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on Constitutional Case-Law

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THE BULLETIN

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four months period (volumes numbered 1 to 3). The last two volumes of the series concerning the same year are actually published and delivered in the following year, i.e. volume 1 of the 1996 Edition in 1996, volumes 2 and 3 in 1997.

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.

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*
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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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Important decisions

Identification: ALB-96-2-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 31.01.1996 / **e)** 1 / **f)** / **g)** Official Gazette, 1/1996, 20-27 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
General Principles – Democracy.
Institutions – Legislative bodies – Political parties.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Crimes against humanity / Lustration.

Headnotes:

The temporary exclusion of the perpetrators, conceptualisers and implementers of that fierce, inhuman dictatorship which the constitutional law denounces in its preamble from the right to be elected is constitutional.

The Constitutional Court is entitled to review requests, by Parliamentary Groups to have declared unconstitutional laws that conflict with the main Constitutional Provisions concerning the right to vote as well as additional fundamental rights.

Summary:

In the present case, the Constitutional Court reviewed requests made by the Albanian Socialist Party's Parliamentary Group and the Albanian Social Democratic Party's Parliamentary Group to have annulled certain legal provisions concerning limitations on the right to be elected of a certain category of persons that worked in certain positions during the period of the communist regime.

The Parliamentary Group of the Social Democratic Party of Albania and the Parliamentary Group of the Socialist Party of Albania argued that the restriction set out in Article 3 of Law no. 8001 dated 22 September 1995 "On genocide and crimes against humanity committed in Albania during the Communist regime for political, ideological and religious reasons", was unconstitutional. This restriction concerned the right to be elected to the central and local organs of power and to be nominated to the high State administration, the judicial system and the mass media until 31 December 2001, for persons who before 31 March 1991 were members of the Political Bureau and the Central Committee of the Party of Labour of Albania (and the Communist Party), Ministers, Deputies of the People's Assembly, members of the Presidential Council, Chairmen of the Supreme Court, General Prosecutors, First Secretaries of the Districts, employees of State security and collaborators with State Security and witnesses who denounced defendants in political trials.

In support of the complaint, they cited Articles 2, 4 and 8 of Law no. 7491 dated 29 April 1991 "On the major Constitutional provisions" and Articles 19, 25 and 41 of Law no. 7692 dated 31 March 1993 "On fundamental human rights and freedoms". These provisions provide for equality before the law, the guarantee of fundamental human rights and freedoms generally recognised in international documents, and the respect by the legislation of the Republic of Albania of the principles and norms generally accepted in international law, as well as for the right of election and the temporary limitation of particular rights.

Having regard to the above constitutional norms in the general context of Albanian constitutional legislation generally accepted international acts and norms, the unparalleled violation and denial of fundamental human rights and freedoms during the Communist regime as well as to the conditions of the transition, the Court considered the complaint of the parliamentary groups to be groundless, with respect to the limitation for a set time period of the right to be elected as well as of the exercise of several employment functions for the category of persons in question.

In its preamble, the Constitutional Law "On fundamental human rights and freedoms", in stating its purpose, stresses "... during the fierce and extremely inhuman 46 year dictatorship of the party state in Albania, civil and political, economic, social and cultural rights, as well as basic human freedoms, were violated and denied through state terror", and that "...the general respect for, the enjoyment of, these rights and freedoms constitutes one of the highest aspirations of the Albanian people and one of the necessary preconditions for guaranteeing the freedom of our society and social justice and democratic progress in it".

It is precisely the subjects specified in Article 3 of Law no. 8001 dated 22 September 1995 and Article 2 of Law no. 8043 dated 30 November 1995 who were the perpetrators, conceptualisers and implementers of that fierce, inhuman dictatorship which the constitutional law denounces in its preamble. Consequently, the temporary limitation of the rights of these subjects to be elected and nominated to specified State duties constitutes a guarantee for the implementation of all the constitutional provisions and international acts that have to do with fundamental human rights and freedoms.

It is true, as the Parliamentary Group of the Socialist Party propounds, that in Article 25, of the International Covenant on Civil and Political Rights it is contemplated that every citizen has the right to vote and be elected and also to take part in the management of public affairs. But, as is specified in the first paragraph of the same Article, only "unreasonable limitations" may not be made to these rights.

