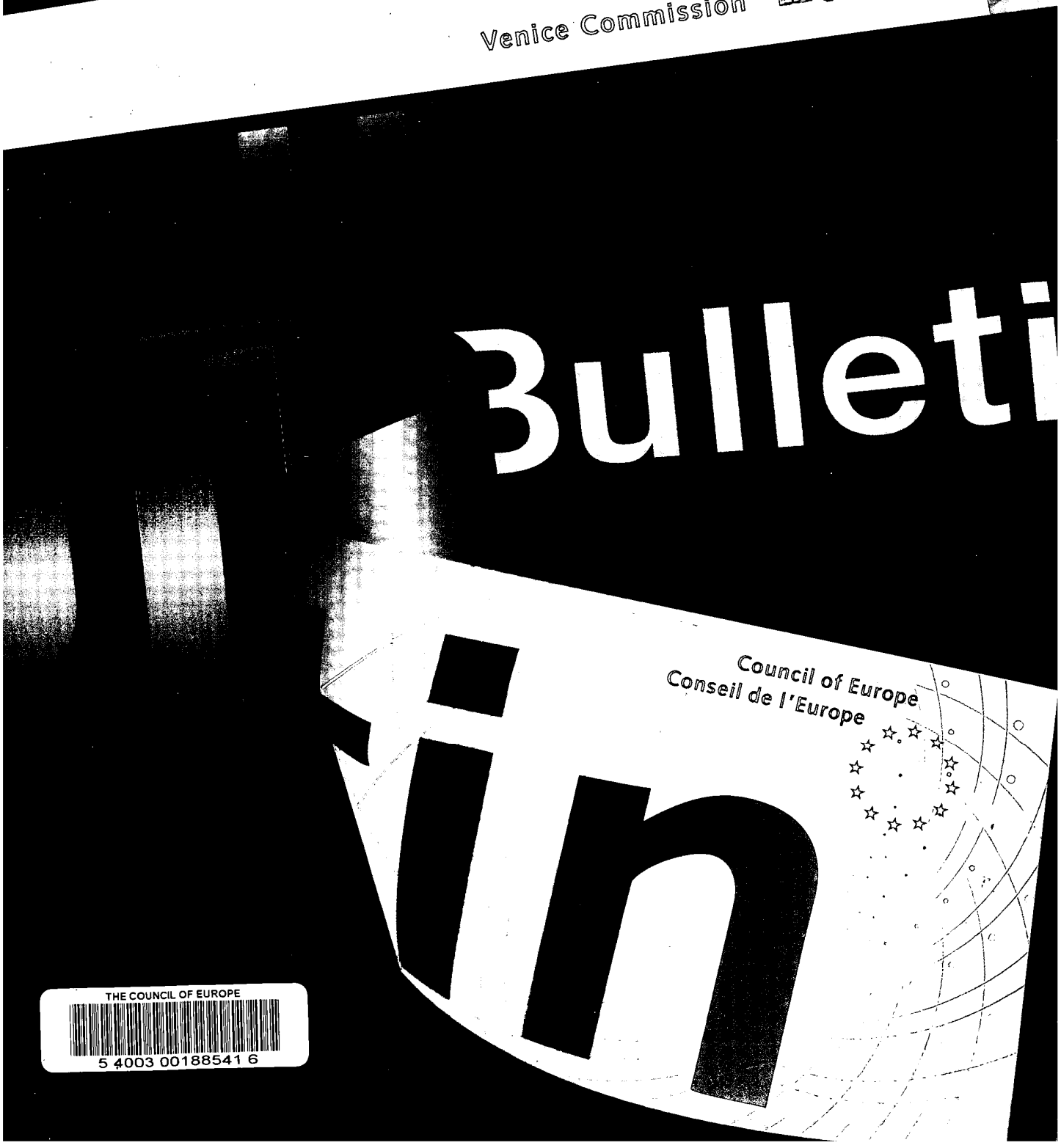
Bulletin on Constitutional Case-Law

Edition 3
1995

Venice Commission



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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*
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Layout: Graphic Design Studio - SEDDOC
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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

Important decisions

Identification: ALB-95-3-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 19.09.1995 / **e)** 11 / **f)** / **g)** Official Gazette 21, 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Statute and organisation – Sources – Rules of procedure.
Constitutional justice – Decisions – Types – Finding of constitutionality or unconstitutionality.
Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Reasons, faulty or insufficient, petition.

Headnotes:

Sittings of the *plenum* of the Court of Cassation in criminal proceedings became unlawful following the amendment of certain legislation.

The constitutional right to challenge the lawfulness of a court decision, guaranteed by Section 13 of the Human Rights and Fundamental Freedoms Act, was preserved, in spite of the withdrawal of the possibility of a petition in respect of faulty or insufficient reasons in criminal proceedings, since the new Code of Criminal Procedure recognises a remedy against decisions which have become final through the introduction of the review procedure.

The Council of Ministers has power to bring before the Constitutional Court petitions in respect of faulty or insufficient reasons.

Summary:

On 26 July 1995, in pursuance of the Code of Criminal Procedure adopted under Act no. 6069 of 25 December 1979 (which was in force until 31 July 1995), the *plenum* of the Court of Cassation sat to examine three petitions in respect of faulty or insufficient reasons in criminal proceedings. While one of the petitions was examined and found to be admissible, the other two, including the criminal case concerning the petitioner, were not examined for different reasons, and the decisions were deferred to September 1995.

In the meantime, the new Code of Criminal Procedure came into force, on 1 August 1995. It made provision neither for petitions in respect of faulty or insufficient reasons, as an exceptional procedure, to the President of the Court of Cassation, nor for the existence of a *plenum* of the Court of Cassation as the supreme criminal court. The new Code further stipulated that, in respect of any case before a court of first instance or appeal, the provisions of the former Code of Criminal Procedure would be applied until 15 November 1995 (Section 525 of the new Code of Criminal Procedure).

During the hearing, counsel for the petitioner claimed that recognition of the principle of retroactivity of the new Code of Criminal Procedure infringed the constitutional rights provided for in Section 6 of Act No 7692 of 31.3.93 amending Act no. 7491 of 29.4.91, the Main Constitutional Provisions Act, and that, even if the amendment concerned was not unconstitutional, it nevertheless infringed the rights of his client.

The Court took the view that these arguments were without foundation, in that the promulgation of the Act was unconnected with the existence of the *plenum* of the Court of Cassation or with petitions in respect of faulty or insufficient reasons. The adoption of the amendment concerned had not worsened the petitioner's position by withdrawing the *plenum* of the Court of Cassation and the possibility of petitions in respect of faulty or insufficient reasons.

The Court further took the view that, in withdrawing the right to petition in respect of faulty or insufficient reasons, the legislature had not denied the constitutional right to challenge the lawfulness of a court decision guaranteed by Section 13 of the Human Rights and Fundamental Freedoms Act, in that the new Code of Criminal Procedure recognised a remedy against decisions which had become final through the introduction of the review procedure.

The Constitutional Court concluded that sittings in *plenum* of the Court of Cassation in respect of criminal proceedings were to be considered contrary to the Constitution with effect from 1 August 1995, and it set aside as unconstitutional the judgment of 26 July 1995 of the *plenum* of the said court on the examination after 31 July 1995 of the petition in respect of faulty or insufficient reasons in criminal proceedings.

Languages:

Albanian, French (translation by the Court).

Identification: ALB-95-3-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 21.09.1995 / **e)** 12 / **f)** / **g)** Official Gazette 21, 1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Executive bodies.
Constitutional justice – Types of litigation – Litigation in respect of jurisdictional conflict.
Constitutional justice – Procedure – Parties.
Institutions – Courts – Jurisdiction.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Execution, stay, unconstitutionality.

Headnotes:

The Constitutional Court has power to rule on the conformity with the Constitution of orders staying execution and may be asked by the Council of Ministers to examine the cases concerned.

Repeated orders by the President of the Court of Cassation for a stay of execution of a single decision in civil proceedings which have become final, and the stay of execution of, or objection to, decisions of the *plenum* of the Court of Cassation are unlawful and unconstitutional acts.

Summary:

The Council of Ministers had asked the Constitutional Court to declare unlawful and unconstitutional the orders of the President of the Court of Cassation during the execution phase of civil decisions of the courts which, in the Council's view, were markedly detrimental to citizens' rights and interests. The acts concerned were:

- orders addressed to the courts and the administrative authorities responsible for the execution of civil decisions for a stay of execution of decisions delivered by such courts which had become final; and

- orders addressed to the same courts for non-execution of decisions of the Court of Appeal against which an appeal had been lodged with the Court of Cassation.

On the other hand, the President of the Court of Cassation had asked the Constitutional Court to rule on the impossibility under the law of the Council of Ministers referring to the said Court orders and acts of the President of the Court of Cassation, and to rule that petitions of the Council of Ministers were not within the jurisdiction of the Constitutional Court.

In addition, the President of the Court of Cassation had asked the Constitutional Court to rule that petitions of the Council were inadmissible, since they were contrary to the Constitution, violated international principles and did not reflect reality.

The Constitutional Court first considered whether the Council of Ministers had the power to refer the petition concerned to the Court. Section 25 of Act no. 7561 of 29.4.92 on alterations and amendments to the Main Constitutional Provisions Act defines the organs of the State which may refer matters to the Constitutional Court. One of these organs is the Council of Ministers.

The Court concluded that the Council of Ministers had the power to ask the Constitutional Court to examine "petitions on behalf of citizens" in pursuance of Section 24 of the same Act, in so far as there was no limitation or prohibition with regard to the Council of Ministers as a petitioner.

The power of the Council of Ministers to refer matters to the Constitutional Court was based upon Section 36 of the Main Constitutional Provisions Act, which lays down that one of its prime tasks is to safeguard the legal system and to protect citizens' interests.

On the subject of the jurisdiction of the Constitutional Court, the Court dismissed the argument put by the President of the Court of Cassation as without foundation. Under the Constitutional Court Act, and in the light of that Court's practice, the case could be considered directly, without first being considered by other courts, whether ordinary or administrative.

As there was no other remedy against an order staying the execution of a decision which had become final, issued by the President of the Court of Cassation or by the Attorney-General, the Constitutional Court had sole power to rule whether such an order was in conformity

with the Constitution, and the Council of Ministers had the power to refer the case concerned to it.

On the issue of repeated orders staying execution of court decisions, the President of the Court of Cassation emphasised that Section 185 of the Code of Criminal Procedure did not specify how many times a stay of execution of a court decision could be ordered, so there was no legislation preventing more than one stay of execution of a court decision.

The Court dismissed this argument, stating that Section 185 of the Code of Criminal Procedure was clear, in that a stay of execution of a court decision was possible only for a two-month period and could not be ordered more than once in respect of a single case. Section 185 was intended to forestall the potential detrimental effects of execution of a decision which has become final, the lawfulness of which might be subject to a serious challenge. A stay of execution of such a decision for a two-month period offered an opportunity to remedy the situation. This was fully in line with Sections 38 and 40 of the Human Rights and Fundamental Freedoms Act, which guarantee a fair trial and a decision within a reasonable time.

The Constitutional Court therefore concluded that the President of the Court of Cassation had exceeded his powers under the legislation on the execution of court decisions and had thus violated citizens' fundamental rights, as guaranteed by Sections 38 and 40 of the Human Rights and Fundamental Freedoms Act.

Finally, in respect of the second part of the petition of the Council of Ministers concerning non-execution of decisions of the Court of Appeal against which appeals had been lodged with the Court of Cassation, the Constitutional Court concluded that the act concerned emanated directly from the Court of Cassation, which was not a party to the case, and not from its President. It was consequently impossible for the Court to consider the merits of the act concerned.

Languages:

Albanian, French (translation by the Court).

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-95-3-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** Third instance / **d)** 07.04.1995 / **e)** G-342.XXVL.R.H. / **f)** Inter-American Convention on Human Rights / **g)** / **h)** *El Derecho* 1995, no. 8784.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Criminal procedure / Inter-American Convention on Human Rights.

Headnotes:

As the supreme body of one of the branches of the federal government, the Supreme Court of Justice of the Nation must apply, to the extent that it has jurisdiction, the international treaties by which the country is bound, because Argentina might otherwise incur liability *vis-à-vis* the international community. In this connection, the Inter-American Court has defined the scope of the word "guarantee" in the Inter-American Convention on Human Rights, specifying that it entails an obligation on the part of States to take all measures to remove any obstacles that may exist to the individual enjoyment of the rights recognised by the Convention. Consequentiy, the fact that a State tolerates circumstances or conditions that prevent persons from having access to appropriate domestic remedies to protect their rights constitutes a violation of the obligation to guarantee what has been established by the Convention's rules.

A limitation contained in the Code of Criminal Procedure relating to the amount for which an appeal on points of law may be lodged was declared unconstitu-

tional because, as a result of this provision, the right to an appeal in criminal cases set forth in the Convention was not guaranteed.

Summary:

The lack of an appeal against certain criminal judgments was declared unconstitutional. This finding of unconstitutionality was in turn based on the failure to comply with the norms of an international treaty, which have constitutional value. It should be stressed that the Supreme Court had previously held that the traditional extraordinary appeal *(recurso extraordinario)* adequately covered the requirements laid down by the Pact of San José de Costa Rica concerning the right to an appeal in criminal cases, an argument that has now been rebutted.

It is also important that the Court referred expressly to the case-law of the Inter-American Court of Human Rights and not only to the treaty in question.

Languages:

Spanish.

Identification: ARG-95-3-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** Second instance / **d)** 07.06.1992 / **e)** / **f)** *Ekmekdjian, Miguel A. v. Sofovich, Gerardo and others* / **g)** / **h)** *Revista Jurídica La Ley*, Volume 1992-C, 540.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.
Sources of constitutional law – Hierarchy.
General principles – Democracy.
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 respect for one's honour and reputation.

Keywords of the alphabetical index:

Right of reply.

Headnotes:

Just as all citizens have the right to express and disseminate their thoughts – ideas, opinions and criticisms – through any means of communication without prior censorship, any citizen who suffers damage to his reputation because of inaccurate or defamatory information has the right to obtain, through a simplified procedure, a decision enabling him to defend himself against the damage to his reputation by means of a reply or a correction, without prejudice to any other civil or criminal proceedings that may be instituted.

The violation of an international treaty may take place either through the adoption of domestic norms which allow for manifestly incompatible conduct or through the failure to adopt provisions to ensure compliance with that instrument. Both situations would be at variance with the ratification of the treaty, ie they would amount to the non-execution or rejection of the treaty, with the adverse consequences that this might entail. When Argentina ratifies a treaty which it has signed with another State, it commits itself internationally to ensuring that its administrative and judicial bodies will apply it to cases regulated therein, provided the treaty contains provisions that are specific enough for it to be applied immediately to such cases. A norm is directly applicable *(operativa)* when it concerns a situation in which it may be applied immediately, without recourse being had to additional provisions which would have to be enacted by the Congress.

Summary:

The Supreme Court took action following an appeal against a decision of a lower court that had dismissed an appeal for the protection of individual liberties *(recurso de amparo)* in simplified proceedings initiated by a person who wanted to assert his right of reply, having considered himself wronged by statements made in a television broadcast. Since he was of the opinion that his religious beliefs had been infringed, he sent a letter to the television programme planner, but it was not read out. That being the case, he lodged an *amparo* appeal. In this case, the Supreme Court discussed the directly applicable or programmatic character of the clauses contained in international treaties (provision is made for the right of reply in the Pact of San José de Costa Rica). In deciding in favour of the first option, the Court set aside the decision and held that the *amparo* appeal as originally lodged was well-founded.

Cross-references:

Primacy of the constitutional right of freedom of the press: *Fallos* 248:291.
Changes in the situation of the press: Supreme Court of the United States, *Miami Herald Publishing Co., Division of Knight Newspaper Inc., vs. Tornillo* (418 U.S. 241, 1974).
Importance of the information media: *Fallos* 310:508.

Languages:

Spanish.

Identification: ARG-95-3-003

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** Third instance / **d)** 13.10.1994 / **e)** / **f)** *Cafés la Virginia SA s/apelación (por denegación de repetición)* / **g)** / **h)** *Revista Errepar, Doctrina*, Volume XV, 395.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body.
Constitutional justice – The subject of review – International treaties.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
Institutions – Executive bodies – Powers.

Keywords of the alphabetical index:

International law, primacy / Vienna Convention of 1969.

Headnotes:

Proceeding from the rule in the Vienna Convention on the Law of Treaties according to which treaties must be interpreted in good faith, it is not logical to argue that a treaty only formulates an ethical, but not a juridical commitment, an expression of the good will of the signatory States to "seek to apply" benefits, favours, exemptions etc. On the contrary, the treaty speaks of "rights and obligations" which are established in agreements of partial application. It also speaks of negotiation and periodical review procedures – which would not make sense if the commitments entered into were only ethical – and of saving and denunciation clauses – which undermines the argument as to compatibility between a binding framework of the treaty and unilateral modification of benefits negotiated. The application by the organs of the Argentine State of a domestic norm (in this case a Ministerial norm) which infringes a treaty constitutes not only failure to comply with an international obligation, but also a violation of the principle of the primacy of international treaties over domestic law.

Summary:

The decision relates to an extraordinary appeal lodged by the Public Treasury *(Fisco Nacional)* against the decision handed down by the Federal Chamber of Administrative Disputes on an action for restitution to the applicant of the sum paid as additional import duty (in conformity with a resolution of the Ministry of the Economy) for the importation into the country of green (unroasted) coffee beans from Brazil.

Cross-References:

Case F. 433 XXIII *Fibraca Construcciones SCA c. Comisión Técnica Mixta de Salto Grande* of 07.07.1993, in which it is stated that the application by the organs of the Argentine State of a domestic norm that infringes a treaty constitutes not only failure to comply with an international obligation, but also a violation of the principle of the primacy of international treaties over domestic law.

Languages:

Spanish.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court
during September and October 1995

- Financial claims (Article 137 B-VG): 5
- Conflicts of jurisdiction (Article 138.1 B-VG): 2
- Review of regulations (Article 139 B-VG): 167
- Review of laws (Article 140 B-VG): 31
- Review of elections (Article 141 B-VG): 4
- Appeals against decisions of administrative authorities (Article 144 B-VG): 1019 (667 declared inadmissible)

Important decisions

Identification: AUT-95-3-008

a) Austria / **b)** Constitutional Court / **c)** / **d)** 27.09.1995 / **e)** G 1219-1244/95, G 1303/95, V 76-101/95, V 110/95 / **f)** *Regionalradio* / **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:

General principles – Rule of law.
General principles – Legality.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Frequencies, distribution / Laws, defined aims, clarity / Media, broadcasting.

Headnotes:

Legislation that only lays down a general framework accompanied by defined aims *(Planungsziele)* is subject to the principle of legality which requires that legal authorization to issue rules should be sufficiently precise.

Summary:

The case concerned the setting aside of a provision of the Law on Regional Radio Stations because it did not determine clearly enough, as required by the constitutional principle of legality, how an administrative authority authorised to issue the rules for distributing frequencies *(Frequenznutzungsplan)* should act. The rules were set aside as a whole for inadequate legal basis. Article 18 of the Federal Constitutional Law provides that "all administrative authorities may, on the basis of laws, issue rules within the limits of their competencies". A provision of the Law on Regional Radio Stations authorises the administrative authority to issue rules for the division of the band of available frequencies between the Austrian Broadcasting Office (ORF) and other (private) radio stations. Firstly, this division should not prevent the ORF from fulfilling its legal obligations for radio broadcasts, and secondly it should guarantee other private radio stations a wide range of broadcasting facilities within each *Land*. Lastly, the classification of frequencies should take account of local broadcasting needs.

At the request of the persons concerned, who had not obtained authorization to run a regional radio station, the Court assumed jurisdiction in this case of its own motion. As regards how the allocation of frequencies was organised, the Court considered that the legislature had merely laid down a general framework accompanied by defined aims *(Planungsziele)*. Recalling its established case-law, the Court considered that, in theory, such determination was subject to the principle of legality which required that legal authorization to issue rules should be sufficiently precise. However, in this case, the legislature had omitted to establish the grounds for the administrative authority's decision: it had not clarified which *criteria* were relevant as a basis for making regulatory decisions – since the ORF's tasks and interests were not taken into account; its relationship with private stations had not been defined; the law had failed to clarify the decisive nature of local radio stations' needs and did not indicate the number of regional radio stations per *Land*, their location, their frequencies or even classification criteria.

Languages:

German.

Identification: AUT-95-3-009

a) Austria / **b)** Constitutional Court / **c)** / **d)** 27.09.1995 / **e)** G 1256-1264/95 / **f)** *Aktiver Kabelrundfunk* / **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:

Constitutional justice – The subject of review – Failure to pass legislation.
Constitutional justice – Effects.
Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
General principles – Proportionality.
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:

Cable television / Freedom to broadcast / Media, broadcasting.

Headnotes:

Legal provisions which excluded all so-called "active" cable broadcasting *(aktiver Kabelrundfunk)* by persons other than the Austrian Broadcasting Office constituted disproportionate interference with the exercise of the freedom to communicate information or ideas.

Summary:

The Court assumed jurisdiction in this case of its own motion following an appeal on the grounds of the unconstitutionality of administrative acts brought by the owners of stations who wanted to broadcast local news, feature films and reporting on their private cable television networks. They had not obtained the necessary licence: the Constitutional Law on Broadcasting defined the term "broadcasting" (an audio or visual broadcast, including cable television) and foresaw an implementing law which guaranteed the balance, objectivity and pluralism of broadcasts and the independence of those responsible for administration. The Law on Broadcasting *(Rundfunkgesetz)* authorised only the Austrian Broadcasting Office (ORF) to organise radio and television. The Law on Regional Radio Stations *(Regionalradiogesetz)* granted other (private) individuals the right to run radio stations. The Regulations on Broadcasting *(Rundfunkverordnung)*, which had the status of a law, introduced unrestricted cable television (so-called "active" cable radio broadcasting) only for the benefit of ORF. It allowed authorities to grant persons and private legal entities licences for so-called "passive" cable broadcasts, ie broadcasting texts *(passiver Kabelrundfunk)*.

Recalling its decision VfSlg. 9909/1983 and the European Court of Human Rights' case law on *Informationsverein Lentia*, the Constitutional Court observed that the Constitutional Law imposing a licensing system on broadcasting companies was not contrary to Article 10 ECHR; the legislature had simply failed to adopt an implementing law. However, it was important to note that such an omission was not exempt from the Court's competence. According to the Court's interpretation, the provisions of the aforementioned Regulations on Broadcasting prohibited persons in legal ownership of private cable television networks from broadcasting anything other than texts. Therefore this represented disproportionate interference in the exercise of the freedom to broadcast *(Rundfunkfreiheit)*. In setting aside these regulations, the Court made clear that cable broadcasts would be authorised without restriction.

The Court set a short period for the entry into force of the annulment because the legislator already knew since the time of the decision of the European Court of Human Rights about the infringement of Article 10 ECHR.

Languages:

German.

Identification: AUT-95-3-010

a) Austria / **b)** Constitutional Court / **c)** / **d)** 10.10.1995 / **e)** B 70/94 / **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:

Constitutional justice – Types of litigation – Electoral disputes – Elections of officers within various occupations.
Institutions – Executive bodies – Sectoral decentralisation – Universities.

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Electoral rights – Right to be elected.
Fundamental rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Public office / Students / Students Council, election.

Headnotes:

The Law on the Austrian Students Council concerning elections to this body *(Hochschülerschaftswahlordnung)* prohibiting the electoral committee from accepting the candidature of a foreign student is in conformity with the State's Basic Law on Citizens' General Rights *(Staatsgrundgesetz*, 1867) which only guarantees access to public office for citizens.

Summary:

An electoral group proposing a list of candidates for elections to the Austrian Students Council had found that the name of a foreign national had been deleted. It brought an appeal against the administrative decision before the Constitutional Court, claiming that its rights had been harmed by the application of an unconstitutional norm. The electoral committee had justified its decision by referring to legal provisions which only guaranteed eligibility for students of Austrian nationality, whereas students of all nationalities were entitled to vote.

The Court dismissed the appeal: observing that under Article 3 of the State's Basic Law *(Staatsgrundgesetz*, 1867) it was clear that access to "public office" was only guaranteed for citizens, it accepted that members of the Austrian Students Council held "public office" within the meaning of the said constitutional law. The following elements clearly demonstrated this: the Austrian Students Council had been founded to be a corporate body under public law; it exercised the powers of a public authority, since its central committee was competent to take administrative decisions affecting the rights and obligations of members of the Students Council and in particular to set subscription fees; the provisions of the General Law on Administrative Procedure were applicable; the central committee had the right to send representatives to university bodies and public authorities.

Languages:

German.

Belarus
Constitutional Court

Important decisions

Identification: BLR-95-3-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 05.10.1995 / **e)** J-16/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
Institutions – Public finances – Budget.
Fundamental rights – Economic, social and cultural rights.

Keywords of the alphabetical index:

Budget, State.

Headnotes:

Under the Constitution, the Supreme Council of the Republic of Belarus shall approve the national budget and the national account, the distribution of allocations from national taxes and receipts among local budgets, and impose national taxes and duties. The rules of the drawing up, approval and execution of budgets and extra-budgetary State funds shall be determined by law.

Summary:

The case was brought by the Constitutional Court at its discretion. The Court examined the constitutionality and legality of Presidential Decree no. 267 of 12 July 1995 "On the specification of the budget of the Republic of Belarus for the year 1995 and temporal measures for reduction of budget expenditure". Point 1 of the Presidential Decree determines receipts and expenditure of the budget of the Republic as well as the amount of subsidies from the budget to the budgets of the regions and of the town of Minsk.

According to the law "On the budget any system of the Republic of Belarus" the executive is only empowered to draw up and implement the budget of the Republic.

Point 6 of the Decree practically suspended the granting of income-tax privileges to a number of persons specified by the law.

The Court held that the regulations of this point of the Decree are at variance with the Constitution and the law "On income-tax from citizens".

Point 13 of the Decree envisages the reorganisation of night school by transferring evening classes attached to free-paying day schools.

According to the Constitution and the Law "On the Education in the Republic of Belarus" the State guarantees free general secondary, as well as technical education. Certain points of the Presidential Decree were found to be unconstitutional and invalid.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 11.10.1995 / **e)** J-17/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Parliamentary elections.
Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Composition.

Keywords of the alphabetical index:

Parliament, competence.

Headnotes:

Under the Constitution the Supreme Council is the highest standing representative and the unique legislative body of State authority of the Republic of Belarus.

The Constitution excludes a situation where the highest legislative body is absent.

Summary:

The case was brought as a result of a constitutional motion filed by the Supreme Court, the Supreme Economic Court and the acting Attorney General. The motion challenged the competence of the Supreme Council of the Republic of Belarus.

The Court emphasised that under the Constitution the term of power of the Supreme Council shall be five years. The Supreme Council shall retain its powers until the opening of the first sitting of the Supreme Council of a new convocation.

The Court also noted that election of not less than two-thirds of the total number of the Supreme Council deputies establishes its competence, as a State body whereas the quorum for the Supreme Council sitting and for decision making need not tally with that number of deputies. Such an approach is not at variance with the democratic principles of organisation and activities of the collegiate bodies as well as international parliamentarism.

Supplementary information:

The decision was taken by the Court with one dissenting opinion.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-007

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 27.10.1995 / **e)** J-18/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
Sources of constitutional law – Categories – Written rules.
Sources of constitutional law – Categories – Written rules – Other international sources.
Institutions – Executive bodies – Powers.
Institutions – Executive bodies – Relations with legislative bodies.
Fundamental rights – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Pensioners, payments.

Headnotes:

The Constitution and the laws do not allow the President of the Republic of Belarus to abolish, amend or suspend the laws.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council.

The motion challenged the constitutionality and legality of the Presidential Decree no. 350 of 1 September 1995 "On some issues of the regulation of labour activity and pension securing of the citizens" with the amendments introduced by Presidential Decrees no. 419 of 11 October 1995 and no. 437 of 20 October 1995.

The Decree had practically changed the order of pension payments to working pensioners and suspended the effect of a number of laws. Thereby the President of the Republic of Belarus had acted as the legislative body and violated a number of Articles of the Constitution. Taking into consideration Article 23 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Economic, Social and Cultural rights and other international sources, the Court declared certain points of the Presidential Decree to be unconstitutional and invalid.

Supplementary information:

The decision was taken by the Court with one dissenting opinion.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-008

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 30.10.1995 / **e)** J-19/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Parliamentary elections.
Constitutional justice – Types of litigation – Electoral disputes – Local elections.
Constitutional justice – The subject of review – Parliamentary rules.
Institutions – Legislative bodies – Composition.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Elections, local, parliamentary.

Headnotes:

The Supreme Council of the Republic of Belarus has the right to adopt laws when its composition gives it the necessary competence.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council.

The motion challenged the constitutionality of the Laws of 7 September 1995 "On the introduction of amendments to the Law of the Republic of Belarus", "On the elections of the deputies to the Supreme Council of the Republic of Belarus" and "On the introduction of amendments to the Law on the elections of the deputies to the local Councils of the Republic of Belarus".

According to the Constitution the electoral procedures are to be specified by the law.

The Court emphasised that the Supreme Council had the right to adopt the laws on the elections of the deputies to the Supreme and local Councils. These laws had been adopted by the Supreme Council with a composition allowing the necessary competence. Procedure of adoption and signing of the laws as well as their publications had also been observed. The laws were not found to be unconstitutional.

Supplementary information:

The decision was taken by the Court with one dissenting opinion.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-009

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 03.11.1995 / **e)** J-21/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Status of the members of the court – Privileges and immunities.
Constitutional justice – The subject of review – Presidential decrees.
Institutions – Legislative bodies – Guarantees as to the exercise of power.

Keywords of the alphabetical index:

Diplomatic passports.

Headnotes:

A presidential decree that excluded the Supreme Council deputies, judges of the Constitutional Court as well as other officials from the list of persons to whom, under the law, diplomatic passports should be issued, is unconstitutional.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. The motion challenged the constitutionality of Presidential Decree no. 299 of 8 August 1995 "On the setting of the rules on the order to issue diplomatic and service passports for the citizens of the Republic of Belarus". Under the law diplomatic passports are issued to a certain category of persons for their term of office.

The Court concluded that the Presidential Decree had violated the rights, envisaged by the law, and had reduced the level of guarantees afforded to deputies' activities and judges' immunity.

The Court declared the Presidential Decree to be unconstitutional and invalid.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-010

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 08.11.1995 / **e)** J-22/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
Sources of constitutional law – Categories – Written rules – International Covenant on Economic, Social and Cultural Rights.
Sources of constitutional law – Categories – Written rules – Other international sources.
Fundamental rights – Civil and political rights – Freedom of association.
Fundamental rights – Economic, social and cultural rights – Right to strike.
Fundamental rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade unions.

Headnotes:

Legislation in force does not ban trade union activities such as participation in strikes. The law envisages only contractual responsibility for illegal strikes.

If the activities of republican trade unions and their associations are at variance with the Constitution and the laws of the Republic of Belarus, they may be discontinued by a Supreme Court decision on the request of the Attorney General. As far as territorial trade unions are concerned their activities may be discontinued by decision of a Local Court on the request of the Prosecutor of the territory.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. The motion challenged the constitutionality and legality of Presidential Decree no. 336 of 21 August 1995 "On some measures to assure stability, law and order in the Republic of Belarus".

The Decree provides for suspension of the activities of the free trade unions of the Republic of Belarus and the main trade union organisation of Minsk which had been underground before the introduction of relevant amendments to the law "On Trade Unions". The Court emphasised that the legislation which regulates trade unions' activities does not comprise the notion "suspension of activities". The suspension of activities resulted in practice in their discontinuance.

The order and grounds for discontinuing the activities of political parties, public associations and trade unions are specified by the law.

According to the Law "On Trade Unions", their activities may be discontinued following a decision of their members in accordance with their statutes.

The Court declared that certain points of the Presidential Decree were at variance with the Constitution and the laws of the Republic of Belarus, as well as international – legal acts, ratified by the Republic of Belarus.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-011

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 06.12.1995 / **e)** J-24/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Parliamentary rules.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Pension / Public service.

Headnotes:

The Supreme Council is not empowered to introduce new norms in its resolutions that would require the adoption of laws.

Summary:

The case was brought through a constitutional motion filed by the Supreme Court, the Supreme Economic Court, and the acting Attorney General. The motion challenged the constitutionality and legality of a Supreme Council Resolution. The Resolution provided for a change in the order of pension payments to public officials. The Court found that the Resolution was in fact introducing a new norm which deviated from the law which grants pensions to public officials in percentage terms not in relation to the average monthly earnings but in relation to the factual earnings at the moment of retirement.

The Court declared certain points of the Resolution to be unconstitutional and invalid.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-012

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 11.12.1995 / **e)** J-25/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Powers of local authorities.
Constitutional justice – Types of litigation – Electoral disputes – Local elections.
Constitutional justice – The subject of review – Presidential decrees.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Local councils, abolition / Local elections, suspension.

Headnotes:

The abolition of local councils as representative organs results in the violation of democratic principles of State organisation.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council.

The motion challenged the constitutionality and legality of a number of Presidential Decrees. The Decrees provided for the abolition of local councils and their organs, and their replacement authorities by local administrations having the rights of judicial persons, as well as the suspension of local elections.

The Court found that the abolition of local councils violated the system of local self-government, which is specified by the law.

The Court emphasised that the suspension of local elections had been carried out in the process of a repeated holding of elections. Under the Constitution the electoral procedures are to be specified by the law.

The Court concluded that the Presidential Decrees were at variance with the Constitution and the laws of the Republic of Belarus.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-013

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 14.12.1995 / **e)** J-26/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
Constitutional justice – Procedure – Interlocutory proceedings – Joinder of similar cases.
Sources of constitutional law – Categories – Written rules – Constitution.
Institutions – Legislative bodies – Powers.

Keywords of the alphabetical index:

Supreme Council / Venice Commission, opinion.

Headnotes:

The Constitutional Court declared certain regulations of the Law "On the Supreme Council of the Republic of Belarus" to be unconstitutional and pointed out that certain regulations which, in relation to their incompleteness and non-conformity to the other laws, needed to be reviewed, amended and adjusted.

Summary:

The case was brought as a result of a constitutional motion filed by the President of the Republic of Belarus. The President asked the Constitutional Court to give judgment on the constitutionality of the Law "On the Supreme Council of the Republic of Belarus".

Having listened to the litigants and experts, having studied the opinion of the European Commission for Democracy through Law and other materials of the case, having analysed the norms of the Constitution and laws, the Constitutional Court concluded that certain regulations of the law under consideration were at variance with the Constitution:

- Article 1.2, in relation to the Supreme Council's possibility to exercise legislative power in due form and within the limits of the law;
- Article 9, in relation to determining the Supreme Council's authority by law;
- Article 10.1 on the exercise of property rights of the Republic of Belarus by the Supreme Council;
- Article 19, in relation to determining the aims of setting up a Supervisory Authority to exercise supervision over the conformity of other acts with the Supreme Council acts;
- paragraph 4 of Article 27 in relation to the Supreme Council's control over the local government and self-government activities which are not connected with their execution of the legislation;
- Article 32, in relation to accepting the resignation of the President by the Supreme Council without voting;
- Article 31, in relation to the hearing of the report of the President on the Programme of Action of the Cabinet of Ministers by the Supreme Council within a month after the adoption of the national budget;
- paragraphs 1 and 10 of Article 56 in relation to determining by law the Supreme Council control powers over the executive;
- paragraph 8 of Article 83 in relation to the consideration given by the Presidium of the Supreme Council to issues relating to the organisation and the activities of the Supervisory Authority, the Attorney General's Office and other bodies, to be established by and be subordinated to the Supreme Council;
- paragraph 4 of Article 87 in relation to granting the permanent Commission of the Supreme Council the right to hear any official;
- paragraph 10 of Article 96 in relation to granting each deputy the right to call for a vote of confidence on the composition of bodies established or elected by the Supreme Council, on the officials elected, appointed or approved by the Supreme Council, as well as paragraph 12 of this Article in relation to granting each deputy the right to submit proposals, to hear the report or information of a body or an official at a Supreme Council session, if this right is not derived directly from the Constitution or a special law;
- Article 110.2 on the salaries of deputies;
- Article 116.3 on privileges of the President of the Supreme Council;
- Article 117 which provides for the possibility of granting the Supreme Council deputies additional rights and guarantees the enforcement of these rights by resolutions of the Presidium of the Supreme Council.

Supplementary information:

1. In these proceedings, the Constitutional Court has made use of the Opinion on the above-mentioned

law, prepared by the Venice Commission on 14 November 1995.

2. Representatives of a number of CIS States (Russia, Ukraine, Moldova, Kyrgyzstan) have requested a copy of this law in order to help drafting their own legislation.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-014

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 15.12.1995 / **e)** J-27/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Parliamentary rules.
General principles – Rule of law.
Institutions – Legislative bodies – Powers.

Keywords of the alphabetical index:

Parliamentary rules, legal force / Supreme Council.

Headnotes:

Laws and other acts of State bodies should be enacted on the basis of and in conformity with the Constitution of the Republic of Belarus.

Summary:

The case was brought as a result of a constitutional motion filed by the Supreme Court, the Supreme Economic Court, and the acting Attorney General. They requested a judgment on the conformity between Article 146.2 of the Constitution and Article 2 of the Law "On the affinity of the acts of the Supreme Council of the Republic of Belarus having consequences in law". Article 2 of this Law envisages that Supreme Council resolutions, adopted within the competence of the Supreme Council, have the same legal force with the laws of the Republic of Belarus and are binding for all State bodies, officials, enterprises, establishments, organisations, political parties and other public associations, citizens of the Republic of Belarus, foreign citizens and stateless persons who are on the territory of the Republic of Belarus.

Under the Constitution, in case of conflict between a law and another regulatory enactment, the law should be given priority. Thus the Constitution determines the place and legal force of the law and other regulatory enactments including Supreme Council resolutions. Article 2 concerning the legal force of the Supreme Council enactments was found to be unconstitutional.

The Court considered that the regulations of the Article under scrutiny concerning the observance of the Supreme Council rules are in conformity with Article 54 of the Law "On the Supreme Council of the Republic of Belarus" and are not at variance with the Constitution.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-015

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 21.12.1995 / **e)** J-28/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Head of State – Powers.
Institutions – Head of State – Loss of office.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Impeachment / President / Venice Commission, opinion.

Headnotes:

The Constitutional Court declared certain regulations of the Law "On the President of the Republic of Belarus" to be unconstitutional.

Summary:

The case was brought as a result of a constitutional motion filed by the President of the Republic of Belarus. The President asked the Constitutional Court to give judgment on the constitutionality of the Law "On the President of the Republic of Belarus".

Having listened to the litigants and experts, having studied the opinion of the European Commission for Democracy through Law and other materials of the case, having analysed the norms of the Constitution and laws, the Constitutional Court concluded that certain regulations of the law under consideration were at variance with the Constitution:

- Article 11.4 concerning the execution of the powers of the President by the Chairman of the Supreme Council from the moment the Constitutional Court brings its judgment or from the moment the *ad hoc* commission reaches its conclusion until a relevant decision is taken by the Supreme Council, as well as until the Supreme Council passes the decision on the reinstatement of the President; Article 11.6;

- Article 12.2 concerning the relief of the President of his office before the expiration of his term of office due to his refusal to undergo a medical examination; Article 12.3 and Article 12.5, as well as the first sentence of Article 12.4;

- paragraph 1 of Article 17 in relation to defining the Presidential authority as being exclusive;

- Article 18.4 on the right of the President to make motions to the Supreme Soviet on discharging the Chairman of the Constitutional Court, Chairman of the Supreme Court, Chairman of the Higher Economic Court and the Chairman of the Board of the National Bank;

- Article 20.1 concerning the power of the President to present annual reports on the situation in the State when the Supreme Council is considering the approval of the national budget; Article 20.2 concerning the determination by the Supreme Council of the terms and content of information on concrete issues; Article 20.3 concerning the determination of the terms on the presentation of the report on the Programme of Action of the Cabinet of Ministers by the President to the Supreme Council;

- Article 24.2 relating to the execution of the functions of State power and government by the National Security Council through a Supreme Council decision;

- paragraph 3 of Article 28 on the Presidential right to appeal to the Constitutional Court for judgment on the conformity between the regulatory enactments of a State body and the Constitution, laws, and international acts ratified by the Republic of Belarus;

- Article 31.2 on entrusting the Cabinet of Ministers with the organisation of the execution of Presidential edicts and orders;

- Article 38.3 on the determination by the Supreme Council resolutions of the conditions on provision for service and guard of the President and additional rights and guarantees for the realisation of these tasks.

Supplementary information:

In these proceedings the Constitutional Court has made use of the Opinion on the above-mentioned law, by the Venice Commission on 14 November 1995.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-016

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 26.12.1995 / **e)** J-29/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
Institutions – Head of State – Powers.
Institutions – Legislative bodies – Law-making procedure.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Citizens, privileges.

Headnotes:

Under the Constitution the adoption of laws, the supervision of their enforcement, the interpretation of the Constitution and of the law shall be the task of the Supreme Council. The President shall issue, within the limits of his powers, edicts and orders and shall organise and supervise their execution. In case of a lack of norms on the executive power in any sphere, the President shall use his right of legislative initiative.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. The motion challenged the constitutionality and legality of Presidential Decree no. 349 of 1 September 1995 "On the regulation of some privileges to a certain group of citizens".

The Decree provided for the suspension of privileges and advantages given to a certain group of citizens, envisaged by the law. The Court emphasised that the Constitution and the laws of the Republic of Belarus had not given the President the right to suspend or change the effect of laws. Having adopted such a Decree, the President therefore performed a function of the legislative body and therefore, exceeded his power. Certain points of the Presidential Decree were found to be unconstitutional and invalid.

Languages:

Belarusian, Russian.

Identification: BLR-95-3-017

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 28.12.1995 / **e)** J-30/95/ **f)** / **g)** to be published in the *Vesnik Kanstitucionnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Head of State – Powers.
Institutions – Legislative bodies – Organisation.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Official / Rate of pay.

Headnotes:

Decrees and orders of the President of the Republic of Belarus may not be at variance with the Constitution, laws, or international legal acts ratified by the Republic of Belarus. Supreme Council rules may not add to them or change them.

Summary:

The case was brought by the Constitutional Court at its discretion. The Court examined the constitutionality and legality of Presidential Decree no. 271 of 13 July 1995 "On the pay of the officials of some State organs". The Decree provides for a new salary rate for officials. The Court concluded that points 1 and 2 of the Decree had been adopted by the President having exceeded his powers. Points 1 and 2 of the Presidential Decree were thus found to be unconstitutional and invalid.

Languages:

Belarusian, Russian.

Belgium
Court of Arbitration

Statistical data
1 September 1995 – 31 December 1995

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

Important decisions

Identification: BEL-95-3-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 13.09.1995 / **e)** 64/95 / **f)** / **g)** *Moniteur belge*, 30.09.1995; *Cour d'arbitrage – Arrêts* (Official collection), 1995, 937 / **h)**.

