Bulletin

on Constitutional Case-Law

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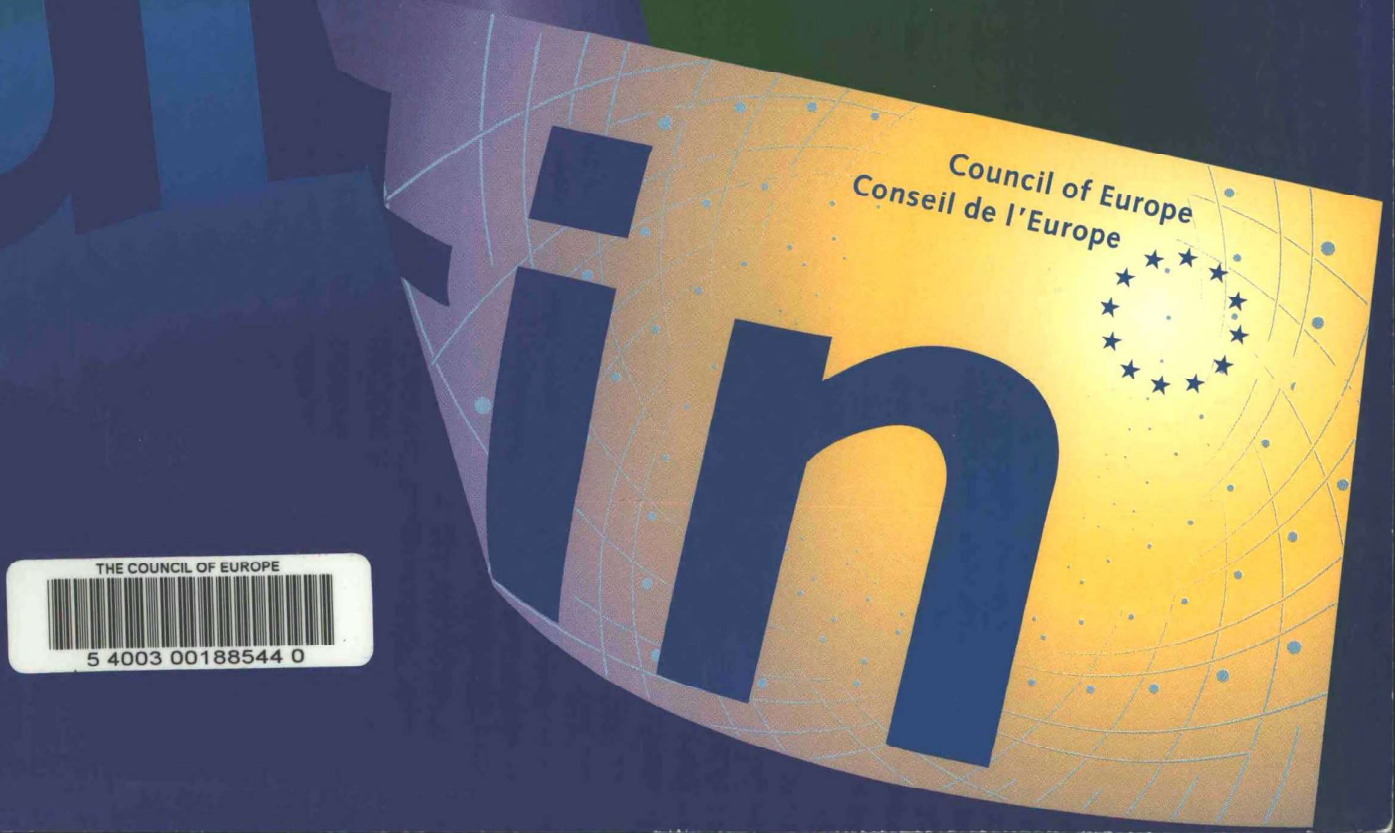


THE BULLETIN

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

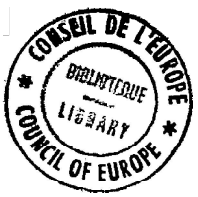
Its aim is to allow judges and constitutional law specialists in the academic world to be informed quickly about the most important judgments in this field. The exchange of information and ideas among old and new democracies in the field of judge-made law is of vital importance. Such an exchange and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

This issue of the Bulletin contains the introductory report, presented by Mr. László Sólyom, President of the Hungarian Constitutional Court, to the 10th Conference of the European Constitutional Courts, Budapest 6-10 May 1996. Furthermore, given the interest expressed by other jurisdictions to participate in the work of the Venice Commission Sub-Commission on Constitutional Justice, references to decisions by other courts are also published in the Bulletin

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) *official publication*
   - h) *non-official publications*
2. *Keywords of the systematic thesaurus*
3. *Keywords of the alphabetical index*
4. *Headnotes*
5. *Summary*
6. *Supplementary information*
7. *Cross-references*
8. *Languages*



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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.

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Albania
Constitutional Court

Summaries of important decisions of the reference period 1 January 1996 – 30 April 1996 will be published in the next edition, *Bulletin* 96/2.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court
during December 1995

- Financial claims (Article 137 B-VG): 1
- Conflicts of jurisdiction (Article 126a B-VG): 1
- Conflicts of jurisdiction (Article 138.1 B-VG): 3
- Conflicts of jurisdiction (Article 148f B-VG): 1
- Review of regulations (Article 139 B-VG): 18
- Review of laws (Article 140 B-VG): 43
- Review of elections (Article 141 B-VG): 3
- Appeals against decisions of administrative authorities (Article 144 B-VG): 1242 (587 declared inadmissible)

Composition of the Constitutional Court

Changes in the composition of the Constitutional Court during the year 1995:
Mr Peter Jann, member and permanent rapporteur, was appointed to the Court of Justice of the European Communities as judge in respect of Austria.
He is succeeded by Mr Gerhart Holzinger (formerly a Federal Chancellery official).
Mr Heinrich Kienberger, member and permanent rapporteur, withdrew because of ill-health. He is succeeded by Mr Willibald Liehr (a civil servant with the Niederösterreich provincial administration until his appointment).
Mrs Gabriele Kucsko-Stadlmayer was appointed substitute judge in place of Mrs Lisbeth Lass (substitute until 1995 then ordinary member).
Mr Rudolf Müller, member of the Administrative Court, was appointed substitute judge in place of Mr Oswin Martinek who had reached the age limit.

Important decisions

Identification: AUT-96-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 25.09.1995 / **e)** B 1030/94, V 126/94 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments and decisions of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Administrative acts.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Civil rights.

Headnotes:

Decisions awarding a pension are not part of the "hard core of civil rights" (*"Kernbereich der civil rights"*), ie traditionally judicial matters. Review by public law tribunals suffices.

Summary:

The Bar Council of Tyrol had dismissed a lawyer's request to be granted an occupational invalidity pension. He appealed against this administrative decision, complaining that he was denied access to an independent and impartial tribunal and alleging a violation of his constitutional rights as secured by Article 6 ECHR.

The Constitutional Court almost invariably defers to the case-law of the European Court of Human Rights; here it conceded the applicability of Article 6 ECHR but held that in the instant case the rights at issue were not infringed, relying on a more restrictive interpretation of the aforesaid provision than that of the European Court of Human Rights. The Constitutional Court referred to its established precedents as from decision VfSlg. 11500/1987, to the effect that civil rights must be determined on the merits by an independent and impartial tribunal where the litigation concerns the "hard core of civil rights" (*"Kernbereich der civil rights"*) – ie traditionally judicial matters. In that case – if an administrative authority without the status of an independent body is competent to rule in these matters – review by the Constitutional Court and the Administrative Court, which normally deliver only judgments setting aside decisions, does not meet the requirements of Article 6 ECHR. This applies to decisions in litigation relating to:

- damage caused by game animals (VfSlg 11591/1987);
- settlement of disputes over the interpretation of an agreement by an arbitration board instituted by the Social Security General Act and the Hospitals Act (VfSlg. 11729/1989 and 12083/1989);
- refund of hospital fees *(Pflege- und Sondergebühren nach dem oberösterreichischen Krankenalstaltengesetz)* (VfSlg. 12470/1990);
- a dispute concerning reasonable rent (in accordance with the Allotment Gardens Act *"Kleingartengesetz"* (VfSlg. 12003/1989);
- an award of compensation for expropriation (VfSlg. 11760/1988, 11762/1988).

Conversely, review by the Constitutional Court and the Administrative Court suffices in respect of decisions (by the competent authority where it is not an independent body, "a tribunal") taken in order to determine civil rights which relate solely to private law situations. This is valid for:

- planning permission to build a house, or refusal of planning permission (VfSlg. 11500/1987);
- an authorisation for road construction (VfSlg. 11645/1988);
- a permit under the Animal Husbandry Act *"Viehwirtschaftsgesetz"* (VfSlg. 12082/1989);
- withdrawal of a licence to operate a pharmacy (VfSlg. 11937/1988);
- fixing of the rate for parking space allocated in accordance with the Civil Service Act *"Beamtendienstrechtsgesetz"* (VfSlg. 12929/1991);
- refusal of a work permit for foreigners (VfSlg. 13505/1993).

On the basis of these precedents, the Court held that in the case before it the award of a pension was not in the nature of a typical civil right and – with reference to the judgment of the European Court of Human Rights of 21.09.1993 in the case of *Zumtobel v. Austria* – that review of (administrative) decisions by public law tribunals meets the requirements of Article 6 ECHR.

Languages:

German.

Identification: AUT-96-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11.12.1995 / **e)** B 2300/95 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments an decisions of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and other domestic legal instruments.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Administrative authority / Award of contracts / Lawful judge / Preliminary ruling, referral.

Headnotes:

The Court of Justice of the European Communities is the "lawful judge" (*"gesetzlicher Richter"*) – with the extensive connotation of *due process* given to the term in the established case-law of the Constitutional Court.

An independent collegial (administrative) body which delivers a final ruling is a tribunal, and as such must submit any preliminary question to the Community court.

Lawful apportionment of responsibilities is infringed by a tribunal that fails in its duty to request the intervention of the Community judge through a preliminary ruling. It rests with the Constitutional Court to remedy such error by finding a violation of the right to a *due process*.

Summary:

The appeal involved a challenge to a decision by an administrative authority (the Federal Tenders Board – *Bundesvergabeamt*), submitting that a contract was not awarded to the lowest bidder (the dispute raised the issue of the extent to which an alternative bid should be taken into consideration). The appellant alleged a violation of the right to a *due process* in that the national authority did not refer to the Community court the preliminary question regarding the interpretation of a Council Directive on the co-ordination of procedures for the award of public works projects.

The Constitutional Court supported the position of the parties in its finding that the impugned decision was issued by an authority constituting not only a tribunal within the meaning of Article 6 ECHR but also a court within the meaning of Article 177 EC Treaty. It was established in accordance with federal constitutional law as a collegial authority which has power to deliver final rulings, whose decisions are not subject to annulment or amendment under administrative procedures and which includes at least one judge, while its other members are not subject to instructions in the performance of their functions. The decision cannot be referred to the Administrative Court. The possibility of appeal to the Constitutional Court does not alter the fact that it is a decision at last instance within the meaning of Article 177.3 EC Treaty (as review by the Constitutional Court is limited to its specific area of jurisdiction under the terms of Article 144 B-VG).

In its established case-law, the Court gives a broad interpretation to the constitutional right to *due process* as it applies to the protection of the competent authority established by law. This interpretation is in line with the case-law of the former Imperial Court, in which the term "lawful judge" was to be understood as including not only a tribunal but also any State authority empowered by a law or regulation to take a decision. In this sense, the Court of Justice of the European Communities is a "lawful judge". The national authority is competent to enforce the law – including Community law – but is bound by the preliminary ruling which establishes the interpretation of Community law. Thus there is a collaboration among the tribunals.

In the case considered, the Court did not allow the claim: plainly, the interpretation of national law is not contrary to the requirements of the relevant Community law.

Languages:

German.

Identification: AUT-96-1-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12.12.1995 / **e)** V 136/94 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments and decisions of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Rules issued by the executive.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and other domestic legal instruments.

Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.

Keywords of the alphabetical index:

Environment, protection / Natural mineral water, container / Regulation, scope.

Headnotes:

By virtue of the principle that domestic law is to be interpreted in accordance with Community Directives, the (national) Regulation on mineral water (*Mineralwasserverordnung*) is inapplicable in so far as it prescribes the sole use of glass bottles for distributing natural mineral water.

Summary:

A firm introduced a direct application asking the Court to declare illegal a provision of the Regulation on mineral water fixing the effective date of the new stipulation that natural mineral water could be transported only in the containers approved for sale to consumers (meaning all containers which do not alter the nature of the mineral water). Until that date – 1 January 1997 – glass bottles must be used (under a Regulation with force of law dating from 1935). The applicant contended that the Regulation did not meet the requirements of a Directive of the Council of the European Union concerning the packaging of liquid foodstuffs.

The Court rules on the legality of a regulation at the request of any person claiming that its alleged illegality directly infringes his rights, provided that the regulation is applicable to that person without having been enforced by a judicial or administrative decision. The Court considered the question whether the impugned Regulation applied to the firm and whether it infringed the firm's rights as alleged. In the instant case, the firm had been refused permission to use plastic bottles for the sale of natural mineral water (resulting in reduced turnover and consequently in an alleged violation of its property rights, equality and freedom to engage in gainful activity).

Taking the line of the Court of Justice of the European Communities, the Court interpreted the aforesaid Council Directive of 15 July 1980 in a manner consistent with the free movement of goods. Consequently, it must be deemed lawful to bottle natural mineral water for sale in whichever containers do not alter its bacteriological and chemical characteristics. All domestic courts are compelled to interpret and apply national law in accordance with Community law, using their discretion to the utmost. This principle applies in particular to situations which not only constitute a provision of national law but are also covered by a Directive. The provision in the Regulation on mineral water intended to perpetuate the principle of compulsory use of glass bottles (though only until 31.12.1996) is inconsistent with Community law. The applicant firm's rights could not have been infringed, because the impugned Regulation could not be interpreted as it contended. The Court therefore declared the application inadmissible.

Languages:

German.

Belarus
Constitutional Court

Important decisions

Identification: BLR-96-1-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 18.01.1996 / **e)** J-31/96 / **f)** / **g)** *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 1 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Organisation.

Keywords of the alphabetical index:

Cabinet of Ministers.

Headnotes:

The "Law On the Cabinet of Ministers of the Republic of Belarus" is constitutional although several provisions have to be amended.

Summary:

The case was taken up by the Constitutional Court at its discretion. The Court examined the constitutionality of the "Law on the Cabinet of Ministers of the Republic of Belarus".

According to Article 106 of the Constitution, the Cabinet of Ministers shall be attached to the Office of the President for the execution of policy in the field of the economy, foreign policy, defense, national security, protection of public order and other spheres of State administration.

Article 108 of the Constitution states that the jurisdiction of the Cabinet of Ministers and its activities shall be determined by the Law on the Cabinet of Ministers of the Republic of Belarus.

Although the law was declared not to be unconstitutional, the whole Court requested the Supreme Council to amend the law in the following points:

The Cabinet of Ministers may create, reorganise and liquidate only those organisations, establishments and associations which are in State ownership.

The Cabinet of Ministers has the right to establish, in case of necessity, maximum wage rates only within the limits of law and only in respect of employment contracts in the public sector.

Orders concerning the use of natural resources issued by the Cabinet of Ministers must take into account that such regulation remains within the limits of legislative acts.

The elaboration of draft legislative acts by the Cabinet of Ministers on the instructions of the Supreme Council may be carried out only in cases envisaged by the law.

Languages:

Belarusian, Russian.

Identification: BLR-96-1-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 10.04.1996 / **e)** J-32/96 / **f)** / **g)** *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 2 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Pensions / Servicemen.

Headnotes:

The Cabinet of Ministers is not granted the right to change statutory scales of pensions.

Summary:

The case was a result of a constitutional motion filed by the Commission for Legislation of the Supreme Council of the Republic of Belarus challenging the constitutionality and legality of a Resolution of the Cabinet of Ministers. The motion alleged that this Resolution violated the rights to social insurance of servicemen,commanding staff and rank and file of the organs of internal affairs, and noted that this Resolution had not been promulgated and therefore was at variance with the Constitution.

The Court found that the constitutional right of citizens to social security had been violated. Under the Constitution restriction of personal rights and freedoms shall be only admissible in cases stipulated by the law. The Court concluded that the Cabinet of Ministers practically changed the norms of pension insurance, guaranteed by the law, thereby exceeded its powers and violated the Constitution and the laws.

Languages:

Belarusian, Russian.

Identification: BLR-96-1-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 19.04.1996 / **e)** J-33/96 / **f)** / **g)** *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 2 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Other international sources.
Fundamental rights – Civil and political rights – Equality – Scope of application – Employment.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Dismissal, right to appeal.

Headnotes:

The exclusion of employees in managerial functions from recourse to appeal procedures against their dismissal infringes upon the right to equal treatment.

Summary:

The case was a result of a constitutional motion filed by the Procurator General of the Republic of Belarus challenging the constitutionality of certain points of the Labour Code of the Republic of Belarus and of the Resolution of the Plenum of the Supreme Court of the Republic of Belarus of 17 June 1994, "On Some Issues of the Application of the Legislation by the Courts during the Settlement of Labour Disputes". The motion alleged that certain provisions allowed for the exclusion of chief specialists of the managing entities from recourse to appeal procedures against their dismissal from work.

The Court found that the constitutional rights of citizens to protect their economic and social interests and to the judicial defence of their rights and freedoms before a court within time periods established by the law had thus been violated. Under Article 22 of the Constitution, all persons are equal before the law and have the right, without any discrimination, to equal protection of their rights and legitimate interests.

In accordance with ILO Convention and Recommendations no. 111 "On Discrimination in the Field of Labour and Business" all persons shall enjoy, without discrimination, equality of opportunities in the field of labour and business.

The Court concluded that certain points of the rules under examination had a discriminatory character and contradicted the Constitution.

Languages:

Belarusian, Russian.

Identification: BLR-96-1-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 29.04.1996 / **e)** J-35/96 / **f)** / **g)** *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 2 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Presidential decrees.
Constitutional justice – Effects – Influence on State organs.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and other domestic legal instruments.
Sources of constitutional law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
Institutions – Head of State – Powers.

Keywords of the alphabetical index:

Differentiation / Edict, order, President.

Headnotes:

The President of the Republic of Belarus has the right to issue, within the limits of his power and in the fulfilment of the Constitution, laws and resolutions of the Supreme Council, as well as edicts and orders, and to supervise their execution.

Edicts and orders of the President must not contradict the Constitution, the laws and international legal acts ratified by the Republic of Belarus, or resolutions of the Supreme Council, and may not amend or add to them.

Edicts and orders of the President declared by the Constitutional Court in the prescribed manner to be inconsistent with the Constitution, the laws or international legal acts ratified by the Republic of Belarus are invalid.

Control over the constitutionality of regulatory enactments in the State shall be exercised by the Constitutional Court (Article 125 of the Constitution).

Summary:

The case was brought by the Constitutional Court at its discretion.

The matter for consideration was the Order of the President of the Republic of Belarus no. 259 of 29 December 1995 "On the Observance of the Edicts of the President of the Republic of Belarus". Point 1 of this order provided for the securing of absolute observance of the norms of a number of Presidential edicts by the Cabinet of Ministers and other State bodies without making appropriate amendments to the legislative acts of the Republic of Belarus. Point 2 of the order instructed the Presidential Administration to publish the collection of the effective edicts of the President of the Republic of Belarus. Certain presidential edicts enumerated in this order had been declared by the Constitutional Court to be inconsistent with the Constitution and the laws of the Republic of Belarus; either wholly or in special part.

The Court emphasised that according to the Constitution and the Law "On the Constitutional Court of the Republic of Belarus", decisions of the Constitutional Court, adopted within the limits of its power, are legally binding for the execution on the territory of the Republic by all State bodies, enterprises, establishments, organisations, officials and citizens, and its conclusions are final and subject to no appeal or protest. Point 1 of the Presidential order under examination was found to be unconstitutional and invalid.

In its judgment the Constitutional Court proposed that the Supreme Council of the Republic of Belarus review the differentiation at the legislative level of the sphere of competence for issuing edicts and orders of the President of the Republic of Belarus.

Languages:

Belarusian, Russian.

Belgium
Court of Arbitration

Statistical data
1 January 1996 – 30 April 1996

- 28 judgments
- 48 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 34 new cases
- Average length of proceedings: 10 months
- 15 judgments concerning applications to set aside
- 9 judgments concerning preliminary points of law
- 5 judgments concerning an application for suspension
- 2 judgments settled by summary procedure (one order to suspend and one combined order to set aside and to suspend)

Important decisions

Identification: BEL-96-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 09.01.1996 / **e)** 4/96 / **f)** / **g)** *Moniteur belge*, 27.02.1996; *Cour d'arbitrage – Arrêts* (Court of Arbitration – Judgments), 1996, 21 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction.
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 of asylum.

Keywords of the alphabetical index:

Family unification, law / Immigration / Marriage / Nationality.

Headnotes:

The principles of equality and non-discrimination contained in Articles 10 and 11 of the Constitution are not infringed by the distinction made by the legislator, regarding admission to Belgian for a period of more than three months with a view to family unification, between married foreigners who are not nationals of a member State of the European Union, to the effect that anyone married to a Belgian may automatically reside in Belgium, whereas anyone who is not married to a Belgian only receives authorisation to stay if their cohabitation is genuine and lasting. This difference in treatment reflects the legislator's aim to curb immigration whilst catering for the situation of foreigners who have ties with Belgians. It is not contrary to this objective to subject family unification of two foreign partners to more stringent conditions than family unification between two partners of whom one is Belgian. Interference in the private life of the persons concerned is not disproportionate, provided that the administrative authorities assess whether cohabitation is genuine and lasting within a reasonable time and that they do not consider a separation which is not genuine and lasting as a ground for refusing authority to reside in the country. Once granted, the right to reside cannot be withdrawn for reasons of divorce or separation.

Summary:

A Moroccan man who was married to a Moroccan woman who had settled in Belgium but with whom he had cohabited only from mid-1988 to the beginning of 1990, brought before the *Conseil d'Etat*, the highest administrative court, an action to set aside and a request to suspend a ministerial decision denying the right to residence and ordering him to leave the territory. In connection with this case, the *Conseil d'Etat* applied to the Court of Arbitration for a preliminary ruling as to whether the legislation which requires that cohabitation between foreign partners residing in Belgium for more than three months is genuine and lasting is discriminatory, considering that this condition is not imposed on foreigners (from outside the European Union) who are married to a Belgian. Having noted that foreigners in Belgium enjoy the same personal and property rights as Belgians, apart from the exceptions prescribed by law (Article 191 of the Constitution), the Court decided that the distinction made by the legislator was justified, given that the action taken was based on an objective criterion, namely the nationality of the spouse, that it was in reasonable proportion to the goal of the legislator, and did not, as far as the checks on cohabitation were concerned, constitute a disproportionate infringement of the right to respect for private and family life guaranteed by Article 22 of the Constitution and Article 8 ECHR,

provided that the authorities took a decision within a reasonable time (at the time that this case was brought before the *Conseil d'Etat* the time limit was one year, and could be extended by three months).

Cross-references:

See decision no. 93-325 DC of 13.08.1993 of the Constitutional Council, *Bulletin* 93/2, 22 [FRA-93-2-007]; decision no. 28/1995 of 19.01.1995 of the Constitutional Court, *Bulletin* 95/1, 48 [ITA-95-1-003]; decision no. 8152 of 07.05.1993 of the Supreme Court, *Bulletin* 94/2, 141 [NED-94-2-005].

Languages:

French, Dutch.

Identification: BEL-96-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 27.03.1996 / **e)** 26/96 / **f)** / **g)** *Moniteur belge*, 18.04.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual.
Constitutional justice – Procedure – Parties – Interest.
Institutions – Courts – Legal assistance – The Bar – Status of members of the Bar.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Inviolability of the home.
Fundamental rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Doctor / Lawyer / Medical confidentiality / Professional confidentiality / Recording calls / Telephone tapping.

Headnotes:

Any natural or legal person bringing an action before the Court of Arbitration to set aside a previous decision must demonstrate an interest. Only persons whose situation might be directly and adversely affected by the measure taken can establish an interest. When a measure favours a particular category of person, those who are not granted the advantage may have a sufficiently direct interest in challenging the measure. The fact that annulment of the measure may place the applicant in a more advantageous situation is sufficient to demonstrate the applicant's interest in an appeal.

It is not contrary to the principles of equality and non-discrimination contained in articles 10 and 11 of the Constitution that the circumstances in which the private communications and telephone conversations of lawyers and doctors can be monitored are more strictly limited than for other categories of people who are also bound by professional confidentiality. The law prohibits any surveillance activity aimed at premises used for professional purposes, or at the residence or means of communication and telecommunication of a lawyer or a doctor, except in exceptional circumstances (for instance, when the lawyer or doctor are themselves under suspicion). The legislator wished to take account of the fact that these persons have frequent contacts with suspects, that they maintain a relationship of trust with their clients which it is vital to protect and, finally, that they are responsible to bodies established by law which see to it that professional ethics are observed. Considering the nature of the principles at issue, the legislator could reasonably argue that the restrictions specifically laid down by the law with regard to lawyers and doctors are necessary in order to ensure that the rights of the defence and the right to respect for private life in its most intimate details are fully secured.

Summary:

The law of 30 June 1994 on the protection of private life from phone tapping and the interception and recording of private communications and telephone conversations prohibits the practice of phone tapping but introduces, by means of clauses included in the Criminal Investigation Code, the possibility of overriding this principle, provided that the conditions it lays down are satisfied and, in particular, that the investigating judge is involved; the investigating judge, who is authorised to order surveillance measures, has a report drawn up on the information, messages or telephone conversations recorded which are relevant to the investigation. This report may not contain messages or telephone conversations covered by professional confidentiality. The law prohibits surveillance measures from being ordered in respect of premises used for professional purposes or of the residence or means of communication or telecommunications of a lawyer or doctor, unless the latter are themselves under suspicion of having committed or taken part in an offence covered by the law, or unless precise evidence leads the investigators to suppose that third

parties suspected of having committed such an offence are using the aforementioned premises, residence or means of communication or telecommunication.

A chartered accountant and an association for the defence of chartered accountants' interests requested that the law be declared void because it created discrimination between doctors and lawyers on the one hand and those who practice other professions also subject to the duty of professional confidentiality, like chartered accountants, on the other hand. The Court accepted that the applicants had a legitimate interest since annulment might lead to another law which would be more to their advantage. Having established that the special rule for lawyers and doctors was justified (see the headnotes above), the court decided that, since Article 458 of the Criminal Code protecting professional confidentiality is applicable to persons other than doctors and lawyers, it does not follow that the principles of equality and non-discrimination contained in Articles 10 and 11 of the Constitution demand that these other persons should benefit from the special guarantees required to protect the values which are at stake when doctors and lawyers are involved.

Languages:

French, Dutch, German.

Bulgaria
Constitutional Court

Summaries of important decisions of the reference period 1 January 1996 – 30 June 1996 will be published in the next edition, *Bulletin* 96/2.

Canada
Supreme court

Important decisions

Identification: CAN-96-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 08.02.1996 / **e)** 24436 / **f)** Mooring v. Canada (National Parole Board) / **g)** [1996] 1 *Supreme Court Reports*, 75 / **h)** Internet: gopher.droit.unmontreal.ca/mooring.en; (1996), 104 *Canadian Criminal Cases*, (3d) 97, 132; *Dominion Law Reports*, (4th) 56, [1996] 3; *Western Weekly Reports*, 305, 33; *Canadian Rights Reporter*, (2d) 189, 192; *National Reporter* 161.

Keywords of the systematic thesaurus:

Institutions – Courts – Jurisdiction.

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Evidence, exclusion / Jurisdiction / Parole.

Headnotes:

A Parole Board is not a court of competent jurisdiction for the purpose of excluding evidence under the Constitution.

Summary:

The respondent, who had been serving a term of imprisonment following convictions for robbery and other related offences, was released on mandatory supervision. When responding to a call reporting that two men had been seen attempting to break into a car, police officers searched the respondent's van and found a stolen handgun as well as what could have been housebreaking equipment. The respondent was arrested and charged with a number of offences, but proceedings on all charges were later stayed, apparently because Crown counsel believed that the search of the van violated the Canadian Charter of Rights and Freedoms, and that evidence concerning the search would not be admissible in a trial. The National Parole Board nevertheless revoked the respondent's statutory release, and that decision was affirmed on appeal. A superior court judge dismissed the respondent's application for an order for relief in the nature of *habeas corpus*. The Court of Appeal found that the Board was a court of competent jurisdiction within the meaning of Section 24 of the Charter, with the ability to exclude evidence where such evidence was obtained by a Charter violation. It quashed the Board's decision and the respondent was released from custody. In a majority decision, the Supreme Court of Canada reversed the Court of Appeal's judgment.

A court or tribunal will only be a "court of competent jurisdiction" within the meaning of Section 24 of the Charter where it has jurisdiction over the parties, the subject matter, and the remedy sought. Even assuming that the Parole Board has jurisdiction over the parties and the subject matter, both its structure and function and the language of its constituting statute show that it is not empowered to make the order sought. The Board acts in neither a judicial nor a quasi-judicial manner. It does not hear and assess evidence, but instead acts on information. The Board acts in an inquisitorial capacity without contending parties. From a practical perspective, neither the Board itself nor the proceedings in which it engages have been designed to engage in the balancing of factors that Section 24.2 demands.

Languages:

English, French.

Identification: CAN-96-1-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 14.12.1995 / **e)** 23127 / **f)** *Ruffo v. Conseil de la magistrature* / **g)** [1995] 4 *Supreme Court Reports*, 267 / **h)** Internet: gopher.droit.unmontreal.ca/ruffo.en; (1995), 130; *Dominion Law Reports*, (4th) 1, 33; *Canadian Rights Reporter*, (2d) 269, 190; *National Reporter*, 161.

Keywords of the systematic thesaurus:

Institutions – Courts – Organisation – Members – Discipline.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Independence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Impartiality.

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Ethics, judicial / Impartiality, institutional / Judicial council / Tribunal, independent and impartial.

Headnotes:

The authority of the chief judge of the Court of Quebec, who is also chairman of the Judicial Council, to file a complaint against a judge of that court with the Council does not violate the principles of judicial impartiality and independence guaranteed by the Constitution.

Summary:

The chief judge of the Court of Quebec laid a complaint with the Judicial Council, in which he alleged that the appellant, a judge of the Court of Quebec, Youth Division, had acted in a manner inconsistent with the Code of Ethics, in particular by breaching her duty to act in a reserved manner and uphold the independence of the judiciary. In her motion in evocation in the Superior Court, the appellant argued that the members of the Judicial Council and of the committee of inquiry appointed by it did not have the necessary impartiality to make a fair and equitable decision concerning her. She further argued that sections 263 and 265 of the Quebec *Courts of Justice Act*, if they are to be interpreted as authorising the chief judge of the Court of Quebec to lodge a complaint with the Judicial Council, violate the rights guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. The Superior Court dismissed the motion and the Court of Appeal affirmed this judgment in a majority decision. The Supreme Court dismissed the appellant's appeal, with one judge dissenting on the issue of impartiality in the specific circumstances of the case.

1. The right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice protected by section 7 of the Charter, and the constitutional guarantee of an independent and impartial tribunal includes the concept of institutional impartiality.

2. Sections 263 and 265 of the *Courts of Justice Act* authorise the chief judge of the Court of Quebec to lay a complaint with the Judicial Council against a judge of his court and do not violate the rights guaranteed by section 7. The chief judge is *ex officio* the chairman of the Council, and sections 263 and 265 provide that any person may lodge a complaint with the Council, including a member of the Council, although a member cannot participate in the examination of the complaint in such a case. The key role given to the chief judge in ethical matters is simply the expression of a reality that is consistent with general practice and gradual developments over time. The supervisory powers of chief judges over ethics are inherent in the exercise of their functions.

3. As regards institutional impartiality, it cannot be concluded from an examination of the powers conferred on the chief judge of the Court of Quebec by the *Courts of Justice Act* that they might compromise the impartiality of members of the Judicial Council or the committee of inquiry in dealing with a complaint lodged by the chief judge. The Council is responsible for receiving and examining complaints lodged by any person against a judge for failure to comply with the Code of Ethics and, if an inquiry is necessary, it establishes a committee of inquiry for that purpose consisting of five persons chosen from among its members. When the inquiry is completed, the committee submits its recommendations to the Council. Proceedings before the committee are not similar to an adversarial trial. The complainant is not a prosecutor on whom the burden of proof lies. Rather, the committee's inquiry is intended to be the expression of purely investigative functions and, in light of this, the actual conduct of the case is the responsibility not of the parties but of the committee itself. The complaint is merely what sets the process in motion. It does not initiate litigation, which means that, where the Council decides to conduct an inquiry after examining a complaint lodged by one of its members, the committee does not thereby become both judge and party: its primary role is to search for the truth. The concept of "party" at a committee hearing does not change the essence of the institution in question. Where the chief judge makes use of the disciplinary process by taking the initiative of laying a complaint, there is therefore no reason to think that the Council and its committee do not, in the eyes of a reasonable and well-informed observer, have the impartiality required to carry out their duties. The chief judge's authority under the *Courts of Justice Act* is essentially administrative and his moral authority, which is naturally associated with his status and functions, is not restrictive and is part of the context in which all judges perform their duties. This moral authority does not in itself affect the capacity of a judge to decide to the best of his or her knowledge and belief and on the basis of the relevant factors. Finally, the existence of a friendly relationship between the chief judge and the members of the Council and the committee of inquiry is not liable to compromise their impartiality. Such an assertion has no legal basis and challenges the dignity and professionalism of the judiciary and its Council.

4. With respect to case-by-case impartiality, a reasonable and well-informed observer would not apprehend in this case that the Judicial Council was unable to make an impartial decision.

Languages:

English, French.

Croatia
Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

- Cases concerning the conformity of laws with the Constitution:
  received 32, resolved 18:
  in 1 case provision of a law was repealed, in 8 cases proposals to review the constitutionality of laws were not accepted, in 5 cases the proposals were dismissed, in 2 cases the procedure was terminated because the law was no longer valid, in 2 cases the petitioners were instructed about their right to propose review of constitutionality of laws.

- Cases concerning the conformity of other regulations with the Constitution and laws:
  received 21, resolved 9:
  in 3 cases regulations were repealed, in 1 case the proposal to review the constitutionality and legality of regulations was not accepted, in 3 cases the proposals were dismissed, in 2 cases the procedure was terminated.

- Cases concerning the protection of constitutional rights:
  received 175, resolved 182:
  in 8 cases the action was accepted, the disputed acts repealed and the cases returned for reconsideration; in 104 cases the actions were rejected; in 55 cases the actions were dismissed; in 5 cases the procedure was terminated; in 10 cases the claimants were instructed about their rights concerning the constitutional action.

- Cases concerning jurisdictional disputes among legislative, executive and judicial branches:
  received 2, resolved 2.

- Cases concerning supervision of the constitutionality and legality of elections:
  received none, resolved 1.

- Cases concerning suspension of implementation of individual acts before the case was finally decided:
  received 18, resolved 15; in 6 cases the claim was accepted and in 7 cases rejected; in 2 cases the procedure was terminated.

Important decisions

Identification: CRO-96-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.01.1996 / **e)** U-III-437/1993 / **f)** / **g)** *Narodne novine*, 7/1996, 354 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental rights – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Expropriation by municipality.

Headnotes:

Deprivation of property by decision of a municipal assembly is unconstitutional. According to the Constitution restrictions on ownership and deprivation of property are possible only if regulated by a State law and only in the interests of the State.

Summary:

A constitutional action claiming protection of property rights was submitted against the act of a municipality assembly (and a decision of an administrative court which upheld its validity) which sought to expropriate privately owned land on the grounds of the common good, namely the general interest in "microaccumulation of water and regulation of rivulets".

The action was successful, and the disputed acts were repealed since the Constitution of 21 December 1990 states that municipal bodies may not determine which general interests can serve as a foundation for the deprivation of private property, and this question must therefore be regulated by laws under the Constitution.

Languages:

Croatian.

Identification: CRO-96-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.01.1996 / **e)** U-III-846/1995 / **f)** / **g)** *Narodne novine*, 7/1996, 354-355 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Motor vehicle, deprivation.

Headnotes:

Constitutional rights of equality before the courts were not violated by the application of a law (by the Administrative Court) which was valid at the time of the trial rulings on sentence and protective measures following conviction for a misdemeanour, event though the amended law, valid at the moment of the decision of the administrative court, was less severe.

Summary:

A constitutional action was submitted against protective measures accompanying a sentence for a misdemeanour – deprivation of motor vehicle – claiming that the law which prescribed obligatory deprivation of motor vehicles in all cases in which the misdemeanour was committed was no longer in force and that the valid law, which prescribed facultative deprivation of a motor vehicle, and only if the misdemeanour was repeated, should be applied. The action was unsuccessful.

Languages:

Croatian.

Identification: CRO-96-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.01.1996 / **e)** U-III-509/1995 / **f)** / **g)** *Narodne novine*, 11/1996, 575-576 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Equality – Scope of application.
Fundamental rights – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Advocate, conditions for exercise of profession / Citizenship.

Headnotes:

Constitutional rights to equality before the law and before the courts, to work and to freedom of work were not violated by the requirement, prescribed by law, of Croatian citizenship as a condition for admission to the Advocates' Chamber and consequently for practice as an advocate.

Summary:

A constitutional action was submitted against an act of the Advocates' Chamber (and of the Administrative Court which upheld its validity) which denied to the claimant admission to the Chamber and consequently to professional practice.

The action was rejected by the Court on the grounds that the claimant, a citizen of Montenegro at the time of application, did not fulfil the conditions regulating Croatian citizenship and the conditions under which advocates may practice; the conditions as such did not violate constitutional rights.

Languages:

Croatian.

Identification: CRO-96-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 24.01.1996 / **e)** U-II-99/1995 / **f)** / **g)** *Narodne novine*, 11/1996, 576-577 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Public finances – Principles.

Keywords of the alphabetical index:

Local self-government, taxation.

Headnotes:

A unit of local self-government and administration acquires its financial means according to State law and may not introduce additional contributions chargeable against citizens which are not prescribed by law.

Summary:

A decision of a municipal council obliged all consumers of electric energy to pay an additional 3,5% of the amount owing for spent electricity in order to finance public lighting. The proposal to review the constitutionality and legality of the decision was successful, and the decision of the municipal council was repealed accordingly.

Cross-references:

In decision U-II-506/1993 of 14 February 1996 (*Narodne novine*, 17/1996), which concerns such a contribution in another municipality the Court also stated that public lighting, as a matter of communal life, is to be financed from means collected as "communal contributions" according to the Law on communal activities.

Languages:

Croatian.

Identification: CRO-96-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.02.1996/ **e)** U-III-1031/1994 / **f)** / **g)** *Narodne novine*, 13/1996, 579-580 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Employees, right to appeal.

Headnotes:

All natural and legal persons whose position is influenced by a process of transformation of ownership are entitled to legal protection of their rights. Since there is no right of natural persons, such as employees or shareholders in joint-stock companies, to appeal against consent of the privatisation fund envisaged in the law regulating privatisation, disputes before the Administrative Court constitute the only means of legal protection of employees in enterprises during transformation. Therefore, the claims of employees of a firm and of their trade union organisation should not be dismissed by the Administrative Court but should be judged on the merits.

Summary:

The privatisation fund gave its consent to the transformation of ownership of a publishing house. Against this consent, employees of a firm and their trade union organisation submitted an action to the Administrative Court which held that the law entitled only the enterprises, the legal entities, to apply to the Administrative Court, not persons employed in them. Their actions were therefore dismissed.

The action submitted to the Constitutional Court alleged that this ruling gave rise to a violation of the constitutional right to appeal. The action was successful.

Languages:

Croatian.

Identification: CRO-96-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 03.04.1996/ **e)** U-III-938/1995 / **f)** / **g)** *Narodne novine*, 30/1996, 1175-1179 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Name, change.

Headnotes:

Since personal integrity is constitutionally protected as inviolable, and one's name is a characteristic of one's individuality, the legislator is authorised to impose upon citizens only such restrictions on change of name as are authorised generally for restricting rights and freedoms – such as to protect the freedoms and rights of other people, public order, morality and health.

Summary:

A constitutional action was submitted against rulings of administrative bodies and the Administrative Court by which the claimant was denied the right to change his name and surname on grounds that the proposal of a new name was uncustomary in the region in which he lived, that it was contrary to the orthography of the Croatian language, and that his reasons for the proposed name were subjective in character.

The action was successful. The majority of the Court held that the bodies which denied the right of change did not establish whether the proposed name endangered freedoms and rights of other people, the public order, morality and health; reasons why constitutional rights may be restricted. Subjective reasons of the claimant are not grounds for denying the change, because subjective reasons and motives for change of name are exactly those which justify such a change, if legal conditions are fulfilled.

Supplementary information:

There were four dissenting opinions stating that the right to personal name implies that nobody may be forced to change their name for ethnic, linguistic, political, cultural or other reasons. Subjective reasons do not justify the change of name: stability of a name has to be the rule. Given that the Constitution has dedicated several articles to the preservation of the natural and cultural heritage,

which includes Croatian language, customs and traditional culture.

Languages:

Croatian.

Identification: CRO-96-1-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.04.1996 / **e)** U-III-132/1996 / **f)** / **g)** *Narodne novine*, 32/1996, 1253-1255 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Equality – Scope of application.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Expulsion of an alien.

Headnotes:

Constitutional rights of equality of citizens and aliens before the courts are violated if provisions of law, according to which an alien is subjected to removal from Croatian territory, do not correspond with established facts. The notion of a fair trial requires that reasons for expulsion from Croatian territory be substantiated.

Summary:

The Police department declared that the status of the claimant as a legal alien was not valid since the police certificate regulating his residence had expired. The expulsion decision of the Magistrates' Court was founded on the statement that "... the competent officers established...", while a judge did not establish the facts. The High Magistrates' Court did not ex officio review this essential violation of procedure and rejected the claimant's appeal. His subsequent action before the Constitutional Court was successful.

Languages:

Croatian, English.

Identification: CRO-96-1-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.04.1996 / **e)** U-I-28/1993 / **f)** / **g)** *Narodne novine*, 32/1996, 1255-1256 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Land register / Real estate tax.

Headnotes:

To prescribe that the transfer of ownership of real property cannot be entered in the land register without proof that a real estate tax was paid is a restriction which goes beyond the constitutionally permitted restrictions on ownership.

Summary:

In the Act regulating real estate taxes, the Court repealed the above provision which was held to be an unconstitutional restriction on the acquisition of property. The Court also held that the gaps between factual circumstances and the information entered in land registers weakens confidence in land registers and thus threatens entrepreneurial and market freedoms, which are constitutionally defined as the basis of the economic system of the State.

Languages:

Croatian, English.

Identification: CRO-96-1-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 29.04.1996 / **e)** U-II-204/1996 / **f)** / **g)** *Narodne novine*, 33/1996, 1275-1277 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Public finances – Budget.

Keywords of the alphabetical index:

Local self-government, budget.

Headnotes:

A budget adopted without following a legally prescribed procedure is unconstitutional.

Summary:

The Court repealed the 1996 budget of the City of Zagreb. In the procedure for adopting the budget of a local self-government and administration unit, as prescribed by law, a draft budget is submitted to the representative body by its council. This procedure also includes the participation of an appointed representative of the unit's council in the sessions of the representative bodies and its working bodies, who presents the budget to the assembly, gives reasons for the proposals and for the positions taken by the council, and gives expert explanations and opinions about submitted amendments. Denying the right to the representative of the unit's council to such participation renders the procedure for adopting the budget illegal and unconstitutional.

Supplementary information:

Dissenting opinion of one judge.

Languages:

Croatian.

Czech Republic
Constitutional Court

Statistical data

1 January 1996 – 30 April 1996

- Judgments of the Plenary Session: 12
- Judgments of the Chambers: 27
- Other decisions of the Plenary Session: 6
- Other decisions of the Chambers: 400
- Other procedural measures: 5
- Total: 450

Important decisions

Identification: CZE-96-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 22.02.1996 / **e)** III.ÚS 232/95 / **f)** Criminal defendant's right not to be removed from the jurisdiction of his statutory judge / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Legality.
Institutions – Courts – Procedure.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Criminal procedure.

Headnotes:

A decision taken by a court which is not competent for the case violates the right of access to courts.

Summary:

The complainant submitted a constitutional complaint against the final resolution of the District Court in Prague-East concerning the prolongation of his criminal custody. He asserted that his fundamental rights under Article

38.1 of the Charter of Fundamental Rights and Basic Freedoms had been violated, because instead of his case being decided in the proper forum – that is, by the District Court in Mladá Boleslav – it was decided by a court that lacked competence in respect of that decision.

The Constitution of the Czech Republic provides that it is a law-based State founded on respect for the rights and freedoms of persons and of citizens. The protection of these rights and freedoms falls upon courts. In carrying out their duties, courts are independent, and when making decisions, judges are bound only by law. These constitutional guarantees of an independent judicial branch, as well as the impartial exercise of its power, are given special emphasis by a further constitutional command, that is, that nobody may be removed from the jurisdiction of his statutory judge. This constitutional imperative must be considered as an indispensable condition of the due exercise of that branch of State power which has been entrusted to courts by the Constitution. On the one hand, this imperative builds up and strengthens judicial independence; on the other hand, for each party to a judicial proceeding, it represents a guarantee that his case will be assigned to courts and judges in accordance with rules prescribed in advance, such that the principle of strict adherence to the allocation of a court's case-load is observed, and so as to rule out the choice, for various reasons, of courts and judges *ad hoc*.

Under the terms of the Code of Criminal Procedure, the proper venue for the decision concerning the prolongation of the complainant's custody was the District Court in Mladá Boleslav. Neither the argument that the decision itself was substantively correct, nor that this procedural defect was subsequently cured, carries any weight. Not merely historical experience, but also recent experience with the totalitarian regime convincingly demonstrates how dangerous it is for the individual and how harmful for society if, in the determination of rights, courts and judges are assigned to do justice from an expedient perspective or by selection. In fact, there is no provision in the Code of Criminal Procedure permitting the defect of a court's lack of competence to be cured. In addition, the court heard the State Attorney's petition for the prolongation of custody in a closed session, that is, without the accused being present, so that he did not have the opportunity to assert the objection of in proper forum. By proceeding in this erroneous fashion, the court had unconstitutionally infringed the complainant's fundamental rights and, as a result, the Constitutional Court annulled the contested decision.

Languages:

Czech.

