be used for punitive purposes or to anticipate a sentence, or even to help with investigations.

Having stressed the need for courts to give adequate reasons for decisions to detain someone on remand, the Constitutional Court pointed out that, in order to ascertain whether there was a risk of the person in question absconding, it was necessary to take into account firstly, in addition to the nature and seriousness of the offence with which the person had been charged and the sentence, the material circumstances of the case and the personal circumstances of the accused and, secondly, the fact that the conditions laid down when the measure was initially taken were not necessarily the same as those applicable to its renewal, in so far as circumstances reducing the danger of the person's absconding might emerge over time.

The Constitutional Court held that the contested court decisions were unreasonable, since they were incomplete, in that the danger of the detainee's absconding had been assessed solely on the basis of the seriousness of the offence committed, while other circumstances surrounding the case, the appellant's criminal record and the effects of the time spent in prison had not been weighed up. It therefore considered that these court decisions infringed the appellant's right to freedom, and ordered that he be provisionally released, without prejudice to any precautionary measures taken by the judicial authorities.

Languages:

Spanish.

Sweden

Supreme Court
Supreme Administrative Court

Reference period:
1 May 1995 – 31 August 1995

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

Switzerland
Federal Court

The following statistical data cover the reference period 1 January 1994 – 31 December 1994.
The same statistics have already been published in the Bulletin 1995/1 but under a wrong 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-95-2-005

a) Switzerland / **b)** Federal Tribunal / **c)** Court of Cassation in criminal Law / **d)** 11.01.1995 / **e)** 6A.78/1994 / **f)** T. against Administrative Law Appeals Board of the Canton of Sankt Gallen / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 II 22 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Criminal courts.
Institutions – Courts – Administrative courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Criminal charge / Driving licence, suspension as a reprimand / Public hearings.

Headnotes:

Legal nature of suspension of driving licence as a reprimand; public hearings.

The suspension of a driving licence is a decision as to the merits of a criminal charge within the meaning of Article 6.1 ECHR. The person concerned is entitled to a public hearing.

Summary:

T. was found guilty of a drink-driving offence. The Road Traffic Office of the Canton of Sankt Gallen subsequently suspended his driving licence for four months. The Cantonal Administrative Law Appeals Board confirmed the decision.

T. lodged an appeal in administrative law with the Federal Court, claiming a violation of Article 6.1 ECHR because there had been no public hearing before the Canton Appeals Board.

It was not disputed that this Board is a court within the meaning of Article 6 ECHR.

The Federal Court considered whether the suspension of the driver's licence fell within the provisions of Article 6.1 ECHR and was a decision as to the merits of a criminal charge. Although, under Swiss law, the suspension of a driving licence is an administrative measure and not a criminal penalty, the Federal Court accepted that Article 6.1 ECHR was applicable in view of the similarity of criteria used in considering the suspension of the driving licence as a reprimand.

In this case, the Canton Appeal Board's refusal of a public hearing violated the Convention. The Federal Court upheld the appeal and quashed the disputed decision.

Languages:

German.

Identification: SUI-95-2-006

a) Switzerland / **b)** Federal Tribunal / **c)** 2nd Public-law Chamber / **d)** 27.01.1995 / **e)** 2P.350/1994 / **f)** Anouk Hasler and others against State Council of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 22 / **h)**.

Keywords of the systematic thesaurus:

General principles – Separation of powers.
General principles – Legality.
Institutions – Executive bodies – Powers.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

Medical studies / *Numerus clausus* / University, access.

Headnotes:

Measures restricting admission to medical studies; *numerus clausus*.

Case-law of the Federal Court concerning restrictions on admission to public educational establishments.

Any restriction on admission to medical studies at the University of Zurich must have a formal legal basis; it may not in principle be ordered by the executive authorities, either on the basis of powers of enforcement or on the basis of police measures which may be taken in an emergency.

Summary:

For the 1994-1995 winter semester at the University of Zurich, the State Council of the Canton of Zurich took measures restricting access to medical studies; in particular, it fixed a maximum number of students allowed to begin these studies. Three students disputed this decision by means of an appeal in public law lodged with the Federal Court; they claimed that there had been a violation of the principle of the separation of powers, the principle of equal treatment and the freedom of trade and industry.

The Federal Court referred to its case-law on restrictions on admission to public educational establishments. It did not exclude that personal freedom might be affected by such measures, and stressed that there was no fundamental right to university education. The principle of the rule that the executive was bound by law, just as the strict requirements of delegation to the executive by the legislature, had to be respected.

In the case at issue, the applicants claimed that the disputed decision lacked legal foundation and thereby violated the principle of the separation of powers, which, according to case-law, was admissible as a complaint lodged by a private individual.

In principle, the executive could issue implementing regulations or take emergency police measures; this had not been the case with regard to the measures restricting admission to university (introduction of a *numerus clausus*). The Federal Court therefore allowed the appeal in public law and quashed the disputed measures.

Languages:

German.

Identification: SUI-95-2-007

a) Switzerland / **b)** Federal Tribunal / **c)** 2nd Public-law Chamber / **d)** 28.03.1995 / **e)** 2A.86/1995 / **f)** Diallo against Bern canton immigration police and examining judge 7 of Bern district / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 II 53 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Independence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Impartiality.

Keywords of the alphabetical index:

Foreigners / Asylum seeker / Deportation, detention pending / Detention, supervision.

Headnotes:

Under the criminal procedure applicable in the canton of Bern, the examining judge required to decide on the detention of an alien with a view to deportation was neither a "judicial authority" within the meaning of

federal legislation on aliens nor a "court of law" within the meaning of the European Convention on Human Rights.

Summary:

Badara Diallo approached the Swiss authorities using different names and nationalities. His applications for asylum were refused. The immigration police issued a deportation order and placed him in detention on 10 February 1995 pending that deportation. His detention was confirmed at a hearing by the examining judge of Bern district on 14 February 1995. Badara Diallo lodged an appeal in administrative law against this decision with the Federal Court.

The Federal Court considered whether the examining judge for Bern satisfied the requirements of independence and impartiality. Detention with a view to deportation fell within the provisions of Article 5.1.f ECHR. The detainee was therefore entitled to review of the proceedings as provided for in Article 5.4 ECHR. However, the examining magistrate who normally directed criminal inquiries and ordered remand in custody did not present the characteristics and guarantees of an independent and impartial court with regard to measures of constraint in connection with the law relating to aliens.

The Federal Court therefore accepted the appeal in administrative law and ordered the release of the appellant.

Languages:

German.

Turkey
Constitutional Court

Reference period:
1 May 1995 – 31 August 1995

Statistical data

Number of decisions : 27

27 decisions were given between 1 May 1995 and 31 August 1995. 18 of them were dismissed and in 9 cases some legal provisions were annulled. Only one decision was published in the Official Gazette; the others have not yet been published because a written statement of the legal reasoning behind the decisions has not yet been prepared.

In this period, a total of 8 decisions concerning the auditing of political parties were handed down, of which 7 were published in the Official Gazette.

One political party was dissolved because its statute and programme were in conflict with the indivisible integrity of the state.

Important decisions

Identification: TUR-95-2-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 27.06.1995 / **e)** 1994/90 / **f)** / **g)** Official Gazette, 10.08.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Social State.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social security, equal conditions for contribution.

Headnotes:

According to the Constitution, all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion, sect, or any such consideration. This principle, does not mean, however,

that everyone must be treated equally. If there are justifiable reasons for doing so, the law-maker may intervene and provide for unequal treatment of the persons concerned. In other words, only those subject to identical conditions and who have identical qualities must be treated equally.

The social State envisaged by the Constitution comprises social rights, social security and social justice. The State is charged with responsibility for establishing social security and social welfare institutions for all citizens. According to the Constitution everyone has the right to social security and the State shall take any measures necessary with a view to establishing institutions for the provision of that social security. The Institute of Social Insurance is one of the main national social security bodies. All employers, whether they work in the field of public or private law, must pay their debts to the Institute of Social Insurance. Public corporate bodies, and in this case municipalities, must pay their debts like any other private employer.

According to the Constitution, the State fulfils its social and economic duties taking into consideration the limits of its financial resources and the maintenance of economic stability. The right to social security is very important and for this reason it is laid down in the Universal Declaration of Human Rights. The right to social security is indispensable for human dignity and the free development of human personality. In order to provide social security, social security institutions need financial resources. For this reason, municipalities, like other employers, should pay their insurance premium to the Institute of Social Insurance. Public corporate bodies may not have privileges as regards payment or non payment of their debts to the Institute of Social Insurance.

Summary:

These incidental proceedings were initiated by the Court of Cassation which had found that provisional Article 1 of Law no. 3986 to be applied in this case was unconstitutional.

Provisional Article 1 of Law no. 3986 introduced a special rule with regard to debts owed by municipalities to the Institute of Social Insurance; according to this rule payment in instalments for accumulated debts was allowed.

The Constitutional Court found that this rule violated the principle of equality before the law regulated in Article 10, and the right to social security laid down in Article 60 of the Constitution. According to the Court, the State has an obligation to protect workers and must ensure that they enjoy a decent standard of living. In order to realise this aim, the Institute of Social Insurance must have the necessary financial resources. Provisional Article 1 of Law no. 3986 was found to be unconstitutional and annulled by the Constitutional Court.

This decision was unanimous.

Supplementary information:

Settled case-law.

Languages:

Turkish.

United States of America
Supreme Court

Reference period:
1 May 1995 – 31 August 1995

Important decisions

Identification: USA-95-2-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 19.06.1995 / **e)** 94-749 / **f)** *John J. Hurley and the South Boston Allied War Veterans Council v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Parade.

Headnotes:

A parade is presumptively expressive under the Free Speech clause of the First Amendment. The organisers of a parade have a right to control the message of a parade they are sponsoring. The parade organisers or any other speaker cannot be required to express someone else's opinion.

The exclusion of a group promoting gay, lesbian and bisexual sexuality from a parade is not discriminatory when the group is prevented from taking part in the march only because of its message and not because of members' sexual orientation.

Summary:

In 1992, the South Boston Allied War Veterans Council, organizers of Boston's annual St. Patrick's – Evacuation Day Parade, refused to allow the Gay, Lesbian, and Bisexual Group of Boston (GLIB) to march in the parade. The group wanted to "express pride in their Irish heritage as openly gay, lesbian and bisexual individuals". GLIB subsequently obtained a court order to allow it to participate in the 1993 parade.

The Veterans Council challenged that order, but both a lower state court and the Massachusetts Supreme Judicial Court upheld it under the Massachusetts Public Accommodations Law which prohibits discrimination based on sexual orientation in places of public accommodation. The state courts held that the parade was not expressive activity protected by the free speech clause of the First Amendment to the Bill of Rights since the council did not select participants for the purpose of shaping a broader message.

The United States Supreme Court overturned that ruling, finding, 9 votes to 0, that under the First Amendment parade organisers have a right to control the message of a parade they are sponsoring, and cannot require the parade organisers or any other speaker to express someone else's opinions. The Court held that a parade is presumptively expressive under the Free Speech clause of the First Amendment. It concluded that the Council refused to permit GLIB to march only because of its message, not because of members' sexual orientation, since homosexuals and bisexuals were not prevented from participating as members of other groups.

Languages:

English.

Identification: USA-95-2-009

a) United States of America / **b)** Supreme Court / **c)** / **d)** 19.06.1995 / **e)** 93-1911 / **f)** *Cinda Sandin, Unit Team Manager, Halawa Correctional Facility v. DeMont R.D. Conner* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Disciplinary hearing, prison / *Due Process* Clause / Witnesses, right to call.

Headnotes:

Neither the due process clause nor the applicable prison regulations include a right to call witnesses at a prison disciplinary hearing.

Summary:

After swearing at a prison guard during a physical search, DeMont Conner an inmate, was charged with three counts of violating prison rules. After being found guilty on all three counts, Conner filed a civil suit alleging that his federal *due process* rights had been violated on the grounds that he had not been allowed to call witnesses at the hearing. The Federal trial court ruled in favour of the prison officials, but the Appeals Court for the Ninth Circuit reversed.

The United States Supreme Court reversed the Ninth Circuit, holding, 5 votes to 4, that neither the Due Process Clause nor the prison regulations at issue included a right to call witnesses at a prison disciplinary hearing. The Court found that Conner's punishment, 24 hour confinement for 30 days instead of his usual 12 to 16 hours a day confinement, was not an unusual or significant change that required additional procedural protections.