Keywords of the systematic thesaurus:

General principles – Legality.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Powers.
Institutions – Public finances – Taxation – Principles.
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:

Legislative power / Taxation / Taxes.

Headnotes:

The Court set aside a legislative provision authorising the executive power to set the level of a tax. This decision was based on the fact that there was a difference of treatment between those targeted by the tax and other taxpayers as regards the authority competent to determine the tax base and the level of tax, given that the Constitution guarantees that no citizen shall be liable for a tax unless it has been decided by a deliberative and democratically elected assembly.

Summary:

This judgment concerned a "charge" levied by Walloon Region for environmental protection. The Court ruled that this charge was equivalent to a genuine tax, subject as such to the constitutional principle of legality. The Court relied on the principles of equality and non-discrimination as well as the guarantee that taxation matters come under the competence of the legislative power. Since the legislative decree had authorised the executive power to set the level of this tax, the Court set aside this provision.

This judgment also dealt with other issues of less interest for the *Bulletin*.

Languages:

Dutch, French, German.

Identification: BEL-95-3-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.12.1995 / **e)** 80/95 / **f)** / **g)** *Moniteur belge*, 11.05.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
General principles – Social State.
Fundamental rights – Civil and political rights – Equality – Scope of application – Social security.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Attachment / Sickness-Disability insurance / Social security.

Headnotes:

By requiring, in the area of social security (services of clinical biology laboratories relating to disability/sickness insurance), a specific form of security (a

specific form of preventative attachment), which departs from some aspects of the (provisionally) binding judgments of courts and which can be implemented without effective judicial review, the legislature is infringing the right of a person to submit any request for payment made by or against him or herself or any seizure of their goods to effective judicial review.

Summary:

Sickness/disability insurance is part of the social security system in Belgium. In particular, it provides for the reimbursement of medical services, including services (such as analyses) carried out in clinical biology laboratories. In order to combat overconsumption in this area, laws have been adopted in the past limiting such reimbursement to a fixed budgetary "package". For accounting purposes, the mechanism introduced may compel some laboratories to return to the INAMI (the public body responsible for sickness/disability insurance) sums of money, (sometimes considerable), which exceed their share of this "package".

Since certain of the amounts which INAMI owes to laboratories are not repaid, a law has been passed to compel insurers providing sickness/disability cover (mainly private insurance companies) to withhold the sums which they owe to these laboratories. The same law submitted to the Court in this case, established that only when a legal decision unfavourable to INAMI is final, in other words not an interim, essentially provisional, order in an urgent case) and has become *res judicata* (ie against which there can be no ordinary appeal), can the insurers dispense with this security cover.

The Court held that this measure was a specific form of preventative attachment departing from ordinary law, which provides for judicial review whatever the circumstances. The Court accepted that the legislature was authorised to assess whether there were grounds for allowing the INAMI to protect itself from the insolvency of some of its debtors. Nevertheless, it considered that the system introduced – to the extent that it created exceptions from certain aspects of (provisional) binding judgments by courts and that it could be implemented without effective judicial review – breached the principles of equality and non-discrimination, together with the right of all persons to submit a request for payment made by or against themselves and any seizures to which they were subject, to effective judicial review.

Furthermore, this judgment also accepted that specific provisions for security should be introduced in this matter, provided that they were not excessive which would be the case if they left laboratories without protection against the arbitrary withholding of money.

This judgment based the partial annulment on the principles of equality and non-discrimination, combined with other particular constitutional rules on access to courts and to their spheres of competence, as well as Articles 6, 13 and 14 ECHR.

Languages:

Dutch, French, German.

Identification: BEL-95-3-006

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.12.1995 / **e)** 81/95 / **f)** / **g)** *Moniteur belge*, 03.01.1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Community law.
Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Categories – Written rules – European Social Charter.
Sources of constitutional law – Categories – Written rules – International Covenant on Economic, Social and Cultural Rights.
Sources of constitutional law – Categories – Written rules – Other international sources.
General principles – Legality.
Institutions – Legislative bodies – Powers.
Institutions – Army and police forces – Army.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Forced or compulsory labour, prohibition / Freedom of employment / Individual freedom / Legislative power.

Headnotes:

Under the Constitution, the army's recruitment methods should be determined by a deliberative and democratically elected assembly: in this instance, the federal legislature. As a result, the legislature was not able to delegate to the monarch the essential element of a power granted it by the Constitution.

Articles 4.2 and 4.3 ECHR, as interpreted by the European Commission of Human Rights in the light of the "*travaux préparatoires*" of the Convention, excluded from the notion of "forced or compulsory labour" all service of a military character, without distinguishing between voluntary engagement and compulsory service.

Individual freedom and freedom of employment prohibited that a person be required, under threat of any kind of penalty, to enter employment for which he or she had not freely volunteered, unless such employment could be justified on the grounds of the general interest.

With respect to tasks performed by the army in the general interest, some constraints could be imposed on persons who have chosen a military career. However, it was important to examine whether the challenged measures relied on admissible criteria, whether they were in the general interest and whether they were not disproportionate to the aims sought.

The rule stipulating that a soldier who has resigned was liable for active service if he had been paid during his period of freely provided training was not an unjustified infringement of the individual freedom of persons who had decided to pursue a military career. It was the return for training funded by the appropriate linguistic community and met the army's need for officers. The rule was sufficiently widely known for it not to impose an unforeseeable constraint on those subject to it. The length of service set by law (one and a half times the training period or five years after appointment to the rank of second-lieutenant) did not seem manifestly disproportionate to the aim sought.

On the other hand, measures whereby a candidate officer or reserve officer who has completed his contractual term of active service was obliged to serve as a "short-term volunteer" for a maximum period of three years were an excessive infringement of individual freedom.

Because of the limited nature of the constraints and the special nature of a military career, temporary measures which obliged several categories of soldiers to serve about three weeks per year at most as a reserve following their period of active service could not be considered a disproportionate infringement of the individual freedom of those concerned.

Summary:

This judgment concerned two laws adopted in the context of the reduction of numbers of the Belgian armed forces. The challenged provisions established in particular the conditions in which soldiers were designated professional or reservists, the consequences of soldiers' resignations, the conditions for terminating their contractual engagement etc.

The summarised passages established several principles which went beyond the limited requirements for such a reduction of numbers, such as the competence of the legislative power in military matters, the interpretation of notions of forced or compulsory labour, the applicability of the prohibition on forced or compulsory labour in the army, the notions of individual freedom and freedom of employment and the limits to these freedoms in the army etc.

The grounds for the infringement of individual freedom and freedom of employment were based not only on Article 23 of the Belgian Constitution, but also on a variety of international instruments, together with the "standstill" obligation provided for in Article 2 of International Covenant of the 19 December 1966 on Economic, Social and Cultural rights. The provisions derived from international law were Article 2 of ILO Convention no. 29 of 28 June 1930 on Forced Labour; Article 1 of ILO Convention 105; Articles 4, 6, 13, 14, 15 and 60 ECHR, Article 48 EC and Article 1 of the European Social Charter.

Languages:

Dutch, French, German.

Identification: BEL-95-3-007

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.12.1995 / **e)** 85/95 / **f)** / **g)** *Moniteur belge*, 04.01.1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Co-management / Education / Grants.

Headnotes:

The freedom of education guaranteed by the Constitution implied that the authorities of privately run schools could under certain conditions claim grants from the linguistic community (ie the federal body competent for education). The right to claim grants was limited, firstly, by the linguistic community's power to tie grants to conditions considered to be necessary in the general interest, including good quality education and observance of certain standards for pupil numbers and, secondly, by the need to divide available funds between the linguistic community's various responsibilities. Freedom of education was therefore subject to limitations and did not prevent legislation from imposing conditions for funding and grants which restricted the exercise of this freedom, provided that they did not entail an essential infringement.

Conditions for grants for private education, in particular that co-management bodies be set up, consisting of associations representing pupils and students, teachers and employees and in certain cases, representatives of social, economic and cultural groups, did not infringe the freedom to establish schools nor did they prevent organising authorities from freely determining the school's religious or philosophical nature, its teaching methods or orientation. The provisions complained of left heads of schools the power to decide; they did not interfere to an unreasonable or disproportionate degree in the organisation and running of schools awarded funding and thus left the freedom of education more or less intact. The same applied for the power of co-decision given to student representatives in non-profit associations, which were compulsorily set up (in certain limited cases) for social benefits.

Summary:

Belgian provisions on the right to education were primarily based on the constitutional guarantee of freedom of education, which included the notion of the right of any persons to set up a school and, as a result, to claim grants from the competent linguistic community.

The Court confirmed its case-law which specifies limits to this right to funding. It also observed that obligations in this case on private schools to introduce co-management and, in limited areas, a co-decision making procedure with organisations representing students, teachers, employees and social, economic and cultural groups did not infringe freedom of education.

Languages:

Dutch, French, German.

Bulgaria
Constitutional Court

Statistical data
1 July 1995 – 31 December 1995

Number of decisions: 25

Important decisions

Identification: BUL-95-3-003

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 19.09.95 / **e)** 16/95 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette) no. 86 of 26.09.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Separation of powers.
Institutions – Legislative bodies – Powers.

Keywords of the alphabetical index:

Media, television and radio.

Headnotes:

The Permanent Committees of the National Assembly (Parliament) are only auxiliary organs, having no competence to adopt decisions changing Acts voted by Parliament nor to exercise executive powers.

Summary:

The Chief Prosecutor of the Republic of Bulgaria seized the Constitutional Court with a challenge to the constitutionality of a decision of the Grand National Assembly (1991) on the adoption of General Rules of a Provisional Status of the Bulgarian National Television (BNTv) and the Bulgarian National Radio (BNR).

The Transitional and Concluding Provisions of the Constitution of the Republic of Bulgaria stipulate that, pending the passage of new legislation concerning BNTv and BNR, the National Assembly shall be competent for the appointment and dismissal of the two institutions' Directors General. To date, there is no such legislation. The National Assembly decision provides that the Parliamentary Committee for Radio, Television and the Bulgarian News Agency shall approve the regulations governing the structure and operation and the corporate bodies of management, familiarise itself with and give opinions on the programmes, hear regularly their Directors General and approve their budget allocations. The Constitutional Court ruled that the texts in question were in breach of the Constitution on the following grounds: the Constitution divides State power among the Legislature, the Executive and the Judiciary. Parliament is vested with legislative power and exercises parliamentary control over the Executive. The Committee for Television and Radio was disbanded (1990), and BNTv and BNR became independent, autonomous, all-national institutions dissociated from any party. The Permanent Parliamentary Committees are only auxiliary organs, and they have no competence to adopt decisions changing the Acts voted by Parliament, nor can they exercise executive powers.

By this reasoning, the Constitutional Court found that the provisions of the National Assembly decision on the adoption of General Rules of a Provisional Status of the Bulgarian National Television and the Bulgarian National Radio contravened the Constitution.

Languages:

Bulgarian.

Identification: BUL-95-3-004

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 26.10.95 / **e)** 21/95 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette) no. 99 of 10.11.1995 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Judicial review.

Headnotes:

All administrative acts, including acts that are not normative or individual, can be challenged in court.

Summary:

The case was brought by the Chief Prosecutor of the Republic of Bulgaria who asked the Constitutional Court for a binding interpretation of Article 120.2 of the Constitution of the Republic of Bulgaria, viz. whether all administrative acts, including acts that are not normative or individual, can be challenged before the courts.

The Constitutional Court ruled that, in compliance with the Constitution of the Republic of Bulgaria, all administrative acts can be challenged. This is an expression of the law protection function in a State committed to the rule of law. Judicial review is the concrete expression of the fundamental principle of judicial protection of rights and legitimate interests of citizens and legal entities. In-house administrative acts are an exception, provided they do not violate or threaten rights or legitimate interests of citizens and legal entities.

The Constitutional Court ruled that citizens and legal entities shall be free to contest all administrative acts, including in-house acts, where these acts violate or threaten their rights or legitimate interests provided that these acts are not expressly excluded from court contestation by a law.

Languages:

Bulgarian.

Canada
Supreme Court

Important decisions

Identification: CAN-95-3-005

a) Canada / **b)** Supreme Court / **c)** / **d)** 21.09.1995 / **e)** 23460, 23490 / **f)** RJR – MacDonald Inc. v. Canada (Attorney General) / **g)** Supreme Court Reports, [1995] 3 S.C.R. 199 / **h)** Dominion Law Reports (1995), 127 D.L.R (4th) 1, Canadian Criminal Cases (1995), 100 C.C.C. (3d) 449, Canadian Patent Reporter (1995), 62 C.P.R. (3d)417, Quicklaw, [1995] S.C.J. no. 68, Internet: <gopher://gopher.droit.umontreal.ca/macdonal.en> <ftp://ftp.droit.umontreal.ca/macdonal.en> <http://www.droit.umontreal.ca/macdonal.en>.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Advertising ban, tobacco / Canadian Charter of Rights and Freedoms / Commercial advertising.

Headnotes:

Parliament has legislative competence to pass legislation broadly banning tobacco advertising and promotion. The legislation infringed the constitutional right to freedom of expression because it could not be considered as a reasonable limitation demonstrably justifiable in a free and democratic country.

Summary:

The Tobacco Products Control Act broadly prohibited the advertising and promotion of tobacco products and the sale of those products unless its package included prescribed unattributed health warnings and a list of toxic constituents. Its constitutionality was challenged in two separate motions for declaratory judgments which were heard together by the Quebec Superior Court. That court found the Act to be of no force or effect being an unjustified infringement of Section 2.b of the Charter. The Quebec Court of Appeal reversed this judgment.

1. The Supreme Court of Canada unanimously found Parliament competent to enact the legislation: a

majority found this competence to be founded on Parliament's criminal law power.

2. The Court also unanimously found the provisions dealing with advertising, trade mark use and unattributed health warnings to be inconsistent with the right of freedom of expression as set out in 2.b of the Canadian Charter of Rights and Freedoms. A majority found that these infringements did not constitute reasonable limitations demonstrably justified in a free and democratic society pursuant to Section 1 of the Charter: the impugned provisions did not minimally impair the right being infringed. The minority would have found on an attenuated standard of justification that the impugned provisions minimally impaired the infringed right and accordingly were saved as a justifiable infringement. The majority concluded that the provision dealing with retail displays and sponsorships could not be cleanly severed from those provisions which had been found to be unconstitutional. All the impugned provisions therefore were held to be of no force or effect pursuant to Section 52 of the Constitution Act, 1982.

Languages:

English, French.

Identification: CAN-95-3-006

a) Canada / **b)** Supreme Court / **c)** / **d)** 16.11.1995 / **e)** 24254 / **f)** R. v. Fitzpatrick / **g)** to be published in Supreme Court Reports, [1995] 4 S.C.R. / **h)** Internet: gopher.droit.umontreal.ca/fitzpatr.en.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Admissibility of evidence / Canadian Charter of Rights and Freedoms / Fundamental justice / Regulatory prosecution / Self-incrimination, right against / Statutorily compelled records.

Headnotes:

It is not contrary to fundamental justice for an individual to be convicted of a regulatory offence on the basis of a record that he is required to submit as one of the terms and conditions of his participation in a regulatory sphere. As a principle of fundamental justice, the right against self-incrimination does not prevent the Crown's use in evidence of statutorily compelled documents in all contexts.

Summary:

A fisherman – the captain of a vessel engaged in a licensed an regulated commercial groundfish fishery – was charged under the Fisheries Act with catching and retaining fish in excess of the fixed quota. At trial, the Crown sought to admit into evidence the fishing logs and hail report made by the fisherman, which indicate the estimated poundage of the catch by species as well as the date, time and location of catch during each trip. All fishermen are required under Section 61 of the Fisheries Act to provide these documents and failure to do so constitutes an offence under the Act. The trial judge excluded the hail report and fishing logs on the grounds that they were self-incriminatory and that their admission would violate the fisherman's rights under Section 7 of the Canadian Charter of Rights and Freedoms. The Crown called no further evidence and an acquittal was entered. The Court of Appeal allowed the Crown's appeal and ordered a new trial, holding that the admission in evidence of such documents did not infringe the fisherman's right against self-incrimination. The Supreme Court of Canada, in a unanimous decision, upheld the Court of Appeal's judgment.

The protection against self-incrimination afforded by Section 7 of the Charter is not absolute. In determining the ambit of this protection, it is important to consider the particular context in which the claim for its application arises. In the present regulatory context, the principle against self-incrimination does not prevent the Crown from relying on fishing logs and a hail report at the fisherman's trial for overfishing simply because these documents are statutorily required. No one is compelled to participate in the groundfish fishery. In accepting his licence, a fisherman is presumed to know, and to have accepted, the terms and conditions associated with it, which include the completion of hail reports and fishing logs, and the prosecution of those who overfish. Just because the information in these records may later be used in an adversarial proceeding, when the state seeks to enforce the restrictions

necessary to accomplish its regulatory objectives, does not mean that the state is guilty of coercing the individual to incriminate himself. Hail reports and fishing logs are necessary for the effective regulation of the fishery and should be seen to constitute the "ordinary" records of those licensed to participate in the groundfish fishery. The fact that they are statutorily required, and would not exist but for Section 61 of the Act, does not turn them into compelled testimony of the kind that is taken during an investigation into wrongdoing. The protection against self-incrimination afforded by Section 7 of the Charter should not be understood to elevate all records produced under statutory compulsion to the status of compelled testimony at a criminal or investigative hearing.

Languages:

English, French.

Croatia
Constitutional Court

Statistical data

1 September 1995 – 31 December 1995

- Cases concerning the conformity of laws with the Constitution:
  received 59, resolved 16:
  in 1 case a law was repealed, in 6 cases the motions to review the constitutionality of laws were not accepted, in 2 dismissed, and in 3 cases rejected, in 2 cases the procedure was terminated; and in 2 cases the petitioners were instructed on the right to submit a motion to review the constitutionality of laws.

- Cases concerning the conformity of other regulations with the Constitution and laws:
  received 27, resolved 18:
  in 9 cases the motion to review the constitutionality and legality of regulations other than laws was not accepted, in 8 cases rejected, in 1 case the procedure was terminated.

- Cases concerning the protection of constitutional rights:
  received 164, resolved 138:
  in 11 cases the constitutional action was accepted, in 52 cases dismissed, in 57 cases rejected, in 4 cases the procedure was terminated, in 4 cases forwarded to other bodies and in 10 cases the petitioners were instructed on the right to submit a constitutional action.

- Cases concerning jurisdictional disputes among legislative, executive and judicial branches:
  received 1, resolved 1.

- Cases concerning supervision of constitutionality and legality of elections and electoral disputes:
  received 54, resolved 53:
  in 5 cases the claim was accepted, in 46 cases dismissed, in 1 case the procedure was terminated, and in 1 case the petitioner was instructed about his rights.

- Cases concerning appeals to suspend temporarily the execution of individual acts based on a provision of law the constitutionality of which is under review or of acts disputed by constitutional action:
  received 21, resolved 18:

in 14 cases the claim for temporary suspension was accepted, in 3 cases dismissed, and in 1 case the procedure was terminated.

Important decisions

Identification: CRO-95-3-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 18.10.1995 / **e)** U-I-821/1995 / **f)** / **g)** *Narodne novine*, 84/1995, 2336-2338 / **h)**.

Keywords of the systematic thesaurus:

General principles – Publication of laws.
Institutions – Legislative bodies – Law-making procedure.
Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.

Keywords of the alphabetical index:

Electoral rights, citizens living abroad.

Headnotes:

A provision by which the law comes into force on the day of its publication in *Narodne novine* is not unconstitutional.

When the Chamber of Representatives is dissolved, non-exercise of the right of the other chamber, the Chamber of *Županije*, to return passed laws to the Chamber of Representatives for fresh consideration is not unconstitutional.

Summary:

The Court rejected the claim of one third of representatives in the Chamber of *Županije* to review the constitutionality of the Amendments of the Law on the Election of Representatives in the Parliament of the Republic of Croatia.

The Court held that although the Constitution as a rule demands that a law comes into force at the earliest on the eighth day after publication in *Narodne novine*, it also authorises the legislator to specify other times of entry into force, when especially justified reasons exist.

The plaintiffs also claimed that a provision stating that the law comes into force on the day of its publication made it impossible for the Chamber of *Županije* to exercise its right of suspensive veto.

The Court found the claim to be unfounded.

According to the Constitution both chambers of the Parliament of the Republic of Croatia may be dissolved if so decided by the majority of all their representatives. If the Chamber of Representatives is dissolved, the exercise of this right extinguishes the possibility to exercise the right of the other Chamber to enact a suspensive veto (the right to return a law, within a period of 15 days from the date on which it was passed, with a substantiated opinion, to the Chamber of Representatives for fresh consideration).

Considering the constitutional question at issue, the Court held that the constitutional provision by which the Republic shall ensure suffrage to all citizens who at the time of the elections find themselves outside its borders, applies regardless of whether these citizens do or do not have their residence in the Republic of Croatia. Therefore this right is also applicable to Croatian citizens who permanently reside abroad.

The Court also held that by changing the minimum ratio of votes which have to be cast for a party ticket to qualify, the party concerned for distribution of seats in Parliament (prohibitive clause), the legislator did not violate the democratic multiparty system, which is specified as one of the highest values of the constitutional order.

Languages:

Croatian, English.

Identification: CRO-95-3-017

a) Croatia / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.10.1995 / **e)** U-VII-857/1995 / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.

Keywords of the alphabetical index:

Candidate, nickname.

Headnotes:

According to the Law on elections, forms for signatures of electors who propose candidates as representatives shall contain only the name and surname, the nationality, the address and the personal number of the proposed candidate.

Summary:

The applicant complained that he was in an inferior position in relation to other candidates because in his constituency he was well-known under a nickname which the Republic Electoral Committee, accepting his candidacy, omitted from the form for signature of electors.

The Court held that the complaint was not founded, and that any addition in the prescribed forms, except academic titles, as stated in the Obligatory Instructions of the Electoral Committee of the Republic of Croatia, was not legal.

Languages:

Croatian, English.

Identification: CRO-95-3-018

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.11.1995 / **e)** U-VII-944/1995 / **g)** *Narodne novine*, 94/1995, 2486-2487 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Votes, non-valid.

Headnotes:

Nobody may be assigned non-valid votes, because it cannot be established from non-valid ballot-papers which candidate or list an elector voted for.

Summary:

Eleven political parties stated that in the previous elections in 1992 and 1993 the so-called prohibitive clause was calculated in a manner different from the one applied in elections in 1995; since the Law does not define the meaning of vote, but uses the terms "most of the votes" and "total of the votes", they wanted the Court to clarify whether a so-expressed number of votes included non-valid ballots as well.

The Court held that citizens whose votes were found non-valid might have been expressing their disbelief towards all political parties and candidates, and that their opinion could not be disregarded since there were 82.666 such cases.

The Court held that the claim was not founded.

Languages:

Croatian, English.

Identification: CRO-95-3-019

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 29.11.1995 / **e)** U-I-1010/1994 / **f)** / **g)** *Narodne novine*, 97/1995, 2535-2536 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Temporal effect – Postponement of temporal effect.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Media law, formal constitutionality.

Headnotes:

The Media Act determines the content and manner of exercising constitutionally guaranteed freedoms and rights and, as such, according to the Constitution has to be passed by the House of Representatives by a majority vote of all representatives.

Summary:

During the proceedings the Court established that the Media Act was passed by the majority vote of all the representatives present, not of all the representatives, and repealed the Act.

As a rule, the repealing decision of the Constitutional Court takes effect on the day of its publication in *Narodne novine*, but the Court is authorised to determine another day. In this case the court postponed the withdrawal of the repealed Act until 30 June 1996. The date for the cessation of the Act had been set in such a way as to enable the passing of the Media Act by the appropriate procedure provided by the Constitution.

Languages:

Croatian, English.

Identification: CRO-95-3-020

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 27.12.1995 / **e)** U-II-1019/1995, U-II-1021/1995 / **f)** / **g)** *Narodne novine*, 109/1995, 3031-3034 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Administrative acts.
Institutions – Executive bodies – Powers.

Keywords of the alphabetical index:

Local self-government.

Headnotes:

Acts of government which deal only with preliminary issues cannot be the subject of constitutional review, but the outcome of a preliminary issue may be disputed in the review of a decision which is based on the outcome of preliminary issues. The "Conclusions" in this case, which deal only with preliminary issues, may not be questioned in proceedings for the abstract review as to legality.

A regulation is in force until it is terminated in a legally provided manner; this applies to rules of procedure as well.

Summary:

46 newly elected members of the Zagreb County Assembly and 31 newly elected members of the Zagreb City Assembly introduced motions for the initiation of proceedings for examining the constitutionality and legality of certain "Decisions" and "Conclusions" of the Government of the Republic of Croatia by which it called the first session of the Zagreb County Assembly and the first session of the Zagreb City Assembly for 2 January 1996; by which it stated that the Zagreb County Assembly and the Zagreb City Assembly had not been constituted at the sessions held on 2 December 1995; and by which it stated that the acts issued by members of the Zagreb County Assembly and the Zagreb City Assembly on 2 December 1995 were legally non-existent.

The applicants claimed that the Government was not authorised to examine the legality of their sessions and determine the non-constitutionality of County and City representative bodies and the legal non-existence of their acts.

The Court found that the "Conclusions" of the Government were the acts dealing with preliminary issues and were not regulations. Therefore they could not be disputed in proceedings for abstract review as to legality. Thus, the claims to review the "Conclusions" were rejected.

The Law on the Election of Representatives to the Representative bodies of the Units of Local Self-Government and Administration authorises and obliges the Government to call the first session of these bodies within 30 days after the election results have been published.

The Court found that this provision was to be interpreted in a wider context, not in the narrow linguistic sense, which meant that the Government could also call a renewed session, the constituting session, which could be called several times if need be. It further found that the period of 30 days after the election results had been published, within which the Government was obliged to call the first session of the assembly, was not preclusive, and that the Government could, if need be, call the first (constituting) session even after the expiry date of the first period.

Concerning the application of the Provisional Rules of Procedure of the previous City Assembly, the Court held that a regulation was in force until it was terminat-

ed in a manner provided by law. In this case, since the Provisional Rules of Procedure were adopted by the City Assembly that had been constituted, they may be terminated (amended or supplemented) only by such authorised body, i.e. the City Assembly which had been constituted. Having not been constituted on 2 December 1995, the Zagreb City Assembly could not change the Provisional Rules of Procedure of the previous City Assembly in order to exclude the provision which required the presence of at least two thirds of the members of the City Assembly for its constitution.

The claims to review the "Decisions" were rejected.

Languages:

Croatian, English.

Cyprus
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 1995 – 31 December 1995.

Czech Republic
Constitutional Court

Statistical data
1 September 1995 – 31 December 1995

- Decisions by the Plenary Court: 10
- Decisions by chambers: 34
- Number of other decisions by the Plenary Court: 1
- Number of other decisions by chambers: 249
- Number of other procedural orders: -
- Total number of decisions: 294

Important decisions

Identification: CZE-95-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 15.09.1995 / **e)** IV.ÚS 5/95 / **f)** Interpretation of the applied legal rules by the court may not exceed the limits set by the Constitution / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Techniques of interpretation – Logical interpretation.
Fundamental rights – General questions – Basic principles – *Ne bis in idem.*

Keywords of the alphabetical index:

Criminal offence, elements / Military service, refusal.

Headnotes:

In every constitutional complaint, the Constitutional Court has to determine whether the interpretation by the courts of the legal rules applied has not exceeded the limits set by the Constitution. An interpretation that may appear at first sight to be legal, can – in connection with the circumstances of a case – be so extreme that it exceeds the limits of constitutionality. According to Article 4 of the Charter of Fundamental Rights and Freedoms, when using the rule on the limits to fundamental rights and freedoms, their essence and meaning have to be taken into consideration. The court that decides on the degree of guilt and punishment for a criminal offence also has to pay due respect to the principle laid down in Article 40.5 of the Charter and in Article 4.1 Protocol 7 ECHR according to which no one may be prosecuted or punished twice for the same offence.

Summary:

The plaintiff demanded the suspension of his sentence to imprisonment following Section 269.1 of the Criminal Code for the offence of refusing to begin his military service. He had not obeyed the call-up command to the military regiment in Litomlxice in the year 1994, although he had been sentenced for the same criminal offence when he was called to the military regiment in Hodonmn in the year 1993 and did not present himself. Thus, the principle of *ne bis in idem*, which prohibits the repeated punishment for one and the same criminal offence, was breached.

In the matter under consideration, the general courts came to the conclusion that there was no such breach as the conditions as to time and place had not been fulfilled.

The Constitutional Court adopted a reverse decision agreeing with the plaintiff. The criminal offence of refusing to enrol in the army is laid down in Sections 269 and 270 of the Criminal Code. According to Section 269.1 a person that, with the intention of permanently avoiding the active military service, does not begin his military service within 24 hours of the expiry of the time limit set forth in the call-up command, shall be sentenced to imprisonment for one and up to five years. An essential ingredient to the offence is the intent of permanently avoiding the military service. This feature is clearly visible when comparing this offence with the criminal offence in Section 270.1 of the Criminal Code that outlaws the non-enrolment in the army, even through negligence, within 24 hours of the expiry of the time limit set forth in the call-up command. The sentence is also more lenient – imprisonment of one to two years only. According to the Constitutional Court, there has been a violation of the principle of *ne bis in idem*. If Section 269.1 of the Criminal Code dictates a substantially heavier sentence for a person that does not begin his military service with the intention of avoiding it permanently, it would be unreasonable to interpret this rule in a way that "permanently" means in fact "temporarily". Under that interpretation the number of criminal offences would be determined by the number of call-up orders to military service. Even after being convicted of the first of these criminal offences, the recruit may receive a new call-up order. However, its non-obeying may not be qualified as a new criminal offence, if in the preceding criminal proceedings – as it is the case in the matter under consideration – the intention permanently refuse to start the military service has been proved.

When called to begin his military service once again, the plaintiff was only reaffirming his will not to enrol in the army. This represents the same act with the same consequences as for the previous offence and thus the offences are said to be identical. The circumstances individualising the offence, i.e. the call-up commands in different times and places, can change nothing to this qualification.

Languages:

Czech.

Identification: CZE-95-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary Session / **d)** 08.11.1995 / **e)** Pl.ÚS 5/95 / **f)** Deprivation and Loss of State Citizenship as two legal terms with different legal consequences / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
Fundamental rights – Civil and political rights – Right to a nationality.

Keywords of the alphabetical index:

Citizenship, dual, loss, deprivation.

Headnotes:

By using two different terms, namely "deprivation" of state citizenship and "loss" of state citizenship in various provisions of the Constitution, the Legislator intends to distinguish between two qualitative different situations that shall result into various legal consequences.

Summary:

Article 12.2 of the Constitution of the Czech Republic on one hand, and Article 12.1 of the Constitution as well as Section 17 of the Act no. 40/1993 Gazette on Acquisition and Loss of the State citizenship of the Czech Republic on the other hand make use of two different terms namely "deprivation" of State citizenship and "loss" of State citizenship respectively. By using the above terminology, the Legislator intends to distinguish between two different situations.

Article 12.1 of the Czech Constitution dictates that the conditions for acquisition and loss of State citizenship of the Czech Republic shall be provided by the law. Paragraph 2 of the said article sets forth that no person can be deprived of State citizenship against their will.

On 30 June 1993, citizen P.U. had elected to acquire the citizenship of the Slovak Republic. Relying on the provisions of Section 17 of Act no. 40/1993 Gazette on Acquisition and Loss of State citizenship of the Czech Republic, according to which a Czech citizen shall lose the State citizenship of the Czech Republic the moment he becomes a foreign State citizen unless he becomes a foreign State citizen by entering into marriage or by birth, the Czech authorities refused to issue a certificate confirming that he continues to be a Czech citizen. Through his appeal, the plaintiff proposed the abrogation of Section 17 of the Act as in his opinion its provisions conflicted with Article 12.2 of the Constitution that contains a prohibition on depriving any Czech citizen of his citizenship. He also based his claim on the provisions of the Charter of Fundamental Rights and Freedoms and international treaties on human rights.

However, the Constitutional Court found that dual or multiple State citizenship was undesirable and could be admitted in exceptional cases only. The principle conflicts neither with the Constitution nor with the Charter or international treaties on human rights. Furthermore, as the Court noted, the plaintiff had not been deprived of the State citizenship of the Czech Republic but gave it up voluntarily by choosing the State citizenship of the Slovak Republic. For those reasons, the appeal was dismissed.

Languages:

Czech.

Identification: CZE-95-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber/ **d)** 30.11.1995 / **e)** III.ÚS 62/95 / **f)** Use of records resulting from the communication of an accused person with her defending counsel in a trial is inadmissible / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Communication between defending counsel and accused / Telephone tapping as proof of evidence.

Headnotes:

Any records connected with the constitutionally protected confidentiality and according to Article 13 of the Charter of Fundamental Rights and Freedoms may not be kept in protocols or records (Section 88.4 of the Code of Criminal Proceedings). Including tape records or written messages of such communications, into a criminal record, regardless of their form or content, is not only illegal, but also totally incompatible with the Constitution.

Summary:

A case was brought before the Constitutional Court concerning the proceedings in a criminal court which had not adopted the necessary measures to exclude telephone tapping and records from telephone communications between the plaintiff and her counsel. Thus, it had breached the right to confidentiality of messages exchanged by telephone (Article 13 of the Charter of Fundamental Rights and Freedoms). The plaintiff asked the Constitutional Court to declare the proceedings of the criminal court contrary to the Constitution and prohibit the use of records and telephone tapping in the communications between her and her counsel.

The Constitutional Court found that telephone tapping did occur and that the records containing, among others, the communication of the plaintiff with her lawyer form part of the criminal record. The actions taken by the judge that ordered the telephone tapping were legal at the time of their occurrence, nevertheless, during the criminal proceedings an amending law to the Code of Criminal Procedure was passed. This law obliges police organs to interrupt immediately any tapping, to destroy the records and not to use the information they obtained as soon as they realise that during a telephone tapping the accused was communicating with his or her counsel. Neither the Constitution nor the Code of Criminal Procedure admit exemptions from the confidentiality of messages between a plaintiff and his or her lawyers. The Constitutional Court held that although the telephone tapping was ordered and later cancelled by the criminal court even before the amending law entered into force, its consequences could not be tolerated.

Therefore, it allowed the appeal and ordered the chairman of the criminal court panel to remove from the criminal record all information concerning the communication of the plaintiff with her counsel and destroy all related records.

Languages:

Czech.

Identification: CZE-95-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary Session / **d)** 13.12.1995 / **e)** Pl.ÚS 8/95 / **f)** Permanent Residence on the territory of the Czech Republic is an inadmissible condition for restriction of the right to property restoration / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Conflict of rules with different legal power / Permanent residence / Proprietary restoration, right.

Headnotes:

The Charter of Fundamental Rights and Freedoms gives no possibility of distinguishing between Czech state citizens with a permanent residence within the Czech territory and outside that territory. At the same time, according to the Charter, only an Act of Parliament can set limits to a fundamental right or freedom under the conditions set forth by the Charter. In setting these limits, the very nature and the meaning of these rights and freedoms must be taken into consideration.

Summary:

The Parliament passed Act no. 229/1991 Gazette on the regulation of ownership rights to land and other agricultural property in an effort to mitigate the consequences of the proprietary damage done to the owners of agricultural and forestry property in the period between 1948 and 1989 and to improve the care for agricultural land and woodland by restoring the former ownership rights to this land. One of the conditions, set forth for the persons entitled to raise claims for restoration of their rights was, in addition to the State citizenship of the Czech Republic, a permanent residence on the Czech territory.

A proposal for the cancellation of the permanent residence condition was raised by a Czech citizen living abroad and by a group of Members of Parliament.

As the Constitutional Court noted, the restriction imposed on a group of entitled Czech citizens as a consequence of not fulfilling the condition of permanent residence on the territory of the Czech Republic conflicts – from the point of view of the principle of equity – with the Constitution. The requirement to consider the very nature and meaning of fundamental rights and freedoms has not been respected by requiring a permanent residence on the territory of the Czech Republic as a legal precondition to the restoration of property rights. When interfering with constitutionally granted fundamental rights and freedoms, the legislator shall be bound by constitutional acts, the Charter as well as international treaties on human rights. Thus, an act of Parliament may set a limitation to those rights only when permitted by rules of a higher legal force than the Act itself.

Basing its ruling on the above consideration, the Court allowed the proposal and abolished the condition of permanent residence that denied Czech citizens abroad the right to proprietary restoration.

At the same time, the short terms originally set forth in the act preventing the above-mentioned category of persons from implementing their rights, has been abrogated as well.

Supplementary information:

Parliament is expected to pass an amending Act so as to bring the law in time with the Constitutional Court's ruling. An identical provision, contained in Act no. 87/1991 Gazette on Extra-Court Restorations that was referring to the restitution of non-agricultural movable and immovable property, had been abolished by the Constitutional Court in 1994.

Languages:

Czech.

Denmark
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 1995 – 31 December 1995.

Estonia
National Court

Statistical data
1 September 1995 – 31 December 1995

Number of decisions: 1

Important decisions

Identification: EST-95-3-003

a) Estonia / **b)** National Court / **c)** Constitutional Review Chamber / **d)** 18.09.1995 / **e)** III-4/A-3/95 / **f)** Review of the provision prescribed by Article 21.1 of the Law on Foreigners / **g)** *Riigi Teataja* (Official Gazette) I 1995, no. 74, Article 1320, 2284 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Parliamentary rules.
Institutions – Legislative bodies – Relations with the executive bodies.
Fundamental rights – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Foreigners / Housing / Public interest.

Headnotes:

An Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work, whereas the conditions and procedure for the exercise of this right may be provided by law. Such specified conditions and procedure for foreigners applying for residence and work permits have been prescribed by the Law on Foreigners, the provisions of which are not incompatible with the constitution. The government's right to establish procedures for applications for residence does not amount to a restriction of rights and liberties enshrined in the Constitution.

Summary:

In the course of the trial of the F.U. case, Tallinn Administrative Court came to the conclusion that the provision pertaining to permanent residence permits in the former Estonian Socialist Soviet Republic, stipulated by Article 21.1 of the Law on Foreigners, violates

the principles contained in Article 11 of the Constitution for the restriction of rights and liberties. Such restrictions must be necessary in a democratic society, and their imposition must not distort the nature of the rights and liberties.

In the course of constitutional review of the case in the National Court it appeared that the conclusion of the Administrative court had been groundless. Article 21.1 of the Law on Foreigners does not exclude the possibility that procedures established by the Government may give the foreigners, who had permanent residence permit in the Estonian Socialist Soviet Republic, the right to apply for residence and work permits from the Citizenship and Migration Agency. This provision does not restrict the rights or liberties and thus there is no substantial relation between Article 21.1 of the Law on Foreigners and Article 11 of the Constitution. The government's right to establish procedures for applying for residence and work permits does not contradict Article 11 of the Constitution, because the object of regulation of this constitutional provision is different. Thus, the National Court did not satisfy the petition of the Administrative Court.

Languages:

Estonian.

Finland
Supreme Administrative Court

Important decisions

Identification: FIN-95-3-002

a) Finland / **b)** Supreme Administrative Court / **c)** Third chamber / **d)** 28.11.1995 / **e)** 4909 / **f)** / **g)** *Korkeimman hallinto-oikeuden vuosikirja 1995. A Yleinen osa - Högsta förvaltningsdomstolens årsbok 1995. A Allmänna delen* / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Nationals.
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Right to a nationality.

Keywords of the alphabetical index:

Nationality / Data, personal.

Headnotes:

According to the Population Data Act, personal data included in the population data system are considered to be reliable evidence of a person's identity and of his status under family law unless otherwise proved.

A passport cannot be cancelled without sufficient evidence of the factual grounds for the loss of the Finnish citizenship.

Summary:

The son of the applicants, a mixed Finnish-Russian couple received the Finnish citizenship at birth.

According to the Nationality Act of the Russian Federation, which entered into force on 6 February 1992, Russian citizenship was automatically awarded to citizens of the Former Soviet Union having their permanent residence or domicile on the Russian territory at the time of entry into force of the Nationality Act and could be awarded to citizens of the Former Soviet Union on the basis of registration or as a result of an application. Since the minor's son lived in Finland at that time, he could only receive Russian citizenship on the basis of registration or application.

However, an assistant rural police chief had on the basis of Section 14.1 of the Passport Act, cancelled the minor's passport because, according to the Central Population Register, he was no longer a Finnish citizen.

The County Administrative Court quashed the police authority's decision, because according to evidence given in that court the person had not lost Finnish citizenship under Section 8 of the Nationality Act according to which a person, who has obtained the citizenship of a Foreign State as a result of an application or otherwise with his expressed consent, loses his Finnish citizenship.

In the county agent's appeal the Supreme Administrative Court upheld the decision of the County Administrative Court by four votes to one, taking into consideration in addition to the grounds mentioned in the decision of the County Administrative Court, Section 6.1 of the Population Data Act, according to which personal data contained in the population data system are considered to be reliable evidence of a person's identity and of his status under family law unless otherwise proved.

One judge dissented on the reasoning: The Court emphasised the lack of evidence whereas the dissenting judge referred to the fact that the procedure that had been followed was wrong because the parents had not been heard.

Languages:

Finnish.

France
Constitutional Council

Statistical data

1 September 1995 – 31 December 1995

27 decisions, including:

- 3 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.1 of the Constitution
- 3 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution
- 9 decisions on electoral matters pursuant to Article 58 of the Constitution
- 10 decisions on electoral matters pursuant to Article 59 of the Constitution
- 2 decisions on the statute of members of parliament taken under the institutional arrangements in the electoral code

Important decisions

Identification: FRA-95-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 11.10.1995 / **e)** / **f)** Decision of the Constitutional Council concerning the campaign accounts of Mr E. Balladur, a candidate in the presidential election of 23 April and 7 May 1995 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 12.10.1995, 14.847 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Presidential elections.

Keywords of the alphabetical index:

Campaign expenses, control.

Headnotes:

The only expenses that can be taken into account are ones the candidate has incurred or approved, or ones arising directly from activities undertaken on his behalf and in which he has indicated his intention of taking part in the course of the campaign.

Summary:

For the first time, the legislation on the control of campaign expenditure was deemed to apply to the presidential election.

The Constitutional Council found it necessary to clarify the scope of one of the relevant provisions, amended in January 1995.

The interpretation of Article 52-12 of the Electoral Code as applied to the campaign accounts of the nine candidates, taking here the example of the first candidate in alphabetical order, restricts the types of expenses liable to be taken into account.

Languages:

French.

Identification: FRA-95-3-010

a) France / **b)** Constitutional Council / **c)** / **d)** 08.11.1995 / **e)** 95-366 DC / **f)** Resolution modifying the National Assembly's rules of procedure / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 11.11.1995, 16.658 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Parliamentary rules.
Institutions – Executive bodies – Relations with legislative bodies.

Keywords of the alphabetical index:

Legislative procedure / National Assembly / Parliament, rules of procedure.