Identification: CZE-96-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary Session / **d)** 10.04.1996 / **e)** Pl.ÚS 34/95 / **f)** Special protection of the rights of children and youths in relation to the security information service's intelligence gathering power / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Data protection / Security information service.

Headnotes:

Article 32.1 of the Charter of Fundamental Rights and Basic Freedoms guarantees special protection to children and youths. However, Article 32.6 further provides that detailed rules shall be set by statute. In keeping with Article 41.1, the above-mentioned rights may be claimed only to the extent they are implemented by statute, and none has yet been issued in this area, so that in relation to the powers of the Security Information Service, there is no special legal regime for children and youths.

Summary:

A group of parliamentary deputies submitted a petition seeking the annulment of a part of paragraph 16.1 of Act no. 154/1994 Sb., on the Security Information Service (BIS), which enabled the BIS to file, store, and use data on natural and legal persons if such was necessary to carry out tasks within their authority, as provided for in paragraph 5.1 of Act no. 153/1994 Sb., on Intelligence Services, so that, among other things, BIS could secure information on aims and activities directed against the democratic foundations, sovereignty, and territorial integrity of the Czech Republic, on activities which may result in a threat to the security or the vital interests of

the Czech Republic, and on organised crime and terrorism.

The petition sought to have natural persons excluded from this grant of authority, because that legal category includes children and youths who enjoy special protection under provisions of the Constitution and international treaties on human rights, which provide that children may not be exposed to an arbitrary intrusion into their personal lives, family, home, or correspondence, nor to an unlawful assault on their honour or reputation. The Constitutional Court rejected the petitioners' arguments and thus rejected the petition for the annulment of the above-mentioned part of the Act no. 154/1994.

The reasoning of this decision stated that while Article 32.1 of the Charter of Fundamental Rights and Basic Freedoms guarantees special protection to children and youths, Article 32.6 further provides that a statute should make more detailed provisions, and that, in harmony with Article 41.1, the above-mentioned right may be claimed only to the extent provided by the law which implements it. At present, in contrast to the recent past, special statutory regulation of the area does not exist. However, in the future there is nothing to prevent, by means of the ordinary legislative process, changes being made in the current legal rules. The submission of such a bill is not, however, conditioned upon the Constitutional Court's annulment of some provisions of the Act. Article 7 and Articles 10.1 and 10.2 of the Charter of Fundamental Rights and Basic Freedoms have a broader general character and relate generally to the inviolability of privacy and family life. Article 16 of the Convention on the Rights of Children has a similar character – in relation, of course, to children.

Nonetheless, in contrast to international treaties on human rights and fundamental freedoms, the Charter of Fundamental Rights and Basic Freedoms contains special provisions with regard to dealing with any sort of information on persons. Article 10.3 of the Charter of Fundamental Rights and Basic Freedoms lays down the right to protection from unauthorised gathering, publication, or other misuse of data on persons. However, this means protection *only* from *unauthorised* handling of information, that is, conduct not permitted by law. The Charter of Fundamental Rights and Basic Freedoms prescribes no other conditions or restrictions.

The current legal rules show that the Constitution has not been violated and that no detriment to the rights of children has been caused. Naturally, this does not rule out the possibility that a specific case of manipulation of personal data of a private or family nature could occur and could qualify as a violation of rights and freedoms under Article 7 and Articles 10.1 and 10.2 of the Charter of Fundamental Rights and Basic Freedoms.

If public officials conduct themselves incorrectly, that may give rise to a proceeding before the Constitutional Court, which could result in the quashing of a particular decision or the prohibition of such an intrusion. It is not, however, grounds for the automatic annulment of the legal provisions under which public officials proceed, unless these legal provisions would unequivocally and without exception bind them to specific conduct or behaviour which would be in conflict with the Constitution or with an international treaty on human rights.

Languages:

Czech.

Identification: CZE-96-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.04.1996 / **e)** I.S 2/95 / **f)** Court decision without a hearing in straightforward cases / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – International Covenant on Civil and Political Rights.
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 – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Citizenship, dual.

Headnotes:

Only in straightforward cases, in particular if there is no doubt that an administrative decision was based on the correct determination of the facts of the case, may a court make a decision on a complaint without a hearing.

Summary:

The complainant submitted a constitutional complaint against the decision of the Municipal Court in Prague which had rejected his complaint against a final

administrative decision. The administrative body had determined that the complainant could not be issued a certificate of citizenship of the Czech Republic under paragraph 13.c and paragraph 17 of Act no. 40/1993 Sb., on the Acquisition and Loss of Citizenship of the Czech Republic, because he had lost his citizenship due to the fact that, of his own free will, he had taken up citizenship of the Slovak Republic. He objected that this manner of proceeding had infringed his rights guaranteed by the Constitution of the Czech Republic and by international treaties on human rights because he was deprived of his Czech citizenship without his consent, despite the fact that there is no express prohibition on dual citizenship.

First of all, the Constitutional Court reviewed whether all constitutional procedural rules were observed in the proceeding before the ordinary court. Under Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms, everyone has the right to have his case heard in public, without unnecessary delay and in his presence, and to be allowed to state his view on all the submitted evidence. Under Article 14.1 of the International Covenant on Civil and Political Rights, everyone has the right to be fairly and publicly heard by an independent and impartial court which will decide either on his rights and duties or on any sort of criminal accusation made against him. An exception to the principle that court hearings must be oral and public is governed by paragraph 250.f of the Code of Civil Procedure, which is inserted in the part of the Code on decision-making concerning complaints against administrative decisions. Under this provision, in straightforward cases, in particular if there is no doubt that the administrative decision was based on the correct determination of the facts, so that it is only a matter of assessing a legal issue, the court may make a decision on the complaint without a hearing. It shall proceed in the same manner if the contested decision is unreviewable because it is incomprehensible or because it lacks sufficient grounds to support it.

The Court came to the conclusion that the proceeding as a whole had not been in conformity with the principles of fair procedure laid down in Articles 90 and 96.2 of the Czech Constitution, in Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms, and in Article 14.1 of the International Covenant on Civil and Political Rights.

Despite the fact that it was not a straightforward case, the court heard and decided it while the complainant was not present and, in addition, he had not been questioned and was not permitted to give his views on the evidence at either level of the administrative proceeding. Thus, the Constitutional Court came to the conclusion that the conditions for applying paragraph 250.f of the Code of Civil Procedure had not been met, and it therefore quashed the contested decision. The court or the administrative body could in further proceedings correct the errors made in relation to fair procedure.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-96-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 16.11.1995 / **e)** I 36/1995 / **f)** / **g)** *Ugeskrift for Retsvæsen* (Danish Law Reports) 1996, 234 / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and other domestic legal instruments.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Acting judges / Criminal proceedings / Justice, appearance.

Headnotes:

The judgments of the district court (*byret*) and of the High Court (*Landsret*) in a criminal case were quashed and the case remitted for retrial before the district court because in the circumstances of the case an order for detention in custody based on an especially confirmed suspicion – made during the trial before the district court – disqualified the court from trying the case.

Summary:

A person charged with rape had been detained pending trial of the case before the court, as in the circumstances of the case there were specific reasons to believe that the accused would render difficult the prosecution of the case. The judge found that the detention could not be based on an especially confirmed suspicion.

During the trial before the district court, an order was made to maintain the detention, but now based on the establishment of an especially confirmed suspicion. At the time of this order, the court had examined the accused and six witnesses in the trial. The witness examination was not concluded, and counsel for the defence had not yet made his closing speech.

The accused claimed that the court had disqualified itself through the order for detention, and that the continued trial was an infringement of Article 6.1 ECHR.

The presuppositions for the rules on disqualification as declared by the legislator in the Danish Administration of Justice Act (*retsplejeloven*), and the relationship of these rules to detention pending trial, were expressed in the preparatory works of an amendment to the Act in 1990. This amendment was caused by the decision of the European Court of Human rights in the *Hauschildt* case. The preparatory works presupposed that no disqualification would arise pursuant to Article 6.1 ECHR caused by detentions based on an especially confirmed suspicion (not prior to, but) during the trial.

The Supreme Court stated that the present practice from the Convention bodies does not provide a basis for establishing that in all cases it will be compatible with the Convention provision that a judge participates in the adjudication of a case if he has ordered detention of the accused based on an especially confirmed suspicion during the trial.

The majority (three judges) of the Supreme Court found that, in the circumstances, the use of the provision on detention was suited to give the accused the impression that the question of guilt now had in fact been decided without his having had an opportunity to exercise his right of defence, cf. Article 6.3.c and Article 6.3.d ECHR. Accordingly, these judges found that the case had presented circumstances which were suited to call in question the absolute impartiality of the court during the continued trial.

The minority (two judges) found that, although the production of evidence was not completely concluded and counsel for the defence had not yet had an opportunity to make his closing speech, disqualification did not arise because by far the most important part of the production of evidence had been completed when the order was made.

The judgments of the district court and of the High Court were then quashed and the case was remitted for retrial.

Cross-references:

The judgments of the district court and of the High Court are reported in *Ugeskrift for Retsvæsen* (Danish Law Reports) 1994, 225 .

The decision refers to the Supreme Court order of 1 November 1989, reported in *Ugeskrift for Retsvæsen* 1990, 13, and to the judgment of the European Court of Human Rights of 24 May 1989 in the *Hauschildt* case (Series A no. 154).

Languages:

Danish.

Estonia
National Court

There was no relevant constitutional case-law during the reference period 1 January 1996 – 30 April 1996.

France
Constitutional Council

Statistical data
1 January 1996 – 30 April 1996

14 decisions, including:

- 2 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.1 of the Constitution
- 2 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution
- 2 decisions on the dismissal of a member of parliament pursuant to core provisions of the Electoral Code
- 3 decisions on incompatibility pursuant to core provisions of the Electoral Code
- 4 decisions on electoral matters pursuant to Article 59 of the Constitution
- 1 decision on the internal workings of the Constitutional Council: appointment of two deputy rapporteurs to the Constitutional Council

Important decisions

Identification: FRA-96-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 09.04.1996 / **e)** 96-373 DC / **f)** Organic law on the statute of autonomy of French Polynesia / **g)** *Journal officiel de la République française – Lois et décrets* (Official Gazette of the French Republic – Acts and Decrees), 13.04.1996, 5724 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Effect as between the parties.
Fundamental rights – General questions – Effects.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Languages.
Fundamental rights – Civil and political rights – Freedom of association.
Fundamental rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Association / Fundamental rights, validity throughout the territory / Local authorities / Overseas territories / Precedent, limitations.

Headnotes:

Subject to their institutional nature being established, there is no reason to examine the constitutionality of provisions of an institutional law referred to the Constitutional Council when they are identical in wording or in content to provisions previously ruled to be in keeping with the Constitution.

Neither the principle of local and regional self-government nor the special organisational status of France's overseas territories can lead to the basic conditions for the exercise of public freedoms, and consequently to all the guarantees that they entail, becoming dependent on the decisions of local and regional authorities and, hence, possibly not being the same throughout the Republic.

The effect of registering an association is to entitle it to take part in court proceedings, to receive donations, to collect membership subscriptions and to acquire, own and administer such property as is necessary for it to function; such registration, which is an essential condition for the implementation of a law relating to the exercise of a public freedom, cannot be regulated by an authority of the territory.

The effect of this provision is to deprive a person wishing to challenge the lawfulness of a decision taken in application of deliberations of the territorial assembly, more than four months after publication of said deliberations, of the right to lodge an application for judicial review when the question at issue concerns the distribution of powers between the State, the overseas territory and the local government; in view of the importance attached to the proper distribution of powers between these authorities, the legislator's concern to strengthen the legal certainty of decisions of the Assembly by no means justifies such a substantial restriction of the right to appeal.

Summary:

In examining the institutional Act and the ordinary Act on the autonomous status of French Polynesia, the Constitutional Council ruled on all the legislation henceforth applicable to the territory. The purpose of

all the negative rulings is to ensure that fundamental rights and freedoms are guaranteed with the same rigour throughout the territory of the French Republic.

Languages:

French.

Identification: FRA-96-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 09.04.1996 / **e)** 96-375 DC / **f)** Law on certain economic and financial provisions / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 13.04.1996, 5730 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of the constitutionality of enactments.
Sources of constitutional law – Techniques of interpretation – Concept of manifest error in assessing evidence or exercising discretion.
Sources of constitutional law – Techniques of interpretation – Weighing of interests.

Keywords of the alphabetical index:

General interest / Legislative power, limitations / Legislative validation / Ownership / Privatisation / Transfer from public to private sector.

Headnotes:

By authorising loan offers which ignored the provisions of Article L.312-8, paragraph 2, of the Consumer Code concerning repayment scheduling, it was the legislator's intention to avoid a spate of legal proceedings of such magnitude that the financial equilibrium of the banking system as a whole, and therefore the country's economic activity in general, would have been placed at considerable risk. Since the Constitutional Council does not have the same power of appreciation and decision making as Parliament, it is not for the Constitutional Council, in the absence of any manifest error, to rule on the seriousness of the risks involved. Since the legislator also took care to limit the scope of the disputed measure to those loan offers which stated the amount and frequency of the repayments, their number or the duration of the loan and, where applicable, any arrangements for their readjustment, the provisions concerned must be regarded as serving the public interest.

While Article 34 of the Constitution provides for the law to lay down the rules governing transfers of company ownership from the public to the private sector, it does not require all transfers from the public to the private sector to be decided directly by the legislator. The legislator may lay down criteria on the basis of which such transfers may be approved by authorities or bodies appointed by it, just as it is responsible for defining the rules applicable to such transfers; however, in exercising its powers under Article 34, the legislator may not contravene any principle or rule of constitutional value.

By providing for the possibility, subject to the approval of the administrative authority, of transferring to the private sector firms in which the State has a majority share and which meet certain requirements in terms of size and turnover – while maintaining the same procedures applicable to firms whose transfer must be approved by law – the legislator had not violated any principle of constitutional value. It is for the administrative authority concerned, under judicial supervision, to make sure that the firms concerned are not in the nature of public services whose existence and operation would be required by the Constitution.

Summary:

The validation of the loan offer by the law in question was accepted, but in keeping with the case-law initiated by Decision 95-369 DC of 28 December 1995 (see *Bulletin* 95/3 [FRA-95-3-011]), the Council made sure that the purpose of the law was not to guarantee purely financial interests. In this instance, it decided that the rush of legal proceedings that would have been prompted by a negative ruling on Article 87-I of the law referred to it, confirming Court of Cassation judgments constituting *res judicata*, would have represented a threat to the banking system as a whole.

Languages:

French.

Germany
Federal Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

- 14 decisions by a panel *(Senat)* among them:
  - 1 concerning a federal conflict
  - 3 concerning concrete norm control
  - 10 concerning individual constitutional complaints together with 4 cases that have been joined
- 1669 rejecting decisions of the chambers *(Kammern)* together with 31 cases that have been joined
  20 granting decisions of the sections together with 1 case which has been joined
- 1973 new cases

Important decisions

Identification: GER-96-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.11.1995 / **e)** 2 BvR 413/88, 2 BvR 1300/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Budgetary and financial aspects – Finance.
Institutions – Public finances – Taxation.

Keywords of the alphabetical index:

Environment taxes / Water, use.

Headnotes:

Water is a common good. If persons get permission to use this resource intensively, they obtain a privilege with respect to others who do not use this resource to the same extent. It is justified to impose a levy on this privilege.

Summary:

Some German *Länder* impose a levy on the extensive use of water. Several enterprises brought individual constitutional complaints against the respective legal provisions. They claimed that the levies lacked a legal foundation; for the statutes on which the levies were based were adopted by the *Länder* in circumstances where, in the opinion of the complainants, they did not have legislative competence in this field. The Federal Constitutional Court rejected the individual constitutional complaints. It stated with reference to former case law that the regulation of the use of water as a common good is constitutionally admissible. Beyond prohibitions and commands, the State has the possibility to reduce the use of water by imposing levies.

With respect to legislative competence, the Federal Constitutional Court pointed out that the Federation adopted a skeleton law within its competence, but this law does not exclude legislative activity by the *Länder* in the same field. The Constitution does not prohibit the imposition of levies or fees which cannot be qualified as taxes in a strict sense. However, such charges can be levied only under certain conditions, i.e. they need a special justification, they must respect the principle of equality and they must not undermine the principle of the completeness of the budget.

The charge on the extensive use of water is justified as it constitutes a payment for the privilege which a person gets by using the water, which has to be qualified as a common good, in an extensive way. The charge is clearly separated from taxes in a strict sense as it is paid in return for the performance of a service by the State, i.e. the granting of the possibility to use the water; therefore, the general rule that the State has to cover its expenses by taxes as provided by Articles 105 and 106 of the Basic Law is not put into question. The principle of the completeness of the budget is not impaired by the imposition of a contribution for the use of water, as this contribution forms part of the budget.

Supplementary information:

The Federal Constitutional Court decided for the first time on the admissibility of a charge levied on the use of a natural resource in the interest of environmental protection.

Languages:

German.

Identification: GER-96-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 14.11.1995 / **e)** 1 BvR 601/92 / **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:

Fundamental rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade unions, publicity in an enterprise.

Headnotes:

The freedom to form working associations, among them trade unions as guaranteed by Article 9.3 of the Basic Law, is not restricted to activities indispensable for the existence of such organisations. To make publicity for such an organisation is also part of this constitutional freedom.

Summary:

A person gave some information on a trade union to a colleague in an enterprise during working hours. He received a warning from his employer. His law suit against this measure was in the last instance rejected by the Federal Labour Court. The Federal Constitutional Court, by clarifying its former case-law, stated that the freedom to form working associations also includes a guarantee of freedom to make publicity for a trade union within an enterprise.

Languages:

German.

Identification: GER-96-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 16-01-1996 / **e)** 2 BvL 4/95 / **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:

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

Keywords of the alphabetical index:

Eligibility of closely related persons.

Headnotes:

The prohibition on contemporaneous membership of former spouses in the same municipal council is incompatible with the constitutional principle of electoral equality.

Summary:

The municipal code of a German *Land* provided that former spouses must not contemporaneously be members of a municipal council in municipalities with less than 20.000 inhabitants. In a local election two divorced persons, who were married to each other before, were elected to the municipal council. The former wife was not admitted to the council, as she got less votes than her former husband. She brought a claim against the decision, which was rejected before the administrative courts.

The Federal Constitutional Court declared the relevant provision of the municipal code unconstitutional. It underlined that the provision should prevent nepotism. The Federal Constitutional Court left the question open as to whether the prohibition on contemporaneous membership of relatives or married persons in a municipal council is constitutional. As for divorced persons, the danger of promoting common interests is far less than for example in the case of business friends. The important principle of electoral equality does not admit an exception in cases where a real danger for the functioning of the municipal council cannot be identified.

Languages:

German.

Identification: GER-96-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 18.01.1996 / **e)** 1 BvR 2116/94 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.
Constitutional justice – Effects – Consequences for other cases – Decided cases.
Institutions – Courts – Ordinary courts.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Constitutional Court, pending case, effects / Final judgment.

Headnotes:

An individual constitutional complaint pending before the Federal Constitutional Court does not suspend the execution of the impugned decision.

Summary:

A Turkish family set up a satellite antenna on the balcony of its apartment without the consent of the landlord. He required the dismantling of the antenna and obtained a final decision. The members of the family brought an individual constitutional complaint against this final decision. While this case was pending before the Federal Constitutional Court the landlord had the decision executed. However, the Turkish family reinstalled the antenna. The landlord terminated the contract with the family and required it to leave the apartment. The civil court of first instance granted the landlord's claim. While the case was pending before the second instance court, the Federal Constitutional Court decided with respect to the individual constitutional complaint that a foreigner living in Germany has a right – guaranteed by freedom of information – to have access to information in his native language via satellite antenna. The appeal court rejected the remedy of the Turkish family against the decision of the civil court of first instance, as it considered the reinstallation of the antenna by the family in spite of the final court order to dismantle it as a heavy violation of the contractual relationship, which justified the termination of the contract.

The first panel of the Federal Constitutional Court did not admit this case. It left open whether the civil court of appeal would have to take into account the fact that the decision of the civil court requiring the dismantling of the antenna had been quashed. The result of the decision of the court of appeal would have been the same in any case, because the court of appeal correctly stated that the complainants would have had to respect the final decision which ordered the dismantling of the antenna. The fact that the complainants brought the case before the Federal Constitutional Court did not set aside their obligation to obey the final decision, as the procedure before the Federal Constitutional Court had no suspensive effect.

Languages:

German.

Identification: GER-96-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 31.01.1996 / **e)** 2 BvL 39/93; 2 BvL 40/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Army and police forces – Army.
Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Public.

Keywords of the alphabetical index:

Equal remuneration.

Headnotes:

It is incompatible with the principle of equality to grant supplementary remuneration to servicemen deployed abroad and not to civil servants working under the same conditions.

Summary:

According to the federal statute on remuneration, servicemen being deployed abroad get supplementary remuneration as compensation for the inconvenience

of living in a foreign country. Civil servants working as military staff under the same conditions do not get this extra payment. Two administrative courts which had to apply the statute in concrete cases put the question of its constitutionality before the Federal Constitutional Court. The Federal Constitutional Court, referring to its steady case-law, pointed out that on the one hand the legislator has a certain freedom in legislating, and on the other that it may differentiate between two groups of persons only insofar as there are reasonable ground for doing so. In the present case the Federal Constitutional Court could not identify a reason which could justify the unequal treatment of military men and civil servants. Therefore, it declared the statute incompatible with the principle of equality. It stated that the administrative courts had to suspend the decision until the legislator changed the law.

Languages:

German.

Identification: GER-96-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 13.02.1996 / **e)** 1 BvR 262/91 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions – Courts.
Constitutional justice – The subject of review – Court decisions.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Libel.

Headnotes:

In a case concerning a libel claim, the Federal Constitutional Court reviews the decision of an ordinary court with respect to the qualification of a statement as an assertion of fact or as a pure opinion. Beyond that, it reviews whether the ordinary court interpreted the statement in question correctly. Apart from this review concerning constitutional requirements, it falls within the competence of the ordinary courts to decide a libel suit.

Summary:

In the present case the Federal Constitutional Court had to decide to what extent and in which way a person could criticise an organisation which is engaged in assisting suicides of persons who are incurably ill. After the harsh criticism of some of its recent decisions concerning freedom of expression and the protection of personal honour, the Federal Constitutional Court used this case to clarify to what extent it will review decisions of the ordinary courts in such cases.

Languages:

German.

Identification: GER-96-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 29.02.1996 / **e)** 2 BvR 136/96 / **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 – Organisation – Members – Status.
Institutions – Courts – Organisation – Members – Discipline.

Keywords of the alphabetical thesaurus:

Judge, independence / Suspension.

Headnotes:

A judge who violated his duties by changing the decisions of younger judges in cases in which he was not the judge predetermined by law can be suspended.

Summary:

A president of an administrative court was suspended because he was suspected of having changed decisions of younger colleagues in cases in which he was not the judge predetermined by law. In an administrative procedure his complaint against the suspension was rejected.

The Federal Constitutional Court did not admit the case because it held the individual constitutional complaint not to be sufficiently founded. The principle of the independence of a judge is part of the traditional principles of this office in the sense of Article 33.5 of the Basic Law to which a person may refer in an individual constitutional complaint. The independence of a judge is subject to restriction by law, i.e. it can be restricted by a decision of a court if the judge commits an act which constitutes a violation of his duties. The suspension of a judge is justified if he or she is suspected of having violated his or her duties in a way that would impair the functions of the office if the judge continued to exercise his or her functions. The interference of the judge in the decisions of younger judges is so heavy that the suspension of the judge does not violate the principle of proportionality even if he or she will not be dismissed by the final decision in the disciplinary procedure.

Languages:

German.

Identification: GER-96-1-008

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 02.04.1996 / **e)** 2 BvR 169/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Scope of application – Employment – Public.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Civil servant, motherhood and employment.

Headnotes:

The obligation of the State to protect the marriage, the family and mothers does not require that a woman having born a child should in all respects be treated equally to a person who is not a mother.

Summary:

A woman took her final examination to become a school teacher. She did not get a job in the civil service because she did not have enough credits. Her examination had been postponed because of a pregnancy and a birth. Without this delay she could have taken the examination one year before, and at that time the credits she got in the end would have been enough to be employed. She claimed a job in the public service and brought the case before the administrative courts, which rejected the claim.

The Federal Constitutional Court did not admit the individual constitutional complaint. It stated that according to Article 33.2 of the Basic Law, civil servants have to be chosen in conformity with the performance principle. This principle cannot be set aside without a legal basis. The obligation of the State to protect the family and motherhood does not entail a right of a woman to be compensated for motherhood in all respects; it does not prevail over the above mentioned performance principle. The implementation of the obligation to protect motherhood falls within the competence of the legislator, who enjoys a margin of appreciation in this connection.

Languages:

German.

Identification: GER-96-1-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 18.04.1996 / **e)** 1 BvR 1452/90, 1 BvR 1459/90, 1 BvR 2031/94 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.
Constitutional justice – The subject of review – Constitution.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Foreign policy / Property, restitution / Treaty on unification.

Headnotes:

The exclusion of restitution of property expropriated in the years 1945 to 1949 in the Soviet occupation zone as provided by the Treaty on unification between the Federal Republic of Germany and the German Democratic Republic and by Article 143.3 of the Basic Law is compatible with the Constitution.

Summary:

Between 1945 and 1949 many expropriations took place in the zone of Soviet occupation. In the treaty on unification of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic it was provided that these expropriations should not be restituted, in contrast to the expropriations which followed that time. This treaty provision was incorporated into Article 143 of the Basic Law. In a decision of 23 April 1991 the Federal Constitutional Court had declared the treaty and the respective constitutional provision compatible with the unchangeable norms of the Basic Law, enumerated in Article 79.3 of the Basic Law, among them the protection of human dignity under Article 1.1 of the Basic Law. In that first decision, to which the Federal Constitutional Court referred, it held that these expropriations took place beyond the jurisdiction of the Federal Republic of Germany in a territory in which the Basic Law was not applied. At the moment of unification and the extension of the Basic Law to the territory of the German Democratic Republic, the former owners did not have a title any more. The eternal principles as provided by Article 79.3 of the Basic Law do not require the restitution of property expropriated by a foreign State. The exclusion of restitution did not violate the principle of equality – which in its very essence is part of human dignity and which must not be infringed even by a constitutional provision – even though only restitution of the expropriations affected before 1949 was excluded. This distinction was declared justified because according to the statements of the federal government it was a precondition set up by the German Democratic Republic and the Soviet Union for unification.

In the new case the complainants questioned the constitutionality of the Treaty on unification, in so far as it excluded the restitution of property expropriated between 1945 and 1949. They referred to various statements of Soviet politicians, among them the former President of the USSR, according to which the exclusion of such restitution was not to be considered a condition of the consent of the Soviet Union to the unification of Germany.

The Federal Constitutional Court upheld the former decision. It stated that the decision on the constitutionality of a constitutional norm had to be based on the essential principles which according to Article 79.3 of the Basic Law must not be abolished. The principle of equality as protected by Article 3 of the Basic Law does not fall under the above-mentioned principles. Only its essence forms part of the principle of human dignity as protected by Articles 1.1 and 79.3 of the Basic Law. This essential content of the principle of equality was not violated by the exclusion of the restitution, as the Federal Government considered the respective agreements with the USSR and the former GDR as necessary conditions for unification. The Federal Constitutional Court underlined that the Federal Government disposes of a great margin of appreciation in the field of foreign policy. In interpreting the various statements of politicians during the negotiations and afterwards, it came to the conclusion that the government could understand the positions of the USSR and the former GDR in the sense that they would give their consent to the unification only if the property expropriated in the years between 1945 and 1949 would not be restituted.

Supplementary information:

Former decision on the same topic BVerfGE 84, 90.

Languages:

German.

Greece
State Council

There was no relevant constitutional case-law during the reference period 1 January 1996 – 30 April 1996.

Hungary
Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

Number of decisions

- Decisions by the plenary Court published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 9
- Number of other decisions by the plenary Court: 20
- Number of other decisions by chambers: 11
- Number of other (procedural) orders: 45
- Total number of decisions: 90

Important decisions

Identification: HUN-96-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 26.01.1996 / **e)** 1/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 7/1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Discrimination between private and public employers / Employees, liability for damages.

Headnotes:

Special liability rules laid down for a limited circle of employers results in an unconstitutional discrimination.

Summary:

Article 348 of the Civil Code regulates the liability of the employee when causing work-related damage to a third person. As a general rule in such cases the employer is liable toward the third person. Paragraph 2 of the mentioned article regulates that special case when the employer is not able to cover the damages: in that case the employee can be made liable for it. The division of

the liability between the employer and the employee is regulated by the Labour Code.

The special rule applies only to employers having no more than thirty employees. The present-day text of the article dates from 1989. Before that time it referred to private employers in general (thus making a clear distinction between state-owned and private enterprises). The Constitutional Court found even the amended text of the article to be unconstitutional, and annulled it. The challenged section provided a special liability rule in favour of the third person, who is usually the client of the employer, by also rendering the employee liable. A rule creating a subsidiary or background liability in specified cases can be justified. The provision of the Civil Code discriminated against a group of private employers without giving any constitutionally acceptable reason, however, and therefore it was unconstitutional.

Supplementary information:

One judge concurred in the opinion, explaining in detail the history of the respective provisions.

Languages:

Hungarian.

Identification: HUN-96-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 23.02.1996 / **e)** 3/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 14/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual – Political parties.
Constitutional justice – Types of litigation – Admissibility of referendums and other consultations.
Constitutional justice – The subject of review.

Keywords of the alphabetical index:

Parliamentary resolution, nature / Popular referendum.

Headnotes:

An individual resolution of Parliament on the admissibility of a popular referendum is not a legislative act.

Summary:

A political party (the Workers' Party) initiated a popular referendum on the question as to whether or not Hungary should join NATO. The party was able to collect more than 140,000 signatures (the minimum requirement is 100,000). Nevertheless Parliament with a resolution rejected the claim for the popular referendum because it considered it to be too early to hold a referendum on a question which the country was not in a position to decide. The petitioner considered that the parliamentary resolution violated both the provisions of the Constitution and the law on popular referenda.

The Constitutional Court, interpreting the provisions of the Act on Legislation, pointed out that an individual resolution deciding on the admissibility of a popular referendum is not a legislative act, and thus held that the Constitutional Court had no competence to adjudicate upon its constitutionality. The Constitutional Court also rejected other parts of the petition.

Languages:

Hungarian.

Identification: HUN-96-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 22.03.1996 / **e)** 12/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 32/1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

Criminal record, clean / Data protection / Dignity / Right to Higher education.

Headnotes:

It violates the right to higher education, the right of privacy, and thus the right to human dignity that applicants for admission to higher education institutions are requested to present a document certifying the lack of criminal record (good-conduct certificate).

Summary:

A governmental decree on admission to higher education institutions prescribed that the applicant has to attach to the application for admission an official document certifying the absence of a previous criminal record. The Constitutional Court by its decision no. 35/1995 (VI.2) had declared unconstitutional a provision of the Act on Higher Education that excluded from higher education persons whose punishment also included the exclusion from public affairs.

The Constitutional Court in the present case declared that a previous criminal record is not an obstacle to university studies. The Constitutional Court examined the question from the point of view of the protection of personal data. Under the Act on Data Protection the use of special personal data can be permitted only by a law. A governmental decree cannot prescribe the use of special personal data like that of a previous criminal record. Thus the governmental decree violated Article 35 of the Constitution, according to which a governmental decree cannot contradict a law.

Supplementary information:

The decision was delivered by a three-member panel.

Languages:

Hungarian.

Identification: HUN-96-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 03.05.1996 / **e)** 16/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 35/1996 / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Certainty of the law.
General principles – Rule of law – Maintaining confidence.
Institutions – Public finances – Taxation.
Fundamental rights – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Tax exemptions, reversal / Taxes.

Headnotes:

The reversal or reduction of a tax exemption given for a defined time period before the expiration of that period is usually unconstitutional because it violates legal certainty and consequently the principle of the rule of law expressed in Article 2 of the Constitution.

A distinction must be made between tax reductions granted for a short term and those that are long term. The reversal of tax reductions given for a short period of time are especially not acceptable constitutionally. In the case of long-term tax exemptions, proportionally with the duration of the exemption, exceptionally the legislator may reverse it in event of basic and significant changes in the circumstances. This may be particularly the case when the changes in the circumstances compared to those at the time of the granting of the exemptions would make it disproportionally hard or even impossible for the State to uphold the exemptions. Thus tax exemptions given for a defined time generally cannot be reversed. But exceptionally tax exemptions given for a long time period might be reduced or reversed constitutionally.

Summary:

An amendment in 1994 to the Act on Corporate Taxes of 1991 reduced the exemptions granted in 1988 for companies operating with foreign capital. The exemption was originally granted for ten years. The amendment of the law as a matter of fact did not abolish the tax exemption but split the respective tax into two parts. The exemption applied automatically only for one part of the tax, while additional prerequisites were set out for attaining exemption for the other part. According to the Constitutional Court the reversal concerned the original tax, and did not amount to the introduction of a new tax. Therefore the constitutional review focused on the constitutionality of the reversal of an exemption granted for a limited time period.

Supplementary information:

The decision extensively quoted the Constitutional Court's previous rulings on tax exemptions.

Four judges out of the nine dissented. One judge wrote the dissenting opinion in which the other three concurred. The dissent warned of the dangers of the generalisation in the majority's opinion. The principle of maintaining confidence in the certainty of legal regulations cannot be examined only in terms of duration of time; the examination of the gravity of the reasons relied on by the legislator for amending the law, and especially the proportionality of the goals and the means applied, were also important elements in reaching a well-founded decision.

Languages:

Hungarian.

Ireland
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 1996 – 30 April 1996.

Italy
Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

Meetings of the Constitutional Court during the period from 1 January to 30 April 1996: 7 public hearings and 7 hearings in chambers. The court gave 140 decisions in all.

Decisions given in cases where constitutionality was a secondary issue: 67 judgments, 17 finding measures complained of unconstitutional and 53 court orders.

Decisions given in cases where constitutionality was the main issue: 11 judgments, 7 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: 4 judgments;
b. between State authorities in disputes between public bodies over the exercise of powers: 1 judgment and 1 court order.

Important decisions

Identification: ITA-96-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 06.12.1995 / **e)** 7/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 4 of 24.01.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Composition.
Institutions – Executive bodies – Relations with the legislative bodies.

Keywords of the alphabetical index:

Collegiality, principle / Individual motion of no confidence.

Headnotes:

Although the Constitution does not expressly provide for a motion of no confidence voted in respect of an individual Minister, known as an "individual motion of no confidence", this cannot be regarded as foreign to the institutional order. Taking into account the way in which parliamentary government has developed, it must be established whether the individual motion of no confidence, albeit not explicitly provided for, can be regarded as integral to the purport of Articles 92, 94 and 95 of the Constitution as to relations between the Government and Parliament.

In the parliamentary form of government, which is the one practised in Italy, the thrust of policy is determined jointly by the Parliament and the Government and implemented through co-ordination between the government's collective activity and the individual activity of the Minister concerned. The Government collectively, and the Minister individually, are each answerable to Parliament as Article 95 of the Constitution explicitly stipulates. A relationship of confidence, linked with this responsibility, is formed between the Government and the Parliament as well as between individual Ministers and the Parliament.

The principle of collegiality is meant to guide the Government's activity in order to ensure unity of direction. However, the principle is not to be construed as compelling all members of the Government to remain in office for an equal length of time; indeed, a situation may arise where collegiality is jeopardised by the conduct of a single Minister, in which case a motion of no confidence passed by the Chambers against that Minister alone (individual motion of no confidence) can help to restore unity of direction. Nor can the individual motion of no confidence be deemed to entail undue preponderance of the Parliament over the Ministers by making them vulnerable to intermittent and unstable parliamentary majorities: when a motion of no confidence is passed against one member of the Council of Ministers, the President of the Council may, if he supports that Minister's action, call for a vote of confidence for the entire Government.

The above interpretation of the organisation of relations between the Government and Parliament is validated firstly by Rule 115 of the Rules of Procedure of the Chamber of Deputies regulating a motion calling for a Minister's resignation in the same way as a motion of no confidence against the Government. In the Senate, moreover, parliamentary records attest that in practice frequent recourse has been had to the same procedure in the absence of any rule resembling that of the Chamber of Deputies.

These regulatory and factual elements amplify the textual provisions of the constitution and define the respective positions of the constitutional bodies.

The powers which Article 110 confers on the Minister for Justice, ie authority to determine the organisation and operation of the justice departments, do not suffice to differentiate Parliament's oversight of this Minister from its oversight of other Ministers. Parliamentary oversight, being of a political nature, is not confined to the Minister's administrative functions but embraces all his responsibilities.

Summary:

The Minister for Justice had brought an appeal alleging conflict of jurisdiction against the Senate, which had passed a motion of no confidence against him, on the grounds that the Italian constitutional order did not provide for a motion of no confidence against a single Minister (individual motion of no confidence) and that having regard to the collective and homogeneous nature of the Government's action, the motion of no confidence could only be moved against the Government. The Constitutional Court dismissed the appeal, which challenged inter alia the admissibility by the Senate of the individual motion of no confidence, holding that it was for both Chambers to pass a motion of no confidence even if tabled against a single Minister.

Languages:

Italian.

Identification: ITA-96-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 21.03.1996 / **e)** 84/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 13 of 27.03.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
Constitutional justice – Decisions – Types – Procedural decisions.

Keywords of the alphabetical index:

Decree with force of law, validity / Prescriptive content, identity / Question of constitutionality, admissibility.

Headnotes:

Under Article 77.3 of the Constitution, the legislature may give retroactive effect to the arrangements made by decrees with force of law where their validity has expired, without being subject to any limitations apart from those implicit in the observance of other constitutional standards and principles. Where the prescriptive content of lapsed decrees is reproduced in another decree or a series thereof, and where the most recent is converted into a law, the enactment in question is intended to make any new legislative enactment derive from the original provision and consolidate its effects, thereby obviating any break in the continuity of the provision.

On the same principle, the case-law of the Court recently admitted the possibility of transposing its censure of a given provision from one prescriptive act to another. The explanation was that in the cases considered it was precisely the difference in prescriptive content which determined the *ratio decidendi* of decisions declaring such transposition inadmissible. Moreover, on numerous occasions the Court has in effect transposed its examination of constitutionality from one prescriptive act to another, where a given rule embodied in the first is replicated in the second. It has done so not only in the case of a provision repealed by a subsequent provision, but also in that of a rule which is embodied in a decree with force of law whose validity has expired but which is reproduced in a subsequent decree. In particular, it was deemed admissible to review the constitutionality of a provision contained in a decree whose validity has expired but whose effects have been maintained by a subsequent law.

In the performance of its protective function, the Court does not consider it decisive that the lapsed provision and the later one – on which it rules – should be identical in form as long as the prescriptive content remains unchanged. What the Court assesses are actual legal rules, although it passes judgment on the provisions containing them, the latter having an ancillary and instrumental function in relation to the former. Thus it is merely in the figurative sense that the question of constitutionality is "transposed" since it remains tied to the subject-matter specified in the writ originating the proceedings.

A rule contained in an act which had force of law at the time when the proceedings were brought before the Constitutional Court but which is no longer in force at

the time of delivery of judgment continues to be the object of the Court's examination when that rule is retained in the legal order because it is reproduced in a subsequent provision, to which the Court's judgement must accordingly refer.

Summary:

In the case considered by the Court, the rules instituted by the provisions challenged by the court below (which referred the matter to the Constitutional Court) had not been amended and were therefore enforceable by the court below, because the effects of the rules in question, embodied in a decree having force of law but no longer valid, were replicated by a subsequent regulatory provision approved in accordance with Article 77.3 of the Constitution. On the merits, the Court held that the questions raised were unfounded.

Cross-references:

Judgment no. 243/1985 is cited in support of the Court's general ruling that by virtue of the provisions made in Article 77.3 of the Constitution, the legislature is authorised to legislate retroactively (see *Headnotes*).

Recently the Court based its decisions of inadmissibility concerning legal rules embodied in decrees with force of law whose validity has expired on alterations of substance when such decrees were reiterated. Orders 165, 175, 176 and 179/1995 are recalled in this connection. Subsequently, when referring the questions back to the courts which had submitted them, the Court specified that, depending on the case, the regulations were amended either by the subsequent decree converted into law (see orders 272, 403 and 535/1995) or in the reiterated decree then in force, even if not yet converted (see orders 243, 379 and 518/1995).

Reference is then made to judgment no. 188/1994 in which the Court deemed it necessary to consider the merits by establishing the nature of the provision in question even though there was a patent error in the lower court's definition thereof.

Further, in judgment no. 482/1995 the Court, observing that the impugned provision was replaced by another, found that the same substantive rules still stood. Similarly, reference is made to judgment no. 446/1995 then judgment no. 482/1991 concerning an objection to a repealed provision whose prescriptive content was reformulated in a subsequent provision replacing the impugned provision, which warranted examining the question of constitutionality on the merits.

In 1993 in judgment no. 429 concerning the lapse of a decree with force of law deemed *tertium comparationis* by the court below, it was decided to settle the issue on the merits by examining the formulation of the reiterated decree's prescriptive content.

In this case, the concluding commentary on the judgment refers to the highly significant precedent of judgment no. 40/1994: at the very time when a decree had lapsed through non-conversion into law, the act regularising it was effected. The Court held that the reference made (in an appeal concerning a dispute as to jurisdiction) to the regulations set out in a provision no longer in force remained effective precisely by virtue of the saving clause contained in the provisions referred to.

Languages:

Italian.

Identification: ITA-96-1-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 17.04.1996 / **e)** 131/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 18 of 30.04.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Disqualification / Fair trial / Judge, impartiality.

Headnotes:

"Fair trial" – an expression comprising the constitutional principles that govern not only the characteristics of the court from the subjective and objective standpoint but also the rights of action and defence during trial – requires the judge to exercise impartiality and therefore detachment from the case before him. The rules concerning objection to judges are founded on the need to avoid repetition of the same type of judgments by the same judge, and hence on the need to prevent judgment of the merits of the case from being biased by prejudgment, whether actual or merely potential, arising from

substantive assessments of the presumptions raised by the charge and stated in connection with acts performed earlier in the proceedings. The Court, in numerous pronouncements, has supplied the unconstitutional deficiencies of Article 34.2 of the Code of Criminal Procedure by specifying further cases of incompatibility besides those explicitly defined in that provision (see judgments nos. 496/1990 and 401/1991). Latterly, in judgment no. 432/1995, the Court held that the principles established earlier were applicable not only to the relationship between the various stages of the trial proceedings but also to the relationship between the application of precautionary measures and the decision on the substance of the charge. Precautionary measures presuppose a predictive assessment of guilt which is much more thorough than in the past even though it is founded on inferences rather than on real evidence at that stage. The Court has acknowledged, also pursuant to Law no. 332 of 8 August 1995, that the assessments made by the judge in connection with the adoption of a precautionary measure entail pre-judgment of the substance of the charge.

Summary:

Review and appeal are both remedies against an order to apply precautionary measures of a personal nature; they differ chiefly in that whereas review is envisaged solely at the initiative and in the interest of the accused, appeal makes it possible to plead grounds for the precautionary measures (at the initiative of the prosecution) and also reasons for release (at the initiative of the accused and counsel).

The Court, holding that the constitutional principles of "fair trial" and therefore of impartiality of the judge were infringed by Article 34.2 of the Code of Criminal Procedure, declared unconstitutional the part of that Article not providing for a. disqualification from service as a trial judge for a judge who, as member of the court responsible for reviewing the case (Article 309 of the Code of Criminal Procedure), has had decision on an order concerning a precautionary measure in respect of a person charged or under investigation; b. disqualification from service as a trial judge for a judge of the court hearing the appeal against an order concerning a precautionary measure in respect of a person charged or under investigation (Article 310 of the Code of Criminal Procedure) where the latter court has ruled on other than strictly formal points of the order in question.

Languages:

Italian.

Identification: ITA-96-1-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 18.04.1996 / **e)** 118/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale*, no. 17 of 24.04.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having the force of law.
Fundamental rights – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Compulsory medical treatment / Damage / Just compensation / Poliomyelitis vaccination.

Headnotes:

Health has two aspects in constitutional law. One is individual and subjective and concerns a "fundamental right of the individual"; the other is societal and objective and concerns health as "a public interest". These aspects may conflict: pursuit of the goal of public health through compulsory medical treatment may interfere with this individual right where such treatment has intolerable adverse effects for those required to undergo it.

Compulsory medical treatment, expressly authorised by a constitutional provision which restricts the scope of such treatment to what is allowed by law, must respect the human person. As the Court pointed out, this requires the legislature to make provision for all possible safeguards against the risk of complications. Since risk cannot be completely avoided, conflict arises between the individual and collective aspects of health, as, for example, in the case of anti-poliomyelitis vaccination. The law imposing this treatment weighs up the public and private interests and, tragically, gives the former precedence over the latter.

Nobody can be asked to sacrifice his health to preserve that of anyone else, even of everyone else, without just compensation being granted to the individual who sustains damage as a result of medical treatment. Such compensation is due for the simple reason that damage is sustained, so that liability for negligence is not taken into consideration. Actual negligence, however, calls for the payment of damages in the true sense.

The link considered essential by the Court between compulsory vaccination and redress of consequential damage clearly shows the contrast between this and other cases where the community assumes responsibility for harmful effects which are unrelated to decisions taken

in the interests of society. In the first instance, there is a real and specific obligation corresponding to a claim secured by the Constitution.

In practice, damage to health caused by compulsory medical treatment can have three different consequences: entitlement to full redress of damage in the event of negligence; entitlement to just compensation by direct application of the Constitution where the damage, even if not caused by a wrongful act, has been incurred in the performance of a statutory obligation; in other cases entitlement, also under the Constitution, to the measures of assistance provided by the legislature within the limits of its discretionary power.

Summary:

In the present case, the Court declared unconstitutional the provisions in Law no. 210 of 25 February 1992, passed subsequent to the Court's judgment no. 307 of 1990, on the ground that these provisions deny the right to just compensation payable by the State for damage linked with anti-poliomyelitis vaccinations incurred before the law took effect, and prevent the victims from securing payment as the law provides, except in cases of liability for negligence. The Court noted that damage sustained as a result of compulsory anti-poliomyelitis vaccination gives rise to a claim for compensation under the Constitution without liability for negligence being taken into consideration; however, in other cases of damage even where specified in the provision challenged (damage incurred as a result of non-compulsory vaccination, transfusions and administration of blood products), the victims do not have a comparable claim and are entitled only to assistance from the legislature within the limits of its discretionary power.