Languages:

English.

Identification: USA-95-2-010

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.1995 / **e)** 94-590 / **f)** *Vernonia School District 47J v. Wayne and Judy Acton* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Drug testing / School.

Headnotes:

A compulsory drug testing programme for students who participate in interscholastic athletics does not violate the protection of the Fourth Amendment against unreasonable searches and seizures. Public school students are committed by their parents to the custody and control of school authorities under compulsory attendance laws and thus enjoy less Fourth Amendment protection than they might have outside the school setting.

Privacy interests of public school students which might be opposed to the compulsory drug testing programme are outweighed by the school district's interests in testing.

Summary:

In 1989, the Vernonia School District 47J of Oregon began a drug-testing programme for all students who participated in interscholastic athletics. The programme was initiated in an effort to curb disciplinary problems that the school district believed stemmed from increased drug use among its students and because it believed that athletes who used drugs were at greater risk of injury.

In 1991, James Acton, a seventh-grade student and football player, refused to consent to the test. He and his parents, who also refused to give consent, filed suit in the federal district court, claiming that the programme violated James Acton's protections against "unreasonable searches and seizures" found in the Fourth Amendment of the Bill of Rights as well as the Oregon State Constitution.

The federal trial court upheld the drug testing programme. The Ninth Circuit Court of Appeals reversed, however, finding the programme unconstitutional under the Fourth Amendment and, without making a separate analysis, under the search and seizure provision of the Oregon Constitution.

The United States Supreme Court overturned the Ninth Circuit on the Fourth Amendment issue and remanded the case back to the appellate court for reargument and judgment based only on the search and seizure protections of the Oregon Constitution, which, under the system of federalism in the United States, may be more expansive than the Federal Constitution.

With regard to the Fourth Amendment, the Court held, 6 votes to 3, that public school students were committed by their parents to the custody and control of school authorities under compulsory attendance laws and thus have less Fourth Amendment protection than they might have outside the school setting. The Court balanced the interests of the students and those of the school district, finding that the district had demonstrated that the programme was a legitimate response to an immediate crisis and had documented the problem it was trying to address.

The Court ruled that the privacy interests of the students were outweighed by the school district's interests in testing, concluding that "school sports are not for the bashful" and that the athletes routinely relinquish privacy concerns by such things as showering and changing in front of each other. The Court also said that the privacy intrusion was minimised because the drug-testing programme did not test for medical conditions and because positive test results were not released to law-enforcement agencies.

Languages:

English.

Identification: USA-95-2-011

a) United States of America / **b)** Supreme Court / **c)** / d) 29.06.1995 / **e)** 94-780 / **f)** *Capitol Square Review and Advisory Board et al. v. Vincent Pinette, et al. and The Knights of the Ku Klux Klan* / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Relations between the State and bodies of a religious or ideological nature.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Religion.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Ku Klux Klan / Public forum / Religious display.

Headnotes:

Access to traditional public fora cannot be restricted on the grounds of the content of speech without the demonstration of a compelling State interest. Religious displays must be given the same right of access as non religious displays.

Summary:

During the 1993 Christmas season, the Ku Klux Klan was denied permission to erect a large Latin cross in the Capitol Square area of Columbus, Ohio where the state government sits. The agency that regulates public access to the square, the Capitol Square Review and Advisory Board, argued that allowing a religious symbol such as the Klan's cross to be placed so close to the state capitol would violate the First Amendment to the Bill of Rights prohibiting state establishment of religion. The Klan countered that the Board's action violated their rights under the Free Speech Clause of the First Amendment.

Both the federal trial court and the Sixth Circuit Court of Appeals rejected the Establishment Clause argument and ordered the Board to allow the display of the cross.

The United States Supreme Court affirmed the lower courts 7 votes to 2 and concluded that the Capitol Square area is a traditional public forum to which access cannot be restricted on the grounds of the content of speech without the demonstration of a compelling state interest. The Court explained that Capitol Square had for decades been a place to express both secular and sectarian viewpoints and was known to the public as such. The government, therefore, must give a religious display the same right of access to a public forum that it gives to non religious displays.

Languages:

English.

Identification: USA-95-2-012

a) United States of America / **b)** Supreme Court / **c)** / **d)** 29.06.1995 / **e)** 94-329 / **f)** *Ronald W. Rosenberger*

et al. v. Rector and Visitors of the University of Virginia et al. / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Relations between the State and bodies of a religious or ideological nature.
Institutions – Executive bodies – Sectoral decentralisation – Universities.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Religion.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Establishment Clause.

Headnotes:

When funding campus journals, a state-sponsored university must not discriminate on the basis of content or viewpoint unless it has a compelling reason.

The funding by a state-sponsored university of a journal designed to present a Christian viewpoint on the campus does not violate the Establishment Clause of the First Amendment.

Summary:

In 1994, the University of Virginia denied reimbursement of $5,862 in magazine printing costs to one of the school's student groups, *Wide Awake Productions (WAP)*, which publishes a magazine designed to present a Christian viewpoint to the faculty and the students at the University.

The University pays for some of the expenses of recognised campus-based student organisations out of the student activity fund (SAF), a fund generated by a student fee. In this case, however, the school denied the funding because, it said, the publication was religiously oriented, in violation of University guidelines which prohibit funding of certain types of activity, such as religious activity.

The group challenged the ruling under the Free Speech Clause of the First Amendment to the Bill of Rights. A federal trial court held for the University, a decision affirmed by the United States Court of Appeals for the Fourth Circuit.

The United States Supreme Court reversed, holding 5 votes to 4 that establishing the Student Activities Fund had created an open forum encouraging debate and an exchange of ideas. Having done so, it could not discriminate on the basis of content or viewpoint unless it had a compelling reason.

The Court rejected the University's argument that its compelling reason was compliance with the Establishment Clause of the First Amendment, which prohibits a government entity (in this case a state-sponsored university) from taking any action that advances religion. Instead, the Court found that *Wide Awake* was a journal, not a religious activity, rendering the Establishment Clause inapplicable. The Court noted that *Wide Awake* was the only journal out of fifteen other campus journals to be denied funding.

The Court reasoned that the collegiate environment was one of varied discourse on a multiplicity of topics. Additionally, it concluded that the University had adequately distanced itself from the message contained in *Wide Awake* so that SAF funding of *WAP* could not be construed as religious coercion or endorsement of a particular religious position. For student groups to be recognised by the University, they must enter into an agreement that the University is not responsible for nor does it necessarily condone any of the organisation's activities, goals, or beliefs.

Finally, the Court explained that there was no constitutional violation, because under the system of payment, no money would go directly to *WAP*, but would be payed to the vendors of service for printing. Because *WAP* had a constitutional right to use the University's own facilities to print *Wide Awake*, paying the printer used by the organisation does not transform the payment into an advancement of religion.

Languages:

English.

Court of Justice of the European Communities

Reference period:
1 January 1995 – 31 August 1995

Introduction

The Court of Justice of the European Communities has qualified the founding treaties of the Communities as a "Basic constitutional charter" *("Les verts", judgement of 23 April 1986, (Case 294/83) [1986] ECR 1339; Zwartweld, order of 13 July 1990, (Case C-2/88) [1990] ECR 3365; European Economic Area , opinion of 14 December 1991, (opinion 1/91) [1991] ECR 6079; Beate Weber, judgement of 23 March 1993, (Case C-314/91) [1993] ECR 1093; Parliament v. Council, judgement of 30 June 1993, (joint Cases C-181/91 & C-284/91) [1993] ECR 3685)* or also as an "internal constitution of the Community" *(European laying-up fund for inland waterway vessels, Opinion of 26 April 1977, (Opinion 1/76) [1977] ECR 741)*, expressions which are frequently employed by the Advocates General in their opinions. In the Beate Weber judgement for example, the Court points out, in paragraph 8, that:

> *"(...)the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty", the latter having established "a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".*

In Opinion 1/91, the Court, relying on its renowned judgement in Van Gend en Loos *(Case 26/62 Van Gend en Loos [1963] ECR 1)* stated that:

> *"(...) the EEC treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".*

The jurisprudence of the Court in its "constitutional" functions is approached from the above perspective. The analysis is carried out in this respect by referring to traditional concepts of national constitutional law, and is thus primarily concerned with fundamental principles of the Community legal order (fundamental rights, general principles of law, common values and goals) and with the institutional structure of the Communities (distribution of powers between the Member States and the Union, and separation of powers at Union level), even though the Communities' "constitutional system" could never be completely assimilated to the state model.

Given the substantial number of judgements and orders delivered by the Court and by the Court of First Instance during the reference period, only those which include important "constitutional" developments will be discussed here, and other cases containing similar developments shall be cited under the heading "Supplementary information".

Statistical data

Cases dealt with: 293

- Court of Justice of the European Communities: 141
  - 91 Judgements,
  - 1 Opinion,
  - 14 Orders,
  - 1 authorization to serve a garnishee order,
  - 34 Orders to strike out

- Court of First Instance: 152
  - 71 Judgements,
  - 45 Orders,
  - 36 Orders to strike out

Judgements analysed:

1. CFI, 23 February 1995, *F. v Council*, Case T-535/93; not yet published; Integration of fundamental rights into general principles of Community law, Article 6 ECHR.

2. ECJ, 24 March 1995, *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment* (Opinion 2/92) [1995] ECR 521; External relations of the Community, Respective powers of Community and Member states, Internal and External competence of the Community

3. ECJ, 30 March 1995, *Parliament v Council* (Case C-65/93) [1995] ECR 643; Due consultation of the European Parliament, Democratic principle, Genuine cooperation between the institutions

4. CFI, 27 April 1995, *ASPEC* (Case T-435/93); not yet published; Principle of collegiality governing the Commission's functioning, Habilitation procedure for the adoption of measures of management or administration

5. CFI, 8 June 1995, *Siemens* (Case T-459/93); not yet published; Recovery of aid incompatible with the common market, Respective powers of the Member states and the Commission, Existence of legitimate expectations held by the recipient of the aid

6. CFI, 29 June 1995, *Solvay* (Case T-30/91); not yet published; Administrative procedure in competition law, Respect of the rights of the defence, Access to the file

7. ECJ, 5 July 1995, *Parliament v Council* (Case C-21/94); not yet published; Consultation and reconsultation of the European Parliament, Democratic principle, Transitional measures re the temporal effects of an annulment decision

8. ECJ, 6 July 1995, *BP Soupergaz* (Case C-62/93); not yet published; Jurisdiction of the Court to give preliminary rulings, Restitution of monies unduly paid

9. ECJ, 13 July 1995, *Parliament v Commission* (Case C-156/93); not yet published; Parliament's capacity to bring actions, Hierarchy of regulations, Misuse of powers

10. CFI, 13 July 1995, *K v Commission* (Case T-176/94); not yet published; Integration of fundamental rights into general principles of Community law, Article 8 ECHR, Restrictions on the exercise of fundamental rights

Important decisions

Identification: CJE-95-2-001

a) European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 23.02.1995 / **e)** T-535/93 / **f)** *F. v Council* / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Categories – Unwritten rules – General principles of law.
Fundamental rights – General questions – Basic principles – Nature of the list of fundamental rights.
Fundamental rights – Civil and political rights – Procedural safeguards – Non-litigious administrative procedure.

Keywords of the alphabetical index

Courts and tribunals, definition / Medical committee, composition / Medical secrecy / National constitutional traditions / Reasoning of measures / Recruitment of officials / Physical unfitness, refusal to appoint.