Headnotes:

The government's power to declare draft legislation inadmissible, under Article 41 of the Constitution, can only be exercised on the government's own initiative, and it is not required to explain the reasons for its decision in a preliminary debate.

Summary:

Quashing of a provision of the resolution adopted by the National Assembly amending its rules of procedure. Article 16 of the resolution empowered any member of the Assembly to request the government to declare draft legislation inadmissible, under Article 41 of the Constitution, and stipulated that such requests should be followed by a debate.

The main reason for amending the National Assembly's rules of procedure had been the need to take account of the constitutional revision of 4 August 1995 establishing, *inter alia*, a single 120 day session.

Languages:

French.

Identification: FRA-95-3-011

a) France / **b)** Constitutional Council / **c)** / **d)** 28.12.1995 / **e)** 95-369 DC / **f)** Finance Act 1996 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 31.12.1995, 19.099 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental rights – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Enterprises, small and medium-sized / Legislative validation / Ownership, control of a company / Public interest / Succession.

Headnotes:

The equality principle does not prevent parliament from encouraging the transfer of certain forms of property through the granting of tax concessions, on condition that its assessment of the situation is based on objective and rational criteria, having regard to the goals it has set itself.

By introducing a 50% abatement of the value of business property transferred free of charge *inter vivos* to one or more donees, subject only to their retaining this property for a period of five years, without the requirement that they exercise a managerial function within the enterprise, and by extending the scope of this measure to successions following the accidental death of persons aged under 65, the law has introduced a different situation to that applying to other donees and heirs, not directly related to the public interest objective referred to above. Under these circumstances and having regard to the size of the concession, its granting is likely to lead to an established breach of the principle of equality between tax payers in the application of the taxation arrangements provided for under the laws governing gifts and inheritances.

Parliament is empowered to introduce retroactive measures to validate administrative decisions following a final judgment and in compliance with it, but it may only do so on grounds of public interest. Grounds based on financial interest are therefore not sufficient.

Summary:

This decision sets a precedent in that for the first time the public interest requirement led to the quashing of a legislative validation decision that was only based on grounds of financial interest.

Languages:

French.

Identification: FRA-95-3-012

a) France / **b)** Constitutional Council / **c)** / **d)** 30.12.1995 / **e)** 95-370 DC / **f)** Legislation under Article 38 of the Constitution authorising the government to reform the social security system / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 31.12.1995, 19.111 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Law-making procedure.
Institutions – Public finances – Principles.

Keywords of the alphabetical index:

Taxes, approval / Enabling act, orders / Parliamentary amendment / Preliminary question / Right of amendment.

Headnotes:

Proper democratic debate, and thus the smooth functioning of constitutional public bodies, presupposes that the right of amendment granted to parliament under Article 44 of the Constitution will be fully respected and that parliament and government will be allowed to use the relevant procedures open to them unhindered. This double requirement implies that these rights will not be abused.

Article 14 of the Declaration of the Rights of Man and of the Citizen provides that "every citizen has a right, either of himself or his representative, to a free voice in determining the necessity of public contributions, the appropriation of them, and their amount, mode of assessment, and duration".

These requirements have constitutional force and must be applied through the constitutional provisions governing parliament's powers.

Under Article 34 of the Constitution, "laws shall establish the regulations concerning the basis, the rate and the methods of collecting taxes of all kinds". This means that taxes are among the subjects that may be covered by legislation, thus enabling the government to adopt the relevant provisions by order under the procedure laid down in Article 38 of the Constitution, while parliament, having approved the taxes in the vote on the enabling legislation and acting in accordance with the principles set out in Article 14 of the Declaration of the Rights of Man and of the Citizen, has a duty to express its opinion on the provisions adopted by order, when it considers the ratification bill that must be introduced within the statutorily defined time limit.

Summary:

The political debate on the reform of the social security legislation, one of the main planks in the government's programme, was highly charged. At the vote on the enabling legislation, the opposition reacted strongly to the government's decision to legislate by government order.

During the proceedings, the government used the single vote procedure (*vote bloqué* – Article 44 of the Constitution) in the National Assembly, followed by the

preliminary question procedure in the Senate. The opposition moved more than 2000 amendments.

Languages:

French.

Germany
Federal Constitutional Court

Statistical data

1 September 1995 – 31 December 1995

- 2 decisions by a chamber *(Senat)*:
  - 1 concerning an individual constitutional complaint
  - 1 concerning an abstract review of a norm
- 1394 rejecting decisions of the sections *(Kammern)*, 39 cases dealt with (taking into consideration the joinder of cases), 32 granting decisions
- 1968 new cases

Important decisions

Identification: GER-95-3-028

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber / **d)** 24.05.1995 / **e)** 2 BvF 1/92 / **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 – Democracy.
Institutions – Executive bodies – Relations with legislative bodies.
Institutions – Executive bodies – The civil service.

Keywords of the alphabetical index:

Co-determination within an administrative authority.

Headnotes:

All decisions of a State authority must be qualified as an exercise of State power which requires a democratic legitimation. In conveying the right of co-determination to persons employed by an administrative authority, the legislator is limited by the requirement of democratic legitimation of decisions of the administrative authority.

To what extent co-determination within an administrative authority is constitutionally admissible depends on the character of the respective decisions. To the extent that only persons working within the administrative

authority are concerned, co-determination is possible. In all cases of the exercise of State power, the final decision must lie with an authority responsible to Parliament.

Summary:

In the Land Schleswig-Holstein Parliament adopted a law conferring the right on persons working in an administrative authority to participate in the decision-making of this authority to a certain degree. In case of a dispute between the representatives of the persons working in the administrative authority and the authority itself, a special commission composed of delegates of the administrative authority and the representatives of persons working in the administrative authority had to determine the issue.

The Constitutional Court declared the law unconstitutional to the extent that it conferred on representatives of persons working in the administrative authority the right to participate in decisions concerning the composition of the staff of the administrative authority, decisions which by their nature concern questions of great importance for citizens. Therefore, they have to be taken by a democratically legitimated organ.

Languages:

German.

Identification: GER-95-3-029

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 09.08.1995 / **e)** 1 BvR 2263/94; 1 BvR 229/95; 1 BvR 534/95 / **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:

Institutions – Courts – Legal assistance – The Bar – Status of members of the Bar.
Fundamental rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Lawyer, withdrawal of admission / *Stasi* / State security service of the former GDR, collaboration.

Headnotes:

A legal provision which provides the possibility to revoke the admission of a lawyer to the bar because he collaborated with the State security service of the former GDR and by doing so violated fundamental principles of humanity or of a State governed by the rule of law is not unconstitutional.

The collaboration itself is not a sufficient reason for revoking the admission.

Summary:

In 1992 a law was adopted according to which the admission of a lawyer to the bar by the Ministry of Justice of the former GDR could be revoked if the lawyer had collaborated with the State security service and had violated principles of humanity and of a State governed by the rule of law. The Constitutional Court declared the law constitutional. However, it upheld two individual constitutional complaints against decisions revoking the admission of two lawyers. The Court declared that the limitation of the freedom of profession would be disproportionate if the admission could be revoked for the fact only that the lawyer penetrated into the private sphere of another person and gave information about it to the State security service. The revocation of the admission is only justified if the lawyer violated fundamental human principles or if he could foresee that the information in question could lead to a violation of such rights. For these reasons, the Constitutional Court rejected another individual complaint in which the lawyer had given personal information about his client to the State secret service which contributed to the conviction of the client.

Languages:

German.

Identification: GER-95-3-030

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber / **d)** 10. 10. 1995 / **e)** 1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92, 1 BvR 221/92 / **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 – Army and police forces – Army.
Fundamental rights – Civil and political rights – Freedom of opinion.

Keywords of the alphabetical index:

Slander.

Headnotes:

A criminal court which has to decide if a certain expression constitutes a slander must investigate all possible meanings of the expression in question.

The expression that all soldiers are murderers does not necessarily constitute a slander on the honour of the members of the federal armed forces.

Summary:

The Federal Constitutional Court had to decide on the constitutionality of four decisions of criminal courts according to which persons were convicted for slander because they qualified soldiers as murderers in public. With reference to settled case-law the Constitutional Court stated that according to Article 5.2 of the Basic Law, freedom of expression is limited by the laws protecting the honour of a person; these laws, however, have to be construed in a sense that the importance of freedom of expression is duly taken into consideration. While in general the construction and application of ordinary norms fall into the competence of the ordinary courts, the Constitutional Court can review whether these courts sufficiently take into consideration the importance of fundamental rights. An expression which purely aims at slandering another must be qualified as an attack against human dignity, whereas an expression in a public dispute on a question of general interest is supposed to be under the protection of freedom of expression. A criminal court has to investigate if the expression in question must exclusively be understood as a slander or if it is open to another interpretation. In the latter case a conviction for slander cannot be delivered. It does not violate fundamental rights if a criminal court qualifies an insult to a collective group as a slander on its members. However, the bigger such a group the lesser its members can be concerned by an insult to the group. To qualify an insult of "all soldiers in the world" as a slander on all members of this group would violate freedom of expression. However, it can constitutionally be affirmed that an insult to the federal armed forces implies a slandering of all its members. The qualification of army men as murderers as a slander is constitutionally admissible.

The Constitutional Court held that in the four cases in question, the criminal courts did not sufficiently investigate if the expression "all soldiers are murderers" really meant an insult to the members of the federal armed forces. Therefore, it referred the cases back to the respective ordinary courts.

The decision was taken by 5 votes to 3. A dissenting opinion was published which stated that it does not fall within the jurisdiction of the Constitutional Court to review the evaluation of facts by the ordinary courts; otherwise the Constitutional Court would have the function of a super-appeal court. Furthermore, the dissenting opinion criticises the evaluation of the facts by the majority.

Supplementary information:

A decision concerning the same question was taken by a section composed by three justices in 1994. The Constitutional Court felt obliged to take a decision in a chamber *(Senat)* as the first decision was harshly criticised in the public. As for the construction of freedom of expression, the decision reflects settled case-law.

Languages:

German.

Greece
State Council

Important decisions

Identification: GRE-95-3-003

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 02.06.1995 / **e)** 4946/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Economic, social and cultural rights – Right to culture.
Fundamental rights – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Environment.

Headnotes:

According to the Constitution, the State is under an obligation to protect the natural and cultural environment of the country. To achieve this aim, the State should prescribe special measures of a preventative or punitive nature. In addition, local planning, urbanisation and the development and expansion of towns are normally regulated by the State and are under its control.

Constitutional provisions which guarantee the protection of the natural environment and the rationality of local planning dictate that the legislator must take appropriate measures contributing to the improvement of the urban environment, depending on the functional characteristics and the degree of development of a given area, in order to insure the best possible living conditions.

Among the criteria that may legitimately influence the legislator when adopting rules of urbanisation is the taking into account of the vital needs of society, requiring the construction of a number of public buildings or buildings of a specific nature such as museums.

Summary:

An association which, according to its charter, was in charge of urbanisation and local planning, took proceedings for abuse of authority against the granting of a building permit of a modern art museum in the centre of Athens. The association was claiming that the choice of the construction site for the museum had not been preceded by the appropriate study.

Given the previous use of the site in question, which had already been designated as a centre for cultural activities, the Court found that the construction of a modern art museum, namely a building that would contribute to the promotion of arts and education, values guaranteed by the Constitution, did not infringe the protection of the environment. The appeal was dismissed.

Languages:

Greek.

Hungary
Constitutional Court

Statistical data
1 September 1995 – 31 December 1995

Number of decisions

- Decisions by the Plenary Court published in the Official Gazette: 22
- Decisions by chambers published in the Official Gazette: 8
- Number of other decisions by the Plenary Court: 24
- Number of other decisions by chambers: 12
- Number of other (procedural) orders: 39
- Total number of decisions: 105

Important decisions

Identification: HUN-95-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 15.09.1995 / **e)** 56/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 76/1995 / **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:

Proportionality / Sickness benefit / Social welfare.

Headnotes:

As the State guarantees social security benefits under the Hungarian Constitution, when the legislature reduces the expenditures in social security, it withdraws the underlying State guarantees with regard to the related social benefits. A drastic reduction in these benefits is unconstitutional because it dismantles the sickness benefit system itself. Nonetheless, it does not reduce the payment obligations of the insured.

Summary:

According to the regulations of the Economic Stabilisation Act whoever 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 because of sickness, for the first five days of which the employee shall not be entitled to remuneration, while otherwise the employer must pay 75 % of the absence fee to the employee for the remaining period of the sick leave.

The Constitutional Court declared in June 1995 that the provisions providing for the immediate entry into force of the law promulgated on 15 June 1995 as from 1 July were unconstitutional. Hence the Court annulled these provisions and declared that the law amendments were not to come into force on 1 July.

The Court examined the merits of the case through a thorough analysis of statistical data, and found that the average sick payment per capita in the past years was 33 days. That meant that to put the burden on the insured and the employers for 25 days would be such a significant withdrawal of guarantees with respect to the insured that it would weaken their social security to a constitutionally unacceptable level.

Supplementary information:

The Government's austerity plan was introduced by the Economic Stabilisation Act (Act no. 48 of 1995). In June the Court examined the constitutionality of the law in five interrelated decisions (judgments no. 42-46 of 1995). On 30 September another six related decisions were published by the Court.

Languages:

Hungarian.

Identification: HUN-95-3-009

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 15.09.1995 / **e)** 58/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 76/1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – International Covenant on Civil and Political Rights.

Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.
Fundamental rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Criminal procedure.

Headnotes:

The main rule in criminal procedure is that hearings are public. In individual cases, the judge may with regard to morals and to regulations of international human rights covenants, consider the measures to be taken for the protection of the privacy of the accused person.

Summary:

The Code of criminal procedure makes possible the exclusion of the public from the courtroom in the interest of juveniles, and in order to protect morals. According to the applicant, the public presentation of the medical statement on the mental state of the accused violated her right to privacy.

The Constitutional Court did not find unconstitutional the respective rules of the Code of criminal procedure, but set a constitutional requirement that they must be interpreted in accordance with constitutional principles and with the more detailed provisions of the International Covenant on Civil and Political Rights. Article 14 of the Covenant makes possible the exclusion of the press and of the public from all or part of a trial when the interests of the parties with regard to their private lives so require.

Languages:

Hungarian.

Identification: HUN-95-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.10.1995 / **e)** 66/1995 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 101/1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Certainty of the law.

Keywords of the alphabetical index:

Contracts / *Rebus sic stantibus.*

Headnotes:

Contractual freedom is not a basic right. Its restriction is unconstitutional only when it is arbitrary. Contractual freedom can be restricted only when the conditions of the *rebus sic stantibus* clause (fundamental change in circumstances) prevail. The State can intervene by legislative means into the contractual terms only when essential changes in the conditions occur, and where these lead to the violation of lawful interests. Otherwise the legislative amendments of contracts are arbitrary and unconstitutional.

Summary:

The government in the previous decades supported home-building financially by granting a special long-term loan (in fact a kind of mortgage). The legislature by amending the 1995 Budget increased the interest rate to 25 percent per year. It justified the increase by the high inflation rate.

The Constitutional Court quoted its previous decision on this problem in 1991 when it upheld a law increasing the interest rate to 15 percent. The Court pointed out that in 1991 one could refer to a fundamental change of conditions (an increase of general interest rates from 5 to 28-32 percent) which, given the existence of approximately 2 million contracts, put an unbearable burden on the budget, and that the proportion of expenditures for housing had become the highest in the world.

But in 1995 the rate of inflation and the interest rates were more or less the same as in 1991, and the number of the specially low rate contracts dropped to two hundred thousand. Thus the legislative amendment of contractual terms could not be justified by the *rebus sic stantibus* clause.

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-95-3-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 12.05.1995 / **e)** 87/95 / **f)** In the matter of Article 26 of the Constitution / **g)** *Irish Reports*, vol. 1, 1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Constitution.
Sources of constitutional law – Categories – Unwritten rules – Natural law.
Sources of constitutional law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
Fundamental rights – Civil and political rights – Right to life.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Abortion / Information right.

Headnotes:

A Bill prescribing the conditions subject to which certain information may be given relating to services lawfully available outside the State for the termination of pregnancies and to persons who provide such services is not repugnant to the Constitution.

Summary:

By the Fourteenth Amendment to the Constitution there was added to the Constitution a provision that the sub-section dealing with the right to life of the unborn child should not limit the freedom to obtain or make available in the State, subject to such conditions as might be laid down by law, information relating to services lawfully available in another State. Following the support of the Fourteenth Amendment to the Constitution by the People, the Legislature passed a Bill which was intended to regulate information regarding services outside the State for the termination of pregnancies. The President referred the Bill to the Supreme Court for decision as to whether or not it was repugnant to the Constitution.

The Supreme Court ruled that medical termination of pregnancy performed in accordance with the law of the State in which it is carried out constitutes a service lawfully available in another State within the meaning of the Fourteenth Amendment to the Constitution. The nature of information made available in the State in relation to the termination of pregnancies could not be limited to information of a general nature, but included information with regard to the identity, location and method of communication with a specified clinic or clinics where such services were lawfully available.

With regard to the Fourteenth Amendment, the Supreme Court found that this Amendment could not be disregarded on the ground that it was inconsistent with the natural law. All organs of State, the Oireachtas (the legislature), the executive and the judiciary are subject to the Constitution and the law. The Courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State and at no stage recognised the provisions of the natural law as superior to the Constitution. The Courts must act in accordance with the guidelines laid down in the Constitution and must interpret them in accordance with their ideas of prudence, justice and charity. The people were entitled to amend the Constitution and even though there was a conflict between the Eighth and Fourteenth Amendments of the Constitution, the people in enacting the Fourteenth Amendment were aware of this conflict because they specifically decided that the freedom to obtain information relating to services lawfully available in another State should not be limited by the provisions of the Eighth Amendment. The Eighth Amendment originally set down that the State acknowledged that the right to life of the unborn and, with due regard to the equal right to life of the mother, guaranteed in its laws to respect, and as far as practicable, by its laws to defend and vindicate that right.

The condition that the information to be given did not advocate or promote the termination of pregnancy constituted a clear indication of the intention of the legislature to respect and as far as practicable to defend and vindicate the right to life of the unborn having regard to the equal right to life of the mother. While a doctor, or any person to whom the legislation applied, was precluded from making an appointment for or on behalf of a woman with a person who provided services outside the State for the termination of pregnancies, once an appointment was made, the doctor was permitted to communicate in the normal way with such other doctor in relation to the condition of his patient, provided that such communication did not advocate or promote the termination of pregnancy. The woman was also entitled to any medical, clinical, surgical, social or other records relating to her. A doctor, while precluded from advocating or promoting termination, could however give full information to a woman with regard to her state of health and the consequences to her health and life if the pregnancy continued. The woman must be given information, counselling and advice directly in relation to all courses of action which are open to her. In giving such information, counselling and advice, the person giving it would have regard to and give advice in accordance with the principles of constitutional justice.

The Supreme Court also found that the fact that the Bill did not contain any provision requiring notification to the parents of pregnant minors or to the husbands of pregnant wives did not render it repugnant to the provisions of the Constitution.

Languages:

English.

Identification: IRL-95-3-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 24.05.1995 / **e)** 363/90 / **f)** O'Leary v. Attorney General / **g)** *Irish Reports*, vol. 1, 1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Burden of proof / Criminal procedure / Organisation, unlawful.

Headnotes:

The constitutionally guaranteed principle of presumption of innocence in a criminal trial has not been breached by a legislative provision which lays down that the possession of incriminating documents relating to an unlawful organisation shall without more be evidence until the contrary is proved that such a person was a member of the unlawful organisation.

Summary:

The plaintiff appealed to the Supreme Court in respect to the constitutionality of a legislative provision which he claimed infringed his constitutional right to a trial in due course of law, and in particular the presumption of innocence, by placing upon an accused the burden of proof. During the course of his trial evidence was adduced that the plaintiff was in possession of posters which the court accepted were incriminating documents. As a result the accused was convicted of being a member of an unlawful organisation. The relevant provision under examination provided that "on the trial of a person charged with the offence of being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such persons or in his possession or on lands or in the premises owned or occupied by him or under his control shall without more be evidence until the contrary is proved that such person was a member of the said organisation at the time alleged in the said offence".

The Supreme Court found that the presumption of innocence in a criminal trial is implicit in the requirement of Article 38.1 of the Constitution that no person shall be tried on any criminal charge save in due course of law. The legislative provision under review (Section 24 of the Offenses Against the State Act 1939) does not pass a legal burden of proof onto the accused to prove that he was not guilty of the offence, but creates an evidential burden only. The section provides that the possession of an incriminating document amounts to evidence only, and that such possession is not to be taken as proof. In consequence, the probative value of the possession of these documents might be shaken in many ways such as by cross examination; by pointing to the mental capacity of the accused; or the circumstances by which he came to be in possession of the document. There is no mention in the section of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage.

Languages:

English.

Identification: IRL-95-3-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 17.11.1995 / **e)** 361/366/95 / **f)** McKenna v. An Taoiseach and Others/ **g)** to be published in the *Irish Reports* / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Admissibility of referendums and other consultations.
Constitutional justice – Effects – Influence on everyday life.
General principles – Separation of powers.
Institutions – Executive bodies – Powers.
Institutions – Executive bodies – Relations with the courts.
Institutions – Courts – Jurisdiction.
Institutions – Public finances – Principles.
Fundamental rights – Civil and political rights – Freedom of opinion.

Keywords of the alphabetical index:

Constitution, amendment.

Headnotes:

In expending public monies to campaign for a specific outcome to a referendum to amend the terms of the Constitution, the government is not acting within its powers under the Constitution and the law.

Summary:

The plaintiff brought an appeal to the Supreme Court with regard to whether the government was entitled to expend State monies on funding a publicity campaign directed to persuade the public to vote in favour of a proposed amendment to the Constitution. The amendment proposed to abolish the provision within the Constitution which sets down that no law shall be enacted providing for a dissolution of marriage. The appellant claimed that her constitutional rights were being infringed by the activity of the government in requesting or advising voters to vote in favour of the proposed divorce referendum.

The Supreme Court had to consider the nature of the courts' jurisdiction in the circumstances of this case and in light of the principle of the separation of powers. It was held that if the government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene. The government cannot act free from the restraints of the Constitution. Neither the powers of the Oireachtas (the legislature)

nor of the government are absolute even within their own domain.

The majority of the court based its reasoning on the role the People had in amending the Constitution. They stated that it was the sole prerogative of the People to amend any provision of the Constitution. The People by virtue of the democratic nature of the State enshrined in the Constitution were entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State. The use by the government of public funds to fund a campaign designed to influence voters was an interference with the democratic process and the constitutional process for the amendment of the Constitution, and infringed the concept of equality and the right to a democratic process. For the government to fund one side of a campaign was to treat unequally those citizens who held the opposite view.

Languages:

English.

Italy
Constitutional Court

Statistical data

1 September 1995 – 31 December 1995

Meetings of the Constitutional Court during the period from 1 September to 31 December 1995: 6 public hearings and 9 hearings in chambers. The court gave 122 decisions in all.

Decisions given in cases where constitutionality was a secondary issue: 50 judgments, 21 finding measures complained of unconstitutional and 46 court orders.

Decisions given in cases where constitutionality was the main issue: 13 judgments, 8 finding measures complained of unconstitutional.

Decisions given in constitutional proceedings concerning conflicts of authority:

a. between the State and the regions (or the autonomous provinces of Trento and Bolzano) over the definition of their respective powers: 8 judgments;
b. between State authorities in disputes between public bodies over the exercise of powers: 3 judgments and 2 court orders.

On 8 September 1995, the Court elected Mr Vincenzo Caianiello, formerly Vice-President, as its President to succeed Mr Antonio Baldassarre. Mr Caianiello ended his term of office as President and judge on 23 October 1995. He was succeeded by the Vice-President, Mr Mauro Ferri, elected President on the same day.

Important decisions

Identification: ITA-95-3-012

a) Italy / **b)** Constitutional Court / **c)** / **d)** 06.09.1995 / **e)** 422/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 39 of 20.09.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Affirmative action.
Fundamental rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Chamber of Deputies / Elections / Local councils / Regional Council.

Headnotes:

The principle of equality set out in Article 3 of the Constitution stipulates that sex and the other characteristics mentioned (race, language, religion, political opinions and personal or social circumstances) have no legal significance. This rule is reaffirmed, with regard to entitlement to stand for election, by Article 51.1 of the Constitution, which provides that all citizens of either sex are equally eligible for public office and for elective office provided they have the qualities required by law; this equality can only be understood to mean that a person's sex is irrelevant to the purposes in question.

Since being of one or other sex can never be taken as a condition of eligibility, it follows that this must be affirmed *a fortiori* in respect of standing for election.

The fact is that being eligible to stand for election is merely the preliminary and necessary condition for being in a position to be elected and therefore for benefitting, in real terms, from the entitlement to stand for election covered by Article 51.1 of the Constitution.

Unequal legislative measures may be adopted to eliminate situations of social and economic disadvantage or to compensate for or put an end to material inequalities between individuals (as a basis for the full exercise of fundamental rights), as required by Article 3.2 of the Constitution, but these measures cannot directly affect the actual substance of these rights, which are strictly secured to all citizens.

Nor can measures such as those referred to above be described as affirmative action, which seeks to remove obstacles preventing women from achieving particular results, but not to give women these results directly, since this would constitute discrimination on the basis of sex, explicitly prohibited by the Constitution.

Summary:

In this judgment, the Court declared unconstitutional the rule stating that in the lists presented for election to provincial and municipal councils, neither sex could in principle represent more than two-thirds of the candidates.

Consequently, it also declared unconstitutional other State and regional provisions (on the grounds that the rules they contained were basically identical) setting up reserve lists of female candidates for political, regional and administrative elections.

Languages:

Italian.

Identification: ITA-95-3-013

a) Italy / **b)** Constitutional Court / **c)** / **d)** 18.10.1995 / **e)** 438/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 44 of 25.10.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation.
General principles – Reasonableness.
Fundamental rights – Civil and political rights – Security of the person.
Fundamental rights – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

HIV (AIDS) / Prisons / Sentence, execution.

Headnotes:

The Constitutional Court has given judgment on several occasions on the mandatory suspension of sentence under the Code of Criminal Procedure for persons with AIDS. It has also invited the legislature to find new solutions capable of reconciling the protection of the health of individuals suffering from this serious illness and having to serve a sentence with the fundamental requirement to protect the community, bearing in mind that mandatory suspension of enforcement of sentence, and hence non-imprisonment, is an exceptional and therefore necessarily temporary measure. The legislature has not failed to respond in a manner which takes account of the various values involved, such as protecting the health of individuals, of the prison community and of the community as a whole as well as the rehabilitative purpose of sentences; rather, it has preferred to keep to the practice of automatically suspending the sentences of convicted persons who are HIV-positive, creating an irrefutable presumption that the situation of these persons is incompatible with prison life, without providing for a case-by-case as-

sessment of the actual harm that the restriction of freedom in prison could have caused to the health of both the convicted person and other detainees.

The legislature's rigid presumption that it is impossible to cater adequately in prison for the health situation of HIV-positive persons, and particularly those with AIDS, means that other constitutional values may be compromised, such as life, security, property, individual and community health, and the deterrent and punitive nature of the sentence.

Summary:

This decision declares the rule on mandatory suspension of the sentence of a convicted person with AIDS – because it fails the criterion of reasonableness – unlawful under the Constitution, even when the judge verifies that the prisons have internal facilities or access to external facilities which render the enforcement of the sentence compatible with the state of health of the convicted person and that the sentence can be served without detriment to the rest of the prison population.

Cross-references:

See the Court's judgments no. 70/1994 (*Bulletin* 1/1994, 35 [ITA-94-1-004]) and no. 308/1994.

Languages:

Italian.

Identification: ITA-95-3-014

a) Italy / **b)** Constitutional Court / **c)** / **d)** 18.10.1995 / **e)** 440/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 44 of 25.10.1995 / **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 worship.

Keywords of the alphabetical index:

Blasphemy.

Headnotes:

The abolition in existing law of the notion of a "state religion" (term reserved for the catholic religion), as being incompatible with the fundamental constitutional principle of a secular state, has not erased the offence of "blasphemy against the Divinity or the symbols or persons worshipped in the state religion" as provided for in the Criminal Code. It is sufficient in this regard to consider the expression "state religion" as a linguistic intermediary indicating the catholic religion, without attributing to that religion its past recognition as the religion supported and defended by the State.

While the rule sanctioning blasphemy "against the Divinity" cannot be declared unconstitutional, since blasphemy is punishable irrespective of the religion to which the Divinity belongs, so that the rule protects all believers and all religions, the rule sanctioning blasphemy against the "symbols and persons" worshipped in the "state religion" only, in other words the catholic religion, infringes equality before the law and non-discrimination in respect of religious opinions, and the equal freedom of all religions.

Summary:

The Court has declared the rule punishing blasphemy against the symbols and persons worshipped in the catholic religion alone to be unlawful under the constitution and has rescinded it. The Court was unable to extend the cases concerned by the rule sanctioning blasphemy injurious to the symbols and persons worshipped in other religions, since it would have had to give an "additional" ruling which in this case it did not have the authority to do, given that offences and penalties are the preserve of the legislature.

Cross-references:

As regards blasphemy, and in particular the determination of the legal interest protected by the rule, see judgment no. 79/1958 which defines the catholic religion as the religion of the state not in the sense of a political structure but as society; judgment no. 14/1973 which recognises "religious feeling" as something to be protected under the criminal law; judgment no. 925/1988 which upholds the protection of "good morals" under the rule, pointing out to the legislature the need for review of the instances covered by it.

The legislature's inertia led the Court to hand down this judgment annulling the rule.

Languages:

Italian.

Identification: ITA-95-3-015

a) Italy / **b)** Constitutional Court / **c)** / **d)** 22.12.1995 / **e)** 515/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 53 of 27.12.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Constitutional justice – The subject of review – Acts of government.
Institutions – Federalism and regionalism – Institutional aspects – Deliberative assembly.

Keywords of the alphabetical index:

Current procedures / Legislative competence / Prorogated bodies, regime / Regional Council.

Headnotes:

Regional councils, which are entitled to exercise their mandate until the 46th day preceding the date set for the election of new assemblies, continue to possess some of their powers after that date, by analogy with legislative bodies. This accords with constitutional case-law, the principle being that the regional council assemblies are inherently representative by virtue of their direct appointment by the people. As a result, while no legislative assembly can commit subsequent assemblies to decisions which it has adopted as part of unconcluded legislative proceedings, it is also true that the principle of an assembly's continuity requires that the fact that it is weakened (by the imminence of elections) must not have the effect of totally paralysing it. Thus, according to the Court's case-law, if the Government rejects legislative decisions of the Regional Council, and the latter considers it vital to adopt them and impossible to postpone them, such decisions may be approved again even after the 46th day preceding the election of the new assembly. The requirement to balance the principle of representativeness with the principle of functional continuity means that a legislative procedure, once initiated, can be concluded even after expiry of the prescribed period if the session is continuous.

Summary:

The Veneto region had raised the question of a conflict of authority with the State, referring to the measure by which the government had rejected the regional legislature's decision on the 1995-1997 Social Health Plan as having been approved after the 46th day preceding the date set for the election of the new assembly. In its decision, the Court affirmed that the State (and therefore the government) did not have the authority to reject such a decision, and therefore annulled the government measure in question.

Moreover, the Court also dismissed an application for inadmissibility which the State's counsel had pleaded in defence.

Cross-references:

Referring to the analogy between the positions of regional councils in the 45 days immediately preceding elections and those of legislative bodies whose mandate has been extended, the Court recalled its judgment no. 468/1991.

Languages:

Italian.

Identification: ITA-95-3-016

a) Italy / **b)** Constitutional Court / **c)** / **d)** 28.12.1995 / **e)** 519/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 1 of 03.01.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of the constitutionality of enactments.
Constitutional justice – The subject of review – Laws and other rules having the force of law.
General principles – Reasonableness.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Personal liberty.

Fundamental rights – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Beggars / Criminal penalties / Solidarity.

Headnotes:

Social awareness of certain kinds of behaviour (such as begging), considered in the past as a threat to the social order, has matured. Thus civil society has developed its own responses, such as voluntary work (to combat the causes of such behaviour) which derives its purpose and rules from the constitutional concept of solidarity. From this standpoint, treating non-aggressive begging as an offence seems to be at variance with the Constitution, on the ground of reasonableness, since it cannot be argued that a criminal penalty is necessary; nor can it be argued that simply asking for charity endangers public order.

On the other hand, criminal penalties for various forms of aggressive begging, intended to provide legal protection for important interests such as spontaneously performing the duty of solidarity, must remain lawful under the Constitution.

Summary:

In this judgment, the Court declares unconstitutional paragraph 1 of Article 670 of the Criminal Code, which provides for a criminal penalty for non-aggressive or simple begging, while accepting that a criminal penalty must be retained for aggressive or aggravated forms of begging involving annoying, repugnant, insolent or fraudulent behaviour, as provided for in paragraph 2 of Article 670.

Cross-references:

In the past, the Court, in its judgments no. 51/1959 and no. 102/1975, referred to in this decision, dismissed questions regarding Article 670 of the Criminal Code as unfounded.

In the first judgment, the Court ruled, inter alia, that freedom of private assistance (Article 38 of the Constitution) in no way comprised freedom to beg; in the second judgment it considered, on one hand, that begging was "a free choice" and, on the other, observed that, for individuals who had been forced to beg because they were not eligible to receive public assistance, begging by a person who was physically weak and lacked the capacity of persons who, in the eyes of the law, had a responsibility to meet their basic needs – could fall within the scope of Article 54 of the Criminal Code (an individual committing an act constituting an offence is not deemed to have committed an offence if he or she was forced by necessity to do so).

Languages:

Italian.

Identification: ITA-95-3-017

a) Italy / **b)** Constitutional Court / **c)** / **d)** 29.12.1995 / **e)** 536/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 1 of 03.01.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of the constitutionality of enactments.
Constitutional justice – The subject of review – Laws and other rules having the force of law.
Sources of constitutional law – Categories – Written rules – Community law.
Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Community legislation, interpretation / Constitutional Court / Court of Justice of the European Communities.

Headnotes:

The issue of constitutionality, based on the interpretation of Community law (in this instance a Directive), implies that the substance of this Directive should be clarified under the rules of the relevant legal system to ensure that this Directive was certain and reliable; this was required because of the non-reversible nature of effects which in the domestic judicial system would stem from a ruling of unconstitutionality, such as the request made by the court of referral.

While the Constitutional Court is obviously competent to verify breaches of fundamental principles and a person's inalienable rights, it is not for the Court to interpret Community rules which are unclear, nor to resolve differences which emerge over their interpretation once the Court of Justice of the European Communities has been asked for its interpretation, which is binding on member States.

The Constitutional Court cannot refer a case to the Community judge, its task being to monitor the Constitution and to act as the ultimate guarantor that the Republic's Constitution is observed by the constitutional bodies of the State and the regions.

If an interpretation of Community law is necessary to determine the scope of the provision the constitutionality of which is contested, the court of referral (to which the case file is returned) shall, in the absence of precedents in the Court of Justice's case-law, refer the case to the latter for an interpretation which will settle the issue of the constitutionality of the contested provision in a pertinent and not manifestly unfounded way.

Summary:

By this order the Court affirmed, firstly, that it lacks competence to refer a case to the Court of Justice of the European Communities and, secondly, that it stands outside the judicial system and has a particular supervisory function with regard to constitutional bodies.

Cross-references:

First of all, judgment no. 509/1995 is relevant at a time when the Court reaffirms its competence to censure any breach by community legislation of the fundamental principles and inalienable rights of the person.

Judgment no. 168/1991 is relevant is so far as it considered the possibility, here categorically denied, that the Court could refer a case to the Court of Justice of the European Communities.

Lastly, as regards the Constitutional Court's standing outside the judicial system and the particular function assigned to it by the constitution, parts of judgment no. 13/1960 are relevant.

Languages:

Italian.

Lithuania
Constitutional Court

Statistical data

1 September 1995 – 31 December 1995

Number of decisions: 4 final decisions including:

- 3 rulings concerning the compliance of laws with the Constitution
- 2 rulings concerning the compliance of governmental resolutions with the laws

All cases – *ex post facto* review and abstract review.

The content of the cases was the following:

- independence of judiciary (remuneration): 1
- restoration of the rights of ownership: 2
- validity of international treaties: 1

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

Important decisions

Identification: LTU-95-3-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 17.10.1995 / **e)** 8/95 / **f)** The Law on International Treaties / **g)** *Valstybės žinios* (Official Gazette), 86-1949 of 20.10.1995 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Other international sources.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources.
Institutions – Head of State – Powers.

Keywords of the alphabetical index:

International treaties, validity.

Headnotes:

In accordance with the principle of sovereignty every State has the right to choose concrete ways and forms of implementing norms of international law in its

internal legal system. There are various ways and forms of implementation of norms of international law, and it is recognised that the validity of international law in general and of international treaties in particular within the legal system of the State shall always depend on national law. According to the Constitution only international treaties which are ratified by the *Seimas* shall be the constituent part of the legal system of the Republic of Lithuania having the force of law.

Summary:

The case was initiated by the Government of the Republic of Lithuania. It requested the Constitutional Court to investigate if Article 7.4 and Article 12 of the Law "On International Treaties of the Republic of Lithuania" are in compliance with the Constitution. In the first case, the question of who shall sign international treaties and submit them to the *Seimas* for ratification was raised. The second problem concerned the juridical force of international treaties entered into by the Republic of Lithuania and the ways of implementing them.

The Constitutional Court ruled that the provision of Article 12 of the disputed law, namely that international treaties "shall have the force of law", was in compliance with the Constitution to the extent that it applied to international treaties ratified by the *Seimas*; but the same provision contradicted the Constitution to the extent that it applied to international treaties which had not been ratified by the *Seimas*. It was also recognised that Article 7.4 of the said Law, establishing that "The Government [...] shall submit by its own decision international treaties of the Republic of Lithuania to the Supreme Council [...] for ratification", contradicted the provision of Article 84.2 of the Constitution, whereby the President of the Republic of Lithuania "submits them to the *Seimas* for ratification".

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-95-3-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.10.1995 / **e)** 2/95 / **f)** Restoration of the Rights of Ownership / **g)** *Valstybės žinios* (Official Gazette), 86-2007 of 02.11.1995 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Institutions – Economic duties of the State.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Denationalization / Private property, restoration.

Headnotes:

In a democratic society, priority is given to the individual. Therefore, everything that is related to fundamental human rights and freedoms is regulated by law. That includes questions of conformity to human rights and freedoms, the determination of the contents thereof, legal guarantees of protection and defence, their permissible limitation, etc. In Lithuania these provisions are substantiated by constitutional norms which do not provide for the delegation of norm-making power to the legislature. Therefore, a legal provision by which the Government is commissioned to establish by an executive act the conditions for the restoration of ownership rights, and the executive act itself, contradict the Constitution.

Summary:

The case was brought by a local court which requested an enquiry into the constitutionality of the legal provision which had given the right to the Government to establish the conditions for the restoration of ownership rights to land, and of the legality of the corresponding executive act.

The Constitutional Court ruled that the Constitution does not provide for the delegation of such power to the legislature, and that the Government may not intrude by an executive act into the regulation of the matter by law and establish additional conditions for the restoration of ownership rights. Therefore, the disputed provisions were found to contradict the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-95-3-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.12.1995 / **e)** 3/95 / **f)** The executive acts concerning remuneration of judiciary / **g)** *Valstybės žinios* (Official Gazette), 101-2264 of 13.12.1995 / **h)**.

Keywords of the systematic thesaurus:

General principles – Separation of powers.
Institutions – Executive bodies – Powers.
Institutions – Executive bodies – Relations with legislative bodies.
Institutions – Courts – Organisation – Members – Status.

Keywords of the alphabetical index:

Judges, independence, remuneration.

Headnotes:

The whole complex of guarantees consolidating the independence of judges and courts is established in the Constitution, the Court Law and other laws. The material independence of a judge and other social guarantees are among them. Therefore the laws of many countries establish, according to common criteria, the remuneration of judges separately from other officials of the State. Conditions to prevent interference with the actions of a judge or a court deciding a case must be created on the basis of the guarantees for the independence of judges. Violation of any of the above-mentioned guarantees may cause damage to the administration of justice and the guarantee of the rights and freedoms of individuals. Therefore any attempt to reduce the remuneration of judges or other social guarantees, or to limit the financing of courts, are interpreted as an encroachment upon the independence of the judiciary.

The awarding of a premium is a form of individual incentive by the means of which the motivation of employees is stimulated in order to achieve certain results. Candidates for the premium are selected individually, and the size of a premium is usually fixed individually. It is however not permissible to grant judges incentives in connection with the administration of justice. Therefore the awarding of a premium for judges is incompatible with the principle of independence of the judiciary.

Summary:

The procedure for remunerating and awarding premiums to judges and other officials of the Public Prosecutor's Department and the Office of State Control had been established by decisions of the Government. A group of *Seimas* members applied to the Constitutional Court with a request that it examine whether the concrete norms of the decision of the Government, especially those for awarding a premium, did not contradict the Constitution and the laws.

The Constitutional Court examined the disputable norms on the basis of the principle of separation of powers, as well as of the independence of the above-mentioned institutions.

The Constitutional Court decided that the provisions of the executive act enabling the Government to fix the size of a premium for the President of the Supreme Court, the Prosecutor General and The State Controller, as well as the norms for the awarding of a premium to judges, contradict the Constitution and the corresponding laws.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-95-3-011

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.12.1995 / **e)** 9/95 / **f)** Restoration of the Rights of Ownership / **g)** *Valstybės žinios* (Official Gazette), 106-2381 of 29.12.1995 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Denationalization / Private property, restoration / Tenants, rights.

Headnotes:

One of the main objectives of law as a means to regulate social life is justice. Justice is one of the basic moral values, as well as being the basic foundation of States governed by law. The aspiration of justice and a State governed by law is established in the preamble

to the Constitution. Justice may be implemented by ensuring a certain balance of interests, by escaping fortuity and self-will, instability of social life and conflicts of interests. It is impossible to attain justice by defending the interests of only one person or group of persons and overlooking the interests of others at the same time. It is impossible to solve clashes of interests by making absolute the protection of rights of a person who attempts to restore rights of ownership to a residential house by giving it back, and at the same time deny the right to tenants to lease a living place.

The legislator chose the protection of ownership rights by returning a house and ensuring at the same time the tenant's right to a living place. The lease with the tenant may be abrogated and he may be asked to leave if he is allotted another dwelling. Thus a former owner may recover his or her residential house when the conditions prescribed in the Law are met. Whenever they are not met or the loss of property rights is not adequately compensated, the ownership rights of a former owner are not deemed to have been restored. This means that only restored ownership rights are to be protected in law against third parties.

According to the law, ownership rights are not to be restored for all former owners, and for all formerly owned property. The law contains special conditions or, to be more precise, restrictions which are applied to former owners who wish to recover their property in kind. It is obvious that certain conditions restrict the restoration of ownership rights, as the system of socio-economical relations which has been formed in Lithuania during the last 50 years, exerts influence upon this process. Where it is not possible to return property in kind, former owners may choose a different way of compensation provided for in the law. The Constitutional Court has noted several times that for the non restoration of property, adequate compensation is not in contradiction with the principle of protection of property ownership rights, because fair compensation also ensures protection of the rights of ownership.