Cross-references:

This decision makes several references to judgment no. 307/1990 as its logical foundation. In this earlier judgment the Court declared unconstitutional the law instituting compulsory anti-poliomyelitis vaccination, which did not provide for just compensation, in the absence of liability for negligence, for persons having incurred damage as a result of the vaccination. Concerning the lawfulness of compulsory medical treatment under Article 32 of the Constitution, the Court referred to judgment no. 258/1994. As to the need for full redress of damage arising from liability for negligence, the Court referred to a number of its decisions, the most recent being judgment no. 455/1990.

Languages:

Italian.

Lithuania
Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

Number of decisions: 4 final decisions including:

- 2 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:

- privatisation: 1
- financial questions: 2
- commercial banks: 1

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

Important decisions

Identification: LTU-96-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.01.1996 / **e)** 7/95/ **f)** On initial privatisation of State property / **g)** *Valstybės žinios* (Official Gazette), 9-228 of 31.01.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Economic duties of the State.
Fundamental rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Company, initial privatisation / State property.

Headnotes:

The Constitution enumerates property which exclusively belongs to the Republic of Lithuania (the subsoil of the earth, as well as nationally significant internal waters, forests, parks, roads, and historical, archaeological and cultural facilities). According to the Civil Code, other possessions may also belong to the State. This property, as a rule, corresponds to the necessary exercise of State powers, including powers of attribution, or, alternatively, it is of general importance, the ownership of such property by the State being linked with the significance of the property itself.

Article 28 of the Constitution stipulates that "procedures concerning the management, utilisation, and disposal of State property shall be established by law". Consequently, relations arising from the management, utilisation and disposal of State property are to be regulated only according to the law. Therefore, the norms of bye-laws may never contradict the law.

Article 29 of the Constitution consolidates the principle of equality of all people before the law, the courts and other State institutions and officers. This principle must be observed when passing and applying laws, as well as when administering justice. This principle requires uniform application of legal assessments to homogeneous facts and prohibits arbitrary assessments of essentially homogeneous facts.

However, persons themselves may be different, and in some cases, when passing laws, this is to be taken into consideration. For example, if a law directed towards the good of society takes into consideration differences in the social status of persons, this does not in itself mean that the principle of equality is violated. Besides, quite frequently laws are aimed only at certain categories of persons, or they are valid only in specific situations under which particular categories of persons fall. The variety of social life determines the manner and content of legal regulations, but diverse interpretation of inborn personal rights and their diverse application to individual categories of persons is not permissible.

The legislator is called upon to regulate questions concerning privatisation of State property, the activities of State enterprises, control of State shares possessed in joint-stock companies, as well as other matters connected with the management, utilisation, and disposal of State property. It may choose the legal manner for this regulation within the limits of the Constitution.

Summary:

The case was initiated by a group of *Seimas* members who requested the review of certain norms of company law, as well as of some provisions of the Law on Initial Privatisation of State Property, having regard to their compliance with the Constitution.

The petitioner considered that Article 10 of the company law, whereby reorganisation was defined as the transformation of a company as a legal person without a liquidation procedure, read together with Article 50 of the said law, which provided that "public and private companies shall have to amend their Articles of Association according to this law and have them registered according to the procedure established by the Law on Register of Enterprises within 9 months as of the date of the enactment of this law", contradicted the Constitution.

The petitioner argued that the disputed provisions failed to ensure that companies undergoing reorganisation be established legally, i.e. that the company being reorganised should be founded on prior or existing company laws or that it should have been re-registered following privatisation in accordance inter alia with the Law on Initial Privatisation. On the contrary, the law appeared to expressly permit this last possibility.

The Constitutional Court established that some laws adopted in Lithuania provided for State enterprises to issue shares (collect contributions) or to privatise a part of the capital goods (up to 10 percent) of the enterprise. The capital accumulated was not to be divided into shares. At the same time, there was no prohibition on increasing private share capital from its profits. Thus, legal conditions were created to increase private share capital without privatisation of the enterprise as a whole. Depending on how the ratio between private shares and State capital changed, pursuant to the procedure established by the Law on State Enterprises to reorganise State enterprises into joint-stock companies or private joint-stock companies, the legal status of such companies changed in the Register of Enterprises, and thus their activities became subject to company law.

The company law defines reorganisation as transformation of a company without the liquidation procedure, i.e. attention is paid mainly to the specific character of companies (as well as other enterprises) functioning as the subjects of commercial economic activity; to the continuity of their activity; and to the succession of the rights and liabilities of the companies reorganised. In these circumstances, the disputed norm did not establish any restrictions or privileges concerning the procedure of reorganisation which violated the principle of the equality of persons.

For these reasons, the Constitutional Court ruled that the disputed norms were in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 28.02.1996 / **e)** 10/95 / **f)** On the capitalisation of the credits of some enterprises / **g)** *Valstybės žinios* (Official Gazette), 20-537 of 06.03.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Rules issued by the executive.
Sources of constitutional law – Hierarchy – Hierarchy as between national sources.
Institutions – Executive bodies – Powers.
Fundamental rights – General questions – Basic principles – Equality and non-discrimination.

Keywords of the alphabetical index:

Capitalisation / Credits / Enterprises.

Headnotes:

The constitutional principle of equality does not prevent the law from establishing different legal regulations in respect of categories of people who are in different situations. This also applies to legal persons, and not only to natural persons, as the former are, as a rule, corporations of natural persons.

The Ministry of Agriculture was permitted by the government Resolution at issue to utilise the Agriculture Support Fund in order to cover the debts of certain enterprises owing to the Bank of Agriculture, as well as to acquire shares on behalf of the State up to the amount of the corresponding increase in their assets or authorised capital. This process is defined as the "capitalisation of credits".

Such a form of disposal of State assets is not established in the Law on State Regulation of Economic Relations

in Agriculture. It is only the legislator who may establish the form of utilisation of State assets, because Article 128.2 of the Constitution stipulates that "Procedures concerning the management, utilisation, and disposal of State property shall be established by law".

Summary:

A group of *Seimas* members appealed to the Constitutional Court requesting review of a government Resolution "On the capitalisation of the credits of some enterprises under the authority of the Ministry of Agriculture", having regard to its compliance with the Constitution and the law.

The Ministry of Agriculture was permitted by the disputed Resolution to repay gratis and irretrievably the expenses of the enterprises enumerated in the appendix to the Resolution and which function on the basis of private enterprise; i.e. the Ministry is permitted to cover the debts of the aforesaid enterprises owing to the Bank of Agriculture by utilising the means of the Agriculture Support Fund. In the opinion of the petitioner, these payments are made on the basis of individual selection, and not pursuant to certain rules which should be applied to all enterprises processing agricultural goods.

The aforementioned enterprises, after the disputed government Resolution had been adopted, acquired the right to never repay private expenses and debts. The petitioner therefore argued that the Resolution violated the essential principles of a free market based on fair competition and equality of all subjects of law.

The Constitutional Court, while ruling that the Resolution did not contradict the constitutional principle of equality, found that it did contradict the Law on State Regulation of Economic Relations in Agriculture because the said law did not provide for any such possibility of covering the particular debts of individual enterprises.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.03.1996 / **e)** 13/95/ **f)** On the stamp tax rates / **g)** *Valstybės žinios* (Official Gazette), 25-630 of 20.03.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Rules issued by the executive.
Sources of constitutional law – Hierarchy – Hierarchy as between national sources.
Institutions – Executive bodies – Powers.
Institutions – Public finances – Taxation.
Fundamental rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Stamp duty.

Headnotes:

Stamp duty, even though it may be called a stamp tax, differs essentially from a measure of taxation properly understood because it is in the nature of a direct recompense. This tax is collected for actions performed by State institutions, as well as for the issue of documents bearing legal power (Article 1 of the Law on Stamp Tax). As a rule, such payments are paid only once. On the other hand, the characteristic of taxes is that they are paid regularly over an established time period, and their nature is not that of a direct recompense, i.e, after they have been paid, the State has no obligation to perform any action or render any particular service for the tax payer's benefit.

It is impossible to assert that the government, by establishing the rates of stamp duty, intruded upon the competence of the *Seimas* because it was the *Seimas*, and not the government, which introduced stamp duty after passing the Law on Stamp Duty. In Article 3.1 of this law, the purpose for which the duty is collected is expressly indicated, whereas in Article 3.2 it is established that the rates of duty, except for cases under investigation in the courts or in respect of copies of issued documents, shall be established by the government.

The right to freely choose one or another type of occupation or business may be regulated in various ways. This right is first of all bounded by manifold natural considerations, notably the skills and capacities of every person. These extend to questions concerning the possession of corresponding training, to an individual's moral and other qualities (e.g., physicians, teachers,

judges, public prosecutors, etc.), the acquisition of a specific license (e.g., drivers), etc.

The opportunity to freely choose one's business is also restricted by objective requirements, e.g., the possession of the initial capital. It follows that a person may be prevented for any such reasons from making such a choice – a person when choosing an occupation or business knows in advance that he is supposed to have an adequate training, or pay particular taxes, and, according to his skills or capacities, decides what to choose.

What is important and relevant from a legal viewpoint, however, is that the opportunity for a person to exercise a free choice is not restricted directly, in a normative manner, i.e., the person may not be prohibited from choosing a particular occupation or business.

The stamp duty rates established by the government would have the effect of restricting competition if they were different for the same categories of persons (a sector of the economy or type of business), i.e, if certain economic entities were privileged by being subject to one rate, and others discriminated against by being subject to a different rate. In the present case, however, the government has established equal stamp duty rates for all entities in the same sector of the economy or the same type of business.

Summary:

The case arose from a petition submitted to the Court by a group of *Seimas* members, requesting a review as to whether certain aspects of the stamp duty rates established by the government were in compliance with the Constitution and the law.

The petitioners argued that the government, by constantly increasing stamp duty, transformed it into a means of illegally replenishing the budget and thereby in fact intruded upon the competence of the *Seimas* which is established in Article 67.15 of the Constitution to "establish State taxes and other obligatory payments". In addition, the petitioner alleged that the government, by groundlessly increasing the rates of stamp tax, unlawfully restricted freedom of individual economic activity and initiative (Article 46.1 of the Constitution), as well as the right to the opportunity to freely choose one's business (Article 48.1 of the Constitution).

In the view of the petitioners, these actions in turn created conditions that encouraged the monopolisation of the market, because small and medium-sized businesses were financially incapable of meeting the high rates of stamp duty and, therefore, were compelled to give up the most profitable markets to large companies and monopolies, in violation of Articles 46.3, 46.4 and 46.5 of the Constitution.

The Constitutional Court ruled that the government, in establishing the rates of stamp duty, had fulfilled the provision of the law. It did not thereby violate the provision of Article 67.15 of the Constitution, as it merely established the rates of stamp duty and did not establish new taxes or other obligatory payments. Thus the disputed stamp duty rates were found to comply with article 67.15 of the Constitution, as well as with Article 6 of the Law on Stamp Duty.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 18.04.1996/ **e)** 12/95/ **f)** On Commercial Banks / **g)** *Valstybės žinios* (Official Gazette), 36-915 of 24.04.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Institutions – Public finances – Central bank.
Fundamental rights – Civil and political rights – Right to property – Other limitations.
Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Bankruptcy, commercial bank / Banks, commercial, insolvency / Depositors, protection.

Headnotes:

Subjective property rights are an element of the absolute legal relation of ownership whereby the owner may oppose all other persons in respect of the use of the property. On the other hand, the owner, when exercising his property rights, is not entirely free. It is established in Article 28 of the Constitution that: "While exercising their rights and freedoms, persons must observe the Constitution and the laws of the Republic of Lithuania, and must not impair the rights and interests of other people". Therefore, the subjective property right may

be defined as the legally protected opportunity of the owner to manage the possessions which belong to him, to utilise and dispose of them at his discretion and in his interests, within the bounds, however, of the limits imposed by the law and by respect for the rights and freedoms of other people.

In common with the protection of fundamental rights in other democratic States governed by the rule of law, restrictions may lawfully be placed on the exercise of property rights, as well as on some other basic human rights. But in all cases, the essential content of the basic right cannot be violated by such restrictions. If reasonable limits are exceeded, or if its legal protection is not sufficiently ensured, that is a situation which is to be distinguished from the denial of the fundamentals of the right.

Legal persons also have a constitutional obligation to observe the Constitution and the laws, as well as not to impair the rights and interests of other people. It follows from the content of Article 28 that persons who when exercising their rights and freedoms do not observe the Constitution and the laws, or impair the rights and freedoms of others, may be subject to corresponding sanctions, including restrictions on their property rights and restraints on their economic activities and power of initiative.

The possibility of applying sanctions to a bank is connected to the establishment of violations of law committed by the management bodies of the bank, and to the non-fulfilment of obligations concerning its economic activities.

The main objective of the sanction – suspension of the activities of the management bodies of the bank – which is regulated by the contested provisions of the law is a preventive one: if there appears to be a threat to the trustworthiness and stability of the bank, the law attempts to protect the interests of depositors and to ensure the safety, trustworthiness and stability of the bank and banking system.

The bank, disposing of the assets of others, assumes corresponding risks and responsibilities, and its share capital constitutes a guarantee for the borrowed capital. From this perspective, the above sanction also seeks to preserve the bank's assets and to improve its functioning.

The institution of bankruptcy proceedings is an example of the exercise of a person's right to appeal to a court, as consolidated in Article 30.1 of the Constitution. The legal provisions which consolidate this right do not violate the principle of equality of all people before the court. After bankruptcy proceedings have been instituted, other persons who have legitimate property interests take part in the investigation of such civil proceedings, i.e, they take part in the bankruptcy procedure which is investigated in accordance with the determined legal procedure. Every person taking part in the proceedings has the rights and obligations which are determined by the Code of Civil Procedure and which correspond to his or her procedural status, as well as, in this case, the rights characteristic of the judicial bankruptcy procedure against a bank as provided for by the Law on Commercial Banks. Therefore, the objection of the petitioner that the institution of bankruptcy proceedings is "a procedural decision in favour of the subject that brought the action" is not well-founded.

Under Article 5 of the Code of Civil Procedure, the court must institute civil proceedings in all cases where the statement of the party concerned complies with the requirements of the relevant provisions on civil procedure. The disputed norms of the Law in question were to be interpreted analogously in an imperative manner: the court must institute bankruptcy proceedings if the statement of the party concerned is in conformity with general requirements of the relevant provisions of the Code of Civil Procedure as well as with supplementary conditions provided for in that Law. Thus, the institution of bankruptcy proceedings against a bank is linked to the fulfilment of the corresponding requirements of a procedural character. It should not be viewed as a violation of the principle of the independence of judges and of the courts.

Summary:

The case was referred by the Court of Appeal, requesting a review as to whether certain provisions of the Law on Commercial Banks were in compliance with the Constitution.

The petitioner argued that Article 37 of the Law, which provided that the Bank of Lithuania was entitled to suspend the powers of the bank council, to remove from office the board of the bank and the head of the bank administration, and to appoint a temporary bank administrator, had the effect that a State institution, the Bank of Lithuania, had the power to decide to take over private property – the property of a commercial bank – and to manage it. Once so taken over, the shareholders/owners of the bank were deprived of the possibility of managing and utilising their property. Thus the right to private property, as well as the freedoms of commercial activity and of initiative, were restricted in a manner which was contrary to the principle of equality before the courts, as consolidated in Article 29.1 of the Constitution.

Furthermore, in the opinion of the petitioner, there existed grounds for finding that the above legal provisions contradicted Article 109.2 of the Constitution, which consolidates the independence of judges and courts while administering justice. The requirement for the court to act in a particular manner impeded the court, and made it dependent upon the will of the party submitting the statement concerning the institution of bankruptcy proceedings. In addition, reliance by the court in such circumstances on the sole and uncontested evidence of the Bank of Lithuania concerning the solvency of the bank in question deprives the court of the possibility of arriving at an alternative procedural decision – to refuse to institute bankruptcy proceedings against the bank.

The Constitutional Court pointed out that, under Article 45 of the Law, the conclusion of the Bank of Lithuania concerning the commercial bank's insolvency could be challenged by any party before the court considering the request for the institution of bankruptcy proceedings against the bank, and that their rights were thus protected. The Bank of Lithuania, which is obliged by law to ensure the reliable functioning of the currency market and the system of credits and payments, is also entitled to submit a statement to the court regarding the bank's insolvency.

It was also noted that in the bankruptcy law of other countries, the right of the State institution which supervises banking to immediately apply sanctions to an insolvent bank so that its depositors were protected and the remaining assets were preserved was essentially not disputed: after the failure of a private bank, State interests, and not only those of a limited private sphere, are also affected.

The individual's right to appeal to the court is implemented by the procedure established by the Code of Civil Procedure and other laws. If a person enjoys a subjective procedural right to appeal to the court and has exercised it accordingly, the relevant provisions of the Code of Civil Procedure do not provide for an opportunity to reject his application. The acceptance of the application by court order, as a procedural act, confirms the institution of civil proceedings before the court.

The Constitutional Court ruled that the disputed provisions of the Law on Commercial Banks were in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Netherlands
Supreme Court

Important decisions

Identification: NED-96-1-001

a) Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 19.12.1995 / **e)** 101269 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.152; *Nederlandse Jurisprudentie*, 1996, 249.

Keywords of the systematic thesaurus:

Institutions – Army and police forces – Police forces – Functions.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Fundamental rights, violation, pro-active stage / Garbage bags, search / Mobile telephone calls, scanning / Police powers.

Headnotes:

Violations of fundamental rights, in particular the right to privacy, at a stage at which it is unclear, or insufficiently clear, that a criminal offence has been or is being committed (the pro-active stage) and no suspect can be identified, are permissible only if they are allowed under the Constitution or a treaty provision.

Police searches of garbage bags placed outside do not constitute a violation of Article 8 ECHR.

The scanning, monitoring and recording of conversations conducted on mobile telephones in principle constitutes a violation of Article 8 ECHR. However, as telephone conversations of this kind can easily be monitored, interference of this kind in the right to respect for private life must be accepted up to a point.

Summary:

The central question to be answered in this case is what kinds of interference are permissible when fundamental rights are concerned, such as the right to respect for private life, in the stage preceding that of the investigation within the meaning of the Code of Criminal Procedure, in other words before suspicions have been formulated, when it is unclear, or insufficiently clear, that a criminal offence has been or is in the process of being committed. It is sometimes described as the pro-active phase.

In the case at hand, during the pro-active phase the police used powers which are vested in them by law for the purposes of investigating criminal offenses which have been, or which are suspected of having been committed. The question is whether the police were justified in doing so, and if so, the limits of acceptability that should have been taken into account. The action taken by the police included searching garbage bags that had been placed outside, and using scanners to monitor calls made by mobile telephone.

The Supreme Court considered that in the phase prior to that of investigation within the meaning of the Code of Criminal Procedure, any infringement by police officers of individuals' fundamental rights as enshrined either in the Constitution or in provisions of treaties whose content can be universally binding is unlawful, unless such an infringement is permitted in the conditions and restrictions contained in, or laid down pursuant to, the Constitution or treaty provision concerned. Where the Constitution regards the imposition of restrictions on any fundamental right to be permissible, such restrictions can acquire legitimacy only by or pursuant to an Act of Parliament. The power to commit such an infringement must be defined in the legislation in a sufficiently accessible and foreseeable manner. A provision in general terms such as Section 2 of the 1993 Police Act does not fulfil this requirement. The continuing development of the fundamental right to the protection of privacy combined with the increasing technological sophistication and intensification of investigative methods and techniques make it essential for such infringements to be based on a more precise justification than Section 2 of the 1993 Police Act.

The Supreme Court observed however that the above does not detract from the police's authority, pursuant to Section 2 of the 1993 Police Act, to perform actions in the pro-active phase which properly belong to its duties as defined in the Section 2, such as, in the interests of public policy, ordering someone to leave a particular location, impounding property, the surveillance and following of individuals and photographing them in public, and that even where actions of this kind amount to a limited infringement of privacy, the general definition of the duties of the police as defined in Section 2 of the 1993 Police Act provides a sufficient basis for this.

The Supreme Court then proceeded to discuss the disputed investigating methods. It endorsed the appeal court's ruling that someone who has put garbage bags out to be collected must be deemed to have relinquished possession of these bags and their contents. Police searches of these bags do not therefore constitute a violation of Article 8 ECHR. For objectively speaking, according to the Supreme Court, it is not reasonable for someone who puts garbage bags out in the street to expect their contents to be subject to rules governing the protection of privacy.

As far as a three-week period of monitoring (by means of a scanner) and recording conversations conducted by mobile telephone is concerned, the Supreme Court held that the confidentiality of telephone conversations is protected by Article 8 ECHR. The Court observed however that it is widely known that conversations conducted by mobile telephone can be monitored by anyone who wishes to do so with the aid of simple and readily available electronic devices. This in itself not only means that persons conducting conversations by mobile telephone should take into account the possibility that a third party may be able to receive and overhear the call, but also that he is up to a point obliged – given that everyone is in principle free to receive radio signals – to resign himself to it. This does not however mean that he forfeits every right to respect for privacy in this regard.

If investigating officers, as in the case at hand, for a long period of time and using specially placed apparatus, deliberately and systematically monitor and record telephone calls that are made from inside or from the immediate vicinity of an individual's home by mobile telephone, the limit of acceptability is exceeded, thus constituting a violation of the right to telephone confidentiality pursuant to Article 8.1 ECHR. In such a case, the interference with the person's right to respect for his private life is of such a nature that it must be provided with a statutory basis, having regard to the provisions of Article 8 ECHR and Article 10 of the Constitution, by or pursuant to an Act of Parliament. This did not occur in the present case. The interference with the right to privacy was not however, in the view of the Supreme Court, so serious as to constitute grounds for ruling the prosecution's case against the accused inadmissible.

Supplementary information:

Section 2 of the 1993 Police Act states: "The police has the task, acting in a subordinate capacity in relation to the competent authorities and in accordance with the applicable rules of law, to ensure the active enforcement

of the law and the provision of assistance to those who require it".

Article 10 of the Constitution concerns respect for, and protection of, privacy.

Cross-references:

In relation to the removal of garbage bags that have been put out for collection, see also Supreme Court judgment of 13 February 1996, no. 101.665, *Delikt en Delinkwent*, 96.211, [NED-96-1-003].

Supreme Court judgment of 23 January 1996, no. 101.302, *Delikt en Delinkwent*, 96.178, likewise concerns police scanning of mobile telephone calls. In it, the Supreme Court reiterated its considerations in relation to the judgment given on 19 December 1995.

Languages:

Dutch.

Identification: NED-96-1-002

a) Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 09.01.1996 / **e)** 101558 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.159.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.
Fundamental rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Psychiatric report, use.

Headnotes:

It is incompatible with Article 8 ECHR for the contents of a psychiatric report to be used, without permission, for a purpose other than that for which the report was drawn up, and hence to be made more widely known.

Summary:

In this criminal case, the accused asked for psychiatric reports that had previously been drawn up on two witnesses for use in their own criminal cases to be made available and hence to be incorporated into the file of the case at hand. The appeal court denied this request. In cassation proceedings, it was argued that the appeal court had denied the accused a fair trial in violation of Article 6 ECHR.

The Supreme Court considered it inadmissible for a psychological or psychiatric report that has been compiled about an individual with that individual's cooperation during criminal proceedings against him, and which contains highly personal and confidential information, to be added to the file by the court or public prosecutions department in criminal proceedings against another accused, at any rate without the permission of the individual concerned. It is incompatible with the person's right to respect for his private life as enshrined in Article 8.1 ECHR for the contents of a report of this nature to be used, without special permission being obtained, for a purpose other than that for which the report was drawn up, so that they become more widely known.

Languages:

Dutch.

Identification: NED-96-1-003

a) Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 13.02.1996 / **e)** 101665 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.211.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Garbage bags, search / Police powers.

Headnotes:

Police searches of garbage bags put outside do not constitute a violation of Article 8 ECHR. The local Waste Substances Ordinance does not protect the interests of an individual who has placed his garbage bags outside the door.

Summary:

The police removed garbage bags that the accused had put outside. The accused's counsel argued that evidence thus procured had been obtained unlawfully and could hence not be admitted as evidence. The accused's counsel contended that there is no statutory provision permitting investigating officers to confiscate garbage bags that have been put outside. Furthermore, counsel submitted, the Waste Substances Ordinance of the municipality of Venlo prohibits the unlicensed removal of garbage bags, so that the police had committed a criminal offence by removing the bags.

The appeal court rejected this line of defence. The Supreme Court held that there was nothing in the appeal court's rejection of the defence that pointed to an incorrect interpretation of the law. In the view of the Supreme Court, the search did not constitute a violation of the right to respect for private life within the meaning of Article 8.1 ECHR. For, objectively speaking, it is not reasonable for someone who puts garbage bags out in the street to expect their contents to be subject to rules governing the protection of privacy.

The Supreme Court further held that the relevant provision of the municipality of Venlo's Waste Substances Ordinance is clearly intended to promote the orderly collection and processing of domestic waste and not to protect the interests of someone such as the accused who has disposed of his garbage bags by depositing them in a refuse container placed in a public thoroughfare. Even if it is assumed that the reporting officers in question did contravene the ordinance in collecting garbage bags without a licence, this does not mean that material obtained as a result of these actions cannot be used as evidence.

Cross-references:

See also Supreme Court judgment of 19 December 1995, no. 101.269, *Delikt en Delinkwent*, 96.152, [NED-96-1-001].

Languages:

Dutch.

Identification: NED-96-1-004

a) Netherlands / **b)** Supreme Court / **c)** First division / **d)** 15.03.1996 / **e)** 15778 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 70.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Right to state one's case.

Headnotes:

A party to legal proceedings should be given an opportunity, if that party so requests, to explain their position verbally to the court. Only compelling reasons advanced by the other party can lead to the denial of the request. The court may also deny the request *ex officio*.

Summary:

This case concerned the question of whether the district court had broken the law by denying the defendant's request, on appeal, to state his/her case, while the other party made no objection to the request being granted and there were no considerations of due process that militated against it.

The Supreme Court held first and foremost that it followed from the fundamental principles of procedural law as enshrined in Article 6 ECHR that any party to proceedings should have the opportunity, at their request, to give an oral explanation of their position to the court. The provisions of the Code of Civil Procedure do not, in a case such as the one in question, in which the defendant did not submit a statement of defence on appeal, constitute an impediment to the granting of the defendant's request to state their case. If the other party objects to the request being granted, only reasons of a compelling nature, for instance that the proceedings

would suffer an unacceptable delay if the case were to be stated, may result in the request being denied. In a case such as the present one, the court may also on appeal deny the defendant's request *ex officio*, but solely on the grounds that to grant it would be incompatible with the requirements of due process. In each of the two cases referred to above, the court must clearly state its reasons for denying the request, and must give sound arguments in support of its decision.

It followed from the above, in the view of the Supreme Court, that the district court had either failed to appreciate the rules outlined above or failed in its duty to give reasons, as its judgment did not show that the plaintiff had submitted objections of a compelling nature to the defendant's request on appeal, nor that the request could not be granted from the point of view of due process.

Languages:

Dutch.

Identification: NED-96-1-005

a) Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 19.03.1996 / **e)** 101094 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.251.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Written rules – Constitution.
Institutions – Army and police forces – Police forces – Functions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.
Fundamental rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Police powers / Video surveillance.

Headnotes:

The covert and continuous surveillance, using a video camera and monitor, of a suspect who has been confined in a police cell for questioning, without his being able to take account of the possibility that he is under surveillance, constitutes such a drastic measure, in the light of Article 10 of the Constitution and Article 8.1 ECHR, as to require a separate provision by or pursuant to an Act of Parliament. As no such provision exists, this *modus operandi* on the part of the police constitutes a violation of the suspect's privacy. Observations procured by these means may not be used as evidence.

Summary:

After a suspect in a shooting incident had been locked up prior to questioning, the reporting officers following the suspect's movements in his cell on a monitor, and observed the suspect urinating over his hands and scratching his nails and hands against the wall. This was recorded in an official report drawn up under oath of office. The lorensic laboratory stated that the suspect's actions were capable of obliterating traces left after a shooting.

The suspect contended that the observations could not be used as evidence, because placing the suspect in a special cell fitted with video cameras with a view to observing his behaviour constituted a violation of Article 8 ECHR. The appeal court rejected this defence, and held that there had been no violation of Article 8 ECHR.

The Supreme Court, however, reached a different conclusion. The Supreme Court considered that during the stage at which a suspect is being held awaiting questioning, unlike the stages of police custody and pre-trial detention, the law does not provide for the possibility of ordering measures in the interests of the investigation. It may however be necessary, in the interests of the investigation, to ensure that a suspect is prevented, in the period between his arrest and his subsequent questioning, from getting rid of any evidence that may be present or rendering it unusable. As a preventive measure, it may be necessary for the suspect to be placed in a secure room under continuous police guard. The power to impose a security measure of this kind is a derivative of the power to hold the suspect for questioning.

However, continuous covert surveillance as a means of investigation, using a camera or other device, of a suspect who has been confined in a police cell or an equivalent room in which it is in principle reasonable for him to assume that he is unobserved, without the suspect being able to take account of the fact that he is to be subjected to this form of surveillance as he has been told nothing about it and has no way of knowing it, constitutes, in the light of the right to privacy enshrined in Article 10 of the Constitution and Article 8.1 ECHR, such a drastic measure as to require a separate provision by or pursuant to an act of parliament. As no such provision exists, the police was not justified in subjecting

the suspect to continuous surveillance in the manner described.

Languages:

Dutch.

Identification: NED-96-1-006

a) Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 19.03.1996 / **e)** 102009 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.256.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Parked car, opening the door / Police powers.

Headnotes:

Opening the door of a car parked in a public thoroughfare does not constitute a violation of Article 8 ECHR, and is permissible without the need for any statutory basis.

Summary:

The reporting officers saw a parked car the windows of which, unlike those of other cars parked in the same place, exhibited condensation. They also saw that a man was seated at the steering-wheel. Upon opening the car door, the reporting officers saw that the man was using narcotics. The accused alleged a violation of Article 8 ECHR.

The appeal court ruled that the reporting officers were entitled to open the car door on the basis of their duty to enforce the law and to provide assistance, in order to ascertain the state of health of the car's occupant. Moreover, the appeal court maintained that simply opening an unlocked door of a car parked in a public thoroughfare in order to speak to the car's occupant cannot be seen as an infringement of privacy.

The Supreme Court considered that the appeal court evidently judged that there was no reason for the reporting officers, seeing a person seated in a car in the circumstances described, to assume that the situation was one in which the person in question wished not to be disturbed, and that they were therefore entitled to open the car door without any statutory justification. The Supreme Court found that in arriving at this judgment, the appeal court had not demonstrated an incorrect interpretation of the law concerning the right to protection of privacy.

Languages:

Dutch.

Identification: NED-96-1-007

a) Netherlands / **b)** Supreme Court / **c)** Third division / **d)** 27.03.1996 / **e)** 30758 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law – Maintaining confidence.
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:

Expectations, legitimate.

Headnotes:

In answering the question of whether there has been a violation of the principle of equality before the law or the principle of legitimate expectations, it is not only important to determine whether the inspector was competent in respect of other taxpayers, but it is equally important to establish whether the inspector who was formally competent did not depart from his own practice.

Summary:

The interested party X owed NLG 512,737 in special tax on private cars (BVP) for the import of used cars in the period 1987-1989. For the periods concerned he consistently specified on his tax return form that he had

no outstanding taxes to pay. For the second quarter of 1989, X asked the then competent tax inspector for the repayment of BVP in respect of the export of used cars. After an initial negative decision, the inspector eventually approved repayment, although the statutory provisions did not permit this. Restitution of this kind was also approved in other tax districts. As from 1 January 1991 a new competent inspector was appointed. The latter issued a tax demand for the BVP for which repayment had been granted for 1987-1989.

The interested party argued before the appeal court that since repayment of BVP on the export of used cars had been granted in tax districts other than that of the inspector concerned, the principle of equality was violated if he was not granted repayment of BVP in respect of the used cars exported by him.

The appeal court ruled that there was no question of a violation of the principle of equality, as the new inspector had also refused to grant repayment to other entrepreneurs.

The Supreme Court considered that the appeal court had applied an incorrect standard. In answering the question of whether the principle of equality or that of legitimate expectation had been violated in respect of the interested party, the Supreme Court held that the point was not simply whether the inspector who had imposed the tax assessment was the competent inspector when the case was heard before the appeal court. An equally decisive point may be whether the inspector who was competent in respect of the interested party, during the period of time covered by the subsequent tax assessment, during the period when the tax demand was imposed or when a decision was made concerning his notice of objection, did or did not depart from his own practice. The Supreme Court then quashed the judgment of the appeal court and referred the case back.

Languages:

Dutch.

Norway
Supreme Court

Important decisions

Identification: NOR-96-1-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 29.04.1996 / **e)** Inr 36/1996, Inr 37/1996 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right to property – Expropriation.
Fundamental rights – Economic, social and cultural rights.

Keywords of the alphabetical index:

Compensation, right.

Headnotes:

Courts are not allowed to base compensation on a utilisation which is contrary to a statutory plan for land development.

In the case of expropriation for public road construction, the courts must disregard the actual plan for road construction and consider what kind of utilisation is to be expected without this plan.

Summary:

The Supreme Court in plenary session has handed down two judgments of importance for the stipulation of compensation in the case of expropriation of private property for the purpose of constructing public roads. In both cases the landowners pleaded that the land could have been utilised for building sites and demanded the amount of compensation to be based on the value of the land as building sites.

According to the Act of 6 April 1984 on compensation in cases of expropriation (compulsory purchase) of real property, compensation is based on the expected utilisation of the expropriated land.

The Government pleaded that compensation could only be awarded for the agricultural or forestry value, and

the Court of Appeal was of the same opinion. The Court of Appeal held that as the land was planned for public roads, this plan was binding for the utilisation and also for the stipulation of compensation. The landowners appealed to the Supreme Court. The Supreme Court ruled that in the case of expropriation for the purpose of constructing public roads the courts must disregard the actual plan for road construction and consider what kind of utilisation is to be expected without this plan. If the landowners would have utilised the land for building sites, this had to be taken into account. This was considered to be in accordance with section 105 of the Constitution, which declares the right to full compensation in cases of expropriation.

The Supreme Court was of the opinion that the development value of land had been transferred from the private landowner to the public.

The Supreme Court overturned both decisions handed down by the Court of Appeal: the cases must now be reviewed. The decisions were unanimous. One of the judges, however, gave a separate opinion, expressing reservations about awarding compensation for the value as building sites.

Languages:

Norwegian.

Identification: NOR-96-1-002

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 29.04.1996 / **e)** Inr 38/1996 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Expulsion of offenders.

Headnotes:

An expulsion order imposed on a foreign national convicted of serious crimes (drugs offences) is not contrary to Article 8 ECHR.

Summary:

A 44 year old foreign national had lived in Norway for 19 years. He had a Norwegian partner and they had three children aged 6 to 14. He was convicted of two criminal offences in Norway. The last one, in 1989, was an attempt to import a considerable quantity of cocaine from his native country, and he was sentenced to 7 years' imprisonment.

The immigration authorities decided to expel him. The decision was based on section 30 of the Immigration Act of 24 June 1988.

He filed a civil case against the State/the Ministry of Justice claiming that the expulsion order was invalid.

In the Supreme Court the case was heard together with two other cases, Inr 39/1996 and Inr 40/1996, concerning related questions. The Supreme Court hearing was limited to the question whether the expulsion order was contrary to Article 8 ECHR.

The Supreme Court held that the Norwegian Authorities had a certain margin of appreciation in relation to the Convention and that the expulsion order – whose purpose was "prevention of disorder or crime" and "the protection of health and morals" in Norway – was within the framework established in Article 8.2 ECHR. The Supreme Court found that the expression "prevention of disorder or crime" was not only aimed at the person in question but also at the general prevention of crime.

Considering the serious crimes he was convicted of, his and his family's right to family life could not be decisive. The circumstances in this case were quite different from the case *Beldjoudi v. France*, judgment of 26 March 1992, Series A no. 234-A.

Cross-references:

See also the cases Inr 39/1996 [NOR-96-1-003] and Inr 40/1996 [NOR-96-1-004].

Languages:

Norwegian.

Identification: NOR-96-1-003

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 29.04.1996 / **e)** Inr 39/1996, nr 177/1995 / **f)** / **g)** to be published in *Norsk Retstidende* (Official gazette) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Fundamental rights – General questions – Basic principles – *Ne bis in idem.*
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Expulsion of offenders.

Headnotes:

An expulsion order imposed on a foreign national convicted of serious crimes (drugs offences) is not contrary to Article 8 ECHR.

Summary:

B., a foreign national had come to Norway in 1976 at the age of 12, and lived here since. He was married to a woman of the same nationality who had come to Norway in 1982 and had become a Norwegian national. They had five children, all born in Norway. In 1990, B was sentenced to 10 years' imprisonment for complicity in importing 1 kg of heroin from his native country and for acquiring 850 grams heroin.

Subsequently, the immigration authorities decided to expel him. He filed a civil case against the State/the Ministry of Justice claiming that the expulsion order was invalid.

The Supreme Court hearing was limited to the question whether the expulsion order was in violation of Article 8 ECHR. The conclusion was the same as in the case Inr 38/1996 [NOR-96-1-002]. The Supreme Court expressed the same views on the interpretation of Article 8 ECHR, and found that it was in accordance with Article 8 to take into consideration the general prevention of crime. The Supreme Court decided that his and his family's connections both to Norway and to his native country prevented the expulsion order from violating Article 8 ECHR, considering the serious crime for which he had been convicted. Nor did such a violation arise from the fact that he risked criminal proceedings in his native country for the export of the same quantity of heroin as in the Norwegian conviction. The Supreme Court had been informed that his native country respects the principle "*ne bis in idem*", and that the sentence served in Norway would be deducted from a possible sentence in his native country.

Cross-references:

See also the cases Inr 38/1996 [NOR-96-1-002] and Inr 40/1996 [NOR-96-1-004].

Languages:

Norwegian.

Identification: NOR-96-1-004

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 29.04.1996 / **e)** Inr 40/1996 / **f)** / **g)** to be published in *Norsk Retstidende* (Official gazette) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Right to private life.
Fundamental rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Expulsion of offenders.

Headnotes:

An expulsion order imposed on a foreign national convicted of serious crimes (drugs offences), is not contrary to Article 8 ECHR.

Summary:

A foreign national had come to Norway in 1976 at the age of 12. He was married to a woman of the same nationality and they had 5 children. In 1991 he was sentenced to 5 years and 6 months' imprisonment for two drug crimes. The immigration authorities decided to expel him.

The questions in this case were the same as in the cases Inr 38/1996 [NOR-96-1-002] and Inr 39/1996 [NOR-96-1-003]. Also in this case the hearing was limited to the question whether the expulsion order was contrary to Article 8 ECHR. The Supreme Court came to the same result. The expulsion order was not in violation of Article 8 ECHR.

Cross-references:

See also the cases Inr 38/1996 [NOR-96-1-002] and Inr 39/1996 [NOR-96-1-003].

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 January 1996 – 30 April 1996

Constitutional review

Decisions:
- Cases decided on their merits: 4
- Cases discontinued: 0

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

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 4
- Cases on the legality of other normative acts under the Constitution and statutes: 0

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 3
- Upholding the constitutionality of the provisions in question: 1

Universally binding interpretation of laws

Resolutions issued under Article 13 of the Constitutional Tribunal Act: 8
Motions requesting such interpretations rejected: 1

Important decisions

Identification: POL-96-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.01.1996 / **e)** K 18/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General principles – Legality.
General principles – Proportionality.
Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Legislative bodies – Relations with the executive bodies.

Keywords of the alphabetical index:

Municipal property / Social justice, principle.

Headnotes:

The "urgent legislative procedure" provided by Article 16 of the Small Constitution does not allow members of Parliament to introduce amendments which would significantly change the scope of the proposed law.

Summary:

The Constitutional Act of 17 October 1992 (the Small Constitution) introduced the abbreviated ("urgent") procedure for enacting statutes. The only body which may initiate the urgent procedure in certain, listed cases is the Council of Ministers. If the government would like this procedure to be used, it must provide the Parliament with a reasonable justification.

In the Tribunal's opinion the urgent procedure must be exercised strictly in accordance with the Constitution. In particular, deputies cannot introduce at their discretion amendments which could significantly change the scope of the draft presented by the government. During the urgent legislative procedure the deputies may introduce amendments the only purpose of which is to make the new regulation more efficient and which strictly relate to the governmental's proposals.

Therefore, the Tribunal found new provisions amending the Law on Land Administration and Expropriation to be contrary to the Constitution. In particular, the Tribunal pointed to the violation of the rule of law and the principle according to which all State authorities are obliged to obey law. In addition, the Tribunal decided that the provisions in doubt limited the competences of commune councils as real estate owners. The Tribunal declared this to be contrary to the principle of social justice and to the principle of proportionality.

Cross-references:

Decision of 26 April 1995 (K 11/94), decision of 17 October 1995 (K 10/95), decision of 31 January 1996 (K 9/95), [POL-96-1-002].

Languages:

Polish.

Identification: POL-96-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 31.01.1996 / **e)** K 9/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Construction law / Social justice, principle.

Headnotes:

In order that laws can achieve their intended goals, the legislative authorities should use the means which closely correspond to the intended goals and at the same time impose only minimum new obligations upon citizens.

Summary:

The 1994 Construction Law introduced severe sanctions for so called "free building" i.e. erecting buildings and other constructions without a permit. From 1 January 1995, an administrative body was authorised to order

that any construction built without a permit be pulled down. This rule applied not only to buildings which were completed after 1 January 1995: all remaining constructions performed without a permit, despite the fact that they may have been built in accordance with all applicable technical norms and on an area designated for building purposes, could be pulled down. In the opinion of the applicants – the President of the Supreme Administrative Court and the Ombudsman – such a regulation violated the basic rules of the State governed by the rule of law: *lex retro non agit*, the principle of social justice and the principle of citizens' confidence in State authorities.

The Constitutional Tribunal did not find a violation of the non-retroactivity rule. In its opinion the new law did not provide for a new definition of uncontrolled construction works, but only stipulated more severe sanctions for acts which also under the old regulation were understood to be forbidden. In the light of previous decisions of the Tribunal, in such cases, the rule *lex retro non agit* remained untouched. However, the Tribunal found a collision between the new provisions and other principles encompassed by the rule of law (Article 1 of the constitutional provisions continued in force). i.e. the principle of maintaining citizens' confidence in the State and its laws, and the principle of proportionality. The Tribunal explained that the new provisions seriously affected those investors which had already undertaken actions to legalise their construction works. Such strict regulation did not correspond to the purpose of the new law, as any construction could be pulled down due to only minor procedural infringements.

The Tribunal also took this opportunity to comment on its previous decisions regarding the proportionality principle. In the Tribunal's opinion this principle relates to the principle of justice and triggers the following standards:

- legal provisions may be adopted only when it is necessary to protect public interests;
- provisions of a law should be structured in such a way as to achieve its intended purposes;
- a balance should be kept between the purpose of such legal provisions and additional obligations for citizens resulting from them.

Cross-references:

Decision of 26 April 1995 (K 11/94), decision of 17 October 1995 (K 10/95), decision of 9 January 1996 (K 18/95), [POL-96-1-001].

Languages:

Polish.

Identification: POL-96-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.02.1996 / **e)** W 11/95 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 24, item 112; to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Incompatibilities / State control.

Headnotes:

The President and Vice-Presidents of the State Chamber of Control may not at the same time serve as deputies or senators.

Summary:

According to Article 8 of the Small Constitution, a deputy may not sit in Parliament and at the same time serve as the President of the Supreme Chamber of State Control. In addition, the 1994 Law on the Supreme Chamber of State Control prohibits the Chamber's Vice-Presidents and its Director General from being members of any political party and from performing any other work or public function. In the Tribunal's opinion, this prohibition extends also to the prohibition on the Chamber's Vice-Presidents and its Director General from serving simultaneously as a member of Parliament.

As explained by the Tribunal, Articles 8 and 31 of the Small Constitution give only an example of which posts and functions may not be performed while serving as a deputy or senator. This rule is a specific application of a more general rule in Article 2.1 of the Small Constitution, whereby persons who hold offices or perform public functions on behalf of the State are forbidden to engage in any activity that may put their public reliability

in question or affect their proper behavior as public servants. Therefore, it is justified and desirable that other, ordinary laws should specify further posts and offices which may not be combined with service as a deputy or senator.

Supplementary information:

A dissenting opinion was delivered by judge Z. Czeszejko-Sochacki.

Cross-references:

Resolution of 13 April 1994 (W 2/94), *Bulletin* 1/94, 45, [POL-94-1-006]; Resolution of 11 January 1995 (W 17/94), *Bulletin* 1/95, 65, [POL-95-1-002].

Languages:

Polish.

Identification: POL-96-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.02.1996 / **e)** W 1/96 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 16, item 84; to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums and other consultations.

Keywords of the alphabetical index:

Referendum.

Headnotes:

Should a referendum have been attended by more than half of the legitimate voters but there was not an absolute majority of votes cast in favor of one of the proposed solutions, the results of such a referendum are not binding for the relevant legislative or executive authorities.

Summary:

This decision was taken in connection with doubts regarding the wording of some provisions of the 1995 Act on Referendums.

Languages:

Polish.

Identification: POL-96-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.03.1996 / **e)** K 11/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General principles – Rule of law.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Dispute settlement / Pre-trial procedure.

Headnotes:

Although the principle of the rule of law (Article 1 of the Constitution) includes the right of access to courts, it does not mean that all existing limitations on access to courts are contrary to the Constitution.

Summary:

The 1995 amendments to the Law on Land Administration and Expropriation introduced a pre-court procedure for settling disputes arising out of or in connection with the new charges for perpetual *usufruct* of State-owned or municipal real estate. Disputes on setting or changing the amount of such charges are submitted to an appeal committee of a relevant Provincial Assembly. A person not satisfied with the committee's decision may appeal against it to a court. The Tribunal declared that such procedure for settling disputes fully protects the rights of interested parties and gives them a right of access to a court. Therefore, neither the principle of the rule of law nor the principle that justice be administered exclusively by the courts were violated.

Supplementary information:

The provisions in question replaced the provision of the 1985 Law on Land Administration and Expropriation that had been found unconstitutional by the Tribunal in its decision of 8 December 1992 (case no. K 3/92).

Cross-references:

Decision of 8 December 1992 (K 3/92), *Bulletin* 1/93, 31, [POL-93-1-004].

Languages:

Polish.

Identification: POL-96-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.03.1996 / **e)** W 12/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Universally binding interpretation of laws.
General principles – Separation of powers.

Headnotes:

The Constitutional Tribunal may refuse to provide a binding interpretation of any law if such an interpretation could result in the creation of new provisions of law.