Headnotes:

Fundamental rights form an integral part of the general principles of law which the Community judicature will enforce, as provided for by Article F.2 of the Treaty on European Union. In safeguarding such rights, the Court draws inspiration from constitutional traditions common to the Member States and from guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, the European Convention on Human Rights being particularly significant in that respect. (cf. point 32)

Article 6 ECHR does not apply to the medical committee provided for in the second paragraph of Article 33 of the Staff Regulations, since that committee does not exercise a judicial function but is an appeal body entrusted, in the context of the administrative procedure for appointments, with the task of giving a purely medical opinion after the medical officer of the institution has given his opinion. In any event, so far as the observance of the rights of the defence of a candidate for a post is concerned, the composition of the medical committee which excludes the doctor who issued the initial finding of unfitness and which is not exclusively composed of doctors of the institution in question and its detailed rules of procedure which include keeping the person concerned informed through his own doctor, the submission of an opinion by a doctor of his choice, and the possibility of carrying out further examinations and obtaining the opinion of specialists are such as to ensure a full and impartial examination of that candidate's position. (cf. points 35-36)

The duty to state reasons for the refusal to appoint a candidate to a post on grounds of physical unfitness

must be balanced with the requirements of medical confidentiality. That balance is achieved by allowing the person concerned to require the grounds of unfitness to be communicated to the attending practitioner of his choice, to enable the latter to advise him on the possibility of challenging the reasons for refusing to recruit him. (cf. point 37)

In exercising its power to review the legality of a refusal to appoint on grounds of physical unfitness, the Community judicature cannot substitute its own assessment for that of the doctors, nor, in particular, for the assessment of the medical committee, which must therefore be considered definitive provided it was made under conditions which were not irregular. However, the Court does have jurisdiction to verify whether the recruitment procedure was lawfully conducted and, more particularly, to examine whether the decision of the appointing authority refusing to recruit a candidate on account of physical unfitness is based on a medical opinion for which reasons are given, and which establishes a comprehensible link between the medical findings it contains and the conclusion which it reaches. (cf. points 50-51)

Summary:

Winner of a competition organised by the Council and due to take up a typing post, the applicant, who had had surgery on a chondrosarcoma, was declared unfit for work by the medical consultant for the Council and the Medical Commission, to whom the matter was referred under Article 33.2 of the Community Officials' Regulation. This was due to the risk of metastasis, of disabling after-effects of surgery and a survival rate over the next ten years estimated between 30% and 40%. His administrative claim was rejected, and he thus requested the Court of First Instance to annul the Council's decision not to recruit him, the opinions of the medical consultant and the Medical Commission, and also the Council's decision rejecting his claim, invoking an alleged violation of his rights of defence under Article 6 ECHR, and grave error in the appraisal of future developments in his state of health. The Court of First Instance rejected the claim, however ordered the Council to pay full costs given the circumstances of the case.

Supplementary information:

Re the respect by the Community judge of fundamental rights as general principles of Community law, see:

CFI, 13 July 1995, *K v Commission* (Case T-176/94); not yet published
CFI, 19 June 1995, *Kik v Conseil* (Case T-107/94); not yet published

Re the protection of medical secrecy, see infra:

CFI, 13 July 1995, *K v Commission* (Case T-176/94); not yet published

Cross-references:

Re the respect by the Community judge of fundamental rights as general principles of Community law, see:

ECJ, 12 November 1969, *Erich Stauder* (Case 29-69) [1969] ECR 419
ECJ, 17 December 1970, *International Handelsgesellschaft* (Case 11-70) [1970] ECR 1125
ECJ, 17 December 1970, *Köster and Berodt* (Case 25-70) [1970] ECR 1161
ECJ, 14 May 1974, *Nold* (Case 4-73) [1974] ECR 491
ECJ, 15 June 1978, *Gabrielle Defrenne* (Case 149/77) [1978] ECR 1365
ECJ, 12 October 1978, *Belbouab* (Case 10/78) [1978] ECR 1915
ECJ, 13 December 1979, *Liselotte Hauer* (Case 44/79) [1979] ECR 3727
ECJ, 18 March 1980, *SpA Ferriera Valsabbia* (joint Cases 154, 205, 206, 226 to 228, 263 and 264/78; 39, 31, 83 and 85/79) [1980] ECR 907
ECJ, 19 June 1980, *Testa* (joint Cases 41/79, 121/79 and 796/79) [1980] ECR 1979
ECJ, 26 June 1980, *National Panasonic* (Case 136/79) [1980] ECR 2033
ECJ, 7 February 1985, *ADBHU* (Case 240/83) [1985] ECR 531
ECJ, 11 July 1985, *Cinéthèque* (joint Cases 60 and 61/84) [1985] ECR 2605
ECJ, 18 September 1986, *Commission v Germany* (Case 116/82) [1986] ECR 2519
ECJ, 8 October 1986, *Keller* (Case 234/85) [1986] ECR 2897
ECJ, 30 September 1987, *Demirel* (Case 12/86) [1987] ECR 3719
ECJ, 18 May 1989, *Commission v Germany* (Case 249/86) [1989] ECR 1263
ECJ, 11 July 1989, *Schräder* (Case 265/87) [1989] ECR 2237
ECJ, 13 July 1989, *Wachauf* (Case 5/88) [1989] ECR 2609
ECJ, 21 September 1989, *Hoechst AG* (joint Cases 46/87 and 227/88) [1989] ECR 2859
ECJ, 17 October 1989, *Dow Benelux NV* (Case 85/87) [1989] ECR 3137
ECJ, 17 October 1989, *Dow Chemical Ibérica* (joint Cases 97/87, 98/87 and 99/87) [1989] ECR 3165
ECJ, 18 October 1989, *Orkem* (Case 374/87) [1989] ECR 3283
ECJ, 13 December 1989, *Augustin Oyowe and Amadou Traore* (Case C-100/88) [1989] ECR 4285

ECJ, 8 April 1992, *Commission v Germany* (Case C-62/90) [1992] ECR 2575
ECJ, 28 October 1992, *Ter Voort* (Case C-219/91) [1992] ECR 5485
ECJ, 24 March 1994, *Dennis Clifford Bostock* (Case C-2/92) [1994] ECR 955
ECJ, 5 October 1994, *X v Commission* (Case C-404/92 P) [1994] ECR 4737

Languages:

French (language of the case).

Identification: CJE-95-2-002

a) European Union / **b)** European Court of Justice / **c)** / **d)** 24.03.1995 / **e)** 2/92 / **f)** Competence of the Community, or one of its institutions, to participate in the Third Revised Decision of the OECD on national treatment / **g)** [1995] ECR 521 / **h).**

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between Community and Member states.
Institutions – European Union – Distribution of powers between Community and Member states.

Keywords of the alphabetical index:

Community, exclusive and shared powers / Community, implicit and explicit powers / Community, internal and external powers / International Agreement, definition.

Headnotes:

In its reference to an "agreement", Article 228.6 of the Treaty uses that expression in a general sense to indicate any undertaking entered into by subjects of international law which has binding force, irrespective of its formal description. (cf. point 8)

The opinion of the Court may be sought pursuant to Article 228.6 of the Treaty, in particular on questions which concern the division of powers between the Community and the Member States to conclude a specific agreement with non-member countries. The fact that certain questions raised in a request for an opinion may be dealt with by means of other remedies, in particular by bringing an action for annulment under Article 173 of the Treaty, cannot have the effect of precluding the Court from being asked for an opinion on those questions beforehand under Article 228. That procedure must be available for all questions capable of submission for judicial consideration, in so far as such questions give rise to doubt as to either the substantive or the formal validity of the agreement with regard to the Treaty. (cf. points 13-14)

The rule on national treatment set out in the Declaration of the OECD member countries on international investment and multi-national enterprises, to which the Third Decision on national treatment of the Council of the OECD refers, concerns the situation of undertakings, regardless of the sector in which they carry on their activities, which operate, in particular through branches and subsidiaries, on the territory of the Member States of the Community and which are owned or controlled by nationals of other OECD member countries. In view of its scope, that rule concerns mainly the conditions for the participation of foreign-controlled undertakings in the internal economic life of the Member States in which they operate conditions which are governed by the Community's internal market rules but it also applies to the conditions for their participation in trade between the Member States and non-member countries, which are the subject of the common commercial policy of the Community. Accordingly, Article 113 of the Treaty cannot confer exclusive competence on the Community to participate in the Third Decision. (cf. points 21-26, 28)

International agreements in the field of transport fall within the scope of the common transport policy and not within that of the common commercial policy. Thus, to the extent that it concerns the conditions under which foreign-controlled undertakings are involved in international transport to or from non-member countries, the national treatment rule set out in the Declaration of the OECD member countries on international investment and multinational enterprises, to which the Third Decision on national treatment of the Council of the OECD refers, falls outside the scope of Article 113 of the Treaty. (cf. point 27)

The Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. The Member States, whether acting individually or collectively, only lose their right to enter into obligations with non-member countries as and when there are common rules which could be affected by such obligations. Although, in certain fields of activity to which the Third Decision on national treatment of the Council of the OECD relates, the Com-

munity has adopted, on the basis in particular of Articles 57.2, 75, 84 and 100a of the EC Treaty, measures capable of serving as a basis for an exclusive external competence, those measures do not cover all the activities to which that decision relates.It follows that the Community is competent to participate in the Third Decision, but that such competence does not cover all the matters to which that decision relates, with the result that joint competence is shared with the Member States. (cf. points 31-35, disp. 2)

While Article 235 of the Treaty enables the Community to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of its objectives, that article cannot in itself vest exclusive competence in the Community at international level. Save where internal powers, and *a fortiori* the power conferred by Article 235, can only be effectively exercised at the same time as external powers in order to achieve Treaty objectives which cannot be attained merely by laying down autonomous rules, internal competence can give rise to exclusive external competence only if it is exercised. (cf. points 32-36)

Summary:

A request for an opinion was referred to the Court by Belgium, pursuant to the second subparagraph of Article 228.1 of the EEC Treaty (Article 228.6 of the EC Treaty) in order to determine if the Community has exclusive competence to take part in the Third Revised Decision of the Council of the Organisation for Economic Cooperation and Development, with regard to national treatment, and if Articles 57 and 113 are the appropriate legal bases for the Council Decision.

Supplementary information:

On the internal division of powers between Community and Member states, see:

ECJ, 14 February 1995, *Schumacker* (Case C-279/93) [1995] ECR 225
ECJ, 13 July 1995, *Spain v Commission* (Case C-350/92), not yet published

Cross-references:

On the division of powers between the Community and the Member states, with regard to the conclusion of international agreements, see:

ECJ, 31 March 1971, *AETR* (Case 22-70) [1971] ECR 263
ECJ, 11 November 1975, *OECD Understanding on a Local Cost Standard* (Opinion 1/75) [1975] ECR 1355
ECJ, 14 July 1976, *Kramer* (joint Cases 3, 4 and 6/76) [1976] ECR 1279
ECJ, 26 April 1977, *European laying-up fund for inland waterway vessels* (Opinion 1/76) [1977] ECR 741
ECJ, 4 October 1979, *International Agreement on Natural Rubber* (Opinion 1/78) [1979] ECR 2871
ECJ, 30 September 1987, *Demirel* (Case 12/86) [1987] ECR 3719
ECJ, 14 December 1991, *European Economic Area* (Opinion 1/91) [1991] ECR 6079
ECJ, 19 March 1993, *Convention nº 170 of the International Labour Organisation concerning safety in the use of chemical substances at work* (Opinion 2/91) [1993] ECR 1061
ECJ, 2 March 1994, *European Parliament v Council* (Case C-316/91) [1994] ECR 625
ECJ, 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* (Opinion 1/94) [1994] ECR 5267

Languages:

German, English, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish.

Identification: CJE-95-2-003

a) European Union / **b)** European Court of Justice / **c)** / **d)** 30.03.1995 / **e)** C-65/93 / **f)** *European Parliament v Council of the European Union* / **g)** [1995] ECR 643 / **h).**

Keywords of the systematic thesaurus:

General principles – Democracy.
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

European Parliament, due consultation / Institutions, genuine cooperation / Institutions, Member States, genuine cooperation / Procedural requirements, essential, infringement / Interinstitutional dialogue / Institutional balance / Urgent situation.