Summary:

The case was initiated by a group of *Seimas* members, who requested the Constitutional Court to examine the constitutionality of some provisions of Article 8 of the Law "On the Procedure and Conditions of Restoration of the Rights of Ownership to Existing Real Property". On 3 July 1995, the *Seimas* passed a Law that amended the above-mentioned Law by introducing a new wording for Article 8. The *Seimas* established in point 4 of Part 2 of the aforesaid Article that residential houses (or portions thereof) and apartments shall be returned if the "tenants, occupying the houses which are to be returned, are provided with adequate dwellings to replace in conformity with the requirements of Article 358 of the Civil Code of the Republic of Lithuania". It was established in Part 4 of the aforesaid Article that "in all other cases, not specified in Part 2 of the Article, the right of ownership to residential houses (or portions thereof) and to apartments shall be restored by buying them out from persons specified in Article 2 of the Law on the basis of the options open to the aforesaid persons...".

The petitioner requested a declaration by the Court to the effect that the aforementioned norms of the Law contradicted Articles 23 and 29 of the Constitution.

The Constitutional Court established that the essential conditions for restoring the right to ownership by returning residential houses (or portions thereof) remained the same. Therefore the argument that harder requirements are applied to former owners of residential houses than before were not founded. Thus the disputable provisions of the said Law were found to be in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

The Netherlands
Supreme Court

Important decisions

Identification: NED-95-3-011

a) Netherlands / **b)** Supreme Court / **c)** Third division / **d)** 20.09.1995 / **e)** 30.567 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
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:

Sewerage charges, levy.

Headnotes:

A municipal ordinance under which only a few of the users of plots of land from which waste water is disposed of by means of the municipal sewerage system are required to pay sewerage charges while the remaining users are exempt violates the principle of equality.

Summary:

In 1992 the interested party was the user of a plot of land from which 381 cubic metres of waste water were disposed of through the municipal sewerage system. In that year 819 users of land, including the interested party, received an assessment under the Sewerage Charges (Levy and Collection) Ordinance for the municipality of T (hereinafter referred to as the Ordinance). A total of 4,574,892 cubic metres of waste water was disposed of from these plots of land in 1992. Users of dwellings and plots from which less than 250 cubic metres per year was disposed of were not required to pay the charges under the Ordinance. In 1992 this exemption applied to 67,728 users of plots from which 6,772,800 cubic metres of waste water were disposed of. The interested party took the position that this Ordinance was not binding because it violated Article 1 of the Constitution (the ban on discrimination).

The Appeal Court ruled that the relation between the charges and actual use was so disproportionate that, as no justification could be given for it, the charges were deemed to be arbitrary and unreasonable. This rendered the Ordinance non-binding. The Supreme Court held that this meant that the failure, without objective, reasonable justification, to levy the charges on 98.8% of users who must be assumed to be responsible for at least half the use of the sewerage system rendered the Ordinance non-binding on the grounds that it contravened the general legal principle enshrined in Article 1 of the Constitution that all persons shall be treated equally.

Languages:

Dutch.

Identification: NED-95-3-012

a) Netherlands / **b)** Supreme Court / **c)** First division / **d)** 22.09.1995 / **e)** 8651 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 180.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Bankruptcy files, access.

Headnotes:

A bankrupt may request access to the non-public part of the bankruptcy file.

Summary:

The examining magistrate refused to allow a bankrupt access to the non-public part of the bankruptcy file held at the registry of the District Court.

As the Bankruptcy Act states that certain documents are open to public access, the bankrupt always has the right to examine them. However, the Supreme Court held that this did not mean that the bankrupt is never entitled to access the non-public parts of the file.

Given the nature of the data which could be contained in the non-public sections of the file and which might relate to financial and other aspects of the bankrupt person's position, it must be accepted that he should be able to request such access. The question of whether such a request should be granted should be decided by the court after weighing the bankrupt person's interest in access to the file against any interests opposed to the granting of access. The Supreme Court held that it should be clear from the reasons given for any denial of access that the interests in question had been considered, and that any other approach would be at odds with developments in relation to the law on access to information collected on an individual, including his financial assets, by the government or an equivalent body. The developments in question are reflected in the Government Information (Public Access) Act and the Data Protection Act, which are based on Article 10.3 of the Constitution which states that rules concerning the rights of persons to be informed of data recorded concerning them and of the use made of such data shall be laid down by an Act of Parliament. The complaints lodged by the bankrupt person were therefore well-founded.

Languages:

Dutch.

Identification: NED-95-3-013

a) Netherlands / **b)** Supreme Court / **c)** First division / **d)** 20.10.1995 / **e)** 8648 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 210.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Paternity / Registers of births, deaths and marriages.

Headnotes:

In assessing the relative weight to be attached to two interests protected by Article 8 ECHR, namely respect for private and family life and the importance of recording facts in the registers of births, deaths and marriages in a way which is legally and factually accurate, the latter must prevail.

Summary:

A child was born out of the relationship between the petitioners, who had been living together for a considerable time, within 307 days of the dissolution of the woman's marriage. The name of the child's father given on the birth certificate was that of the woman's former husband. In the presence of the register of births, deaths and marriages the woman denied that her former husband was the father and the man acknowledged paternity of the child. These acts established, having regard to the Supreme Court judgment of 17 September 1993, NJ 1994, 373 (*Bulletin* 2/94, 143 [NED-94-2-011]) that the child was not the legitimate child of the woman's former husband but the natural child of the man. The petitioners took the view that the respect for their private and family life to which they were entitled under Article 8 ECHR meant that it should not be possible to infer from a copy of the entire birth certificate that anyone other than the man had been referred to as the child's father.

The Supreme Court held that to maintain the public registers of births, deaths and marriages, which serve to assemble and keep certificates containing all the facts relating to people's personal status or changes therein, in the most accurate and impartial way possible so that they may provide incontrovertible evidence undoubtedly serves one of the purposes defined in Article 8.2 ECHR. In the opinion of the Supreme Court, the interest of the persons in question in respect for their private lives must therefore be weighed against the interests of the objectives served by the maintenance of the registers of births, deaths and marriages.

The Supreme Court took the view that in principle it is for the legislature to compare these interests. Acting on this basis, the legislature had considerably restricted public access to the registers of births so as to protect personal privacy. There was therefore no reason to depart from the conclusion of the legislature embodied in the Act of 14 October 1993 (Bulletin of Acts and Decrees, no. 555).

The Supreme Court held that the interests invoked by the petitioners were protected as much as possible by the statutory provisions referred to above and that their interests could not justify a departure from the provisions of the said Act. The Supreme Court found that their request for the actual course of events to be concealed from those who would have a legitimate interest in its disclosure conflicted with the Dutch legal system.

Languages:

Dutch.

Identification: NED-95-3-014

a) Netherlands / **b)** Supreme Court / **c)** First division / **d)** 20.10.1995 / **e)** 15767 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 212.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
General principles – Relations between the State and bodies of a religious or ideological nature.
Fundamental rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Ecclesiastical office, training.

Headnotes:

Failure to admit a woman into a course for deacons because she was a woman was not degrading treatment within the meaning of Article 3 ECHR. The ban on discrimination between men and women does not apply to admissions to training courses for ecclesiastical office.

Summary:

This case arose out of an application by a woman for admission to the training course for deacons in the diocese of 's-Hertogenbosch. The woman in question also expressed the wish to be ordained as a deacon once she had completed the course. She was refused admission on the grounds that only men could be ordained deacons in the Roman Catholic Church and that anyone who was ineligible for ordination could not be admitted to the training course. The woman sought in these proceedings an order compelling the Bishop to allow her to be admitted to the diocesan training course for deacons.

The Appeal Court ruled that the woman's invocation of Article 3 ECHR could not be upheld, since her non-admission to the training course on the sole grounds that she was a woman did not constitute degrading treatment within the meaning of the said provision. The Supreme Court held that this ruling showed no evidence of an incorrect interpretation of the law relating to the term "degrading treatment" within the meaning of Article 3 ECHR. The Supreme Court also held that the applicability of Article 3 did not depend on whether the person involved felt degraded by the treatment in dispute.

The Supreme Court further held that it was indisputably clear from the Equal Opportunities Act that the legislature's intention, in calling for respect for the freedom of religion and belief enshrined in Article 6 of the Constitution in respect of admission to and training for ecclesiastical office, was to introduce a generally applicable exception to the ban on discrimination between men and women.

Languages:

Dutch.

Identification: NED-95-3-015

a) Netherlands / **b)** Supreme Court / **c)** First division / **d)** 08.12.1995 / **e)** 8659 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 261.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Techniques of interpretation – Weighing of interests.

Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Paternity, acknowledgement.

Headnotes:

The mere fact of birth does not create a relationship between father and child that may be characterised as family life. Acknowledgement affects a child's interests as protected under Article 8 ECHR. The child's interests must therefore be weighed against those of the man acknowledging paternity.

Summary:

On 16 January 1987 a child was born out of the relationship between a man and a woman, who were both unmarried. They had not lived together before the child's birth. After the child was born, the man and the woman lived together for a year with the woman's grandmother, in the latter's home. The relationship then came to an end, after which the man lived abroad for two and a half years, during which time he had no contact with the woman or the child. He returned to the Netherlands in 1991. The woman consistently refused to give permission to the man to acknowledge the child. She died on 15 February 1994. In accordance with the woman's wishes expressed in her will, the child was being cared for and brought up in her brother's family. The man applied to the registrar of births, deaths and marriages to add to the register of births a certificate containing the man's acknowledgement of the child.

The Supreme Court based its ruling on the principle that the child was not born of a relationship which, in the opinion of the Appeal Court, could be equated with a marriage. The Supreme Court also held that it had been established that the man had not lived with the woman before the child's birth, while there was nothing in the documents in the case to demonstrate the existence of any other circumstances which could justify the conclusion that the relationship between the man and the woman was nonetheless sufficiently lasting to be equated with marriage (cf. European Court of Human Rights judgment of 27 October 1994 in the case of Kroon vs. the Netherlands, series A, no. 297-C, no. 30, p. 56, *Bulletin* 3/94, 301 [ECH-94-3-016]). A relationship which could be described as family life did not therefore exist between the man and the child by virtue of the mere fact of the child's birth.

The Supreme Court then held that legally valid acknowledgement by the man would create a family-law relationship between the child and the man acknowledging her. As a result of this far-reaching consequence, acknowledgement affects interests of the child which are protected by Article 8 ECHR. Although acknowledgement may serve these interests, it is equally possible for these interests to be opposed to acknowledgement. The latter case involves both the law's defence of respect for the ties of family life which exist between the child and others and the freedom of choice regarding one's own life which forms part of everyone's right to respect for personal privacy. Since it was argued on the child's behalf, with reasons, that this latter situation was the case in the proceedings in question, the Appeal Court could not ignore such an argument. Indeed, the Appeal Court was bound, in accordance with the ECHR provision referred to above, to weigh the man's interest, assuming that a relationship which could be described as family life existed between him and the child, in having this relationship recognised under family law against the child's interests which enjoyed the protection of Article 8 ECHR in equal measure.

The factors which could be taken into account were the importance to the child of a stable place of residence, the nature and depth of the assumed relationship between the father and the child, the fact that the father had never previously indicated a desire actually to assume responsibility for caring for the child, and the fact that he had not been able to argue convincingly that he would be able to assume this responsibility in a proper manner. It also had to be borne in mind that recognition would give the child the father's name, so that she would have a different name from the other members of the family in which she was growing up, a situation which would not be in her interest. The Supreme Court took the view that the Appeal Court had been right in concluding that the interests of the child must prevail in this case.

Languages:

Dutch.

Identification: NED-95-3-016

a) Netherlands / **b)** Supreme Court / **c)** First division / **d)** 22.12.1995 / **e)** 8643 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 10.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Categories – Written rules – Convention on the rights of the Child.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Right to family life.
Fundamental rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Paternity.

Headnotes:

The mere fact of a child's birth does not create a relationship between the father and the child which may be described as family life. The right of a child to know his or her parents does not extend to the right to enforced contact with the child's biological father against the latter's wishes.

Summary:

In June 1985 a child was born out of the relationship between a man and a woman who had never lived together. The man broke off the relationship when he learned that the woman was pregnant. The child expressed a wish to meet his father. The man was married and had no contact with the child since his birth, nor did he wish to; there was never any agreement between the man and the woman concerning contact with the child. In the proceedings the woman applied for an arrangement for meetings between father and child.

In response to the woman's application, the Supreme Court held that the requirements which should determine the existence of family life depend on the context in which Article 8 ECHR is invoked and on who invokes it. If a child invokes the protection of Article 8 in order to establish some form of contact with his biological father the conditions to be met are not the same as those which would apply if the biological father were seeking some form of contact with a child he had fathered but not acknowledged. The Supreme Court was of the opinion that, in view of the case-law of the European Court of Human Rights, it must be assumed that a relationship which could be described as family life within the meaning of Article 8 could not be said to exist simply because the child was fathered by its biological father, even in the context of a request by the child for access arrangements involving him and his biological father. The nature and the permanency of the relationship between the mother and the biological father prior to the child's birth could not be overlooked.

Article 7.1 of the Convention on the rights of the child states that a child has, as far as possible, the right to know and be cared for by his or her parents. The Supreme Court believed that the right of a child to know his or her parents, as referred to here, embraces more than the simple right to know the parents' names. However, the Supreme Court did not deem it likely that the States Parties to the Convention intended to confer a right that extends to the point where, if a biological father has not acknowledged his child and has refused to have any personal contact with the child, the child has the right to enforce personal contact against the father's wishes. In the opinion of the Supreme Court, the District Court was correct to declare the woman's application inadmissible, as the arguments on which her application was based are insufficient to render it admissible.

Supplementary information:

The Supreme Court would refer in particular to the following judgments handed down by the European Court of Human Rights: 21 June 1988, Series A no. 138, NJ 1988, p. 746 (Berrehab). 26 May 1994, Series A no. 290, NJ 1995, 247 (Keegan), *Bulletin* 2/94, 178 [ECH-94-2-008] and 27 October 1994, Series A no. 297, NJ 1995, 248 (Kroon), *Bulletin* 3/94, 301 [ECH-94-3-016]. The Convention on the rights of the child was concluded in New York on 20 November 1989 and approved by the Netherlands by Kingdom Act of 24 November 1994 (Bulletin of Acts and Decrees, no. 862). It entered into force for the Netherlands on 8 March 1995 (Netherlands Treaty Series 1995, no. 92).

Languages:

Dutch.

Norway
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 1995 – 31 December 1995.

Poland
Constitutional Tribunal

Subject matter of important decisions:

Constitutional jurisdiction
Resolution of 5 September 1995 (W 1/95)

Housing- Local self-government
Decision of 25 October 1995 (K 4/95)

Privatisation
Decision of 22 November 1995 (K 19/95)

Public radio and television
Decision of 28 November 1995 (K 17/95)
Resolution of 13 December 1995 (W 6/95)

State Budget
Decision of 24 October 1995 (K 14/95)

Taxation
Resolution of 6 September 1995 (W 20/94)
Decision of 28 December 1995 (K 28/95)

Trade unions
Decision of 21 November 1995 (K 12/95)

Other information

The Official Collection of the decisions of the Constitutional Tribunal is now published monthly under the title *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (beginning from September 1995).

Important decisions

Identification: POL-95-3-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.09.1995 / **e)** W 1/95 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 111, item 539; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 1, item 5 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions – Head of State.
Constitutional justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Constitutional justice – Types of claim – Type of review – Preliminary review.

Constitutional justice – Types of claim – Type of review – *Ex post facto* review.
Constitutional justice – Types of litigation – Universally binding interpretation of laws.
Constitutional justice – Procedure – Originating document – Signature.
Constitutional justice – Procedure – Parties.
Sources of constitutional law – Techniques of interpretation – Historical interpretation.
Sources of constitutional law – Techniques of interpretation – Systematic interpretation.
General principles – Separation of powers.
General principles – Rule of law.
Institutions – Legislative bodies – Powers.

Keywords of the alphabetical index:

Constitutional Tribunal, jurisdiction / Presidential acts, counter-signature.

Headnotes:

The provisions of the Constitutional Tribunal Act providing for the subjection of decisions on the unconstitutionality of laws or other acts having the force of law to *Sejm* control, apply only to decisions taken as a result of *ex post facto* review (review executed after the law is signed by the President and properly published). They do not apply to laws which have been found to be unconstitutional by means of preliminary review before they were signed by the President.

The President must decline to sign any law which is not consistent with the Constitution.

Summary:

An application for a universally binding interpretation of Article 7 of the Constitutional Tribunal Act had been filed by the President to affirm that the Tribunal's decision on the unconstitutionality of a statute not yet signed by the President was final, and that the statute in question could not be promulgated.

After completing a historical and systematic analysis of the relevant constitutional and other provisions on procedures for the review of decisions of the Tribunal by the *Sejm*, the Tribunal concluded that:

- the constitutional principle of the rule of law (Article 1 of constitutional provisions continued in force) and the constitutional principle of the separation of powers (Article 1 of the Constitutional Act of 17 October 1992, hereinafter referred to as the *Small Constitution*) clearly define the Tribunal's position in the hierarchy of State authorities. It follows that the *Sejm* may intervene in procedures of constitutional review only when the law expressly provides for competences in this regard and in forms expressly provided by law;

- according to the Constitution, only the Tribunal's decisions regarding "laws" may be reviewed by the Sejm: "law" is understood in this sense as a legal act enacted by Parliament, signed by the President and properly published. Therefore, the *Sejm* may only decide upon the Tribunal's decisions issued as a result of an *ex post facto* review, and has no power to scrutinise decisions regarding acts not yet signed by the President;

- the President may not sign any law which has been found by the Tribunal to be contrary to the Constitution. This also follows from Article 28 of the *Small Constitution*, which compels the President to "ensure observance of the Constitution".

Before deciding the case on its merits, the Tribunal had to answer a preliminary question, namely whether the President's application for a universally binding interpretation of the law was subject to countersignature by an appropriate member of the Council of Ministers. The majority of the Tribunal concluded that since the application itself was not a "legal act", as understood by Article 46 of the *Small Constitution*, it did not require the countersignature of the Prime Minister or an appropriate minister.

Supplementary information:

Three dissenting opinions were delivered, by judges Z. Czeszejko-Sochacki, L. Garlicki and W. Sokolewicz. In their opinion, the President's application should not have been decided on its merits since it had not been countersigned by a member of the Government. Furthermore, there were no constitutional provisions expressly excluding the President's application for the universally binding interpretation of the law from the requirement of countersignature. Moreover, Judge Sokolewicz was of the view that under the Constitution a "law" means a statute passed by the *Sejm*, despite the fact that it is yet to be signed by the President. Therefore the Tribunal's decisions on the unconstitutionality of a statute issued in preliminary review are subject to the *Sejm*'s control, and the Constitutional Tribunal Act provisions related to the procedure on *ex post facto* review should be applied accordingly.

Cross-references:

Resolution of 22 August 1990 (K 7/90), ruling of 7 March 1995 (K 3/95).

Languages:

Polish.

Identification: POL-95-3-012

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.09.1995 / **e)** W 20/94 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 114, item 555; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 1, item 6 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Historical interpretation.
Sources of constitutional law – Techniques of interpretation – Systematic interpretation.
General principles – Rule of law – Maintaining confidence.
Institutions – Public finances – Taxation – Principles.
Fundamental rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Universally binding interpretation of law.

Headnotes:

An autonomous possessor of real estate who is not its owner is obliged to pay real estate taxes imposed upon the property.

Summary:

In analysing the relevant provisions of the 1991 Law on Local Taxes, the Tribunal found that even if an autonomous possessor of real estate is not its owner, he or she is obliged to pay taxes imposed on that estate. This may be justified both by the historical and systematic interpretation of regulations providing for taxes and levies due in connection with immovable property. The real estate tax is a tax levied on property and should be paid by a person who benefits from the possession of this property.

Given the constitutional principle of citizens' confidence in the State as well as the settled case-law of the Tribunal and the fact that taxes may only be imposed through statutes, the possibility is excluded that the tax authorities may chose between the owner and the autonomous possessor as the taxpayer at their sole discretion.

Languages:

Polish.

Identification: POL-95-3-013

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.10.1995 / **e)** K 14/95 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 2, item 12 / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Certainty of the law.
General principles – Rule of law – Maintaining confidence.
General principles – Publication of laws.
Institutions – Courts – Organisation – Members.
Institutions – Public finances – Budget.
Fundamental rights – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Budget, State / Civil servants, remuneration.

Headnotes:

Including in the Budget Act provisions which modify the legal status of citizens and in particular which impose upon citizens certain financial duties, is contrary to Article 20 of the *Small Constitution* governing the content of the Budget Act.

Summary:

According to laws on courts and other justice authorities, the salaries of judges and public prosecutors should be defined by the executive in relation to the average salary (and be increased proportionally to the increase of the average salary). The 1995 Budget Act blocked the proportional increase between 1 January 1995 and 31 March 1995, and allowed the raise only starting from 1 April 1995. Between 1 January 1995 and 31 March 1995 the salaries of judges and public prosecutors were the same as in December 1994. The provision in question, as well as the whole 1995 Budget Act, came into force on

16 March 1995, being however effective since 1 January 1995.

The Constitutional Tribunal stressed that since the provision in question covered events which took place before the new law entered into force, its retroactivity had worsened the financial situation of the citizens concerned. Therefore, the provision violated the prohibition against *ex post facto* laws, which constitutes an important element of the constitutional principle of the rule of law. In addition, the said provision violated the principle of citizens' confidence in the State.

The Budget Act which provides for State earnings and expenditure in a calendar year was a law of a special kind, elements of which were detailed by the Constitution. Parliament was strictly bound by the Constitution in the procedure for the preparation and enactment of the Budget Act. The modification of the legal status of citizens, and in particular the imposition upon citizens of certain financial duties by a Budget Act, was contrary to Article 20 of the *Small Constitution* which provides for a "special" content of the Budget Act.

The provision in question, by dealing with matters different from those reserved for a Budget Act, infringed not only the rule on the special character of the Budget Act but also the principles of legality and rule of law (Article 3 of 1952 Constitution – provisions still in force).

Cross-references:

See previous decision on the same merits: decision of 8 November 1994 (P 1/94), *Bulletin* 3/94, 263 [POL-94-3-018]; decision of 10 January 1995 (K 16/93), *Bulletin* 1/95, 65 [POL-95-1-001].

Languages:

Polish.

Identification: POL-95-3-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.10.1995 / **e)** K 4/95 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 2, item 11 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Economic duties of the State.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Housing / Local self-government.

Headnotes:

The rule that it is the task of a commune to satisfy the housing needs of its members included in the 1994 Law on Lease of Apartments and Housing Allowances may not be understood and interpreted as giving anybody the right to demand that a house or an apartment be provided by the commune.

Summary:

The applications were filed by the Association of Polish Cities as well as by a number of city councils and Provincial Assemblies. In the applicants' opinion, the wording used in the law could easily suggest that a commune was responsible for meeting the housing needs of all its inhabitants. In addition, the applicant communes complained about the lack of State guarantees that expenditure for providing people with housing would be reimbursed from the State budget.

The Tribunal explained that although the new law had imposed upon communes a duty to meet the housing needs of their inhabitants, it did not constitute a basis for a claim against the commune to provide an individual with a house or an apartment. On the other hand, a lack of State guarantees that the amounts spent by communes to meet housing needs would be fully covered by the State budget was contrary to the constitutional principle that the sources of revenue for public tasks performed by communes must be guaranteed by law (embodied in Article 73.2 of the *Small Constitution*). In order to assure the implementation of the law in accordance with the Constitution, the Council of Ministers should reserve in a draft Budget Act the amounts necessary to compensate the communes for their housing expenditure.

The law in question gave the Council of Ministers the right to decide, via the issuing of relevant regulations,

the terms and conditions for providing communes with funds in order to support their housing activities. According to the Tribunal, this is inconsistent with the constitutional rule that legal rules may be issued by the executive only in order to implement statutes and on the basis of legislative powers specified therein.

Several provisions of the law in question depriving certain categories of citizens of their right to apply for a housing allowance were found to be inconsistent with the constitutional principle of equality.

Languages:

Polish.

Identification: POL-95-3-015

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 14.11.1995 / **e)** W 5/95 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 141, item 699; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 3 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
Institutions – Army and police forces.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – National service.

Keywords of the alphabetical index:

Compulsory employment, compensation / Pensions.

Headnotes:

Persons who joined the army before December 1956, excluding those who voluntary continued their employment after 1 January 1957, are entitled to an increased pension for each month of their compulsory employment.

Summary:

The resolution in question related to the 1994 law granting special privileges to persons who after 1949 were forced to work in coal and uranium mines or quarries while serving in the army.

Languages:

Polish.

Identification: POL-95-3-016

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.11.1995 / **e)** K 12/95 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 3 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
General principles – Rule of law.
Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Public.
Fundamental rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade unions, membership, exclusion.

Headnotes:

Unreasonable limitations on the freedom to be a member of trade unions are not allowed in a democratic State ruled by law, especially when they infringe international treaties ratified by the Republic of Poland.

Summary:

The 1994 Law on the Supreme Chamber of State Control, extending the scope of the prohibition of membership in trade unions to new categories of employees of the Chamber, was found by the Tribunal to be contrary to the constitutional principle of the

freedom of trade unions as well as to the principle of the rule of law and to the principle of equality.

Before the new law entered into force, only the members of the Chamber's management were prohibited from associating in trade unions. The new law imposed this prohibition upon most of the professional members of the staff (all employees who performed control and supervisory actions). The Tribunal did not find any arguments to justify the new prohibition, even taking into account provisions on the protection of State or professional secrecy currently in force. Moreover, the new law, as far as the said prohibition was concerned, was contrary to ILO Convention no. 151, which provides for the acceptable limitations on the freedom to be a member of a trade union and to Article 11 ECHR and Article 17 ECHR. Therefore, the provisions in doubt were declared contrary to the basic principles of a State ruled by law.

The Tribunal observed that over the last two years all similar prohibitions regarding civil servants (judges, public prosecutors and other State officers) had been repealed. The provision in question caused a situation where employees occupying similar positions were treated differently, and it was therefore declared as being contrary to the constitutional principle of equality.

Supplementary information:

The Tribunal referred to its earlier decisions providing for rules on the basis of which the State may limit the constitutional freedoms of its citizens.

Languages:

Polish.

Identification: POL-95-3-017

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 22.11.1995 / **e)** K 19/95 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 3 / **h)**.

Keywords of the systematic thesaurus:

General principles – Democracy.
General principles – Separation of powers.
General principles – Rule of law.

Keywords of the alphabetical index:

Privatisation / Separation of powers.

Headnotes:

Article 1 of Constitutional Act of 17 October 1992, hereinafter referred to as the *Small Constitution*, cannot be understood as expressing the principle of a strict separation of powers. While interpreting this Article, one should take into account the purpose of enacting the Act, namely the improvement of the organisation and operation of supreme State authorities.

Summary:

The subject of this preliminary review were several provisions of the 1995 Act on Commercialisation and Privatisation of State Enterprises. The President had questioned the provision that the privatisation of certain (key) sectors of the Polish industry was to be subject to preliminary approval by a resolution of the *Sejm*. The President had also found questionable that the Council of Ministers was widely authorised to decide, through its executive orders, upon exceptions to privatisation rules provided for in the Act.

The Tribunal stated that some of the provisions in doubt violated the Constitution. In particular, the provision making the privatisation of certain sectors subject to the *Sejm*'s consent were inconsistent with basic constitutional rules. According to the Tribunal, limiting the statutory powers of executive bodies by entrusting certain tasks to the *Sejm*, acting by a resolution, is contrary to the principle of a democratic State ruled by law and the principle of separation of powers: it constituted an inadmissible intervention by the legislature into the essence of executive power. In addition, such a requirement would render uncertain the legal situation of privatised enterprises, their contractors and persons entitled to obtain their shares.

The provision which gave the Council of Ministers the right to issue executive orders allowing for privatisation of enterprises which, in the light of the Act, did not qualify for privatisation, was also found to be contrary to the principle of a democratic State ruled by law. The Tribunal emphasised that any regulation issued by the executive should be of abstract and general character and could function as an individual act.

The Tribunal stressed that Article 1 of the *Small Constitution* did not draw an impassable line between powers of particular branches (it did not express the principle of a strict separation of powers). Interpretation of the Article had to be pursued in accordance with the

preamble of the Constitutional Act which stated that the Constitution has been enacted in order to improve the activities of the supreme authorities of the State.

Supplementary information:

There was one dissenting opinion to this decision.

Cross-references:

The Tribunal referred back to its previous decisions on the contents of the constitutional principle of the separation of powers: decision of 9 November 1993 (K 11/93), *Bulletin* 3/93, 34 [POL-93-3-016], decision of 21 November 1994 (K 6/94), *Bulletin* 3/94, 263 [POL-94-3-019].

Languages:

Polish.

Identification: POL-95-3-018

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.12.1995 / **e)** W 6/95 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 2, item 15; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 4 / **h)**.

Keywords of the systematic thesaurus:

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, public radio and television / Universally binding interpretation of law.

Headnotes:

Membership of the Supervisory Boards of public radio and television companies may not be revoked before the end of the three-year term of office.

Summary:

The principle of independence of public radio and television is not absolute; it is limited in connection with the necessity to protect the State's right as the owner. Public radio and television operates in Poland in the form of a joint stock company with the exclusive participation of the State Treasury.

Special functions performed by radio and television companies and their public character do not allow these companies to be treated in the same way as any other commercial companies. In particular, provisions of the Commercial Code must be applied in accordance with constitutional provisions which seek to protect the independence of public radio and television by taking into account freedom of speech and right to information through the media.

Therefore, the Tribunal concluded that members of the Supervisory Board in a public radio and television company (appointed by the National Council of Radio and Television and the Minister of Finance) may not have their membership revoked by the appointing authority or through a Shareholders General Meeting before the end of their term of office. The 1992 Broadcasting Act must be interpreted as forming the rule that the membership of Supervisory Boards of public radio and television companies is irrevocable before the end of the three-year term of office.

Supplementary information:

Three separate opinions were submitted.

Cross-references:

The Tribunal confirmed the view of its majority expressed in resolution W 1/95 of 5 September 1995 (*Bulletin* 3/95 [POL-95-3-011]) that a presidential application for a universally binding interpretation of a statute is not subject to the requirement of countersignature by an appropriate member of the Council of Ministers (the Prime Minister or an appropriate minister).

Languages:

Polish.

Identification: POL-95-3-019

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.12.1995 / **e)** K 28/95 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Collection of decisions of the Tribunal), no. 4 / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Certainty of the law.
General principles – Rule of law – Maintaining confidence.
General principles – Publication of laws.
Fundamental rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Expectations, taxpayer / Taxation, rules / *Vacatio legis*.

Headnotes:

The basic guarantee preserving the rights of taxpayers while defining their duties for the forthcoming tax year is that any amendments must be notified to them within a reasonable period before the beginning of the tax year.

Summary:

The President had applied for a preliminary review of several 1995 amendments to the Personal Income Tax Act. The amendments were intended to introduce a six-bracket scale of income tax. The law was enacted by the Sejm on 1 December 1995 and submitted to the President for his signature three days later. The President vetoed the law and subsequently referred it to the Tribunal.

The Tribunal recalled that any change with regard to rights and duties of taxpayers should be notified to taxpayers in advance, with a period of *vacatio legis* long enough to allow them to adjust their businesses to the new regulations.

The tax law currently in force imposed upon the Minister of Finance the duty to announce by way of a regulation the tax brackets for the forthcoming year by 30 November. After that date, taxpayers could reasonably expect that there would be no disadvantageous changes in tax regulations for the forthcoming year. The law in question violated the above expectations and rendered the situation of taxpayers uncertain. Therefore, the said law was found to be contrary to Article 1 of the constitutional provisions declaring that the Republic of Poland is a democratic State ruled by law.

The Tribunal concluded that taxpayers could not be affected by any actions or omissions of State authorities participating in the process of enacting the law. Therefore, it was irrelevant that, by questioning the new law the President had made the whole legislative procedure even longer (the President first refused to sign the new law and referred it to the Sejm for reconsideration and subsequently – after the veto was lifted – challenged the law before the Tribunal).

The Tribunal remarked that the legislature was authorised to decide upon the content of tax laws at its discretion and that the Tribunal would take action only when provisions of law are violated.

Cross-references:

See the decision of 15 March 1995 (K 1/95).

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 September 1995 – 31 December 1995

Total of 268 judgments, of which:

- Subsequent scrutin *in abstracto*: 14 judgments
- Appeals: 268 judgments, of which:
  - Substantive issues: 120
  - Applications for a declaration of unconstitutionality: 38
  - Procedural matters: 75
- Complaints: 14 judgments
- Electoral disputes: 7 judgments

Important decisions

Identification: POR-95-3-011

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 05.12.1995 / **e)** 681/95 / **f)** / **g)** *Diário da República* (Official Gazette) (Serie II) no. 25 of 30.01.1996, 1501-1511 / **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 – National service.

Keywords of the alphabetical index:

Civilian service / Conscientious objection / Jehovah's Witnesses / Military service.

Headnotes:

The right to conscientious objection, as a corollary of freedom of conscience, takes the form of opposition to general legislation based on individual conscience, because of personal convictions that prevent the individual from respecting that legislation, and extends beyond obligations arising from compulsory military service to other areas.

In the specific area of conscientious objection to military service, the Constitution requires conscientious objectors to undertake civilian service for an equivalent period and of equivalent difficulty to military service.

In the case of conscientious objection, the principle that citizens should bear an equal share of the community burden requires a balance to be struck between freedom of conscience and the right and duty to defend the homeland, such that the harmonisation of these constitutional values safeguards the freedom while not dispensing with the duty. This is why the right to conscientious objection to military service is linked to the requirement to undertake civilian service as an alternative.

Individuals' obligation to declare themselves available for civilian service, thus excluding recognition of a "total objector" status, cannot be deemed an excessive or unreasonable requirement, and is not, therefore, unconstitutional.

Summary:

This judgment concerns the provision of the legislation on conscientious objection to military service which requires persons claiming the status of conscientious objectors to make an express declaration of their availability to undertake alternative civilian service.

The Jehovah's Witnesses refuse to make this declaration and therefore fail to obtain conscientious objector status. As a result, they continue to be statutorily liable to normal military obligations, with the possibility of their being called up to complete military service.

The very large number of constitutional appeals and the need for uniform case-law led to the intervention of the Court's plenary assembly.

In a controversial decision, the Court found, by a narrow majority, that the relevant statutory provision was not unconstitutional.

Supplementary information:

Mandatory case-law for the Constitutional Court.

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data
1 September 1995 – 31 December 1995

- 2 decisions on the constitutionality of legislation prior to its enactment
- 52 decisions on objections alleging unconstitutionality
- 1 interpretation decision by the plenary Court

Activities of the Constitutional Court since its foundation until 31 December 1995

During this period, the Constitutional Court has examined 471 cases:

- 56 cases entailing the review of the constitutionality of laws before their promulgation including 9 of 1992, 11 of 1993, 17 of 1994 and 19 of 1995
- 9 cases entailing the review of the constitutionality of Parliamentary regulations including 3 of 1993, 4 of 1994 and 2 of 1995
- 360 complaints of unconstitutionality brought before courts including 24 in 1992, 88 in 1993, 116 in 1994 and 132 in 1995
- 43 objections (in 1992) under Law no. 69/1992 on the election of the President of Romania
- 1 proposal (in 1994) to suspend the President of Romania from office
- 2 applications (in 1994) for monitoring the satisfaction of conditions for the exercise of legislative initiative by citizens.

Of all the cases brought before it, the Court has taken 346 decisions:

- 38 decisions under Article 144.a of the Constitution including 6 in 1992, 9 in 1993, 10 in 1994 and 13 in 1995
- 8 decisions under Article 144.b including 2 in 1993, 4 in 1994 and 2 in 1995
- 300 decisions under Article 144.c including 60 in 1993, 126 in 1994 and 114 in 1995.

It has also issued:

- 6 interpretations including 1 in 1993, 2 in 1994 and 3 in 1995
- 43 judgments on the election of the President of Romania
- 1 consultative opinion on the proposal to suspend the President of Romania from office
- 2 amendments of the Rules on the Organisation and Running of the Court
- 2 judgments on monitoring the satisfying of conditions for the exercise of legislative initiative by citizens.

Citizens and a variety of social organisations have submitted 1584 applications to the Court (182 in 1992, 345 in 1993, 559 in 1994 and 498 in 1995).

Important decisions

Identification: ROM-95-3-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 31.10.1995 / **e)** III (3) / **f)** / **g)** *Monitorul Oficial al României* (Official Gazette of Romania), no. 259/09.11.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of the constitutionality of enactments.
Constitutional justice – The subject of review – Laws and other rules having the force of law.
Constitutional justice – Procedure – Interlocutory proceedings – Intervention.
Sources of constitutional law – Techniques of interpretation – Intention of the author of the controlled enactment.

Keywords of the alphabetical index:

Reviewed norm modified during proceedings.

Headnotes:

If, when an objection on the grounds of unconstitutionality has been brought before the courts, the legal provision subject to review is amended, the Constitutional Court shall decide on the constitutionality of the new wording of the legal provision, only when the legislative interpretation of the amended law or decree is, in theory, the same as before the amendment.

Summary:

If, after an objection on the grounds of unconstitutionality has been brought before the courts, the text of the law is amended, but retains in its new wording the same legislative interpretation as before the amendment the case need not be brought again to settle the

raised objection, since the grounds of unconstitutionality are the same.

The target of objection on the grounds of unconstitutionality is not so much the legal provision in the formal sense but its substance, since a person who raises the objection argues that the legal text is contrary to a constitutional provision. Therefore, whenever the legislative interpretation of an amended legal text has in principle been carried out from the text prior to amendment, the objection on the grounds of unconstitutionality stands. However, if the interpretation differs from that placed on the legal provision prior to amendment, the Court is not able to determine the constitutionality of the legal provision in its new wording since this would exceed the scope of the objection submitted to it.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data

1 September 1995 – 31 December 1995

Total number of decisions: 9

Types of decision:

- Rulings: 8
- Decisions on dismissal of claims: 1

Categories of cases:

- Interpretation of the Constitution: 2
- Conformity with the Constitution of acts of state bodies: 7
- 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: 6
- Complaints of individuals: 3
- Inquires of courts: 0

Important decisions

Identification: RUS-95-3-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 16.10.1995 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 21.10.1995 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Occupational pensions.

Headnotes:

The suspension of payment of a state retirement pension during the detention of the pensioner on the basis of a court judgment constitutes an inadmissible restriction of the right to a retirement pension, as it is tantamount to depriving the citizen concerned of that right.

Summary:

In connection with the sentencing of a number of citizens to imprisonment, the payment of the pensions granted to them was suspended by decision of the social services with reference to the "Law on state pensions in the RSFSR". Believing that this law infringed their right to a pension, the citizens in question lodged an application with the Constitutional Court, asking that it be recognised as unconstitutional.

The Constitutional Court stated that the Constitution recognised the right of every person as a member of society to social security, which included the right to receive a pension in circumstances and of an amount defined in law. Working pensions were granted in the event of a prolonged period of work. Via a system of compulsory insurance contributions, working citizens paid part of their salary into the pension fund of the Russian Federation and so helped to build up the funds which would cover pensions. For this reason, such pensions had been earned by virtue of previous work.

Depriving pensioners of their pension by suspension of payment during their stay in a place of detention constituted a restriction of the constitutional right to social security, which was not consistent with the admissible grounds for restricting civil rights and liberties set forth in the Constitution.

The suspension of the relevant payment deprived the sentenced pensioner of the possibility of receiving the portion of the pension which exceeded the costs of his or her detention in the penitentiary establishment and acquired the nature of an additional punishment. It established different categories of rights for the dependants of sentenced pensioners and the dependants of all other persons, which violated the principle of equal human and civil rights and freedoms guaranteed by the State.

The Constitutional Court considered the provision of the law in question, which prescribed that payment of a state retirement pension should be suspended during the detention of the pensioner on the basis of a court judgment, to be unconstitutional and invalid from the moment that the decision on the instant case was issued. The federal organs of legislative and executive power would have to establish procedures for the payment of the retirement pension granted and the deduction of costs in respect of pensioners in places of detention in application of court judgments.

Languages:

Russian.

Identification: RUS-95-3-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 31.10.1995 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 09.11.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Constitution.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Constitution, amendment.

Headnotes:

Amendments to the provisions of Chapters 3-8 of the Constitution are adopted in the form of a special legal text, the "Russian Federation Law amending the Constitution", which has a special status and differs from both the federal law and the federal constitutional law.

Summary:

Article 136 of the Constitution states that amendments to the provisions of Chapters 3-8 of the Constitution shall be adopted in accordance with the procedure established for the adoption of federal constitutional laws and shall come into force after they have been approved by legislative authorities of not less than two-thirds of the constituent entities of the Russian Federation. The State Duma requested the Constitutional Court to interpret the constitutional norm in question.

The Constitutional Court stated that a federal law could not be used as a form of adoption of a constitutional

amendment since the text of the Constitution itself indicated that, to amend the Constitution, a more complicated procedure than that established for the adoption of federal laws had to be applied. Furthermore, in respect of federal laws, the President of the Russian Federation had the right of veto, which was not provided for in the procedure for adopting a federal constitutional law, extended by Article 136 of the Constitution to cover the procedure for adopting amendments.

Amendments to the Constitution could not be adopted, either, in the form of a federal constitutional law, as the Constitution directly specified the matters to which such laws were applicable. The use of a federal constitutional law would make amendments impossible, as these, by their content, did not relate to this sphere of matters. Moreover, unlike amendments, federal constitutional laws, by their legal nature, were adopted in execution of the Constitution, could not change its provisions and could not, either, become an integral part of it.

The Constitutional Court explained that amendments within the meaning of Article 136 of the Constitution were adopted in the form of a special legal act, namely a Russian Federation law amending the Constitution. However the procedure for adopting amendments was an extension of the procedure for adopting a federal constitutional law, which entailed approval of the said act by a majority of at least three quarters of the total number of members of the Federation Council and at least two thirds of the total number of deputies in the State Duma. Furthermore, the Constitution had introduced a special requirement for the entry into force of amendments: they had to be approved by the organs of legislative power with a majority of at least two thirds of the Federation's constituent entities. The Russian Federation Law amending the Constitution, when it entered into force, would have to be signed by the President of the Russian Federation and promulgated.

Languages:

Russian.

Identification: RUS-95-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 20.11.1995 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 06.12.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Parliamentary elections.
General principles – Separation of powers.

Keywords of the alphabetical index:

Parliamentary elections / Parliamentary seats, qualifying level.

Headnotes:

In accordance with the constitutional principle of the separation of powers, the Constitutional Court is not entitled to act in lieu of the legislature.