Summary:

The reasoning of this decision concerns situations when the Tribunal is not authorised to issue a universally binding interpretation of law. In particular, the Tribunal may refuse to give an interpretation when:

- a motion does not aim at clarification of legal doubts but tries to make the Tribunal responsible for certain decisions to be taken by State authorities;
- the provisions which are at the motion's basis are clear (*clara non sunt interpretanda*);
- an interpretation could result in limiting the scope of the principal provisions of a given law;
- a motion's purpose is to obtain a decision which would result in creating new provisions of law;

The Tribunal stressed that issuing universally binding interpretations of laws may not result in amending or supplementing existing regulations by new provisions. Such activities are reserved exclusively for the legislative authorities, and such a course is therefore forbidden under the principle of the separation of powers.

Supplementary information:

A dissenting opinion was delivered by judge L. Garlicki.

Cross-references:

Resolution of 7 March 1995 (W 9/94), *Bulletin* 1/95, 69, [POL-95-1-007].

Languages:

Polish.

Identification: POL-96-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.04.1996 / **e)** K 29/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Organisation.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Executive bodies – The civil service.

Keywords of the alphabetical index:

Local self-government.

Headnotes:

The prohibition on serving concurrently as a local councillor and in the local administration is fully justified

since it prevents possible conflicts of interest, although such a prohibition may not be introduced during the term of office of local councils.

Summary:

Under a September 1995 law amending the Local Self-Governmnent Act of 1990, the members of the constitutive bodies of local self-government units were banned from being employed by the commune as councillors. According to the provisions in question, entering into an employment contract with the local administration is deemed to result in termination of the councillor's mandate. Any and all councillors who at the same time took up employment with the local administration were given six months to decide whether they would perform functions in local councils or continue their employment.

In the Tribunal's opinion such a limitation corresponded with social and public interests, and therefore could not be considered to be contrary to the Constitution.

However, the Tribunal decided that introducing the prohibition in doubt during the current term of local councils (1994-98) violated the principle of stability of the councils as well as the principle of the completion of the councillors' terms of office.

Languages:

Polish.

Portugal
Constitutional Court

Statistical data

1 January 1996 – 31 April 1996

Total of 636 judgments, of which:

- Subsequent scrutiny *in abstracto*: 5 judgments
- Appeals: 608 judgments, of which:
  - Substantive issues: 522
  - Applications for a declaration of unconstitutionality: 7
  - Procedural matters: 79
- Complaints: 16 judgments
- Property and income declaration: 5 judgments
- Electoral disputes: 2 judgments

Important decisions

Identification: POR-96-1-001

a) Portugal / **b)** Constitutional Court / **c)** 1st Chamber / **d)** 17.01.1996 / **e)** 34/96 / **f)** / **g)** *Diário da República* (Official Gazette) (Series II), no. 100, 29.04.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Army and police forces – Army.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Lawyer / Military criminal procedure / Time limit for appeal.

Headnotes:

In military criminal procedure, defendants are entitled to choose their defence counsel. If no choice is exercised, they will always be guaranteed defence in court preferably by someone with legal knowledge.

The qualification required for properly exercising defence rights is legal knowledge; neither professional experience nor any other technical knowledge can be considered

sufficient for guaranteeing those rights. Whenever possible the defence counsel must therefore be a lawyer.

In military criminal procedure, the time allowed for filing appeals, presenting the grounds and submitting documentary evidence is significantly shorter – by approximately a half – than in ordinary criminal procedure. However, the general interests of the military do not make it necessary to limit defendants' defence guarantees or their right of access to the courts in this way. Moreover, given the special nature of military criminal procedure and the fact that particularly severe penalties may be applied, allowing a shorter time for filing appeals than under ordinary criminal procedure is not appropriate.

Summary:

This judgment concerns various rules of the Military Code of Justice, in particular a provision not requiring a lawyer to be appointed in military criminal procedure and another setting a period of five days within which appeals had to be lodged, together with grounds.

In this case, the defendant in military criminal proceedings asked the judge to appoint an official defence counsel because he could not afford to pay a lawyer's fees. The judge refused on the grounds that, according to the Military Code of Justice, when defendants are not represented by a defence counsel the court will appoint a military counsel. The accused also challenged the excessively short period of five days allowed for filing the appeal and giving grounds.

The Constitutional Court decided unanimously that the possibility of assigning military counsel without any legal knowledge was a violation of an accused person's constitutional defence guarantees. It also decided that setting significantly shorter time limits for filing appeals in military criminal procedure than in ordinary criminal procedure constituted a violation of the constitutional principles of equality, access to the courts and guarantees of defence in criminal proceedings.

Supplementary information:

Amended by judgment no. 469/96.

Languages:

Portuguese.

Identification: POR-96-1-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 14.03.1996 / **e)** 470/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Institutions – Legislative bodies – Status of members of legislative bodies.
Fundamental rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Income declaration / Political activity, transparency / Privacy, protection / Public office, holders.

Headnotes:

Subjectively, the fundamental right to privacy must be recognised for the holders of public office as well as other citizens.

Objectively, in respect of its content, this right does not cover only the most intimate aspect of personal life but also includes other aspects of privacy including "material", economic or property aspects.

Whereas the holders of public office cannot be denied the constitutional right to privacy just because they hold office, nonetheless they cannot enjoy that right in exactly the same way as any other citizen.

On the other hand, any limitations or restrictions on their fundamental right to privacy must respect relevant constitutional requirements, in particular the principle of proportionality and respect for the very essence of the right.

Revealing economic or property-related information to the public is a limitation or restriction on the right to privacy of the holders of public office. This restriction is not without justification in respect of the constitutional values of transparency or "confidence" in political activity, especially since this particular case related to property-related information registered in public records and to the global value of income appearing in the annual income tax declaration of physical persons.

Summary:

Under existing legislation any citizen may consult the property-related and income declarations which the holders of public office must submit to the Constitutional Court. In such cases, however, on grounds such as the

interests of other persons, the holder of a public office may oppose consultation, and it is for the court to decide whether there are sufficient grounds to uphold the objection.

In this particular case, a member of parliament opposed access to his income declaration on the grounds of "principle": the right to protection of privacy in personal and family life since his property, in its entirety, was also his place of personal and family residence.

The Constitutional Court decided unanimously that the grounds cited were not "a relevant ground" to oppose public access to his property and income declaration.

Languages:

Portuguese.

Identification: POR-96-1-003

a) Portugal / **b)** Constitutional Court / **c)** 1st Chamber / **d)** 20.03.1996 / **e)** 505/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of the written press.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Administrative decisions / High Authority for the Mass Media, powers / Press.

Headnotes:

The list of attributions and powers of the High Authority for the Mass Media, set out in Article 39 of the Constitution, is not exhaustive, and the law may grant it other attributions and powers, in particular that of "providing for the accuracy of information".

The High Authority for the Mass Media is an independent administrative authority and, therefore, ordinary law may not attribute judicial powers to it.

However, making assessments of complaints about the accuracy of information and issuing recommendations do not amount to exercising the judicial functions constitutionally reserved for the courts.

On the other hand, these recommendations do not represent a form of *a posteriori* censorship but, above all, a value judgment of an ethical nature, in respect of the exercise of journalism.

Summary:

The editor of a newspaper appealed to the Administrative Court against a decision by the High Authority for the Mass Media, claiming that the powers attributed to this body resulted in an unconstitutional interference in freedom of expression and in the freedom of the press. The Administrative Court refused, on the grounds of unconstitutionality, to apply the rules granting the High Authority for the Mass Media powers to "provide for the accuracy of information" and to issue directives and recommendations.

The case was then brought before the Constitutional Court which unanimously ruled that these rules were not contrary to the Constitution of the Portuguese Republic.

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

- 3 decisions on the constitutionality of legislation prior to its enactment
- 38 decisions on objections alleging unconstitutionality
- 1 judgment on the completion of the Rules on the Organisation and Running of the Constitutional Court of Romania.

There was no relevant constitutional case-law during this period.

Russia
Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

Total number of decisions: 11

Types of decision:

- Rulings: 11
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 1
- Conformity with the Constitution of acts of State bodies: 10
- Conformity with the Constitution of international treaties: 0
- Conflicts of 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: 5
- Complaints of individuals: 6
- Inquires of courts: 0

Important decisions

Identification: RUS-96-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 18.01.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 01.02.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Regional measures.
General principles – Federal State.
Institutions – Federalism and regionalism – Distribution of powers – System.

Keywords of the alphabetical index:

Regions, legislative procedure / Regions, separation of powers.

Headnotes:

Under the Constitution of the Russian Federation sole power to adopt laws rests with the legislative bodies. At the same time the Constitution ensures the separation of powers by giving the Head of State a substantial role in the passing of laws, ie the right of veto and of promulgation. This is also important with regard to the legislative process at the level of the constituent entities of the Russian Federation, where laws are usually promulgated by their Head of Government.

Summary:

The application by the Government of Altai Territory challenged certain provisions of the Territory's Statute. These provisions were alleged to be incompatible with the Constitution of the Russian Federation because the system of territorial State authorities which they established was contrary to the basis of the constitutional system, the principle of the separation of powers and the independence of State authorities which flows from it; this system was said to violate the unity of the system of State authorities as well as the rules laid down by the Constitution of the Russian Federation for the legal settlement of questions falling within the joint jurisdiction of the Russian Federation and its constituent entities.

In the opinion of the Constitutional Court, the balance of power with regard to the adoption of laws would be upset if laws were to be passed and promulgated by the same body. The Head of Government has the right of veto in respect of laws passed by the legislative organs as well as the right to sign and publish laws. The Statute can strike a balance between these powers by laying down a procedure to nullify the veto of the Head of Government and oblige him/her to sign the law subject to certain conditions.

The constitutional principle of the unity of State authority requires that the constituent entities of the Russian Federation conform basically to the federal model of relations between the executive and legislative powers. Given that the Constitution stipulates that the legislative and executive branches of power are independent, it is unacceptable – and exceeds the limits set by the Constitution – to include provisions in the Statute which make the executive authority subordinate to the representative body. This would be contrary to the Constitution as it would prevent application of the provision whereby, in respect of certain powers, the federal organs of executive power and those of the constituent entities of the Russian Federation form a single system of executive authority.

Languages:

Russian, French (translation by the Court).

Identification: RUS-96-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 20.02.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 29.02.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Status of members of legislative bodies.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Deputies, status / Parliamentary immunity.

Headnotes:

Parliamentarians do not enjoy full immunity in respect of acts which are not related to their parliamentary activities.

Summary:

The proceedings were instituted following a request by the President of the Russian Federation for verification of the constitutionality of certain provisions of the Federal Law "on the status of members of the Federation Council and the status of deputies of the State Duma of the Federal Assembly of the Russian Federation". These proceedings were instituted on grounds of uncertainty as to the constitutionality of these provisions.

The Constitution states that members of the Federation Council and deputies of the State Duma enjoy immunity for the duration of their term of office: they cannot be detained, arrested, subjected to a house search – except in cases of *flagrante delicto* – or to a body search – except in cases provided for by federal law with a view

to guaranteeing the safety of others; immunity can be lifted by the relevant Chamber of the Federal Assembly at the proposal of the Principal State Prosecutor. Parliamentary immunity, as embodied in the Constitution, is one of the main aspects of parliamentary status and the most important legal guarantee covering parliamentarians' work. In view of its scope, it affords a higher degree of protection then the general constitutional guarantees of the inviolability of the individual. It is, however, not an individual privilege, as it is of a public law nature and serves public interests by providing greater legal protection of the person of parliamentarians on account of the official functions they fulfil, by protecting them against ill-founded proceedings, allowing them and consequently Parliament to perform their parliamentary activities freely and independently.

The Constitutional Court acknowledged the constitutionality of the provisions of the Law on the requirement of consent from the relevant Chamber of the Federal Assembly in order to bring judicial proceedings of a criminal or administrative nature against deputies or to question them about acts committed in the course of their parliamentary activities, as well as the provision requiring the Principal State Prosecutor to apply to the relevant Chamber of the Federal Assembly for such consent.

It ruled, however, that the Law's provisions as they applied to acts not related to a deputy's parliamentary activities were not constitutional. In cases where criminal or administrative proceedings have been initiated in respect of acts not related to deputies' parliamentary activities, the consent of the relevant Chamber of the Federal Assembly must be secured prior to bringing the case before the courts as well as after completion of the investigation or at the stages of pre-trial "instruction" or the procedure relating to administrative fines. Measures such as detention, arrest, and house- or body-searches are to be implemented in accordance with the provisions of the Constitution.

Languages:

Russian, French (translation by the Court).

Identification: RUS-96-1-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 07.03.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 19.03.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a private body or individual – Natural person.
Constitutional justice – The subject of review – Laws and other rules having the force of law.
Institutions – Courts – Organisation – Members – Status.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Right of petition.

Keywords of the alphabetical index:

Judges, Appointments Board / Judges, immunity.

Headnotes:

The rule whereby criminal proceedings cannot be instituted against a judge without the consent of the Appointments Board is one of the guarantees of judges' inviolability. The Appointments Board's refusal to give its consent to criminal proceedings against a judge can be challenged by appealing first to the Supreme Appointments Board and then to the courts.

Summary:

The proceedings were instituted following an appeal by citizens alleging violation of their constitutional rights by a provision of the Russian Federation Law on "the Status of Judges in the Russian Federation", on the grounds of uncertainty as to the constitutionality of the Law which stipulates that criminal proceedings can be brought against a judge only with the consent of the relevant Appointments Board.

The Constitution of the Russian Federation proclaims that judges are inviolable. This is the principle by reference to which practical questions of judges' immunity and liability are to be resolved; criminal proceedings may only be brought against judges according to the procedure provided for by federal law.

The provision of the Law whereby criminal proceedings cannot be instituted against a judge without the consent of the Appointments Board is one of the guarantees of judges' inviolability.

The Appointments Board is the judges' body which ensures that legislation on the status of judges is applied.

The requirement of consent from the Appointments Board concerned for the institution of criminal proceedings against a judge does not go beyond the guarantees which may be considered necessary and sufficient to ensure judges' inviolability.

The Appointments Board's refusal to give its consent to criminal proceedings against a judge may be challenged by appealing to the Supreme Appointments Board. A provision of the Constitution states that appeals may be brought before the courts against the acts and decisions of State bodies, local self-government bodies, public associations and officials which result in a violation of the rights and freedoms of citizens or prevent citizens from exercising such rights and freedoms. There are no exceptions to this constitutional principle.

The Constitutional Court ruled that the cited provisions of the Law of the Russian Federation "On the status of judges in the Russian Federation" comply with the Constitution.

Languages:

Russian, French (translation by the Court).

Slovakia
Constitutional Court

Statistical data

1 January 1996 – 30 April 1996

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 3
- Decisions on the merits by panels of the Court: 3
- Number of other decisions by the plenum: 2
- Number of other decisions by panels: 30
- Total number of cases brought to the Court: 223

Important decisions

Identification: SVK-96-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 02.04.1996 / **e)** PL.ÚS 30/95 / **f)** Case of constitutionality of statutes / **g)** Collection of Laws of the Slovak Republic, no. 130, 1996 Z.z. in brief; to be published in the Collection of judgments and decisions of the Constitutional Court in complete version / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Contractual liberty / Property, municipal.

Headnotes:

Laws on restitution, no more than any other laws, may not extend or reduce the limits imposed on the activities of State bodies by the Constitution.

The duty to contract may not be imposed on persons by statute because the essential basis for any contract is the free will of the parties to that contract.

Summary:

The petitioners, a group of 34 members of the National Council of the Slovak Republic, claimed that there was a constitutional conflict between Law no. 147/1995 amending Law no. 138/1991 on the Property of Villages, as amended by a series of other laws, and Articles 12.1, 13.2, 20.1 and 20.4 of the Slovak Constitution. According to Law no. 147/1995, village municipalities were obliged to conclude a contract on the replacement of forests if the Slovak government so requested.

The Constitutional Court appraised Law no. 147/1995, which had the affect of restricting the rights of village municipalities. This restriction was contrary to the principle provided for within Article 12.1 of the Constitution according to which fundamental rights and freedoms are inalienable, irrevocable and absolutely perpetual. In the context of this principle, the duty to contract may not be imposed on persons by statute because the essential basis for any contract is the free will of the parties to that contract.

This basis of the law of contract was denied by the obligation imposed on the villages by the statute in question. What is more, the right to own property provided for in Article 20.1 of the Constitution serves to entitle the owner to lawfully control a thing in his or her ownership. This opportunity includes deciding on the issue of ownership, on who can take advantage of it, and on who may have such a thing at his or her disposal. This exclusive control is further reflected in the fact that all persons are obliged to respect such decisions of the owner.

The right to own property is guaranteed by the duty imposed on all other persons not to disturb the owner when exercising such control. The duty to conclude a contract on the replacement of forests under Law no. 147/1995 constitutes an evident restriction on the owner's right to own property. Law no. 147/1995 is one of a series of legal regulations on restitution which was adopted in Slovakia. Laws on restitution, no more than any other laws, may not extend or reduce the limits imposed on the activities of State bodies by the Constitution.

The constitutional principle in Article 20.1 excludes the possibility of extending more vigorous protection to one owner than to other owners of a comparable thing. As this principle was breached through the priority given to the interests of the State under Law no. 147/1995, the provisions which imposed restrictions on villages in the name of the interests of the State were proclaimed to be contrary to Article 20.1 of the Constitution.

Languages:

Slovak.

Identification: SVK-96-1-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 03.04.1996 / **e)** PL.ÚS 38/95 / **f)** Case of constitutionality of statutes / **g)** to be published in the Collection of Laws of the Slovak Republic in brief; to be published in the Collection of decisions and judgments of the Constitutional Court in complete version / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Shares, Golden share.

Headnotes:

Article 20.1 of the Slovak Constitution does not proclaim that property itself is a human right. Only the right to be an owner, to have the obtained property protected, is guaranteed under that constitutional provision.

Summary:

The petitioners, a group of 36 members of the National Council of the Slovak Republic, claimed that there was a constitutional conflict between paragraph 6 of Law no. 192/1995 on Securing the Interests of State Within Privatisation of Strategically Significant Enterprises and Share Companies, and Articles 1, 2.2, 12.1, 12.2, 13.1, 13.3, 13.4, 20.1, 20.4 of the Constitution and Articles 2.2, 3.1, 4.1, 4.3, 4.4, 11.1 of the Charter of Fundamental Rights and Freedoms.

The petitioner's principal argument was that paragraph 6.3 of Law no. 192/1995 introduced new, retroactive restrictions on existing legal relations.

Other arguments brought forward by the petitioner concerned changes and vigorous restrictions on share-holdings in enterprises and companies through the

introduction of a brand new type of share, a so called "golden share". This new share was introduced by the legislator in reliance on paragraph 6.3 of Law no. 192/1995.

The Constitutional Court ruled that Article 20.1 of the Slovak Constitution does not proclaim that property itself is a human right. The right to be an owner, to have the obtained property protected, is guaranteed under that constitutional provision. This right belongs to the citizens of the Slovak Republic as well as to foreigners, judicial persons and the State. According to Article 4 of the Constitution, the State is vested with the exclusive right to own raw materials, underground water, natural and thermal springs and streams.

Under Article 20.2, for the purposes of safeguarding the needs of society, the interests of the general public, and the advancement of the national economy, the law shall determine other property which may be vested exclusively in the State. Due to Articles 4 and 20.2, it is obviously providing for a general right to own solely that property which is not vested exclusively in the State. For such property as can be owned by everyone, any owner's rights and duties must be equal to those enjoyed by all other owners of comparable property.

With the "golden share", differences between owners were created. Those differences did not depend on constitutionally accepted differences between the type of property so owned. The differences, grounded on paragraph 6 of Law no. 192/1995, therefore brought about unequal rights of ownership in a manner contrary to the constitutional principle of the equal enjoyment of property rights. In consequence, the Constitutional Court ruled that paragraph 6 was neither in conformity with Article 20.1 of the Slovak Constitution nor with Article 11.1 of the Charter of Fundamental Rights and Freedoms.

As far as the arguments on retroactivity were concerned, the Constitutional Court decided that the objection of retroactivity is relevant and admissible solely in circumstances where the law claimed to be in constitutional conflict was adopted in accordance with Article 2.2 of the Constitution, according to which "State bodies may act solely in conformity with the Constitution. Their actions shall be subject to its limits, within its scope and governed by procedures determined by law."

If the National Council of the Slovak Republic adopts a law which may not be adopted by Parliament, or if the adopted law exceeds constitutional limits, there is no constitutional ground for considering whether such a law is in conformity with the principle of non-retroactivity. The law exceeding the limits given by the Constitution is no law at all, and this is why the issue of its retroactive effects is irrelevant.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 January 1996 – 30 April 1996

Number of decisions

The Constitutional Court had 13 sessions during this period, in which it dealt with 128 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 31 cases in the field of protection of human rights and basic freedoms (cases denoted Up- in the Constitutional Court Register and submitted to the plenary session of the Court; other Up- cases were processed by a senate of three judges at sessions closed to the public). There were 279 U- and 222 Up- unresolved cases from the previous year at the start of the period (1 January 1996). The Constitutional Court accepted 128 U- and 80 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:

- 57 cases (U-) in the field of protection of constitutionality and legality, of which there were (taken by Plenary Court)
  - 19 decisions and
  - 38 resolutions

- 99 cases (U-) were joined to the above mentioned cases because of common treatment and decision; accordingly the total number of resolved cases (U-) is 156.

- In the same period, the Constitutional Court resolved 64 cases (Up-) in the field of protection of human rights and basic freedoms (7 decisions taken by Plenary Court, 57 decisions taken by 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 rule published in an Official Bulletin but only handed over to the participants in the proceedings.

However, all decisions and resolutions are published or have been submitted to the users:

- in an official yearly collection (Slovene full text version, with the dissenting/concurring opinions, with English abstracts);

- in the Journal *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts, with the full-text version of the dissenting/concurring opinions);

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

- since August 1995 on Internet (Slovene constitutional case law of 1994 and 1995, as well as some important cases prepared for the *Bulletin* of the Venice Commission from 1992 through 1995, in full text in Slovene as well as in English <http://www.sigov.si/us/eus-ds.html>).

Since 1995, some important cases in English full-text version have been published in the *East European Case Reporter of Constitutional Law*, by *the Book World Publications*, the Netherlands.

Important decisions

Identification: SLO-96-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 18.01.1996 / **e)** U-I-213/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia, nos. 61/95 and 8/96; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), V, 1996 / **h)** *Pravna Praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Election, local authorities / Electoral units, determination.

Headnotes:

A municipal ordinance on the determination of electoral units for the election of members to local authority councils which, in the determination of the electoral units

of local authorities, simply does not make a division into electoral units, is contrary to the statute.

Summary:

Pursuant to Articles 109.5 and 109.6 of the Local Elections Act (valid text, Official Gazette of the RS, nos. 72/93, 7/94 and 33/94), the electoral units and the number of local authority council members should as a rule be prescribed by the local authority councils, and only exceptionally by a municipal ordinance (if the local authority is not functioning, if the area of the local authority was changed following the statutory establishment of municipalities at the end of 1994 or if the local authority is newly founded). It is clear from Article 6.3 of the municipal statute that the new municipal statute preserves the former local authorities; in other words, it re-establishes them, but on the territory of the "local authorities of the same name that were founded on the territory of the Municipality of Sežana prior to the enactment of the Municipal Statute". In view of this the municipal ordinance should be allowed to regulate these questions only for those local authorities in which councils do not operate, and not for all local authorities in the municipality.

The substance of the contested ordinance is clearly contrary to Article 109.7 of the Local Elections Act (now valid text), which reads as follows: "The electoral units shall be determined so as to ensure the representation of the inhabitants of individual settlements or parts of local, village or district authorities in the council of this authority". The contested ordinance does not divide local authorities into electoral units at all.

In its preliminary examination, when the initiative was accepted, the Constitutional Court believed that Article 3 actually divided the areas of individual local authorities into several electoral units, for the Article states how many local authority members are elected from an individual settlement, but from the reply to the initiative by the municipal council it is clear that the meaning of Article 3 is different. The provisions on how many local authority council members are elected from individual settlements could in fact mean that these settlements thereby actually became electoral units only if the voters in these settlements themselves at separate voting places and on special ballot papers chose their representatives to the local authority council – which was categorically denied by the municipal council in its reply. The provisions of Article 3 therefore mean that all voters in a particular local authority would receive the same ballot paper listing separately the candidates for council members from individual settlements. In compliance with the provision of Article 6 those who received most votes, i.e at least a relative majority, would be elected. The claim of the municipal council in its reply to the initiative that such an arrangement cannot "lead to any different final result than if each settlement were its own electoral unit" is obviously incorrect, since under the contested ordinance all voters in the local authority would decide with their votes on the representative for an individual settlement, including inhabitants from other settlements.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25.01.1996 / **e)** U-I-106/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 14/96; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), V, 1996 / **h)** *Pravna Praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Failure to pass legislation.
General principles – Democracy.
Institutions – Legislative bodies – Composition.
Institutions – Legislative bodies – Review of validity of elections.
Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Constitutional Court, re-opening of proceedings / Election, direct, principle / Election to the National Assembly, national list / Legal vacuum.

Headnotes:

The principle of general voting rights means that active and passive voting rights are not restricted by conditions which derive from the personal circumstances of an individual (religious affiliation, sex, property, ideology, profession, education, etc.). Some exceptions are nonetheless permissible (e.g. the conditions of citizenship and a specified age). By the provisions of Article 7 of the Act on Elections to the National Assembly, that a

citizen who has reached the age of 18 on the day of voting and whose capacity to contract has not been taken away has the right to vote and be elected as a deputy, the legislator respected in entirety the principle of general voting rights.

The principle of equality of voting rights derives from the general principle of equality before the law, although due to its special significance it has specific particularities. The principle of equality of voting rights means that each voter has the right to cast his vote and that the vote of each elector must have the same weight in the result of the election. In a proportional voting system this principle is satisfied by the appropriate formation of electoral units and an appropriate method of calculation for distributing the mandates.

The principle of equality also embraces equality of passive voting rights (the right to be elected). Also in relation to passive voting rights, the electoral system may not discriminate among individuals. The principle of equality of passive voting rights is not violated with the possibility of determining national lists.

The principle of directness means that voters have the right, without the mediation of the special electoral bodies (associations of professionals) or elected persons (electoral colleges), to decide on the composition of the representative body. This principle is not violated by the possibility of determining candidate lists in which the proposer himself determines the order of the candidates to whom the mandates will go (the so-called closed list), since the final electoral decision is dependent on the voters.

A statutory provision which provides for the possibility of political parties and other proponents of the candidates to determine the lists of candidates which is (at the maximum) a half of the electoral mandates obtained on the basis of the remaining votes from electoral units (the so called national lists) is however contrary to the principle of direct elections insofar as it does not prescribe a mandatory and timely promulgation of these lists.

Summary:

The Constitutional Court had already decided on the constitutionality of Article 93.2 the Act on Elections to the National Assembly (Official Gazette of the RS, no. 44/92) in case no. U-I-36/94 (OdlUS III, 23). The initiative was then rejected because it was unfounded on its face. Since the submitters of the request cited new reasons which allegedly proved an inconsistency of Article 93.2 of the Act on Elections to the National Assembly with the Constitution, the Constitutional Court heard the request and decided on its merits.

The Constitution declares in Article 1 that Slovenia is a democratic Republic. The principle of a democratic arrangement means that the citizens decide on public affairs directly (by referendum) or indirectly (through elected representatives). In order to ensure indirect democracy, the provision of Article 43 of the Constitution is important, as it guarantees to citizens general and equal voting rights. In Article 80 of the Constitution, it is prescribed that deputies to the National Assembly shall be elected by general, equal, direct and secret voting. The Constitution does not regulate the electoral system, but establishes only the basic principles which the legislator must respect in enacting electoral legislation. The electoral system must match the principles of generality and equality of voting rights as well as the principles of freedom, generality, equality, secrecy and directness of voting.

The system of election to the National Assembly is regulated by the Act on Elections to the National Assembly. The legislator chose a proportional electoral system, but modified it so that the State is divided into 8 electoral units in which not all candidates (up to 11 instead) are quoted on ballot-papers. In each of 11 districts within an electoral unit, only one candidate may be quoted in an individual candidate list. By voting for that candidate, the elector votes primarily for the whole list which this candidate represents in that voting district – and in the event of this list winning only one place in the electoral unit as a whole, this place will belong to the candidate from this specific voting district only if, among all 11 (or fewer) candidates from this list, that candidate receives the highest proportion (percentage) of votes at the election. The votes given for a candidate of an individual list, in other words, are counted on the level of the electoral unit as a whole. Part of the mandates are divided on the level of the electoral unit among those lists which achieve (one or more times) the electoral quotient. Mandates thus obtained go to the individual candidates of such list according to the order of the share of votes received in the voting districts. The remaining mandates are divided on the level of the State in relation to the sum of the remaining votes of lists (of the same parties), according to the so-called d'Hondt system of calculation. Mandates which fall to specific lists go to the most successful of the candidates who were proposed in the electoral units in which the list achieved the highest relative remainder of the votes. The exception to this rule is prescribed by the challenged Article 93.2 of the Act on Elections to the National Assembly, which gives the proposers of the lists the possibility of composing a register which contains the order of the candidates from lists proposed in individual electoral units. A maximum of a half of the mandates which fall to the lists on the basis of the division on the State level is allocated to the candidates from the national list.

According to the Constitutional Court, the challenged provisions of the statute do not violate the principle of equality, generality and directness of elections. Equally, the principles of equality before the law and a democratic constitutional arrangement are not violated.

The second Article of the Act on Elections to the National Assembly prescribes that "deputies shall be elected according to the principle that each deputy shall be elected by approximately the same number of inhabitants". In Article 20, the cited principle is also established in relation to the formation of electoral units. By the provisions of Articles 2 and 20 of the Act on Elections to the National Assembly and the system of counting votes and distributing the mandates, according to which all votes have the same value, the criteria of equality of voting rights are satisfied. The national lists can cause a deviation from the principle that the mandates are obtained by eleven candidates from each electoral unit. However, the principle of equality of voting rights does not guarantee the equal representation of individual regions within the State (in this case electoral units), but only the equal value of the vote of each elector. If a smaller number of deputies is elected from among the candidates in some electoral units, that does not mean that the votes of the voters in this electoral unit have been of less value, since they have been taken into account as a remainder on the State level.

The proposers claimed that the Act on Elections to the National Assembly allows for the possibility that the candidates of the lists who had poorer election results might be elected instead of those who had better election results. The Court rejected this claim, since the distribution of deputy mandates is based on establishing the electoral success of lists, not individual candidates. Voters in voting districts choose primarily among the lists, and do not have the possibility to choose among the individual candidates from one list, so it is not possible to say with certainty whether the electoral success of a candidate in a voting district can be ascribed to the popularity of the candidate or of the list or political party. The success of an individual candidate is thus connected with the success of the list and vice versa. Despite the complexity of the electoral system, the provisions of the Act on Elections to the National Assembly are clear and unambiguous. A voter who is acquainted with the electoral system knows that by the choice of a candidate he has given a vote for the list, although at the voting place he circles the number in front of the name of the candidate. Because the voter's vote is primarily a vote for the list, this vote may in reality assist the electoral success of another candidate (not the one for whom the voter voted). However, this can already happen on the level of the electoral unit, and not necessarily on the level of the distribution of mandates in relation to the remaining votes from electoral units. The situation in which the vote of an individual voter can contribute to the electoral success of the candidate for whom the voter did not vote is not simply a result of the possibility enacted by the legislator to determine a national list (as the submitters of the request believe) but a logical result of the electoral system as a whole.

The principle of equality of passive voting rights is not violated by the possibility of determining a national list, since in accordance with the Act on Elections to the National Assembly, any adult Slovene citizen with the capacity to contract has the right to be elected irrespective of any personal circumstances – thus also the right in compliance with the democratic decision of a political party to appear on the national list.

The claim of the submitters of the request that the national lists cause the composition of the National Assembly to be contrary to the will of the voters and that the principle of a democratic constitutional arrangement is thus violated, does not hold true. By giving a vote to a candidate, a voter votes for a list. It is not possible to claim that by determining a national list a political party obtains the possibility of shaping the appearance of the National Assembly against the will of the electorate, since it is not possible under the electoral scheme to ascertain the will of the voters in relation to the question to which of the candidates from the lists they wish to give their vote.

The claim of the submitters of the request that the composition of the National Assembly is inconsistent with the expressed will of the voters thus also does not hold true. The principle of directness is satisfied on condition that the structure of the list is known to the voters in advance and that it is not changed after voting has been carried out. On this condition, a voter by his vote (without the mediation of a third person) directly influences the election result. In a democratic State the influence of political parties on who shall be the candidates is normal. By the formation of closed lists, parties may, for example, positively influence the structure of the representative body such that they include in the list a comparable number of men and women, members of various professions, social classes, etc.

In order to satisfy the principle of directness, however, the following conditions must be fulfilled:

- the national lists must be composed within an appropriate time prior to the day of voting,
- the national lists must be public; and
- the national lists cannot be subsequently changed.

The arrangement under the Act on Elections to the National Assembly fulfils the first and third conditions. Lists in electoral units must be submitted to the electoral

commission of the electoral unit not later than fifteen days prior to the election day (Article 54). The register under the Article 93.2 (the national lists) must be submitted to the Electoral Commission of the Republic within the same time limit. Subsequent changes to their composition are not allowed.

The Act on Elections to the National Assembly does not regulate the procedure for the promulgation of the national lists. Mandatory promulgation is prescribed only for the lists in electoral units and for the list of candidates standing for election in individual voting districts. Article 61 of the Act on Elections to the National Assembly prescribes that both shall be published in the public media not later than fifteen days prior to the election day. Article 64.4 prescribes that it is necessary to post an announcement at voting places with the lists of candidates standing for election. The public media which the Electoral Commission of the Republic defines are bound to publish the list of candidates are defined in the Act on Elections to the National Assembly. The composition of lists in their own electoral units is thus known to electors, although in the ballot-paper only the name of one of the candidates from each list is cited. In relation to the national lists there is no obligation set by the legislator concerning their publication. A voter is thus unable to be acquainted with the names of these candidates. The principle of direct elections is thus violated, since the voter is not acquainted with the choice which the proposer of the list (a political party) has made. Only by the mandatory publication of the national lists is it possible to ensure that, in compliance with the principle of direct elections, the voter retains in his own hands the final decision as to his vote. In the contrary case, a third person (a political party) is inserted between the voter and the person who obtains the mandate, and the voter casts his vote without knowing the effect this will have on the election result (the distribution of mandates).

The Constitutional Court therefore found that despite the compliance in principle of the institution of a national list with the constitutional principles in relation to elections, these principles require the enactment of the mandatory publication of the national lists (a register of the candidates under the Article 93.2) in the public media and their announcement at voting places in the same manner as provided for in relation to the list of candidates in electoral units. The Court thus charged the legislator with removing this inconsistency not later than 1 August 1996.

Supplementary information:

In the reasoning of the decision, the Constitutional Court refers to its decision no. U-I-36/94 (OdlUS III,23).

Dissenting opinion of a Constitutional Court judge.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25.01.1996 / **e)** U-I-264/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 9/96; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), V, 1996 / **h)** *Pravna Praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Application of laws – Autonomous rule-making powers.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Local self-government / Municipal statutes, procedure for enactment.

Headnotes:

Regulation of the organisational aspects of local self-government by the State is neither a violation of the constitutional principle that the autonomy of local self-govemment in Slovenia shall be guaranteed, nor of other provisions of the Constitution, if by such regulation the legislator pursues a constitutionally admissible goal (the ensuring of equal standards of democracy and legal security on the entire territory of the State) and if in doing so it does not resort to unnecessary or disproportionate measures.

Summary:

It is provided in Article 9 of the Constitution that the autonomy of local self-government in Slovenia shall be guaranteed, and in Article 140.1 that the range of duties and functions performed by a municipality shall include such general matters affecting only the people of that municipality, as the municipality may independently prescribe. The State must comply with these constitutional provisions and may not with its statutes and regulations

interfere with the guaranteed sphere of local self-government.

It is constitutionally admissible for the State to regulate the organisation of organs of local-governments, their powers and their work. Such regulation is common also in other comparable legal systems. The regulatory framework relating to the organisation and work of municipal bodies should be the same in all municipalities, as far as this is necessary for ensuring equal standards of democracy and legal security on the local level as on the entire territory of the State. Regulating organisational aspects of local self-government, then, does not constitute an inadmissible interference with the guaranteed autonomy of local self-government unless it is unnecessary or disproportionate having regard to the aim to be achieved. The same also applies to the regulation of procedures for the enactment of general legal acts of a municipality. The legislator may regulate such procedures as well, however, only to the extent necessary for ensuring legal security and democratic decision-making in public matters of local importance, and such should not be disproportionate to the aim to be achieved.

Article 64.3 of the Local Self-Government Act provides that municipal statutes shall be enacted by the municipal council by a two-thirds majority of all members of the council. If statutes fail to be so, their enactment shall be decided on again not earlier than 30 days and not later than 60 days. The purpose of this last provision is, according to the Secretariat for Legislative and Legal Matters, to make possible in the case of disagreement between the members of a municipal council concerning the subject matter of the statute, "for all those taking part in its enactment to reconsider it thoroughly", and to provide "enough time for coordination of the views", and, on the other hand, also to ensure that the process of enacting the statute is not prolonged "indefinitely".

The constitutionally admissible aim of regulating the procedure for enactment of a municipal statute by law can only be based on the fact that the statute, as an act of fundamental importance for the municipality, should be based on greater support than other decisions. The law, in encouraging statutes to be adopted as a result of careful consideration by the members of the municipal council, is a means of ensuring consolidation of democracy and legal security on the local level. The provision on the two-thirds majority required to be able to enact statutes is from this viewpoint justified and sufficient. Provisions specifying time limits for repeating the decision-making concerning a proposal for the statute, however, unnecessarily interfere with the autonomy of the municipality in regulating its own affairs. There is no such reason as would follow from the described aim as would allow the legislator to prevent the municipality from enacting its statute within a shorter period of time if a sufficient majority in favour of such a decision has been reached in the municipal council. The provision on deadlines is also unnecessary from the viewpoint of achieving its aim. According to the Secretariat, the aim of the provision is said to be to prevent the process of enacting the statute from being prolonged "indefinitely". In the case of the first statute of a new municipality such a deadline could be justified by the need for timely enactment of the fundamental legal act, which is indispensable to the operation of the municipality. But, with a view to reaching this aim, the legislator has already provided in Article 99 of the Local Self-Government Act that statutes shall be enacted by the municipalities by 30 April 1995. Concerning changes to the statutes, however, this aim is no longer justified – for once a municipality has its own statute it may act on its basis, which is why it is from this viewpoint the same whether a proposal for changing the statute is accepted or not. For the same reason it is unnecessary to make municipalities within 60 days decide again on a proposal which has in the relevant procedure fallen to the ground. Furthermore, the legislator should not have hindered the municipal council from the subsequent coordination of the statute's proposal and from deciding upon it also after the expiry of the 60 day period.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-1-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 16.02.1996 / **e)** U-I-234/94 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 14/96; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), V, 1996 / **h)** *Pravna Praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Local self-government / Municipalities, establishment / Municipality, number of inhabitants, lower limit.

Headnotes:

The Local Self-Government Act is not inconsistent with the Constitution if the legislator prescribes a lower limit to the number of inhabitants of a municipality, provided this limit is proportionate to a legitimate aim, that is the carrying out of public tasks of local significance and that it does not prevent the founding of municipalities in regions which correspond to the constitutional basis of a municipality.

Summary:

The Constitution prescribes in Article 139 that a municipality is a self-governing local community. The region of a municipality shall embrace a settlement or a number of settlements which are linked by the common needs and interests of the inhabitants. A municipality shall be founded after the prior holding of a referendum by which the will of the inhabitants in a specified area shall be established.

In the original text of Article 13 of the Local Self-Government Act it is prescribed that the region of a municipality shall be formed such that a municipality can fulfil the majority of 11 functions enumerated in the Article. The Local Self-Government Act did not prescribe conditions in relation to the number of inhabitants of a municipality. The Constitutional Court abrogated the provisions of Article 13, which had regulated the conditions for establishing a municipality, since it considered that because of unclear measures, municipalities in Slovenia could be formed on its basis which would not be in compliance with the Constitution (decisions nos. U-I-144/94 of 15 June 1994 – OdlUS III, 95).

The Local Self-Government Act was amended by the Act on Amendments and Supplements to the Local Self-Government Act, which took effect on 30 September 1994. The abrogated Article 13 was replaced with a new Article 13, which prescribed more precisely the conditions for establishing a municipality. The new Article 13 prescribes that a municipality must be capable of satisfying the needs and interests of its inhabitants and of fulfilling other functions in compliance with the statute. It shall be considered that a municipality is capable of fulfilling the mentioned functions if all the conditions enumerated in Article 13.2 of the Local Self-Government Act are satisfied. In addition to these conditions, the legislator prescribed in the new Article 13.a) a further condition in relation to the number of inhabitants: a municipality must have at least 5,000 inhabitants. For geographical, border-related, national, historical or economic reasons, a municipality may exceptionally also have less than 5,000 inhabitants.

In compliance with the principle that local self-government shall be guaranteed in Slovenia, the Constitution guarantees the existence of self-governing local communities. However, this does not mean that the legislator may not prescribe the criteria (conditions) and procedures for the establishment of municipalities. At the time of abrogating the original Article 13 of the Local Self-Government Act, the Constitutional Court even explicitly drew the attention of the legislator to the duty to prescribe unified criteria for the establishment of municipalities, and the cases and conditions for deviating from them, in order that there should be no functionally inappropriate municipalities. In its reasoning, the Constitutional Court also stressed that the number of inhabitants is also an important element of a local community. The number of inhabitants of a municipality must be such that it enables the performance of local self-government. A municipality with too few inhabitants cannot ensure the effective implementation of public tasks of local significance.

Accordingly, the Court was of the view that it was not inconsistent with the constitutional provisions on local self-government for the legislator to prescribe a lower limit to the number of inhabitants of a municipality, as long as this limit was found not to be disproportionate to the legitimate goal described in the previous paragraph, or unless this limit prevented the founding of municipalities in regions which corresponded to the constitutional scheme of a municipality. The challenged provision was not disproportionate to the legitimate goal, since the number of 5,000 inhabitants is not incomprehensibly high, and, in addition, Article 13.a of the Local Self-Government Act applies to those examples in which a municipality may also be founded in regions with a smaller number of inhabitants. The condition could not therefore be considered as being rigid, but as a condition which takes into the account the particularities of individual regions in which a municipality could be founded that would be capable of performing its functions even with a smaller number of inhabitants. Exceptions to the prescribed condition in relation to the number of inhabitants are thus allowable, and they enable the founding of a municipality even in a region with a smaller number of inhabitants.

Supplementary information:

In its reasoning, the Constitutional Court referred to its decisions nos. U-I-144/94 of 15/7-1994 – OdlUS III, 95 and U-I-183/94 OdlUS III, 122).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-1-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 16.02.1996 / **e)** U-I-62/95 / **f)** / **g)** Official Gazette of the Republic of Slovenia, no. 14/96; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest of the Constitutional Court of RS), V, 1996 / **h)** *Pravna Praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract).

Keywords of the systematic thesaurus:

Institutions – Public finances – Taxation – Principles.
Fundamental rights – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Acquired rights / Income tax, assessment basis / Right to disposal of income.

Headnotes:

Determining tax obligations for income paid prior to a statute taking effect involved an encroachment on an existing acquired right to disposal of one's income, and was thus inconsistent with the Constitution.

Summary:

According to Article 4 of the Income Tax Act, the level of income tax and taxes deducted from income is established according to regulations which apply on 1 January of the year for which income tax is assessed, unless otherwise prescribed by the statute. Article 19 of the Act on Amendments and Supplements to the Income Tax Act prescribes that the amendments and supplements to the statute shall enter into force on the day following their promulgation (5 February 1995), and shall be effective as from 1 January 1995. In Article 17.2, the amending Act prescribes that income tax from the receipts additionally cited in Articles 15 and 16 of the Income Tax Act, on which the tax on personal income has not been assessed and paid from 1 January 1995 to 5 February 1995 shall be included in the basis for income tax for 1995.

In reality, this was a new tax burden or the removal of previously prescribed explicit tax reliefs. In case U-I-181/94 (OdlUS IV, 31) the Constitutional Court had already decided that under the provisions of Article 147 of the Constitution tax obligations may only be prescribed by a statute. The obligation can take effect only after the validation of a statute and its previous promulgation. The provision of retroactive tax obligations is inconsistent with Article 155 of the Constitution, since such tax obligations encroach on an existing acquired right to disposal of one's income.

Irrespective of the intention of the tax, in compliance with Article 154 of the Constitution tax obligations may only be prescribed with forward validity. The manner of assessing tax (e.g. annually) does not provide a basis for the interpretation whereby the validity of tax obligations is extended also to receipts paid in the period when such a tax obligation did not exist. So income paid in the period from 1 January 1995 to the taking effect of the amendments to the statute (5 February 1995) cannot be included in the basis for income tax for 1995 if the Act on Amendments and Supplements to the Income Tax Act, such as applied on 1 January 1995 did not define them as the income on which tax on personal income shall be paid, or if this statute even explicitly prescribed that the tax on personal income shall not be paid from this income.

By determining tax obligations retroactively (Article 17.2 of the Act on Amendments and Supplements to the Income Tax Act) the statute encroached on existing acquired rights of taxpayers to the disposal of specific income without payment of tax. From the reasons given for the amendments to the Income Tax Act, it is not possible to identify a public good which would require the retroactive validity of the statutory provision.

In view of the above, the Constitutional Court abrogated the provision of Article 17.2 of the Act on Amendments and Supplements to the Income Tax Act.

Supplementary information:

In its reasoning, the Constitutional Court referred to its decision no. U-I-181/94.

By resolution of the Constitutional Court of 14.09.1995, case no. U-I-138/95 was joined to the case being heard for common treatment and decision.

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-96-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.02.1996 / **e)** CCT 19/95; CCT 35/95 / **f)** State v. Mbatha; State v. Prinsloo / **g)** / **h)** 1996 (2) *South African Law Reports* 464 (CC); 1996 (3) *Butterworths Constitutional Law Reports* 293 (CC).

Keywords of the systematic thesaurus:

General principles – Proportionality.
General principles – Reasonableness.
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 provision that a person present at premises where arms or ammunition are found is presumed to be in possession thereof, unless the contrary is proved on a balance of probabilities, unjustifiably violates an accused person's right to be presumed innocent and is therefore unconstitutional.