Headnotes:

Due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential procedural requirement, disregard of which renders the measure concerned void. The effective participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. Such power reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. Observance of the consultation requirement implies that the Parliament has expressed its opinion; the requirement cannot be satisfied by the Council's simply asking for it. In an emergency, it is for the Council to use all the possibilities available under the Treaty and the Parliament's Rules of Procedure in order to obtain the prior opinion of the Parliament. However, the dialogue between institutions, on which the consultation procedure in particular is based, is subject to the same mutual duties of genuine cooperation as those which govern relations between Member States and the Community institutions. The Parliament fails in its duty of genuine cooperation with the Council if, following a request from the Council which was justified having regard to the special relations between the Community and the developing countries and to the difficulties which would result from an abrupt interruption in the application of the system of generalized tariff preferences established in favour of certain products originating in those countries, it decides to deal with a draft regulation applying those preferences for the forthcoming year under its procedure for urgent cases, but then decides to adjourn the last plenary session during which the draft could have been debated in time without debating it. In those circumstances, the Parliament is not entitled to complain of the Council's failure to await its opinion before adopting the contested regulation. (cf. points 21-28)

Summary:

The Council requested the Parliament, by letter addressed to its President on the 22 October 1992, to express its opinion, under the urgency procedure provided for by Rule 75 of its Rules of Procedure, in order that a decision could be made before 1 January 1993, on the Commission's proposal for a regulation, based on Articles 43 and 113 of the EC Treaty, with the object of extending into 1993 the application of several regulations applying generalized tariff preferences in respect of certain products originating in developing countries, and adding to the list of beneficiaries of such preferences. It proved impossible for the Parliament to provide its opinion within this time limit, and the possibility of convening an extraordinary session of the Parliament before the end of 1992 was excluded. The Council thus decided to adopt , on 21 December 1992, Regulation nº 3831/90, which was published in the Official Journal on 31 December 1992. The Parliament having finally examined the proposal on 18 January 1993, approved the regulation with 17 amendments, and requested the Council to consult it again in the event of substantial modifications, sought annulment of the contested regulation, on the ground that it had not been duly consulted.

The Court dismissed the application and declared that the regulation was valid, finding that the absence of consultation of the Parliament, even if it is an infringement of an essential procedural requirement, was justified in this case, due to the Parliament's failure to discharge its obligation to cooperate sincerely with the Council.

Supplementary information:

On the consultation requirement and institutional balance, see also:

ECJ, 30 March 1995, *European Parliament v Council* (Case C-65-93) [1995] ECR 643
ECJ, 10 May 1995, *European Parliament v Council* (Case C-417/93), not yet published

On the application of the principle of genuine cooperation between institutions, see also:

ECJ, 23 February 1995, *Commission v Italy* (Case C-349/93) [1995] ECR 343
CFI, 29 March 1995, *Hogan* (Case T-497/93); not yet published
ECJ, 4 April 1995, *Commission v Italy* (Case C-348/93) [1995] ECR 673
ECJ, 4 April 1995, *Commission v Italy* (Case C-350/93) [1995] ECR 699

Cross-references:

On the concept of institutional balance, see:

ECJ, 17 December 1970, *Köster and Berodt* (Case 25-70) [1970] ECR 1161
ECJ, 17 December 1970, *Scheer* (Case 30-70) [1970] ECR 1197
ECJ, 29 October 1980, *Roquette Frères* (Case 138/79) [1980] ECR 3333
ECJ, 29 October 1980, *Maizena* (Case 139/79) [1980] ECR 3393
ECJ, 4 February 1982, *Buyl* (Case 817/79) [1982] ECR 245

ECJ, 4 February 1982, *Adam* (Case 828/79) [1982] ECR 269
ECJ, 4 February 1982, *Battaglia* (Case 1253/79) [1982] ECR 297
ECJ, 21 June 1988, *Commission v Ireland* (Case 415/85) [1988] ECR 3097
ECJ, 21 June 1988, *Commission v United Kingdom* (Case 416/85) [1988] ECR 3127
ECJ, 22 May 1990, *European Parliament v Council* (Case C-70/88) [1990] ECR 2041
CFI, 10 March 1992, *Società Italiana Vetro* (joint Cases T-68/89, T-77/89 and T-78/89; [1992] ECR 1403
ECJ, 13 March 1992, *Vreugdenhil* (Case C-282/90) [1992] ECR 1937
ECJ, 2 March 1994, *European Parliament v Council* (Case C-316/91) [1994] ECR 625
ECJ, 9 August 1994, *France v Commission* (Case C-327/91) [1994] ECR 3641

On the consultation requirement, see:

ECJ, 29 October 1980, *Roquette Frères* (Case 138/79) [1980] ECR 3333
ECJ, 29 October 1980, *Maizena* (Case 139/79) [1980] ECR 3393
ECJ, 27 September 1988, *Commission v Council* (Case 165/87) [1988] ECR 5545
ECJ, 16 July 1992, *European Parliament v Council* (Case C-65/90) [1992] ECR 4593
ECJ, 5 October 1993, *Driessen en Zonen* (joint Cases C-13/92, C-14/92, C-15/92 and C-16/92) [1993] ECR 4751
ECJ, 1 June 1994, *European Parliament v Council* (Case C-388/92) [1994] ECR 2067
ECJ, 5 October 1994, *Germany v Council* (Case C-280/93) [1994] ECR 4973

On the application of the principle of genuine cooperation between institutions, see:

ECJ, 10 February 1983, *Luxembourg v European Parliament* (Case 230/81) [1983] ECR 255
ECJ, 15 January 1986, *Commission v Belgium* (Case 52/84) [1986] ECR 89
ECJ, 22 September 1988, *France v European Parliament* (joint Cases 358/85 and 51/86) [1988] ECR 4821
ECJ, 2 February 1989, *Commission v Germany* (Case 94/87) [1989] ECR 175
ECJ, 14 November 1989, *Italy v Commission* (Case 14/88) [1989] ECR 3677
ECJ, 27 March 1990, *Italy v Commission* (Case C-10/88) [1990] ECR 1229,
ECJ, 10 July 1990, *Commission v Germany* (Case C-217/88) [1990] ECR 2879
Ord. ECJ, 13 July 1990, *Zwartveld* (Case C-2/88 Imm) [1990] ECR 3365
Ord. ECJ, 6 December 1990, *Zwartveld* (Case C-2/88 Imm) [1990] ECR 4405
ECJ, 28 February 1991, *Delimitis* (Case C-234/89) [1991] ECR 935
ECJ, 21 March 1991, *Italy v Commission* (Case C-303/88) [1991] ECR 1433
ECJ, 11 June 1991, *Athanasopoulos* (Case C-251/89) [1991] ECR 2797
ECJ, 28 November 1991, *Luxembourg v European Parliament* (joint Cases C-213/88 and C-39/89) [1991] ECR 5643
ECJ, 13 December 1991, *Commission v Italy* (Case C-33/90) [1991] ECR 5987
ECJ, 10 June 1993, *Commission v Greece* (Case C-183/91) [1993] ECR 3131

On the concept of interinstitutional dialogue, see:

ECJ, 27 September 1988, *Greece v Council* (Case 204/86) [1988] ECR 5323

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: CJE-95-2-004

a) European Union / **b)** Court of First Instance / **c)** Second Chamber, extended composition / **d)** 27.04.1995 / **e)** T-435/93 / **f)** *Association of Sorbitol Producers within the EC (ASPEC), Cerestar Holding BV, Roquette Frères SA and Merck oHG v Commission of the European Communities* / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

General principles – Rule of law – Maintaining confidence.
General principles – Rule of law – Certainty of the law.
Institutions – European Union – Institutional structure – Commission.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

Commission, Collective political responsibility / Commission, Equality of Commissioners / Complex factual and legal analysis / Delegation / Habilitation procedure / Inexistent measure / Measures of management or administration / Collegiality, principle.

Headnotes:

The Commission's functioning is governed by the principle of collegiality resulting from Article 17 of the Merger Treaty, now replaced by Article 163 of the EC Treaty. This principle is based on equality as between the members of the Commission in the decision-making process and signifies that decisions must be deliberated on jointly and that all the members of the college bear collective responsibility at political level for all decisions adopted. Recourse to the habilitation procedure for the adoption of measures of management or administration is compatible with this principle. In fact, limited as it is to specific categories of measures of management or administration, thus excluding by definition decisions of principle, such a system of delegation of authority appears necessary, having regard to the considerable increase in the number of decisions which the Commission is required to adopt, to enable it to perform its duties. (cf. points 101-103)

When it has before it an individual aid which is alleged to come within a previously authorized general scheme, the Commission must first confine itself, prior to the initiation of any procedure, to an examination of whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving that scheme. After initiation of the procedure provided for in Article 93.2 of the Treaty, observance of the principles of the protection of legitimate expectations and of legal certainty could not be ensured if the Commission were able to go back on its decision approving the general scheme. Therefore, if the Member State in question proposes modifications to an aid proposal submitted for the examination provided for under Article 93.2, the Commission must first assess whether those modifications result in the proposal being covered by the decision approving the general scheme. If that is the case, the Commission is not entitled to assess the compatibility of the modified proposal with Article 92 of the Treaty since such assessment was already carried out in the framework of the procedure culminating in the decision approving the general scheme. (cf. point 105)

A decision approving aid under a general scheme of aid already approved by the Commission and which is rightly adopted on the basis of an examination limited to verification of compliance with the conditions laid down in the decision approving the general scheme none the less cannot be classified as a measure of management or administration under the rules governing the functioning of the college of Commissioners since one of the abovementioned conditions necessitates a thorough examination of complex factual and legal questions. It cannot therefore be adopted under the habilitation procedure. (cf. points 106-114)

Observance of the principle of collegiality and especially the need for decisions to be deliberated on collectively by the members of the Commission is necessarily of interest to persons concerned by the legal effects which they produce in the sense that they must be assured that those decisions were in fact adopted by the college and precisely correspond to the latter's wishes. That is so following a procedure initiated under Article 93.2 in the case of decisions which give expression to the Commission's final assessment of the compatibility of aid with the Treaty or with a previously approved general aid scheme, and affect not only the Member State which is the addressee of the decision but also the recipient of the planned aid and its competitors. After the adoption by the college of Commissioners of such a decision, only spelling or grammatical changes may be made to it. Even on the assumption that the college is entitled to leave to one Commissioner the task of finalizing the decision, where the decision notified to the recipient includes such amendments in relation to the draft submitted to the college that the college cannot be regarded as having adopted all the factual and legal elements of the contested decision, the intervention by that Commissioner goes beyond finalization and amounts to genuine delegation, which was not permissible in this case.(cf points 115-122)

The formal defect vitiating a Commission decision erroneously adopted by the express wish of the college under the habilitation procedure is not of such manifest seriousness that the decision must be regarded as non-existent. (cf. point 125)

Summary:

By Decision 91/474/EEC of 16 August 1991, and in the context of the general scheme of aid by the Italian government in favour of the Mezzogiorno approved in 1988, the Commission approved aid granted by the Italian government in favour of an Italian company for the setting up of an agri-foodstuffs complex in the Mezzogiorno, subject to certain conditions laid down in the decision. This decision has been the object of several annulment proceedings, including one brought conjointly by the Association of Sorbitol Producers

within the EC (ASPEC) and three companies members of ASPEC, which produce starch products, who claim inter alia an infringement of the rules concerning the adoption procedure for Commission decisions and, in particular, the principle of collegiality and the Commission's Rules of Procedure which deal with the habilitation procedure empowering its members to take measures of management or administration. The Court of First Instance allowed the applicants' claim and annulled the decision for the reasons invoked, without deciding, however, that this decision was non-existent.

Supplementary information:

On the principle of collegiality, see also:

CFI, 27 April 1995, *AAC* (Case T-442/93); not yet published
CFI, 27 April 1995, *BASF* (joint Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89, T-112/89); not yet published
CFI, 17 May 1995, *Benecos* (Case T-16/94); not yet published

On the definition of act of management or administration, see:

CFI, 14 July 1995, *CB v Commission* (Case T-275/94); not yet published

On the definition of a non-existent measure, see:

CFI, 21 February 1995, *SPO* (Case T-29/92); not yet published
CFI, 27 April 1995, *AAC* (Case T-442/93); not yet published
CFI, 27 April 1995, *BASF* (joint Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89, T-112/89); not yet published

Cross-references:

On the principle of collegiality, see:

ECJ, 23 September 1986, *AKZO* (Case 5/85) [1986] ECR 2585
ECJ, 21 September 1989, *Hoechst* (joint Cases 46/87 and 227/88) [1989] ECR 2859
ECJ, 17 October 1989, *Dow Chemical Ibérica* (joint Cases 97/87, 98/87 and 99/87) [1989] ECR 3165
ECJ, 11 October 1990, *FUNOC* (Case C-200/89) [1990] ECR 3669
CFI, 27 February 1992, *BASF* (joint Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89) [1992] ECR 315
ECJ, 15 June 1994, *BASF* (Case C-137/92 P) [1994] ECR 2555
ECJ, 5 October 1994, *Germany v Council* (Case C-280/93) [1994] ECR 4973
CFI, 6 December 1994, *Lisrestal -Organização Gestão de Restaurantes Colectivos* (Case T-450/93) [1994] ECR 1177

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: CJE-95-2-005

a) European Union / **b)** Court of First Instance / **c)** Second Chamber / **d)** 08.06.1995 / **e)** T-459/93 / **f)** *Siemens SA v Commission of the European Communities* / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

General principles – Rule of law – Maintaining confidence.
General principles – Proportionality.
Institutions – European Union – Distribution of powers between Community and Member states.