Summary:

The deputies of the State Duma applied to the Constitutional Court to check the constitutionality of the "Federal Law on the election of deputies to the State Duma of the Federal Assembly of the Russian Federation". The Supreme Court, which disputed the constitutionality of establishing a five per cent qualifying level for seats, also referred the matter to the Constitutional Court.

The Constitutional Court found that the regulations governing electoral procedures could have different solutions, and such solutions were determined on a legislative basis. The choice between this or that variant and its enshrinement in electoral law depended on real social and political circumstances and was a question of political expediency. In accordance with the constitutional principle of the separation of powers, the Constitutional Court was not entitled to act in lieu of the legislature. Moreover, in compliance with the law, it ruled only on questions of law and was bound to refrain from considering matters relating to policy.

The law on the election of deputies to the State Duma had been adopted in June 1995. The applicants had lodged their application with the Constitutional Court five months after the law had entered into force, during an election campaign and at the climax of the electoral process, when candidates had declared their participation and had been registered. The very timing of the application indicated that the true motive of the applicants was political rather than legal. Judicial debate during election campaigning, just before the vote, could unjustifiably complicate the electoral process,

exert a negative influence on the will of the electorate and, in sum, bias the results of the vote. Moreover, the questions raised by the applicants were not only linked to the results anticipated from the vote, which were not directly dependent on the law at dispute, but also concerned circumstances that would require investigation. The ascertainment of the facts relative to violations of electoral rights in response to applications alleging such violations fell within the competence of general law courts.

The Constitutional Court held that the appeals concerning the aforementioned questions did not meet the criterion of admissibility within the meaning of the Law on the Constitutional Court. Examination of these appeals would constitute an encroachment upon the jurisdiction of either the legislature, whose role it was to guarantee the representative nature of the legislative organ, or the general law courts which were required to rectify violations of electoral rights. The Constitutional Court refused to examine the applications.

Languages:

Russian.

Identification: RUS-95-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 24.11.1995 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 05.12.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Regional elections.
Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental rights – Civil and political rights – Freedom of movement.
Fundamental rights – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Refugees.

Headnotes:

Temporary stays of citizens outside their place of residence do not justify striking them from the register of their place of permanent or principal residence. For this reason, the absence of citizens at the time of registration for the electoral roll may not be used as a reason for refusing to register them on the electoral roll of the corresponding constituency.

Summary:

The law of the Republic of North Ossetia on "election to the Parliament of the Republic of North Ossetia-Alania" provides for the registration on the electoral roll of persons who have the right to vote and are permanently resident on the territory of the corresponding constituency. On the basis of this law, the Central Electoral Commission for the election of deputies to the Parliament of the Republic of North Ossetia-Alania decided not to register on the electoral roll citizens who did not reside on the territory of the republic and were located outside its frontiers, regardless of the reasons for their absence. The Government of the Ingush Republic applied to the Constitutional Court to check the constitutionality of the aforementioned law.

The Constitutional Court stated that the question as to the recognition of a citizen's right to be registered on the electoral roll was sufficiently important to be considered as a constitutional matter because it was directly linked to the right of citizens to participate in free elections, which were the supreme expression of the people's power. According to the "Federal law on fundamental guarantees of the electoral rights of citizens of the Russian Federation", the criterion for registering citizens on the electoral roll of their constituency was their residence on the territory of that constituency, established in accordance with the "Federal Law on the right of Russian Federation citizens to freedom of movement and the choice of place of abode and residence within the frontiers of the Russian Federation". Furthermore, "place of residence" meant not only "permanent place of residence", but also "principal place of residence". The law obliged citizens to be registered in their place of abode or place of residence. As regards forced migrants, their place of abode was classified as a temporary residence according to the Russian Federation law on "forced migrants" and therefore merely a place of abode and not a place of residence. Temporary stays by citizens outside their place of residence did not give rise to the possibility of striking them from the register of their place of permanent or principal residence. For this reason, the absence of citizens at the time of registration for the electoral roll could not be used as

reason for refusing to register them on the electoral roll of the corresponding constituency.

The Constitutional Court held that the law of the Republic of North Ossetia on "election to the Parliament of the Republic of North Ossetia-Alania" complied with the Constitution in that it provided for the registration on the electoral roll of persons who had the right to vote and were permanently resident on the territory of the corresponding constituency, and it did not prevent their being registered on the electoral roll in the event of a temporary stay outside the frontiers of the Republic of North Ossetia.

At the same time, the Constitutional Court considered the law unconstitutional, since it made no provision for the registration on the electoral roll of citizens entitled to vote but residing principally on the territory of the corresponding constituency.

It was suggested to the Parliament of the Republic of North Ossetia-Alania that the law of the Republic of North Ossetia on "election to the Parliament of the Republic of North Ossetia-Alania" be brought into line with the Constitution and the "Law on fundamental guarantees of the electoral rights of citizens of the Russian Federation".

The aforementioned decision of the Central Electoral Commission was considered as having no authority of enforcement. The decisions of the electoral commissions concerned as to the recognition of the powers of the deputies of the Parliament of the Republic of North Ossetia-Alania, whose election or non-election might have been influenced by the incorrect interpretation of the electoral body, were also to be reviewed.

Languages:

Russian.

Identification: RUS-95-3-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 28.11.1995 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 14.12.1995 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Sources of constitutional law – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
Institutions – Federalism and regionalism – Distribution of powers.

Keywords of the alphabetical index:

Constitution, changes / Region, name.

Headnotes:

Changes in the name of a constituent entity of the Russian Federation are incorporated in the text of the Constitution by decree of the President of the Russian Federation, on the basis of the decision of that constituent entity adopted according to the procedure of its own choice.

Summary:

Article 137 of the Constitution states that in the event of a change in the name of a republic, territory, region, city of federal significance, autonomous region or autonomous district, the new name of the constituent entity of the Federation shall be included in the Constitution of the Russian Federation. The State Duma applied to the Constitutional Court to interpret the constitutional norm in question.

The Constitutional Court stated that the solution as to changes of constituent entities' names lay exclusively within the jurisdiction of the constituent entities themselves. That solution formed the legal basis for the inclusion of the new name in the Constitution.

The Constitutional Court explained that the Russian Federate President's position as head of State and guarantor of the Constitution made it his duty to have amendments and modifications incorporated into the Constitution, by officially promulgating the legal texts adopted under Articles 136 and 137 of the Constitution. And the President was not entitled to reject the amendments and modifications adopted. In the event of a dispute between the state authorities of the Federation and those of its constituent entities, or between the constituent entities of the Federation, as to the inclusion of a new name in the Constitution, the President could use conciliation procedures and other powers provided for in the Constitution.

Changes in the name of constituent entities of the Federation were included in the text of the Constitution by decree of the President of the Russian Federation, on the basis of the decision of that constituent entity adopted according to an established procedure. Account could not be taken of a change of name of a constituent entity of the Federation and, consequently, the relevant procedure could not be applied to a change of name, which affected the foundations of the constitutional system, human and civil rights and freedoms, the interests of the other constituent entities of the Federation or of the Federation as a whole, or the interests of other States, and which also presupposed a change in the composition of the Federation or in the constitutional legal status of its constituent entities.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data

1 September 1995 – 31 December 1995

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 3
- Decisions on the merits by panels of the Court: 5
- Number of other decisions by the plenum: 2
- Number of other decisions by panels: 147
- Total number of cases brought to the Court: 192

Important decisions

Identification: SVK-95-3-006

a) Slovak Republic / **b)** Constitutional Court / **c)** 2nd Panel / **d)** 25.10.1995 / **e)** II.ÚS 26/95 / **f)** Case of right to trial within reasonable time / **g)** to be published in the Collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Judges, independence.

Headnotes:

Although the independence of judges is guaranteed by the Constitution, they are bound by the law and have to act in conformity with fundamental rights.

Summary:

The applicant claimed that his right to be tried within a reasonable time, which is guaranteed by Article 48.2 of the Slovak Constitution, had been violated. This right was claimed to have been infringed by the ordinary courts when deciding the paternity of the applicant, who was 20 years old.

The applicant was born in 1975. In February 1977 his mother went to the District Court in the town of Košice with an action to determine her son's paternity. The case remained unsettled until May 1995, when the applicant brought his case to the Constitutional Court.

According to Article 130.3 of the Slovak Constitution the Constitutional Court may commence proceedings upon a petition presented by an individual claiming that his or her rights have been violated. The Constitutional Court ruled that the applicant had the right to know the identity of his father and that his claim before the Constitutional Court was made in accordance with Article 130.3 of the Constitution.

The father was a Belgian citizen. This was one of the reasons why, according to the Circuit Court for Košice, the paternity had not been determined for a period of more than 18 years. The Circuit Court also objected to the competence of the Constitutional Court to deal with the matter. The objection of the Circuit Court was founded on the assertion that under Article 144.1 of the Constitution "Judges shall be independent and bound only by law". Accordingly, the Circuit Court argued that the Constitutional Court could not protect the applicant's right to a trial within a reasonable time sooner than the paternity case itself was settled.

The Constitutional Court recalled that under Article 152.4 of the Constitution all laws "shall be interpreted and applied in conformity with this Constitution". This provision meant that independent judges were obliged to respect citizens' rights when deciding cases brought to them. A person may claim that the right to have his or her case settled without unreasonable delay has been violated. Whenever that person exercises his or her right, the governmental authorities competent to protect that right are obliged to act. That is why there is no interference with the judge's independence if before the paternity issue is decided by the ordinary court the Constitutional Court enquires into whether the applicant's rights are treated by the ordinary court in accordance with the Constitution. The Constitutional Court thus came to the conclusion that it had competence to decide on the merits of the case.

The Constitutional Court further ruled that the reasonableness of time spent to decide a case cannot be distinguished from an unreasonable delay solely on the ground of time consumption. The speed and effectiveness of the proceedings in every case is determined by the characteristics of the case. That is why there must be some "separation criteria". The complexity of the case, the conduct of applicants and the conduct of the judicial authorities are the leading criteria to be taken into account in the light of the circumstances surrounding the case.

Under these criteria, certain failures within the activity of the Circuit Court for Košice were noted by the Constitutional Court. The Constitutional Court therefore decided that the paternity determination, which had lasted for 18 years and 8 months at the time of the decision on the breach of the constitutional right, gave rise to an infringement of Article 48.2 of the Constitution of the Slovak Republic.

Languages:

Slovak.

Identification: SVK-95-3-007

a) Slovak Republic / **b)** Constitutional Court / **c)** Plenum / **d)** 29.11.1995 / **e)** PL.ÚS 29/95 / **f)** Case of constitutional conflict on powers of fact-finding commission of Parliament / **g)** Collection of laws of the Slovak Republic, no. 2, 1996 Z.z., in brief; complete version to be published in the Collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Organisation.
Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Parliamentary enquiry.

Headnotes:

Parliament is allowed to exercise investigative activity under the Constitution. The parliamentary power to investigate is however limited by the Constitution, and it may be exercised solely when monitoring the activities of the Government or when supervising the implementation of the Constitution and other laws.

Parliament has the power to establish any internal body so as to improve activities within its own structure. If the parliamentary bodies are established for the purpose of acting outside Parliament, then their power is of a different nature. According to Article 92.1 of the Constitution "The National Council of the Slovak Republic shall establish Committees composed of its

own members." According to the Constitution, no other body may be established by Parliament for external activities.

Parliamentary fact-finding bodies established in conformity with the Constitution may not infringe the constitutional rights and liberties of citizens.

Summary:

A group of 43 members of the Slovak Parliament asked the Constitutional Court to rule a constitutional conflict between Article 29.5 and Article 55a of the Statute on the Deliberation Procedure of the National Council of the Slovak Republic, and Articles 2.2 and 85, in conjunction with Articles 17, 86 and 92 of the Slovak Constitution. In the applicants' opinion, the establishing of parliamentary fact-finding commissions infringed the constitutional principle of separation of powers, and of personal liberty of citizens.

In accordance with the above-mentioned articles of the law on parliamentary procedure, fact-finding commissions were established in 1991 as extraordinary parliamentary bodies. Those commissions were vested with the power to invite natural and juridical persons to their sessions when investigating "extraordinary significant facts of public interest within the competence of Parliament" according to Article 55.a.1 of the Statute. The fact-finding commissions were also vested with some additional powers emanating from the Code of Penal Procedure. The applicants were of the opinion that those powers were contrary to the Constitution.

The Constitutional Court was called upon to consider the following issues:

a. Is it in accordance with the Constitution for Parliament to have an investigative activity?

b. What parliamentary body has the right to carry out investigations?

c. What restrictions may be imposed on natural and juridical persons when the authorised body of Parliament exercises the investigative power?

The applicants argued that the powers of fact-finding commissions were contrary to the personal liberty of every individual guaranteed by Article 17 of the Constitution. The Constitutional Court ruled that personal liberty does not include all privileges enabling a man to feel and behave as a free human being. Within the Constitution there is a bunch of rights and liberties dedicated to this purpose, such as the right to privacy, freedom of thought, conscience, religion and faith, etc. Personal liberty according to Article 17 guarantees solely the freedom from external bars and restrictions imposed on free movement. The applicants' claim to an infringement of personal liberty was therefore ill-founded. The right to privacy in fact is the constitutional right provided for the protection of the individual from restrictions imposed on him or her by investigative powers under Article 55.a of the Statute on Parliamentary Deliberation Procedure of 1991.

On those grounds the Constitutional Court decided that the Articles of the Statute On the Parliamentary Deliberation Procedure enumerated in the petition were in conflict with Articles 2.2, 16.1, 85, 86 and 92 of the Slovak Constitution.

Languages:

Slovak.

Identification: SVK-95-3-008

a) Slovak Republic / **b)** Constitutional Court / **c)** 2nd Panel / **d)** 13.12.1995 / **e)** II.ÚS 94/95 / **f)** Case of constitutional conflict between a generally binding rule passed by a local self-government and fundamental rights of citizens / **g)** Collection of laws of the Slovak Republic, no. 3, 1996 Z.z., in brief; complete version to be published in the Collection of decisions and judgments of the Constitutional Court / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Local self-government, legislative powers.

Headnotes:

Local authorities are vested with the power to impose duties on persons to a limited degree, within the limits of the rights and freedoms regulated by the Constitution.

Summary:

The Attorney General of the Slovak Republic brought to the Constitutional Court, under Article 125, a petition on the constitutional conflict between generally binding rule no. 23/1995 passed by a local authority in the city district of Bratislava-Karlova Ves and the Constitution. Consumption of all drinks containing more than 0.75% of alcohol at public places was prohibited by generally binding rule no. 23/1995. The Attorney General found this prohibition to be in conflict with Articles 2.3, 13.1, 13.2, 20 and 68 of the Slovak Constitution as well as with the Charter of Fundamental Rights and Liberties, Law no. 372/1990 On Petty Offences and Law no. 369/1990 On Self-Government in Municipalities.

The main issue for the Constitutional Court when deciding the case was the relationship between Article 2.3 of the Constitution and its 4th chapter on local self-government. Under Article 2.3, "Anyone may act in a way not forbidden by law and no one may be forced to act in a way not prescribed by law." The pivotal question was whether the word "law" in Article 2.3 could be identified with a "generally binding rule" passed by the local authority. The Constitutional Court ruled that the word "law" means solely the laws adopted by Parliament through a procedure provided by the Constitution in its provisions on the law-making power of the National Council of the Slovak Republic.

The Constitutional Court further ruled that the legal rights of citizens may be limited only if two conditions are met. The first one is a formal prerequisite provided for in Article 2.3 of the Constitution. The second *sine qua non* condition is a material provision set out in Article 13.4 of the Constitution. This provision reads: "When imposing restrictions on constitutional rights and freedoms, respect must be given to the essence and meaning of these rights and freedoms."

The right to privacy is guaranteed by Article 16.1 of the Constitution. The Constitutional Court ruled that the very essence of this right is to prevent public authorities and state bodies including local authorities, from imposing on individuals restrictions that are not absolutely necessary. In the same way that the Law on Petty Offences and Law no. 46/1989 on Protection from Alcoholism, Smoking and Other Forms of Toxicomania allow for the protection of public order from the breach of public peace by noisy persons, drunk persons, etc., the municipal authority had the power to protect public peace through laws adopted for the whole country, without having to adopt a generally binding rule of its own. Accordingly the prohibition on drinking within the city district imposed on persons living or staying was not strictly necessary. Furthermore, the chance to be free from public authorities' interferences deriving from the right to privacy is in some respect guaranteed not only behind closed doors but also in public places. This right was not respected by the municipal authority that imposed its prohibition on every person without reference to individual conduct or to any real participation in a breach of public peace. On these grounds the Constitutional Court decided that the generally binding rule passed by the municipal authority of Bratislava-Karlova Ves was not in conformity with the provisions of the Slovak Constitution.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 September 1995 – 31 December 1995

Number of decisions

The Constitutional Court held 12 sessions during this period, in which it dealt with 118 cases in the field of the protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 19 cases in the field of protection of human rights and basic freedoms (cases denoted Up- in the Constitutional Court Register and submitted to the plenary session of the Court; other Up- cases were examined by a senate of three judges at session closed to the public). There were 217 U- and 195 Up- unresolved cases from the previous year at the start of the period (1 September 1995). The Constitutional Court accepted 140 U- and 83 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 years.

In the same period, the Constitutional Court resolved:

- 77 cases (U-) in the field of the protection of constitutionality and legality, of which there were (taken by the Plenary Court):
  - 20 decisions and
  - 34 resolutions

- 23 cases (U-) were joined to the above mentioned cases because of common treatment and decision; accordingly the total number of resolved cases (U-) is 100.

- In the same period, the Constitutional Court resolved 57 cases (Up-) in the field of protection of human rights and basic freedoms (5 decisions taken by the Plenary Court, 52 decisions taken by a Senate of three Judges).

- The 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 the Official Bulletin, but are 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);
- in the Journal *Pravna Praksa* (Legal Practice) (Slovene abstracts with the full-text version of dissenting or concurring opinions).

Decisions are also available to users:

- since 1 January 1987 via the on-line STAIRS, ATLASS and TRIP databases (Slovene and English full text language version);

- since August 1995 on the Internet (Slovene constitutional case-law of 1994 and 1995 in full text in Slovene and in English) at:
  "http://www.sigov.si/us/eus-ds.html";

- since 1995 in the East European Case Reporter of Constitutional Law, published by BookWorld Publications, The Netherlands.

Important decisions

Identification: SLO-95-3-012

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.09.1995 / **e)** U-I-48/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia no. 58/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental rights – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

By-law, retroactive effect / Customs.

Headnotes:

In accordance with the Constitution, the obligation to pay customs tariffs may only be introduced by law. The statutory provision which authorises the Government to decide that material objects shall be considered tariffable goods, in addition to those determined by law, cannot be used so as to impose obligations to pay customs duties, because such an interpretation of the law or use of authority would be in conflict with the Constitution. The government decree, as a regulatory act, may supplement legislative norms only so far as

it does not impose regulations outside the legislative framework and does not introduce new obligations.

Summary:

Article 147 of the Constitution determines that the State shall prescribe taxes, customs dues and other levies by law. Article 155 provides that laws, other regulations and general acts may not be retroactive.

In accordance with the provisions of Article 147 of the Constitution, the obligation to pay customs dues may only be introduced by law. A Decree, as a regulatory act, must be in accordance with the Constitution and the law (Article 153 of the Constitution), and may not contain provisions for which there is no basis in law, and in particular it may not determine rights and obligations such as the introduction of the payment of customs dues. Article 5.4 of the Customs Act authorises the government to decide which material objects shall count as customs goods in addition to those defined in the law, but it is not possible to use this provision to impose an obligation to pay custom dues, since such an interpretation of the law or use of such authority would be in conflict with the Constitution. A regulatory act, as an implementing act, may supplement legislative norms only so far as it does not impose regulations outside the legislative framework and does not introduce new obligations.

Since the impugned decree additionally defined as customs goods objects which at the time they were brought onto the territory of the Republic of Slovenia did not count as customs goods, its provisions had a retroactive effect. According to the provisions of Article 155 of the Constitution, regulatory acts may not (under any circumstances) have retroactive effect. Only laws may contain retroactive provisions, and then only when deemed necessary for the public good and if the said provisions do not frustrate previously secured rights.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-3-013

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.09.1995 / **e)** U-I-184/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 58/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Agricultural properties, merger / Land, regulation on use / Social property.

Headnotes:

The Law and By-law on Agricultural Land regulate legal matters which are ruled by the former socialist concept of ownership rights in a way which is in conflict with the current Constitution. The Law and the By-law envisage the creation of social property and regulate trade in agricultural land. The purchase of land and farming operations are arranged in a way that is unusually stricter than the measures necessary for the protection of agricultural land under the Constitution and for the protection of the social position of farmers. This is due to a conceptional difference in the notion of property.

Summary:

The Constitutional Court found in relation to the Agricultural Lands Act that matters which were ruled by the older concept of ownership rights were regulated in a manner which was in conflict with the current Constitution. The Act envisaged the creation of social property and regulated trade in agricultural land. The purchase of land and farming operations was regulated in a manner which was unusually stricter than measures necessary for protecting agricultural land in accordance with Article 71.2 of the Constitution or for protecting the social position of farmers under Article 4 of the Agricultural Lands Act.

The view of the National Assembly, that the reasons which dictate the existing solution derive from the adopted Strategy of Development of Agriculture in Slovenia and that this or a partially amended solution was also likely to be maintained in the future, could not justify excessive intervention into ownership rights in agricultural land. The achievement of set aims of

agricultural policy, namely the stabilisation of the production of high quality food at the lowest possible price, the assurance of food security in Slovenia, the maintaining of a settled and cultivated landscape, the protection of agricultural land and waters from pollution and improper use, the constant improvement of the competitive capacities of farms and the guaranteeing of parity of income for above average efficient producers, would of course still require restricting trade and other actions in connection with agricultural land. However, in order to ensure the well founded and proportional nature of each individual measure, these measures could not be based only on the characteristics of future owners of land, but rather on the economic importance of individual land and other circumstances.

Supplementary information:

The present case was joined to case U-I-104/94 by Resolution of the Constitutional Court of 02.02.1995 given the similarities in the nature of the claims.

Cross-references:

In its reasoning, the Constitutional Court referred to its decisions no. U-I-122/91 of 10.09.1992, and no. U-I-57/92.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-3-014

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.09.1995 / **e)** U-I-152/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia no. 60/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Non-retrospective effect of law.
Fundamental rights – Economic, social and cultural rights – Freedom to work for remuneration.
Fundamental rights – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Law, retroactive effect / Salaries, State administration.

Headnotes:

It is not a matter of retroactivity if prior circumstances or prior changes in circumstances are taken into account in determining the rights of employees deriving from an employment relation (in this case pay).

Summary:

The Constitution guarantees the right to work, implying a free choice of employment and the accessibility of all working posts to all persons under the same conditions (Article 49 of the Constitution), and obliges the State to create the possibilities for employment and for work, to ensure their legal protection (Article 66 of the Constitution), and to determine by law the conditions for the enjoyment of social security (Article 50 of the Constitution).

The right to pay (salary) for work performed is not explicitly mentioned as a constitutional right. It is cited as a general human right by the Universal Declaration of Human Rights (Article 23.1) and by the International Covenant on Economic, Social and Cultural Rights (Article 7.2).

Slovenia is also bound by ILO Convention no. 131 on Minimum Personal Income, read in connection with the Act of notifying succession in relation to conventions, statutes and other international agreements which represent Acts on the founding of international organisations.

The law guarantees pay for work done, in accordance with general Acts and collective contracts (Article 49.1 of the Act on basic rights from employment, read in connection with Articles 1 and 51 of the Constitutional Act for the Implementation of the Constitution).

It can be deduced from the above-mentioned Acts and regulations that the right to be paid for work done is legally guaranteed for workers in their employment. On the other hand, pay at a specific level cannot be considered an acquired right, because this could be changed in accordance with the law, a collective contract or a general act of an employer.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-3-015

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.10.1995 / **e)** U-I-176/94 / **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 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental rights – Civil and political rights – Right to property – Nationalisation.

Keywords of the alphabetical index:

Nationalisation of farmland.

Headnotes:

Farmland does not become a national asset by nationalisation. It is ownership that is determined in this way.

The exercise of public powers and, in particular, the issuing of general acts for the exercise of public powers in the framework and on the basis of the Constitution and the law implies that the holder of public powers cannot adopt general acts which would change the rights and obligations of legal entities arising under the legislation in force or which would autonomously vest new rights and obligations in legal entities.

Summary:

The unfounded opinion of the applicants was that farmland and forests have become by nationalisation national assets or natural resources which are regulated by Article 70 of the Constitution. Land is a national asset only when it is in the nature of things to be made available for general use to everyone under equal conditions, or if it is expressly defined as a national asset by the legislator (by statute). In other cases, land is subject to civil law. In principle, in legal transactions, it can be used either way. In accordance with the degree of public interest, however, legal transactions relating to these things may be dealt with by public law. Depending on the purpose and use of some things, their legal status may approach the regime applying to national assets (without the things themselves becoming in this way a national asset). In the case of land in general, and of farmland in particular, the imposition of special conditions for their use or special protection is based on Article 71 of the Constitution. This, however, does not imply a special right of utilisation, as provided for in Article 70 of the Constitution with reference to national assets.

Supplementary information:

Concurring opinion of a judge of the Constitutional Court.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-3-016

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.10.1995 / **e)** U-I-294/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia no. 64/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Media, registration of radio and television / Media, subscription fee / Subordinate legislation, limits.

Headnotes:

Rules adopted by the broadcasting company cannot impose upon owners of radio and television sets the payment of the costs of sealing the radio / television set on the occasion of its removal from the register, because no such authorization has been granted by statute.

Summary:

According to Article 67 of the Act on Public Information Activities, Radio and Television (RTV) Ljubljana was, inter alia, authorised to determine the method of registration of radio and television sets and their removal from the register. This authorization should be deemed to refer to the regulating of professional and technical questions relating to registration of radio/television sets and their removal from the register (this also including their sealing in the event of their removal from the register), but should not be deemed to refer to the determination of financial obligations of subscribers relating to such procedures. By imposing on the subscriber mandatory payment of the costs of sealing, the Rules have interfered with the area of regulation of financial obligations, for which no authorization has been granted by law. This is why the provisions of the disputed article are in conflict with Article 15 of the Radio and Television Slovenia Act, which applies in-lieu-of Article 67 of the Act on Public Information Activities. The provisions of the above-mentioned article are also in conflict with provisions of Article 153 of the Constitution, according to which regulations must be in conformity with laws.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-3-017

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.10.1995 / **e)** U-II-152/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia no. 61/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of jurisdictional conflict.
Institutions – Executive bodies – Powers.
Institutions – Courts – Jurisdiction.

Keywords of the alphabetical index:

Jurisdictional dispute, court of justice, administrative body.

Headnotes:

In deciding a denationalization claim, the decisive fact is the actual basis for the transfer of property rights. Where there was a legal transaction between a real estate owner (the present applicant for denationalization) and an applicant for land consolidation which incorporated all of the components specified by the rules of the law of obligations, with the land consolidation decision only being used as the means of executing such a transaction, the decision concerning the denationalization claim came within the jurisdiction of the courts of justice.

In the case where the legal title to the transfer of property right consists of a decision of a State body, the decision, in accordance with the rules of administrative proceedings, shall come within the jurisdiction of an administrative body.

Summary:

The determination of jurisdiction concerning the resolution of a particular denationalization claim depends on the answer to the following question: which was the act that served as the actual legal basis for the transfer of property rights. Was this done on the basis of

a) a land consolidation decision issued on the basis of the Farmland Exploitation Act; or

b) a contract concluded in an extrajudicial procedure?

Article 54.1 of the Denationalization Act requires administrative authorities to decide as first-instance bodies on denationalization requests relating to property nationalised on the basis of regulations referred to in Article 3 and 4 of the Denationalization Act. These regulations also include, in accordance with the Denationalization Act, Article 3.1, clause 29, of the Basic Act on Farmland Exploitation on the basis of which the land consolidation decisions were issued. The Denationalization Act provides that denationalization cases covered by Article 5 shall exceptionally

come within the jurisdiction of the courts of justice (Article 56). This refers to cases where things or property became the property of the State on the basis of a legal transaction effected as the result of threatened use of force or use of deceit by a State body or representative of the authorities.

At the time of issuing of the relevant land consolidation decisions, the land consolidation procedure was regulated by the Farmland Exploitation Act. Under Article 56 of the Act, the owner of the land being joined to other land on the basis of the land consolidation scheme was entitled to compensation, which had to be paid by the land consolidation claimant. The land consolidation claimant and the owner of the appended land could, in accordance with Article 60 of the Act, agree upon some other form of compensation for the land so appended. The procedure with regard to land consolidation had two phases.

Any proposal for land consolidation was decided by the Council of the District's People's Committee responsible for agriculture, which by its decision gave full or partial permission for land consolidation or refused to approve it (Article 63.1 and 63.2 of the Act). The land consolidation approved by decision was effected by the land consolidation committee, which also issued the corresponding land consolidation decision (Article 64.1 and Article 65.1). The business organisation concerned came into possession of the appended land on the effective date of the final land consolidation decision (Article 67).

Having regard to the decision of the Constitutional Court no. U-I-7/92 of 31 March 1994 (OdlUS 27/III), and also to the established court practice, the text of Article 5 of the Denationalization Act, which deals with the transfer of things or property into State ownership "on the basis of a legal transaction", shall be deemed to cover, in addition to the cases where legal title for transfer of property into socially-owned property derived from a legal transaction only, also cases where legal title derived from an act of a State body (decision) based on a valid legal transaction effected prior to that.

Cross-references:

In stating the reasons for this Decision the Constitutional Court makes reference to its Decision no. U-I-7/92 of 31 March 1993.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-3-018

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.10.1995 / **e)** U-II-23/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia no. 64/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Powers of local authorities.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Conflict of powers between municipality and State.

Headnotes:

Decisions on administrative matters in the field of physical planning and building construction (location and construction permits, decisions on approval of announced work) which were formerly decided by municipal administrative bodies come within the competence of Administrative Units.

Summary:

Article 140.1 of the Constitution provides that the range of duties and functions performed by a municipality shall include such local matters affecting only the people of that municipality, as the municipality may independently determine. Among the basic conditions for establishing the system of local self-government as guaranteed by the Constitution is also the defining of competences of new Municipalities. At the time when the new Municipalities were created, the conditions were not fulfilled by the legislator because the powers of the State and Municipalities were not delimited. Instead of doing this, the legislator, in Article 101.1 of the Administration Act of 1 January 1995, had transferred "all administrative tasks and competences in those fields for which Ministries have been established, and all other such administrative tasks of governmental character within the competence of Municipalities as have been laid down by statute" from the competence of the Municipalities to the competence of the Administrative Unit and Ministries. On the basis of this provision, Administrative Units have also taken over competence with regard to administrative acts in the field of land use (location permits, decisions on approval of announced work) and building constructions (construction permits and inspection certificates) which were

formerly issued by municipal administrative bodies in accordance with the Act on Housing Development Planning and Other Use of Land and the Building Construction Act.

Cross-references:

In stating the reasons for this Decision the Constitutional Court makes reference to its Decision no. U-I-285/94 of 30 March 1995.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-95-3-019

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.10.1995 / **e)** U-I-122/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia no. 64/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Public finances – Taxation – Principles.
Fundamental rights – General questions – Basic principles – Equality and non-discrimination.

Keywords of the alphabetical index:

Accrued rights / Law, retroactive effect / Tax exemption.

Headnotes:

The determination of conditions applying to the enforcement, with retroactive effect, of the right to tax exemption for the portion of profits of legal persons used for the purchase of its own shares is left to the free discretion of the legislator and is not in conflict with the Constitution if the principle of equality of legal entities before the law has not thereby been infringed.

Summary:

Article 6.c of the Act on Amendments and Supplements to the Act on the Regulation of Calculation and Payment of Certain Taxes and Contributions within the Framework of Company Ownership Transformation Procedures does not interfere with accrued rights of payers of tax on corporate profits; on the contrary, Article 6.a of the Act only introduces the right to tax exemption and extends the area of its application by the disputed provision. Such application has been prescribed by the above-mentioned Act in the public interest, to ensure as quickly as possible, and in as wide a manner as possible, the application of the Act and the realisation of its aim, namely to encourage companies to reduce their operating costs, to decrease the draining of cash from companies, to increase profits and promote economic growth, and to stimulate those economic entities which had already acted in compliance with social criteria regarding the paying of wages prior to the enforcement of the Act. The disputed provision is thus not in conflict with either Article 155 of the Constitution or Article 154, because it does not impose on taxpayers obligations but grants them rights which they may, subject to the fulfilment of specific conditions, enforce with retroactive effect.

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-95-3-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.04.1995 / **e)** CCT 5/94 / **f)** *The State v Zuma and Others* / **g)** / **h)** 1995(2) South African Law Reports 642 (CC); 1995(4) Butterworths Constitutional Law Reports 401 (SA).

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Historical interpretation.
Sources of constitutional law – Techniques of interpretation – Literal interpretation.
Sources of constitutional law – Techniques of interpretation – Teleological interpretation.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Presumptions, constitutionality.

Headnotes:

A statutory presumption requiring an accused to prove that a confession was not freely and voluntarily made is unconstitutional, because it violates the presumption of innocence, the right not to be a compellable witness against oneself, and the right to a fair trial.

Summary:

A presumption in the Criminal Procedure Act provided that an accused's confession would be presumed to be freely and voluntarily made unless the accused proved the contrary. The Court characterised the presumption as a "reverse-onus" provision because it shifted the onus of proof away from the prosecution to the accused with respect to the admissibility of the confession.

The presumption involved a confession which by definition admitted all elements of the crime. The Court found that if such confession was made admissible on the basis of the presumption, the accused could be convicted notwithstanding a reasonable doubt that the confession was freely and voluntarily made, and consequently, notwithstanding a reasonable doubt that the accused was guilty. This constituted an unjustifiable violation of the right to be presumed innocent and the right to a fair trial enumerated in the bill of rights.

Cross-references:

This case was heard together with *The State v Mhlungu and Others* (CCT 25/94).

Two later cases heard together, *The State v Bhulwana* (CCT 11/95) and *The State v Gwadiso* (CCT 12/95), concerned a similar "reverse-onus" presumption which this court declared unconstitutional.

Languages:

English.

Identification: RSA-95-3-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.06.1995 / **e)** CCT 3/95 / **f)** *State v Makwanyane and Another* / **g)** / **h)** 1995 (3) South African Law Reports 391 (CC); 1995 (6) Butterworths Constitutional Law Reports 665 (CC).

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 – Right to life.
Fundamental rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Capital punishment / Punishment, cruel, inhuman or degrading.

Headnotes:

Capital punishment is unconstitutional because it constitutes an unjustified infringement upon the right not to be subjected to cruel, inhuman or degrading punishment, and upon the right to life.

Summary:

The Court found that the imposition of the death penalty is inherently arbitrary, in that it is conditioned by factors such as race, class and poverty, the quality of advocacy, the subjective attitudes of the judiciary, and the possibility of error. The element of arbitrariness is compounded by the fact that the death penalty is uniquely irremediable. This supports the conclusion that capital punishment offends the constitutional proscription of "cruel inhuman or degrading treatment or punishment". The uniquely cruel, degrading and inhuman character of capital punishment also offends internationally recognised conceptions of human dignity that are embodied in the South African Constitution.

The unqualified right to life enshrined in the Constitution lends further support to the conclusion that the death penalty falls into the category of cruel, inhumane or degrading punishment.

While public opinion regarding the issue is of some relevance, the question before the Court was not what the majority of South Africans believed to be the appropriate sentence for murder, but rather whether the Constitution allowed capital punishment. Under the new legal order that was for the courts to determine.

Turning to the question of whether the infringement of fundamental rights entailed by capital punishment could be justified as both reasonable and necessary under the limitations clause, the Court noted that this evaluation involved a weighing of values and a case-by-case proportionality assessment. It was true that the death penalty acted as a deterrent, but the fact that no proof was offered that the death penalty constituted a more effective deterrent than long term imprisonment undermined the argument that capital punishment was both reasonable and necessary. Similarly, the objective of prevention and the objective of retribution (which, in view of the fundamental values underlying the Constitution, ought not to be accorded great weight), had to be evaluated in light of alternative punishments that could satisfy those goals while impairing rights to a lesser extent, and be weighed against the factors that, taken together, rendered capital punishment cruel, inhuman and degrading. While imprisonment involved the limitation of the incarcerated's rights for purposes of punishment, execution destroyed those rights altogether.

The Court decided that, taking all of these factors into account, the clear and convincing case necessary to justify capital punishment had not been made.

The Justices unanimously concurred in the order of the Judge President, and a majority of the Justices concurred in the Judge President's decision that the death penalty was an unjustifiable limitation on the prohibition of cruel, inhuman or degrading treatment or punishment.

Supplementary information:

This decision was issued under the Interim Constitution. Capital punishment remains the subject of lively debate. The working draft of the new Constitution published on 22 November 1995 by the Constituent Assembly addresses the question of capital punishment within the context of the right to life. Two options are proposed for discussion. One expressly abolishes capital punishment; the other envisages that the death sentence be constitutionally sanctioned as an exception to the right to life. The final text of the Constitution is expected to be adopted by the Constituent Assembly in May 1996.

Languages:

English.

Identification: RSA-95-3-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 08.06.1995 / **e)** CCT 25/94 / **f)** *The State v Mhlungu and Others* **g)** / **h)** 1995 (3) South African Law Reports 292 (CC); 1995 (7) Butterworths Constitutional Law Reports 793 (CC).

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Constitution.
Constitutional justice – Decisions – Types – Procedural decisions.
Constitutional justice – Effects – Temporal effect – Retrospective effect.

Sources of constitutional law – Categories – Written rules – Constitution.
Sources of constitutional law – Techniques of interpretation – Historical interpretation.
Sources of constitutional law – Techniques of interpretation – Literal interpretation.
Sources of constitutional law – Techniques of interpretation – Teleological interpretation.

Keywords of the alphabetical index:

Application to pending cases.

Headnotes:

The Constitution applies as of the date of its commencement, and Section 241.8 thereof does not preclude an accused person in a criminal trial pending before a court of law at the commencement of the Constitution from relying upon any applicable provision of the chapter on fundamental rights.

Summary:

This case pertained to criminal proceedings initiated prior to 27 April 1994, the date of the commencement of the Constitution. The trial judge referred two issues to the Constitutional Court for determination. The first issue concerned the constitutionality of Section 217.1.b.ii of the Criminal Procedure Act, which presumed confessions made in writing before a magistrate to have been made freely and voluntarily and without undue influence, unless the contrary was proved. This question was decided by the Court in the case of *S v Zuma and Others* (CCT 5/94) which was heard simultaneously with this case. The second question concerned the proper construction of Section 241.8 of the Constitution, which provides:

"All proceedings which immediately before the commencement of this Constitution were pending before any court of law ... exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution."

The majority of the Court found that a literal interpretation of Section 241.8 would lead to unjust and absurd consequences, unintended by the framers, by depriving persons involved in legal proceedings of the protection of the Constitution merely because such proceedings had begun prior to the commencement of the Constitution. The majority interpreted Section 241.8 to have as its sole purpose the preservation of the authority of pre-Constitution courts to continue to function as courts for the purpose of adjudicating pending cases. The accused in this case could thus rely on their constitutional right to a fair trial and to be presumed innocent as the basis for their challenge to Section 217.1.b.ii, notwithstanding that proceedings against them had been initiated before the commencement of the Constitution. Section 217.1.b.ii was rendered invalid in respect of any criminal trial which commenced before, on or after 27 April 1994, and in which the final verdict was or might be given after 27 April 1994.

The minority noted that Section 241.8 provided expressly that pending cases shall be dealt with as if the Constitution had not been passed. The purpose of the section was not only to ensure that courts which had derived their power to hear cases from the old Constitution could continue to hear them under the new Constitution, but also to ensure that there would be an orderly transition from the old to the new order so as to avoid the dislocation that would be caused by introducing a different set of legal precepts in the course of pending proceedings.

Cross-references:

This case was referred and heard together with the case of *S v Zuma and Others* (CCT/5/94), *Bulletin* 3/95 [RSA-95-3-001]. The Court declared Section 217.1.b.ii to be unconstitutional in *Zuma's* case but had left the interpretation of Section 241.8 to be decided in this case.

Languages:

English.

Identification: RSA-95-3-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.06.1995 / **e)** CCT 20/94 / **f)** *The State v Williams and Others* / **g)** / **h)** 1995(3) South African Law Reports 632 (CC); 1995(7) Butterworths Constitutional Law Reports 861 (CC).

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Teleological interpretation.
Fundamental rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
Fundamental rights – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Dignity, right / Punishment, cruel, inhuman or degrading / Punishment corporal, juvenile.

Headnotes:

A statutory provision providing for whipping as a sentencing option for juveniles violates the right to dignity and the protection against cruel, inhuman and degrading treatment or punishment.

Summary:

A statutory provision providing for juvenile whipping violated the right to human dignity and the prohibition on cruel, inhuman and degrading treatment or punishment. The Court concluded, after analysing comparable international bill of rights provisions, and the growing international and national consensus against juvenile whipping, that juvenile whipping did not conform to the values underpinning the Constitution and the bill of rights.

Languages:

English.

Identification: RSA-95-3-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 22.09.1995 / **e)** CCT 19/94, CCT 22/94 / **f)** *Coetzee v The Government of the Republic of South Africa and Others; Matiso and Others v The Commanding Officer of the Port Elizabeth Prison and Others* / **g)** / **h)** 1995(4) South African Law Reports 631 (CC); 1995 (10) Butterworths Constitutional Law Reports 1382 (CC).

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Civil debt, imprisonment.

Headnotes:

A system of imprisonment for non-payment of a civil debt is inconsistent with the Constitution where the system does not adequately distinguish between those unwilling to pay and those unable to pay.

Summary:

Certain provisions of the Magistrates' Courts Act were referred to the Constitutional Court. The provisions, which form part of the system for the enforcement of civil debts, made it possible, in particular circumstances, for a judgment creditor to have the judgment debtor imprisoned if the debt was not paid.

The Court held that the particular provisions in question unjustifiably infringed the right to freedom of the person. The majority found the provisions over broad, impacting not only those unwilling to pay their debts but also those who are unable to pay. The Court also held that the provisions could be excised from the Act while leaving in place a meaningful debt enforcement mechanism.

Languages:

English.

Identification: RSA-95-3-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 22.09.1995 / **e)** CCT 27/95 / **f)** *The Executive Council of the Western Cape Legislature and Others v The President of the Republic of South Africa and Others*

/ g) / h) 1995 (4) South African Law Reports 877 (CC); 1995 (10) Butterworths Constitutional Law Reports 1289 (CC).

Keywords of the systematic thesaurus:

General principles – Separation of powers.
General principles – Rule of law.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Powers.
Institutions – Federalism and regionalism – Distribution of powers.

Keywords of the alphabetical index:

Legislation, procedural requirements.

Headnotes:

Parliament cannot give to the President its constitutional authority to enact primary legislation.