Summary:

A section in the Arms and Ammunitions Act provided that a person who was "on or in or in charge of or present at or occupying" premises on or in which arms and ammunition were found would be presumed to be in possession thereof unless the contrary was proved. The Court characterised this presumption as a "reverse -onus" provision because it shifted the onus of proof from the prosecution to the accused with respect to the proof of possession, a key element of the offence. Because the presumption could be used to find an accused guilty despite the existence of a reasonable doubt, the Court ruled that the presumption offended the constitutional right to be presumed innocent.

Turning to the question of whether the provision could be saved by the limitations clause, the Court held that it could not. Because the offended right – the presumption of innocence – is of vital importance, any justification for its limitation must be established clearly and convincingly. Taking into account the possibility that the very widely couched presumption could lead to the conviction of innocent people, the Court held that the requirements of reasonableness and justifiability were not satisfied, especially in view of the fact that the legitimate law-enforcement objectives behind the presumption could reasonably be achieved through means less damaging to constitutional rights.

Cross-references:

The Constitutional Court had previously declared two other "reverse-onus" provisions unconstitutional: *State v. Zuma and Others* (CCT 5/94) 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) *Bulletin* 95/3 [RSA-95-3-001]; *State v. Bhulwana; S v. Gwadiso* (CCT 11/95; CCT 12/95) 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC), *Bulletin* 95/3 [RSA-95-3-008].

Languages:

English.

Identification: RSA-96-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.03.1996 / **e)** CCT 23/95 / **f)** Bernstein and Others v. Bester NO and Others / **g)** / **h)** 1996 (4) *Butterworths Constitutional Law Reports* 449 (CC).

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Security of the person.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

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

Keywords of the alphabetical index:

Civil litigation, fairness / Constitutionality, presumption.

Headnotes:

A statute providing for the summoning and examination of persons as to the affairs of a company in the course of winding-up is constitutional to the extent that it does not violate the right against self-incrimination in a criminal trial.

Summary:

The constitutionality of sections of the Companies Act, permitting the Master or the Supreme Court to summon and examine any person as to the affairs of a company in the course of winding-up, and to imprison anyone failing to comply, was challenged. The applicants sought to have the provisions struck down in their entirety on various constitutional grounds.

The constitutionality of the sections was examined in the context of the duty of the Supreme Court to prevent the oppressive, vexatious and unfair use of such enquiry proceedings. It was acknowledged that the mechanism embodied in these sections furthers very important public policy objectives, such as the honest conduct of the affairs of a company.

A previous case had already declared a particular aspect of the challenged provisions unconstitutional, namely, that answers given could be used against the examinee in subsequent criminal proceedings. Except to that extent, the Court held that the challenged sections were constitutional.

Considering first the argument that the provisions violated the right to freedom, the Court held that the obligation to honour a subpoena was a civic duty recognised in all open and democratic societies and was not an invasion of freedom, and held that imprisonment for failing to comply with a subpoena did not infringe upon the freedom-related right not to be detained without trial.

In dealing with an argument based upon the right to privacy and not to be subject to seizure of private possessions, the Court noted that in terms of the Companies Act an examinee is excused from answering questions if he or she has "sufficient cause". The Court held that the relevant section had to be interpreted in such a way that if answering a question would unjustifiably infringe or threaten to infringe any of the examinee's constitutional rights, this would constitute "sufficient cause" for refusing to answer. The same applied to the production of documents. Thus interpreted, the challenged sections were consistent with the Constitution. The majority of the Court expressed the opinion that, on the available facts, it was in any event difficult to see how there could be an infringement of the right to privacy. The benefits of limited liability imply corresponding obligations of disclosure and accountability. Moreover, the right of privacy acknowledged in the truly personal sphere is curtailed in relation to a person's business dealings. This applied equally to directors, officers, auditors and debtors of the company.

It was argued that the sections violated the right to administrative justice. The majority of the Court expressed some doubt as to whether these provisions of the Constitution were applicable to the proceedings in question, but concluded that even if they were applicable, nothing in the challenged sections was inconsistent with procedural fairness.

Finally, it was argued that the provisions violated a constitutionally-protected right to a fair civil trial. The majority of the Court expressed doubt, but did not decide, whether a right to a fair civil trial had been constitutionalised. The Court held that, even assuming such a right, a possible basis for a breach thereof by the challenged provisions could advise only from an infringement of the right to equality applied to such a civil trial. The Court held that there was no such infringement; in fact the impugned sections were designed to place the company in liquidation on an equal footing with directors, officers, debtors and others against whom the company might be obliged to litigate in order to recover its property, and not to secure an unfair advantage.

To the extent that the attack in the present case was broader than the challenge successfully raised in *Ferreira v. Levin*, the application was dismissed and the constitutionality of the relevant sections of the Companies Act confirmed.

Judgment for the majority was given by Ackermann J. O'Regan J concurred in the order, but dissented from the majority's interpretation of the right to freedom. Kriegler J, in a judgment concurred in by Didcott J, also concurred in the order but reserved judgment on certain aspects of the majority judgment.

Cross-references:

Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others (CCT 5/95) 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

Languages:

English.

Identification: RSA-96-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 03.04.1996 / **e)** CCT 46/95 / **f)** Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill, no. 83 of 1995 / **g)** / **h)** 1996 (4) *Butterworths Constitutional Law Reports* 518 (CC).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
General principles – Federal State.
Institutions – Legislative bodies – Powers.
Institutions – Executive bodies – Territorial administrative decentralisation – Provinces.
Institutions – Federalism and regionalism – Distribution of powers – Co-operation.

Keywords of the alphabetical index:

Governments, national, provincial, concurrent powers / Governments, national, provincial, consultation / Governments, national, provincial, cooperation.

Headnotes:

Where the national and provincial legislatures have concurrent powers, the only reasonable way in which such powers can be exercised is through consultation and co-operation. Where the national and provincial legislatures have exercised their concurrent powers and there is a conflict between a national law and a provincial law, in terms of the Constitution one law shall prevail over the other, depending on the circumstances. In such a case, the other law is not invalidated. For as long as the inconsistency endures, it is inoperative and ineffective only to the extent of the inconsistency, but is effective and has to be implemented in all other respects.

Summary:

This case concerned a challenge by members of the National Assembly to the National Education Policy Bill. The Bill provided for the determination of national education policy by the national Minister, and required this to be done in accordance with the provisions of the Constitution, taking into account the competence of the provincial legislatures and relevant provisions of the provincial laws relating to education.

The main challenge to the Bill was that it required the provinces to amend their legislation to conform to national education policy, and thereby empowered the Minister to impose national education policy on the provinces. The Court held that the provisions of the Bill neither imposed an obligation on the provinces to follow national education policy, nor empowered the Minister to require the provinces to adopt national policy or to amend their own legislation. The Court held that provinces must comply with national standards which have been formulated in accordance with the Constitution and lawfully made applicable to them.

The Court rejected a further challenge to the Bill, namely, that it required the members of the Executive Councils of the provinces and their administrations to participate in structures, provide information, and promote a national policy. The Court held that the only reasonable way in which concurrent powers could be exercised was through consultation with and cooperation between the national and provincial executives.

It was argued that as long as a province is capable of regulating education, a Schedule 6 matter, effectively, it has the exclusive right to do so. The Court rejected this argument. After analysing the relationship between the powers of the provincial legislatures and the powers of Parliament, the Court held that provincial legislatures had the power to make laws for their provinces in respect of any matter set out in Schedule 6 to the Constitution, which includes education. This power had to be exercised concurrently with Parliament, which had the power to make laws for the whole of the Republic. If there was a conflict between a provincial law and an Act of Parliament, Section 126 of the Constitution provided for the resolution of such a conflict. Depending on the circumstances, either the Act of Parliament or the provincial law would prevail. The provisions of the prevailing law must be enforced in all respects. The subordinate law would not be invalidated and, for as long as that inconsistency endured, it would be inoperative and ineffective only to the extent of the inconsistency, but would be effective and would have to be implemented in all other respects. Thus, the Court held that provincial legislatures did not have any exclusive powers under the Constitution.

Cross-references:

The Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others (CCT 27/95) 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC), *Bulletin* 95/3 [RSA-95-3-006]; *Premier of KwaZulu-Natal and Others v. President of the Republic of South Africa and Others* (CCT 36/95) 1996 (1) SA 769 (CC); 1995 (12) BCLR 1561 (CC), *Bulletin* 95/3 [RSA-95-3-009].

Languages:

English.

Identification: RSA-96-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 04.04.1996 / **e)** CCT 30/95 / **f)** Nel v. Le Roux NO and Others / **g)** / **h)** 1996 (4) *Butterworths Constitutional Law Reports* 592 (CC).

Keywords of the systematic thesaurus:

Sources of constitutional law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Administrative justice, right / Constitutionality, presumption / Summary proceedings, constitutionality.

Headnotes:

A statute providing for the examination of any person as to any alleged offence, and the summary imprisonment of any recalcitrant witness failing to show a "just excuse", is constitutional.

Summary:

This case involved a constitutional challenge to a section of the Criminal Procedure Act. This section permits the examination of any person likely to give material or relevant information as to any alleged offence. It also provides for the summary imprisonment of any recalcitrant witness refusing to give such information without a "just excuse".

The applicant argued that the compulsion to answer questions which would expose him to the civil forfeitures provided for in the Exchange Control Regulations violated his rights to equality and to privacy, the right to freedom of speech, an accused's right to be presumed innocent and to remain silent, and an accused's right against self-incrimination. The Court held that the section had to be interpreted so that if answering a question would unjustifiably infringe or threaten to infringe any of the examinee's constitutional rights, that would constitute a "just excuse" for refusing to answer. This had to be decided by the lower courts on a case by case basis. Thus interpreted, the provisions were consistent with the Constitution, rendering it unnecessary for the Court to consider the ambit of the allegedly violated rights and the extent of their facial infringement.

It was further argued that the summary procedure for imprisonment violated an accused's right to a fair trial, the right not to be detained without trial, the right not to be subject to cruel, inhuman or degrading treatment or punishment, the right to access to information and the right to administrative justice. The Court found that an examinee was not "an accused person" for the purposes of an accused's constitutionally entrenched right to a fair trial. It also held that the summary proceedings before a judicial officer leading to imprisonment were not inconsistent with the right not to be detained without trial, as they complied with the requirement that an impartial entity, independent of the executive and the legislature, acts as arbiter between the individual and the State. The Court expressed doubt as to whether the right to administrative justice was applicable to the proceedings in question, but held that even if it was, the right had not been infringed. The Court held that the challenges based on the right not to be subjected to cruel, inhuman or degrading treatment or punishment and the right to access to information were inapplicable.

The challenged section was accordingly declared to be constitutional.

Cross-references:

The concept of constitutionality dependent on a specified interpretation, as applied in this case, was also applied by the Court in an earlier case, *Bernstein and Others v. Bester NO and Others* (CCT 23/95) 1996 (4) BCLR 449 (CC).

Languages:

English.

Identification: RSA-96-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 04.04.1996 / **e)** CCT 39/95 / **f)** The Gauteng Provincial Legislature: In re: Dispute concerning the Constitutionality of Certain provisions of the School Education Bill of 1995 / **g)** / **h)** 1996 (4) *Butterworths Constitutional Law Reports* 537 (CC).

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Freedom of worship.
Fundamental rights – Civil and political rights – Linguistic freedom.
Fundamental rights – Economic, social and cultural rights – Right to be taught.
Fundamental rights – Economic, social and cultural rights – Right to culture.

Keywords of the alphabetical index:

Education / Schools based on common culture, right to establish / Schools based on common language, right to establish / Schools based on common religion, right to establish.

Headnotes:

The Constitution protects the right of persons to establish schools based on a common culture, language or religion, provided that there is no racial discrimination. However, the Constitution does not oblige the State to establish such schools.

Summary:

The constitutionality of three provisions of The School Education Bill in the Gauteng provincial legislature was challenged. The disputed provisions provide for:

1. a prohibition against public schools using language competence as an admission requirement;
2. an obligation on public schools to develop religious policy which is aimed at the development of a national, democratic culture of respect for the country's diverse cultural and religious traditions, and
3. prohibits compulsory attendance at religious education classes and religious practices at public schools and subsided private schools.

The central issue was the interpretation of Section 32.c of the Constitution which provides that "every person shall have the right ... to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race".

The petitioners argued that the section created a positive obligation on the State to establish schools based on a common culture, language or religion. On that interpretation, they urged that the disputed provisions of the Bill would conflict with the section.

The Court held that the section meant that a person has the right to establish schools based on a common culture, language or religion, where it was practicable, and provided there was no discrimination on the ground of race. But that did not create an obligation on the State to establish such schools. Therefore, the disputed provisions were declared constitutional.

Languages:

English, Afrikaans.

Identification: RSA-96-1-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.05.1996 / **e)** CCT 20/95; CCT 21/95 / **f)** Case and Another v. Minister of Safety and Security and Others, Curtis and Another v. Minister of Safety and Security and Others / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Privacy, right.

Headnotes:

A statutory provision prohibiting the possession of indecent or obscene photographic material is an unconstitutional violation of the right to privacy.

Summary:

These cases concerned a challenge to the constitutionality of a section of the Indecent or Obscene Photographic Matter Act, which prohibits the possession of indecent or obscene photographic matter. The applicants were charged with the contravention of this section in that they were found in possession of cassettes containing sexually explicit matter. The Court unanimously held that the challenged section was invalid and of no force and effect. There were however differing reasons for the finding of unconstitutionality.

In a judgment delivered by Didcott J, the majority of the Court held that the prohibition constituted an infringement of the right to personal privacy guaranteed by Section 13 of the Constitution. It was held that the invasion of the right to privacy was aggravated by the very broad definition of indecent or obscene photographic matter contained in the Act.

The Court held that the infringement of the right to privacy was neither reasonable nor justifiable in terms of the limitation clause, Section 33.1 of the Constitution, and that the challenged section was therefore unconstitutional. The Court did, however, note that an invasion of privacy might be permissible in terms of the limitation clause where the material concerned was so pernicious that a ban on its possession could be said to serve a useful purpose in the campaign against the production of such material. This was not, however, the case in respect of the challenged section because the section covered innocuous material that deserved to be protected by the constitutional right to privacy.

Having established that Section 2.1 constituted an unreasonable and unjustifiable violation of the right to privacy, the Court found it unnecessary to consider whether Section 2.1 violated the possessor's right to freedom of expression and therefore left the question open. Mokgoro J, however, delivered a minority judgment in which she held that the challenged section constituted an unjustifiable infringement of the right to freedom of expression as well as the right to privacy. Langa and Madala JJ wrote separate judgments concurring with Didcott J, while Sachs J, in a separate judgment, concurred with both Mokgoro and Didcott JJ.

Languages:

English.

Identification: RSA-96-1-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 14.05.1996 / **e)** CCT 34/95 / **f)** Besserglik v. Minister of Trade, Industry and Tourism and Others / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Procedure – Exhaustion of remedies.
Institutions – Courts – Supreme court.
Fundamental rights – Civil and political rights – Equality.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Civil proceedings / Courts, appeal procedure.

Headnotes:

Legislation which provides for a screening procedure to exclude unmeritorious appeals, whereby a higher court is able to make an informed decision as to the prospects of success of such an appeal, is not unconstitutional.

Summary:

The constitutionality of a section of the Supreme Court Act was challenged. The section provides that there can be no appeal against a judgment or order of a division of the Supreme Court in civil proceedings unless leave to appeal has been granted by that court or, where leave has been refused, by the Appellate Division. It was argued that the section violated the rights of access to court and equality.

The Court held that, provided the screening process enabled a higher court to make an informed decision

as to the prospects of success, there was no denial of the right of access to court.

The Court also held that equality before the law and equal protection of the law did not require identical procedures to be followed in respect of appeals from or to different tiers of courts. The challenged section was therefore not inconsistent with the right to equality either.

Cross-references:

State v. Rens (CCT 1/95) 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC), *Bulletin* 95/3 [RSA-95-3-012]; *State v. Ntuli* (CCT 17/95) 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC), *Bulletin* 95/3 [RSA-95-3-011].

Languages:

English.

Identification: RSA-96-1-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 15.05.1996 / **e)** CCT 8/95 / **f)** Du Plessis and Others v. De Klerk and Another / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Effects – Temporal effect – Retrospective effect.
Fundamental rights – General questions – Effects – Vertical effects.
Fundamental rights – General questions – Effects – Horizontal effects.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Constitution, application to common law / Defamation.

Headnotes:

The fundamental rights in the Constitution are generally not capable of horizontal application and, more specifically, the provision relating to freedom of speech and expression is not capable of application to any relationship other than that between persons and legislative or executive organs of the State at all levels of government. The Constitution cannot be invoked where the relevant events occurred prior to its commencement.

Summary:

The case arose out of a defamation action instituted before the commencement of the Constitution. After the Constitution came into force, the defendant in the defamation action sought to raise a new defence, namely, that the alleged defamation was not unlawful because it was protected by the constitutional right to freedom of expression. Two issues were referred to the Constitutional Court:

1. whether the Constitution could be invoked where the relevant events had occurred prior to the coming into force of the Constitution and
2. whether the chapter on fundamental rights (Chapter 3) of the Constitution was applicable to legal relationships between private parties.

With regard to the first issue, the Court unanimously held that the commencement of the Constitution could not make lawful what was unlawful at the time. The Court however left open the possibility that there might be circumstances of gross injustice in which the Chapter 3 rights could be applied to actions which occurred before the commencement of the Constitution.

With regard to the second issue, a majority of the Court found that Chapter 3 could not be applied directly to the common law in actions between private parties, but left open the question whether there were particular provisions of the Chapter that could be so applied. The Court held that the right to freedom of expression, Section 15, was in any event not such a provision. However, in terms of Section 35.3 of the Constitution, courts were obliged, in the application and development of the common law, to have due regard to the spirit, purport and objects of Chapter 3. The majority held that it was the task of the Supreme Court including the Appellate Division to apply and develop the common law in the manner required by Section 35.3. The Constitutional Court had jurisdiction in the final instance over the interpretation of Section 35.3.

On the second issue referred, Kriegler and Didcott JJ, dissenting, were of the view that Chapter 3 applied directly to all law. All courts were responsible for the application and development of the common law: the Constitutional Court where constitutional issues were involved and the Appellate Division where non-constitutional issues were involved. Where there was no claim based on the Constitution, then all courts, including the

Appellate Division, would have to have due regard to the "spirit, purport and objects" of Chapter 3.

Judgment for the majority was given by Kentridge AJ and concurred in by Chaskalson P, Langa and O'Regan JJ. and Mahomed DP (with whom Langa and O'Regan JJ concurred). Ackermann, Madala, Mokgoro and Sachs JJ wrote separate concurring judgments. Kriegler J (with whom Didcott J concurred) wrote a dissenting judgment.

Cross-reference:

On horizontality: *Gardener v. Whitaker* (CCT 26/94).

On retrospectivity: *Key v. Attorney General, Cape of Good Hope Provincial Division and Another* (CCT 21/94); *Rudolph and Another v. Commissioner for Inland Revenue and Others* (CCT 13/96).

Languages:

English.

Identification: RSA-96-1-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 15.05.1996 / **e)** CCT 15/95 / **f)** Brink v. Kitshoff NO / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Insurance policies, married women deprived of benefits / Married women, discrimination against.

Headnotes:

Legislation, insofar as it deprives married women in certain circumstances of some or all of the benefits of life insurance policies ceded to them or made in their favour by their husbands, discriminates against married women on the basis of sex and marital status and violates the constitutional right to equality.

Summary:

The constitutionality of a section of the Insurance Act, which deprived married women in certain circumstances of some or all of the benefits of life insurance policies ceded to them or made in their favour by their husbands, was challenged.

The Court held the challenged section discriminated against married women on the basis of sex and marital status and was thus clearly a violation of the right to equality. The Court noted that married men did not lose the benefits of insurance policies ceded to them or made in their favour by their wives.

The Court held that the equality clause was a product of South Africa's particular history and ought to be interpreted against a background of systematic disadvantage caused by racial and other discrimination. The clause recognised that discrimination built and entrenched inequality amongst different groups and led to patterns of group disadvantage and harm.

The Court held that the discriminatory effects of the challenged section could not be justified and that the offending aspects were therefore unconstitutional.

Languages:

English.

Identification: RSA-96-1-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.05.1996 / **e)** CCT 47/95 / **f)** Ynuico Limited v. Minister of Trade and Industry and Others / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Distribution of powers between State authorities.
Constitutional justice – The subject of review – Acts issued by decentralised bodies – Sectoral decentralisation.
Constitutional justice – Effects – Temporal effect – Limit on retrospective effect.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Institutions – Executive bodies – Relations with the legislative bodies.

Keywords of the alphabetical index:

Legislative competences, pre-constitutional legislation / Pre-constitutional legislation, status.

Headnotes:

A statutory provision enacted prior to the commencement of the Constitution, granting wide legislative powers to a Minister, does not violate the constitutional provision vesting legislative power in Parliament.

Summary:

A section in the Import and Export Control Act delegated to the relevant Minister the power to prescribe that specified goods could not be imported except in accordance with the conditions stated in a permit issued by the Minister. The section was challenged on the basis that it violated the Constitutional provision which stipulated that legislative authority vested in Parliament.

The Court upheld the constitutionality of the impugned section. It found that the relevant constitutional provision applied to legislation passed or acts done after the commencement of the Constitution. The Court noted that both the enactment of the challenged section and the actual exercise of the power delegated thereunder had occurred prior to the operation of the Constitution and were therefore preserved by the Constitution, barring a violation of the Chapter on Fundamental Rights or some other constitutional challenge.

Languages:

English.

Spain
Constitutional Court

Statistical data

1 January 1996 – 30 April 1996

Type and number of decisions:

- Judgments: 76
- Decisions: 114
- Procedural decisions: 1437

Cases submitted: 1842

Important decisions

Identification: ESP-96-1-001

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.02.1996 / **e)** 19/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 67 of 18.03.1996, 6-10 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Information, right to communicate freely / Insulting behaviour towards a public official / Public duties, persons performing.

Headnotes:

When it is clear that facts reported in the course of a political battle are true and that the information provided is in the public interest, freedom of information and expression take precedence over other protected legal interests, such as the principle of authority, which is

protected by the existence of the criminal offence of insulting behaviour towards a public official.

Summary:

The appeal in question was lodged against several judgments which had convicted the appellant of insulting behaviour towards a public official, because, in a newspaper interview, he had reported of alleged irregularities in the management of municipal affairs by the mayor and an official of the municipality of which the appellant was himself a town councillor and, more specifically, a representative of the party in opposition. The appellant had pleaded that this conviction had violated his right to freedom of expression and the right to freedom of information (Articles 20.1.a and 20.1.d of the Spanish Constitution).

In accordance with the various criteria which the Constitutional Court had established over time, the conflict between, on the one hand, the right to communicate information freely and the right to freedom of expression and, on the other, the right to respect for one's reputation had to be examined in the light of the very specific position occupied by what were called personality rights, as laid down in Article 18 of the Spanish Constitution, in relation to the broader rights of freedom of expression and information established by Article 20.1 of the Spanish Constitution, because they concerned individual freedom and served as an institutional guarantee for public opinion, which was an inalienable element of political pluralism in a democratic State.

In this connection, the Constitutional Court had, on several occasions, stated that constitutional recognition of freedom of expression and of information had somewhat altered the problems raised by defamation in cases where this had taken place in the course of the exercise of these freedoms. This was why it was necessary to assess the issue from another perspective: it was no longer a question of determining whether the exercise of the above-mentioned freedoms constituted defamation, which was a criminal offence, but rather whether the exercise of these rights resulted in the exclusion of constituent elements of the offence or the illegality of the act. Needless to say, this was only possible if the exercise of these freedoms respected the limits established by the Constitution and – a consideration which was extremely important in this case – if its purpose was to enable public authorities to function more effectively and to avoid irregularities or inefficiency, since awareness of these would make it possible to prevent activities which were detrimental to society.

Having reviewed the balance which had been struck in the challenged judgments, between the freedoms cited and other legally protected interests – in this case reputation and the principle of authority – the Constitutional Court considered that the principle of freedom always had to be pre-eminent providing that the information disclosed was not unreasonable, that it was not manifestly without foundation and that it concerned public affairs which could be deemed to be in the public interest in view of the issues dealt with and the persons involved. The Court pointed out that all persons holding public office or involved in maintaining public order had to accept that they ran a greater risk of having their personality rights infringed than ordinary individuals.

Languages:

Spanish.

Identification: ESP-96-1-002

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.02.1996 / **e)** 21/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 67 of 18.03.1996, 12-16 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus.*

Keywords of the alphabetical index:

Administrative detention / Expulsion.

Headnotes:

Given the very specific nature of the procedure of *habeas corpus* – regardless of whether the measure has been decreed by the competent administrative official, which is the case here – if there is the slightest doubt as to the lawfulness of the circumstances of detention, there are no grounds for declaring the request inadmissible, but rather the circumstances have to be examined, given that judges who institute *habeas corpus* are responsible for reviewing the substantive lawfulness of administrative detention.

Summary:

The appellant, of Peruvian nationality, had been refused political asylum and had then requested dispensation from the visa requirement. An expulsion procedure had been initiated against him and, following a number of events, the appellant had gone to a police station to find out what stage his application had reached. He had immediately been arrested by the police, with a view to his expulsion under the terms of an administrative decision of which he had been notified at the same time. The appellant had therefore immediately applied for *habeas corpus*, but his application had been rejected the same day by a decision declaring it inadmissible and ordering the expulsion of the detainee to his country of origin. The appellant pleaded violation of his rights to freedom (Article 17 of the Spanish Constitution) and to the effective protection of judges and courts (Article 24.1 of the Spanish Constitution).

To the extent that deprivation of liberty was an indispensable condition of any request for *habeas corpus*, the guarantee established by Article 17 of the Spanish Constitution, designed to put an immediate end to any irregular deprivation of liberty, was perfectly applicable to detention occurring before an expulsion decision subsequently made in the following seventy-two hours, ie before the execution of the custodial measure requested by the administration. The Constitutional Court considered that the judge's decision that the appellant's request was inadmissible had not properly weighed up the circumstances of the case:

a. firstly, the fact that detention had been ordered in order to execute a decision made a year earlier, about which the person concerned had not been informed;

b. secondly, the fact that the person concerned had claimed a dispensation from the visa requirement on the grounds that the authorities had issued no statement on the supposed illegality of his presence on Spanish territory. In its judgment, the Constitutional Court concluded that the judge should have weighed up the effect in terms of legality, of the appellant's dispensation from the visa requirement, as well as the effect of the delay in notifying him of his expulsion and thus should have declared the request for *habeas corpus* admissible so that it could be examined according to the appropriate procedure, with due respect for all the guarantees established in this kind of procedure, including hearing the person concerned.

Languages:

Spanish.

Identification: ESP-96-1-003

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 13.02.1996 / **e)** 24/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 67 of 18.03.1996, 24-29 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Court decisions.
General principles – Legality.

Keywords of the alphabetical index:

Diplomas, recognition / Functions, illegal exercise / Skeleton criminal laws.

Headnotes:

The principle of legality cannot be interpreted mechanically in such a way as to remove judges' freedom, providing that, in exercising this freedom, judges do not create new offences or hand down sentences which are not provided for in the legal system.

Summary:

The appellant challenged a judgment convicting her of the offence of illegal exercise of functions (Article 321.1 of the Criminal Code) after practising as a stomatologist without the required qualification; among the facts proven, the challenged judgment had emphasised that the appellant, who had degrees in medicine and surgery and a qualification from the Pierre and Marie Curie University in Paris (which the Spanish authorities had not recognised as being valid in Spain) had described herself as a doctor-dentist and had regularly treated patients in a surgery open to the public. The appellant's application relied on the dual violation of Article 25 of the Spanish Constitution: it argued firstly that the criminal law provision was amplified by a rule that was void as a matter of law since it did not respect the constitutional principle laid down in Article 36 of the Spanish Constitution, whereby the exercise of professions requiring

qualifications could only be regulated by law, and secondly that the criminal provision and the associated rules had been interpreted liberally.

As regards the violation of the principle of legality pleaded by the appellant, the Constitutional Court's judgment answered the two questions raised. Firstly, the Court pointed out that the practice whereby criminal law provisions were supplemented by references to rules, ie the legislative practice of passing "skeleton" penal laws, which left the judiciary the scope to interpret them as they saw fit, was in complete conformity with the Constitution, provided that the reference to rules was explicit and justified in terms of the legal interest protected by the rule and that the law was sufficiently specific to ensure that behaviour classified as an offence was adequately defined by means of the rule to which the law referred, in this case a Royal Decree of 1984.

Moreover, as regards the argument that the additional rule applied was void as a matter of law because it did not have legislative status, the Constitutional Court's judgment stated that the law applied (Law of 20 July 1955) very explicitly established that a specialised medical qualification was a requirement for practising as a doctor-dentist. Indeed, the Supreme Court had consistently interpreted this rule in this way, declaring that neither before nor after the introduction of the above-mentioned law had it been possible for a person holding degrees in medicine and surgery to practise as a doctor-dentist or stomatologist unless he or she had also obtained a post-graduate qualification in one of these specialist fields. According to this interpretation, the necessary conclusion was that the Royal Decree of 1984, which supplemented this rule, in no way altered or restricted the way in which persons practised as doctors-dentists. Therefore, to the extent that interpretation of the rule applied had been rational, it was entirely impossible to find the slightest element in the rule which had been newly introduced.

It was not for the Constitutional Court to determine which of the possible interpretations of the applicable legislation was the most appropriate, given that they were all in conformity with the Constitution. Whichever interpretation was selected, there were no grounds for defining this interpretation as being liberal or *in malam partem*, primarily because the complex reasoning by which the ordinary court had reached its final decision to convict the appellant had relied on parameters that were not those which the appellant had herself complained of, since she had based her whole argument on a premise which was without foundation. Thus, it was impossible to affirm that the Royal Decree of 1984 had been used as a supplementary rule serving as the basis for the conviction, since although it had been mentioned in the judgment, it had been referred to only as a rule and in no way as an element serving as a basis for the conviction. Nor, lastly, could it be affirmed that the reasoning used by the court to reach its decision to convict the person in question had been based on a non-existent rule or that it had created an offence not provided for in the rule.

Languages:

Spanish.

Identification: ESP-96-1-004

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 15.02.1996 / **e)** 27/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 67 of 18.03.1996, 37-39 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Parliamentary elections.
Fundamental rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental rights – Civil and political rights – Right to participate in political activity.
Fundamental rights – Civil and political rights – Electoral rights – Right to be elected.
Fundamental rights – Civil and political rights – Linguistic freedom.
Fundamental rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Co-official language / Electoral candidature / Official language.

Headnotes:

Only "co-official" languages can be used in administrative procedures. Therefore, since Asturian (the dialect used in the Autonomous Region of Asturias) is not recognised as a "co-official" language in the Statute of this Autonomous Region, it cannot be used for this purpose.

Summary:

The appellant was a regional political party in the Autonomous Region of Asturias, whose candidature for the parliamentary elections of 3 March had been rejected by the regional Electoral Commission on the grounds that the candidature and its appended documentation had been written in the Asturian language and that this irregularity had not been rectified within the time limit set for this purpose. The appellant pleaded the violation of the principle of equality (Article 14 of the Spanish Constitution), of the right to participate in public affairs directly or through the intermediary of representatives freely elected in periodic elections on the basis of universal suffrage as well as of the right of access to public office (Article 23.2 of the Spanish Constitution).

The Constitutional Court considered that, since electoral commissions were state authorities, they were subject to the provisions of Law no. 30/1992 on the Legal Provisions governing Public Authorities and Standard Administrative Procedure, which established (Section 36) that "the official language for procedures pursued before the State's general authorities was Spanish. [Nevertheless...], the persons concerned could also, when dealing with general public authorities of an Autonomous Region, use this Autonomous Region's "co-official" language". In this connection, it had to be emphasised that Article 4 of the Statute of the Autonomous Region of Asturias did not confer the status of official language on the language used by the appellants in their candidatures. Therefore, since their claim was not legitimate, they should have made the relevant rectification within the time limit granted for this purpose, which they had not done. Lastly, the Constitutional Court's judgment affirmed that neither the Electoral Commission's decision to reject the appellant's declaration of candidature nor the subsequent decision of the Asturias High Court rejecting the appellant's appeal infringed any fundamental right, since the appellants had not deigned to rectify the irregularity ascertained by the Electoral Commission, ie the fact that the declarations accepting the candidates, had been submitted in Asturian only, within the time limit granted.

Supplementary information:

Three judges issued a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-96-1-005

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 26.02.1996 / **e)** 28/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 80 of 02.04.1996, 3-7 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Court decisions.
Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Duty of care, professional obligations / Information, right to communicate freely / Libel.

Headnotes:

Among the criteria which are of paramount importance in finding the right balance between the right of journalists to communicate information freely and the right to respect for the honour and reputation of the person concerned by this information, particular note has to be taken of the information-provider's duty of care, since observance of the latter makes it possible to ensure the veracity of information. The greatest care is required when the information disclosed is likely to discredit the reputation of the person to whom it refers.

Summary:

The appeal in question had been lodged against a judgment – which had been upheld by the court of cassation – which had convicted the appellant and given him a custodial sentence and a fine for the offence of libel, following the publication of a report in which the writer had accused the head of a hospital gynaecology unit of having forged documents concerning the birth and death of a child born in the hospital. The child's parents had lodged a complaint against the above-mentioned doctor for forgery and making use of forged documents, which had finally ended in termination of the proceedings, a verdict of which the writer had been aware. According to the appellants (the journalist and the publisher for which the latter worked), the challenged judgments had infringed the right to freedom of information, since the judgments had not struck a fair balance between this freedom and the right to respect for a person's reputation.

In order to review the relative weight which the ordinary court had given each of the above two rights, the Constitutional Court examined firstly the criteria established by its own case-law in order to determine when there were grounds for considering information truthful. In applying these criteria to this case, the Constitutional Court considered that, given the circumstances, the journalist could not be regarded as having been sufficiently careful in view of the information contained in the very brief and piecemeal report. The information in no way justified as serious an infringement of a reputation as had happened. When such a serious accusation was made against an individual, one which had as great an impact on the person's personal and professional reputation, as in the newspaper article concerned, it was not enough simply to quote the parents concerned or to report out of context a remark which the doctor had made ("the confusion between boy and girl is due to a mere administrative error") or to cite a remark made by the judge which had only an indirect bearing on whether the information was true ("we cannot play around with the honour and professionalism of doctors in this way"). It could therefore be asserted that the information disclosed had not been proportional to the categorical and serious conclusions that the journalist had drawn from it in reporting the matter as a criminal act. In short, in accordance with the Constitutional Court's case-law referred to in this judgment, the person providing the information should have taken greater care, in view of his categorical account of the perpetration of an offence, which clearly caused serious damage to an individual's personal and professional reputation. In not taking sufficient care and in persisting in the publication of his categorical accusation, the writer of the report had manifestly failed in his professional duty of care, had disclosed false information and had violated the fundamental right of the doctor concerned to respect for his reputation.

Languages:

Spanish.

Identification: ESP-96-1-006

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 27.02.1996 / **e)** 31/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 80 of 02.04.1996, 16-22 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.
Constitutional justice – The subject of review – Court decisions.
General principles – Proportionality.
Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Abuse of authority / Delaying tactics / Detention, illegal / Freedom, deprivation / *Ius ut procedatur* / Legal proceedings, choice.

Headnotes:

In criminal cases, in order to declare a complaint against a judge inadmissible, a statement of reasons explicitly assessing the legal and criminal consequences of extending the period of detention longer than is strictly necessary is required.

Summary:

The facts upon which this application was based were as follows: the appellant, a practising lawyer against whom an investigating court had instituted criminal proceedings for insulting behaviour, had been detained for twenty-four hours during which he had been notified of various court decisions. The arrest warrant had been issued on the grounds of the appellant's "delaying tactics", since on several occasions he had refused to accept notification which had been sent to him. A few months later, the appellant brought criminal proceedings against the judge for illegal detention and abuse of authority, but his complaint had been declared inadmissible. In this appeal, lodged against the judgment which had declared the complaint brought against the judge inadmissible, the appellant pleaded violation of his right to freedom (Article 17 of the Spanish Constitution). This case raised three questions, which the Constitutional Court dealt with in turn.

Firstly, as regards the possible violation of the fundamental right to freedom, the Constitutional Court rejected the appellant's allegation that the arrest warrant issued against him had been without legal foundation, because in practice the appellant's deliberate delaying tactics had been sufficiently serious for these alone to justify the issue of an arrest warrant. On the other hand, the Court considered that the way in which this warrant had been enforced needed to be assessed separately. Detention of twenty-four hours and thirty minutes at the local detention centre for the purposes of notifying the appellant

of a court decision, in this case, the opening of a hearing, seemed excessive. While Article 17.2 of the Spanish Constitution did set the maximum period of pre-trial detention at seventy-two hours, it was important not to forget that this provision established that such detention should never extend beyond the time strictly necessary for checking the facts, and that the principle of a time limit should always prevail in settling any case involving deprivation of liberty other than standard pre-trial detention. In this case, the circumstances in no way justified such a disproportionately long period of detention, which had therefore violated the appellant's fundamental right.

Secondly, the Constitutional Court examined the question raised by the Public Prosecution Office challenging the appropriateness of the legal procedure which the appellant had chosen in order to claim compensation for violation of Article 17 of the Spanish Constitution and, more specifically, the institution of criminal proceedings against the court which he had deemed to be responsible for the infringement. In this respect, the Court quoted its case-law, according to which a person possessing a fundamental right could choose from the appropriate legal procedures the one which he or she considered to be the one most likely to protect his or her rights most effectively. In this case, the aim, in practice, was to reserve or rectify infringements of, the appellant's freedom.

Lastly, as regards whether or not there had been grounds for requesting constitutional protection of the right to personal freedom, the Constitutional Court considered that its review function in no way compelled it to give a ruling on the appellant's criminal proceedings against the judge. On the contrary, it considered that it had to confine itself to examining the decision which had declared the application inadmissible, ie to determining whether the challenged judgments respected the *ius ut procedatur* of the individual who had requested criminal law protection of a fundamental right. In this respect, it was therefore important to stress that individuals pleading the violation of their personal right to freedom could not, by lodging a constitutional appeal, call for the criminal conviction of the perpetrator of the violation. The Constitutional Court's review procedure had to be limited to determining whether the decision declaring the complaint lodged by the person acting in defence of his or her freedom inadmissible infringed this fundamental right and deprived the person concerned of protection.

Languages:

Spanish.

Identification: ESP-96-1-007

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 11.03.1996 / **e)** 35/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 93 of 17.04.1996, 8-11 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Prison authorities / Prison treatment / Right to physical integrity.

Headnotes:

The legal relations between prison authorities and prisoners are considered to be special relations and are subject to Article 25.2 of the Spanish Constitution. Furthermore, these relations have to be interpreted strictly and in conformity with the precedence afforded to fundamental rights.

Some coercive acts derived from the application of prison security rules, can pose an immediate and future risk to health and therefore infringe the right to physical integrity (Article 15 of the Spanish Constitution), to the extent that the right to health and even the right of individuals not to have their personal health damaged in any way are an integral part of the right to bodily integrity.

Summary:

This appeal for constitutional protection was lodged against several decisions of the prison authorities, upheld by a court, to the effect that an inmate was obliged to submit to a number of X-ray examinations every time he left or returned to the prison.

When considering the interconnected specific rights and duties of the prison authorities and inmates, the Constitutional Court emphasised firstly the prison authorities' primary obligation to ensure and monitor prison security and order, by introducing appropriate surveillance and security systems – inspections, searches, roll call etc. In addition, it drew attention to prisoners' corresponding duty to obey and respect the prison's internal rules which govern prison life.

Moreover, the Constitutional Court recalled that X-ray examinations, used as prison security measures, could constitute a danger to health and physical integrity if they were carried out too intensively, if the sessions were too frequent and insufficiently spaced out, if they were not carried out properly from a technical point of view or if they did not satisfy all the medical guarantees required. In order to avoid damaging prisoners' health, these examinations had to be carried out with all the precautions needed. Furthermore, before such a measure was ordered, it had to be determined not only whether it was appropriate and necessary for security reasons, but also that all the required precautions had been taken, such as the use of special equipment, an appropriate and monitored level of radiation, sufficient intervals between use, etc.

In this case, the Constitutional Court considered that the person's right to physical integrity had not been infringed, since the medical opinion attached to the case-file in no way indicated that the techniques used or the frequency of the X-ray examinations had involved higher levels of radiation than authorised. It therefore considered that they represented no risk of future damage to the inmate's health. Indeed, it stressed that these examinations had been carried out on an occasional and sporadic basis, always under medical supervision, and that the equipment used had been in perfect working order and had used a lower level of radiation than the maximum level authorised by the World Health Organisation. The Constitutional Court added that the aim had been to guarantee prison security and that, in this case, while security reasons alone could not justify X-ray examinations, the prisoner's past record had to be taken into account, namely several violent incidents and escape attempts, extensive damage to his cell and the confiscation of prohibited and dangerous objects.

Languages:

Spanish.

Identification: ESP-96-1-008

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 25.03.1996 / **e)** 48/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 102 of 27.04.1996, 13-16 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Prison authorities / Prison treatment / Right to physical integrity.

Headnotes:

The right to life and physical and moral integrity, as recognised by Article 15 of the Spanish Constitution, is absolute and cannot be limited by any judicial sentence or decision. While the prison authorities have to respect the Constitution by refusing any competence in this area, they must carry out their central duty to respect life and physical integrity, ie inmates' health. For while the prison authorities' special relationship with all prisoners from the moment they enter prison certainly enables them to restrict some of their prisoners' fundamental rights as is necessary in the case of substantive restriction of freedom, it also requires them to promote and protect the exercise of rights which need not be restricted.

Summary:

This appeal for constitutional protection was lodged against a court decision which had not granted a request for release made by an inmate who was suffering from a serious and irreversible heart condition. In this judgment, the court had ruled that imprisonment in no way endangered the prisoner's life and that the latter could, moreover have an operation to partially check the course of the illness.

The Constitutional Court held that the central issue was whether the ordinary courts' interpretation of Article 60.2 of the Prison Rules had been in conformity with the Constitution. The above-mentioned provision established that, in exceptional circumstances, any prisoner suffering from a very serious and incurable illness could be released conditionally, on the advice of a doctor, even if the prisoner had not served three quarters of his or her sentence, but only if he or she was subject to a day release regime (prison regime where inmates left the prison every morning and returned in the evening to sleep), on the basis of good conduct, and if he or she offered serious pledges of continued good conduct.

The Constitutional Court considered that the conditional release of persons suffering from very serious and incurable illnesses had to be based on the definite danger that imprisonment posed to their life and physical integrity, ie their health in general. Therefore, this did not mean pleading that an imminent or immediate danger might exist or granting all prisoners suffering from an incurable illness conditional release, even if they did not fulfil the other conditions required by the above provision.

On the basis of the medical opinions included in the case-file, which had described the prisoner's cardio-vascular condition as serious and incurable and which had emphasised that it was impossible for the inmate to obtain appropriate treatment in prison, the Constitutional Court considered that in refusing to grant the appellant conditional release, on the pretext that his imprisonment presented no danger to his life, the court had wrongly interpreted the rule (Article 60.2 of the Prison Rules), thereby creating a restrictive condition, an additional obstacle which had no foundation, and thus introducing a risk factor which had endangered the sick man's physical integrity and even his life. From a constitutional point of view, the Court made the same criticism of the other argument used in the challenged judgment – namely, the fact that the inmate could undergo an operation – because the right to physical and moral integrity in no way authorised the imposition of medical assistance on any person against their wishes, whatever their reasons for refusing.

Languages:

Spanish.

Identification: ESP-96-1-009

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 26.03.1996 / **e)** 54/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 102 of 27.04.1996, 41-48 / **h)**.

Keywords of the systematic thesaurus:

General principles – Legality.
General principles – Proportionality.
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, illegally acquired / Telephone tapping.

Headnotes:

Any restriction on the free exercise of rights established by the Spanish Constitution is so serious that the reasons for it have to be determined before the restriction can be imposed. Moreover, the fact or the body of facts justifying such a restriction have to be explained to the persons who would be affected by it so that they know the reasons and interests which have prevailed over their rights. Any decision intended to limit or restrict the exercise of a fundamental right has to be reasoned and explained to the persons concerned.

Telephone tapping constitutes a serious invasion of personal privacy. This is why this measure is governed by the principle of legality and, more specifically, by the principle of proportionality, which requires not only that the offence must be of a certain seriousness or that the legal interest at stake must be of public importance if the measure is to be justified, but also that the safeguards that apply when specific and reasoned legal authorisation is given are observed.

Summary:

This appeal for constitutional protection was lodged against several court decisions whereby the appellant had been convicted of illegal detention and collaboration with an armed group for having acted as an intermediary in an abduction. The appellant claimed that these judgments had violated his right to secrecy of communication (Article 18.3 of the Spanish Constitution) and his right to the presumption of innocence (Article 24.2 of the Spanish Constitution), on the basis that the supposedly illegal tapping of the telephone of one of the witnesses had made it possible to obtain the evidence which had been used as the principal element of his conviction.

The Constitutional Court drew attention to its case-law on the need for decisions authorising telephone tapping to be reasoned. The statement of reasons was indispensable, because it was the only way of preserving the right to a fair trial and of judging the balance necessary between sacrificing a fundamental right and the reason for making such a sacrifice. This explained why it was necessary to declare void all telephone tapping carried out without specific legal authorisation setting out the reasons justifying the measure and why it was needed.

In this case, the Constitutional Court considered the statement of reasons for the decision authorising telephone tapping to be insufficient, because it had not identified the persons concerned, who were in fact easily identifiable, and had not specified the offence being investigated. Furthermore, it had explained neither the reasons for adopting the measure nor its purpose. The judgment had merely listed the telephone numbers to be tapped and had cited, as the reason for granting authorisation, the authorities' letter applying for it and the reasons given by this. The Constitutional Court considered that this general and cursory statement of reasons did not respect the principle of proportionality guaranteed by the Constitution. The fact that neither the subjective nor the objective scope of the tapping, ie the persons concerned and the offence being investigated had been established, and the lack of a specific statement of reasons constituted an infringement of Article 18.3 of the Spanish Constitution and were therefore contrary to the constitutional prohibition on taking account of such evidence and any information directly or indirectly derived from it, given that it had been obtained by infringing the fundamental right to the inviolability of communications.

Languages:

Spanish.

Identification: ESP-96-1-010

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 28.03.1996 / **e)** 55/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 102 of 27.04.1996, 48-59 / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Conscientious objection / Sentences, proportionality.