Keywords of the alphabetical index:

Independence of national procedure / Procedural autonomy, national / Recovery of aid incompatible with the common market.

Headnotes:

In the absence of provisions of Community law concerning the procedure for recovering amounts unduly paid, the recovery of aid improperly granted must be carried out in accordance with the rules and procedures laid down by national law. However, the application of national law must not affect the scope and effectiveness of Community law, that is to say, it must not make it impossible in practice to recover the sums irregularly granted or be discriminatory in relation to comparable cases which are governed solely by national legislation. It follows that the Commission is not obliged, in its decisions ordering the recovery of State aid, to determine the incidence of tax on the amount of aid to be recovered, since that calculation falls within the scope of national law; it is merely required to indicate the gross sum to be recovered. That does not prevent the national authorities, when recovering the amount in question, from deducting

certain sums, where appropriate, pursuant to their internal rules, provided that, in so doing, they comply with Community law. (cf. points 82-83, 107)

Where, pursuant to Article 93.2 of the Treaty, the Commission orders the abolition or alteration of State aid granted contrary to the Treaty, it may require such aid to be repaid. In so far as that recovery is aimed at restoring the situation as it was prior to the payment of the aid, it cannot in principle be regarded as disproportionate to the objectives of the Treaty with regard to State aid. Since the restoration of the situation as it was prior to the payment of the illegal aid presupposes that all of the financial advantages resulting from the aid which adversely affect competition in the common market have been eliminated, the decision of the Commission may require interest to be recovered on the sums granted in order to prevent the undertaking from retaining any advantage resulting from the aid, in the form of an interest-free loan. Interest may only be recovered in order to offset the financial advantages actually arising from the allocation of the aid, and must be in proportion to the aid. Consequently, such interest, which is not default interest payable by reason of the delay in the performance of the obligation to repay the aid, may not start to run before the date, which it is in principle for the Commission and not for the national authorities to fix, on which the recipient of the aid actually had those funds at its disposal. (cf. points 96-102)

Community law does not prevent national law from having regard, in connection with the recovery of aid unduly paid, to the protection of legitimate expectations, provided however that the conditions laid down are the same as those for the recovery of purely national financial benefits and the interests of the Community are fully taken into account. Accordingly, a recipient of State aid unduly granted may rely, when the aid is to be repaid, only on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful, and it is for the national court alone to assess the material circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

Summary:

By Decision 92/483/EEC of 24 June 1992, the Commission found that part of the aid provided by the Brussels Regional Authorities in favour of Siemens was incompatible with the common market and thus prohibited the Walloon government from proceeding to make payment of the aid not yet paid, and ordered the recovery of sums already paid in accordance with the procedures and provisions of national law, in particular those relating to interest on arrears payable on State liabilities. The recipient company applied to the Court of First Instance for annulment of this decision, claiming inter alia that, in ordering the recovery of the aid granted, together with interest running from the date on which the aid was granted, without taking into account the tax paid in calculating the recoverable amount, it was put at a financial disadvantage in comparison with its competitors. The Court of First Instance dismissed the application, and this argument in particular, by relying on the consistent case-law of the Court on the recovery of monies unduly paid.

Supplementary information:

On the recovery of aid, see also:

ECJ, 4 April 1995, *Commission v Italy* (Case C-348/93) [1995] ECR 673
ECJ, 4 April 1995, *Commission v Italy* (Case C-350/93) [1995] ECR 699

On the recovery of monies unduly paid, see infra, ECJ, 6 July 1995, *BP Soupergaz* (Case C-62/93); not yet published, and the cited references.

Cross-references:

On the recovery of aid, see:

ECJ, 2 February 1989, *Commission v Germany* (Case 94/87) [1989] ECR 175
ECJ, 21 March 1990, *Belgium v Commission* (Case C-142/87) [1990] ECR 959
ECJ, 20 September 1990, *Commission v Germany* (Case C-5/89) [1990] ECR 3437
ECJ, 21 March 1991, *Italy v Commission* (Case C-305/89) [1991] ECR 1603
ECJ, 10 June 1993, *Commission v Greece* (Case C-183/91) [1993] ECR 3131
ECJ, 14 September 1994, *Spain v Commission* (joint Cases C-278/92, C-279/92 and C-280/92) [1994] ECR 4103

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: CJE-95-2-006

a) European Union / **b)** Court of First Instance / **c)** First Chamber, extended composition / **d)** 29.06.1995 / **e)** T-30/91 / **f)** *Solvay SA v Commission of the European Communities* / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlements to rights – Legal persons – Private law.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Equality of arms.
Fundamental rights – Civil and political rights – Procedural safeguards – Non-litigious administrative procedure.

Keywords of the alphabetical index:

Files, access / Competition, community rules / Analysis, complex economic / Manner of proof / Notification of cause of action / Presumption of innocence / Professional confidentiality / Undertaking, community rules.

Headnotes:

Even if the use by the Commission, when it adopts a decision applying Article 85(1) of the Treaty, of inculpatory documents not disclosed during the administrative procedure to one of the undertakings charged were to be characterized as unlawful on the grounds that such use infringed that undertaking's rights of defence, such a procedural defect could result only in those documents being excluded as evidence. Far from leading to the annulment of the entire decision, that exclusion would be relevant only in so far as the objection made by the Commission in relation thereto could be proved only by reference to those documents. (cf. point 58)

The purpose of providing access to the file in competition cases is to enable the addressee of a statement of objections to examine evidence in the Commission's file so that on the basis of that evidence it may effectively express its views on the conclusions reached by the Commission in its statement of objections. That access is one of the procedural safeguards intended to protect the rights of the defence, which is a general principle, the proper observance of which requires that the undertaking concerned be afforded the opportunity during the administrative procedure effectively to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission. Any infringement of the rights of the defence and the consequences thereof must therefore be examined by the Court in relation to the specific circumstances of each particular case. In the light of the objections actually raised by the Commission against the undertaking concerned and the latter's defence to such objections it is possible to assess the relevance to that defence of documents which have not been disclosed, both those which may exculpate the undertaking and those showing the existence of the infringement alleged. (cf. points 59-60)

In the defended proceedings for which Regulation no. 17 provides it cannot be for the Commission alone to decide which documents are of use for the defence. Where difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed. That is particularly true where parallel conduct is concerned, which is characterized by a set of actions that are *prima facie* neutral, where documents may just as easily be interpreted in a way favourable to the undertakings concerned as in an unfavourable way. In such circumstances, any error made by the Commission's officials in categorizing as 'neutral' a given document which, as an item of irrelevant evidence, will not then be disclosed to the undertakings, must not be allowed to impair their defence. Such an error could not be discovered in time, before adoption of the Commission's decision, except in the exceptional case where the undertakings concerned cooperated spontaneously, which would present unacceptable risks for the sound administration of justice, because, the Commission being responsible for the proper investigation of a competition case, it may not delegate that task to the undertakings, whose economic and procedural interests often conflict. Having regard to the general principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission, it is not acceptable for the Commission alone to have had available certain documents to it, when taking a decision on an infringement, and to be able to decide on its own whether or not to use those documents against the undertaking when the latter had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence. In such a situation, the rights of defence which the undertaking enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case file than the defence. Consequently, there is an infringement of an undertaking's

rights of defence where the Commission, as from notification of the statement of objections, excludes from the proceeding documents which it possesses and which may be of use in the applicant's defence. That infringement of the rights of the defence is objective in nature and does not depend upon whether or not the Commission's officials acted in good or bad faith. (cf. points 81-86)

Although, according to a general principle which applies during the course of the administrative procedure applying the Community competition rules and which is expressed in Article 214 of the Treaty and various provisions of Regulation no. 17, undertakings have a right to protection of their business secrets, that right must be balanced against the safeguarding of the rights of the defence and cannot therefore justify the Commission's refusal to make disclosure to an undertaking, even in the form of non-confidential versions or by sending a list of documents gathered by the Commission, of evidence in the case file which it might use in its defence. (cf. points 88-90)

An infringement of the rights of defence of an undertaking charged with infringing the Community competition rules which occurs during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, in which judicial review is conducted only in relation to the pleas raised and which cannot therefore be a substitute for a full investigation of the case by way of an administrative procedure. (cf. points 98-103)

Summary:

By Decision 91/297/EEC of 19 December 1990 relating to the application of Article 85 of the EEC Treaty, the Commission found that the applicant had been participating, between 1973 and 1989, in a concerted practice to share the soda-ash market, and consequently imposed a fine of ECU 7 million. In support of its claim that the decision should be annuled, the applicant put forward a series of pleas, including an infringement of its rights of defence and of Article 6 ECHR, on the ground that the Commission used documents which had not been communicated, and had also refused to grant it access to certain documents containing matters of use in its defence. The Court of First Instance, following a close inspection of the claim of infringement of the rights of the defence, upheld the applicant's claim and annulled the decision in so far as it concerned the applicant, without ruling on the other pleas.

Supplementary information:

The same decision, 91/297/CEE was also the object of an action for annulment by the other undertaking to whom the decision was addressed, and was also annulled with respect to the latter, for similar reasons. See: CFI, 29 June 1995, *ICI* (Case T-36/91); not yet published; esp. points 69-118

On the principle of respect for the rights of the defence in competition law, see also:

CFI, 8 March 1995, *Société générale* (Case T-34/93) not yet published, esp. points 73-74
ECJ, 6 April 1995, *BPB Industries and British Gypsum* (Case C-310/93 P) [1995] ECR 865, esp. p. 907 etc.
CFI, 6 April 1995, *Société métallurgique de Normandie* (Case T-147/89) not yet published, esp. point 25
CFI, 6 April 1995, *Trefilunion* (Case T-148/89) not yet published, esp. point 25
CFI, 6 April 1995, *Société des treillis et panneaux soudés* (Case T-151/89) not yet published, esp. point 25
CFI, 8 June 1995, *Siemens* (Case T-459/93) not yet published, esp. points 38-41
CFI, 29 June 1995, *ICI* (Case T-37/91); not yet published, esp. points 46-73

Cross-references:

On the respect of the right of the defence in administrative procedures, see:

ECJ, 13 February 1979, *Hoffman-La Roche* (Case 85/76) [1979] ECR 461
ECJ, 7 June 1983, *SA Musique Diffusion française* (joint Cases 100 to 103/80) [1983] ECR 1825
ECJ, 9 November 1983, *Michelin* (Case 322/81) [1983] ECR 3461
ECJ, 10 July 1986, *Belgium v Commission* (Case 234/84) [1986] ECR 2263
ECJ, 10 July 1986, *Belgium v Commission* (Case 40/85) [1986] ECR 2321
ECJ, 11 November 1987, *France v Commission* (Case 259/85) [1987] ECR 4393
ECJ, 21 September 1989, *Hoechst* (joint Cases 46/87 and 227/88) [1989] ECR 2859
ECJ, 17 October 1989, *Dow Benelux* (Case 85/87) [1989] ECR 3137
ECJ, 17 October 1989, *Dow Chemical Ibérica* (joint Cases 97/87, 98/87 and 99/87) [1989] ECR 3165
ECJ, 18 October 1989, *Orkem* (Case 374/87) [1989] ECR 3283
ECJ, 18 October 1989, *Solvay* (Case 27/88) [1989] ECR 3355, summary publication
ECJ, 14 February 1990, *France v Commission* (Case C-301/87) [1990] ECR 307

ECJ, 21 March 1986, *Belgium v Commission* (Case C-142/87) ECR 959
ECJ, 27 June 1991, *Al-Jubail Fertilizer Company* (Case C-49/88) [1991] ECR 3187
ECJ, 7 May 1991, *Nakajima All Precision* (Case C-69/89) [1991] ECR 2069
ECJ, 28 November 1991, *Bureau européen des unions de consommateurs* (Case C-170/89) [1991] ECR 5709
ECJ, 10 November 1993, *Otto* (Case C-60/92) [1993] ECR 5683
CFI, 10 March 1992, *Shell International Chemical Company* (Case T-11/89) [1992] ECR 757

See also:

ECJ, 26 June 1986, *Nicolet Instrument* (Case 203/85) [1986] ECR 2049
ECJ, 8 March 1988, *Nicolet Instrument* (Case 43/87) [1988] ECR 1557
ECJ, 21 November 1991, *Technische Universität München* (Case C-269/90) [1991] ECR 5469

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: CJE-95-2-007

a) European Union / **b)** European Court of Justice / **c)** / **d)** 05.07.1995 / **e)** Case C-21/94 / **f)** *European Parliament v Council of the European Union* / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Temporal effects – Postponement of temporal effect.
General principles – Democracy.
General principles – Rule of law – Certainty of the law.
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Institutional structure – Council.