The Constitutional Principles set out in a schedule to the interim Constitution apply to the text of the "final" Constitution, not the interim Constitution.

An amendment to legislation cannot be read (in effect or otherwise) as an amendment to the Constitution; the form and manner requirements for amending the Constitution therefore cannot apply to an amendment to legislation.

The President cannot rely on a "transitional" provision of the interim Constitution to amend legislation by proclamation for first local government elections, because the "transitional" provision in question does not apply to such legislation.

Summary:

The case was brought as a result of a dispute between the provincial government of the Western Cape and the central government. The Western Cape Minister for Local Government rejected the Western Cape Demarcation Board's proposal for the demarcation of the province into local government areas and adopted his own proposal instead. He was empowered to do so by the Local Government Transition Act (the "Act"). The Act contemplated that the Local Government Provincial Committee (the "Committee") would concur in the decision of the Minister; if it did not do so, the dispute would be resolved by the Special Electoral Court. The Committee duly concurred in the Minister's demarcation decisions, but only after the Minister had changed the composition of the Committee pursuant to powers delegated by the provincial Executive Committee, the body authorised by the Act to change the said composition. Thereafter the President, acting under powers given to him by an amendment to the Act, issued two proclamations changing the provisions of the Act regulating the appointment of the Committee and reversing the provincial Minister's demarcation decisions.

Ultimately the Court considered four main contentions advanced by the parties. First, the Applicants contended that Constitutional Principle XXII, concerning powers of the provinces, rendered the presidential proclamations unconstitutional. The Court unanimously rejected the contention, holding that the Constitutional Principles articulate norms required to be embodied in the "final" Constitution; they do not apply to the interim Constitution.

Second, the Applicants contended that the two proclamations were unconstitutional because they in effect amended the constitutional powers of provinces without following the amendment procedures. The Court rejected that argument, holding that an amendment to legislation cannot be read, in effect, as an amendment to the Constitution, and that the form and manner requirements for amending the Constitution therefore could not apply to an amendment to legislation.

Third, the Applicants contended that the amendment of the Act under the authority of which the proclamations had been issued was itself invalid and that the proclamations were therefore invalid. The Justices of the Court reasoned differently on this point. The Court, however, was unanimous in holding that the amendment was invalid because it granted the President such wide legislative powers that it constituted an infringement of the legislator's constitutional role as lawmaker.

Fourth, the Respondents defended the proclamations as being sanctioned by a "transitional" provision of the Constitution which empowers the President to amend certain laws by proclamation, the administration of which he or she assigns or has assigned to a province. The Respondents argued that because the President had assigned the administration of the bulk of the Local Government Transition Act to the provinces he was entitled to amend it by the proclamations at issue. A majority of the justices (in the opinion of Kriegler J) concluded that the proclamations could not be saved by the transitional provision of the Constitution, because the provision did not apply to the Act.

The Court therefore invalidated the two proclamations at issue. Because of the serious implications for local

government and pending elections arising from the invalidation of the amendment to the Act and of the proclamations issued thereunder, the Court, exercising powers it is given by the Constitution, kept those provisions in place and gave Parliament until 25 October 1995 to correct the defects.

Languages:

English.

Identification: RSA-95-3-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.1995 / **e)** CCT 23/94 / **f)** *Shabalala and Others v The Attorney-General of the Transvaal and Another* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Procedure – Preparation of the case for trial.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Criminal procedure.

Headnotes:

The common law rules which preclude an accused person, in all cases and regardless of the circumstances, from obtaining access to the contents of the police docket concerning his or her case, and from consulting with State witnesses without the permission of the prosecution, violate the right of an accused person to have a fair trial.

Summary:

An application was made to the trial court for the accused to have access to the contents of the police docket concerning their case. A related application was made for an order permitting the accused to consult with the State witnesses. The basis for these applications was that the accused required such access to exercise their right to a fair trial. Both applications were refused by the trial court which nevertheless referred the constitutional issues to the Constitutional Court for a ruling.

Prior to the commencement of the Constitution the common law rules of privilege precluded an accused from obtaining access to the contents of the police docket, regardless of the circumstances. An accused person was similarly precluded from consulting with State witnesses (in all cases and regardless of the circumstances) without the consent of the prosecution, which could refuse such consent in its discretion.

The Court held both these "blanket" rules to be inconsistent with the right of an accused person to a fair trial. The Court held that an accused person ought to have such access to the contents of the police docket as may be necessary properly to exercise his or her right to a fair trial. The assessment of what is fair in each case depends on the circumstances of each case: where the circumstances do, *prima facie,* justify an accused having access to the relevant contents of the police docket, the prosecution may successfully resist such disclosure if it is able to show that it has reasonable grounds to believe that such disclosure might, *inter alia*, impede the proper ends of justice.

Similarly, an accused person ought to be entitled to consult with State witnesses where his or her right to a fair trial would, in a particular case, otherwise be impaired. A member of the office of the relevant Attorney-General should be approached for consent, and be entitled to be present at such consultation. If such consultation is refused, the accused may approach the Court for such permission. No witness may be compelled to consult with an accused person, and the prosecution may resist the claim of an accused if it is able to show that it has reasonable grounds to believe that such consultation might, *inter alia*, impede the proper ends of justice.

Languages:

English.

Identification: RSA-95-3-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.1995 / **e)** CCT 11/95, CCT 12/95 / **f)** *State v Bhulwana*; *State v Gwadiso* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Presumption, dealing in cannabis.

Headnotes:

A statutory provision that a person found in possession of a particular quantity of cannabis is presumed to be dealing therein, unless the contrary is proved on a balance of probabilities, violates an accused person's right to be presumed innocent, and is therefore unconstitutional.

Summary:

The Drugs and Drug Trafficking Act provided that an accused person shall be presumed to have been dealing in cannabis, if he or she is found to have been in possession of more than 115 grams thereof, unless the contrary is proved. The Constitutional Court found that this section violated the fair trial provisions of the Constitution and in particular that of the right to be presumed innocent. This was so because, in order to rebut the presumption, the accused was required to prove on a balance of probabilities that he or she was not dealing in cannabis; an accused person could therefore be convicted of a crime even if his or her guilt was not established beyond a reasonable doubt.

Cross-references:

See *State v Zuma and Others* (CCT 5/94), *Bulletin* 3/95 [RSA-95-3-001], an earlier case relating to presumptions concerning the voluntariness of confessions.

Languages:

English.

Identification: RSA-95-3-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.1995 / **e)** CCT 36/95 / **f)** *The Premier of KwaZulu-Natal and Others v The President of South Africa and Others* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Constitution.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Federalism and regionalism.

Keywords of the alphabetical index:

Constitution, amendment, validity.

Headnotes:

Various amendments effected to the Constitution were held to have been effected in compliance with the procedural requirements of the relevant sections of the Constitution governing amendments to the Constitution. The Court discussed, but expressly avoided deciding, the question whether there may be instances when, although the procedural requirements for amending the Constitution are met, the substance of the amendment sought to be effected exceeds the definition of "amendment" and will therefore be unconstitutional.

Summary:

The significance of this judgment lies in its context: an ongoing debate about the relationship between central government and the provinces in South Africa.

The Premier of KwaZulu-Natal (one of the provinces in South Africa) and others sought an order from the Constitutional Court declaring various amendments purportedly effected to the interim Constitution to be unconstitutional. The impugned amendments were to Sections 149.10, 182, 184.5 and 245 of the interim Constitution. The amendments were said to encroach impermissibly on the powers of the provinces.

The amendment to Section 149.10 purported to grant the President (rather than the relevant provincial legislature) the power to determine the remuneration of the Premiers and Executive Councils of the provinces. The amendment to Section 182 purported to provide that the President could (after certain consultation) determine guidelines for the identification of traditional leaders who would become *ex officio* members of local government. Prior to this amendment

no such guidelines were required. The amendment to Section 184.5 purported to alter the procedure for the referral of legislation to traditional authorities and the amendment to Section 245 purported to provide that until 31 March 1996 local government could not be restructured otherwise than in accordance with the Local Government Transition Act (even if elections were held prior to that date). Prior to this amendment, local government could be restructured by a competent authority after local government elections had been held.

The amendments were attacked on two main grounds: First, they were said to conflict with one of the constitutional principles in Schedule 4 to the interim Constitution prohibiting the exercise of national powers which encroach on the integrity of the provinces. The Court held that the purpose of the constitutional principles was to govern the enactment of the final Constitution currently being drafted by the Constitutional Assembly.

The main thrust of the attack on the amendments was that the proviso to Section 62.2 of the Constitution (a manner and form provision governing amendments to the legislative and executive competences of the provinces) required the consent of a province when the legislative or executive competence of such province was being amended. The applicants contended that Parliament ought to have obtained the consent of the KwaZulu-Natal provincial legislature before effecting the amendments. No such consent was obtained. The Court held that this attack was misconceived as the proviso to Section 62.2 requires consent where an amendment is targeted at one or some but not all of the provinces. The impugned amendments applied to all the provinces and therefore fell outside the proviso to Section 62.2.

The Court discussed but did not decide whether a purported amendment to the Constitution, following the prescribed procedures, but "radically and fundamentally restructuring and re-organising the fundamental premises of the Constitution", would be constitutionally permissible. In the opinion of the Court, none of the impugned amendments fell within such a category.

Cross-references:

The Executive Council of the Western Cape Legislature and Others v The President of the Republic of South Africa and Others (CCT 27/95), *Bulletin* 3/95 [RSA-95-3-006]. This decision is also of interest in the context of the ongoing debate about federalism which is occurring in the Constitutional Assembly in preparation of the final Constitution which is due to be adopted in May 1996. It also discusses the purpose of the constitutional principles and Section 62.2.

Languages:

English.

Identification: RSA-95-3-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.12.1995 / **e)** CCT 5/95 / **f)** *Ferreira v Levin and Others; Vryenhoek and Others v Powell and Others* / **g)** / **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 – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Self-incrimination.

Headnotes:

A statutory provision which compels testimony at a company liquidation investigation and permits the use of such testimony against the person who testified in subsequent criminal proceedings is inconsistent with the Constitution to the extent that the use of such testimony is permitted in subsequent criminal proceedings.

Summary:

This case, a referral from the court below, was initiated when the applicants challenged, among other things, Section 417.2.b of the Companies Act on the basis that it infringed their constitutional rights. The Constitutional Court dismissed all other challenges because the issues were not properly referred. The Court also decided that the challenge to the constitutionality of Section 417.2.b was not properly referred, but nevertheless decided the case after granting direct access.

In terms of Section 417 of the Companies Act any person with knowledge of a company's affairs may be summoned to appear at an enquiry. Such a person may, in terms of Section 417.2.b, be compelled to answer all questions put to him or her. The section also provides that all questions must be answered on pain of the payment of a fine or imprisonment, even though the answers given may incriminate the person examined, and further that all answers given may be used against the person examined in subsequent criminal proceedings.

The Court held unconstitutional that part of the section which permitted self-incriminating answers extracted under compulsion to be used as evidence against the person who testified in subsequent criminal proceedings. The effect of the holding is that a person summoned to testify may be compelled to answer all questions put, including those which may be self-incriminating. However, self-incriminating answers given by such a person may no longer be used in subsequent criminal proceedings against such a person. The Court excepted the use of self-incriminating answers in criminal proceedings in which the person examined is charged with the offence of perjury. The Court made no order regarding the use, in a subsequent criminal trial against the person in question, of evidence which had been derived from compelled testimony (as distinct from the compelled testimony itself) but decided by a majority (in the opinion of Ackermann J) that the admission or exclusion of such "derivative evidence" was a matter to be decided by the judge or other officer presiding over the criminal trial in ensuring that the accused received a fair trial.

Although a majority of the Court agreed that the use of compelled testimony in subsequent criminal proceedings infringed a right, there was disagreement as to which right was infringed. A majority (in the opinion of Chaskalson P) held that this infringed a person's right against self-incrimination, which forms part of the right to a fair trial. Procedurally, it was held that a person's interest in having a declaration of unconstitutionality was not limited by Section 7.4, but rather constrained only by the concept of "sufficient interest" to be decided by the Constitutional Court. In this case, the applicants had sufficient interest. O'Regan J agreed that the provision infringed the right against self-incrimination, but disagreed that the applicants in this case had standing under Section 7.4.b.i. She opined that in this case the applicants could rely on Section 7.4.b.v (concerning the public interest) to give them standing (even though they did not explicitly do so in this case). Mokgoro J opined that the proviso was a violation of the right against self-incrimination, but did not agree with either Ackermann J or Chaskalson P in their definitions of freedom. Ackermann and Sachs JJ opined that a person examined in a Section 417 enquiry could not invoke the fair trial rights of accused persons before such person becomes an accused. They found Section 417.2.b to be in violation rather of the applicants' right to freedom. Ackermann J opined that the right to freedom encompasses the right of individuals not to have obstacles to possible choices and activities placed in their way by the State. A majority of the Court disagreed with the wide meaning of freedom opined by Ackermann J. Sachs J found the right to freedom was infringed in this case, but also disagreed with such a wide meaning of freedom. Kriegler J agreed with the decision that the proviso is not a violation of freedom, but also agreed with the decision that fair trial rights do not arise in this case.

Ackermann and Sachs JJ decided that the violation of the right to freedom could not be justified in terms of Section 33.1 of the Constitution (the limitations clause) because the infringement of the right was not necessary to achieve the legislative objective. The majority held that the limit to the right against self-incrimination could not be justified in terms of Section 33.1 for the same reasons given by Ackermann J regarding the right to freedom. Kriegler J dissented, opining that the balancing of interests required by Section 33.1 had not been reasoned adequately. However, because he opined that these cases were not, in any event, properly before the Court, he did not reach an ultimate conclusion on the issue of limitations under Section 33.1.

Languages:

English.

Identification: RSA-95-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 08.12.1995 / **e)** CCT 17/95 / **f)** *State v Ntuli* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Determination of effects by the court.
Constitutional justice – Effects – Temporal effect – Postponement of temporal effect.
Fundamental rights – Civil and political rights – Equality.

Fundamental rights – Civil and political rights – Procedural safeguards.

Keywords of the alphabetical index:

Appeal, right / Equality, right.

Headnotes:

A statutory provision that a certain class of persons convicted in lower courts were required to obtain judges' certificates in order to appeal against conviction or sentence violates their rights to have recourse to a higher court and to equality, and is therefore unconstitutional.

Summary:

The Criminal Procedure Act provided that imprisoned persons who had been convicted in the magistrates' courts and who lacked legal representation did not have an automatic right of appeal to the Supreme Court (as enjoyed by all other classes of convicted person), but were allowed to appeal only if a Judge certified that there were reasonable grounds for such appeal. The Constitutional Court found that because no proper procedure in respect of the granting of judges' certificates was prescribed, there was no guarantee of an adequate reappraisal of every case, as required by the fair trial provisions in the Constitution, the relevant clause of which provides every person with the right: "to have recourse by way of appeal or review to a higher court than the court of first instance". Because the requirement of judges' certificates applied only to a certain class of persons convicted in the lower courts, that requirement also violated the right to equality before the law as proclaimed in the Constitution. The Constitutional Court gave Parliament until 30 April 1997 to remedy the defect, failing which the unconstitutionality of the relevant section of the Act would come into effect.

Cross-references:

See *State v Rens* (CCT 1/95) for a case dealing with the leave to appeal procedures applicable in the higher courts.

Languages:

English.

Identification: RSA-95-3-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.12.1995 / **e)** CCT 1/95 / **f)** *State v Rens* / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Appeal, right.

Headnotes:

Requiring leave to appeal is not inconsistent with the constitutional right to have recourse to a higher court than the court of first instance.

Summary:

Applicants challenged the constitutionality of the provisions in the Criminal Procedure Act which provided that a person convicted of an offence before a higher court was required to apply for leave to appeal from the presiding judge. If such leave was refused, the accused could thereafter seek leave by petition to the Chief Justice. No similar procedure was prescribed for the lower courts.

The Court held that leave to appeal procedures in general and the particular procedure under review did not constitute a limitation on the right to a fair trial, because the demands of fairness were satisfied by the prescribed procedure, which did not close the doors of the appeal process.

The Court also decided that the procedure, although not applicable in the lower courts, did not violate the right to equality, because there were no cogent reasons why cases tried in the higher courts should follow identical procedures to those applicable to lower courts given the differing circumstances of such courts.

Cross-references:

See *State v Ntuli* (CCT 17/95) for a decision distinguishing between the leave to appeal procedure and the application for a judge's certificate.

Languages:

English.

Spain
Constitutional Court

Statistical data

1 September 1995 – 31 December 1995

Type and number of decisions:

- Judgments: 70
- Decisions: 116
- Procedural decisions: 1177

Cases submitted: 4479

Important decisions

Identification: ESP-95-3-026

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.09.1995 / **e)** 130/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 246 of 14.10.1995, 10-13 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Community law.
Fundamental rights – Civil and political rights – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Community law / Social Security / Unemployment.

Headnotes:

A worker of Moroccan nationality employed by a Spanish undertaking cannot be excluded from unemployment benefit to which national workers are entitled if he meets the statutory conditions governing that benefit in accordance with the requirements of Community law, which is directly applicable in Spain.

Summary:

The appellant, who is of Moroccan nationality, challenged a decision of the labour court dismissing his appeal against the Administration's refusal to grant him the unemployment benefit to which he considered he was entitled following the termination of his contract of employment with a Spanish undertaking for which he

had worked as a crew member and which had contributed to the Special Scheme for Seamen for cover against all eventualities, including unemployment, throughout the term of the contract of employment. He was refused unemployment benefit on the ground that, under the Bilateral Convention on Social Security (of 6 November 1978) between the Kingdom of Spain and the Kingdom of Morocco and ILO Convention no. 97 on Migration for Employment, it was not included among the benefits granted to Moroccan workers in Spain. The appellant therefore sought constitutional protection, claiming that he was the victim of discrimination prohibited by Article 14 of the Spanish Constitution, and that the decision under appeal violated Article 41(1) of Council Regulation (EEC) No 2211/78 of 15 September 1978 in so far as it treated him differently from other seamen purely on the ground of his nationality.

The Constitutional Court considered that the constitutional importance of the right invoked by the appellant and which he alleged to have been violated depended on its being recognised by law or by a treaty, even though, apart from international treaty law, it was also necessary to take account of the fact that Spain had been a Member State of the European Communities since 1 January 1986 and that it was therefore governed by the rules of the Community system, which have direct effect for citizens and prevail over domestic provisions. Consequently, it must not be forgotten that Council Regulation (EEC) No 2211/78 approved the Cooperation Agreement of 27 April 1976 between the European Community and the Kingdom of Morocco, and that Article 41(1) established that workers of Moroccan nationality and any members of their families living on the territory of a Member State of the EEC were to "enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed". Furthermore, the Court of Justice of the European Communities held (Judgment in Case C-18/90 of 31.01.1991 *Kziber* [1991] ECR I-199) that the principle of freedom from all discrimination, based on nationality, meant that a person who satisfies all the conditions laid down by national legislation for the purposes of entitlement to unemployment allowances "may not be refused those benefits of the ground of his nationality".

Languages:

Spanish.

Identification: ESP-95-3-027

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 26.09.1995 / **e)** 139/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 246 of 14.10.1995, 45-51 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Legal persons.
Fundamental rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Fundamental rights, entitlement / Right to freely communicate information.

Headnotes:

According to the purposes for which each legal person was created, it is possible to establish a sphere of protection of its identity, in two different senses: either in order to protect its identity when it develops its purposes or in order to protect the conditions in which it exercises its identity, which include the right to honour. Accordingly, a legal person may also suffer a violation of its right to honour as a result of the disclosure of facts concerning its identity, where such disclosure constitutes defamation or causes it to lose its reputation in the estimation of others.

The expression "accurate information" within the meaning of Article 20.1.d of the Spanish Constitution means information verified according to the rules laid down for the information profession, in contrast to lies, rumours or merely insidious statements.

Summary:

The fact which led to the present appeal for constitutional protection was the publication of a magazine article in which, in connection with a case of presumed corruption of officials, a construction undertaking was accused of carrying out illegal acts amounting to bribery. The undertaking referred to in the item brought proceedings under the special procedure for civil judicial protection of the right to honour against the authors of the article, who lodged the present appeal for constitutional protection. The decision in the proceedings referred to above, which was upheld at last instance by the Supreme Court, granted the application, on the ground that there had been an unlawful interference with the applicant undertaking's right to honour. The journalists now seeking constitutional protection relied on the violation of Articles 18.1

(the right to honour) and 20.1.d (the right freely to communicate information) of the Spanish Constitution. In the case of Article 18.1 they considered that it was wrong to ascribe the right to honour to legal persons, while in the case of Article 20.1.d they considered that freedom to communicate information did not prevail in the judgment in which the two rights were weighed against one another.

As regards the first right, the Constitutional Court, after recalling the relevant case-law, stated that, regard being had to the scheme of the Constitution, the meaning of the right to honour could not and must not exclude legal persons from its protection. The applicant undertaking against which the present constitutional proceedings had been brought was therefore actively justified, as a legal person, in applying to the ordinary court, as the owner rather than merely the holder of a legitimate interest, to have that right protected. In order to reach that conclusion, the Court pointed out that from the constitutional aspect it was recognised, expressly or by implication, that legal persons enjoyed certain fundamental rights, and that whether or not this was the position must be defined and explained after each fundamental right had been examined. Accordingly, what had to be examined in the present case was the nature of the right to honour. Previous decisions of the Court varied between a personal conception of honour, which associated it solely with persons considered individually, and an objective conception, in which consideration of the legal possessions protected prevailed: what mattered was loss of reputation in the estimation of others, independently of the individual or collective structure of the subject protected. As the Court had stated in Judgment 214/1991 (the Friedman case, in which protection was extended to all persons belonging to the Jewish people), "violations of the right referred to above need not be directed solely against individuals in order to fall within the scope of constitutional protection. If the converse were to apply all legal persons, including those with a personal substratum, would be denied any protection of their right to honour, with the consequence that violations of or interferences with the honour of persons considered individually would be lawful under the Constitution simply because they did not name the persons against whom they were directed, or were effected in a generic or imprecise manner".

Furthermore, in the present case it was irrelevant that the above-mentioned company's right to honour was not affected by the appellants' exercise of the freedom to communicate information, since the appellants had exercised the right freely to communicate accurate information outside its field of constitutional protection. Consequently, after finding that facts objectively constituting defamation or loss of reputation in the estimation of others were attributed to the above-mentioned commercial company; after finding at first instance and on appeal that the substance of the impugned magazine article was inaccurate with regard to that company; and, lastly, after finding that the attribution of these facts to that company was not an essential ingredient of the information imparted in that article and that the reference to the above-mentioned company could have been avoided with a minimum of journalistic diligence, the Constitutional Court concluded that the decisions under appeal did not in any way violate Article 20.1.d of the Spanish Constitution, since the right invoked was exercised outside the scope of the protection conferred on it by the Constitution.

Languages:

Spanish.

Identification: ESP-95-3-028

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 28.09.1995 / **e)** 140/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 246 of 14.10.1995, 51-63 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Immunity from jurisdiction / Diplomatic agents / Vienna Convention of 1961.

Headnotes:

A Diplomatic Agent's immunity from the civil jurisdiction of the Spanish courts, as an obstacle to or limit on access to the domestic courts laid down in Article 21.1 of the Organic Law on the judiciary with reference to Article 31.1 of the Vienna Convention of 1961, is lawful under the Constitution. Its effect is not disproportionate in relation to the substance of the fundamental right recognised in Article 24.1 of the Spanish Constitution.

Summary:

The appeal in question was lodged against a decision delivered in eviction proceedings for non-payment of rent brought by a landlord against his tenant, an Italian diplomat, who raised an objection on the ground that the court had no jurisdiction to deal with the case because he had diplomatic immunity. The objection was accepted *a quo* by the Court after it had consulted the Ministry of Foreign Affairs in order to ascertain whether immunity from jurisdiction also applied to landlord and tenant relationships, which the Ministry confirmed to be the position. The appellant considered that there had been a violation of, *inter alia*, his constitutional right to the effective protection of the courts (Article 24.1 of the Spanish Constitution) as a result of the courts' decision not to entertain his claim, which deprived him of access to the courts.

The Constitutional Court considered that the ordinary courts' decision as to the rule to be applied (Article 31.1 of the Vienna Convention of 1961, which provides that diplomatic agents are to enjoy immunity not only from criminal and administrative jurisdiction but also from the civil jurisdiction of the courts of the receiving State) was neither arbitrary nor unreasonable. Nor was the interpretation of subparagraph (a) of that article (which provides that a real action relating to immovable assets is not covered by diplomatic immunity) set out in the report issued by the Ministry of Foreign Affairs either arbitrary or unreasonable, since it was consistent with judicial doctrine in other States. It was therefore necessary to conclude that the appellant had received a reply from the courts which was in accordance with the law, even though his claim was not granted, since the courts accepted the defendant's objection that they did not have jurisdiction to deal with the matter. Consequently, since, as is the case here, once it has been ascertained in proceedings that the courts do not have jurisdiction, they cannot deal with the merits of the case, it cannot be claimed that their decision not to deal with a *litis* violated Article 24.1 of the Spanish Constitution, since the courts in question considered that they were not legally empowered to deal with such cases.

Notwithstanding the foregoing, the Constitutional Court considered it necessary to determine, from a constitutional aspect and in order to confirm or amend the above conclusion, whether the limit on or obstacle to the appellant's access to the courts deriving from Article 31.1 of the Vienna Convention was constitutionally lawful, that is whether it corresponded to aims or possessions protected by the Constitution and whether it was proportionate to those aims. In that regard, the Constitutional Court recalled its previous opinion that Article 24.1 of the Spanish Constitution does not recognise an unconditional or absolute right of access to the courts, but a right of access to the courts through existing procedural channels and with regard to the applicable rules of procedure, in such a way that the legislature may impose limits on unrestricted access to the courts, provided that these limits are reasonable and proportionate to the aims which may be established within the framework of the Constitution; furthermore, these statutory limits had been recognised by the European Court of Human Rights with reference to Article 6.1 of the ECHR.

After emphasising that the immunity from jurisdiction in question here did not concern the substantive right which the appellant was asking the Court to endorse but the diplomatic agent's submission to the proceedings, the Court confirmed that this limitation was lawful from the constitutional point of view, since it was based not only on the principle of the sovereign equality of States but also on the principle of peaceful co-operation laid down in the Charter of the United Nations, in other words immunity from jurisdiction had a twofold basis which was objective and reasonable and had been upheld in the judicial doctrine of other States. This was what the legislature had in mind when it determined the scope of the jurisdiction of the Spanish courts (Articles 21 to 25 of the Organic Law on the Judiciary) and provided that they could not deal with cases of immunity from civil jurisdiction and enforcement established by the rules of Public International Law (Article 21.2 of the Organic Law on the Judiciary).

Furthermore, the scheme of immunity provided for by the Vienna Convention allowed the rights and interests of the individuals concerned to be protected. On the one hand, under the Convention that protection could be obtained from the State receiving the diplomatic agent, which was responsible for ensuring that the Convention was correctly applied in Spain and thus for avoiding any abuse which might arise as regards the privileges and immunities contained therein where the individual acted diligently; thus, in a case such as the present case, the landlord could bring the failure to pay the agreed rent to the notice of the Ministry of Foreign Affairs so that it could ask the sending State to order the diplomatic agent to honour that obligation or to waive immunity from civil jurisdiction (Article 32.1 of the Convention). Thus where the individual concerned acted diligently and as a result the receiving State took action *vis-à-vis* the sending State, the landlord might then be able to have access to the civil courts in Spain.

On the other hand, it must not be forgotten that the immunity from jurisdiction conferred on the diplomatic agent did not in any way deprive an individual with whom he had entered into a rental agreement from

judicial protection, since Article 31.4 determines a competent court in which he can rely on his claim, even if it is the court of another State, where it provides: "The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State". Accordingly, in the present case the party seeking constitutional protection could have relied on his claim for payment of the rent before the Italian courts.

Supplementary information:

One judge delivered a dissenting opinion, which was joined by two other judges.

Languages:

Spanish.

Identification: ESP-95-3-029

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.10.1995 / **e)** 143/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 269 of 10.11.1995, 10-14 / **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 sanctions / Prison administration.

Headnotes:

In prison disciplinary proceedings a prisoner may exercise the right of defence not only by obtaining the assistance of his own lawyer but also, under the express provisions of the prison rules, by obtaining the assistance of prison officials, in particular the lawyer-criminologist who is entrusted with the general task of providing information to prisoners and with the specific task of assisting them in any disciplinary proceedings.

Summary:

This appeal for constitutional protection was lodged against a decision issuing from the Regulatory and Administrative Board of a prison sentencing the appellant to twelve days' solitary confinement for a very serious offence against the prison rules; the decision was upheld by two judgments of the Prisons Supervisory Tribunal. During the disciplinary proceedings the appellant unsuccessfully applied to the prison administration for legal assistance from the prison criminologist. According to the appellant, the decisions violated various procedural guarantees recognised in Article 24 of the Spanish Constitution, including the right of defence and the right to effective judicial protection.

The Constitutional Court recalled its own constitutional doctrine, according to which the procedural guarantees provided for by the Constitution for criminal procedure are applicable to disciplinary administrative proceedings. This is particularly so in the event of disciplinary sanctions imposed on prisoners, where these guarantees must be applied very rigorously, since a sanction is a severe restriction on the freedom of the prisoner, who is already restricted by the application of the penalty. Applying this doctrine, the Court considered with regard to the first violation invoked that in the field of prison disciplinary proceedings a prisoner might exercise the right of defence not only by obtaining assistance from his own lawyer but also by obtaining assistance from prison officials, in particular the lawyer-criminologist who is specifically empowered to assist prisoners in any disciplinary proceedings. Although the prisoner had applied in good time to be assisted by this expert in preparing his claims, the administration did not grant his request and thereby violated the constitutionally-protected substance of the right of defence.

Furthermore, with regard to the defect of incongruity represented by the fact that the judgments of the Prisons Supervisory Tribunal made no reference to the violation of the right of defence of which the appellant complained, the Constitutional Court considered, in the light of the foregoing case-law, that since there was nothing in the Tribunal's decision which would enable the Court to appraise the violation of the above-mentioned right, it was necessary to conclude that there had been a breach of the appellant's right to receive an answer based on his claims.

Languages:

Spanish.

Identification: ESP-95-3-030

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 13.11.1995 / **e)** 164/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 298 of 14.12.1995, 26-40 / **h)**.

Keywords of the systematic thesaurus:

General principles – Legality.
General principles – Equality.

Keywords of the alphabetical index:

Financial means, principle.

Headnotes:

Several Administrative Courts raised various questions of unconstitutionality, which were joined for the purpose of the proceedings, regarding Article 61.2 of the Code on Taxation, which is worded as follows: "Where tax is paid after the due date, interest for late payment shall be paid without prior notice, in addition to any penalties which may be imposed in respect of offences committed. In such cases the interest for late payment shall not be less than 10 per cent of the amount of tax payable". The above courts considered that this provision might be contrary to the principle that criminal offences are to be strictly defined by law, the principle of equality and the principle of financial means (Articles 25.1, 14 and 31.1 of the Spanish Constitution).

In the various questions raised, the possibility that the provision might be unconstitutional lay in the first stage of application provided for, namely the stage immediately following the expiry of the date for payment of the amount owed by the taxpayer, and more specifically in the threshold of 10 ten per cent, in so far as it exceeded the amount of the interest for late payment payable on the basis of the time which had elapsed. (In the second stage, on the other hand, interest was payable at up to 10 per cent of the amount of tax owed, without any surcharge being payable.)

The Constitutional Court considered that in order to be able to determine the question from a constitutional standpoint it was necessary first of all to examine the provision in question in the context of ordinary lawfulness, in order to ascertain the legal nature of the specific "surcharge" added to the tax owed and payable where the tax in question was paid after the due date but was independent of the amount of tax owed. In that regard, in the light of its own constitutional doctrine (especially judgment of the Constitutional Court no. 76/1190), the Court ignored the corrective purpose of the surcharge, although some of its external characteristics gave it the appearance of a sanction, since what actually characterises a sanction is its corrective, remunerative or punitive purpose. It was true that Article 61.2 of the Code on Taxation served to secure compensation, so to speak, in the first of the stages provided for, although, taken as a whole, it actually served to discourage late payment of tax, since the surcharge included a financial penalty where tax was paid after the due date and did so in order to encourage taxpayers to pay on time. Despite this coercive, dissuasive or incentive function, however, the purpose of the surcharge (which was also the case of penalty clauses in private contracts or contracts with the administration) was not that of a sanction in the proper sense of the word. Consequently, the surcharge did not in any way constitute a manifestation of "*ius puniendi*" by the State, which meant that the guarantees laid down in Articles 25.1 and 24.2 of the Spanish Constitution in connection with the exercise of the power of sanction were not applicable.

As regards the alleged violations of the principle of equality, Article 14 of the Spanish Constitution recognised the right not to be discriminated against and the citizen's right not to be treated differently by the legislature without reasonable cause, but not the hypothetical right to demand or require to be treated differently (judgment of the Constitutional Court no. 52/1987). The essential complaint here was not that the rules were applied differently without reasonable justification, but specifically the legislature's failure to introduce a distinction based upon the time when the surcharge was determined, which, in the light of what the Court had already said, could not be regarded as a breach of the principle of equality.

Furthermore, the Court did not find that there had been a violation of the principle of financial means. Article 31.1 of the Spanish Constitution provides that everyone is to contribute to the financing of public expenditure in proportion to his financial means. For this reason the principle of financial means did not have the same importance in all fiscal institutions. The principle of financial means, as a constitutional principle, laid down requirements in relation to taxes, which were the various existing fiscal categories, but the same did not necessarily apply with regard to obligations which, strictly speaking, were incidental to the fiscal debt.

Supplementary information:

One judge delivered a dissenting opinion.

Languages:

Spanish.

Identification: ESP-95-3-031

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 20.11.1995 / **e)** 165/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 310 of 28.12.1995, 3-7 / **h)**.

Keywords of the systematic thesaurus:

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:

Administrative implementing measure / Professional associations, sanctions.

Headnotes:

The publication in an official gazette of a decision which had not become final, in which a professional association temporarily suspended one of its members from practising, does not *prima facie* fall within the scope of freedom of expression or freedom to communicate information (Article 20 of the Spanish Constitution). These freedoms therefore cannot serve to cover such an act. Nor does the publication of that decision constitute an unlawful violation of the right to honour (Article 18.1 of the Spanish Constitution), since it has a statutory basis in Article 8.1 of Organic Law 1/1982 of 5 May 1982 on civil protection of the right to honour, personal and family privacy and personal reputation.

Summary:

This appeal for constitutional protection was lodged against a number of judicial decisions refusing the appellant's application for constitutional protection, in this case protection of the right to honour, following the decision of an authority of the professional association to which he belonged to publish in an official gazette the fact that he had been temporarily suspended from practising his profession despite the fact that the decision to suspend him was not final. The question raised here and submitted to the Constitutional Court was whether, in the absence of any relevant statutory provision, the publication of the decision in question constituted a violation of the appellant's right to honour.

The Constitutional Court observed at the outset that the decision to publish the sanction did not come within the scope of freedom of expression or freedom to communicate information, and therefore rejected the existence of any conflict between these freedoms and the right to honour. Furthermore, the Court emphasised that although there was no specific statutory provision to justify the publication of the decision, it had to be borne in mind that any administrative measure was enforceable. In that regard, the Court found that the arguments set out in the judicial decisions under appeal were relevant, and considered that the fact that the decision to suspend the appellant was an enforceable administrative measure, which meant that the body which took the decision to suspend him was empowered to publish the decision immediately so that anyone who might seek the appellant's services might be aware of it, was sufficient justification for any violation of the appellant's honour which might be caused by its publication, in accordance with the provisions of Article 8.1 of Organic Law 1/1982 of 5 May. This provides that "as a general rule, action authorised or decided by the competent authority in accordance with the law cannot be regarded as unlawful interference". The Constitutional Court therefore dismissed the appeal for constitutional protection, being of the view that the ordinary courts had proceeded on the basis of a constitutional concept of the right to honour and that they had properly effected an overall appraisal of the violation and the public interest resulting from the enforcement of the administrative decision.

Languages:

Spanish.

Identification: ESP-95-3-032

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 23.11.1995 / **e)** 174/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 310 of 28.12.1995, 38-44 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arbitration.

Headnotes:

The right to effective judicial protection (Article 24.1 of the Spanish Constitution) is a power of the State conferred on the judiciary and consisting in the provision of judicial activities by the Judges and the Courts. The activity or provision in which the right to effective judicial protection takes material form allows the legislature to define and determine the essential conditions of access to judicial protection. This legislative power cannot have the slightest effect on the essential substance of the right or put in place any arbitrary or capricious obstacles or barriers which render the exercise of the right more difficult unless this difficulty is justified by aims which are justified under the Constitution.

Summary:

The courts which had referred the question of unconstitutionality were uncertain as to the constitutionality of an article of Law 16/1987 of 30 July 1987 on Payment for Land Transport, which provided that, in the absence of express agreement to the contrary by the parties, any disputes arising under a contract for transport by land were to be decided by arbitration where the amount at issue did not exceed 500,000 pesetas. The above courts considered that this provision might infringe the right to effective judicial protection, since, although it did not prevent access to the courts for the resolution of disputes, it made such access conditional upon an express agreement to the contrary, which meant that the exercise of the fundamental right referred to above was made conditional upon the agreement or consent of the other party being obtained.

The Constitutional Court considered that there was no ground for stating that the provision whose constitutionality was called in question by the courts placed an arbitrary or capricious obstacle to access to the courts, in so far as it satisfied the plausible purpose of promoting arbitration as an ideal means of resolving disputes over small amounts more quickly, and thus lightened the courts' workload. However, the fact that the only means of avoiding arbitration was an agreement among all the parties concerned constituted, in the Constitutional Court's view, an obstacle to access to judicial protection which violated the right protected in Article 24.1 of the Spanish Constitution.

The Constitutional Court referred to the relevant constitutional case-law and emphasised that arbitration was compatible with the Constitution, being in effect an equivalent judicial procedure which allowed the parties to achieve the same objectives as they could achieve in the civil courts, and then went on to say that the institutional and compulsory system of arbitration laid down in the impugned provision violated the right to effective judicial protection which everyone enjoyed in order to have his rights and lawful interests protected by the judges and courts, since that provision required that the dispute be submitted to arbitration without taking account of the wishes of one of the parties and thus violated the actual substance of the right of effective judicial protection by making it a requirement that the consent of the opposing party be obtained before a claim against that party could be submitted before a court. In short, where that provision required an express agreement in order to avoid arbitration and have the matter determined by the courts, it subordinated the exercise of the right to effective judicial protection by one of the parties to the consent of the other party, which was contrary to that fundamental right.

Languages:

Spanish.

Identification: ESP-95-3-033

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.12.1995 / **e)** 176/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 11 of 12.01.1996, 7-13 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Natural persons.
Fundamental rights – General questions – Entitlement to rights – Legal persons.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Libel / Strip cartoon.

Headnotes:

Under freedom of expression (Article 20.1.a of the Spanish Constitution), any opinion whatsoever may be expressed, no matter how wrong or dangerous it may appear, even opinions which actually attack the democratic system, since the Constitution also protects those who reject it. The holders of this subjective right are all citizens, although there are certain passive qualified subjects, such as, generally, information professionals, who include, as well as journalists, the directors of magazines or information agencies, who have a right of veto over the content of all copy used in the paper, and also the publishers, whose most important power, inherent in their status, consists in selecting texts in order to publish them.

The substance of the right to honour (Article 18.1 of the Spanish Constitution) is constantly changing and, when all is said and done, depends on the social norms, values and ideas which predominate at the time. From a constitutional standpoint, individuals may also have the right to honour as integral parts of human groups which have no legal personality but which have some other clear and consistent personality formed by other dominant features of their structure and cohesion, such as historical, sociological, ethnic or religious attributes.

Summary:

This appeal for constitutional protection was lodged against a number of judicial decisions convicting the director and publisher responsible for the publication in Spain of the book "Hitler=SS" as the perpetrators of the offence of gross defamation. The book consisted of a unitary publication narrating, in words and pictures, what might be called an account, story or strip cartoon taking place in Nazi concentration camps.

Before dealing with the question, the Constitutional Court was concerned first to identify the freedom at stake and the interests serving to limit that freedom. In that regard, the judgment states that in the light of its narrative content and its complex, graphic and literary form, the book published was a work of fiction which laid no claim to being historical and which must therefore be regarded as coming within the scope of freedom of expression. Furthermore, as regards the right to honour as a limit on that freedom, the judgment states that in this case the Jewish people as a whole, notwithstanding its geographical dispersion, could be readily identified by its racial, religious, historical and sociological characteristics as the target, as a human group, of the invective, injuries and insults proffered in the book published; and since it was collectively attacked, it was right that it could also defend itself collectively, in which case the natural or legal persons encompassed its cultural and human sphere were, by substitution, fully entitled to do so.

In weighing up the conflicting fundamental rights – freedom of expression and right to honour – the Constitutional Court transcribed in part the considerations set out in the judicial decisions against which the present constitutional appeal was brought, and pointed out that the strip cartoon in question "relates a series of episodes taking place in Nazi concentration camps, or rather in death camps, where the protagonists and antagonists in ... inhuman, obscene and despicable acts are Germans belonging to the *Schutz-Staffel* (SS) and Jews, with a clear predominance of sexual aberrations. The transporting of prisoners as though they were cattle, the trickery and deceit of distributing soap before they entered the gas chamber, the smell of gas and corpses and the use of human skin are just a few of the scenes related with derision, the whole narrative being spiced with insulting or contemptuous expressions ('animals' or 'carrion', among others)". The judgment goes on to state that "the physical decrepitude of the victims is graphically accentuated in comparison with the arrogant aspect of their torturers. And so on ad nauseam. The overall purpose of the work is clear upon reading it: it is simply to humiliate the persons who were imprisoned in the death camps, and therefore not only, but very mainly, Jews".

In the Constitutional Court's view, "each illustration, word and drawing is aggressive in itself and contains a message which is ugly and coarse, in a word despicable". "Between what is said and what is concealed, there appears, between the lines, a pejorative concept of an entire people, the Jewish people, as regards its ethnic traits and its beliefs. A racist attitude which is contrary to all the values protected by the Constitution." "The vehicle used to express this racist message, destructive in itself, is a libidinous tone in the words and gestures or attitudes of the characters, which might even be classified as pornography, going

beyond the level of what is tolerable in Spanish society today, and without any socially positive, aesthetic, historical, sociological, scientific, political or even pedagogic merit".