Headnotes:

Under the Spanish Constitution, prevention is not the sole purpose of sentences. The constitutional provision establishing that the purpose of imprisonment and security measures has to be rehabilitation and social reintegration (Article 25.2 of the Spanish Constitution) does not settle the question of whether the possible objectives of sentences can be adjusted, to a greater or lesser extent, to take account of the Spanish Constitution's value system and, still less, whether, in this value system, criminal law assigns a specific purpose to sentences.

The right to freedom of ideology (Article 16 of the Spanish Constitution) cannot be used to gain exemption from the community service offered as an alternative to military service, for two reasons: firstly, this would have the result of rendering statutory authority meaningless and, secondly, this fundamental right is not in itself sufficient to free persons from their statutory obligations on grounds of conscience.

In a social and democratic State governed by the rule of law, parliament has exclusive competence to determine criminal policy and in this enjoys total freedom, subject to certain basic restrictions established by the Spanish Constitution. Thus, the proportionality which has to exist between typical criminal behaviour and the penalty imposed has to be the result of a complex assessment at the discretion of parliament. To determine whether a given sentence is proportional, the Constitutional Court cannot simply compare it with a standard sentence as if that were the only one that reflected the proportionality required by the Constitution. Neither can it refuse to carry out a substantive review of sentences, because criminal legislation is not exempt from constitutional review.

Summary:

The judicial bodies which initiated this trial challenged the constitutionality of the sentences established by parliament for persons objecting to military service for reasons of conscience and who refused to perform the alternative community service – sentences ranging from two years, four months and a day to six years in prison together with total legal incapacity throughout the period of the sentence – on the grounds that they called for a disproportionate sacrifice of the rights to personal freedom (Article 17 of the Spanish Constitution) and to freedom of ideology (Article 16 of the Spanish Constitution), to the extent that they inflicted long custodial sentences as a punishment for what was considered an expression of ideological freedom. In addition, these judicial bodies pleaded the violation of Article 25.2 of the Spanish Constitution on the grounds that the sentences imposed were designed purely as retribution

or punishment and thus, in their view, were lacking in any rehabilitative value.

The Constitutional Court rejected firstly the violation of Article 25.2 of the Spanish Constitution, under which imprisonment and security measures had to serve a rehabilitation and social reintegration purpose. The Court did not consider that the challenged sentence was designed purely as retribution or that Parliament had not intended there to be any preventive effects. Moreover, the Court felt that the argument that such behaviour was not repeated was insufficient to belie the rehabilitative goal of sentences.

Furthermore, the Court did not consider that the right to freedom of ideology had been infringed (Article 16 of the Spanish Constitution) because, on the one hand, neither the organisation of, nor services related to, the alternative community service – civil defence, environmental work, social and public health services etc. – inherently implied the performance of activities which could impinge upon the personal convictions of any person who objected to military service and, on the other hand, although a relationship existed between the alternative community service and military service, this could not be used to justify, on the grounds of conscientious objection to military service, refusal to perform the alternative community service provided for in the Constitution (Article 30.2 of the Spanish Constitution). Accordingly, the Court held that persons objecting to military service on the grounds of conscience enjoyed the right to be exempted from the duty to perform this service, but that the Spanish Constitution on no account granted them the right to refuse to perform the alternative community service as a way of imposing specific political views concerning the organisation of the armed forces or their complete abolition. Nevertheless, it had to be recognised that if the rule establishing the period and conditions for the performance of the alternative community service exceeded reasonable limits this could infringe the right to object to military service on the grounds of conscience.

As regards the allegation that the rule in question violated the right to personal freedom (Article 17 of the Spanish Constitution) on the grounds that the sentence was disproportionate to the offence, the Constitutional Court pointed out that, within the limits set by the Spanish Constitution, Parliament enjoyed a large margin of manoeuvre; this freedom derived from its constitutional position and, in the final analysis, from its special democratic legitimacy and authorised it to determine legally protected interests, criminally punishable acts, the type and scope of penalties and the balance between the conduct which it sought to deter and the penalties by which it attempted to do so. On the basis of this assumption, the Constitutional Court considered that, given the constitutional weight of the aims sought, as established in Article 30.2 of the Spanish Constitution, there were no grounds for regarding the sentence imposed as disproportionate. In this respect, it emphasised that the explicit and immediate purpose of the rule was simply to institute alternative community service, which the Constitutional Court had to ensure was strictly respected and which had sprung from a sense of social solidarity geared to collective and socially useful aims. In addition to serving the above-mentioned purpose, this rule was designed indirectly to maintain the effectiveness of the constitutional duty to contribute to the defence of Spain (Article 30 of the Spanish Constitution), given the fact the community service was designed to replace military service. Refusal to perform this community service was punished under the challenged rule, which was binding on all those exempted from compulsory military service for reasons of conscience.

In addition, the Constitutional Court considered neither the imposition of a custodial sentence nor its length disproportionate and therefore considered that such a sentence certainly served a purpose, contrary to what the appellant had asserted, on the grounds that the service which the offender had avoided currently lasted thirteen months, and therefore entailed giving up a considerable part of one's personal and family life and being bound by the discipline of the activity performed during this service. Moreover, the Court added firstly that all persons refusing to perform military service should receive the same sentence and secondly that failure to fulfil certain other general social duties established by the Spanish Constitution was also punishable by custodial sentences similar to those provided for in this case. Lastly, the Constitutional Court felt that a reasonable balance had been struck between the offence and the sentence, given the constitutional weight of the aim of the rule challenged before the Constitutional Court.

Supplementary information:

One judge issued a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-96-1-011

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.04.1996 / **e)** 62/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 123 of 21.05.1996, 19-24 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Court decisions.
Sources of constitutional law – Techniques of interpretation – Weighing of interests.
Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Judgment, reasons / Provisional detention, conditions.

Headnotes:

The extent to which the investigating judges have to weigh up conditions and requirements attached to pre-trial detention and the accused's right to freedom varies depending on the point in the procedure at which precautionary measures have to be imposed or approved. At the beginning of investigations, the need to protect the constitutionally legitimate aims of pre-trial detention and the information available to investigating judges at this point can justify imprisonment solely on the basis of the type of offence committed and the severity of the sentence. At any other point in the investigation, other important information also has to be weighed up in order to assess the risk of the accused absconding, by looking not only at the seriousness of the offence and at the severity of the sentence but also at the circumstances of the case and the accused's personal situation – family ties, work and social relationships, connections with other countries, financial resources etc.

Summary:

This appeal for constitutional protection was lodged against various court judgments which had not granted the appellant provisional release and which had upheld his conviction. The judgment convicting him, which was not final since his appeal against it had still not been judged, had sentenced him to imprisonment without bail. The purpose of this appeal for constitutional protection was to determine whether these court decisions had infringed his right to freedom (Article 17.1 of the Spanish Constitution) because they had not provided sufficient grounds, had unlawfully restricted his freedom and had, in the appellant's view, failed to observe the grounds and conditions justifying the adoption of this kind of precautionary measure.

As regards the first question, the Constitutional Court considered that despite their excessive brevity, which it specifically criticised, the court judgments satisfied the constitutional requirement that reasons be given because pre-trial detention without bail had not been ordered in any of them, except for the judgment convicting the appellant, which contained a meticulous statement of reasons, citing the accused's participation in a particularly serious offence which in this case constituted the substantive assumption justifying pre-trial detention.

As regards the legal basis and conditions for imprisonment, the Constitutional Court drew attention to its case-law on two of the conditions which had necessarily to be met: the existence of reasonable suspicion that an offence had been committed by the person against whom the precautionary measure would be applied and an assessment of the risk of this person absconding. In this case, the Constitutional Court stressed that pre-trial detention had been decided at the same time as the conviction had been given, an important element which had to be taken into account in assessing how the court had weighed up the situation when ordering pre-trial custody of the appellant because of the danger of that he would abscond, given the severity of the sentence – 9 years in prison. Although the conviction was not final, the Constitutional Court held that there was not just a likelihood but sufficient certainty, given the facts established at that stage, that the convicted man had been involved in an offence (drug trafficking), for which the normal penalty was sufficiently severe to conclude that if the judgment were to be upheld the convicted man was liable to abscond, given all the circumstances which generally surrounded this kind of offence, and that this justified the pre-trial custody measure adopted.

Supplementary information:

Two judges issued a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-96-1-012

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.04.1996 / **e)** 74/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 132 of 31.05.1996, 17-23 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Procedure – Parties – Interest.
Fundamental rights – General questions – Entitlement to rights – Natural persons.
Fundamental rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Collective bargaining / Trade unions / Works council.

Headnotes:

The Spanish Constitution accords trade unions the function of contributing to the defence and promotion of workers' interests (Article 7 of the Spanish Constitution), which implies the exercise of the rights needed to fulfil this function, ie those which embody collective trade union freedom (Article 28.1 of the Spanish Constitution). Any obstacle to or attempt to impede the exercise of this freedom is not only an infringement of the Constitution, which enshrines each of these rights, but also an infringement of trade union freedom. Nevertheless, the above analysis does not apply to works councils, since the latter's right to bargain collectively can be limited without infringing trade union freedom, since from a constitutional point of view collective bargaining is not part of their trade union activities.

Summary:

This appeal for constitutional protection was lodged by the president of a works council against a court decision which had declared various individual agreements (which had changed the working hours and working day set out in the national collective agreement) between workers and their company to be in conformity with this right.

In addition to this question of substance, the appeal raised the question of whether the appellant was entitled to apply for protection of trade union rights. The Constitutional Court considered that works councils did not enjoy the rights of trade unions. Therefore, in this case, the right in question was a fundamental right belonging to others because only trade unions, to which the Spanish Constitution accorded a specific role in industrial relations, had the right to defend the precedence of collective autonomy, over acts directed against trade union interests.

The Court also considered that, whether or not works councils were "unionised", their function of representing workers and their other legal powers did not include the authority to monitor and defend the position which the Constitution accorded trade unions in industrial relations and, in particular, in collective bargaining, particularly when this concerned a national collective agreement which could only be negotiated by trade union organisations. Works councils could engage in collective disputes and defend the rights of the workers whom they represented, but where a conflict arose between individual autonomy and the right to collective bargaining, only trade union organisations being beneficiaries of trade union rights (Article 28.1 of the Spanish Constitution), had a legitimate interest before the Court in defending the effectiveness of collective agreements as an indirect expression of these rights, given that they were the only organisations authorised in this context to act against acts directed against trade unions.

Therefore, the Constitutional Court considered that the president of the works council did not have the authority to take legal action against any infringement of trade union rights.

Supplementary information:

One judge issued a dissenting opinion against this judgment.

Languages:

Spanish.

Sweden
Supreme Court
Supreme Administrative Court

Statistical data
1 January 1996 – 30 April 1996

Number of decisions taken: 1

Important decisions

Identification: SWE-96-1-001

a) Sweden / **b)** Supreme Court / **c)** / **d)** 29.02.1996 / **e)** UÖ 33/96 / **f)** / **g)** *Ny Juridiskt Arkiv*, 1996, 14 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Easement / Public interest.

Headnotes:

The revision of the provision concerning property rights in Chapter 2, Article 18.1 of the Instrument of Government of 1973 (due to the incorporation of the European Convention on Human Rights) does not have a restrictive effect on the application of the Land Parcelling Act of 1970.

Summary:

The question was if a change to an easement caused a considerable inconvenience to the use of a road on a property which was extended for the benefit of another property by a compulsory decision according to Chapter 7, Article 4.2 of the Land Parcelling Act of 1970.

According to Chapter 2, Article 18.1 of the Swedish Instrument of Government of 1973 which was modified due to the incorporation of the European Convention on Human Rights, in 1994/95, every natural or legal person is entitled to the peaceful enjoyment of his possessions and no one shall be deprived of his possessions. An expropriation or a similar arrangement or a limitation on one's use of land or of a building is acceptable only if it is necessary to satisfy an important public interest.

The provision in Chapter 2, Article 18.1 of the Instrument of Government of 1973, regarding the necessity to satisfy an important public interest, was not considered to affect the application of the Land Parcelling Act of 1970. Because the purpose of the Land Parcelling Act of 1970 was to ensure suitable use of real estate property while taking account of different interests, a compulsory decision under the Act might also satisfy the public interest. The Supreme Court held that the extension of an easement therefore did not violate constitutional rights.

Supplementary information:

The Swedish Constitution consists of four Laws of constitutional value:

- the Freedom of the Press Act of 1949,
- the Fundamental Law of Freedom of Expression of 1991,
- the Fundamental Law of Succession (to the throne),
- the Instrument of Government of 1973.

Languages:

Swedish.

Switzerland
Federal Court

Important decisions

Identification: SUI-96-1-001

a) Switzerland / **b)** Federal Court / **c)** 2nd public-law Chamber / **d)** 27.10.1995 / **e)** 2P.418/1994 / **f)** V. against Municipality X. and Executive Council of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 367 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Entitlement to rights – Foreigners.
Fundamental rights – Economic, social7 Fe and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Aliens / Assistance, benefits / Minimum subsistence conditions, right / Unwritten constitutional right.

Headnotes:

Right to minimum subsistence conditions.

The right to minimum subsistence conditions is guaranteed by unwritten federal constitutional law (recital 2a – 2c).

Aliens may also claim this right, regardless of their status in the eyes of the immigration authorities (recital 2d).

Refusal to grant benefits because of abuse of right? Case of former refugees who refuse to apply in their (previous) State of origin for renewal of their citizenship (recital 3).

Summary:

The three brothers V. (born in 1955, 1958 and 1960) had lived as refugees in Switzerland with their mother since 1980. Following a criminal conviction they were deported to Czechoslovakia in 1991, but returned to Switzerland illegally in the same year. For various reasons it was not possible to deport them again to the Czech Republic. Having no right to engage in gainful employment, the three brothers V. applied to their municipality of residence for social assistance. The municipality refused their application and the Executive Council of the Canton of Bern confirmed the municipality's decision. The brothers V. lodged a public law appeal with the Federal Council for violation of their constitutional rights.

The Federal Constitution makes no explicit provision for a right to minimum subsistence conditions but the case-law of the Federal Court acknowledges unwritten constitutional rights. Where the corresponding conditions are fulfilled, the Federal Court accepts that the individual has a right to minimum subsistence conditions. This guarantee applies both to Swiss citizens and to aliens. Contrary to the opinion of the municipal and cantonal authorities, the brothers V. cannot be accused of abuse of a right on the grounds that they did not apply for Czech citizenship, which would have enabled them to return to that country. The applicants originally left Czechoslovakia in 1980, and being fugitives in their own country, were admitted to Switzerland as refugees and lost their Czech citizenship. Since then, with one brief interruption, they had lived in Switzerland.

Languages:

German.

Identification: SUI-96-1-002

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Chamber / **d)** 01.11.1995 / **e)** 1P.362/1995 / **f)** Z. against Public Prosecutor and Cantonal Court of Zurich (Third Criminal Division) / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 297 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus.*

Keywords of the alphabetical index:

Custodial sentence / Detention, verification / Execution of sentence.

Headnotes:

Article 5.4 ECHR; court decision on the lawfulness of detention.

When detention follows court proceedings leading to a criminal conviction as stipulated in Article 5.1.a ECHR, the verification called for in Article 5.4 ECHR is generally included in the court's decision for the entire duration of the custodial sentence. There is no reason to waive this rule when the administrative authority revokes a decision concerning the delegation to another country of the execution of a Swiss criminal law decision and orders the sentence to be executed in Switzerland.

Summary:

Z. an Israeli citizen, was sentenced by the cantonal court of Zurich, for violation of federal narcotics law, to 16 years' imprisonment. He began to serve his sentence in a prison in Zurich. After some years the Zurich authorities decided to transfer him to Israel to serve the remainder of his sentence. On arrival in Israel, however, he was released. The whole ploy had been organised by a senior official in Zurich, who was subsequently convicted for abuse of authority and interfering with the course of justice.

An international warrant was issued for Z., who was subsequently arrested in Rome and extradited to Zurich. The competent authority ordered the execution of the remainder of his sentence. Z. appealed against this decision to the Justice Directorate, which rejected the appeal. Z. then applied to the cantonal court, which did not take up the case. So Z. lodged a public law appeal with the Federal Court, pleading a violation of Article 5.4 ECHR.

The Federal Court rejected the appeal. Under Article 5.4 ECHR, everyone who is deprived of his liberty is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court. In the case of criminal sentences, the verification required by Article 5.4 ECHR is generally included in the initial court decision. This case is no exception to that rule. The fact that execution of the sentence was interrupted by a transfer abroad had no effect on the continued execution of the sentence in Switzerland. Z's request for a court decision was accordingly to no avail.

Languages:

German.

Identification: SUI-96-1-003

a) Switzerland / **b)** Federal Court / **c)** Court of cassation in criminal law / **d)** 17.11.1995 / **e)** 6P.63/1995 / **f)** L. against Public Prosecutor of the Canton of Neuchâtel / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 306 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Anonymous witness / Criminal proceedings / Defence witness / Evidence, administration / Prosecution witness / Undercover agent.

Headnotes:

Right to questioning of witnesses for the prosecution and for the defence. Right to a public hearing.

When an undercover agent has been involved in a case, his testimony must be heard unless there is conclusive evidence that the part he played was no more than that described in the case file (recital 1).

An in-camera hearing may be ordered for an undercover agent if there is no other way to preserve his anonymity (recital 2).

Summary:

The Assize Court of the Canton of Neuchâtel sentenced L. to eleven years' imprisonment for serious violation of federal narcotics law. The Court of Cassation of the Canton of Neuchâtel rejected the defendant's appeal. L. then lodged an appeal in public law with the Federal Court for violation of Articles 6.1 and 6.3 ECHR and of Article 4 of the Constitution.

The applicant alleged violation of the right to the questioning of witnesses for the prosecution and the defence insofar as he was not allowed to question P, who was working for the police and who allegedly prompted him to act and put him in touch with undercover agent B. Article 6.3.c does not exclude the possibility of refusing to hear a witness because the evidence concerned is not decisive or would add nothing to the facts previously established. In this case, however, the exact role played by P. was relevant. His testimony would

have established just what this role was. The appeal was therefore justified on this point.

L. also alleged violation of the right to a public hearing guaranteed under Article 6.1 ECHR. He did not object to the steps taken to enable undercover agent B. to give evidence in such a way as not to be seen or recognised by his voice. Safeguarding the identity of an undercover agent reflects a legitimate interest, and justifies restrictive measures. In this particular case, however, the reasons given for the disputed decision were not sufficient to warrant the examination of the witness in camera. As a result, the accused's right to a public hearing was violated.

Languages:

French.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Introduction

I. History

The constitution of the Socialist Republic of Macedonia of 1963 (Official Gazette of SRM N. 14/63) had established the Constitutional Court, determined its position in the judicial system and its competence; The Law on the Constitutional Court (Official Gazette of SRM N.45/63) had regulated the procedure and the details of the legal effects of its decisions. The Constitutional Court had started its work in 1964.

The Constitution of the Socialist Republic of Macedonia of 1974 (Official Gazette of SRM N. 7/74) and the Law on the Principles of the procedure and effects of its decisions (Official Gazette of SRM N.42/76) have introduced small changes in the competence and in the legal effects of decisions of the Constitutional Court of Macedonia, but its position in respect of legislative and executive powers has remained the same: the Constitutional Court is part of the system of unity of power, and has the task of maintaining the internal harmony of the legal order. Despite a relatively restricted jurisdiction (*inter alia*, the Constitutional Court did not have the opportunity of abolishing or annulling unconstitutional laws, but only of ascertaining their lack of conformity with the Constitution), the Constitutional Court in that period played a significant role in ensuring the harmony of the legal order in the framework of a political system based on the unity of powers.

According to the new Constitution of 1991, the organisation and functioning of the political system is based on the principle of separation of powers. Under Article 8 of the Constitution, the separation of powers is one of the 11 fundamental values on which the constitutional order has been based. In such a constitutional environment, the Constitutional Court has gained a special role of review in respect of the due functioning of the political and legal system. The Court has built upon this role in two principal ways: by expanding its jurisdiction significantly and by strengthening the legal effects of its decisions in respect of evaluation of the unconstitutionality of laws.

Under the new Constitution, the Constitutional Court is an independent body of the Republic charged with protecting the constitutionality and legality of general legal acts, as well as with protecting the fundamental freedoms and rights of the individual and citizen. Although it is not a part of the ordinary judiciary, it exercises the highest level of judicial review.

II. Legal bases

The Fourth Chapter of the Constitution (Official Gazette of FM N. 52/91) is dedicated to the Constitutional Court. It consists of seven articles (Articles 108 to 113) in which only the principles concerning the position of the Constitutional Court, its composition, its competence and the legal effects of its decisions are determined. In order not to allow the legislator to influence the conditions under which the power of the Constitutional Court is exercised, the Constitution does not provide for a law on the Constitutional Court but only provides that the mode of work and the procedure of the Constitutional Court shall be regulated by an enactment of the Court. Therefore, the only legal bases of the Constitutional Court are the Constitution and its own Rules of Procedure (Official Gazette of RM N. 70/92).

III. Composition and organisation

Under Article 109 of the Constitution, the Constitutional Court is composed of nine judges. This number includes the president, who is elected among the judges and by the judges themselves for a period of three years without the right to re-election. The judges are elected by the Assembly by majority vote of the total number of Representatives. The term of office for these judges is nine years, without the right of re-election. The Constitutional Court judges are elected from the ranks of outstanding members of the legal profession.

Provided for by Article 111, the office of judge of the Constitutional Court is incompatible with the holding of any other public office, profession, or membership of a political party. Judges of the Constitutional Court are granted the same kind of immunity as Representatives in the Assembly. The Constitutional Court decides on their immunity under the procedure prescribed by its own Rules of Procedure. Judges of the Constitutional Court cannot be called up for service in the armed forces.

The Constitutional Court regulates its organisation by its own enactment. Each judge is helped by an assistant and by a secretary. The Court has a centre for documentation and a library. The Secretary of the Court supervises the services of the Court.

The procedure is regulated by the Court Rules of Procedures. Each legal or natural person has the right to submit an application. The first procedural stage is the making of a decision on the admissibility of the application. If the application is admissible, the Court gives a formal judgment which designates the start of the procedure. The Court can order temporary measures, which can stand until judgment is made on the merits. Court hearings are open to the public. Judgment is given by a majority vote of the total number of judges. The Court always deliberates in plenary session.

IV. Competence

The constitutional court follows the traditional European model of concentration of the judicial review of constitutionality in a sole body. The review of constitutionality and legality is abstract, direct and a posteriori.

The Constitutional Court:

- decides on the conformity of laws with the Constitution
- decides on the conformity of collective agreements and other regulations with the Constitutional and laws
- protects the freedoms and rights of the individual and citizen relating to freedoms of communication, conscience, thought an public expression of thought, political association and activity, as well as in respect of the prohibition on discrimination among citizens on the grounds of sex, race, religion or national, social or political affiliation;
- decides on conflicts of competency among holders of legislative, executive and judicial offices;
- decides on conflicts of competency among State bodies and units of local self-government;
- decides on the accountability of the President of the Republic;
- decides on the constitutionality of the programmes and statutes of the political parties and of associations of citizens.

V. Nature and legal effects of judgments

The judgments of the Constitutional Court are compulsory for each State body, court, legal and natural person. They are final and self-executory. If the Constitutional Court determines that a law does not conform to the Constitution or that other general acts do not conform to the Constitution or to the law, it shall repeal or invalidate that law or other general act. The kind of order depends on the gravity of the breach of constitutionality and legality and on the legal and factual consequences. The decisions of the Constitutional Court are published in the "Official Gazette of RM" and they become legally effective from the day of publication. The effect of a repealing judgment (*ex nunc* effect) is to prohibit the application of the repealed act. The effect of a invalidating judgment (*ex tunc* effect) besides erasing the law or other regulation from the legal system, implies the right of affected

persons to require the elimination of the consequences of any application of unconstitutional norms.

Statistical data

1 January 1996 – 30 April 1996

- New cases in mentioned period: 118
- Procedures pending: 67
- Cases resolved: 51
  - Invalidated: 0
  - Repealed: 18
  - Rejected: 20
  - Inadmissible: 13
- Structure of the cases
  - Laws: 49
  - Other regulations given by State authorities: 19
  - Regulations given by municipal authorities: 16
  - Enactments given by public enterprises: 16
  - Application concerning the protection of human rights: 2
  - Others: 6

Important decisions

Identification: MKD-96-1-001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 17.01.1996 / **e)** U.br. 293/95, U.br. 323/95 / **f)** / **g)** *Sluzben vesnik* (Official Gazette), 6/96 and 17/96 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Inheritance, right / Property, private.

Headnotes:

The constitutional guarantee of the right of ownership of property and of the right of inheritance includes the prohibition on any restriction and deprivation of property or of the rights deriving therefrom except in cases justified by the public interest as determined by law. An expropriation which is based on a public interest determined by a regulation other than a law (in this case based on a municipal assembly's decision on urban plans) is not in conformity with the Constitution.

Languages:

Macedonian.

Identification: MKD-96-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 13.03.1996 / **e)** U.br. 337/95 / **f)** / **g)** *Sluzben vesnik* (Official Gazette), 16/96 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Acts issued by decentralised bodies – Sectoral decentralisation.
Institutions – Legislative bodies – Powers.

Keywords of the alphabetical index:

Collective agreement.

Headnotes:

The right to notice in cases of dismissal belongs to the group of rights which are to be regulated by law and by collective agreements. In this framework, the manner of regulating the minimum period of notice of dismissal provided for by law cannot be changed by a collective agreement. The changes in the length of the period of notice made by the collective agreement was not in conformity with the Constitution and the law.

Languages:

Macedonian.

Identification: MKD-96-1-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 20.03.1996 / **e)** U.br. 343/95,

U.br. 344/95, U.br. 10/96 / **f)** / **g)** *Sluzben vesnik* (Official Gazette), 17/96 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Non-retrospective effect of law.
Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Freedom of entrepreneurship / Non-retroactivity of law.

Headnotes:

Any statutory obligations on the register court to automatically erase from the register companies which had not communicated a contract of employment to their employees is not in conformity with the constitutional guarantee of the freedom of the market and entrepreneurship, because the activity of such companies in question produces credit-debt relationships which can be solved only through regular procedures in question provided for by the law on bankruptcy and liquidation. The provisions of the law are not in conformity with the constitutional prohibition on the retroactivity of laws and other regulations because they extend their effects to companies which were registered before the entry into force of those provisions.

Languages:

Macedonian.

Identification: MKD-96-1-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 20.03.1996 / **e)** U.br. 355/95, U.br. 356/95 / **f)** / **g)** *Sluzben vesnik* (Official Gazette), 16/96 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Official language / Public school.

Headnotes:

Laws which provide for the keeping of pedagogical evidence and documentation only in the language of instruction, and not in addition in the Macedonian language, are not in conformity with the Constitution.

Summary:

In the course of its examination of the issue, the Court recalled that the Constitution allowed for the instruction in primary and secondary education to be given in the language of the national minorities, as well as that the Constitution identified the Macedonian language and its Cyrillic alphabet as the official language in "the former Yugoslav Republic of Macedonia", and that in the units of local self-government, where the majority or a considerable number of inhabitants belong to a national minority, in addition to the Macedonian language and its Cyrillic alphabet the language and alphabet of those minorities are also in official use.

Languages:

Macedonian.

Turkey
Constitutional Court

Statistical Data
1 January 1996 – 30 April 1996

Number of decisions: 20

20 decisions were handed down during the reference period. Of these, 8 were dismissed and in 4 cases some legal provisions were annulled. These decisions have not yet been published because a written statement of the legal reasoning behind the decisions has not yet been prepared. 1 decision concerning the suspension of the enforcement of a law was handed down and published in the Official Gazette.

In this period, a total of 6 decisions concerning the auditing of political parties were handed down. All of these were published in the Official Gazette.

One political party was dissolved because its programme was in conflict with the indivisible integrity of the State as a territory and nation. The decision has not yet been published.

Important decisions

Identification: TUR-96-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 28.06.1995 / **e)** 1995/23 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 20.03.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Administrative contract / Concession.

Headnotes:

According to the Constitution, the Republic of Turkey is defined as a democratic, secular, and social State governed by the rule of law. The provisions of the Constitution are fundamental legal rules and binding for legislative, executive and judicial organs, as well as for administrative authorities and other institutions and individuals. With regard to these principles recourse to judicial review should be available against all actions and acts of the administration. Effective judicial control is a matter of supremacy of law, constitutional government, legality of administration and sound protection of the rights and freedoms of the people. Since the acts, actions and contracts of administrative authorities are exceptionally within the scope of ordinary courts, judicial control of the Administration is the function of administrative courts. These courts of special competence carry out their duties according to the principles of administrative law.

As recognised in doctrine, in order to accept an agreement as an administrative contract three criteria should be fulfilled: First, one of the contracting parties should be a public corporate body. Secondly, contracts which closely associate the private party in meeting the public need in question are regarded as administrative. Thirdly contracts should also contain "*clauses exorbitantes*" (clauses incompatible with the ordinary law which have the effect of causing the contract to be governed by administrative law) which involve an examination of the terms of the contract, and they should be different in nature from those which could be included in a similar contract under civil law.

In order to identify a public service, the quality of the contract must be examined. If the service is a public service, the question of whether or not it is operated by a private sector business cannot alter its public quality. For this reason, the Constitution stipulates that private enterprises performing public services may be nationalised when so required by the exigencies of the public interest.

In accordance with the Constitution, legislative organs cannot opt for review by ordinary courts of the acts, actions and contracts of administrative authorities. Administrative acts and actions fall within the scope of administrative law, and it follows that a regulation would be contrary to the guarantee of *due process*, whereby it follows that no one may be tried by any judicial authority other than the legally designated court.

The Constitution holds that the Council of State examines the contracts under which concessions are granted. In administrative law, a concession implies the performance of a public service by private law persons in accordance with a long term administrative contract.

Summary:

The case was filed by one-fifth of the total number of members of the Turkish Grand National Assembly. Article 5 of Law no. 3996 provides that a contract between the High Committee of Planning and a capital company or a foreign company does not constitute a concession. This contract is therefore subject to private law provisions.

The Constitutional Court held that provisions excluding administrative review of contracts having administrative quality and equating them with provisions of private law are contrary to the principles laid down in the Constitution. For this reason, the Constitutional Court found Article 5 of Law no. 3996 unconstitutional.

The decision was taken by a majority of members.

Languages:

Turkish.

Identification: TUR-96-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 10.09.1995 / **e)** 1995/45 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 20.04.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Rules issued by the executive.
General principles – Separation of powers.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Decrees having force of law / Legislation, delegated.

Headnotes:

In the Constitution it is stipulated that legislative power is vested in the Turkish Grand National Assembly and that this power cannot be delegated; executive powers and functions are exercised by the President of the Republic and the Council of Ministers in conformity with the Constitution and the law; and judicial power is exercised by independent courts. These are the constitutional organs which exercise the sovereignty of the Turkish nation. This means that one of the fundamental principles of the Constitution is the separation of powers. However, as it is stated in the Constitution, the principle of the separation of powers does not imply an order of precedence among the organs of the State, but refers solely to the exercise of certain State powers and to the discharge of duties which are limited to the cooperation and division of functions, and which accepts the supremacy of the Constitution and the law.

According to the Constitution, the Turkish Grand National Assembly may authorise the Council of Ministers to issue decrees having force of law on "certain matters". In the Constitution it is stated that the empowering law should define the purpose, scope, principles, and operative period of the decree having force of law, and whether more than one decree will be issued within the same period. Such laws of empowering and decrees having force of law must be discussed in the committees and in the plenary session of the Turkish Grand National Assembly with "priority" and "urgency". This means that resort to the institution of decrees having force of law should only be in "urgent situations". It is thus understood that legislative power is the original power and cannot be delegated; authorisation to enact decrees having force of law is exceptional and established a subordinate power. Decrees having force of law can only be enacted on the basis of the empowering law, which must have a short operative period so as to allow for decrees for solving urgent matters by means of efficient and indispensable regulations and measures.

The Turkish Grand National Assembly may authorise the Council of Ministers to issue decrees having force of law only on "certain matters". This means that the Council of Ministers can be authorised to exercise such power only in respect of limited subjects with certain powers.

The fundamental rights, individual rights and the political rights cannot be regulated by decrees having force of law. In addition to this, the Council of Ministers cannot be empowered to amend the budget by a decree having force of law.

The subject of the power given to the Council of Ministers must be very clear. The empowering law must clearly state the purpose, scope and principles governing the adoption of decrees. The empowering law must also define the operative period of the decree having force law.

Summary:

The case was brought by the main opposition party in the Grand National Assembly, requesting annulment of the Empowering Law no. 4113, dated 8 June 1995.

The Court found that in Article 1 of the Empowering Law, under the title of "purpose" only the subjects of the decrees having force of law were stipulated. However, the Court said that in Article 91 of the Constitution the purpose of the decrees having force of law should be defined in the Empowering Law. In addition to this, the Court found the principles uncertain and the scope lacking a stated limit. Therefore, the decrees having force of law to be issued under the Empowering Law, for the regulation of chambers of commerce and the union of stock exchanges, would result in the delegation of legislative power.

The Court held that the above article of the Empowering Law resulted in the delegation of legislative power to the executive body is incompatible with Article 7 of the Constitution.

The decision was unanimous.

Supplementary Information:

Settled case law.

Languages:

Turkish.

Identification: TUR-96-1-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 14.09.1995 / **e)** 1995/42 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.01.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Composition.
Institutions – Executive bodies – Organisation.

Keywords of the alphabetical index:

Deputy Prime Minister, designation / Ministers, designation.

Headnotes:

According to the Constitution, the formation, abolition, functions, powers and organisation of the Ministries shall be regulated by law. There is no differentiation between Ministries assuming responsibility for certain public services, State Ministers, and Ministers without portfolio in the Constitution. If there is no prohibit on of Ministers without portfolio, then the law maker may regulate the subject freely, but within the context of the principles of the Constitution. The Deputy Prime Minister is a member of the Council of Ministers. In the absence of the Prime Minister, he/she represents the Prime Minister and exercises the powers of the Prime Minister. Prime Ministers are completely free to appoint any Minister as the Deputy Prime Minister. There is no constitutional bar to such an appointment and there are sound reasons connected to the machinery of government as to why one should be made. According to the Constitution, only the formation, abolition, functions, powers and organisation of the Ministries must be regulated by law. This principle does not mean that the relevant institutions of one Ministry cannot be related to another Ministry at the proposal of the Prime Minister and with the approval of the President of the Republic. Relevant institutions of Ministries are not directly related to services attached to the Ministry.

Summary:

This annulment action, initiated by the parliamentary group of the main opposition party of the Turkish Grand National Assembly, was directed against Law no. 4060.

Article 1 of this law introduced two amendments to the previous law. The first increased the number of ministers without portfolio from fifteen to twenty the Prime Minister was thus given power to appoint twenty Ministers as State Ministers. The second amendment provided that Deputy Prime Ministers could also be appointed from among the Ministers having public services. According to the Constitutional Court, the law in question did not violate the principles of the formation, abolition, functions, powers and organisations of the Ministries which are required by Article 113 of the Constitution to be regulated by law. The principle that public corporate bodies should be established only by law or on the authority expressly granted by law is further regulated in Article 123 of the Constitution. The Constitutional Court also held that these regulations did not violate the principle of the rule of law

expressed in Article 2 or the principle of equality before the law regulated in Article 10 of the Constitution.

This decision was unanimous.

Supplementary information:

Decisions of the Constitutional Court concerning the formation of the Council of Ministers and of Ministries, or concerning the appointment of Ministers, are rare.

Languages:

Turkish.

Identification: TUR-96-1-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 21.09.1995 / **e)** 1995/47 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.04.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Rules issued by the executive.
Constitutional justice – The subject of review – Administrative acts.
General principles – Rule of law.
General principles – Legality.
Institutions – Courts – Administrative courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Administrative law / *Locus standi.*

Headnotes:

An action for annulment is the principal remedy against illegal administrative acts, regulations and bye-laws. In administrative law the complainant seeks the annulment of the administrative act retroactively on the ground of its illegality. In order to commence an action of annulment the plaintiff should have standing to sue, which means the existence of an adverse effect on his/her interests resulting from the decision or act under review.

A full remedy action is different from an action for annulment, and for this reason in order to commence a full remedy action the plaintiff should have again standing to sue, which now means the existence of concrete, personal, actual damage arising from the act or action of the administration. Effective judicial control of the public administration is a matter of supremacy of law, constitutional government, legality of administration and the protection of rights and freedoms of individuals.

Summary:

Law no. 4001 amending Law no. 2577, which is called the Administrative Courts Procedure Act, changed the standing to sue for an action of annulment. Before the amendment, in order to commence an action of annulment the plaintiff's standing to sue required the existence of an adverse effect on his/her interests resulting from the decision reviewed. With the new law, standing to sue required the existence of concrete, personal and actual damage arising from the act of the administration.

The Constitutional Court found the restriction on the standing to sue to contradict the principle of the rule of law in Article 2 of the Constitution. In addition, the Court held that this kind of regulation violated the freedom to vindicate one's rights as stipulated in Article 36 of the Constitution. Article 36 states that everyone has the right to litigate either as a plaintiff or a defendant before the courts. The Court also found the restriction to violate Article 125, which states that recourse to judicial review must be available against all actions and acts of the administration.

The decision was taken by a majority of members.

Languages:

Turkish.

Identification: TUR-96-1-005

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 28.02.1996 / **e)** 1996/7 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.05.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Decisions – Delivery and publication – Publication – Publication in the official journal/gazette.
Constitutional justice – Effects – Scope.
Constitutional justice – Effects – Effect *erga omnes*.
Constitutional justice – Effects – Influence on State organs.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Public enterprises, privatisation / Real value.

Headnotes:

Although expropriation and nationalisation are regulated in the Constitution, privatisation is not envisaged. In some new constitutions, there are provisions concerning privatisation. If there is no special provision on privatisation, this does not mean that privatisation is prohibited by the Constitution. In this situation, the law-maker is free to lay dawn rules on privatisation on the condition that these rules are not in conflict with the principles of the Constitution. In spite of the absence of provisions related to privatisation, some principles can be deduced from the Article related to nationalisation in the Constitution, because nationalisation is the other side of the fabric. For this reason public enterprises may be privatised when it is required by the exigencies of the public interest, and privatisation should be carried out on the basis of real value. The methods and procedures for calculating real value should be prescribed by law. The organ authorised for nationalisation is also authorised for privatisation. The guarantee of the right of property is also applied to public possessions, and the Turkish Grand National Assembly is the authorised organ for the privatisation of public enterprises. Like nationalisation, privatisation can only be effected by law.

According to the Constitution, decisions of the Constitutional Court should be published in the Official Gazette, and should be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies. In order to fulfil this principle, the legislative organ must have regard to relevant decisions of the Constitutional Court, and must not enact new laws which may render ineffective a decision of the Court and its written statement of reasons.

Summary:

The case was brought by one-fifth of the total number of members of the Turkish Grand National Assembly, requesting annulment of Law no. 4107, dated 3 May 1995. In the petition it was claimed that Law no. 4107 introduced the same provisions as Law no. 4000, which had been annulled previously by the Constitutional Court.

Article 1 of Law no. 4107 stated that only 49% of the shares of the Turkish Telecommunication Corporation could be transferred, and that 10% of these shares should be given freely to the General Directorate of the Post Office. The Constitutional Court found that this provision was different from the provision which was annulled by the Court, and it was in conformity with the Constitution. 51% of the shares of the corporation would be in the hands of the public, and this much was enough to safeguard the independence and integrity of the Turkish Nation and the indivisibility of the country.

Article 1.4 of the Law was found to be conflict with the Constitution, because it purported to give the powers of the Minister of Transformation to the High Committee of Privatisation. Giving legislative powers to the Minister had been found to be unconstitutional, and nothing had changed by giving such powers to the High Committee of Privatisation, which could not be regarded as a legislative or executive organ. Article 7 of the Constitution provides that legislative power is vested in the Turkish Grand National Assembly, and this power cannot be delegated.

Article 1.5 makes reference to Law no. 4046, which is a general law concerning privatisation, but powers given to the Presidency of the Privatisation Administration attached to the Prime Ministry were found to be indefinite, and for this reason the Court held that legislative power had been effectively delegated. Powers given to the Presidency of the Privatisation Administration in respect of license transfers were also found to be indefinite and unconstitutional.

The decision was taken by a majority of votes.

Languages:

Turkish.

United States of America
Supreme Court

Important decisions

Identification: USA-96-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 20.03.1996 / **e)** 94-1614 / **f)** Wisconsin v. city of New York et al. / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Reasonableness.
Institutions – Executive bodies – Powers.
Fundamental rights – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Census / Enumeration, actual.

Headnotes:

Because it was reasonable to conclude that an "actual Enumeration" could best be achieved in the 1990 census without the PES-based statistical adjustment, the Secretary of Commerce's decision not to use that adjustment was well within the constitutional bounds of discretion over the conduct of the census that is provided to the Federal Government. The Secretary's decision was not subject to heightened scrutiny and conformed to applicable constitutional and statutory provisions. In light of the Constitution's broad grant of authority to Congress, that decision need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the census' constitutional purpose of apportioning congressional representation.

Summary:

The Constitution's Census clause vests Congress with the responsibility to conduct an "actual Enumeration" of the American public every 10 years, with the primary purpose of providing a basis for apportioning congressional representation among the States. That responsibility has been delegated to the Secretary of Commerce, who decided that an "actual Enumeration" would best be achieved in the 1990 census by not using a postenumeration survey (PES) statistical adjustment designed to correct an undercut in the initial enumeration. The District Court concluded that the Secretary's decision not to statistically adjust the census violated neither the Constitution nor federal law. The Court of Appeal reversed this decision and held that a heightened standard of review was required here because the Secretary's decision impacted the fundamental right to have one's vote counted and had a disproportionate impact upon certain identifiable minority racial groups.

The Supreme Court reversed the decision by the Court of Appeal.

Cross-references:

The Court referred to two recent decisions, *Department of Commerce v. Montana*, 503 U.S. 442, and *Franklin v. Massachusetts*, 505 U.S. 788, where it had rejected the application of *Wesberry's* "one person-one vote" standard to Congress concluding that the Constitution vests Congress with wide discretion over apportionment decisions and the conduct of the census, and that the appropriate standard of review examines a congressional decision to determine whether it is "consistent with the constitutional language and the constitutional goal of equal representation," it is within the Constitution's limits.

Languages:

English.

Identification: USA-96-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 27.03.1996 / **e)** 94-12 / **f)** Seminole Tribe of Florida v. Florida et al. / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Jurisdiction.
Institutions – Federalism and regionalism – Distribution of powers.

Keywords of the alphabetical index:

Immunity, sovereign / Indian Commerce Clause.

Headnotes:

The Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against States to enforce legislation enacted pursuant to the Indian Commerce Clause.

The doctrine of *Ex parte Young*, which allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, where the suit seeks prospective injunctive relief in order to end a continuing federal-law violation, may not be used to enforce the States' duty to negotiate under § 2710.d.3 against a state official.

Summary:

The Indian Gaming Regulatory Act, passed by Congress pursuant to the Indian Commerce Clause, allows an Indian tribe to conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. Under the Act, States have a duty to negotiate in good faith with a tribe toward the formation of a compact, § 2710.d.3.A, and a tribe may sue a State in federal court in order to compel performance of that duty, § 2710.d.7. In this suit, respondents, Florida and its Governor, moved to dismiss petitioner Seminole Tribe's complaint on the ground that the suit violated Florida's sovereign immunity from suit in federal court. The District Court denied the motion, but the Court of Appeal reversed.

The Supreme Court affirmed the decision by the Court of Appeal. It held that Congress had provided an "unmistakably clear" statement of its intent to abrogate the States' sovereign immunity. The Act in question had, however, not been passed pursuant to a constitutional provision granting Congress such power. The Supreme Court overruled a plurality opinion which had found in *Pennsylvania v. Union Gas*, 491 U.S. 1, that Congress' power to abrogate came from the States' cession of their sovereignty when they gave Congress plenary power to regulate commerce. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Cross-references:

Hans v. Louisiana, 134 U.S. 1, 13; *Green v. Mansour*, 474 U.S. 64, 68; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1.

Languages:

English.

Identification: USA-96-1-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 16.04.1996 / **e)** 95-5207 / **f)** Cooper v. Oklahoma / **g)** / **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.

Keywords of the alphabetical index:

Death sentence / Due process / Incompetence.

Headnotes:

Because Oklahoma's procedural rule allows the State to try a defendant who is more likely than not incompetent, it violates due process. Oklahoma's rule has no roots in historical practice and does not exhibit "fundamental fairness" in operation.

Summary:

Oklahoma law presumes that a criminal defendant is competent to stand trial unless he proves his incompetence by clear and convincing evidence. Applying that standard, a judge found petitioner Cooper competent on separate occasions before and during his trial for first degree murder, despite his bizarre behavior and conflicting expert testimony on the issue. In affirming his conviction and death sentence, the Court of Criminal Appeal rejected his argument that State's presumption of competence, combined with its clear and convincing evidence standard, placed such an onerous burden on him as to violate due process.

The Supreme Court reversed the decision by the Court of Appeal. It recalled that it is well-settled that the criminal trial of an incompetent defendant violates due process. This case, however, presented the quite different question whether a State may proceed with a criminal trial after

a defendant has shown that he is more likely than not incompetent.

The near-uniform application of a standard that is more protective of the defendant's rights than Oklahoma's rule supports the conclusion that the heightened standard offends a deeply rooted principle of justice.

Difficulty in ascertaining whether a defendant is incompetent or malingering may make it appropriate to place the burden of proof on him, but it does not justify the additional onus of an especially high standard of proof.

The procedures in Oklahoma do not sufficiently protect a fundamental constitutional right. Due process requires a clear and convincing evidence standard of proof in involuntary civil commitment proceedings.

Cross-references:

Medina v. California, 505 U. S. 437; *Patterson v. New York*, 432 U.S. 197; *Addington v. Texas*, 441 U.S. 418.

Languages:

English.

Identification: USA-96-1-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 13.05.1996 / **e)** 94-1140 / **f)** 44 Liquormart, inc., et al. v. Rhode Island et al. / **g)** / **h)**.

Keywords of the systematic thesaurus:

General principles – Proportionality.
Fundamental rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Advertising ban / Alcoholic beverages / Commerce clause / Commercial speech.

Headnotes:

The 21st Amendment cannot save Rhode Island's price advertising ban because that Amendment does not qualify the First Amendment's prohibition against laws abridging the freedom of speech. Although the 21st Amendment – which repealed Prohibition and gave the States the power to prohibit commerce in, or the use of, alcoholic beverages – limits the dormant Commerce Clause's effect on a State's regulatory power over the delivery or use of liquor within its borders, the Amendment does not license the States to ignore their obligations under other constitutional provisions. Because the First Amendment must be included among those other provisions, the 21st Amendment does not shield the advertising ban from constitutional scrutiny.