Keywords of the alphabetical index:

Amendment / Annulment / European Parliament, consultation / Directive / Formal requirements, essential, infringement / Injunctive Power / Institutional balance / Legislative procedure.

Headnotes:

Due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential formal requirement breach of which renders the measure concerned void. The effective participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. Such power reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. The duty to consult the European Parliament in the course of the legislative procedure, in the cases provided for by the Treaty, implies the requirement that the Parliament should be reconsulted whenever the text finally adopted, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted, except where the amendments essentially correspond to the wish of the Parliament itself. It is not possible for the institution adopting the final text to evade that duty on the ground that it was sufficiently well informed as to the opinion of the Parliament on the essential points at issue, since that would result in seriously undermining the effective participation of the Parliament in the legislative processes of the Community which is essential to the maintenance of the institutional balance intended by the Treaty, and would amount to disregarding the influence that due consultation of the Parliament can have on adoption of the measure in question. (cf. points 17-18, 24, 26)

The need to ensure that annulment, for infringement of the obligation properly to consult Parliament, of Directive 93/89 concerning taxes on certain vehicles used for the carriage of goods by road and road charges for the use of certain infrastructures does not lead to discontinuity in the programme for the harmonization of transport taxation and also important considerations of legal certainty, comparable with those arising where certain regulations are annulled, justify the Court in exercising the power expressly conferred on it by the second paragraph of Article 174 of the EC Treaty when it annuls a regulation and in ruling that all the effects of the annulled directive should be preserved provisionally until the Council has adopted a new directive. Although the Court does not have jurisdiction, in the context of its review of the legality of an act

under Article 173 of the Treaty, to issue an order to the Council imposing a time-limit within which the latter must adopt new rules on the matter, the Council is none the less under a duty to put an end within a reasonable period to the infringement it has committed. (cf. points 31-33, disp. 2)

Summary:

The European Parliament brought an action for the annulment of Directive 93/89/EEC on the application of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures, adopted on the basis of Articles 75 and 99 of the EC Treaty. It alleged an infringement of its right to take part in the legislative process, because the Council failed to consult it a second time before adopting the directive in question, and the text finally adopted contained substantial amendments in comparison with the Commission's proposal on which it had initially been consulted.

The Court allowed the Parliament's claim and annulled the Directive, holding that these amendments, adopted after consultation of the Parliament, affected the scheme of the proposal as a whole. It was however considered necessary to exercise the power under the second paragraph of Article 174.2 of the EC Treaty, and preserve provisionally all the effects of the annulled directive until the Council should adopt, within a reasonable period, a new directive.

Supplementary information:

On the consultation requirement, and the possible re-consultation requirement, see also the cases cited supra under ECJ, 30 March 1995, *European Parliament v Conseil* (Case C-65/93) [1995] ECR 643.

Cross-references:

On the application of Article 174 (2) to annulled measures other than regulations, see:

ECJ, 3 July 1986, *Council v European Parliament* (Case 34/86) [1986] ECR 2155
ECJ, 31 March 1992, *Council v European Parliament* (Case C-284/90) [1992] ECR 2277
ECJ, 7 July 1992, *European Parliament v Council* (Case C-295/90) [1992] ECR 4193

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: CJE-95-2-008

a) European Union / **b)** European Court of Justice / **c)** Sixth Chamber / **d)** 06.07.1995 / **e)** C-62/93 / **f)** *BP Soupergaz* / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Referral by a court.
Institutions – European Union – Distribution of powers between Community and Member states.

Keywords of the alphabetical index:

Direct effect / Preliminary rulings, competence of the Court / Repayment of monies unduly paid / Taxes.

Headnotes:

Under the procedure for a preliminary ruling provided for in Article 177 of the Treaty it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court of Justice. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action. Furthermore, the Court has no jurisdiction, in those proceedings, to rule on the compatibility of a national measure with Community law. (cf. points 10, 13)

The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, the Court of Justice gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the delivery of the judgment ruling on the request for interpretation, provided that in other respects the conditions under which an action relating to the application of that rule may be brought before the courts having jurisdiction are satisfied. It follows more particularly that the right to obtain a refund of amounts charged by a Member State in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by

the Community provisions as interpreted by the Court. While it is true that such a refund may be sought only in the framework of the substantive and procedural conditions laid down by the various relevant national laws, those conditions and the procedural conditions and rules governing actions at law for protecting the rights which individuals derive from the direct effect of Community law may not be less favourable than those relating to similar, domestic actions, nor be framed in a way such as to render virtually impossible the exercise of rights conferred by Community law. Accordingly, a taxable person may claim, with retroactive effect from the date on which the national legislation contrary to the Sixth Directive came into force, a refund of VAT paid without being due, by following the procedural rules laid down by the domestic legal system of the Member State concerned, provided that those rules are no less favourable than those satisfying the abovementioned requirements. (cf. points 39-42, disp. 4)

Summary:

A request was made for a preliminary ruling, by Greece, on the interpretation of Articles 11, 17 and 27 of the Sixth Council Directive 77/388/CEE Harmonisation of the laws of the Member States relating to turnover taxes – common system of Value Added Tax: uniform basis of assessment, in the context of a case dealing with, inter alia, the repayment to the undertaking Soupergaz of VAT which it had paid under national regulations which were found to be incompatible with the Sixth Directive.

Supplementary information:

On the repayment of monies unduly paid, see also:

ECJ, 11 August 1995, *Roders* (joint Cases C-367/93 to C-377/93; not yet published, esp. point 49

On the recovery of aid incompatible with the Common Market, see supra, CFI, 8 June 1995, *Siemens* (Case T-459/93); not yet published

Cross-references:

On the repayment of monies unduly paid, see:

ECJ, 4 April 1974, *Mertens* (joint Cases 178, 179 and 180-73) [1974] ECR 383
ECJ, 21 May 1976, *Société Roquette Frères* (Case 26-74) [1976] ECR 677
ECJ, 26 June 1979, *Pigs and Bacon Commission* (Case 177/78) [1979] ECR 2161
ECJ, 27 February 1980, *Hans Just* (Case 68/79) [1980] ECR 501
ECJ, 5 March 1980, *Ferwerda* (Case 265/78) [1980] ECR 617
ECJ, 27 March 1980, *Denkavit italiana* (Case 61/79) [1980] ECR 1205
ECJ, 12 June 1980, *BALM* (joint Cases 119 and 126/79) [1980] ECR 1863
ECJ, 12 June 1980, *Express Dairy Foods* (Case 130/79) [1980] ECR 1887
ECJ, 10 July 1980, *Ariete* (Case 811/79) [1980] ECR 2545
ECJ, 10 July 1980, *MIRECO* (Case 826/79) [1980] ECR 2559
ECJ, 13 May 1981, *International Chemical Corporation* [1981] ECR 1191
ECJ, 27 May 1981, *Essevi* (joint Cases 142 and 143/80) [1981] ECR 1413
ECJ, 6 May 1982, *Fromme* (Case 54/81) [1982] ECR 1449
ECJ, 6 May 1982, *BayWa* (joint Cases 146, 192 and 193/81) [1982] ECR 1503
ECJ, 1 March 1983, *DEKA Getreideprodukte* (Case 250/78) [1983] ECR 421
ECJ, 9 November 1983, *San Giorgio* (Case 199/82) [1983] ECR 3595
ECJ, 21 September 1983, *Deutsche Milchkontor* (joint Cases 205 to 215/82) [1983] ECR 2633
ECJ, 13 December 1983, *Apple and Pear Development Council* (Case 222/82) [1983] ECR 4083
ECJ, 25 September 1984, *Könecke* (Case 117/83) [1984] ECR 3291
ECJ, 2 February 1988, *Barra* (Case 309/85) [1988] ECR 355
ECJ, 25 February 1988, *Les Fils de Jules Bianco* (joint Cases 331/85, 376/85 and 378/85) [1988] ECR 1099
ECJ, 25 February 1988, *Raiffeisen* (Case 199/86) [1988] ECR 1169
ECJ, 24 March 1988, *Commission v Italie* (Case 104/86) [1988] ECR 1799
ECJ, 29 June 1988, *Deville* (Case 240/87) [1988] ECR 3513
ECJ, 5 October 1988, *Padovani* (Case 210/87) [1988] ECR 6177
ECJ, 2 February 1989, *Commission v Germany* (Case 94/87) [1989] ECR 175
ECJ, 9 November 1989, *Bessin and Salson* (Case 386/87) [1989] ECR 3551
ECJ, 21 March 1990, *Belgium v Commission* (Case C-142/87) [1990] ECR 959

Languages:

Greek (language of the case); German, English, Danish, Spanish, Finnish, French, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: CJE-95-2-009

a) European Union / **b)** European Court of Justice / **c)** / **d)** 13.07.1995 / **e)** C-156/93 / **f)** European Parliament v Commission of the European Communities / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Institutions of the Community.
Constitutional justice – Types of litigation – Litigation in respect of the formal validity of enactments.
Constitutional justice – Types of litigation – Distribution of powers between institutions of the Community.
Constitutional justice – Procedure – Parties – *Locus standi.*
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

European Parliament, consultation / Misuse of powers / European Parliament, capacity to bring actions / Commission, powers of implementation / Reasoning of measures / Regulations, basic and implementing.

Headnotes:

An action for annulment brought before the Court by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement. That condition is satisfied where the Parliament indicates in an appropriate manner the substance of the prerogative to be safeguarded and how that prerogative is allegedly infringed. Applying those criteria, an action must be declared inadmissible in so far as it is founded on infringement of Article 190 of the Treaty. In alleging that the contested provisions are inadequately reasoned for the purposes of that article, the Parliament has failed to indicate in an appropriate manner how that infringement is such as to impair its own prerogatives. On the other hand, the right to be consulted in accordance with a provision of the Treaty is a prerogative of the Parliament; consequently, where the Commission exceeds its powers in seeking to regulate matters falling within the ambit of a basic regulation of the Council by means of provisions implementing that basic regulation, which is itself based on an article of the Treaty requiring the Parliament to be consulted, it is liable to breach that prerogative, since it is in effect excluding the Parliament from the normal procedure for regulating such matters. (cf. points 10-13)

The Council cannot be required to draw up all the details of the regulations concerning the common agricultural policy according to the procedure laid down in Article 43 of the Treaty. It is sufficient for the purposes of that provision that the essential elements of the matter to be dealt with have been adopted in accordance with that procedure; by contrast, the provisions implementing the basic regulations may be adopted according to a procedure other than that laid down by Article 43. Nevertheless, an implementing regulation adopted without consultation of the Parliament must respect the essential elements which were laid down in the basic regulation following such consultation. Commission Regulation no. 207/93, defining *inter alia* the content of Annex VI to Council Regulation no. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, does not go beyond the framework for the implementation of the principles laid down by the latter regulation by including amongst the preparations used in the processing of foodstuffs provided that they have been included in accordance with the management committee procedure genetically modified micro-organisms as defined by Directive 90/220 on the deliberate release into the environment of genetically modified organisms. The effect of the reference to those micro-organisms, which can only be included in the annex by the procedure prescribed for that purpose, is not to lay down new rules permitting the use of those substances in organic farming. Such use is subject to both compliance with the procedures laid down by Directive 90/219 on the contained use of the micro-organisms in question and the abovementioned Directive 90/220 and the effective inclusion of those substances in the exhaustive lists contained in Annex VI. (cf. points 18, 22-23, 25-26)

An act of a Community institution is vitiated by misuse of powers if it is adopted with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. Commission Regulation no. 207/93 defining *inter alia* the content of Annex VI to Council Regulation no. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs is not vitiated in that way by the fact that it includes, within that annex, genetically modified micro-organisms as defined by Directive 90/220. There is nothing to suggest that the Commission adopted the provisions at issue for a purpose other than that stated in the preamble to the regulation containing them, and, since the Commission has not amended the legislation arising from the basic regula-

tion, it was not obliged to follow the special procedure laid down for that purpose. (cf. points 31-33)

Summary:

The European Parliament applied for the annulment of Commission Regulation (EEC)No 207/93 which lays down rules for implementing the provisions of Article 5(4) of, and defines the content of Annex VI to Regulation (EEC) no. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, based on Article 43 of the EEC Treaty.