The Constitutional Court considered that all the above was clearly contrary to the principles of a democratic system of peaceful cohabitation and displayed a profound ignorance of the fundamental rights and respect for morals laid down in the Rome Convention on the limits of the freedom exercised. The praise of the torturers, the glorification of their image and the justification of their actions, which necessarily entailed the humiliation of their victims, had no place in freedom of expression as a fundamental value of the democratic system proclaimed by the Constitution, in so far as any use of that freedom which sought to renounce human dignity, the irreducible core of the right to honour today, was *per se* precluded from constitutional protection. In conclusion, the Court confirmed that a strip cartoon such as the one in question here, which transformed an historic tragedy into a burlesque comedy, must be classified as defamation, since it deliberately sought, without the slightest scruple, to secure contempt for the Jewish people and its qualities in order to cause it to lose all reputation in the eyes of others.

Languages:

Spanish.

Identification: ESP-95-3-034

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.12.1995 / **e)** 181/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 11 of 12.01.1996, 25-29 / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Evidence obtained illegally / Telephone tapping.

Headnotes:

Any restriction of the freedom to exercise the rights recognised by the Constitution is such a serious measure that it is necessary to determine the specific reasons which allow such a measure to be applied. Furthermore, the fact or series of facts justifying such a restriction must be explained to the persons to whom the measures are addressed so that they are aware of the reasons and interests on the basis of which their right has been restricted. The reasons on which such a measure is based must relate directly to the interest which serve to limit the right, in such a way that any decision designed to limit or restrict the exercise of a basic right must be properly reasoned and brought to the knowledge of the person concerned, since otherwise there would be a violation of the right to obtain the effective protection of the judges and the courts which everyone enjoys in the exercise of his rights (Article 24 of the Spanish Constitution).

Summary:

This appeal for constitutional protection was lodged against a number of judicial decisions convicting the appellant and others of an offence contrary to the public health regulations. The appellant relied on the violation of the right to the presumption of innocence (Article 24.2 of the Spanish Constitution) after one of the accused had been the victim of illegal telephone tapping, which had provided evidence against the appellant for constitutional protection which formed the basis of the judgment convicting him. The appellant considered that this evidence should not have been taken into account by the courts, since it had been obtained in violation of the fundamental right to the secrecy of telephonic communications (Article 18.3 of the Spanish Constitution).

The Constitutional Court began by referring to the form in which the telephone tapping had been implemented, and emphasised that the tapping had indeed been ordered by the competent court following consideration of the grounds relied on by the police and taking account of the fact that the intervention sought might enable the authorities to obtain evidence which would be difficult or impossible to obtain by any other means. Having said that, the Court observed that following a fresh application by the police the court in question decided to extend the application of the above-mentioned measure without stating the slightest reasons for doing so, and that it was at that precise moment that the conversations held by means of the telephone

being tapped were intercepted, on the basis of which the courts inferred that the appellant was involved in a drug trafficking operation. In that regard, the Court recalled that the monitoring of telecommunications constituted a serious interference in the field of personal privacy recognised by the Constitution which, as such, must be subject to the principle of lawfulness and in particular to the principle of proportionality, which required not only that the gravity of the criminal offence must justify the nature of the measure adopted but also that the requisite guarantees of specific and reasoned judicial authorization must be observed. A statement of the reasons was therefore necessary, since it provided the only means of maintaining the rights of the defence and determining the necessary proportionality between the sacrifice of the fundamental right and the reason for which it must be sacrificed, in which case the courts alone were competent to weigh up the interests at stake and determine whether, in the light of the competing circumstances, the constitutionally protected right must prevail.

In the present case the Constitutional Court considered that the judicial decision ordering the telephone taps to be extended did not observe the constitutional requirements set out above because it did not contain the slightest statement of the reasons, and that the taps carried out from that point onwards therefore constituted an unlawful interference in the right to secrecy of communications. Furthermore, the Court emphasised that the requirements necessary in order to limit a fundamental right could not be regarded as satisfied simply because the statement of the reasons provided when the restrictive measure was originally adopted was available. These guarantees must be observed in all decisions ordering that a restriction on the exercise of the right be continued or modified, and such decisions must at all times state the reasons which induced the court to adopt such a decision. In short, because the telephone taps were carried out without the requisite guarantees of specific authorisation, the tapping of the appellant's telephone following the extension of the restrictive measure could not in any event, in the Constitutional Court's view, be regarded as valid and was of no evidential value.

Languages:

Spanish.

Identification: ESP-95-3-035

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 14.12.1995 / **e)** 185/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 11 of 12.01.1996, 38-51 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
General principles – Legality.
Institutions – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Taxation, principle of lawfulness.

Headnotes:

In tax matters, the constitutional principle according to which taxation may only be imposed in accordance with the law (Article 31.3 of the Spanish Constitution) does not concern any kind of concrete contribution. The constitutional provision uses the expression "property contributions for public purposes" to allow the legislature, while respecting the Constitution, to amend the scope of the various types of tax existing today within a particular type of contribution and to create new public law revenue.

Under the constitutional principle referred to above, a fresh tax can be created, and the factors which distinguish it or which are regarded as essential can be determined, only by means of a law. However, this principle is relative, in so far as, while the criteria or principles governing the matter must actually be contained in a law, it accepts the complementary existence of a regulation, provided that this is essential for technical reasons or in order to optimise observance of the purposes laid down in the Constitution or the law itself, and provided that the regulation is effected in such a way as to be subordinate to the law, to develop it and to supplement it.

Summary:

The constitutional appeal in question was lodged against various provisions of Law 8/1989 of 13 April 1989 on taxes and public prices, which introduced into the State financial system a new public law revenue, described as "public price" and taking the form of a pecuniary consideration, which had been created after certain individuals had requested to use assets, services or activities belonging to or provided by the Administration. The central question raised by the appellants was that the provisions appealed against

violated the constitutional principle that taxes may only be imposed by law, since they empowered the Administration to create public prices, to determine the amounts or the detailed rules and to establish taxes.

Before hearing and determining the question, the Constitutional Court first considered whether or not public prices, as governed by the law in question, possessed the condition of "property contributions for public purposes" and must therefore be subjected to the constitutional principle laid down in Article 31.3 of the Spanish Constitution. In order to do so, it began by defining the scope of the concept of "property contribution for public purposes". The ultimate purpose, *inter alia*, of this constitutional principle in a social and democratic State subject to the rule of law is to ensure that where a public body imposes a coercive contribution on citizens it has been voluntarily accepted by their representatives. Thus the coercive establishment of the property contribution or, what amounts to the same thing, the unilateral establishment by the public power of an obligation to pay without the assistance of or the will of the subject required to meet that obligation is, in the final analysis, the determining element of observance of the constitutional principle referred to above and therefore of the fundamentally coercive nature which the concept of a "property contribution for public purposes" may have. In order to give depth to this argument, the Constitutional Court emphasised that the only way of definitively establishing whether a property contribution was imposed in a coercive manner was to ascertain whether or not the factual situation which gave rise to the obligation was freely and spontaneously met by the subject affected by the obligation, and whether the latter was able to exercise his free will at the time of asking to use the asset in the public ownership, or the service or activity provided by the Administration, whose use served to found the obligation to pay.

In that regard, the Court considered that a contribution was coercive where the realisation of the factual situation derived from an obligation imposed on the individual by the public body, and also where the realisation of the factual situation came about freely, and that it did not consist in a request to use any asset, service or activity belonging to or provided by the public administrative authorities, but that the obligation to pay arose without the slightest voluntary activity on the part of the taxpayer towards the administration and that its sole purpose was the creation of the obligation. In addition, it was necessary to regard as a coercively imposed provision any provision where the asset, activity or service required was objectively necessary to satisfy the essential needs of the individual's personal or social life according to the social circumstances of each moment and place. Finally, it was also necessary to regard as a coercively imposed payment any financial payment deriving from the use of assets, services or activities provided or carried out by public bodies enjoying a *de facto* or a *de jure* monopoly. On the basis of the criteria set out above, the Court went on to analyse each of the cases which had given rise to the new type of contribution known as public prices in order to ascertain whether it was really a case of "property contributions for public purposes" as defined in Article 31.1 of the Spanish Constitution and whether they must therefore be subjected, as such, to the constitutional principle that taxes may only be imposed by the law. The Constitutional Court concluded that the category of public prices introduced by the impugned law contained actual property contributions for public purposes, the constitutionality of which therefore depended on compliance with the principle that taxes can only be imposed by the law.

The Court then went on to consider the rules contained in the above law in order to ascertain whether or not they observed the requirements flowing from this constitutional principle in fiscal matters. In that regard, the Constitutional Court observed that the collaboration between statute and regulation authorised by this constitutional principle might prove particularly intense in the case of proceeds from the use of an asset in public ownership or the provision of an administrative service or activity, in particular as regards the determination and alteration of the amounts or of other elements of the payment, according to the specific circumstances of the various types of services and activities. On the other hand, the Court considered that this intense collaboration was not applicable to the creation *ex novo* of those payments, since, in this sphere, the possibility of intervention in the form of regulations was extremely restricted, as only the legislature was empowered to determine freely what facts were taxable and what legal-fiscal situations it preferred to apply in each case.

In the same vein, the Constitutional Court considered that the principle that taxes can only be imposed by law required legislative intervention between the abstract proposals for the category of public prices and the actual establishment and application of the various types of public prices, the purpose of this intervention being to define these various types of public prices in concrete terms. Accordingly, the Court declared one of the impugned provisions unconstitutional, in so far as it permitted the creation of public law revenue without requiring the intervention of the legislature and because it did not observe the constitutional principle that a tax can only be established by law, to which it must necessarily submit to the extent to which it is a question of actual property contributions. On the other hand, the Court rejected the grounds on which other provisions of the law had been challenged, concerning

the determination of the amount or the detailed rules of public prices, since in the case of that fiscal category the multiplicity of types of taxes that might be introduced, and also the need to take account of technical factors, could justify the fact that a law provided that the amount of a tax was to be established or determined by regulation, in accordance with the criteria or limits laid down in the law in order to ensure that the discretion of the Administration in appraising technical factors was never transformed into freedom of action without being subjected to any limit.

Languages:

Spanish.

Identification: ESP-95-3-036

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 23.12.1995 / **e)** 197/1995 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 21 of 24.01.1996, 34-45 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Administrative disciplinary law / Rights and guarantees of subjects / Right not to plead guilty / Self-incrimination, right against.

Headnotes:

The right not to give self-incriminating evidence and the right not to plead guilty (Article 24.2 of the Spanish Constitution) enjoyed, in criminal proceedings, by the accused or by any person who might be accused, consist in not making any self-incriminating statement and not admitting guilt. They are therefore guarantees or instrumental rights deriving from the rights of the defence, and are implemented passively, that is they are exercised by inaction on the part of the person who is or might be accused, who is entitled to choose the most appropriate defence for his interests during the proceedings and cannot in any event be forced or compelled, by any pressure or constraint whatsoever, to give self-incriminating evidence or to plead guilty.

The principles which inspire criminal proceedings are applicable, with a few slight differences, to disciplinary administrative law, in so far as these are two of the forms taken by the punitive system of the State. There is no doubt that the right not to give self-incriminating evidence is fully applicable and that it must be observed, as a general rule, in the application of any disciplinary measure or administrative sanction, subject to any changes which might be made owing to the differences between the criminal order and disciplinary administrative law.

Summary:

The judicial authorities responsible for promoting the constitutional process considered that Article 72.1 of the Law on traffic, motor-vehicle traffic and road safety, which provides that a vehicle-owner, when required to do so, is to identify any driver who has committed a traffic offence in a vehicle belonging to him, might be contrary to the right not to give self-incriminating evidence where the same person was both the owner of the vehicle and the driver who had committed the offence, since in such cases that provision obliges the vehicle-owner to declare himself guilty of the traffic offence under pain of a pecuniary penalty for a serious offence, or an "autonomous offence" as it is defined in that provision, for failing to identify the driver who has committed the offence.

After pointing out that the right not to give self-incriminating evidence was fully applicable and must as a general rule be observed in disciplinary administrative proceedings, the Constitutional Court stated that the provision in question created a duty on the part of the vehicle-owner, inherent in the fact of being the owner, to collaborate with the administration, which included, as a logical consequence of its permanent availability, certain obligations, including the obligation to know, in so far as reasonably possible, who is driving his vehicle at a given time, taking account, essentially, of the potential risk which the use of the vehicle represents for the life, health and integrity of persons. The vehicle-owner's duty to disclose to the Administration the identity of the person driving the vehicle at the time of the alleged traffic offence, or where the latter could not be identified when a complaint was filed, was not excessive or disproportionate. However, the Court considered that this duty of collaboration must not be confused with the obligation to confess to actions which might form the subject-matter of sanctions, in so far as it did not in any way compel the vehicle-owner to sign a declaration acknowledging that he was guilty or presuming liability to others, but required the owner

to collaborate in the initial tasks of identifying the driver at the time when the complaint was filed. Consequently, in so far as the duty of collaboration imposed by the provision in question did not presume the realisation of a manifestation of will nor the signature of a declaration expressing a content which might give rise to a charge, it could not in any event be considered that this duty, or even the sanction imposed where the owner failed without due cause to fulfil this obligation, described as an "autonomous sanction", was contrary to the right not to give self-incriminating evidence.

Supplementary information:

Two judges delivered a dissenting opinion.

Languages:

Spanish.

Sweden

Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 September 1995 – 31 December 1995.

Switzerland
Federal Court

Important decisions

Identification: SUI-95-3-008

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Court / **d)** 19.04.1995 / **e)** 1P.202/1995 / **f)** Willi Rohner versus the Parliament and Council of State of the canton of Appenzell Outer Rhoden / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 138 / **h)**.

Keywords of the systematic thesaurus:

General principles – Democracy.
Fundamental rights – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Direct democracy / *Landsgemeinde* / Political rights / Secret ballot.

Headnotes:

Article 85.a OJ, safeguarding freedom to vote and of election in the *Landsgemeinde* (annual assembly of the citizens of the canton).
The scope of the right to vote and to elect, as guaranteed by Federal Law (recital 3).
Specific characteristics of the system of direct democracy of the *Landsgemeinden* (recital 4).
Recognition of the *Landsgemeinde* as an institution under cantonal law (recital 5b).
Preliminary review of the cantonal Constitution (recital 5c)?
Despite certain defects inherent in the system, the institution of a *Landsgemeinde* vote does not violate the freedom to vote (recital 5c).

Summary:

The parliament of the canton of Appenzell Outer Rhoden adopted a new cantonal Constitution which it intended to submit to the vote of the *Landsgemeinde* on 30 April 1995. A citizen of the canton lodged a public law appeal in the Federal Court claiming that the new Constitution should be voted on by the citizens of the canton and not put to the vote in the *Landsgemeinde*. He alleged a violation of the right to vote because of certain defects inherent in the *Landsgemeinde*.

According to the case law of the Federal Court, which follows the practice established in the last century by the Federal Chambers and the Federal Council, the right to vote is an unwritten constitutional right. Its purpose is to ensure that the result of a vote is not recognised as valid unless it faithfully and clearly reflects the freely expressed will of the electorate. This principle also applies to *Landsgemeinden*. The Federal Court was therefore called on to consider whether the vote in this assembly conflicted with this constitutional right.

The institution of the *Landsgemeinde* is a traditional form of direct democracy. Recently, the Federal Parliament decided indirectly on two occasions to retain the *Landsgemeinde* by upholding the 1988 Constitution of the canton of Glaris (which upholds the *Landsgemeinde* tradition) and by formulating a reservation to the International Covenant on Civil and Political Rights of 16 December 1966 (reservation to Article 25.b). The institution of the *Landsgemeinde* has a number of advantages and shortcomings, but the shortcomings inherent in the system do not affect the result of a vote taken during the revision of a cantonal Constitution. The public law appeal was therefore dismissed.

Languages:

German.

Identification: SUI-95-3-009

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Court / **d)** 03.05.1995 / **e)** 1P.642/1994 / **f)** René Noth versus Anne Colliard Arnaud and the Indictments Chamber of the Cantonal Court of Fribourg / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 196 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Languages.
Fundamental rights – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Criminal proceedings / Language, freedom of choice / Territoriality, principle.

Headnotes:

Freedom of language and the principle of territoriality, language to be used in criminal proceedings.
Bases and scope of freedom of choice of language and of the principle of territoriality in Federal constitutional law and in Fribourg cantonal constitutional law (recital 2).
Provisions governing the use of a language in cantonal procedural laws (recital 3).
Special characteristics of criminal procedure with regard to language requirements (recital 5a). Determination in the case in question of the scope of freedom of choice of language and of the principle of territoriality in view of the conflicting interests of parties who speak different languages (recital 5b-d).

Summary:

A criminal investigation was initiated against the appellant for causing a traffic accident in the city of Fribourg. As his mother tongue was German, he requested that the criminal proceedings should be conducted in German. The request was refused by the Indictments Chamber. He therefore lodged a public law appeal in the Federal Court for violation of freedom of choice of language. The Federal Court dismissed the appeal.

Freedom of choice of language is an unwritten fundamental constitutional freedom which guarantees individuals and minority groups the right to use their own language. The principle of territoriality permits cantons to adopt measures to protect the integrity and homogeneity of linguistic territories. It is in the first instance for cantons to decide on the use of languages in their territory. The Constitution of the Canton of Fribourg recognises two official languages (French and German), refers to the principle of territoriality and calls on the State to promote understanding between the two linguistic communities.

Cantonal criminal procedure stipulates that French is the procedural language in the Sarine district (where the city of Fribourg is located), but provides for the possibility of granting a derogation in favour of German. Where a case involves several people with different languages, equitable solutions should be sought to take account of the safeguards for the accused set out in Article 6.3 ECHR as well as of the interests of the French-speaking complainant. In the case in question, because of the different interests involved, the freedom of choice of language was not violated.

Languages:

German.

Identification: SUI-95-3-010

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Court / **d)** 21.06.1995 / **e)** 1P.34/1995 / **f)** M'H. versus the Juvenile Criminal Prosecution Authority and the Juvenile Division of the Canton of Basel-Town / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 208 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus*.
Fundamental rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Criminal procedure / Detention, judicial review / Minors.

Headnotes:

Minors held on remand, right to judicial review of detention? Article 5.1 and Article 5.3 ECHR.
Criminal procedure applicable to minors in the Canton of Basle-Town (recital 2); detention on remand need not be ordered by a court (recital 3).
Requirements under Article 5.3 ECHR (recital 4a).
Special characteristics of the criminal procedure applicable to minors (recital 4b).
Detention on remand of a minor comes under Article 5.1.d ECHR; minors do not have the right to the procedure provided for in Article 5.3 ECHR (recital 4c).

Summary:

The appellant, aged 17, was suspected of having committed various offences. He was held on remand by the authority responsible for juvenile criminal procedure in the Canton of Basle-Town. His appeal to the cantonal Juvenile Criminal Division was dismissed. He therefore lodged a public law appeal on the grounds of violation of Article 5.3 ECHR, in which he claimed that he had been deprived of the right to judicial review as provided for in the European Convention on Human Rights. The Federal Court dismissed the appeal.

Unlike the system applicable to adults, the cantonal procedure for minors does not provide for mandatory review of detention. This arrangement is explained by the special provisions for dealing with minors and is not contrary to the Convention. Detention of minors is covered by Article 5.1.d ECHR. The safeguards set out in Article 5.3 ECHR do not therefore apply to minors. However the latter can avail themselves of the possibility of appeal provided for in Article 5.4 ECHR. In the case in question, the requirements of this Article were clearly complied with.

Languages:

German.

Identification: SUI-95-3-011

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Court / **d)** 04.08.1995 / **e)** 1P.358/1995 / **f)** Bertges versus the Prosecutor of the Canton of Basle-Town / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 164 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance – The Bar – Status of members of the Bar.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Defence counsel, contacts.

Headnotes:

Article 6.3.c ECHR; curtailment of the right of the accused to have unsupervised contacts with his or her defence counsel.
The accused, imprisoned in Switzerland, should be permitted to receive unsupervised visits from the counsel authorised to defend him or her in a criminal case abroad. Refusal is only admissible if there is a genuine danger that the defence counsel will take unfair advantage of his or her position of trust.

Summary:

The Prosecutor's Office of the Canton of Basle-Town was carrying out criminal investigations for fraud against Damara Bertges, who has been held on remand. Charges had also been brought in the same proceedings against her husband, Harald Bertges, and two other persons. They were held on remand in Frankfurt, where the German prosecutor was investigating the couple and other persons for the same offences. Damara Bertges was being defended in Basle by lawyer W. and in Frankfurt by a German lawyer, Mrs S., whose husband, Mr S., also a lawyer, was assisting Harald Bertges in Frankfurt.

Mrs S. sought authorisation from the Principal State Prosecutor of the Canton of Basle-Town for unsupervised visits to Damara Bertges in Basle. The request was refused on the grounds that Mrs S. was not authorised to practise in Switzerland and that the danger existed of exchanges of information between the Bertges couple through the lawyers S. The appeal against this decision was dismissed at cantonal level. Damara Bertges therefore lodged a public law appeal in the Federal Court, alleging a violation of Article 6.3.c ECHR.

The right of the accused to communicate without hindrance with his or her defence counsel, without being overheard by an official, derives from Article 6.3.b and Article 6.3.c ECHR and has been recommended by a resolution of the Committee of Ministers of the Council of Europe. This guarantee is not absolute and can be curtailed if a real danger exists of a fraudulent breach of trust. In the case in question, such a danger does not exist, despite the marital relationship between lawyers S. Effective defence in the German proceedings required freedom of contact between Damara Bertges and her lawyer Mrs S. The Federal Court therefore upheld the public law appeal.

Languages:

German.

Turkey
Constitutional Court

Summaries of important decisions, handed down during the period of reference 1 September 1995 – 31 December 1995, will be published in the next edition of the *Bulletin*.

United States of America
Supreme Court

Important decisions

Identification: USA-95-3-013

a) United States of America / **b)** Supreme Court / **c)** / **d)** 07.11.1995 / **e)** 94-7427 / **f)** *Joseph Libretti v. United States* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Criminal procedure / Forfeiture / Jury trial.

Headnotes:

Under the applicable Federal Rules of Criminal Procedure, persons convicted of operating a continuing criminal enterprise are entitled to a jury trial to determine which of their possessions are connected to their illegal activities and therefore must be forfeited to the government. When defendants plead guilty, however, they waive their right to a jury determination of forfeiture. Because forfeiture is considered to be a component of punishment rather than a plea, it falls outside the scope of the relevant federal rules; and thus the trial judge is not obligated to show a factual basis to justify seizure of the defendant's assets.

Summary:

During his trial on federal drug charges, Joseph Libretti entered into a plea agreement with the Government, in which he pleaded guilty to operating a continuing criminal enterprise. Libretti's continuing criminal enterprise was his Colorado and Wyoming based cocaine and marijuana drug-distribution organization which he ran from 1984-1992. Under the terms prescribed for the plea agreement, Libretti consented to forfeit all of his assets that were associated with or obtained through his drug related activities. Libretti's guilty plea consequently meant that he waived his right under the Federal Rules of Criminal Procedure to a jury trial to determine which of his assets were forfeited because of their connection to his criminal operations. The trial court determined that forfeiture was a component of the sentence imposed following the guilty plea, but ancillary to the plea itself and hence outside the reach of the applicable Federal Rule of Criminal Procedure. Because Libretti pleaded guilty, the Government thus had to provide a factual basis for his criminal activities under the Federal and Regulations, but not to substantiate forfeiture of his assets. The Federal Court sentenced Libretti in accordance with the plea agreement.

Libretti appealed to the Court of Appeals for the Tenth Circuit contesting the forfeiture order, arguing that without the proper jury trial, the trial judge should at least have been required to substantiate the forfeiture of his assets by demonstrating that they were associated with his drug distribution. He also contended that the judge should have explicitly warned him that when he entered a plea of guilty, he waived his right to a jury determination of what assets would be forfeited for being drug tainted. The Tenth Circuit was unconvinced and upheld the Federal Court's forfeiture order.

The United States Supreme Court affirmed the Tenth Circuit's ruling, holding that forfeiture was outside the scope of the Federal Rule in question and the District Court was thus not required to investigate the factual basis for a proposed forfeiture of assets involved in a plea agreement. The Court also ruled that it is the responsibility of the defendant's Counsel – not the trial judge hearing the case – to expressly review with the defendant the consequences of a guilty plea.

Languages:

English.

Identification: USA-95-3-014

a) United States of America / **b)** Supreme Court / **c)** / **d)** 22.01.1996 / **e)** 116 S.Ct. 763 (1996) / **f)** *Meirl Gilbert Neal v. United States* / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Consequences for other cases.
Institutions – Courts – Procedure.

Institutions – Courts – Ordinary courts – Criminal courts.

Keywords of the alphabetical index:

Criminal procedure / LSD / *Stare decisis.*

Headnotes:

A sentencing court is required to consider the actual weight of LSD, including the weight of a carrier medium, when determining if a minimum sentence is required under the controlling federal statute.

The principle of *stare decisis* requires that the United States Supreme Court adhere to its previous interpretation of the federal statute in question. As Congress did not subsequently alter the statute, there is no basis for the Court to doubt its previous decision on this matter.

Summary:

Federal statutory law imposes a mandatory minimum sentence of ten-years upon individuals convicted of possessing 10 or more grams of LSD (lysergic acid diethylamide). Because the average dose of LSD is quite small (0.05 mg), LSD is affixed to a carrier medium, such as blotter paper, and sold by the dose. In 1991 the United States Supreme Court held that the statute requires the consideration of both the weight of the LSD and the carrier medium in determining if the 10-gram threshold has been reached, which would require the 10-year minimum sentence. Until 1993, sentences under the Federal Sentencing Guidelines (implemented in 1987 to help ensure more uniform sentences) were calculated in the same manner as those under the statute. That year, the Federal Sentencing Commission revised the Guidelines and established a presumptive weight of doses of LSD at 0.4 milligrams, thus removing the weight of the carrier medium from the calculation. Furthermore, this new formula could also be applied retroactively to individuals who had already been sentenced.

In 1988 Meirl Neal was convicted on two counts involving possession of LSD with the intent to distribute. The combined weight of the LSD and carrier medium were 109.51 grams; alone, the LSD weighed 4.58 grams. Under the Guidelines as originally applied, the higher weight was used. The result was a prison sentence from 188 to 235 months for Neal, while a sentence resulting from the lower weight would have been from only 70 to 87 months. After the revision of the Guidelines in 1993, Neal argued that his sentence under the Guidelines ought to be reduced and that the federal minimum sentence no longer applied to his offence, as he was below the 10-gram threshold. The federal district court and the Appeals Court for the Seventh Circuit agreed that Neal's sentence *under the Guidelines* should be reduced, but pursuant to the Supreme Court's 1991 ruling, both courts held that the combined weight is used in determining whether a minimum sentence is necessary *under the statute.*

The Supreme Court unanimously affirmed the decision of the lower courts. The Court held that regardless of how the Sentencing Commission revises the calculation under the Guidelines, this does not affect the Court's previous interpretation of the statute. Therefore, sentencing courts need to make one calculation in the application of the Guidelines and a separate calculation in the application of the statute.

Languages:

English.

Identification: USA-95-3-015

a) United States of America / **b)** Supreme Court / **c)** / **d)** 04.03.1996 / **e)** 116 S.Ct. 994 (1996) / **f)** *Bennis v. Michigan* / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal procedure / Due Process Clause / Forfeiture.

Headnotes:

An innocent co-owner's interest in property may be forfeited when the property is used to violate the law by other owners of the property. A forfeiture proceeding that conforms to the requirements of Due Process transfers the property to the State, and once property is lawfully acquired under an exercise of governmental authority other than the power of eminent domain, the government is not obligated to compensate an owner.

Summary:

John Bennis was arrested in Detroit, Michigan after police observed him engaged in sexual activity with a prostitute in an automobile parked on a public street. He was subsequently convicted of gross indecency, and the State sought to have the automobile, which he owned jointly with his wife, declared a public nuisance and seized.

Bennis's wife, Tina Bennis, contested the seizure of her interest in the automobile, claiming that she had no knowledge of her husband's intent to use the car to commit an illegal act. The Michigan Supreme Court affirmed the trial court's decision that Tina Bennis was not entitled to compensation for her interest in the automobile.

The Supreme Court of the United States, in a 5 to 4 vote, affirmed the decision of the Michigan Supreme Court. The Court held that Michigan's seizure did not violate the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment. With regard to the Due Process claim, the Court said that the precedents authorizing actions of this type are well established by a long and unbroken line of cases. Based on these decisions, Tina Bennis's interest in the automobile was lawfully forfeited even though she had no knowledge that it would be used in a particular way. The Takings Clause was not violated, as the government had already lawfully acquired the automobile through the forfeiture proceeding.

Languages:

English.

Court of Justice of the European Communities

Statistical Data

1 September 1995 – 31 December 1995

Cases dealt with: 136

- Court of Justice of the European Communities: 113; 81 Judgments, 1 Opinion, 12 Orders, 1 application for attachment of the property of an institution, 18 Orders to strike out.
- Court of First Instance: 62; 27 Judgments, 23 Orders, 12 Orders to strike out.

Several judgments of the Court of Justice and the Court of First Instance, which are not analysed in this review, contain developments concerning the general principles of Community law:

On the principle of proportionality, see:

CFI, 14 September 1995, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Curaçao NV and Guyana Investments AVV v Commission of the European Communities*, Joint cases T-480/93 and T-483/93, paras 140-143, 149-153, 189-194;
ECJ, 12 October 1995, *Cereol Italia Srl v Azienda Agricola Castello Sas*, Case C-104/94, paras 25-26;
ECJ, 17 October 1995, *Procédure pénale v Peter Leifer, Reinhold Otto Krauskopf and Otto Hozer*, Case C-83/94, paras 32-36, 39-40;
ECJ, 26 October 1995, *Siesse – Soluçoes Integrais em Sistemas Software e Aplicaçoes Lda v Director da Alfândega de Alcântra*, Case C-36/94, paras 20-25;
ECJ, 23 November 1995, *Dominikanerinnen-Kloster Altenhohenau v Hauptzollamt Rosenheim*, Case C-285/93, paras 21-22;
ECJ, 30 November 1995, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, para 37;
CFI, 13 December 1995, *Vereniging van Exporteurs in Levende Varkens & Ors and Nederlandse Bond van Waaghouders van Levend Vee & Ors v Commission of the European Communities*, Joint cases T-481/93 and T-484/93, paras 119-120, 122-128.

On the principle of legitimate expectations, see:

CFI, 13 September 1995, *TWD Textilwerke Deggendorf GmbH v Commission of the European Communities*, Joint cases T-244/93 and T-486/93, paras 69-71, 73;

ECJ, 14 September 1995, *Ireland v Commission of the European Communities*, Case C-49/94, para 24;
CFI, 14 September 1995, *Lefebvre frères et soeurs, GIE Fructifruit, Association des mûrisseurs indépendants and Star Fruits Cie v Commission of the European Communities*, Case T-571/93, paras 72-75;
CFI, 15 September 1995, *Empresa Nacional de Urânio SA (ENU) v Commission of the European Communities*, Joint cases T-458/93 and T-523/93, para 86;
CFI, 9 November 1995, *France-aviation v Commission of the European Communities*, Case T-346/94, para 42;
CFI, 7 December 1995, *Giovanni Battista Abello & Ors and Gerhard Riesch v Commission of the European Communities*, Joint cases T-544/93 and T-566/93, paras 94-95;
CFI, 13 December 1995, *Vereniging van Exporteurs in Levende Varkens & Ors and Nederlandse Bond van Waaghouders van Levend Vee & Ors v Commission of the European Communities*, Joint cases T-481/93 and T-484/93, paras 148-149.

On the respect of the rights of the defence, see:

CFI, 14 September 1995, *Descom Scales Manufacturing Co. Ltd. v Council of the European Union*, Case T-171/94, paras 102, 117-118;
CFI, 18 September 1995, *Detlef Nölle v Council of the European Union and Commission of the European Communities*, Case T-167/94, paras 62-63;
ECJ, 30 November 1995, *The Queen v Secretary of State for the Home Department, ex parte John Gallagher*, Case C-175/94, paras 16,24;
CFI, 13 December 1995, *Vereniging van Exporteurs in Levende Varkens & Ors and Nederlandse Bond van Waaghouders van Levend Vee & Ors v Commission of the European Communities*, Joint cases T-481/93 and T-484/93, para 154.

On the principle of legal certainty, see:

ECJ, 14 September 1995, *Maria Simitzi v Dimos Kos*, Joint cases C-485/93 and C-486/93, paras 30-32;
ECJ, 14 September 1995, *Ireland v Commission of the European Communities*, Case C-49/94, para 24;
CFI, 11 October 1995, *Michael Baltsavias v Commission of the European Communities*, Joint cases T-39/93 and T-553/93, para 43;
ECJ, 19 October 1995, *The Queen v Secretary of State for Health, ex parte Cyril Richardson*, Case C-137/94, para 32;
ECJ, 12 December 1995, *Hendrik Evert Dijkstra v Friesland (Frico Domo) Coöperatie BA and Cornelis van Roessel & Ors*, Joint cases C-319/93, C-40/94 and C-224/94, para 28.

On the right to an effective judicial remedy:

Order CFI, 22 December 1995, *Marie-Thérèse Danielsson, Pierre Largenteau and Edwin Haoa v Commission of the European Communities*, Case T-219/95 R, para 77.

Judgments analysed:

1. ECJ, 17 October 1995, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations & Others and Federation of Highlands and Islands Fishermen & Others*, Case C-44/94; Integration of fundamental rights into general principles of Community law, Restrictions on the exercise of fundamental rights, General principles of Community law, Control of the application of Community law by the Member States

2. ECJ, 19 October 1995, *Job Centre Coop.*, Case C-111/94; Preliminary rulings – Competence of the Court of Justice, Definition of courts and tribunals

3. CFI, 19 October 1995, *Carvel and Guardian Newspapers Ltd. v Council*, Case T-194/94; Public access to documents of the Council

4. ECJ, 9 November 1995, *Germany v Council*, Case C-426/93; Legal basis for acts of the institutions, Principle of proportionality

5. ECJ, 9 November 1995, *Atlanta Fruchthandelgesellschaft*, Case C-465/93; Powers of national courts, Interim relief

6. ECJ, 7 December 1995, *Council v Parliament*, Case C-41/95; Budgetary procedure, Respective powers of the Council and the Parliament, Invalidity of the Budget

7. ECJ, 13 December 1995, *Framework Agreement on Bananas*, Opinion 3/94; Purpose of the Opinion procedure, Protection of rights and interests of the Institutions and the States

8. ECJ, 14 December 1995, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, Case C-312/93; Obligations of national courts and tribunals, Power of a national judge to consider of his own motion grounds for complaint based on breaches of Community law, Independence of national procedures

9. ECJ, 14 December 1995, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, Joint cases C-430/93 and C-431/93; Obligations of national courts and tribunals, Power of a national judge to consider of his own motion grounds for complaint

based on breaches of Community law, Independence of national procedures

10. ECJ, 15 December 1995, *Union royale belge des sociétés de football association & Others v Bosman & Others*, Case C-415/93; Cooperation between the Court of Justice and the national courts and tribunals, Fundamental principles of the Common Market, Principle of Subsidiarity, Freedom of association, Certainty of the law

Important decisions

Identification: ECJ-95-3-011

a) European Union / **b)** European Court of Justice / **c)** / **d)** 17.10.1995 / **e)** C-44/94 / **f)** The Queen v. Minister of Agriculture, Fisheries and Food, *ex parte* National Federation of Fishermen's Organisations & Ors and Federation of Highlands and Islands Fishermen & Ors / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Unwritten rules – General principles of law.
Sources of constitutional law – Techniques of interpretation – Concept of manifest error in assessing evidence or exercising discretion.
General principles – Proportionality.
General principles – Equality.
Institutions – European Union – Distribution of powers between Community and member States.
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 property – Other limitations.
Fundamental rights – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Community law, application by member States / Discrimination, nationality / General interest of the Communities / Misuse of powers / Preliminary rulings, Court, competence.

Headnotes:

The application of national legislation cannot be held to be contrary to the principle of non-discrimination merely because other member States allegedly apply rules which are less strict (cf. point 45).

The fact that Articles 30 and 34 EC, which prohibit quantitative restrictions and all measures having equivalent effect on imports and exports, are regarded as an integral part of the common organisation of the markets in agriculture does not prevent the competent authorities of a member State from adopting national measures on the terms provided for by Community legislation forming part of such an organisation (cf. points 52-53).

The fundamental rights which form part of the general principles of Community law are not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights thus guaranteed (cf. point 55).

Where a provision of Community law leaves the national authorities responsible for its implementation considerable freedom in their evaluation, a court cannot, when considering whether the exercise of such freedom is lawful, substitute its own evaluation for that of the competent authority, but must restrict itself to examining whether the evaluation of the latter contains a patent error or constitutes a misuse of power (cf. point 57).

Summary:

A request was made for a preliminary ruling (Article 177 EC) by the United Kingdom, concerning several questions in the context of proceedings between the Federation of Fishermen's Organisations and the relevant Minister, where the former challenged the validity of an Order which limits the number of days a year that United Kingdom fishing vessels over ten metres in length can spend at sea, with respect to Articles 6, 34, 39 and 40 EC, several Community measures implementing the Common Fisheries Policy and the principles of equal treatment, proportionality, respect for rights to property and freedom to pursue an economic activity.

Decision no. 92/593 on a multi-annual guidance programme for the fishing fleet of the United Kingdom for the period 1993 to 1996 pursuant to Regulation no. 4028/86 must be interpreted as empowering the United Kingdom to limit the number of days a year that vessels over 10 metres in length may spend at sea in so far as a maximum of 45% of the overall target set in that decision may be achieved by measures other than reductions in the capacity of the fishing fleet. The decision does not preclude that member State from adopting technical conservation measures, provided that they have been approved by the Commission. In this respect it is irrelevant that the member State concerned did not achieve the targets set by the previous multiannual guidance programme. Neither Articles 6, 34, 39 and 40.3 EC, nor Regulations no. 3759/92 on the common organisation of the market in fishery and aquaculture products, and no. 3760/92 establishing a Community system for fisheries and aquaculture, the principle of equal treatment, the right to property, the freedom to pursue a trade or professional activity and the principle of proportionality, preclude a member State from making use of that power. Neither the nature of the stock caught by a vessel, nor the extent to which the restrictions in question affect normal fishing, other operations of individual fishermen and the market in fish, nor the opportunity given to a national authority to make derogations in favour of particular sectors of the national fishing fleet can call in question that power or the right to exercise it (cf. points 19, 21, 29, 43, 50, 54, 61, 66, disp. 1-4).

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-012

a) European Union / **b)** European Court of Justice / **c)** Sixth Chamber / **d)** 19.10.1995 / **e)** C-111/94 / **f)** Job Centre Coop. ARL. / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Referral by a court.
Institutions – Courts – Jurisdiction.

Keywords of the alphabetical index:

Courts and tribunals, definition / Court decision / Non-contentious proceedings / Preliminary rulings, Court, competence.

Headnotes:

Whilst Article 177 EC does not make reference to the Court subject to the proceedings during which the national court frames a question for a preliminary ruling being *inter partes*, it is none the less apparent from that provision that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. A court exercising administrative authority in "non-contentious" proceedings concerning an application for confirmation of the memorandum of association of a company with a view to its registration cannot, therefore, make a reference to the Court. In such a situation it is acting independently of any dispute, since a dispute, and thus contentious proceedings, can only arise if confirmation is refused (cf. points 9, 11).

Summary:

The Court refuses to acknowledge jurisdiction on a reference from an Italian court for a preliminary ruling (Article 177 EC) on the interpretation of several articles EC, on the ground that these questions were referred by a judge in the context of non-contentious proceedings dealing with an application for confirmation of the memorandum of association of a company with a view to registration, and not in order to settle a legal dispute.

Cross-references:

On the definition of court and court procedure for the purposes of Article 177 EC, see in particular:

ECJ, 18 June 1980, *Borker*, Case 138/80; [1980] ECR 1975
ECJ, 6 October 1981, *Broekmeulen v. Huisarts Registratie Commissie*, Case 246/80; [1981] ECR 2311, paras 16-17
ECJ, 23 March 1982, *Nordsee v. Reederei Mond*, Case 102/81; [1982] ECR 1095, paras 11-12, 14-15
ECJ, 5 March 1986, *Greis Unterweger*, Case 318/85; [1986] ECR 955, para 5
ECJ, 11 June 1987, *Pretore di Salò v. X*, Case 14/86; [1987] ECR 2545, para 7
ECJ, 17 October 1989, *Handels- og Kontorfunktionaerernes Forbund i Danmark v. Danfoss ex parte Dansk Arbejdsgiverforening*, Case 109/88, [1989] ECJ 3199, paras 7-9

ECJ, 12 December 1990, *Kaefer & Procacci*, Joint cases C-100/89 and C-101/89; [1990] 1 ECR 4647, paras 8-10
ECJ, 3 July 1991, *Department of Health and Social Security v. Barr and Montrose Holdings*, Case C-355/89; [1991] 1 ECR 3479, paras 8-10
ECJ, 12 February 1992, *Leplat v. Territoire de la Polynésie française*, Case C-260/90; [1992] 1 ECR 643, para 8
ECJ, 30 March 1993, *Corbiau v. Administration des contributions*, Case C-24/92; [1993] 1 ECR 1277, paras 15-17
ECJ, 27 April 1994, *Gemeente Almelo & ors. v. Energiebedrijf Isselmij*, Case C-393/92; [1994] 1 ECR 1477, paras 23-24, point 1
ECJ, 17 May 1994, *Corsica Ferries v. Corpo dei piloti del porto di Genova*, Case C-18/93; [1994] 1 ECR 1783, para 12

Languages:

Italian (language of the case); German, English, Danish, Spanish, Finnish, French, Greek, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-013

a) European Union / **b)** Court of First Instance / **c)** Second Chamber, extended composition / **d)** 19.10.1995 / **e)** T-194/94 / **f)** Carvel and The Guardian Newspaper v. Council of the European Union / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Institutions – European Union – Institutional structure – Council.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Council of the European Union, confidentiality, deliberations / Council of the European Union, public right to documents / Council of the European Union, rules of procedure / Professional confidentiality / Reasoning of measures / Right to information, conditions / Right to information, exceptions / Transparency of decision-making process, implementation / Transparency of decision-making process, principle.

Headnotes:

Article 4 of Council Decision no. 93/731 on public access to Council documents lays down exceptions to the principle that the public is to have access to such documents, distinguishing between the cases referred to in Article 4.1, in which access may not be granted where its disclosure could undermine certain interests listed therein, and those referred to in Article 4.2, in which access may be refused to protect the confidentiality of the Council's proceedings.

It is clear both from the terms of Article 4 and from the objective pursued by the decision, namely to allow the public wide access to Council documents, that the Council must, when exercising its discretion under Article 4.2, genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations. Citizens enjoy rights under Article 4.2 which the Council cannot defeat merely by relying on the fact that under Article 5 of its Rules of Procedure its deliberations are covered by an obligation of professional secrecy, since that obligation applies, according to that article itself, only in so far as the Council does not decide otherwise.

Where it is established that the competing interests involved were not balanced before disclosure was refused, in particular because the reason given was that the Council's Rules of Procedure do not allow disclosure of documents such as those requested, relating to the Council's deliberations, such refusal must therefore be annulled (cf. points 62-80).