Because Rhode Island has failed to carry out its heavy burden of justifying its complete ban on price advertising, that ban is invalid.

Summary:

Petitioners, a licensed Rhode Island liquor retailer and a licensed Massachusetts liquor retailer patronized by Rhode Island residents, filed their action seeking a declaratory judgment that Rhode Island laws banning the advertisement of retail liquor prices except at the place of sale violate the First Amendment.

The Supreme Court held that the Rhode Island ban on price advertising was unconstitutional.

Justice Stevens delivered the principal opinion with respect to Parts III-VI, concluding that Rhode Island's ban on advertisements that provide the public with accurate information about retail liquor prices is an unconstitutional abridgement of the freedom of speech. Regulations that entirely suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with "special care", and such alcohol bans should not be approved unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity.

Justice Stevens, joined by justice Kennedy, justice Souter, and justice Ginsburg, concluded in Part III that although the First Amendment protects the dissemination of truthful and nonmisleading commercial messages about lawful products and services in order to ensure that consumers receive accurate information, the special nature of commercial speech, including its "greater objectivity" and "greater hardiness", authorizes the State to regulate potentially deceptive or overreaching advertising more freely than other forms of protected speech and requires less than strict review of such regulations. However,

regulations that entirely suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with "special care", and such blanket bans should not be approved unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity.

Justice Stevens, joined by justice Kennedy and justice Ginsburg, concluded in Part IV that a review of the case law reveals that commercial speech regulations are not all subject to a similar form of constitutional review simply because they target a similar category of expression. Where a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Justice Stevens, joined by justice Kennedy, justice Souter, and justice Ginsburg, concluded in Part V that because Rhode Island's advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product, and serves an end unrelated to consumer protection, it must be reviewed with "special care" under *Central Hudson*, 447 U.S. 566, n. 9. It cannot survive that review because it does not satisfy even the less than strict standard that generally applies in commercial speech cases under *Central Hudson*, *id.* 566. First, the advertising ban does not directly advance the State's substantial interest in promoting temperance. Second, the ban is more extensive than necessary to serve its stated interest, since alternative forms of regulation that would not involve any speech restrictions would be more likely to achieve the goal of promoting temperance.

Justice Stevens, joined by justice Kennedy, justice Thomas, and justice Ginsburg, concluded in Part VI that the State's arguments in support of its claim that it merely exercised appropriate "legislative judgment" in determing that a price advertising ban would best promote temperance must be rejected.

Justice Scalia concluded that guidance as to what the First Amendment forbids, where the core offense of suppressing particular political ideas is not at issue, must be taken from the long accepted practices of the American people.

Justice Thomas concluded that in cases such as this, in which the goverment's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* balancing test should not be applied. Rather, such an "interest" is *per se* illegitimate.

Justice O'Connor, joined by the Chief Justice, justice Souter and justice Breyer, agreed with the principal opinion that Rode Island's prohibition on alcohol-price advertising is invalid and cannot be saved by the Twenty-first Amendment, but concluded that the First Amendment question must be resolved more narrowly by applying the test established in *Central Hudson*.

Cross-references:

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712; *California v. LaRue*, 409 U.S. 109, 118-119; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557; *Edenfield v. Fane*, 507 U.S. 761; *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469; *United States v. Edge Broadcasting*, 509 U.S. 418; *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328; *McIntyre v. Ohio Elections Commission*, 514 U.S.; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748.

Languages:

English.

Identification: USA-96-1-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 20.05.1996 / **e)** 94-896 / **f)** BMW of North America, inc. v. Gore / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Damages, compensatory and punitive / Damages, punitive, excessive / Fraud.

Headnotes:

A person has to receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Grossly excessive punitive damages are unconstitutional.

Summary:

After respondent Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought this suit for compensatory and punitive damages against the petitioner, the American distributor of BMWs, alleging, *inter alia*, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers, and hence their customers, of redelivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, and assessing $4 million in punitive damages. The Alabama Supreme Court reduced the award to $2 million. The $2 million punitive damages award is grossly excessive and therefore exceeds the constitutional limit. Gore's award must therefore be analyzed in the light of conduct that occurred solely within Alabama, with consideration being given only to the interests of Alabama consumers.

Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose, might lead to the conclusion that the $2 million award is grossly excessive.

The harm BMW inflicted on Gore was purely economic; the presale repainting had no effect on the car's performance, safety features, or appearance; and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others.

His $2 million award is 500 times the amount of his actual harm as determined by the jury. Gore's punitive damages award is not saved by the third relevant indicium of excessiveness – the difference between it an the civil or criminal sanctions that could be imposed for comparable misconduct, because $2 million is substantially greater than Alabama's applicable $2,000 fine and the penalties imposed in other States for similar malfeasance, and because none of the pertinent statutes or interpretive decisions would have put an out-of-state distributor on notice that it might be subject to a multimillion dollar sanction. There is no basis for assuming that a more modest sanction would not have been sufficient.

Cross-references:

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454; *Healy v. Beer Institute*, 491 U.S. 324, 335-336; *Day v. Woodworth*, 13 How. 363, 371; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23.

Languages:

English.

Identification: USA-96-1-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 20.05.1996 / **e)** 94-1089 / **f)** Romer, Governor of Colorado, et al. v. Evans et al. / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Bisexual orientation / Equal Protection Clause / Homosexual orientation / Lesbian orientation.

Headnotes:

The Equal Protection Clause forbids to pass an amendment to a State constitution which precludes all legislative, executive, or judicial action designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation conduct.

Summary:

After various Colorado municipalities passed ordinances banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities, Colorado voters adopted by statewide referendum "Amendment 2" to the State Constitution, which precludes all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual lesbian or bisexual orientation conduct, practices or relationships." Respondents, who include aggrieved

homosexuals and municipalities, commenced this litigation in state court against petitioner state parties to declare Amendment 2 invalid and enjoin its enforcement.

Amendment 2 violates the Equal Protection Clause. The State's principal argument that Amendment 2 puts gays and lesbians in the same position as all other persons by denying them special rights is rejected as implausible. Amendment 2 goes well beyond merely depriving them of special rights. It imposes a broad disability upon those persons alone, forbidding them, but no others, to seek specific legal protection from injuries caused by discrimination in a wide range of public and private transactions.

The Court has stated that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. Amendment 2 fails, indeed defies, even this conventional inquiry.

Amendment 2 cannot be said to be directed to an identifiable legitimate purpose or discrete objective. It is a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Cross-references:

Heller v. Doe, 509 U.S. 312, 319-320.

Languages:

English.

Identification: USA-96-1-007

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.05.1996 / **e)** 95-5257 / **f)** Ornelas et al. v. United States / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Army and police forces – Police forces – Functions.
Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Car search, admissibility / Police powers.

Headnotes:

The principal component of an inquiry into questions of reasonable suspicion to stop and probable cause to make a warrantless search nohether a car search is permissible are (1) a determination of the historical facts leading up to the stop or search, and (2) a decision on the mixed question of law and fact whether the historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. A reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn therefrom by resident judges, who view such facts in light of the community's distinctive features and events, and by local police, who view the facts through the lens of their experience and expertise.

Summary:

In denying petitioners' motion to suppress cocaine found in their car, the District Court ruled that the police had reasonable suspicion to stop and question petitioners, and probable cause to remove one of the interior panels where a package containing the cocaine was found. The Court of Appeal ultimately affirmed both determinations, reviewing each "deferentially", and "for clear error", and finding no clear error in either instance.

Cross-references:

Brinegar v. United States, 338 U.S. 160, 160; *Miller v. Fenton*, 474 U.S. 104, 114; *New York v. Belton*, 453 U.S. 454, 458.

Languages:

English.

Court of Justice of the European Communities

Statistical data

1 January 1996 – 30 April 1996

Cases dealt with: 166

Court of Justice of the European Communities (CJEC): 108: 68 Judgments, 1 Opinion, 16 Orders, 23 Orders to strike out
Court of First Instance (CFI): 58: 27 Judgments, 11 Orders, 20 Orders to strike out

Several decisions of the Court of Justice and the Court of First Instance, which are not analysed in this review, contain interesting developments concerning the general principles of Community law:

On the principle of proportionality, see:

ECJ, 15 February 1996, *Fintan Duff*, Case C-63/93; not yet published, paragraphs 27, 31, 34
ECJ, 29 February 1996, *France and Ireland v. Commission*, Joint cases C-296/93 and C-307/93; not yet published, paragraphs 21, 30-31, 33-45
ECJ, 29 February 1996, *Skanavi and Chryssanthakopoulos*, Case C-193/94; not yet published, paragraph 36
ECJ, 28 March 1996, *Anglo-Irish Processors International*, Case C-299/94; not yet published, paragraphs 28-29
CFI, 24 April 1996, *Industrias Pesqueras Campos*, Joint cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94; not yet published, paragraphs 160-163

On the principle of legal certainty, see:

ECJ, 8 February 1996, *FMC*, Case C-212/94; not yet published, paragraphs 56, 59
ECJ, 13 February 1996, *Gebroeders van Es Douane Agenten v. Inspecteur des Invoerrechten en Accijnzen*, Case C-143/93; not yet published, paragraphs 27-33
ECJ, 15 February 1996, *Fintan Duff*, Case C-63/93; not yet published, paragraphs 20, 31, 34
ECJ, 29 February 1996, *Intercommunale voor zeewaterontzilting*, Case C-110/94; not yet published, paragraph 21
ECJ, 7 March 1996, *Associazione Italiana per il World Wildlife Fund*, Case C-118/94; not yet published, paragraphs 23-24
CFI, 24 April 1996, *Industrias Pesqueras Campos*, Joint cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94; not yet published, paragraphs 75-120

On the principle of legitimate expectations, see:

ECJ, 15 February 1996, *Fintan Duff*, Case C-63/93; not yet published, paragraphs 19-24, 31, 34
CFI, 15 February 1996, *Susan Ryan-Sheridan*, Case T-589/93; not yet published, paragraph 127
CFI, 27 February 1996, *Galtieri*, Case T-235/94; not yet published, paragraphs 63-65
ECJ, 29 February 1996, *France and Ireland v. Commission of the European Communities*, Joint cases C-296/93 and C-307/93; not yet published, paragraphs 57-62, 76
Ord. CFI, 11 March 1996, *Guérin Automobiles*, Case T-195/95; not yet published, paragraph 20
ECJ, 28 March 1996, *Anglo-Irish Processors International*, Case C-299/94; not yet published, paragraphs 30-33
CFI, 24 April 1996, *Industrias Pesqueras Campos*, Joint cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94; not yet published, paragraphs 75-120

On the right to an effective judicial remedy:

ECJ, 8 February 1996, *FMC*, Case C-212/94; not yet published, paragraphs 58, 62

decisions presented

1. ECJ, 5 March 1996, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and autres*, Joint cases C-46/93 and C-48/93, not yet published; member State liability for breaches of Community law, Breaches attributable to the national legislature, Conditions of liability, Application of national law

2. ECJ, 7 March 1996, *Parliament v. Council*, Case C-360/93, not yet published; Parliament's right to bring actions, Consultation of the Parliament, Legal basis for a decision concerning the conclusion of an international agreement, Temporal limitation of the effects of annulment

3. ECJ, 19 March 1996, *Commission v. Council*, Case C-25/94, not yet published; Division of powers between Council and Committee of Permanent Representatives, Division of powers between Community and member States, Participation in an international organisation

4. ECJ, 28 March 1996, *Accession by the Community to the Convention for the protection of Human Rights and Fundamental Freedoms*, Opinion 2/94; not yet published; External relations of the Community,

Power of the Community to become a party to the European Convention for the protection of Human Rights and Fundamental Freedoms, Purpose of the Opinion Procedure, Powers of the Court in the absence of a specific proposal for an agreement on accession, Integration of fundamental rights into the general principles of Community law

5. ECJ, 30 April 1996, *Netherlands v. Council*, Case C-58/94, not yet published; Internal organisation of the Council, Public access to documents of the Council

Important decisions

Identification: ECJ-96-1-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 05.03.1996 / **e)** C-46/93, C-48/93 / **f)** Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, *ex parte*: Factortame Ltd and autres / **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 constitutions.
Sources of constitutional law – Techniques of interpretation – Interpretation by analogy.
Sources of constitutional law – Techniques of interpretation – Systematic interpretation.
Sources of constitutional law – Techniques of interpretation – Margin of appreciation.
Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Court of justice, powers / Direct effect / Fundamental principles of the Community legal system / General principles common to the member States / Genuine cooperation between the institutions and member States / Independence of national procedure / National courts and tribunals, powers / Primacy, limits to the independence of national procedure / State liability, basis / State liability, conditions / State liability, forms of redress / State liability, principle / Liability for acts of the legislature.

Headnotes:

The application of the principle that member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible cannot be discarded where the breach relates to a provision of directly applicable Community law. The right of individuals to rely on directly effective provisions before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of Community law. That right, whose purpose is to ensure that provisions of Community law prevail over national provisions, cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a member State (cf. points 17-20).

Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by member States, it is for the Court, in pursuance of the task conferred on it by Article 164 EC Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the member States (cf. point 27).

The principle that member States are obliged to make good loss or damage caused to individuals by breaches of Community law for which they can be held responsible is applicable where the national legislature was responsible for the breaches. That principle, which is inherent in the system of the Treaty, holds good for any case in which a member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach, and, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied, the obligation to make good damage enshrined in that principle cannot depend on domestic rules as to the division of powers between constitutional authorities (cf. points 31-33, 36, disp. 1).

In order to define the conditions under which a member State may incur liability for damage caused to individuals by a breach of Community law, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, the full effectiveness of Community rules and the effective protection of the rights which they confer and the obligation to cooperate imposed on member States by Article 5 EC Treaty. Reference should also be made to the rules which have been defined on non-contractual

liability on the part of the Community, in so far as, under Article 215.2 EC Treaty, they were constructed on the basis of the general principles common to the laws of the member States and it is not appropriate, in the absence of particular justification, to have different rules governing the liability of the Community and the liability of member States in like circumstances, since the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage. Accordingly, where a breach of Community law by a member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation. In particular, pursuant to the national legislation which it applies, the national court cannot make reparation of loss or damage conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law. The decisive test for finding that a breach of Community law is sufficiently serious is whether the member State concerned manifestly and gravely disregarded the limits on its discretion. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. On any view, a breach of Community law will be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement (cf. points 39-42, 51, 55-57, 67, 74, 76-80, disp. 2-3).

Reparation from member States for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law (cf. points 82-83, 87-90, disp. 4).

The obligation for member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question. Since the right to reparation under Community law exists where the requisite conditions are satisfied, to allow the obligation of the member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question would amount to calling in question the right to reparation conferred by the Community legal order. In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the member State concerned would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 EC Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the member States cannot depend on the Commission's assessment of the expediency of taking action against a member State pursuant to Article 169 EC Treaty or on the delivery by the Court of any judgment finding an infringement (cf. points 92-96, disp. 5).

Summary:

The *Bundesgerichtshof* (Case C-46/93) and the *High Court of Justice, Queen's Bench Division, Divisional Court* (Case C-48/93) referred to the Court for a preliminary ruling under Article 177 EC Treaty questions concerning the conditions under which a member State may incur liability for damage caused to individuals by breaches of Community law attributable to that State.

In Case C-46/93, *Brasserie du Pêcheur*, a French company, claimed that it was forced to discontinue exports of beer to Germany in late 1981 because the competent German authorities considered that the beer it produced did not conform with the purity requirement laid down in Paragraphs 9 and 10 of the *Biersteuergesetz* of 14 March 1952 (Law on Beer Duty, *BGBl.* I, p. 149), in the version dated 14 December 1976 (*BGBl.* I, p. 3341, hereinafter the BStG). The Commission took the view that these provisions were contrary to Article 30 EC Treaty and brought infringement proceedings against the Federal Republic of Germany on two grounds, namely the prohibition on marketing under the designation "*Bier*" (beer) beers lawfully manufactured by different methods in other member States and the prohibition on importing beers containing additives, and, by judgment of 12 March 1987 in Case 178/84 *Commission v. Germany* [1987] ECR 1227, the Court had held that the prohibition on marketing beers imported from other member States which did not comply with the provisions in question was incompatible with Article 30 of the Treaty. *Brasserie du Pêcheur* thus brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1 800 000, representing a fraction of the loss actually incurred.

The origin of Case C-48/93 is to be found in the challenge by *Factortame and others*, being individuals and companies incorporated under the laws of the United Kingdom, together with the directors and shareholders of those companies, to the compatibility of Part II of the Merchant Shipping Act 1988 with Community law, in particular Article 52 EC Treaty. That act entered into force on 1 December 1988, subject to a transitional period expiring on 31 March 1989. It provided for the introduction of a new register for British fishing boats and made registration of such vessels, including those already registered in the former register, subject to certain conditions relating to the nationality, residence and domicile of the owners. Fishing boats ineligible for registration in the new register were deprived of the right to fish.

In answer to questions referred by the national court, the Court held by judgment of 25 July 1991 in Case C-221/89 *Factortame II* [1991] ECR I-3905 that conditions relating to the nationality, residence and domicile of vessel owners and operators as laid down by the registration system introduced by the United Kingdom were contrary to Community law, but that it was not contrary to Community law to stipulate as a condition for registration that the vessels in question must be managed and their operations directed and controlled from within the United Kingdom. On 4 August 1989 the Commission brought infringement proceedings against the United Kingdom. In parallel, it applied for interim measures ordering the suspension of the abovementioned nationality conditions on the ground that they were contrary to Articles 7, 52 and 221 EC Treaty. By Order of 10 October 1989 in Case 246/89 R *Commission v. United Kingdom* [1989] ECR 3125, the President of the Court granted that application. Pursuant to that order, the United Kingdom adopted provisions amending the new registration system with effect form 2 November 1989. By judgment of 4 October 1991 in Case C-246/89 *Commission v. United Kingdom* [1991] ECR I-4585, the Court confirmed that the registration conditions challenged in the infringement proceedings were contrary to Community law.

Meanwhile, on 2 October 1991, the Divisional Court made an order designed to give effect to the Court's judgment of 25 July 1991 in *Factortame II* and, at the same time, directed the claimants to give detailed particulars of their claims for damages. Subsequently, the claimants provided the national court with a detailed statement of their various heads of claim, covering expenses and losses incurred between 1 April 1989, when the legislation at issue entered into force, and 2 November 1989, when it was repealed. Lastly, by order of 18 November 1992, the Divisional Court gave Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, leave to amend its claim to include a claim for exemplary damages for unconstitutional behaviour on the part of the public authorities.

Supplementary information:

On liability, see also the following cases:

ECJ, 7 March 1996, *El Corte Inglés*, Case C-192/94; not yet published, paragraph 22
ECJ, 26 March 1996, *British Telecommunications*, Case C-392/93; not yet published, paragraphs 38-46

On the direct effect of Community law and its implications, see also:

ECJ, 7 March 1996, *Associazione Italiana per il World Wildlife Fund*, Case C-118/94; not yet published, paragraph 19

On the more general issue of fulfilment by member States of their Community obligations, see also:

ECJ, 8 February 1996, *FMC*, Case C-212/94; not yet published, paragraphs 51-53, 63-66, 68-77
ECJ, 7 March 1996, *Commission v. France*, Case C-334/94; not yet published, paragraphs 30-32

Cross-references:

On liability, see also:
ECJ, 19 November 1991, *Francovich and Bonifaci*, Joint cases C-6/90 and C-9/90 [1991] ECR I-5357
ECJ, 14 July 1994, *Paola Faccini Dori v. Recreb*, case C-91/ 92 [1994] ECR I-3325

Languages:

German and English respective (languages of the cases); Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-1-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber **d)** 07.03.1996 / **e)** C-360/93 / **f)** European Parliament v. Council of the European Union / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim – Claim by a public body – Institutions of the Community.
Constitutional justice – Types of litigation – Litigation in respect of the formal validity of enactments.
Constitutional justice – The subject of review – International treaties.
Constitutional justice – Decisions – Types – Finding of constitutionality or unconstitutionality.
Constitutional justice – Effects – Temporal effect – Postponement of temporal effect.
General principles – Rule of law – Certainty of the law.
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Distribution of powers between Community and member States.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

Acts of the institutions, legal basis / Cooperation procedure / European Parliament, capacity to bring actions / European Parliament, safeguarding of its prerogatives.

Headnotes:

An action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement. Consequently, an action will lie on the ground that the sole legal basis wrongly used for the contested measures was an article which does not require the procedure involving cooperation with the Parliament, thereby excluding articles requiring that procedure (cf. points 17-19).

In the context of the organisation of the powers of the Community, the choice of the 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 (cf. point 23).

Decision 93/323 approves an agreement in the form of a Memorandum of Understanding between the Community and the United States of America on government procurement. That agreement provides that public contracts are no longer to be open only to the acquisition of products and any services ancillary to their supply, as was provided for by the GATT Multilateral Agreement on Government Procurement, and applies in particular to contracts for which the principal object is the obtaining of one or more services, including maintenance and repair, transport, computer, advertising and accounting services. As for Decision 93/324, it aims to extend the benefit of the provisions of Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors to the United States of America. Since the types of service provision covered by both decisions cannot be reduced to the sole hypothesis of a trans-frontier supply involving no movement of persons, but relate also to supplies made thanks to a commercial presence or the presence of natural persons on the territory of the other Contracting Party, the two decisions exceed the scope of Article 113 EC Treaty. Since, however, they were adopted on the basis of that article alone, they must be annulled (cf. points 24-31).

Since simply to annul Decision 93/323 concerning the conclusion of an Agreement in the form of a Memorandum of Understanding between the Community and the United States of America on government procurement and Decision 93/324 concerning the extension of the benefit of the provisions of Directive 90/531 in respect of the United States of America would be liable adversely to affect the exercise of the rights arising under those decisions and given that the agreement in question has expired, there are important reasons of legal certainty, comparable to those which arise where certain regulations are annulled, which warrant the Court's exercising the

power conferred upon it by the second paragraph of Article 174 EC Treaty where a regulation is annulled and deciding to maintain in force all the effects of the decisions which have been annulled (cf. points 33-36).

Summary:

The European Parliament brought an application under Article 173.1 EC Treaty for the annulment of Council Decision 93/323/EEC concerning the conclusion of an Agreement in the form of a Memorandum of Understanding between the EEC and the USA on government procurement and Council Decision 93/324/EEC concerning the extension of the benefit of the provisions of Directive 90/351/EEC in respect of the USA, alleging a breach of the Treaty and of its essential procedural requirements insofar as these decisions are based solely on Article 113 EC Treaty which, unlike the articles specific to the fields envisaged, do not provide for the cooperation procedure. The Court accepted the claims of the Parliament and annuled the decisions, applying however Article 174.2 of the Treaty to maintain in force the effects of the annuled decisions.

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court)

Identification: ECJ-96-1-003

a) European Union / **b)** Court of Justice of the European Communities / **c) d)** 19.03.1996 / **e)** C-25/94 / **f)** European Commission v. Council of the European Communities / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Institutions – European Union – Institutional structure – Council.
Institutions – European Union – Institutional structure – Commission.
Institutions – European Union – Distribution of powers between Community and member States.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

Coreper, absence of decision-making powers / Council of the European Union, decision-making powers / International representation of the Community / Permanent Representatives Committee.

Headnotes:

The Permanent Representatives' Committee (Coreper) is not an institution of the Communities upon which the EC Treaty confers powers of its own but an auxiliary body of the Council, for which it carries out preparation and implementation work, as is clear from Article 145 EC Treaty, which provides that the Council shall have power to take decisions, and from Article 151.1 EC Treaty, which provides that Coreper is responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council. Since Coreper's function of carrying out the tasks assigned to it by the Council does not give it the power to take decisions which belong, under the Treaty, to the Council, a decision giving the member States the right to vote in an international organisation for the adoption of an agreement cannot be ascribed to Coreper or regarded as confirming a previous Coreper decision (cf. points 24-28).

A decision of the Council giving the member States the right to vote in the United Nations Food and Agriculture Organisation for the adoption of an agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas constitutes an act having legal effects and thus one against which an action for annulment may be brought under Article 173 EC Treaty. As regards relations between the Community and the member States, between the institutions of the Community and between the Community and its member States on the one hand and other subjects of international law, especially the said organisation and its member States, on the other, that decision had legal consequences which preclude it from being regarded as a matter purely of procedure or protocol (cf. points 29-37).

A statement entered in the minutes of the Council meeting at which a decision was taken cannot be used for the purpose of determining the scope of that decision where no reference is made to the content of that statement in the text of the decision in question, and therefore has no legal significance (cf. point 38).

Where, in implementation of the obligation of close cooperation between the member States and the Community institutions which flows from the requirement of unity in the international representation of the Community, the Council and the Commission have

entered into an arrangement which they intended as a binding commitment towards each other and under which, once a common position is established, the Commission is to exercise the right to vote in the United Nations Food and Agriculture Organisation in areas falling essentially within the exclusive competence of the Community, a decision of the Council giving the member States the right to vote for the adoption of an agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas must be annulled because it is in breach of that arrangement; the subject-matter of such an agreement falls essentially within the exclusive competence of the Community as regards conservation of the biological resources of the sea (cf. points 42, 48-51).

Summary:

The Commission brought an action under Article 173 EC Treaty for the annulment of a decision of the Council giving the member States the right to vote in the United Nations Food and Agriculture Organisation for the adoption of an agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas. The Court, considering that in taking this decision, the Council breached an arrangement between itself and the Commission "regarding preparation for FAO meetings, statements and voting", allowed the Commission's claim and annuled the decision.

Supplementary information:

On the interpretation of Community law, see also:

CFI, 16 January 1996, *Candiotte*, Case T-108/94; not yet published, paragraph 30
ECJ, 13 February 1996, *Société Bautiaa*, Joint cases C-197/94 and C-252/94; not yet published, paragraph 51
ECJ, 15 February 1996, *Grand garage albigeois*, Case C-226/94; not yet published, paragraph 22
ECJ, 28 March 1996, *Gemeente Emmen v. Belastingdienst Grote Ondernemingen*, Case C-468/93; not yet published, paragraph 22
ECJ, 28 March 1996, *Birkenbeul*, Case C-99/94; not yet published, paragraph 12

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 28.03.1996 / **e)** 2/94 / **f)** Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Types of claim –Claim by a public body – Institutions of the Community.
Constitutional justice – Types of claim – Type of review – Preliminary review.
Constitutional justice – The subject of review – International treaties.
Constitutional justice – Decisions – Types – Opinion.
Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.
Sources of constitutional law – Categories – Unwritten rules – General principles of law.
Institutions – European Union – Distribution of powers between Community and member States.
Fundamental rights – General questions – Basic principles – Nature of the list of fundamental rights.

Keywords of the alphabetical index:

Community, implicit and explicit powers / Community, internal and external powers / Principle of conferred powers.

Headnotes:

The exceptional procedure laid down in Article 228.6 EC Treaty, under which the Opinion of the Court of Justice on the compatibility of an envisaged agreement with the provisions of the Treaty may be obtained, is a special procedure of collaboration between the Court of Justice on the one hand and the other Community institutions and the member States on the other whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute concerning the legality of a Community act which concludes, implements or applies it, the Court is called upon to ensure, in accordance with Article 164 EC Treaty, that in the interpretation and application of the Treaty the law is observed. Its purpose is to avoid complications which may arise, not only in a Community context but also in that of international relations, from a possible decision of the Court to the effect that an international agreement binding the Community is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty (cf. points 3-6).

In order to assess the extent to which a lack of firm information about the terms of an envisaged agreement affects the admissibility of a request for an Opinion addressed to the Court of Justice pursuant to Article 228.6 EC Treaty, the purposes of the request must be distinguished.

Where a question of Community competence to conclude an agreement has to be decided, it is in the interests of the Community institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated, the only condition being that the purpose of envisaged agreements should be known before negotiations are commenced.

However, where it is a matter of ruling on the compatibility of provisions of an envisaged agreement with the rules of the Treaty, it is necessary for the Court to have sufficient information about the actual terms of the agreement.

Therefore, faced with the question whether accession by the Community for the Convention on the Protection of Human Rights and Fundamental Freedoms would be compatible with the Treaty, the Court may, even though it has still not been decided to open negotiations, give an Opinion on the Community's competence to accede to that Convention because the general purpose and subject-matter of the Convention and the institutional significance of such accession for the Community are perfectly well known, but, where it has insufficient information regarding the arrangements for accession and in particular as to the solutions envisaged to give effect in practice to submission by the Community to the present and future judicial control machinery established by the Convention, it cannot give an Opinion on the compatibility of accession to that Convention with the rules of the Treaty (cf. points 7-22).

It follows from Article 3b EC Treaty, which States that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it. That principle of conferred powers must be respected in both the internal action and the international action of the Community. The Community acts ordinarily on the basis of specific powers which are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them. Thus, the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (cf. points 23-26).

Article 235 EC Treaty is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 EC Treaty cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose (cf. points 29-30).

Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the member States and from the guidelines supplied by international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories. In that regard, the European Convention on Human Rights, to which reference is made in particular in Article F.2 EU Treaty, has special significance (cf. points 32-33).

As Community law now stands, the Community has no competence to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field and such accession cannot be brought about by recourse to Article 235 EC Treaty.

Respect for human rights is a condition of the lawfulness of Community acts. Accession by the Community to the European Convention on Human Rights would, however, entail a substantial change in the present Community system for protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community

and for the member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 EC Treaty. It could be brought about only by way of Treaty amendment (cf. points 34-36 and disp.).

Summary:

A request was made to the Court for an Opinion under Article 228.6 EC Treaty by the Council, in order to determine whether the potential accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms would be compatible with the Treaty. Having recalled the purpose of the procedure provided for in Article 228.6, the Court ruled on the admissibility of the request for an Opinion in so far as it concerns the competence of the Community to proceed with this accession, however, noting the absence of precisions on the content of the agreement envisaged, and particularly regarding the arrangements by which the Community envisages submitting to the judicial control machinery established by the Convention, it ruled that the Court is not in a position to give its opinion on the compatibility of accession with the Rules of the Treaty.

Upon consideration of the substantive issue, the Court ruled that, taking into account the present state of Community law and particularly the institutional constitutional implications of accession, accession to the Convention for the Protection of Human Rights and Fundamental Freedoms would not be compatible with the Treaty, recalling nonetheless that fundamental rights form an integral part of the general principles of law whose observance the Court ensures, and that the Convention has special significance for this purpose.

Supplementary information:

On fundamental rights, see also:

ECJ, 1 February 1996, *Perfili*, Case C-177/94; not yet published, paragraph 20
ECJ, 15 February 1996, *Fintan Duff*, Case C-63/93; not yet published, paragraphs 29-31, 34
ECJ, 29 February 1996, *France and Ireland v. Commission*, Joint cases C-296/93 and C-307/93; not yet published, paragraphs 64-65

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-1-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 30.04.1996 / **e)** C-13/94 / **f)** P v. S and Cornwall County Council / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Sources of constitutional law – Categories – Unwritten rules – General principles of law.
Fundamental rights – Civil and political rights – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Transsexual.

Headnotes:

In view of the objective pursued by Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5.1 of the directive precludes the dismissal of a transsexual for a reason arising from the gender reassignment of the person concerned. Since the right not to be discriminated against on grounds of sex constitutes a fundamental human right, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. It must extend to discrimination arising from gender reassignment, which is based, essentially if not exclusively, on the sex of the person concerned, since to dismiss a person on the ground that he or she intends to undergo, or has undergone, gender reassignment is to treat him or her unfavourably by comparison with persons of the sex to which he or she was deemed to belong before that operation (cf. points 20-24 and disp.).

Summary:

A request was made for a preliminary ruling under Article 177 EC Treaty, on the interpretation of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions in the context of proceedings concerning a male who had undergone gender reassignment, and who had been dismissed, according to the national tribunal, for this reason. The Court, relying on the definition of "transsexual" as it appears in the judgment of the European Court of Human Rights in the *Rees* case, and recalling that the principle of equality is one of the fundamental principles of Community law, ruled that the Directive concerned precludes dismissal

of a transsexual for a reason related to a gender reassignment.

Supplementary information:

On the principle of equality, see also:

ECJ, 1 February 1996, *Perfili*, Case C-177/94; not yet published, paragraphs 14-15, 17-19
ECJ, 13 February 1996, *Joan Gillespie*, Case C-342/93; not yet published, paragraph 16
ECJ, 29 February 1996, *France & Ireland v. Commission*, Joint Cases C-296/93 and C-307/93; not yet published, paragraphs 49-53
ECJ, 29 February 1996, *Skanavi & Chryssanthakopoulos*, Case C-193/94; not yet published, paragraphs 20-21
ECJ, 7 March 1996, *Commission v. France*, Case C-334/94; not yet published, paragraphs 12-24
CFI, 7 March 1996, *De Rijk*, Case T-362/94: not yet published, paragraph 36
CFI, 24 April 1996, *Industrias Pesqueras Campos*, Joint Cases T-551/93, T-231/94, T-232/94, T-233/94 & T-234/94; not yet published, paragraphs 76, 120, 164

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-1-006

a) European Union / **b)** Court of Justice of the European Communities / **c) d)** 30.04.1996 / **e)** C-58/94 **f)** Kingdom of the Netherlands v. Council of the European Union / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

Institutions – European Union – Institutional structure – Council.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Council of the European Union, public right to documents / Council of the European Union, Rules of Procedure / Transparency of decision-making process, implementation / Transparency of decision-making process, principle.

Headnotes:

An action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.

The Code of Conduct concerning public access to Council and Commission documents is not such a measure. The Code of Conduct reflects the agreement reached between the Commission and the Council on the principles governing access to the documents of the two institutions, while inviting the institutions to implement those principles by means of specific regulations, and hence merely foreshadows subsequent decisions intended, for their part, to have legal effects. In so far as it traces out the general lines on the basis of which the two institutions are to adopt measures relating to the confidentiality and disclosure of papers held by them, the Code responds to the concern of the Council and the Commission to prevent major divergences in their subsequent actions in this field. Since the Code is simply the expression of purely voluntary coordination and is therefore not intended in itself to have legal effects, an action for annulment will not lie against it (cf. points 24-27).

So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of requests to that effect by virtue of their power of internal organisation, which authorizes them to take appropriate measures in order to ensure that their internal operation is in conformity with the interests of good administration. Such measures do not exceed the confines of the power of internal organisation on the ground that they have legal effects vis-à-vis third parties.

As Community law stands at present, the Council cannot therefore be accused of having acted unlawfully where, in order to conform to the development of the law relating to public access to documents held by public authorities (which the declaration on the right of access to information, annexed (as Declaration 17) to the Final Act of the Treaty on European Union, links with the democratic nature of the institutions), on the basis of Article 151.3 EC Treaty it provided in Article 22 of its Rules of Procedure that it would itself adopt detailed arrangements for public access to Council documents disclosure of which was without serious or prejudicial consequences, and laid down those arrangements in Decision 93/731/EEC. In particular, it cannot be accused of having misused its powers by circumventing any procedure specially provided for by the Treaty in order to deal with circumstances of this kind or of having impaired the

Parliament's prerogatives by failing to involve the Parliament in drawing up the rules which it adopted (cf. points 34-43).

Summary:

The Kingdom of the Netherlands, supported by the European Parliament, brought an action for the annulement of Council Decision 93/731/EEC of 20 December 1993, on public access to Council documents, the Code of Conduct concerning public access to Council and Commission documents in so far as that act is to be regarded as an act having legal effects, and Article 22 of the Rules of Procedure of the Council. The member State alleged in particular that the Council could not use as legal bases for the contested Decision Article 151.3 EC Treaty and Article 22 of its Rules of Procedure, concerning its internal organisation and management, in so far as its capacity to create rights in individuals goes beyond the sphere of application of the rules on internal organisation and management. The Court, having ruled the application against the Code of Conduct inadmissible, since it is not intended to have legal effects, dismissed the remainder of the application on the grounds that, in the absence of general Community rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, with the result that the Council was entitled to adopt the decision in question on the basis of Article 151.3 EC Treaty.

Languages:

Dutch (language of the case); German, English, Danish, Spanish, Finnish, French, Greek, Italian, Portuguese, Swedish (translations by the Court).

European Court of Human Rights

Important decisions

Identification: ECH-96-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 08.02.1996 / **e)** 41/1994/488/570 / **f)** John Murray v. the United Kingdom / **g)** to be published in the Reports of Judgments and Decisions, 1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Lawyer, right of access to a lawyer / Police interrogation.

Headnotes:

The drawing of adverse inferences from the applicant's silence during police interrogation and at trial was held not to infringe the principle of the presumption of innocence (Article 6.2 ECHR).

The applicant's lack of access to a lawyer during the first 48 hours of his police detention violated the right to a fair trial.

Summary:

Mr Murray was arrested on 7 January 1990 in a house in which a Provisional Irish Republican Army informer had been held captive. The Detective Superintendent, pursuant to the Northern Ireland Act 1987, decided to delay the applicant's access to a solicitor for 48 hours, considering that such access would interfere with police operations against terrorism.

Under the Criminal Evidence Order 1988, Mr Murray was cautioned by the police that adverse inferences might be drawn if he failed to answer questions at the pretrial stage.

On 8 and 9 January 1990, Mr Murray was interviewed twelve times. Before each interview he was either cautioned or reminded that he was under caution.

Mr Murray remained silent throughout these interviews.

On 8 May 1991 the Lord Chief Justice of Northern Ireland sentenced Murray to eight years' imprisonment for aiding and abetting the false imprisonment of the informer.

The judge drew adverse inferences from the fact that the applicant failed to offer an explanation for his presence at the house and had remained silent during the trial.

The applicant's appeal was dismissed by the Northern Ireland Court of Appeal in July 1992.

The first question to be resolved by the European Court of Human rights was whether the drawing of adverse inferences from the applicant's silence infringed the principle of the presumption of innocence.

The Court held that it was a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn and the weight attached to them by the national courts.

In this context, the Court recalled that the applicant was able to remain silent. His insistence in maintaining silence throughout the proceedings did not amount to a criminal offence or to contempt of court under Northern Irish legislation.

Furthermore, the drawing of inferences under Northern Irish legislation was subject to an important series of safeguards designed to respect the rights of the defence and to limit the extent to which reliance could be placed on inferences: it was only if the evidence adduced by the prosecution was sufficiently strong to require an answer that such conclusions could be drawn.

Accordingly there had been no violation of the principle of the presumption of innocence.

Under Article 6.3 ECHR (right to assistance by counsel), the Court observed that this article may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions.

The Court was of the opinion that the scheme contained in the Northern Irish legislation was such that it was of paramount importance for the rights of the defence that an accused had access to a lawyer at the initial stages of police interrogation. If the accused chose to remain silent, adverse inferences might be drawn against him. On the other hand, if he opted to break his silence during the course of interrogation, he ran the risk of prejudicing his defence.

There was therefore a breach of Article 6.1 ECHR taken in conjunction with Article 6.3.c ECHR as regards the applicant's right of access to a lawyer during the first 48 hours of his police detention.

Languages:

English, French.

Identification: ECH-96-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 19.02.1996 / **e)** 53/1994/559/645 / **f)** Gül v. Switzerland / **g)** to be published in the Reports of Judgments and Decisions, 1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Family reunification / Residence permit on humanitarian grounds.

Headnotes:

The refusal by Swiss authorities to permit the minor son of a Turkish citizen who held a residence permit issued on humanitarian grounds to join him in Switzerland was held not to infringe the right of family life.

Summary:

Mr Gül lived in Turkey with his wife and his two sons until 1983, when he moved to Switzerland and applied for political asylum.

In 1987 the applicant was joined in Switzerland by his wife, who suffered from epilepsy, and in 1989 the applicant and his wife were granted a residence permit on humanitarian grounds by the Aliens Police of the Canton of Basle Rural.

The applicant's subsequent request for permission for his two sons to join him in Switzerland was refused by the Cantonal Aliens Police on 19 September 1990, mainly on the grounds that his flat was unsuitable and his means insufficient to provide for his family.

On 30 July 1991 the Basle Rural cantonal government dismissed an appeal by the applicant, stating that he had no right as a holder of a residence permit to be joined by other members of his family. An administrative law appeal to the Federal Court was dismissed on 2 July 1993.

The main question to be resolved by the European Court of Human Rights was whether the refusal by Swiss authorities to permit the minor son of the applicant to join him in Switzerland infringed the right to family life.

First, the Court reiterated that from the moment of a child's birth and by the very fact of it, there existed between him and his parents a bond amounting to "family life" which subsequent events could not break save in exceptional circumstances.

The Court concluded that despite the distance, in geographical terms, between them, the applicant had made a number of visits to Turkey. It could not therefore be claimed that the bond of "family life" between them had been broken.

Secondly, it was necessary to ascertain whether there had been interference by the Swiss authorities with the applicant's right under Article 8 ECHR.

The Court noted that the extent of a State's obligation to admit relatives of immigrants to its territory varied according to the particular circumstances of the persons involved and, according to the general interest. As a matter of well-established international law and subject to its treaty obligations, a State had the right to control the entry of non-nationals into its territory.

Moreover, Article 8 ECHR could not be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.

In the instant case, the frequent visits by the applicant to Turkey, the possibility to receive his ordinary disablement pension if he returned to his country, the possibility for his wife to obtain suitable medical treatment in Turkey, and the couple's lack of a permanent right of abode in Switzerland all supported the finding that there were no obstacles preventing them from establishing family life in their country of origin, where their son had always lived.

While acknowledging that the Gül family's situation was very difficult from the human point of view, the Court found that Switzerland had not interfered in the applicant's family life.

There had therefore been no breach of Article 8 ECHR.

Languages:

English, French.

Identification: ECH-96-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 20.02.1996 / **e)** 21/1994/468/549 / **f)** Lobo Machado v. Portugal / **g)** to be published in the Reports of Judgments and Decisions, 1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Adversarial procedure.

Headnotes:

Impossibility for the applicant, in a dispute related to social rights, to obtain a copy of the Attorney General's department's written opinion at the Supreme Court's private sitting and, consequently, to reply to it, was found to infringe the right to an adversarial proceedings.

Summary:

In 1955, Mr Lobo Machado joined the SACOR Company as an engineer. Following its nationalisation, SACOR was absorbed into "PETROGAL", which in 1989 became a public limited company in which the State was the majority shareholder. In the meantime, on 1 January 1980, the applicant had retired.

On 5 February 1986, Mr Machado brought proceedings in the Lisbon industrial tribunal against his former

employer. He disputed that he belonged to the occupational category which had been assigned to him, and sought to be reclassified. As this would affect the amount of his pension, he also claimed payment of additional sums due to him from 1980 onwards.

The industrial tribunal's judgment of 7 October 1987, in which it found against the applicant, was upheld by the Lisbon Court of Appeal on 1 June 1988.

Mr Machado appealed to the Supreme Court. After pleadings had been exchanged by the parties, the file was sent to the Attorney-General's department, which recommended in writing that the appeal should be dismissed. The Supreme Court met in private on 19 May 1989; the Registrar and a Deputy Attorney-General representing the Attorney-General's department were present. After deliberating, the Supreme Court delivered a judgment on the same day dismissing the appeal.

The European Court of Human Rights considered that great importance had to be attached to the part actually played in the proceedings by the member of the Attorney-General's department, and more particularly to the content and effects of his observations. These contained an opinion which derived its authority from that of the Attorney-General's department itself, which is intended to advise and accordingly to influence the Supreme Court.

The Court concluded that, having regard to what was at stake for the applicant in the proceedings before the Supreme Court and to the nature of the Deputy Attorney-General's opinion, the fact that it had been impossible for Mr Machado to obtain a copy of it and to reply to it before judgment was given had infringed his right to adversarial proceedings. There had therefore been a violation of Article 6.1 ECHR.

The violation in question had been aggravated by the presence of the Deputy Attorney-General at the Supreme Court's private sitting. It had afforded him an additional opportunity to bolster his opinion in private, without fear of contradiction.

Languages:

English, French.

Identification: ECH-96-1-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 21.02.1996 / **e)** 55/1994/502/584 / **f)** Hussain v. the United Kingdom / **g)** to be published in the Reports of Judgments and Decisions, 1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Personal liberty.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Adversarial procedure / Detention, continued.

Headnotes:

The inability of a person detained during Her Majesty's pleasure to challenge the lawfulness of his or her continued detention before a Court was held to infringe the right of access to court.

Summary:

In 1978, Mr Hussain, aged 16, was convicted of the murder of his younger brother and sentenced to be detained during Her Majesty's pleasure.

The Parole Board considered whether or not to recommend the applicant's release on four occasions. At the first review in December 1986, the applicant had no opportunity to see the reports considered by the Parole Board or to appear before it.

At the second review in 1990, the Secretary of State rejected the Parole Board's recommendation to transfer the applicant to open conditions. Again the applicant did not see the reports before the Board and was not heard by the Board. He was not given any reasons for the decisions taken.

In December 1992 the Parole Board's recommendation that the applicant be transferred to open conditions was again rejected by the Secretary of Sate. The applicant was only informed of the decision in March 1993.

The applicant then applied for judicial review on the grounds that he had a right do disclosure of reports. The application was withdrawn in October 1993 following the Parole Board's undertaking to reconsider the case and to allow the applicant to see his file.

In January 1994 the Secretary of State accepted the Parole Board's recommendation that the applicant be transferred to open prison conditions.

The central issue before the European Court of Human Rights was whether a sentence of detention during Her Majesty's pleasure should be assimilated to a mandatory life sentence or to a discretionary life sentence.

The Court reiterated that the applicant had been sentenced to be detained during Her Majesty's pleasure because of his young age. However, an indeterminate term of detention for a convicted young person can only be justified by considerations based on the need to protect the public. These considerations had of necessity to take into account any developments in his personality and attitude as he grew older. Otherwise, the applicant would be treated as having forfeited his liberty for the rest of his life, a situation which might give rise to questions under Article 3 ECHR.

The applicant's sentence, after the expiry of his tariff, therefore was more comparable to a discretionary life sentence than to a mandatory life sentence, and Mr Hussain was therefore entitled under Article 5.4 ECHR to take proceedings to have this issue decided by a court at reasonable intervals.

As to the question whether the available remedy satisfied the requirements of Article 5.4 ECHR, the Court held that where a substantial term of imprisonment is at stake and where characteristics pertaining to a prisoner's personality and level of maturity are of importance in deciding on his potential dangerousness, Article 5.4 ECHR requires that an oral hearing be held in the context of an adversarial procedure involving legal representation as well as the possibility of calling and questioning witnesses.

The Court concluded that the absence of these procedural guarantees prevented the Parole Board from being regarded as a court or court-like body for the purposes of Article 5.4 ECHR.