The Parliament claimed that by adopting this Regulation, and particularly by including genetically modified micro-organisms, as defined by Directive 90/220 on the deliberate release into the environment of genetically modified organisms, amongst the listed substances used to process foodstuffs, the Commission exceeded its powers under the basic regulation and amended that regulation without observing the procedure laid down in Article 43 of the EEC Treaty, which provides for the consultation of the Parliament.

The Court, having ruled that the action was admissible according to its case-law on the Parliament's capacity to bring actions, held that the contested regulation was valid, insofar as it did not go beyond the fulfilment of the objectives defined in the basic regulation, adopted following consultation of the Parliament, according to its case-law concerning the distinction between basic and implementing regulations.

Supplementary information:

On the concept of misuse of powers and its application in Community law, see:

CFI, 2 February 1995, Erik Dan Frederiksen (Case T-106/92); not yet published
CFI, 22 March 1995, Petros Kotzonis (Case T-586/93); not yet published
CFI, 6 April 1995, Ferriere Nord SpA (Case T-143/89); not yet published
CFI, 8 June 1995, Allo (Case T-496/93); not yet published

Cross-references:

On the Parliament's capacity to bring actions, see:

ECJ, 27 September 1988, European Parliament v Council (Case 302/87) [1988] ECR 5615
ECJ, 22 May 1990, European Parliament v Council (Case C-70/88) [1990] ECR 2041
ECJ, 4 October 1991, European Parliament v Council (Case C-70/88) [1991] ECR 4529
ECJ, 31 March 1992, Council v European Parliament (Case C-284/90) [1992] ECR 2277
ECJ, 7 July 1992, European Parliament v Council (Case C-295/90) [1992] ECR 4193
ECJ, 16 July 1992, European Parliament v Council (Case C-65/90) [1992] ECR 4593
ECJ, 30 June 1993, European Parliament v Council and Commission (joint Cases C-181/91 and C-248/91) [1993)] ECR 3685
ECJ, 2 March 1994, European Parliament v Council (Case C-316/91) [1994] ECR 625
ECJ, 1 June 1994, European Parliament v Council (Case C-388/92) [1994] ECR 2067
ECJ, 28 June 1994, European Parliament v Council (Case C-187/93) [1994] ECR 2857

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese (translations by the Court).

Identification: CJE-95-2-010

a) European Union / **b)** Court of First Instance / **c)** Third Chamber / **d)** 13.07.1995 / **e)** T-176/94 / **f)** K v Commission of the European Communities / **g)** not yet published / **h).**

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Categories – Unwritten rules – General principles of law.
Fundamental rights – General questions – Basic principles – Nature of the list of fundamental rights.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Duty of care / Duty to grant assistance / Medical secrecy / National constitutional traditions / Professional confidentiality.

Headnotes:

Fundamental rights form an integral part of the general principles of law, the observance of which the Community judicature ensures. For that purpose, the Community judicature draws inspiration from the constitutional traditions common to the Member States

and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights, to which Article F(2) of the Treaty expressly refers, has special significance in that respect. (cf. points 29-30)

The right to respect for private life enshrined in Article 8 ECHR is one of the fundamental rights protected by the legal order of the Community. It includes in particular the right for every person to keep his state of health secret. (cf. point 31)

Fundamental rights, however, do not constitute unfettered prerogatives but may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the objective pursued, a disproportionate and intolerable interference which encroaches upon the very substance of the rights guaranteed. For that reason it is impossible to consider that an official's right to respect for his private life has been infringed where facts concerning his health have been made known to the persons responsible for examining a complaint against the refusal to reimburse medical expenses submitted by him and in support of which those facts were relied on, without any request that it should be dealt with anonymously. That communication is provided for by the relevant rules, it is necessary in order to verify whether claims for reimbursement are substantiated, a verification on which the survival of the common sickness insurance scheme for Community officials depends, and it is not disproportionate in so far as it is confined to a restricted category of persons, all bound by the obligation of professional secrecy under Article 214 of the EC Treaty. (cf. points 33-45)

Disclosure of a complaint exclusively to the persons competent to deal with it cannot constitute a breach of the principles of assistance and regard for welfare, even if the complaint does contain information which might give rise to a suspicion that the applicant's professional abilities are waning. (cf. point 48)

Summary:

The applicant, an insulin-dependant diabetic, made a claim against a decision of the payments office of the health insurance scheme common to the Community institutions, who had, despite the seriousness of the applicant's illness entitling him to reimbursement at 100% of his medical expenses, only authorised partial reimbursement of his expenses for certain dental care. This claim having been unreservedly distributed to various services within the Commission, he requested the Commission to publicly acknowledge that it erred in divulging his health problems, and that token damages of 1 ECU be paid in respect of same. This request having been implicitly refused, he lodged a claim for annulment of the decisions rejecting his claim and damages, and sought damages against the Commission to the value of 25 000 ECU to compensate the material and moral damage incurred, on the basis of an alleged infringement of Articles 8 and 10 ECHR and also the duty of care and the duty to grant assistance. The Court of First Instance, having dismissed the ground for relief based on infringement of the right of freedom of expression due to the applicant's failure to elaborate on this notion, rejected the ground based on infringement of the right to respect for family and private life, holding that, supposing there were interference in the applicant's private life, this was not without legal justification, being in the interest of "economic stability" and "protection of health", and was not disproportionate to the required objective, in compliance with Article 8.2 ECHR. The appeal was therefore rejected.

Supplementary information:

See also supra, CFI, 23 February 1995, *F. v Council* (Case T-535/93); not yet published, and the references cited under [Cross-references].

Cross-references:

On the restrictions to the exercise of fundamental rights, see:

ECJ, 13 December 1979, *Liselotte Hauer* (Case 44/79) [1979] ECR 3727, 3744
ECJ, 8 October 1986, *Keller* (Case 234/85) [1986] ECR 2897, 2912
ECJ, 11 July 1989, *Schräder* (Case 265/87) [1989] ECR 2237, 2267
ECJ, 13 July 1989, *Wachauf* (Case 5/88) [1989] ECR 2609, 2639
ECJ, 8 April 1992, *Commission v Germany* (Case C-62/90) [1992] ECR 2575
ECJ, 5 October 1994, *X v Commission* (Case C-404/92 P) [1994] ECR 4737

Languages:

French (language of the case).

European Court of Human Rights

Reference period:
1 May 1995 – 31 August 1995

Important decisions

Identification: ECH-95-2-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 05.05.1995 / **e)** 9/1994/456/537 / **f)** Air Canada v. the United Kingdom / **g)** to be published in volume 316-A 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 – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Property, control of use.

Headnotes:

The seizure of an aircraft as liable to forfeiture by the Customs authorities subject to payment of a sum of money for its return amounts to a control of the use of property which does not infringe the right to the peaceful enjoyment of possessions.

Summary:

After having discovered 331 kgs of cannabis resin in one of the containers of an aeroplane of the applicant company, the officers of the Commissioners of Customs and Excise seized the aircraft as liable to forfeiture (Customs and Excise Management Act 1979), but on the same day they returned it on payment of £ 50,000. Air Canada challenged the Commissioners' assertion that the aircraft was liable to forfeiture. The Commissioners' action for condemnation of the aircraft was initially dismissed by a decision of the High Court which was subsequently overturned by the Court of Appeal.

The Court stated that the seizure of the applicant's aircraft and its release subject to payment were exceptional measures which were resorted to in order to bring about an improvement in the company's security procedures. Moreover, the incident was the latest in a long series of alleged security lapses which had been brought to Air Canada's attention involving the illegal importation of drugs into the United Kingdom during the period 1983 to 1987. The measures taken, therefore, conformed to the general interest in combating international drug trafficking. In addition, it would have been open to Air Canada to have instituted judicial review proceedings to challenge the failure of the Commissioners to provide reasons for the seizure of the aircraft. Furthermore, taking into account the large quantity of drugs found in the container, its street value, as well as the value of the aircraft, the requirement to pay £ 50,000 was not disproportionate to the legitimate aim pursued. Bearing in mind the State's margin of appreciation in this area, the Court found that the fair balance required by Article 1 of Protocol 1 ECHR (right to peaceful enjoyment of one's possessions) had been achieved in the present case.

Under Article 6.1 ECHR (right to a fair trial), the Court held that the matters complained of did not involve "the determination of a criminal charge" but concerned a dispute relating to the applicant company's civil rights. The Court found that the relevant provisions of United Kingdom law required the Commissioners to take proceedings for forfeiture once the seizure of the aircraft had been challenged. The requirement of access to court was thus satisfied in this respect and, consequently, there has been no violation of Article 6.1 ECHR.

Languages:

English, French.

Identification: ECH-95-2-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 08.06.1995 / **e)** / **f)** Yağcı and Sargın v. Turkey / **g)** to be published in volume 319-A of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.
Fundamental rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Headnotes:

A pre-trial detention of three months and thirteen days and criminal proceedings lasting two years, five months and eighteen days exceed reasonable time required by the Convention, having regard in particular to the fact that they had begun before the starting-point of the period taken into consideration by the Court.

Summary:

Mr Nabi Yağcı, a journalist, and Mr Nihat Sargın, a doctor, were the general secretaries of the Turkish Workers' Party and the Turkish Communist Party respectively.

On returning to Turkey on 16 November 1987 after a long absence, they were arrested as they alighted from the plane and kept in police custody until 5 December and thereafter in detention pending trial for approximately two years and five and a half months.

The indictment on which they were brought before the National Security Court in Ankara was 229 pages long and concerned fourteen other people also. It charged them with having been the leaders of an organisation whose objective was to establish the domination of one social class; disseminating propaganda to that end and with the intention of abolishing the rights guaranteed in the Constitution; spreading false reports bringing discredit on the State; inciting public hostility and hatred based on distinguishing between the social classes; and attacking the reputation of the Republic of Turkey, its President and its Government. The National Security Court held forty-eight hearings.

Applications for release from custody lodged by the applicants during the proceedings were turned down on account of the nature of the offences, the state of the proceedings and the "evidence". On 4 May 1990 the National Security Court ordered their provisional release. In a judgment of 9 October 1991 the court acquitted them, partly on the ground that the legislation on which some of the prosecutions had been based had been repealed, and declined jurisdiction in respect of the offence of attacking the reputation of the State authorities, which it referred to the Ankara Sixth Assize Court. That court remitted the case to the Ankara Second Assize Court, which had jurisdiction to try offences committed through the press, and Mr Yağcı and Mr Sargın were acquitted on 9 July 1992.

Regarding Article 5.3 ECHR, the Court examined the grounds on which the Turkish authorities based their decisions refusing to release the applicants and reached the following conclusions: a) danger of absconding: it cannot be gauged solely on the basis of the severity of the sentence risked and the National Security Court's orders had confirmed the detention without in any way explaining why there was a danger of absconding; b) expression "the state of the evidence": it could be understood to mean the existence and persistence of serious indications of guilt but in the instant case those circumstances could not on their own justify continuation of detention; c) date of arrest of the applicants: no total period of detention is justified in itself, without there being relevant grounds under the Convention. Consequently, the applicants' continued detention during the period in question contravened Article 5.3 ECHR.

Regarding Article 6.1 ECHR, the Court held that, even allowing for the quantity of documents, the case could not be regarded as complex and that the conduct of the applicants and their lawyers at hearings did not seem to have displayed any determination to be obstructive. On the other hand, between January 1990 and July 1992, the National Security Court held only twenty hearings in the case; moreover, after the Antiterrorist Act of April 1991 had come into force, it waited nearly six months before acquitting the applicants. In conclusion, the length of the criminal proceedings in question contravened Article 6.1 guaranteeing, *inter alia*, the right to a fair trial within a reasonable time.

Languages:

English, French.

Identification: ECH-95-2-010

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 08.06.1995 / **e)** 11/1994/458/539 / **f)** Jamil v. France / **g)** to be

published in volume 317-B 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:

Drug trafficking / Imprisonment, enforcement procedure.