Summary:

An action for annulment was brought before the Court of First Instance by the Guardian newspaper and its European Affairs Editor against a decision of the Council refusing them access to certain documents, in particular the minutes and records of voting during certain deliberations, on the grounds that the documents in question directly referred to its deliberations, which cannot, under its Rules of Procedure, be disclosed. In support of their application, the applicants put forward several pleas in law including breach of the "fundamental principle of Community law of access to the documents of the institutions of the European Union" and breach of Article 4.2 of Council Decision no. 93/731 of 20 December 1993 on public access to Council documents. The Court of First Instance,

following an analysis of the scope of Article 4 of Decision no. 93/371 and the Council's obligations in exercising its discretion, annulled the implied decision of the Council refusing access to these documents, without ruling on the other pleas.

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-014

a) European Union / **b)** European Court of Justice / **c)** / **d)** 09.11.1995 / **e)** C-426/93 / **f)** Federal Republic of Germany v. Council of the European Union / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Unwritten rules – General principles of law.
General principles – Proportionality.
Institutions – European Union – Institutional structure – Commission.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

Acts of the institutions, adoption procedure / Acts of the institutions, legal basis / Commission, powers / Community law, precedent / Practice of the institutions.

Headnotes:

In the context of the organisation of the powers of the Community, the choice of a legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure. A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty and cannot therefore create a precedent binding on the institutions where, before they adopt a measure, they have to determine the proper legal basis to that end (cf. points 21, 29, 34).

Article 213 EC, under which the Commission may, within the limits and under conditions laid down by the Council in accordance with the provisions of the Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it, may, despite the fact that it lays down no rules on voting and does not provide for any right of initiative on the part of the Commission or for the involvement of the European Parliament or the Economic and Social Committee, be used as the sole legal basis for the adoption of an act of the Council. The Council properly adopted Regulation no. 2186/93 requiring member States to establish harmonized business registers on the basis of Article 213 alone with the aim of enabling the Commission to collect reliable, comparable statistical information with a view to the performance of the various specific tasks conferred on it by the Treaty. Whilst that regulation also has effects on the establishment and operation of the internal market, those effects are merely ancillary, with the result that Article 100A EC cannot constitute the proper legal basis for the adoption of the regulation, since the mere fact that an act may have such effects is not sufficient to justify using that provision as the basis for the act (cf. points 16, 18, 22, 30-35).

The Council cannot be charged with having infringed the principle of proportionality by requiring the member States by Regulation no. 2186/93 to establish harmonized business registers designed to enable the Commission to collect reliable, comparable statistics. In order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it. It does not appear that the regulation requires needless information to be gathered, having regard to the requirements for statistics corresponding to the various tasks of the Commission, or that the costs to the member States of creating the registers are manifestly disproportionate to the advantages to the Community of their existence (cf. points 42-51).

Summary:

The Federal Republic of Germany brought an application under Article 173.1 EC for the annulment of Council Regulation (EC) no. 2186/93 on Community coordination in drawing up business registers for statistical purposes, requiring member States to set up for this purpose one or more harmonized registers covering all enterprises carrying on economic activities contributing to gross domestic product. It was alleged firstly that the Council had taken Article 213 EC, which confers on the Commission the right to collect any

information and carry out any checks required for the performance of the tasks entrusted to it, as the legal basis for this Regulation, and that this Article cannot constitute an autonomous legal basis for a measure of the Council.

Secondly, the Council was accused of infringing the principle of proportionality on the one hand in its obligation to record information which is not necessary to achieve the purpose set out in the Regulation and on the other hand, by not sufficiently taking into account the financial consequences for the member States of the implementation of this system. The application is dismissed in its entirety.

Languages:

German (language of the case); English, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-015

a) European Union / **b)** European Court of Justice / **c)** / **d)** 09.11.1995 / **e)** C-465/93 / **f)** Atlanta Fruchthandelgesellschaft mbH & Ors v. Bundesamt für Ernährung und Forstwirtschaft / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Referral by a court.
Constitutional justice – Effects – Consequences for other cases – Ongoing cases.
Institutions – Courts – Jurisdiction.

Keywords of the alphabetical index:

General interest of the Communities / Interim measures, conditions for grant / Interim measures, prescription / Interim measures, suspension of enforcement / Interim protection / National courts, obligation to refer / National courts, powers / Suspension of enforcement, conditions for grant.

Headnotes:

Article 189 EC does not preclude national courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity. The Court has already held, having regard to the requirement of the coherence of the system of interim legal protection, that national courts which have referred such questions for a preliminary ruling are able to order suspension of enforcement of a national administrative measure based on the contested regulation, considering that in the context of actions for annulment, Article 185 EC enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension: firstly, the Treaty not only, in Article 185, authorizes the Court to order such suspension but also, in Article 186, confers on it the power to prescribe any necessary interim measure, and secondly, the interim legal protection which the national courts must afford to individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure or the grant of the interim measures in question, since that grant does not as such have more radical consequences for the Community legal order than the mere suspension of enforcement of a national measure adopted on the basis of a regulation.

For the national court to be able to order such interim relief, it must entertain serious doubts as to the validity of the Community act and state them in its decision; if the validity of the contested act is not already before the Court of Justice, it must itself refer the question to the Court of Justice; there must be urgency, in that the interim relief is necessary in order to avoid serious and irreparable damage being caused to the party seeking the relief; and due account must be taken of the Community interest. Taking such account means that the national court must examine whether the Community act in question would be deprived of all effectiveness if not immediately implemented, and must take account in that respect of the damage which may be caused to the legal regime established by the regulation for the Community as a whole. It also means that if the grant of interim relief represents a financial risk for the Community, the national court must be able to require the applicant to provide adequate guarantees. Finally, in its assessment of all those conditions, the national court must respect any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level (cf. points 22, 25, 27-30, 43-45, 51, disp. 1-2).

Summary:

A German court made a request to the Court for a preliminary ruling on the interpretation of Article 189 EC, and more particularly whether the national judge has the power to order interim measures disapplying a Community regulation until the Court, before which another preliminary reference on the issue is pending, rules on the validity of the regulation, and if so, under what conditions.

Supplementary information:

The Court ruled on the issue of the validity of the contested regulation by a judgment of the same day: see ECJ, 9 November 1995, *Atlanta Fruchthandelsgesellschaft mbH & Ors v. Bundesamt für Ernährung und Forstwirtschaft*, Case C-466/93; not yet published.

Cross-References:

On interim measures and suspension of enforcement:

- of a national measure, see ECJ, 19 June 1990, *Factortame*, Case C-213/89; [1990] ECR 2433
- of a Community measure, see ECJ, 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, Joint cases C-143/88 and C-92/89; [1991] ECR 415

Languages:

German (language of the case); English, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-016

a) European Union / **b)** European Court of Justice / **c)** / **d)** 07.12.1995 / **e)** C-41/95 / **f)** Council of the European Union v. European Parliament / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Temporal effect – Postponement of temporal effect.

General principles – Rule of law – Certainty of the law.
Institutions – Public finances – Budget.
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Institutional structure – Council.
Institutions – European Union – Distribution of powers between institutions of the Community.

Keywords of the alphabetical index:

Budget of the European Union, final adoption / Budget of the European Union, invalidity / Budgetary procedure / Continuity of the European public service / European Parliament, budgetary powers.

Headnotes:

Although the Treaty provides that the maximum rate of increase in respect of non-compulsory expenditure must be fixed by the Commission on the basis of objective factors, no criterion has been laid down for the modification of that rate. According to the fifth subparagraph of Article 203.9 EC, it is sufficient for the Council and the Parliament to come to an agreement. In view of the importance of such an agreement, which confers on the two institutions, acting in concert, the freedom to increase the appropriations in respect of non-compulsory expenditure in excess of the rate declared by the Commission, the existence of that agreement may not be inferred from the presumed intention of one or other of those institutions, and it will not actually exist unless the two institutions have agreed the total amount of expenditure to be classified as non-compulsory; that amount constitutes the basis of the maximum rate of increase.

It follows that, since the Council, through its President, had refused to agree to the new maximum rate of increase in respect of non-compulsory expenditure, as classified by the Parliament, the declaration of the final adoption of the budget by the President of the Parliament is illegal and the budget is invalid (cf. points 23-37).

Where, in proceedings brought under Article 173 EC and Article 146 EAEC, the Court finds the budget of the European Union to be invalid at a point in time when the financial year which it covers has for the most part already elapsed, the need to ensure the continuity of the European public service, together with important considerations of legal certainty comparable to those which apply in the event of the annulment of certain regulations, justify the exercise by the Court of the power expressly conferred on it by the second paragraph of Article 174 EC and the second paragraph

of Article 147 EAEC, and call for a statement by it as to which of the effects of the budget in issue are to be regarded as definitive (cf. points 43-45).

Summary:

The Council of the European Union applied to the Court, under Articles 173 EC and 146 EAEC, for the annulment of the act of the President of the European Parliament declaring the final adoption of the general budget of the European Union for the financial year 1995. The Court found a lack of agreement between the two branches of budgetary authority and declared the final adoption of the budget illegal and the budget invalid, exercising however its power under Article 174.2 EC and Article 147.2 EAEC to preserve the effects of the 1995 budget until the date of its final adoption.

Cross-references:

On the budgetary procedure, see:

ECJ, 3 July 1986, *Council of the European Communities v. European Parliament*, Case 34/86; [1986] ECR 2155;
ECJ, 27 September 1988, *Greece v. Council of the European Communities*, Case 204/86; [1988] ECR 5323;
ECJ, 31 March 1992, *Council of the European Communities v. European Parliament*, Case C-284/90; [1992] ECR 2277.

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-017

a) European Union / **b)** European Court of Justice / **c)** / **d)** 13.12.1995 / **e)** 3/94 / **f)** Framework Agreement on Bananas / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Type of review – Preliminary review.

Constitutional justice – The subject of review – International treaties.
Constitutional justice – Decisions – Types – Opinion.

Keywords of the alphabetical index:

Concluded agreement, definition / International agreement / Judicial protection of the institutions / Judicial protection of the member States / Procedure for requesting an opinion, purposes.

Headnotes:

A request made to the Court for an Opinion under Article 228.6 EC becomes devoid of purpose, and the Court does not need to respond, where the Agreement to which it relates, which was envisaged at the time when the request was submitted to the Court, has since been concluded.

The purpose of that provision, which is to forestall complications which might result both in a Community context and in that of international relations from a decision of the Court to the effect that such an agreement was, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty, can no longer be achieved if the Court rules on an agreement which has already been concluded. The fact that the Court does not respond to a request for an Opinion does not undermine the judicial protection of the institution or member State which requested the Opinion at a time when the agreement had not yet been concluded since, first, Article 228.6 EC is not principally aimed at protecting the interests and rights of the institution or State seeking an Opinion and, secondly, those rights may always be safeguarded by an action for annulment of the decision to conclude the agreement in conjunction, if need be, with a application for interim relief (cf. points 14-23 et disp.).

Summary:

The Court, following a request under Article 228.6 EC by the German government for an Opinion on the compatibility with the Treaty of a framework agreement on bananas incorporated into the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), ruled that this request had become devoid of purpose and thus that there was no need to respond, as the agreements had been concluded after the request was made. The Court also provides details on the purpose of the Opinion procedure.

Languages:

German, English, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish.

Identification: ECJ-95-3-018

a) European Union / **b)** European Court of Justice / **c)** / **d)** 14.12.1995 / **e)** C-312/93 / **f)** Peterbroeck, Van Campenhout & Cie v. Belgian State / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Referral by a court.
Sources of constitutional law – Categories – Unwritten rules – General principles of law.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Primary Community law and domestic non-constitutional legal instruments.
General principles – Rule of law – Certainty of the law.
Institutions – Courts – Jurisdiction.
Institutions – European Union – Distribution of powers between Community and member States.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Direct effect / Cooperation between institutions, member States, genuine / Independence of national procedure / National courts, consideration of EC law of own motion / National judicial system, principles / National procedures, limits to independence.

Headnotes:

Pursuant to the principle of cooperation laid down in Article 5 EC, it is for the courts and tribunals of the member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law. A rule of national law preventing the procedure laid down in Article 177 EC from being followed must, in this regard, be set aside.

Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

In that regard, whilst the imposition on litigants of a period of sixty days to submit a new plea based on Community law is not objectionable *per se*, Community law precludes application of a domestic procedural rule whose effect is to prevent the national court or tribunal, seized of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period, in a case where: the national court hearing the main proceedings is the first court which may refer a preliminary question to the Court of Justice; the limitation period in question has expired by the time that that court holds its hearing so that it is denied the possibility of considering of its own motion the question of compatibility; it seems that no other court or tribunal in subsequent proceedings may of its motion consider the question of the compatibility of a national measure with Community law; and the impossibility for the national courts or tribunals to raise points of Community law of their own motion does not appear to be reasonably justifiable by principles such as the requirement of legal certainty or the proper conduct of procedure (cf. points 12-21 et disp.).

Summary:

The Court received a request for a preliminary ruling under Article 177 EC by a Belgian court, in order to determine if Community law precludes application of a domestic procedural rule which prevents the national court, seized of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period.

The Court, considering the characteristics of the main proceedings in issue, ruled that Community law would preclude the application of such a rule.

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-019

a) European Union / **b)** European Court of Justice / **c)** / **d)** 14.12.1995 / **e)** C-430/93, C-431/93 / **f)** Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Referral by a court.
Sources of constitutional law – Categories – Unwritten rules – General principles of law.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Primary Community law and domestic non-constitutional legal instruments.
General principles – Rule of law – Certainty of the law.
Institutions – Courts – Jurisdiction.
Institutions – European Union – Distribution of powers between Community and member States.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Direct effect / Cooperation between institutions, member States, genuine / Independence of national procedure / National courts, consideration of EC law of own motion / National courts, passive role of the judge / National judicial system, Principles / National procedures, limits to independence.

Headnotes:

In proceedings concerning civil rights and obligations freely entered into by the parties, it is for the national court or tribunal to apply binding Community provisions such as Articles 3.f, 85, 86 and 90 EC even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court or tribunal.

Pursuant to the principle of cooperation laid down in Article 5 EC, it is for national courts and tribunals to ensure the legal protection which individuals derive from the direct effect of provisions of Community law.

However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.

In the absence of Community rules governing the matter, it is for the domestic legal system of each member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law. A rule of national law preventing the procedure laid down in Article 177 EC from being followed must, in this regard, be set aside.

Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

In that regard, the principle that in a civil suit it is for the parties to take the initiative, the court or tribunal being able to act of its own motion only in exceptional cases where the public interest requires its intervention, reflects conceptions prevailing in most of the member States as to the relations between the State and the individual, safeguards the rights of the defence and ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas (cf. points 13-15, 17-22, disp. 1-2).

Summary:

A preliminary reference from a Dutch court requested the Court to say whether firstly, the national judge should apply the provisions of Articles 3.f, 5, 85, 86 and 90 EC in proceedings concerning civil rights and obligations freely entered into by the parties, even when the party to the proceedings with an interest in application of these provisions has not relied on them, and, secondly, if the obligation to apply of his own motion these Community rules also applies if in so doing the judge would have to abandon his passive role by going beyond the ambit of the dispute defined by the parties and/or relying on facts and circumstances other than those on which the party with an interest in application of those provisions is relying in order to substantiate his claim.

Languages:

Dutch (language of the case); German, English, Danish, Spanish, Finnish, French, Greek, Italian, Portuguese, Swedish (translations by the Court).

Identification: ECJ-95-3-020

a) European Union / **b)** European Court of Justice / **c)** / **d)** 15.12.1995 / **e)** C-415/93 / **f)** Union royale belge des sociétés de football association & ors. v. Bosman & ors. / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Referral by a court.
Constitutional justice – Effects – Temporal effect – Limit on retrospective effect.
Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Categories – Unwritten rules – General principles of law.
General principles – Rule of law – Certainty of the law.
General principles – Fundamental principles of the Common Market.
Institutions – Courts – Jurisdiction.
Institutions – European Union – Institutional structure – Commission.
Fundamental rights – General questions – Basic principles – Nature of the list of fundamental rights.
Fundamental rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Commission, powers / Free movement of workers / National and regional cultural diversity / National constitutional traditions / National courts, cooperation with Court / Preliminary rulings, admissibility / Preliminary rulings, Court, competence / Subsidiarity, principle.

Headnotes:

In the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.

Nevertheless, in order to determine whether it has jurisdiction, the Court should examine the conditions in which the case was referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the member States and not to deliver advisory opinions on general or hypothetical questions.

That is why the Court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

Questions submitted by a national court called upon to decide on declaratory actions seeking to prevent the infringement of a right which is seriously threatened are to be regarded as meeting an objective need for the purpose of settling the dispute brought before that court, even though they are necessarily based on hypotheses which are, by their nature, uncertain, if it holds them to be admissible under its interpretation of its national law (cf. points 59-61, 64-65).

Freedom of movement for workers, guaranteed by Article 48 EC, is a fundamental freedom in the Community system and its scope cannot be limited by the Community's obligation to respect the national and regional cultural diversity of the member States when it uses the powers of limited extent conferred upon it by Article 128.1 EC in the field of culture (cf. point 78).

The principle of freedom of association, enshrined in Article 11 ECHR and resulting from the constitutional traditions common to the member States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F.2 EU, are protected in the Community legal order.

However, rules likely to restrict freedom of movement for professional sportsmen, laid down by sporting associations, cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players, nor can they be seen as an inevitable result thereof (cf. points 79-80).

The principle of subsidiarity, even when interpreted broadly to the effect that intervention by Community authorities in the area of organisation of sporting activities must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty (cf. point 81).

Except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty and in no circumstances does it have the power to authorize practices which are contrary to the Treaty (cf. point 136).

Summary:

A preliminary ruling under Article 177 EC is requested by a Belgian Court in order to refer several questions concerning the interpretation of Articles 48, 85 and 86 EC in the context of various proceedings between a professional football player and the Union royale belge des sociétés de football association, the Royal Club Liégois and the Union of European Football Associations, concerning the rules governing the organisation of professional football in Europe. In particular, the Court considered whether Article 48 EC precludes the application of rules laid down by sporting associations under which, firstly, a professional footballer who is a national of one member State may not, on the expiry of his contract with a club, be employed by a club of another member State unless the latter has paid to the former a transfer, training or development fee and, secondly, football clubs may recruit or field only a limited number of players of a different nationality.

The Court, having ruled on its own jurisdiction to give a preliminary ruling on the questions submitted, held that Article 48 EC does preclude the application of such rules, whilst invoking its power of appreciation to limit the temporal effects of the judgment.

The interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 177 EC, gives to a rule of Community law clarifies and where necessary defines 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 can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied.

It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the opportunity for any person concerned to rely upon the provision as thus interpreted with a view to calling in question legal relationships established in good faith. Such a restriction may be allowed only by the Court, in the actual judgment ruling upon the interpretation sought.

Since the specific features of the rules laid down by the sporting associations for transfers of players between clubs of different member States, together with the fact that the same or similar rules applied to transfers both between clubs belonging to the same national association and between clubs belonging to different national associations within the same member State, may have caused uncertainty as to whether those rules were compatible with Community law, overriding considerations of legal certainty militate against calling in question legal situations whose effects have already been exhausted.

It must therefore be held that the direct effect of Article 48 EC cannot be relied upon in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before, the date of this judgment, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date (cf. points 141-145, disp. 3).

Cross-references:

On the temporal effects of preliminary rulings, see:

ECJ, 14 September 1995, *Maria Simitzi v. Dimos Kos*, Joint cases C-485/93 and C-486/93, paras 30-32;
ECJ, 19 October 1995, *The Queen v. Secretary of State for Health, ex parte Richardson*, Case C-137/94, paras 31-32, 37-38, point 3.

Languages:

French (language of the case); English, German, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

European Court of Human Rights

Important decisions

Identification: ECH-95-3-014

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 26.09.1995 / **e)** 7/1994/454/535 / **f)** Vogt v. Germany / **g)** to be published in volume 323 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Civil service, political loyalty.

Headnotes:

The dismissal of a teacher from the civil service on account of her political activities on behalf of the German Communist Party (DKP) infringes the rights to freedom of expression and association.

Summary:

In relation to Article 10 ECHR, the Court held that the applicant's dismissal as a disciplinary penalty for having failed to comply with her duty of political loyalty constituted an interference with the exercise of the right to freedom of expression.

The Court then observed that the interference was "prescribed by law" and pursued a legitimate aim. However, the Court pointed out that there were several reasons for considering dismissal of a teacher to be a very severe sanction: the effect on the reputation of the person concerned, the loss of livelihood and the virtual impossibility in Germany of finding an equivalent post.

Moreover the sole risk inherent in the post held by Mrs Vogt lay in the possibility that she might indoctrinate her pupils. Yet no criticism had been levelled at her on this point. On the contrary, her work at school had met

with unanimous approval; moreover the length of the disciplinary proceedings showed that the authorities did not regard as very pressing the need to remove pupils from her influence. In addition, the applicant had never made anti-constitutional statements or adopted an anti-constitutional attitude outside school. Finally, the fact that the DKP had not been banned meant that the applicant's activities within that party had been perfectly lawful.

In conclusion, the reasons put forward by the Government were not sufficient to establish convincingly that it had been necessary to dismiss Mrs Vogt. Her dismissal had been disproportionate to the legitimate aim pursued. There had accordingly been a violation of Article 10.

In relation to Article 11 ECHR, the Court considered that "administration of the State" within the meaning of Article 11. 2 should be interpreted narrowly, in the light of the post held by the official concerned. Even if teachers were to be regarded as falling within that category – a question that the Court did not consider it necessary to determine in this instance – Mrs Vogt's dismissal had been disproportionate to the legitimate aim pursued. There had accordingly also been a violation of Article 11.

Languages:

English, French.

Identification: ECH-95-3-015

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 26.09.1995 / **e)** 25/1994/472/553 / **f)** Diennet v. France / **g)** to be published in volume 325-A 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 – Impartiality.

Keywords of the alphabetical index:

Disciplinary proceedings / Professional code of ethics, misconduct.

Headnotes:

The fact that hearings before the Ile-de-France Regional Council and the disciplinary section of the National Council of the *Ordre des médecins* (Medical Association) had not been held in public had given rise to a violation of the applicant's right to a public hearing by a tribunal. On the other hand, the fact that three of the seven members of the disciplinary section, as constituted when rehearing the case remitted to it, had already heard the case on appeal had not infringed the applicant's right to an impartial tribunal.

Summary:

The applicant was the object of proceedings for professional misconduct. The Regional Council of the Ile-de-France *Ordre des médecins* ordered the applicant to be struck off the register for professional misconduct. On an appeal by the applicant, the disciplinary section of the National Council of the *Ordre* ordered that he should be disqualified from practising medicine for three years instead of being struck off. The applicant challenged this decision in the *Conseil d'Etat*, which quashed the decision on the ground that it had been reached after proceedings that had been irregular, and remitted the case to the disciplinary section of the National Council. The section, composed of seven members, three of whom, including the rapporteur, had taken part in the previous decision, heard the case in private on 26 April 1989. In a decision given on the same day, it again imposed on the applicant a three-year disqualification from practising medicine.

In his application to the Commission, the applicant alleged a violation of the right to a hearing in public and by an impartial tribunal, guaranteed in Article 6.1 ECHR.

The Court held first that there had been a breach of this Article in that the applicant did not receive a public hearing. The Court noted that there was no dispute that the proceedings before the disciplinary bodies had not been held in public. Where the *Conseil d'Etat* hears appeals on points of law from decisions of the disciplinary section of the National Council of the *Ordre*, it cannot be regarded as a "judicial body that has full jurisdiction". The fact that hearings before it are held in public is therefore not sufficient to remedy the defect found to exist at the stage of disciplinary proceedings. Holding proceedings in camera may be

justified by the need to protect professional confidentiality and private lives of patients, but such an occurrence must be strictly required by the circumstances. In the instant case, the public was excluded because of the automatic prior application of the provisions of the decree of 26 October 1948.

As regards the question of impartiality, the Court held that no ground for legitimate suspicion could be discerned in the fact that three of the seven members of the disciplinary section had taken part in the first decision. Furthermore, even if the second decision had been differently worded, it would necessarily have had the same basis, because there had been no new factors. The applicant's fears therefore could not be regarded as having been objectively justified. There had therefore been no violation of Article 6.1 in that respect.

Languages:

English, French.

Identification: ECH-95-3-016

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.09.1995 / **e)** 17/1994/464/545 / **f)** McCann and Others v. the United Kingdom / **g)** to be published in volume 324 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Terrorist attack / Use of force.

Headnotes:

Having regard to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court was not persuaded that the killing by members of the security forces of the three terrorists suspected of involvement in a bombing mission constituted a use of force which was no more than absolutely necessary in defence of persons from unlawful violence.

Summary:

The United Kingdom, Spanish and Gibraltar authorities were aware that the I.R.A. were planning a terrorist attack on Gibraltar; the intelligence assessment of the authorities was that an I.R.A. unit (which had been identified) would carry out an attack by means of a car bomb. It was planned to arrest the members of the unit after they had brought the car into Gibraltar. However, the three members of the unit were shot dead by members of the Special Air Service (the "SAS") near a parked car, after a bomb disposal expert reported after cursory visual examination that he regarded it as a possible car bomb. No weapons or detonator devices were found on their bodies. An inquest by the Gibraltar Coroner into the killings was opened. The jury returned verdicts of lawful killing. Dissatisfied with these verdicts, the applicants commenced actions against the Ministry of Defence in the High Court of Justice in Northern Ireland, which were finally struck off the list.

In their application to the Commission, the applicants complained that the killings of the three suspects constituted a violation of Article 2 ECHR.

The Court first observed that Article 2 ranks as one of the most fundamental provisions in the Convention.

It considered that the exceptions delineated in paragraph 2 indicate that this provision extends to cover but is not concerned exclusively with intentional killing. The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force must be no more than "absolutely necessary" for the achievement of one of the purposes set out in subparagraphs a., b. or c.

The Court stated that it must subject deprivations of life to the most careful scrutiny if deliberate lethal force is used, taking into consideration not only the actions of the agents of the State but also the surrounding circumstances including such matters as the planning and control of the actions under examination.

Against this background, the Court did not consider that the alleged various shortcomings in the inquest proceedings substantially hampered the carrying out of a thorough, impartial and careful examination of the

circumstances surrounding the killings. There had thus been no breach of Article 2.1 on this ground.

Applying Article 2 to the facts of the case, the Court rejected the applicants' allegation that the killings were premeditated. The Court observed that it would need to have convincing evidence before it could conclude that there was a premeditated plan to kill the suspects.

The Court then scrutinised not only whether the force used was strictly proportionate to the aim of protecting lives, but whether the operation was planned and controlled so as to minimise, to the greatest extent possible, recourse to legal force.

The reflex action of the soldiers – shooting to kill – lacked the degree of caution in the use of firearms to be expected from law-enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects.

The failure by the authorities to make provision for a margin of error suggested a lack of appropriate care in the control and organisation of the arrest operation.

Accordingly, there had been a violation of Article 2.

Languages:

English, French.

Identification: ECH-95-3-017

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 27.09.1995 / **e)** 29/1994/475/557 / **f)** G v. France / **g)** to be published in volume 325-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:

Corruption / Indecent assault.

Headnotes:

Conviction for indecent assault and sentence under a law whose entry into force postdated the commission of the offence did not infringe in the instant case the principle of prohibition of retrospective application of criminal law.

Summary:

The applicant, a driving-test examiner, was charged with accepting sums of money to issue driving licences. In the course of the investigation further charges were brought, for corruption in the form of soliciting sexual favours and for indecent assault on the person of a driving test candidate. He was sentenced to three years' imprisonment.

Mr G. appealed on points of law, arguing in particular that when the alleged indecent assault with coercion was committed, it had not constituted a criminal offence in so far as no violence was used against the person who was the victim of the alleged coercion. The Court of Cassation dismissed the appeal on the ground that the finding of guilt on the charge of corruption justified the sentence imposed and that it was not necessary to rule on this submission.

In his application to the Commission, the applicant complained that his conviction for an act which, at the time of its commission, did not constitute an offence under the law in force infringed Article 7 ECHR.

The Court noted that the acts of which the applicant had been accused also fell within the scope of the new legislation. On the basis of the principle that the more lenient law should apply both as regards the definition of the offence and the sanctions imposed, the national courts had applied the new Article 333 of the Criminal Code for the imposition of sanctions, as that provision had downgraded the offence of which Mr G. had been accused from a serious offence *(crime)* to a less serious offence *(délit)*. Its application, admittedly retrospective, had therefore operated in the applicant's favour.

In short, there had been no violation of Article 7.1.

Languages:

English, French.

Identification: ECH-95-3-018

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 28.09.1995 / **e)** 24/1994/471/552 / **f)** Scollo v. Italy / **g)** to be published in volume 315-C 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 – Fair trial – Trial within reasonable time.
Fundamental rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Housing, eviction.

Headnotes:

The impossibility for the owner of a flat to have a possession order enforced infringes the right to peaceful enjoyment of possessions and the right to a hearing within a reasonable time.

Summary:

The applicant contended that the fact that for a prolonged period it had been impossible for him to recover his flat, owing to the implementation of legislative provisions on residential property leases, had infringed his right to the peaceful enjoyment of his possessions, enshrined in Article 1 Protocol 1 ECHR.

Relying on Article 6.1 ECHR, he also alleged that his case had not been heard within a reasonable time on account of the implementation of legislative provisions suspending the enforcement of evictions, together with the impossibility of having an eviction enforced when this course of action was theoretically open to him.

In relation to Article 1 Protocol 1 ECHR, the Court concluded that, by adopting emergency measures and providing for certain exceptions to their application, the Italian legislature was reasonably entitled to consider, having regard to the need to strike a fair balance between the interests of the community and the right of landlords, and of the applicant in particular, that the means chosen were appropriate to achieve the legitimate aim. However, the restriction on Mr Scollo's use of his flat resulting from the competent authorities' failure to apply those provisions was contrary to the requirements of the second paragraph of Article 1 Protocol 1 ECHR. It followed that there had been a breach of that Article.

In relation to Article 6.1 ECHR, the Court noted that if an eviction was to be enforced, the interested party had to take the initiative, and Mr Scollo had not spared any effort to obtain satisfaction, applying on numerous occasions to the bailiff, who had systematically requested police assistance. However, the prefectorial committee and the Prefect had never acted on these requests. While not overlooking the practical difficulties raised by the enforcement of a very large number of evictions, the Court considered that the inertia of the competent administrative authorities engaged the responsibility of the Italian State under Article 6.1. There had accordingly been a breach of Article 6.1.

Languages:

English, French.

Identification: ECH-95-3-019

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 20.11.1995 / **e)** 38/1994/485/567 / **f)** Pressos Compania Naviera S.A. and Others v. Belgium / **g)** to be published in volume 332 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Margin of appreciation.
General principles – Reasonableness.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Legitimate expectation / Liability for negligence / Public interest.

Headnotes:

An Act, quite simply extinguishing with retrospective effect going back thirty years and without compensation claims for damages that the victims of the pilot accidents could have pursued against the Belgian State or against the private companies concerned, and

in some cases even in proceedings that were already pending, infringed the right to peaceful enjoyment of possessions.

Summary:

In the Court's view, a claim for compensation which, as in the case before it, was generated when the damage occurred constituted an "asset" and therefore amounted to a possession within the meaning of the first sentence of Article 1 Protocol 1 ECHR, which was therefore applicable. On the basis of the Court of Cassation's case-law, the applicants could argue that they had a "legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort. That was the position with regard to the accidents in issue, which all occurred before 17 September 1988, the date of the entry into force of the 1988 Act.

The Court noted that the 1988 Act exempted the State and other organisers of pilot services from their liability for negligent acts for which they could have been answerable. It resulted in an interference with the exercise of rights deriving from claims for damages which could have been asserted in domestic law up to that point and, accordingly, with the right that everyone, including each of the applicants, had to the peaceful enjoyment of his or her possessions. In so far as that Act concerned the accidents that occurred before 17 September 1988, the only ones in issue in the present proceedings, that interference amounted to a deprivation of property within the meaning of the second sentence of Article 1.1 Protocol 1 ECHR.

The Court recalled that the national authorities enjoyed a certain margin of appreciation in determining what was "in the public interest". Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court would, it stated, respect the legislature's judgment as to what was "in the public interest" unless that judgment was manifestly without reasonable foundation, which was clearly not the case in this instance.

The Government invoked the financial implications, which were both enormous and unforeseeable, of the Court of Cassation's judgment of 15 December 1983. They also stressed that it had been necessary to put an end to the "lack of legal certainty" generated by that judgment. Finally, they contended that the 1988 Act had also been intended to bring Belgian legislation into line with that of neighbouring countries.

The Court recalled that the Court of Cassation had recognised in its "*La Flandria*" judgment of 5 November 1920 that the State and other public-law bodies were subject to the general law of tort. Since then the Court of Cassation had admittedly not had occasion to hear cases relating to the State's liability concerning pilot services, but it had certainly not been unforeseeable that it would apply to this type of case, at the first opportunity, the principles that it had defined in general terms in the 1920 judgment. This was especially true in view of the fact that a reading of the 1967 Act in the light of the *Conseil d'Etat*'s opinion could reasonably support the conclusion that the Act did not depart from the general law of tort. The 1983 judgment had not therefore undermined legal certainty.

The financial considerations cited by the Government and their concern to bring Belgian law into line with the law of neighbouring countries could have warranted prospective legislation in this area to derogate from the general law of tort. Such considerations could not justify legislating with retrospective effect with the aim and consequence of depriving the applicants of their claims for compensation. Such a fundamental interference with the applicants' rights was inconsistent with preserving a fair balance between the interests at stake.

Accordingly, there had been a violation of Article 1 Protocol 1 ECHR.

Languages:

English, French.

Identification: ECH-95-3-020

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 21.11.1995 / **e)** 40/1994/487/569 / **f)** Velosa Barreto v. Portugal / **g)** to be published in volume 334 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.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Right to family life.

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

Keywords of the alphabetical index:

Housing / Social policy aim, legitimate.

Headnotes:

The restriction on a landlord's right to terminate his tenant's lease does not violate the right to respect for private and family life and the right to peaceful enjoyment of possessions.

Summary:

The applicant complained of the fact that the Portuguese courts had prevented him from recovering possession of the tenanted house he owned in order to live in it.

As regards Article 8, the Court reiterated that the object of this Article was essentially that of protecting the individual against arbitrary interference by the public authorities. It could also give rise to positive obligations, particularly the obligation to ensure respect for private and family life even in the sphere of interpersonal relations. In that matter as in others a fair balance had to be struck between the general interest and the interests of the people concerned.

The decisions complained of had prevented Mr Velosa Barreto from living in his house, as he intended. Nevertheless, effective protection of respect for private and family life could not go so far as to place the State under an obligation to give a landlord the right to recover possession of a rented house on request and in any circumstances.

The finding reached by both the Funchal Court of First Instance and the Lisbon Court of Appeal, that the applicant did not need the house in order to live in it, had been reached after duly considering the various questions of fact and of law submitted to them and conducting a careful analysis of the arguments put forward by the applicant. In particular, these courts had taken account of the fact that Mr Velosa Barreto's situation had improved during the proceedings, since two of his wife's aunts and her brother had in the meantime left the house he was living in, leaving more room for his own household.

It had not been shown, and there was no evidence to suggest, that by ruling as they did the Portuguese courts had acted arbitrarily or unreasonably or failed to discharge their obligation to strike a fair balance between the respective interests.

Accordingly, the right guaranteed by Article 8 had not been infringed.

In relation to Article 1 Protocol 1 ECHR the Court found that the restriction on the applicant's right to terminate his tenant's lease constituted control of the use of property within the meaning of the second paragraph of Article 1 Protocol 1 ECHR, and pursued a legitimate social policy aim.

For the rest, the Court referred to its considerations relating to the alleged infringement of the applicant's right to respect for his private and family life, which were also applicable to his right to the peaceful enjoyment of his possessions.

Accordingly, the right guaranteed by Article 1 Protocol 1 ECHR had not been infringed.

Languages:

English, French.

Identification: ECH-95-3-021

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 22.11.1995 / **e)** 48/1994/495/577 / **f)** C.R. v. the United Kingdom / **g)** to be published in volume 335-C of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation.
Fundamental rights – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Case-law, development / Rape, marital immunity.

Headnotes:

The national courts' decisions that the applicant could not invoke marital immunity to escape conviction and sentence for attempted rape upon his wife did not infringe the principle of non-retrospective effect of criminal law.

Summary:

The Court held that the guarantee enshrined in Article 7 occupied a prominent place in the Convention system of protection, as was underlined by the fact that no derogation from it was permissible under Article 15 in time of war or emergency. It should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. It entailed that only the law could define a crime and prescribe a penalty; that the criminal law should not be extensively construed to an accused's detriment; and that an offence ought to be clearly defined in law.

Nonetheless, however clearly drafted a legal provision might be, in any system of law there was an inevitable element of judicial interpretation, elucidation of doubtful points and adaptation to changing circumstances. Article 7 could not be read as outlawing this process, provided that the resultant development was consistent with the essence of the offence and could reasonably be foreseen.

The Court recalled that it was for the national authorities to interpret and apply national law, and found no reason to disagree with the Court of Appeal and the House of Lords about the meaning of "unlawful" in Section 1.1 of the Sexual Offences (Amendment) Act 1976. Their decisions did no more than continue a perceptible line of case-law development dismantling the marital immunity for rape. There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was a clear movement in the case-law, which was consistent with the essence of the offence, towards treating such conduct generally as within the scope of rape. This evolution had reached a stage where judicial recognition of the absence of the immunity had become a reasonably foreseeable development.

The essentially debasing character of rape was so manifest that the decisions of the national courts could not be said to be at variance with the object and purpose of Article 7 nor with the fundamental objectives of the Convention, namely respect for human dignity and freedom.

Accordingly, there had been no violation of Article 7.

Languages:

English, French.

Identification: ECH-95-3-022

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 22.11.1995 / **e)** 44/1994/491/573 / **f)** Bryan v. the United Kingdom / **g)** to be published in volume 335-A 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.

Keywords of the alphabetical index:

Appeal on points of law / Facts, establishment.

Headnotes:

The proceedings which the applicant had brought under English law, firstly before a Planning Inspector and then before the High Court, to challenge a planning enforcement notice served on him, satisfied the requirements of the right to a fair trial.

Summary:

The applicant received an enforcement notice from the Vale Royal Borough Council requiring him to demolish two brick buildings of his property, on the grounds that they had been erected without the required planning permission. The applicant appealed against the decision to the Secretary of State for the Environment. The appeal was dismissed by an Inspector employed by the Department for the Environment. The applicant appealed on points of law to the High Court, which dismissed the appeal. The High Court could review the Inspector's findings of fact or the inferences drawn by him from those facts only to the extent that it found them perverse or irrational.

The Court held that the proceedings before the Planning Inspector, which were accompanied by uncontested safeguards, ensured the applicant a "fair hearing". However, the fact that the Secretary of State for the Environment can at any time revoke an Inspector's power to decide an appeal is enough to deprive the Inspector of the requisite appearance of independence required by Article 6.1 ECHR. Therefore, the review by the Inspector does not of itself satisfy the requirements of Article 6.1 ECHR.

An appeal to the High Court is only on "points of law" and is therefore not capable of embracing all the aspects of the Inspector's decision.

However, the High Court had jurisdiction to entertain all the grounds of appeal pleaded and maintained by the applicant, whose submissions were dealt with point by point. Furthermore, the decision by the Inspector could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the Inspector was not capable of supporting a finding of fact; or if it had been based on any inference from the facts which was perverse or irrational. Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of law, such as that of town and country planning, especially where the facts have already been established in a quasi-judicial procedure.

Having regard to the subject-matter of the decision, the manner in which the decision was arrived at, and the content of the dispute, the scope of review of the High Court was sufficient.

The Court concluded that the remedies available to the applicant in relation to his complaints satisfied the requirements of Article 6.1 ECHR. There had accordingly been no violation of that provision.

Languages:

English, French.

Identification: ECH-95-3-023

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 04.12.1995 / **e)** 42/1994/489/571 / **f)** Ribitsch v. Austria / **g)** to be published in volume 336 of Series A of the Publications of the Court / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Police custody.

Headnotes:

The injuries suffered by the applicant in police custody showed that he had undergone ill-treatment which amounted to both inhuman and degrading treatment.

Summary:

The applicant was arrested on suspicion of drug trafficking and held in police custody. Following his release, the applicant informed several people, including a journalist, of the ill-treatment he had allegedly undergone while in police custody. Following broadcast reports on the incident, criminal proceedings were instituted against the police officers concerned. The applicant joined them as a civil party. The Vienna District Court accepted the applicant's version of events, excluding the possibility that his injuries might have been caused accidentally, and convicted of assault occasioning bodily harm one of the police officers. The Vienna Regional Court quashed that judgment and acquitted the policeman: it held that on balance, the accused's version of events, to the effect that the applicant had fallen against the door of a police car, could not be refuted. The Constitutional Court dismissed the applicant's complaint concerning ill-treatment.

Mr Ribitsch claimed that while in police custody at the Security Branch of the Vienna Federal Police Authority he had undergone ill-treatment incompatible with Article 3 ECHR.

It was not disputed that Mr Ribitsch's injuries had been sustained during his detention in police custody. The acquittal of police officer in criminal proceedings by a court bound by the principle of the presumption of innocence did not absolve Austria from its responsibility under the Convention. The Government were accordingly under an obligation to provide a plausible explanation of how the applicant's injuries had been caused. The Court found the explanation put forward by the Government unconvincing, as a fall against a car door could only be a very incomplete, and therefore insufficient, explanation of the injuries concerned.

The Court emphasised that, in respect of a person deprived of his liberty, any recourse to physical force which had not been made strictly necessary by his own conduct diminished human dignity and was in principle an infringement of the right set forth in Article 3 of the Convention. It reiterated that the requirements of an investigation and the undeniable difficulties

inherent in the fight against crime could not justify placing limits on the protection to be afforded in respect of the physical integrity of individuals.

In the instant case the injuries suffered by Mr Ribitsch showed that he had undergone ill-treatment which amounted to both inhuman and degrading treatment.

There had therefore been a breach of Article 3 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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1.4 The subject of review

1.5 Procedure

[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.*

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2. SOURCES OF CONSTITUTIONAL LAW

[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.*
[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.

pages

[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 keyword "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.*
[32] *The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.*
[33] *Civil servants, administrators, etc.*

pages

[34] *Comprises the Court of auditors insofar as it exercises jurisdictional power.*
[35] *E.g. Court of Auditors.*

pages

[36] *Ombudsman, etc.*
[37] *E.g. Court of Auditors.*
[38] *Open-ended or finite.*
[39] *If applied in combination with another fundamental right.*

pages

[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.*

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[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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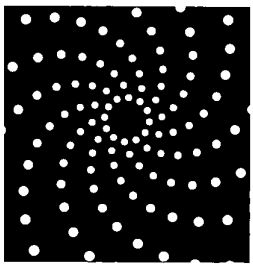

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