In addition to the above, the Court notes that the second paragraph of Article 29 of the Universal Declaration of Human Rights provides that : "in the exercise of his rights, every person is subject only to the limitations set by law and only with the purpose ... of responding to the demands of morality and general well-being in a democratic society".

Basing itself also on these provisions, the Court reaches the conclusions that the laws that are the object of investigation set out reasonable limitations that respond to the demands of the moral law of the democratic society of Albania.

The Court finds well-grounded the complaint of the Albanian Socialist Party's Parliamentary Group to repeal the point "j" of article 1 (this article provides for restrictions on the profession of mass-media employees) of Law no. 8043 "On the verification of the moral character of officials and other persons connected with the defense of the democratic State". Article 1 of this law provides for the positions where the subjects defined by Article 3 of Law no. 8001 "On genocide and crimes against humanity committed in Albania during the communist regime for political, ideological and religious reasons" cannot be placed.

By Article 2 of the Law "On fundamental human rights and freedoms" and Article 1 of Law no. 7755 "On the press", the right of the press is guaranteed. The profession of journalist is a free profession, based on initiative and personal activity, and has no connection to State duties.

The Court finds well-founded the complaint of the Albanian Socialist Party's Parliamentary Group to repeal Article 12 of Law no. 8043, dated 30 November 1995, which provides for the right of the Minister of Justice to make a request for the verification of the leadership of political parties and associations. Giving this right to the Minister of Justice is in conflict with the second paragraph of Article 6 of the Law "On the major constitutional provisions". According to this provision, political parties and other organisations are completely separate from the State. For this reason, the words "by the Minister of Justice or" shall be struck from Article 12.

Languages:

Albanian.

Identification: ALB-96-2-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 09.05.1996 / **e)** 10 / **f)** / **g)** to be published in the Official Gazette / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a public body.
Constitutional Justice – Types of litigation – Electoral disputes – Parliamentary elections.
Constitutional Justice – Procedure – Parties – *Locus standi.*
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Candidates / Electoral Commission / Electoral entity.

Headnotes:

The electoral commission of a constituency is not entitled to appeal to the Constitutional Court to set aside a decision of the Central Committee on Parliamentary Elections to the National Assembly.

Summary:

On 29 April 1996, the electoral commission of constituency no. 26 refused to register a candidate for the National Assembly proposed by the Socialist Party in its capacity as an "electoral entity" in these elections. On 4 May 1996, the Central Committee on Elections examined the complaint of the proposed candidate, decided to set aside the decision of the electoral commission of constituency no. 26, and ordered that the candidate be registered immediately. The commission of constituency no. 26, represented by its chair, brought proceedings in the Constitutional Court against the aforementioned decision of the Central Committee on Elections. The Court found that under Sections 36, 38 and 50 of Law 7556 of 4 February 1992 "On elections to the National Assembly", the institution of proceedings is a remedy which may only be used by electoral entities and candidates proposed by electoral entities, in order to ensure that the rights derived from constitutional and electoral law are respected. Accordingly it is the exclusive right of these electoral entities to bring their case before the Constituency Commission, the Central Committee on Elections or the Constitutional Court. Ultimately, the Court decided to reject the application from the Electoral Commission of constituency no. 26.

Languages:

Albanian.

Identification: ALB-96-2-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 10.05.1996 / **e)** 11 / **f)** / **g)** to be published in the Official Gazette / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a private body or individual – Political parties.
Constitutional Justice – Types of litigation – Electoral disputes – Parliamentary elections.
Constitutional Justice – The subject of review – Administrative acts.

Keywords of the alphabetical index:

Parliamentary, elections, Central Committee, decisions / Electoral entity.

Headnotes:

The Constitutional Court is responsible for examining complaints by "electoral entities" against decisions of the Central Committee on Parliamentary Elections to the National Assembly. In this particular case, the Constitutional Court examined an application by an electoral entity, namely the Christian Democrat Party of Albania, regarding the setting aside of two decisions taken by the Central Committee on Elections refusing to register the party's candidates in two constituencies.

Summary:

As an electoral entity, the Christian Democrat Party of Albania appealed to the Constitutional Court to set aside two decisions of the Central Committee on Parliamentary Elections refusing to register its candidates in two constituencies. In both cases the Central Committee on Elections found that the applications for the registration of the candidates had been submitted after the deadline prescribed by law. The Constitutional Court, having examined the matter, found that, in the first case, the necessary papers for registration of the candidate as specified in the Law on Election to the National Assembly had been delivered to the Electoral Commission of the constituency on 27 April 1996, ie. before the statutory deadline. As regards the second case, the reason for the delay was a lack of organisation on the part of the constituency commission. In conclusion, the Court decided to set aside the decisions of the Central Committee on Elections and ordered that the candidates for the delegation of the Christian Democrat Party of Albania be registered in the aforementioned constituencies.