There had therefore been a violation of Article 5.4 ECHR.

Languages:

English, French.

Identification: ECH-96-1-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 26.03.1996 / **e)** 54/1994/501/583 / **f)** Doorson v. the Netherlands / **g)** to be published in the Reports of Judgments and Decisions, 1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Witness, anonymous.

Headnotes:

The reliance by a trial court on the evidence of anonymous witnesses, and on an incriminating statement made to the police by a named witness who retracted in open court and on a statement made during the police investigation by a named witness whom the defence had had no opportunity to question, was held not to infringe the right to a fair trial.

Summary:

Mr Doorson was arrested in April 1988 on suspicion of having committed drug offences. A number of drug users, including six who remained anonymous, had identified him to the police as a drug dealer from a photograph taken of him in 1985.

At the trial, the Amsterdam Regional Court rejected a request by the defence that the case should be referred back to the investigating judge for the examination of all six anonymous witnesses but it ordered that two identified witnesses should be brought before the court. The first witness never appeared and the second one withdrew his earlier statement.

In December 1988 the Regional Court convicted the applicant of drug trafficking and sentenced him to fifteen months' imprisonment.

Mr Doorson appealed to the Amsterdam Court of Appeal. Following his request for an examination of the anonymous witnesses, the Court referred the case back to the investigating judge. Counsel for the applicant was permitted to put questions to the two witnesses who appeared, but they were not confronted with the applicant himself. In the light of previous experience, the witnesses wished to remain anonymous for fear of reprisals.

The Court of Appeal turned down a request by Mr Doorson's lawyer that all six anonymous witnesses should be summoned to the hearing, and ruled that the anonymity of the two witnesses should be preserved.

The first witness withdrew his previous statement and the second one repeatedly failed to appear.

In December 1990 the Court of Appeal found Mr Doorson guilty and sentenced him to fifteen months' imprisonment. It said that it had relied upon the statements of the two named witnesses and the anonymous witnesses.

With regard to the reliance by a trial court on the evidence of anonymous witnesses to found a conviction, the European Court of Human Rights held that Contracting States should organise their criminal proceedings in such a way that those interests of witnesses in general, and those of victims called upon to testify in particular, were not unjustifiably imperilled.

The principles of fair trial also require that in appropriate cases the interests of the defence were balanced against those of witnesses or victims called upon to testify.

While it would clearly have been preferable for the applicant to have attended the questioning of the witnesses, the Court considered, on balance, that the Amsterdam Court of Appeal had been entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses.

The requirement of a fair trial was thus satisfied, and there had been no violation of Article 6.1 ECHR taken together with Article 6.3.d ECHR.

With regard to the witness who retracted his statements, the Court held that it could not hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two were in conflict.

With regard to the witness who did not appear at the hearing, the Court found that it had been open to the Court of Appeal to have regard to the statement obtained by the police, especially since it could consider that statement to be corroborated by other evidence before it.

Consequently, there had been no violation of Article 6.1 ECHR combined with Article 6.3 ECHR.

Languages:

English, French.

Identification: ECH-96-1-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.03.1996 / **e)** 16/1994/463/544 / **f)** Goodwin v. the United Kingdom / **g)** to be published in the Reports of Judgments and Decisions, 1996 / **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 – Freedom of expression.

Keywords of the alphabetical index:

Disclosure, order / Journalist, sources, disclosure.

Headnotes:

A disclosure order granted to a private company requiring a journalist to disclose the identity of his source, and a fine imposed upon him for having refused to do so, infringed the right to freedom of expression.

Summary:

Mr Goodwin, a British national, is a journalist and lives in London. In 2 November 1989, he was telephoned by an informant, who gave him unsolicited information about the Company TETRA Ltd. He subsequently prepared a draft article on the subject for publication in "The Engineer".

Being of the opinion that the information originated from a draft of its confidential Corporate Plan which had been missing since 1 November 1989, TETRA applied and obtained from the High Court an *ex parte interim* injunction to restrain the publishers of "The Engineer" from publishing the applicant's article.

On 22 November 1989, the company obtained an order from the High Court requiring the applicant to disclose his notes on the grounds that it was necessary "in the interests of Justice" for the source's identify to be disclosed in order to enable the Company to bring proceedings against the source.

On 4 April 1990, the House of Lords dismissed the appeal by the applicant against the disclosure order finding that the necessity for the disclosure of the applicant's notes had been established.

Throughout the proceedings, the applicant had refused to disclose his notes. On 10 April 1990 the High Court fined him £ 5,000 for contempt.

The European Court of Human Rights set out a number of general principles. Protection of journalistic sources was, it noted, one of the basic conditions for press freedom. Without such protection, sources could be dissuaded from assisting the press in informing the public on matters of public interest.

As a result, the vital public watchdog role of the press could be undermined, and the ability of the press to provide accurate and reliable information could be adversely affected.

The interest of democratic society in ensuring and maintaining a free press would weigh heavily in the balance in determining whether the restriction was proportional to the legitimate aim pursued. Limitations on the confidentiality of journalistic sources called for the most careful scrutiny by the Court.

Assessing the particular circumstances of the case, the Court found that TETRA was granted an order for source disclosure primarily on the grounds of the threat of severe damage to their business and to the livelihood of their employees which would arise from disclosure of the information in their corporate plan while their refinancing negotiations were still continuing. This threat, "ticking beneath them like a time bomb", could only be defused if they could identify the source, whether himself the thief of the stolen copy of the plan or as a means of identifying the thief.

However, the justifications for the disclosure order in the present case had to be seen in the broader context of the *ex parte interim* injunction which had earlier been granted to the company. That injunction had been notified to all the national newspapers and relevant journals. The purpose of the disclosure order was to a very large extent the same as that already being achieved by the injunction, namely to prevent dissemination of the confidential information contained in the plan. There was no doubt that the injunction was effective in stopping dissemination of the confidential information by the press.

This being so, in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons.

In sum, the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so could not be regarded as having been "necessary in a democratic society" for the protection of TETRA's rights under English Law, notwithstanding the margin of appreciation available to the national authorities.

Accordingly, the impugned measures gave rise to a violation of the applicant's right to freedom of expression under Article 10 ECHR.

Languages:

English, French.

Other Courts

Republic of Korea
Constitutional Court

At the Documentation Centre on Constitutional Justice of the Venice Commission summaries in English of the following decisions of the Constitutional Court of Korea are available:

1. **Compulsory Delivery of Copies of Periodicals**
(4 KCCR 362, 26.06.1992)

Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Freedom of the written press.
Fundamental rights – Civil and political rights – Right to property.

2. **Presiding Judge's Right to Direct Pleading**
(4 KCCR 413, 26.06.1992)

Constitutional justice – Procedure – Exhaustion of remedies.
Fundamental rights – Civil and political rights – Procedural safeguards – Access to courts.

3. **Prohibition of Intervention by Third Party**
(5-1 KCCR 29, 11.03.1993)

General principles – Legality.
Fundamental rights – Economic, social and cultural rights – Freedom of trade unions.

4. **Immediate Appeal against Release on Bail**
(5-2 KCCR 578, 23.12.1993)

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

5. **School Age**
(6-1 KCCR 173, 24.02.1994)

Fundamental rights – Economic, social and cultural rights – Right to be taught.

6. **Release from Position**
(6-2 KCCR 1, 29.07.1994)

General principles – Proportionality.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental rights – Economic, social and cultural rights – Right to work.

7. **Obligatory Domestic Motion Picture Showing**
(7-2 KCCR 155, 21.07.1995)

Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental rights – Economic, social and cultural rights – Commercial and industrial freedom.

8. **Mandatory Confiscation**
(7-2 KCCR 550, 11.11.1995)

General principles – Proportionality.
Fundamental rights – Civil and political rights – Procedural safeguards – Fair trial.

On the co-operation of Constitutional Courts

Introduction to the 10th Conference of the European Constitutional Courts, Budapest 6 - 9 May 1996,

by László Sólyom,
President of the Hungarian Constitutional Court

1. The acceleration of the prevalence of Constitutional Courts

Twenty four years ago, in 1972, the Yugoslav Constitutional Court invited to a conference in Dubrovnik all the presidents of the Constitutional Courts of Europe, which were older and already had acquired traditions and experience in the field. The sequence of Conferences of European Constitutional Courts developed out of this meeting of the German, Italian, Yugoslav and the Austrian Constitutional Courts. (Hereinafter: the "CECC") During the first decade the group of members, the so-called organising courts, was extended to the Spanish and Portuguese Constitutional Courts and the Swiss Federal Court. A new expansion started in 1987: at the Lisbon conference, the French Constitutional Council and the Turkish Constitutional Court became members; three years later in Ankara, the Belgian Court of Arbitration and the Polish Constitutional Court joined. The Hungarian Constitutional Court participated at the Paris conference in 1993 already as a member of the organisation, and the same conference granted the then introduced associated membership to five other courts. During the preparations of the present, the 10th conference in 1994, the presidents affiliated four members with full membership, and five new applicants were given associated member status. The CECC thus has 15 full members. On the eve of the conference, the presidents will decide (presumably positively) on two new applications for full membership. Beyond the remaining 4 associated members there will be 3 more Constitutional Courts applying for the same status and asking for the decision of the meeting of the presidents. Further applications are expected before the end of the conference. In 1987, nine organising courts were members of the CECC together with the new admitted courts; this conference will presumably have 24 members participating (17 full members and 7 associated members).

The increase in the number of the members at the conference is obviously the result of the abrupt growth of the number of Constitutional Courts in the last ten years. This process was accelerated in Europe by the collapse of communist Europe. The introduction of Constitutional Courts in the former socialist countries has become a kind of symbol of the rule of law, an internationally approved trade-mark.

Similarly, the Republic of South Africa established its Constitutional Court, South-Korea even before. However, it has to be emphasised that Constitutional Courts are spreading everywhere: not only the new democracies, but even countries with a well-established rule of law see the importance of its introduction. The trend is general. It can be presumed that this is the beginning of a stage of development in which the enforcement of constitutionality requires independent and external judicial review of democratic decision making and in which the protection of human rights according to international requirements requires this type of judicial protection.

In post-totalitarian systems, the guarantees offered by Constitutional Courts can have a special role, where the special problems of transition to democracy – like the rearrangement of ownership relations, the accounting for the past – emphasise the beneficial impact of constitutional courts. However, it is my conviction that the problems shifted to Constitutional Courts were not less important, nor was the process easier, in old democracies. Participation in the ever deepening process of European integration reviewed by the constitutional courts; the constitutionality of legal answers to the development of technology, e.g. in connection with the media or computer networks or biotechnology; the constitutional resolution of new, emerging social problems like the rights of minorities, migration etc. can all be compared to the challenges of the change of a political system.

The general requirement for judicial review such as to correct majoritarian democracies is shown by the fact that the judicial review of norms and the adjudication of constitutional rights has spread faster than constitutional courts. The CECC has always acknowledged the category of the "Supreme Court with competences similar to the Constitutional Court". There are endless transition types. I can only refer to the fact that even in the countries of the common law, there is a mine of functions similar to those exercised by constitutional courts. (See the regular Judicial Colloquia starting from 1988 of the judges of the Supreme Courts of the Commonwealth, on the enforcement of international human rights norms in the domestic law.) Judicial review cannot be exercised only in correlation to the constitution but also to international agreements. In that respect, there are several European supreme courts with activities similar to Constitutional Courts.

The delegates of the supreme courts and European institutions participated at the conferences of the European Constitutional Courts for more than mere reasons of protocol, but because of the multiple borderline questions concerning both them and the Constitutional Courts. The traditional participation of both the European Court and Commission for Human Rights as well as the Court of Justice of the European Community at the conferences is justified by the fact that the European institutions and the individual Constitutional Courts can only fulfil their tasks with respect for each other. The different Constitutional Courts develop after all a common European constitutional culture, a common "language", i.e. methods and measures – while the European institutions also imply the development of a "European consensus".

II. The issue of membership of the Conference of European Constitutional Courts – formal or substantial criteria?

1. The CECC developed from an almost friendly professional meeting of 5 or 6 Constitutional Courts into a conference with a great number of participants, in short into a diplomatic event. In the meantime, the conference did not take on a more solid organisational form, and the repeated proposals on the establishment of a secretariat operating between two conferences died for lack of interest. The documentation centre collecting the resolutions made by Constitutional Courts lives its own organisational and financial life within the network of the Council of Europe. The president of the court organising the forthcoming conference is responsible for the organisation and for mediation in connection with problems on applications for membership.

   The rules of the CECC were developed on the basis of customary law and occasional individual decisions. The conditions of affiliation have never been defined by the conference. Under a mutual agreement, there are only formal criteria: the applicant court must be a "constitutional court", which requires full independence from the legislative and the executive power on the one hand, and the competence to review acts and to annul anti-constitutional provisions, on the other.

   The conditions for accession to the European Constitutional Courts do not follow the literature, which distinguishes the "European model" from another – more ancient – model of constitutional jurisdiction: the Supreme Court of Washington. The European constitutional jurisdiction, which is rooted in the Kelsen model, is exercised by a single organ with centralised competences, conducting abstract review norms, with its decisions being of erga omnes effect. The first representative of this model, the Austrian Constitutional Court, is one of our first members. However, the CECC is not bound by theoretical definitions, but allows a more colourful reality to join its ranks: Spain and Portugal, where the exclusive competences of the Constitutional Court are only exercised at the last instance as the forum of appeal; we have admitted supreme courts with power to review norms as well (Switzerland and Cyprus); the Conference does not require the extension of the power to annul legal norms to the highest source of law under the constitution (to federal law in Switzerland and to laws in Poland and Rumania). The Cour d'Arbitrage from Belgium, with its special competences, could also become member of the CECC, as could the French Constitutional Council which conducts an exclusively preliminary review of norms. It has not been mentioned yet in connection with the highly influential German Constitutional Court that 98% of the examined cases are constitutional complaints. However, this is correct since the essence of constitutional jurisdiction is not merely the elimination of unconstitutional norms, but at least as important is the activity of interpreting the constitution. This forms the basis for the judgment and has a more lasting effect than the actual decision itself, since it defines the conditions of constitutionality in the country.

2. The CECC has always been content with formal- and competence-related criteria for accession. The starting point may be that a country with an operating Constitutional Court must be democratic and constitutional. It was only at the 1994 presidents' meeting, when the first and very careful proposal arose that with the invitation for observer status in the case of distant countries from other continents, two full members should testify that the particular country is democratic.

   As non-democratic countries may have "constitutions", the possibility is not excluded that they have constitutional courts as well. In that case, however, it is also important and difficult to decide what is the right attitude to adopt with respect to the Constitutional Court of a country where human rights practices are doubtful. The Constitutional Court of such a country may be the last resort of democracy and of hope for changes: only the court can assess the risk of when to act or how far it can go for the benefit of correcting its own system. Have the founders of the conference ever analysed how far the Tito system in 1972 was democratic or "free" by the standards of any Western European rule of law?

This question can be raised when admitting new members, but also in connection with the conference members. Let us remember that initiatives for the assessment of human rights practices of any country have never been unambiguous among member countries. The prime necessity for the constitutional court is to stay away from politics, and this is true for co-operation among the courts too. It is totally alien to the objectives and possibilities of the CECC – independently of the question of meeting a democratic minimum – to qualify the constitutional courts' practice in different countries.

a. At the present organisational state of the Conference, due to the lack of administrative staff, it seems to be technically impossible to have every new and unknown applicant qualified by every member court; it would be similarly difficult for the courts to give a well-grounded opinion on the anti-democratic turn in the practices of any member Constitutional Court. How could the members agree on unified standards with the emergence of multiple legal and political traditions? This would have been difficult even for the founders. To rely on the qualification of other organisations – e.g. on the notice of the Council of Europe to some member countries – would also be misleading: these assessments are not based on the practices of the constitutional courts, and both the notice directed to certain countries and the lack of it with respect to others being the result of political considerations, should not be taken into account by constitutional courts. To adopt the position of international organisations is only justified when the membership of the court with reference to its suitability to become a member was questioned because of the international status of its country. With respect to this formal problem, the members of the Conference almost exclusively take the position of following the practices of the Council of Europe and its organisations – and stay away from the political differences (Cyprus, Serbia).

b. The self-definition of the CECC also militates against the application of substantial membership criteria. The conference has never felt itself to be responsible for dealing with the practices of member courts and especially not for qualifying them. Co-operation is aimed at the exchange of information and the review of jointly selected problems. This co-operation served the strengthening of the institution of constitutional jurisdiction in Europe, the conferences clarifying the role and the function of constitutional courts in modern democracies (their relation to parliament, to supreme courts and their role in connection with international law with respect to federal state structures and in the protection of basic rights). This task was in harmony with the formal membership criteria. No one questions the justification and major tasks of Constitutional Courts today. The newly-emerging constitutional courts have an unquestioned position (their States turn them into the symbol of the rule of law and are thus interested in their functioning), and their formal competences do not differ from their European predecessors' (as they are copies in that respect). Due to the emergence of a new historic phase of constitutional jurisdiction, CECC has to redefine its functions. Without this, nothing would justify the conference changing the formal requirements of membership.

As Constitutional Courts do not need to meet any substantial requirements for CECC membership, this has nothing to do with the new practice, according to which it has become easier in Europe today to be admitted to organisations where substantial requirements have to be met as well. All the international and the political reasons which play a role here cannot be relevant from the point of view of constitutional jurisdiction. The CECC just carries on its original practices.

However, the above considerations do not exclude the possibility that the CECC might take the decision not to admit a court or to consider it as having ceased to be a member in the case that it does not fulfil the requirements connected to independence and competences. Due to substantial reasons, exclusion may also be possible if the practices of a Constitutional Court do not fulfil the minimum requirements on human rights and constitutionality. Until the CECC has a written statute, we should not make rules in advance but – in a manner similar to that adopted for admission – rely on customary law (hoping that such a case would never emerge).

The constitutional courts of the different countries being rooted in the history of their own country, our activities are not primarily meant for one another. But there is common responsibility as far as every court joins the mutual exchange of information, and time will show what the individual courts can contribute to the emergence of a joint European constitutional culture.

c. Until then I would not make any distinction between the many who are invited and the few who are chosen. I would be especially cautious in distinguishing on the basis of old members and new comers. Signs of such an attitude were to be seen at the Paris and Budapest preparatory conferences, when Poland made a repeated proposal for including on the agenda the problems of Constitutional Courts in transition from dictatorship to democracy. Some thought that this was the special problem of the "new"

ones and that it could be of no interest of an all-European conference.

Membership of the CECC should continue to be based on formal criteria. This cannot be essentially changed by the fact that the underlying reason for the sudden increase in the number of the admitted or applying Constitutional Courts is primarily the change of political system in Central and Eastern Europe. However, we have to consider the possible consequences of such a change in the composition of the CECC.

III. The consequences of the "change of political system"

1. It would be far beyond the possibilities of this conference to analyse the extent to which the traditional categories of characterising the countries of Europe and their political systems can be used after the collapse of the socialist world. The literature of political science, but also writings dealing exclusively with constitutional jurisdiction, frequently distinguish between "mature" and "emerging" democracies. The most essential consequence of the previous confrontation becoming nonsense is that the "East" and the "West" cannot be described any more by generalising characteristics. The time has come for differentiation and self-analysis. The newcomer to democracy is often surprised as to what limitations on basic rights are accepted as constitutional in the "old" democracies; on the other hand – due to their neophyte hustle or as a reaction to the previous injustice – the "new" democracies are setting sometimes high requirements never seen before. The "transition state" has its negative attributes with which we have to count. However, there are positive consequences which the countries in "transition" should make use of more consciously, on the one hand, and which are beneficial for the co-operation of all constitutional courts, on the other. All this has to be recognised in order to avoid any rupture in the conference between the Constitutional Courts of post-communist and Western European countries, which could develop instinctively or simply by lack of due consideration.

a. The majority of the European Constitutional Courts emerged from a change of political system. This is not only true for Spain and Portugal, but for the Italian and the German Constitutional Courts as well. These courts were founded as part of the new, democratic establishment. This strengthened their position against legislation. The conditions of their emergence contributed to the judicial activism of the European Constitutional Courts. All that can be derived from this history is also true for the Constitutional Courts established in the third wave of the process of democratisation of Europe. But as members of the third generation, they could rely on well-developed methods and precedents of other European constitutional courts. Their "transition period" is in this way shorter. In principle, the new Constitutional Courts can make the same development in 4-5 years' time which their predecessors built up in decades. The process is accelerated by the membership of the Council of Europe and the integrative impact of the Strasbourg jurisdiction.

Time has speeded up. There are examples of new Constitutional Courts gaining international recognition at the very beginning of their activity – I deliberately quote a non-European example: the Constitutional Court of the Republic of South Africa.

The question arises, whether it depends on the courts, how many and what kind of cases they have, i.e. when their theoretical readiness and their possibilities become solid judicial practice. Constitutional Courts are – within certain limits – capable of forming their competences and influencing the number of cases judged, and of giving the judgment an importance pointing beyond the particular case. It is precisely the new constitutional courts which under the plastic circumstances of the change of system can greatly mould their own role. The Hungarian constitutional court e.g. handled the admissibility of the motions rather generously and judged every motion which offered an opportunity to interpret any constitutional provision. In Hungary, the Constitutional Court, which can exercise only abstract review of norm, expanded its competences by examining the "living law" (adapted from Italy) and by introducing the constitutional presumption of conformity (after the German example). There are however examples contrary to this activism among the "new" courts, for example the competences covering constitutional complaints are interpreted restrictively, or the exercise of this competence is almost given up (in order to reconcile it with the jurisdiction supreme courts). On the other hand, there are some among the "old" courts, not emerging from a change of system, which due to their strongly limited competences cannot develop any position on certain issues of human rights and their constitution (the Swiss, Belgian and French courts). In that respect, the borderline among the courts is not between the "old" and the "new" ones.

b. Both the new and the old courts have to deal in parallel with difficult constitutional issues posed by social and technological changes, independent of the change of system. Next to the already mentioned

information technology and medical issues, the latest topic on the agenda is the constitutional satisfaction of minority rights, starting from the rights of national minorities, for Europe a decisive issue from Ireland to the Balkans, to the settling of the demands of religious sects or sexual minorities.

c. The majority of constitutional issues are cases not connected either to the change of the system or to new challenges. But these cases are present everywhere, e.g. the reduction of social services; the change of taxes during the levy period; the constant sophistication of all criminal law guarantees (the right to defence, the rights of the accused and of the prisoner), limits on freedom of speech, limits on the right to enterprise, employment etc. Conclusions on the changing trend of judicial practices can only be drawn after a long period of time, but it is hardly possible to differentiate on the basis of old and new democracies.

d. The major problem for the courts posed by the "change of political system" is the relation between the change of the system and "normality". The question is, whether the transition from the non-democratic system to democracy – the existing (and necessary) discontinuity of the quality of the political and legal systems – allows for the application of the same guarantees of the rule of law as are made for consolidated constitutional States, even under the non-recurring and exceptional state of affairs of the transition. The best-known problems of this type are whether retroactive criminal legislation is constitutional (see the law on the reopening of the statute of limitations); or the restitution of property confiscated and nationalised on the basis of laws which under the present constitutions are unconstitutional; or the problem of the extent of compensation; or, similarly, the constitutionality of access to (and the volume of) information on former secret agents and their reports.

It is known that the answers Constitutional Courts gave to the change of the system was not uniform – similar to the different judicial practices of Western democracies after World War II in similar circumstances, and theory has not clarified definitely the problem of the borderline of the conflict between justice and formal guarantees. The "impact of the special historic events" cannot be fully excluded from the constitutional settlement of problems of transition. There are also some courts which developed a *statement of principle* as well. According to the Hungarian Constitutional Court e.g., the change of the system cannot justify any divergence from constitutional guarantees. Others have formulated their expression of breaking away from the absence of the rule of law in the principle that the guarantees of the rule of law cannot defend sins committed in the past (the Czechoslovak Constitutional Court).

Independently of any such statement of principle, it has been impossible to avoid acknowledging the extraordinary changes which have resulted from the process of restructuring the ownership relations and reconciling these with the past. The different Constitutional Courts have found different dogmatic solutions to harmonise this circumstance with their constitutions.

Disregarding the intention of the Constitutional Courts to develop a principled position on the character of the change of the system and to give a moral and political evaluation, and further leaving the concrete circumstances of the respective cases aside, we can see that the problem of "extraordinary circumstances" and the solutions given as answers are less specific and do not differ from the extraordinary situations which the "old" Constitutional Courts had always taken into account. The lesson is that almost without interruption there are "extraordinary" situations, i.e. burning and important social problems where political solutions test the guarantees of the constitutions. Old problems, like the distribution of the compensation burdens after the war, the decrease of the capacity of the social distribution systems after the oil crises in the 80s and the protection of acquired rights; terrorism and the limitation of freedoms with reference to its threat; language and autonomy ambitions of minorities (from among the "old" countries in Belgium, France and Spain) – these are all problems which have always been present in the exercise of the "old" European constitutional and human rights jurisdiction. (And where solutions can only be measured in the same way as the "new" ones. It is, however, not sure that all the solutions would be accepted by some of the new courts.)

e. On the basis of the above, it would not be justified or arguable to have any kind of distinction in the CECC between the Constitutional Courts of "old" democracies and of the countries in which the change of system has intervened more recently on the basis of these historic conditions. (Can the "old" and the "new" jurisdiction of the German Federal Constitutional Court be separated? On what basis should we distinguish among the judgments on the French chador, the German Kruzifix on the one hand, and the Polish "cross in the classroom" on the other?) It would have been more fortunate if the new courts had not proposed the problems of the Eastern-European system changes be put on the agenda, but rather that the management of "extraordinary

situations" be no included. This would have made everyone's interest clear.

2. The emergence of a large number of "new" Constitutional Courts has a positive consequence, too, one whereby the "system changing" attribute can be emphasised.

a. The collapse of the Soviet Union and the socialist systems was of world political importance and attracted incomparably greater attention than any earlier fall of dictatorship and the case of countries (like Spain or Portugal) joining the democratic Europe. (A similar difference was noted in the case of the change of the system in South Africa compared to the fall of the South American juntas, although the latter enjoyed great attention of North America.)

The peaceful transition from dictatorship to democracy on the basis of negotiations and constitutional regulations in Central and Eastern Europe was a novel method world-wide. We must not forget about countries where this method failed, the former Yugoslavia and its successor States, or the wars in Chechenya and the Caucasus. The lessons must be drawn after thorough analyses. In the successor States of the former Yugoslavia, there are Constitutional Courts whose roles and possibilities – especially after the end of armed conflict – did not diverge from the other countries after the change of the system.

The successful constitutional transitions have considerably increased the importance of Constitutional Courts. The question should be formulated in another way: would this type of transition model be possible without constitutional jurisdiction? The symbolic role gained by new courts bridged or replaced the years which older courts needed to stabilise their status and have it acknowledged. The concrete result of the opportunities depended only on the individual new courts.

The Hungarian Constitutional Court introduced the paradox term of "revolution under the rule of law" for the characterisation of the change of system. This meant that the changes which were important from a political point of view – including the new Constitution – developed by respecting the legislative rules of the old law and were impeccable from a formal point of view; later changes were only possible when following all the guarantees of the new rule of law. These cannot be set aside on the basis of the exceptional historic conditions or with reference to justice. The formalism and neutrality of constitutional jurisdiction (the strength may change from country to country, but today it seems to be one of the dominant characteristics) has become an essential element of the stability of the new systems. Raising politically contradictory, but from the point of view of the change of system, decisive issues to the level of constitutional law, allowed them to be solved by being shifted from the system of arguments of politics into a strictly professional, neutral system of terms and rules discussible from the point of view of history and comparative law. Another question, that of enforcement of the decisions, is again part of the world of politics, but there is no obstacle – as it often happens – to one problem travelling several times through the Constitutional Court. The role of the Constitutional Courts made both the politicians and the population conscious of one of the most important characteristics of the rule of law never known before: political intentions can only be implemented lawfully and within the framework of the Constitution and not vice versa as before, when politics was above the law. Finally, the Constitutional Courts developed new dogmatic solutions of constitutional law for the specific problems of transition which had never been used before by other Constitutional Courts in managing extraordinary situations.

While studying the latter, we can clarify the types of constitutional change of system. The "restoration" and the "prospective" type of approaches to the constitutionally controlled change of system (and constitutional court) can be separated; the different models of legal continuity and the gradual transformation of law on the one hand, and the diverging models of a total break with the previous law and order and the introduction of the new law and order (if there is any, as it was in the case of Germany) on the other; the deduction of different constitutional legal consequences from the moral requirements of the change of system etc. The elaboration of these is not part of this presentation: the examples rather illustrate that these choices are strongly interdependent. The restoration attitude gives rise to the approach that the decades of socialism are non-existent from the legal point of view; from the point of view of the rule of law nationalisation did not take place in the legal sense and thus it restores ownership relations of the period before socialism; similarly it does not consider the termination of the period of prescription and turns prescribed political crimes into prosecutable ones again. This approach emphasises discontinuity and raises justice above the formal guarantees. On the other hand, emphasising both the revolutionary changes and the legal continuity, partial compensation, instead of restitution, becomes constitutional. This approach offers the guarantees of the rule of law to everyone. What is more, this is exactly why the revolutionary changes introduced by means of the rule of law are

considered to be morally of a higher value than the previous, similarly revolutionary changes, for by respecting constitutional limitations it cannot repeat the crimes and injustices which the previous revolutions understood on the basis of their own ideology to be justified and permissible. (This was the position of the Hungarian Constitutional Court on handling the past.) Whatever solution a Constitutional Court opts for, the categories and methods applied by the rule of law give the "transition" a constitutional frame and keep it within the bounds by which the country can be called constitutional. The comparison of new solutions and the consideration of trends not only offers theoretical lessons, but can also serve as a model for planned changes of the political system.

b. This is the reason for the interest *from all over the world* in the output of the new courts. This offers a unique opportunity for *publicity* even for constitutional courts which due to the size or importance of their countries would never have achieved this. Misunderstandings rooted in the lack of information must be tolerated: on the one hand the lack of knowledge on the history of the new democracies and their present stage of development, and, on the other, the greater potential for superficial or ill-considered opinions which exists in countries lacking democratic experiences. But this interest nevertheless presents the new courts a unique opportunity to introduce themselves in a self-controlled manner: by publishing their original documents (resolutions) *in world languages.*

c. Here we have to discuss the development of working languages. The CECC worked originally in the languages of the oldest member-courts. German and French were the languages for the non-member invited countries. English was used by the European institutes and the Nordic guests. The Italian and the Spanish courts brought their own language and made it accepted. The number of languages could not grow parallel with the abrupt growth of the conference and, according to the 1994 resolution of the presidents, the languages of the CECC events were reduced to the common languages of scientific conferences – English, German and French. These are all mediator languages as well, among which English is becoming more and more general, while German and French, as major foreign languages – and traditional cultural and legal zones of influence –, are fading but are still perceptible.

The current information from "old" courts does not justify the mediatory character of German and French. The most distinguished and ancient resource, the *Europäische Grund-rechte Zeitschrift*, publishes from the national constitutions and supreme courts practically only German language extracts. Even the Italian and Spanish get seldom a summary publication on certain cases. This is even more true for the countries after the change of the system. The *Human Rights Law Journal*, also published by Engel Verlag, publishes documents of international courts and organisations. The *Revue universelle des droits de l'homme* mainly covers international material and publishes the resolutions of the French Constitutional Council and State Council as well as those of the Swiss Federal Court.

The situation of the French flow of information is better, as it informs on all the European Constitutional Courts. The *Chroniques* column of the *Annuaire International de Justice Constitutionnelle* – being an annual publication, after a certain delay – gives the opportunity and practically unlimited space to all constitutional courts to introduce their latest news, even in the form of their own report. Even this forum is not suitable for the publication of whole judgments.

For the time being, the interest in new democracies offers new courts publication opportunities which neither the non-German and non-French nor the lately established "Western" courts have had access to. The *East European Case Reporter of Constitutional Law* publishes full resolutions and summaries prepared by the staff of the courts, and the *Journal of Constitutional Law in Eastern and Central Europe* publishes full judgments and summaries – edited by the author from the given country. Although written by its own authors, the "Constitution Watch" column of the *East European Constitutional Review* summarises the latest judgments too. By this, the problem of the small languages of Central and Eastern Europe was solved in the only possible way, namely by forcing the use of the most widespread mediatory language (the success of the Strasbourg data bank will depend much on whether or not they can fully introduce the use of the mediatory language). The publication possibilities will hopefully remain as long as the courts and constitutional lawyers of the new democracies manage with the translation works and as long as the special interest in the countries of "transition" is alive. Even if this vanishes, the output of the new courts will have become well known.

d. The interest in the specific solutions of constitutional law to the "transition from dictatorship to democracy" not only makes the communication positions of the new courts easier, but also joins them beneficially to the process of *globalisation* of constitutional jurisdiction.

Transition and new democracies are present not only in Europe. Attempts have been made for a peaceful, bloodless, negotiated and legally and first of all constitutionally controlled transition from dictatorship to democracy on other continents too. Interest has already been shown for the experience of the new European courts in the planning stage of the changes, concerning the stabilising role of Constitutional Courts on the one hand, and the constitutional solution of issues necessary to the change of the system, on the other, such as compensation or the constitutional behaviour towards the criminals of the past. South Africa already informed itself at the "round table discussions" on advantages of constitutional jurisdiction but they wanted to confront the arguments for and against the establishment of an independent Constitutional Court or as part of the supreme court with the benefit of the experiences of the post-socialist changes of political system. South Korea is not indifferent to the experiences of constitutional law in Europe, and has manifested a special interest in the German model.

It has to be seen that the third generation, system-changing Constitutional Courts of Europe – in spite of their exceptional historic situation – fit into a broader and older process. The Hungarians were conscious of this and studied the respective judgments of the Spanish and the Portuguese courts. All that has taken place in South America namely in Argentina, and including the statements of the Inter-American Court of Human Rights, can be of importance for the new European courts. This process, which originates from the past and flows into the future, links the "new" European Constitutional Courts to the constitutional jurisdiction of the world, partly students, partly inventors, but making them as important and well-known, as they could never have become as "evolutionary" constitutional courts, solving merely the routine cases, even if in an excellent manner. There is a good hope that the process will bring lessons to outsiders and to the non-concerned as well, (e.g. in managing extra-ordinary situations, in increasing the requirements for some not so well-established rights, like environment protection, data protection). It is desirable that the "new" Constitutional Courts pay attention to one another and that the example of the others generates a continuous self-reflection for all.

This global aspect has another advantage for the new courts. The geographic layout of the old and the new constitutional courts follows roughly the separation of the former European Community insiders and outsiders. Neither now, nor later, can the borderline of integration be the borderline between constitutional cultures or the levels of the rule of law. All European Constitutional Courts are part of the development of a common constitutional language, or at least of its grammar. This common culture is broader than the group of countries applying for membership to the European Union, or the ones which have good chances to be admitted. I do not think that constitutional courts speaking this language or enriching its vocabulary would feel today different because of the progress their countries have made in the integration process. This common language is not restricted to Europe either, but bears the traces of a recognisable dialect of a world language.

The development of a common constitutional language is important for the Constitutional Courts, for which this common dogma is the preparation of a future "European constitution", and important also for those for whom this process provides the opportunity to remain equal members of a common legal culture.

4. The increase in the number of the conference members raises the question whether we should establish other divisions within the conference, if not along the line of old/new courts, but others. There are several historic, cultural, religious, political or economic etc. points of view along which the real separation line could be drawn in Europe. I do not think that the differences of the German, French and Anglo-Saxon law families – groups primarily in a private law context – could have an impact. The Constitutional Courts did not emerge from the domestic organic development of law, but are imported products – it is only the Austrian Constitutional Court which can protest against this with justification. It is another question whether in the traditional areas of influence of these legal families – perhaps due to language barriers – the models developed within the families could not spread more intensively. Within this framework, the traditions of State organisation of some influential countries – like centralisation or in other cultures the federal structure – can easily influence the constitutional courts too. Attempts have been made to revive such co-operation among constitutional courts between two conferences, and also to establish co-operation on the basis of geographic proximity.

   A deeper knowledge of one another's practices is warmly welcome, and any meeting of constitutional judges is beneficial; good personal contacts can strengthen co-operation. However, I do not think that any regional sectioning is warranted within the CECC. As far as it can be seen, not even the typical characteristics connected to constitutional jurisdiction would lead to closer co-operation among countries,

for instance those recognising constitutional complaints in the review of a concrete case, on the one hand, or those recognising only abstract review of norms, on the other. Even the adoption of the strictest professional solutions cannot be bound by such criteria. In case similar problems of interpretation of a constitution arise, the existing answers can be applied independently of the competences of the courts concerned. As appears from the examination of an inquiry of the Hungarian Constitutional Court, even the differences of constitutions do not lead necessarily to different constitutional jurisdiction. (In spite of the differences of the German constitution, not recognising separate social rights, only the term "social state based on the rule of law", of the Italian constitution, with a detailed list of social rights, and of the Hungarian constitution, declaring the obligation of the State to adopt social provisions, the Constitutional Courts of the three countries came to similar conclusions on the constitutional possibilities of cutting social services.)

This independence of constitutional jurisdiction has an exceptional integrative potential. There are professional, technical and historic reasons for the independence of domestic determination, but also for the existence of connections between constitutional courts above the nations. We have already dealt with the historic emergence of constitutional jurisdiction. In time, the common language and the methods applied in the review of norms will operate to inform the choices open to constitutional courts. International human rights litigation can have a forming impact too. This uniformity binds Constitutional Courts more than domestic dogmatic traditions.

IV. The Conference of European Constitutional Courts and parallel platforms of co-operation

1. In contrast to possible separation, there are platforms of co-operation which – parallel to the CECC – integrate constitutional courts without discrimination and – similarly to the CECC invited courts – include organisations with similar interests or competencies. The most important from this point of view is the Venice Commission, which acts under the auspices of the Council of Europe, and which has the statutory task of advising on constitutional issues, relying also on a broader circle of expertise even than the 39 member States of the Council of Europe.

   The Venice Commission has organised 2-3 conferences on constitutional issues on an annual basis since 1996, and has been following the CECC meetings every third year for two conference periods. Its topics do not differ from those of the CECC. On the contrary, there may be some overlapping. Constitutional judges work in the Commission on constitutional issues; members of the CECC generally participate at the conferences. The *Bulletin* issued by the Venice Commission and the CODICES database are *indispensable* for co-operation among European Constitutional Courts.The Venice Commission was established within the Council of Europe on the basis of a Partial Agreement, and is presently composed of 32 member States and 15 non-member States.

   There are also multiple co-operation forms organised on a non-intergovernmental basis which vary in their comprehensiveness and political or purely scientific ambitions. The American Center for Democracy organises meetings, which aim to be regular in the future, under the title "International Judicial Conference". This has the objective of establishing contacts between the highest courts of Western and Eastern Europe and the Supreme Court of the US, not without an attempt at achieving political and representative importance. From among the purely scientific meetings, the Groupe d'Etudes et de Recherches sur la Justice Constitutionnelle of Professor Favoreu, from Aix en Provence, can be mentioned. This organises colloquia on a regular basis with the constant participation of constitutional judges. In addition, note should be taken of the series of seminars at Yale University inviting constitutional judges.

2. The CECC must at least acknowledge the conferences which are striving at regularity and full coverage, and should develop its own position towards them. This is primarily a question of practicalities – timing and the sharing of work – as nothing can concern the following specialities of the CECC:

   The CECC remains an event devised by the European Constitutional Courts of their own initiative. Its character is developed exclusively by the member courts respectively and by the presidents representing them. The independence of the Constitutional Courts is reflected by the fact that the CECC is maintained by the Constitutional Courts both in financial, intellectual and organisational terms.

   The CECC remains the sole platform comprising *all* European Constitutional Courts; its membership means that the already functioning Constitutional Courts *acknowledge* the admitted similar institutions.

   The CECC therefore remains the most representative platform, an occasion for all courts to be *represented*

at the highest level – by the president and a large delegation where the meeting of the presidents is the executive and operating body.

a. All this results in the large size of the CECC. We have to decide how we accommodate the specificities of large conferences. We can resign ourselves to the unavoidable formality of plenary sessions, leaving the genuine work to the working groups. It should be considered whether this does not lead to a loss of the great advantage of the CECC, the full range of participation, i.e. that all the constitutional courts prepare reports or contribute to the discussion. The present conference has made a step forward by discussing several issues on the basis of interest, in which all courts could write a national report on one or the other topic (or on both) according to their own decision. We will see whether contributions will be made other than those of the rapporteurs by interested parties. We could also select only one topic and discuss it in detail in different smaller groups. The topics of the media and the distribution of power would have been suited for that. However, we should not lose sight of the fact that the CECC is not a scientific conference where the experts dig down to the details, but a meeting of courts. Yet there are no other experts who would have deeper knowledge of the special practices of the courts, of the background to the judgments, the wider objectives within the courts or connections relevant for the topic of the conference and useful for other courts, but unperceivable for outsiders etc. It depends on the conference, how it utilises the possibilities for first-hand, internal exchanges of information and the unique chance of mutuality and immediate reaction, how it can make the increased number of members to an advantage. Every conference will offer a new chance.

b. The definition of the topics is of crucial importance for the success of the CECC: The conferences until now were generally dealing with partial problems, selected by voting at the meeting of the presidents, and the importance and timeliness of these topics could hardly be questioned. The same is true now, when the problems of freedom of speech, freedom of the media and the separation of powers are put on the agenda. It was only the first, and later the 7th conference held in Lisbon, at the turning point of the expansion period, which dealt with constitutional review by constitutional courts in general: it reviewed its tasks, the competences required and the impact of the decisions.

   Such self reflection by Constitutional Courts is needed from time to time. I would like to draw attention to the fact that the increased number of participants in the conference would require a similar review even if this was not needed by the new historic circumstances of constitutional jurisdiction. I do not think that this should be done in the form of national reports on competences, procedures, constitutional standards or the consequences of decisions. Such reports should be prepared by academic writers. (The only question is, why the handbooks prepared are not up-dated and why is the planned work on the new courts delayed, most threatening by negative prescription.)

   The new review should be rooted in well-known and documented facts, correcting them, making comments from its own point of view and attaching the self-interpretation of Constitutional Courts and noting any wider objectives. Is it sure that the result would be the same self-restrained, negative definition of the Lisbon conference on the essence of constitutional jurisdiction? Has the time not come for the discussion of the "activist" and the "self-restricting" courts, with special attention to the possible shift of international jurisdiction to an activist direction? What results would bring about an increase of the interchangeability between the constitutional review of individual decisions and abstract norms? What new techniques have been developed for this by the courts? How can the Constitutional Court maintain its neutrality without a political question doctrine, when it has to make judgments on the most burning political issues of its country from a constitutional point of view?

   Conference topics focusing on methodological issues can be useful, as not all Constitutional Courts may have (sufficient) practice on all concrete topics – as it has turned out to our great surprise in connection with the topics of the media and the separation of powers. It is not worth trying to substitute missing resolutions by doctrines or texts of provisions at this forum. The unique opportunity of the CECC lies exactly in the fact that it has first-hand knowledge of the relation of the text of the constitution to the constitutional reality. To highlight the abovementioned general ("methodological") issues, resolutions taken on any issue could be suitable. Courts having made few resolutions can have the same chances of contributing as others with decades of practice. Everyone knows himself and his ambitions.

3. We cannot lose sight of the fact that the means for the co-operation of Constitutional Courts are not in the hands of the CECC. The CECC has no organisational background. The publication of the conference documents is the responsibility of the host country. The conference contributions are not the only, or the most important sources, for co-operation among Constitutional Courts. Continuous and interactive

exchanges of information and access to the original documents can develop a common language, indeed. There are constitutional judges among the editing committees, advisory boards or patrons of the periodicals or annuals publishing Constitutional Court resolutions and summaries. In some cases they only give their names whereas in other cases they have a real influence.

The most important basis for such co-operation at the moment is the data bank of the Venice Commission, and the *Bulletin*. The CECC welcomes the activity of the Venice Commission, and is grateful for it. The constitutional courts can use this source of information for their own benefit and, what is more, can feed in their own resolutions, translated into mediating languages, without having any formalised co-operation between the CECC and the Venice Commission. In my introduction I wanted to paint a picture of the current co-operation of Constitutional Courts in Europe and to encourage the CECC to take account of the changing circumstances. It was my intention not to make recommendations on organisational issues – this can only be done after and be dependent on discussion of the situation. However, I wish to signal nonetheless that the organisational structuring of co-operation on the exchange of information with the Venice Commission is of decisive importance for the future.

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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.*
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[7] *Registrars, assistants, auditors, general secretaries, researchers, other personnel, etc.*

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[8] *Preliminary references in particular.*

[9] *Horizontal distribution of powers.*

[10] *Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.*

[11] *Decentralised authorities (muncipalities, provinces, etc.).*

[12] *This keyword concerns decisions on the procedure and results of referendums and other consultations.*

[13] *This keyword concerns decisions preceding the referendum including its admissibility.*

[14] *Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword (No. 1.3.3)).*

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[15] *Local authorities, municipalities, provinces, departments, etc.*
[16] *Or: functional decentralisation (public bodies exercising delegated powers).*
[17] *Political questions.*
[18] *Unconstitutionality by omission.*
[19] *Pleadings, final submissions, notes, etc.*

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[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.).*

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[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.

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[24] *Bicameral, monocameral, special competence of each assembly, etc.*
[25] *Including specialised powers of each legislative body.*
[26] *Presidency, bureau, sections, committees, etc.*
[27] *State budgetary contribution, other sources, etc.*
[28] *For procedural aspects see the key-word "Electoral disputes" under "Constitutional justice - Types of litigation".*
[29] *For example incompatibilities, parliamentary immunity, 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.*

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[34] *Comprises the Court of auditors insofar as it exercises jurisdictional power.*

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[35] *E.g. Court of Auditors.*
[36] *Ombudsman, etc.*
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[38] *Open-ended or finite.*
[39] *If applied in combination with another fundamental right.*
[40] *The question of "Drittwirkung".*
[41] *Used independently from other rights.*
[42] *Includes for example identity checking, personal search and administrative arrest. Detention pending trial is treated under "Procedural safeguards - Detention pending trial".*
[43] *Including the right of access to a tribunal established by law.*

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[44] *Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.*

[45] *Militia, conscientious objection, etc.*

[46] *Aspects of the use of names are included either here or under "Right to private life".*

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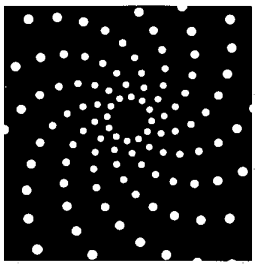

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