Headnotes:

The prolongation of the term of imprisonment in default ordered by the Paris Court of Appeal pursuant to a law enacted after the offence was committed (Article 749 of the Code of Criminal Procedure) violates the principle of non-retrospective effect of criminal law.

Summary:

The applicant was charged with smuggling prohibited goods and conspiracy to smuggle prohibited goods. The Bobigny Criminal Court sentenced him to eight years' imprisonment, after which he was to be deported from French territory and, jointly, to a customs fine; in default of payment, he would be liable to imprisonment. The Paris Court of Appeal upheld the judgment and applied to the applicant the Law of 31 December 1987 on the prevention of drug trafficking, which increased the maximum term of imprisonment in default to two years. The Court of Cassation decided that the 1987 Law could apply retrospectively, holding that imprisonment for non-payment was an enforcement procedure, not a penalty, and that provisions relating to the enforcement of penalties were applicable immediately to situations that already existed when they came into force.

The main question to be resolved by the Court was whether imprisonment in default was a penalty within the meaning of Article 7 ECHR guaranteeing the principle *nullum crimen, nulla poena sine lege* of the Convention.

The Court reiterated that the word "penalty" in Article 7.1 was autonomous in meaning. To render the protection afforded by Article 7.1 effective, the Court had to remain free to go behind appearances and assess for itself whether a particular measure amounted in substance to a "penalty". Its practice was to ascertain whether the measure had been imposed following conviction for a criminal offence, and it also took into account the characterisation of the measure under national law; its nature and purpose; the procedures involved in the making and implementation of the measure; and its severity.

The sanction imposed on Mr Jamil had been ordered in a criminal-law context – the prevention of drug trafficking. However, in France imprisonment in default was not confined to this single, ordinary-law field. As it was a means of enforcing the payment of debts to the Treasury other than those in the nature of civil damages, it could also be attached to penalties for customs or tax offences, among others.

The measure was intended to ensure payment of fines, *inter alia*, by enforcement directed at the person of a debtor who could not prove his insolvency, and its object was to compel such payment by the threat of incarceration under a prison regime harsher than for sentences of imprisonment under the ordinary criminal law. It was a survival of the ancient system of imprisonment for debt which still existed only in respect of debts to the State and did not absolve the debtor from the obligation to pay which had led to his committal to prison. Although he could no longer thereafter be compelled to pay by means directed against his person, his goods were still subject to distraint.

The sanction imposed on Mr Jamil was ordered by a criminal court, was intended to be deterrent and could have led to a punitive deprivation of liberty; it had therefore been a penalty.

The applicant had admittedly been absolved from the obligation to pay a substantial part of the customs fine, although he had never been made to serve any period of imprisonment in default, but that exemption did not suffice to invalidate the foregoing analysis.

Consequently, as the 1987 Law had increased the maximum period of imprisonment in default from four months to twenty-four months and had been applied retrospectively in the instant case, there had been a breach of Article 7 ECHR.

Languages:

English, French.

Identification: ECH-95-2-011

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 13.07.1995 / **e)** 8/1994/455/536 / **f)** Tolstoy Miroslavsky v. the United Kingdom / **g)** to be published in volume 316-B of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Libel / Security for costs.

Headnotes:

Conviction to pay libel damages of an amount of £ 1.5 million awarded by a High Court jury infringes the right to freedom of expression, but not an injunction by the same court restraining defendant from repeating libel.

An order by the Court of Appeal that the defendant provides £ 124.900 in security for plaintiff's costs as a condition for hearing the defendant's appeal does not infringe the right of access to courts.

Summary:

In March 1987 a pamphlet written by the applicant was distributed by a Mr Watts to parents, boys and staff at Winchester College as well as to members of both Houses of Parliament, the press and former members of the school. The pamphlet alleged that the Warden of Winchester College, Lord Aldington, as a high-ranking British army officer serving in occupied Austria at the end of the Second World War, had been responsible for handing over seventy thousand people (Cossack and Yugoslav prisoners of war and refugees) to the Soviet authorities, without the authorisation of the Supreme Allied Commander and knowing full well that they would meet a cruel fate. It added that Lord Aldington had repeatedly been accused in books and press articles of being a war criminal on that account.

Lord Aldington sued for libel. The jury trial began on 2 October 1989. In his summing-up to the jury the trial judge devoted ten pages to the question of damages should defamation be established. The jury returned its verdict on 30 November 1989, finding for Lord Aldington and awarding him damages amounting to £ 1.5 million. In addition, the High Court granted an application by Lord Aldington for an injunction restraining the defendants from repeating the libellous statements in the pamphlet. The applicant gave notice of appeal, alleging that the trial judge had been biased in favour of Lord Aldington and had misdirected the jury and that the damages awarded were in any event unreasonable and excessive. As the applicant did not furnish the required security for an amount that would cover the costs of Lord Aldington's representation should the appeal be unsuccessful, his appeal was dismissed on 3 August 1990.

Under Article 10 ECHR (freedom of expression), the Court stated in the first place that the amount of damages awarded and the injunction constituted an interference with the applicant's right to freedom of expression. More specifically, as regards the award, the Court considered that it was "prescribed by law": the Court noted in this respect that the relevant legal rules concerning libel damages were formulated with sufficient precision and that decisions on such awards were subject to a number of limitations and safeguards. Moreover, the lack of reasoning for awards of damages could not be said to affect the foreseeability of a particularly high award being made in the applicant's case. Furthermore, the award clearly pursued a legitimate aim: the protection of the reputation or rights of others.

On the other hand, the Court observed that the sum awarded was three times the size of the highest libel award previously made in England and no comparable award had been made since. An award of the size in question must be particularly open to question where the substantive national law applicable at the time failed itself to provide a requirement of proportionality. At the material time the national law allowed great latitude to the jury and the scope of judicial control, at the trial and on appeal, did not offer adequate and effective safeguards against a disproportionately large award. Accordingly, the award was not "necessary in a democratic society" and there had been a violation of Article 10.

Under Article 6 ECHR, the Court concluded that the security for costs order pursued a legitimate aim – to protect the plaintiff from being faced with irrecoverable legal costs if the appellant were unsuccessful in the appeal – and was imposed in the interests of a fair administration of justice. The security for costs order, which was based on the applicant's impecuniosity and the lack of merits of his appeal, did not disclose any arbitrariness; it did not impair the very essence of the applicant's right of access to court and was not disproportionate for the purposes of Article 6.1. Accordingly, there had been no violation of this Article.

Languages:

English, French.

Identification: ECH-95-2-012

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 13.07.1995 / **e)** 18/1994/465/546 / **f)** Nasri v. France / **g)** to be published in volume 320-B of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Expulsion of offenders.

Headnotes:

A deportation order imposed on an Algerian deaf-mute, who had come to France with his family at the age of four, would infringe the right to respect for family life if it were to be implemented.

Summary:

From 1977 various criminal proceedings were brought against the applicant – born deaf and dumb, and being illiterate – resulting in convictions for theft, assault and gang rape. In 1987 the Minister of the Interior issued an order for his deportation founded on five convictions, including the conviction for rape. The Versailles Administrative Court rescinded the order by decision of March 1988, which the *Conseil d'Etat* set aside in February 1991. The applicant was summoned to the Prefecture in January 1992 and was detained with a view to his deportation to Algeria. The following day he challenged the decisions relating thereto in the Paris Administrative Court, relying, *inter alia*, on Article 8 ECHR (right to respect for family life). That court dismissed his application basing its decision on, among other things, his past history as a persistent offender and his continuing criminal activity. He was not, however, deported, but was placed under a compulsory residence order after he had lodged his application with the European Commission of Human Rights.

At first, the Court took the view that the execution of the deportation order would amount to an interference with the exercise by the applicant of his right to respect for his family life. Secondly, the Court noted that the ministerial deportation order was based on the Order on these conditions of entry and residence of aliens in France, and that the *Conseil d'Etat* had found that the measure concerned was lawful. The interference in question pursued aims that were fully compatible with the Convention: the "protection of disorder" and "prevention of crime". The Court moreover stressed that duty for the Contracting States to maintain public order, in particular by exercising their right to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences.

However, the Court considered that the decision to deport the applicant, if executed, would not be proportionate to the legitimate aims pursued and would constitute a breach of Article 8, because of an accumulation of special circumstances in the instant case: the applicant's handicap which had been aggravated by an illiteracy which had been the result of largely inadequate schooling; the fact that for a person confronted with such obstacles the family was especially important, not only in terms of providing a home, but also because it could help to prevent him from lapsing into a life of crime; the fact that the applicant had never severed links with his parents who came to France in 1965; and finally, his inability to understand Arabic.

Languages:

English, French.

Identification: ECH-95-2-013

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 13.07.1995 / **e)** 19/1994/466/547 / **f)** Kampanis v. Greece / **g)** to be published in volume 318-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.

Headnotes:

Refusal by the Indictment Division of a Court of Appeal to give a prisoner leave to appear in order to present argument in support of his application for release – whereas the public prosecutor is heard – contravenes the principle of equality of arms and infringes the right of the accused to take proceedings before a court.

Summary:

The investigating judge of the Athens Criminal Court brought charges against the applicant chairman and managing director of a publicly owned company on four occasions for misappropriation and repeated fraud to the detriment of the company, making false statements and incitement to misappropriation and fraud, and remanded him in custody. The applicant filed with the Indictment Division of the Court of Appeal several applications for release on bail – challenging the alleged excessive length of his detention on remand – which were refused. On one such occasion, the applicant also sought leave to appear before the Indictment Division in order to present his arguments orally; he had previously developed these arguments in writing in a memorial. After having heard the prosecutor, who expanded on the written submission he had filed the day before, the Indictment Division dismissed the applicant's petition.

The Court noted that the applicant had been in prison for twenty-five months and ten days pursuant to three successive orders, each of which had fixed a different starting-point for the calculation of his detention on remand; in two of these cases detention had been prolonged up to the maximum permitted under the Greek Constitution. To ensure equality of arms, it was necessary to give the applicant the opportunity to appear at the same time as the prosecutor so that he could reply to his arguments. As they did not afford the applicant an adequate opportunity to participate in proceedings whose outcome determined whether his detention was to continue or to be terminated, the Greek rules in force at the material time, as applied in the instant case, did not satisfy the requirements of Article 5.4 ECHR.

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.*

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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] *This keyword concerns decisions on the procedure and results of referendums and other consultations.*
[13] *This keyword concerns decisions preceding the referendum including its admissibility.*
[14] *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)).*

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[15] *Local authorities, municipalities, provinces, departments, etc.*
[16] *Or: functional decentralisation (public bodies exercising delegated powers).*
[17] *Political questions.*
[18] *Unconstitutionality by omission.*
[19] *Pleadings, final submissions, notes, etc.*

pages

pages

[20] *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

[21] *Presumption of constitutionality, double construction rule.*

[22] *Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.*

pages

[23] *Only where not applied as a fundamental right.*
Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.
[24] *Bicameral, monocameral, special competence of each assembly, etc.*
[25] *Including specialised powers of each legislative body.*
[26] *Presidency, bureau, sections, committees, etc.*
[27] *State budgetary contribution, other sources, etc.*
[28] *For procedural aspects see the key-word "Electoral disputes" under "Constitutional justice - Types of litigation".*
[29] *For example incompatibilities, parliamentary, exemption from jurisdiction and others.*
[30] *Derived directly from the constitution.*
[31] *Local authorities.*

pages

[32] *The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.*
[33] *Civil servants, administrators, etc.*
[34] *Comprises the Court of auditors insofar as it exercises jurisdictional power.*

pages

[35] *E.g. Court of Auditors.*
[36] *Ombudsman, etc.*
[37] *E.g. Court of Auditors.*

pages

5. FUNDAMENTAL RIGHTS

[38] *Open-ended or finite.*
[39] *If applied in combination with another fundamental right.*
[40] *The question of "Drittwirkung".*
[41] *Used independently from other rights.*
[42] *Includes for example identity checking, personal search and administrative arrest. Detention pending trial is treated under "Procedural safeguards - Detention pending trial".*
[43] *Including the right of access to a tribunal established by law.*

[44] *Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.*

[45] *Militia, conscientious objection, etc.*

[46] *Aspects of the use of names are included either here or under "Right to private life".*

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Keywords of the alphabetical index

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