Languages:

Albanian.

Identification: ALB-96-2-004

a) Albania / **b)** Constitutional Court / **c)** / **d)** 15.06.1996 / **e)** 24 / **f)** / **g)** to be published in the Official Gazette / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a private body or individual – Political parties.
Constitutional Justice – Types of litigation – Electoral disputes – Parliamentary elections.
Constitutional Justice – The subject of review – Presidential decrees.
Constitutional Justice – The subject of review – Administrative acts.
Constitutional Justice – Procedure – Parties – *Locus standi.*

Keywords of the alphabetical index:

Elections, Central Committee, decisions, setting aside.

Headnotes:

The Constitutional Court is responsible for examining complaints by "electoral entities" against decisions of the Central Committee on Parliamentary Elections to the National Assembly of the Republic of Albania. In the case in question, the Constitutional Court heard an application from two electoral entities, namely the Democratic Alliance Party and the Social Democratic Party of Albania, against the decision of the Central Committee on Elections and a Decree of the President of the Republic regarding the re-staging of the parliamentary elections to the National Assembly in 17 constituencies.

Summary:

As electoral entities, the Democratic Alliance Party and the Social Democratic Party of Albania appealed to the Constitutional Court requesting it to set aside the decision of 26 May 1996 of the Central Committee on Parliamentary Elections to the National Assembly, regarding the re-staging of elections in 17 constituencies, and, by extension, the annulment of the Decree of the President of the Republic setting 17 June 1996 as the day on which these elections would be held. The applicant argued that the Central Committee on Elections had already expressed its views and recognised the results of elections in all the constituencies of the Republic and that it was not entitled to go back on a previous decision. The Constitutional Court considered that the press release issued by the Central Committee on Elections on 29 May 1996 did not constitute a specific decision on its part. In response to the complaints lodged by various electoral entities and on the basis of the investigation it had conducted, the Central Committee on Elections had taken the appropriate decisions with regard to the annulment of the elections in the 17 constituencies. Therefore, this did not amount to going back on a previous decision of the Central Committee on Elections. Since the decision of the Central Committee on Elections on the annulment of the results of the elections in the 17 constituencies was lawful, the Decree of the President of the Republic on the re-staging of the elections was also legitimate. Ultimately, the Constitutional Court rejected the applications of the two aforementioned parties.

Languages:

Albanian.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court
during June 1996

- Financial claims (Article 137 B-VG): 7
- Conflicts of jurisdiction (Article 138.1 B-VG): 4
- Review of regulations (Article 139 B-VG): 57
- Review of laws (Article 140 B-VG): 40
- Review of elections (Article 141 B-VG): 1
- Appeals against decisions of administrative authorities (Article 144 B-VG): 984
  (746 declared inadmissible)

Important decisions

Identification: AUT-96-2-004

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12.06.1996 / **e)** B 2477/95 / **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:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Primary Community law and domestic non-constitutional legal instruments.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Award of contracts / Collegial authority, composition / Lawful judge.

Headnotes:

Breach of the right to a lawful judge by a decision taken by a collegial administrative authority the composition of which was contrary to the law.

Summary:

A firm brought a case to the Constitutional Court, complaining that its constitutionally guaranteed rights had been violated by a decision taken by a collegial administrative authority competent to examine a procedure for awarding a public contract. It claimed a violation of equality and the freedom to carry out a remunerated activity.

The Constitutional Court itself raised the problem of the composition of the administrative authority. The legislation in the Land of Tyrol had failed to transpose a Community directive relating to examination of decisions for awarding contracts, whereby the president of the competent authority must be a qualified judge. This rule, which is unequivocal and unconditional, guarantees the individual's right of access to an independent body composed in accordance with specified criteria. It is directly applicable and supplements domestic law.

The Court set aside the impugned decision, which had been given by a collegial administrative authority whose president had not followed any course of professional legal training and did not fulfil the other requirements laid down for a judge.

Supplementary information:

Legal provisions to which the Court referred:
Articles 83.2 and 144.1 of the federal Constitution.

Languages:

German.

Identification: AUT-96-2-005

a) Austria / **b)** Constitutional Court / **c)** / **d)** 13.06.1996 / **e)** G 1395/95, G 24/96, G 27,28/96, G 87-92/96, G 151/96 / **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:

General Principles – Proportionality.

Institutions – Executive bodies – Application of laws.
Fundamental Rights – Civil and political rights – Right to property.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Contractual freedom / Foreigners, employment / Maximum quota, foreign workers.

Headnotes:

Regulations on the work permit requirement for foreign workers and their implementing provisions constitute a limitation of contractual freedom, a guarantee forming part of the right of ownership. Any interference must strike a fair balance between the general interest of the community and the essential need to safeguard the fundamental rights of the individual.

Laying down quotas for foreigners given residence or work permits is in itself lawful. Insofar as legislation specifies a maximum number of permits allowed, it has created a rigid system. The Employment of Foreigners Act does not empower the administrative authorities, even in special circumstances, to overstep the pre-established number or to differentiate between applications according to their economic or social importance. Even when the public or macro-economic interest is at stake, the authorities cannot grant a work permit.

The court looked into this case of its own motion, following several appeals alleging the unconstitutionality of an administrative decision, and at the request of the Administrative Court. It was required to rule on two versions of the provision in question.

One of the legislative provisions being investigated was already no longer in force at the time the ruling was given. The Court concluded that it was unconstitutional. The other version under examination, the provision in force, did correspond in principle, according to the Court, to the requirements of constitutional law (proportionality of the interference, objectivity). A supplementary provision has been passed enabling the administrative authority to enact a regulation authorising the maximum contingent of work permits for foreigners to be exceeded *(Bundeshöchstzahlenüberziehungsverordnung)* if this was deemed necessary in the public interest. Thus the provision under examination no longer represented an absolute obstacle. The Court declared it unconstitutional until the entry into force of the aforementioned regulation. Thereafter the legal provisions were no longer unconstitutional.

Supplementary information:

Legal provisions to which the Court referred:
Article 5 of the Basic Law on the general rights of citizens (*Staatsgrundgesetz* 1867 – StGG)
Article 140 of the federal Constitution (B-VG).

Languages:

German.

Identification: AUT-96-2-006

a) Austria / **b)** Constitutional Court / **c)** / **d)** 19.06.1996 / **e)** V 2,3/96, V 60,61/96 / **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 – Types of claim – Referral by a court.
General Principles – Publication of laws.

Keywords of the alphabetical index:

Preliminary ruling / Publication, lawfulness / Regulations, publication.

Headnotes:

A court is not entitled to refer to the Constitutional Court an appeal challenging the unlawfulness of a regulation when it considers that it has not been published according to the statutory procedure. A regulation which has not been published in the legally prescribed way has no legal effect and cannot normally be applied by the court in a case brought before it.

Summary:

Several courts made preliminary applications to the Constitutional Court with a view to the annulment of a regulation which they suspected was not published in the legally prescribed way.

The Constitutional Court rejected the appeals on the grounds of absence of any legitimate interest: in accordance with a provision of the federal Constitution, courts are not authorised to examine the validity of regulations promulgated in the prescribed manner. Only regulations which have been published according to the appropriate procedure are applicable in a case coming before a court. Another provision of the federal Constitution stipulates that only an applicable regulation, ie a regulation which the court must apply in the matter coming before it, can be appealed against. A court's view that the regulation fails to fulfil the necessary conditions relating to publication implicitly excludes the possibility of the regulation being applied by the court, and, consequently, excludes the filing of an appeal before the Constitutional Court to annul this regulation – despite the fact that the federal Constitution does grant the Constitutional Court jurisdiction to examine and nullify regulations which have not been published in the prescribed manner. All courts – with the exception of the Constitutional Court – are required to disregard a regulation which has not been published in accordance with the correct procedure.

Supplementary information:

Legal provisions to which the Court referred:
Articles 89.1, 89.2, 139.1 and 139.3.c of the federal Constitution (B-VG).

Cross-References:

Decisions G 160,189/94, V 75,116/94 of 06.03.1994.

Languages:

German.

Belarus
Constitutional Court

Editors' note:

Following the last decision presented in this issue [BLR-96-2-012], the *Bulletin's* liaison officer at the Belarusian Constitutional Court resigned together with six others out of the 11 judges of the Court including its President.

On 24 November 1996 in Belarus a referendum was held on – among other topics – two proposals – one by the President, the other by parliamentary groups – for amendments to the Constitution. Before the referendum, the Constitutional Court had held that the referendum on these points could only be of consultative character (see below [BLR-96-2-011]).

After this decision but before the referendum, the Venice Commission had been invited by Mr Sharetsky, Speaker of the Belarusian Parliament, to give its opinion on the two proposals. The Commission found them to fall short of the minimum democratic standards of the European constitutional heritage and called upon the authorities of Belarus to abide by the decision of the Constitutional Court and to try to find a solution to the constitutional crisis which would be in harmony with European standards.

After the referendum and in spite of the decision of the Constitutional Court as well as an agreement of 22 November 1996 between himself, the Speaker of the Parliament and the President of the Constitutional Court on the consultative status of the referendum, the President signed and promulgated his constitutional draft which had been approved in the referendum.

As a consequence of these events, the Bureau of the Parliamentary Assembly of the Council of Europe decided on 13 January 1997 to suspend the special-guest status of Belarus with the Assembly.

Important decisions

Identification: BLR-96-2-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 18.06.1996 / **e)** J-37/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 3/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Constitutional Justice – The subject of review – Presidential decrees.
Institutions – Executive bodies – Territorial administrative decentralisation.

Keywords of the alphabetical index:

Executive Committees, appointment of Chairmen / Local government.

Headnotes:

Under the Constitution (Article 124) the jurisdiction, rules of establishment and activities of local government and self-government bodies shall be determined by law.

Legislation in force provides for the regulation of appointment of Chairmen of Local Executive Committees as well as determining their competence.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. The motion challenged the constitutionality and legality of Presidential Decree no. 476 of November 1995 "On the establishment of the Rule on Chairmen of the Executive Committees of the City and District of Minsk".

The Rule determines the procedure of appointment for the heads of these Executive Committees, as well as broadening their powers. This was found by the Court to be contrary to the laws and to the Constitution.

The Court emphasised that procedural issues and the legal status of the Chairman of the Executive Committee are specified by the Law "On local government in the Republic of Belarus" (Article 14.51.0).

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

Supplementary information:

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

Languages:

Belarusian, Russian.

Identification: BLR-96-2-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 25.06.1996 / **e)** J-38/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 3/1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Freedom of movement.
Fundamental Rights – Civil and political rights – Inviolability of the home.
Fundamental Rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Housing, preservation.

Headnotes:

Under the Constitution, citizens of the Republic of Belarus have the right to housing, to move freely within the borders of the Republic of Belarus, and to leave and return to Belarus unimpeded. No-one shall be arbitrarily deprived of a dwelling.

Summary:

The case was brought by the Constitutional Court at its own discretion. The Court examined the constitutionality of Article 70 of the Housing Code of the Republic of Belarus. This Article provided that in the event of a temporary absence of a tenant or his or her members of family, living accommodation is reserved for a period of six months.

The Court considered that such an absence could not itself constitute an exploitation by these persons of their housing rights and duties under the contract and be a cause in itself for depriving them of their accommodation.

Housing legislation provides for the possibility to lodge sub-tenants on terms and under conditions specified by law. A tenant may also entrust other persons – by

granting them power of attorney – with carrying out his or her rights and duties under the contract of tenancy.

The Court considered that the norms of the Housing Code, limiting the preservation of living accommodation in the event of the temporary absence of tenants to a definite period, infringed the constitutional right of citizens to housing.

Languages:

Belarusian, Russian.

Identification: BLR-96-2-007

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 27.06.1996 / **e)** J-39/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 3/1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Constitution.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
Fundamental Rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Flats, purchase, sale / Houses, purchase, sale.

Headnotes:

Citizens may freely sell their flats or purchase flats or houses in other localities. They are free to move and choose their place of residence within the borders of the Republic.

Summary:

The case was brought by the Constitutional Court at its own discretion. The Court examined the constitutionality and legality of the Supreme Council Resolution of 11 June 1993 "On the purchase and sale of flats (houses) in the Republic of Belarus" and of temporary regulations on the purchase and sale of flats (houses), passed by resolution of the Council of Ministers no. 589 of 31 August 1993. These norms provided that only residents of the Republic of Belarus had the right to purchase flats, and that flats could be sold only to residents of the locality except in cases stipulated by the legislation.

The Court stressed that under the Law "On property in the Republic of Belarus", an owner of property possesses, makes use and disposes of property belonging to him or her at his or her discretion and has the right to make any transaction affecting this property which is not prohibited by law.

The parts of the regulation that violated these principles were declared to be invalid.

Languages:

Belarusian, Russian.

Identification: BLR-96-2-008

a) Belarus / **b)** Constitutional Court / **c)** /**d)** 04.07.1996 / **e)** J-40/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 3/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Constitutional Justice – The subject of review – Presidential decrees.

Keywords of the alphabetical index:

European Charter of Local Self-Government / Local councils, exclusive powers / Local self-government.

Headnotes:

Local councils of deputies themselves decide issues related to their competence, subject to the observance of all legal requirements.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. The motion challenged the constitutionality and legality of Presidential Decree no. 519 "On some issues regarding the security of activities of local councils of representatives of the Republic of Belarus".

The Decree provides for the determination of the official salaries of chairmen of local councils of representatives as well as for some other issues concerning the organisational and technical aspects of local councils' activities and their bodies.

This decree was held to severe restriction of the powers of the executive committees of local councils in a way which did not conform to fundamental principles of local self-government, as proclaimed in the European Charter of Local Self-Government adopted by the Council of Europe.

Certain points of the Decree were thus found to being unconstitutional and invalid.

Supplementary information:

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

Languages:

Belarusian, Russian.

Identification: BLR-96-2-009

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 10.10.1996 / **e)** J-41/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Presidential decrees.
General Principles – Separation of powers.
Institutions – Head of State – Powers.

Keywords of the alphabetical index:

Personnel policy.

Headnotes:

The President shall not interfere with the process of personnel administration of other branches of power. To do so would provide an imbalance in the separation of powers and lead to an excess of executive power.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. The motion challenged the constitutionality and legality of Presidential Decree no. 464 of 14 November 1995 "On establishing a personnel register of the Head of State of the Republic of Belarus".

The Decree provides for the creation of a personnel register of the main key posts of State bodies. The Chairman of the Supreme Council emphasised that such a register has the aim to establish presidential control over the personnel policy not only in the executive bodies subordinated to him, but also over the bodies of legislative and judicial powers. By means of this register, legislative and judicial bodies could come under the total control of the President as head of the executive.

The Court found two points of the Presidential Decree to be unconstitutional and invalid:

- point 2, insofar as the personnel register would include officials whose nomination (election) is made without participation of the President;

- point 4, concerning the necessity of the President's consent to foreign business trips of heads of State bodies, which are not subordinated to the President of the Republic of Belarus.

Supplementary information:

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

Languages:

Belarusian, Russian.

Identification: BLR-96-2-010

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 17.10.1996 / **e)** J-42/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Presidential decrees.
General Principles – Separation of powers.
General Principles – Legality.
Institutions – Head of State – Powers.
Institutions – Legislative bodies – Relations with the executive bodies.

Keywords of the alphabetical index:

Parliamentary newspaper, status.

Headnotes:

Under the Law "On press and other mass media" the activities of mass media may be terminated only by the decision of the founder or by a court.

Summary:

The case was brought as a result of a constitutional motion filed by the Chairman of the Supreme Council. The motion challenged the constitutionality and legality of Presidential Decree no. 233 of 28 June 1996 "On the reorganization of the editors of the newspaper *Narodnaya Gazeta*".

The Decree provides for the transformation of *Narodnaya Gazeta* into a joint-stock company.

The Court held that *Narodnaya Gazeta* is by law a publication of the Parliament and consequently its status has to be decided upon by the Supreme Council, being the founder of the newspaper.

The Presidential Decree was found to be unconstitutional and invalid.

Languages:

Belarusian, Russian.

Identification: BLR-96-2-011

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 04.11.1996 / **e)** J-43/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Admissibility of referendums and other consultations.
Constitutional Justice – The subject of review – Constitution.

Keywords of the alphabetical index:

Constitution, amendment / Constitution, total revision / Referendum, wording.

Headnotes:

A national referendum on drafts for a new constitution or on drafts for far-reaching, sweeping changes and amendments to the existing Constitution can only be of consultative value.

Summary:

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

The Court examined the constitutionality and legality of the Resolution of the Supreme Council of 6 September 1996 "On holding a republican referendum in the Republic of Belarus and on measures for securing it".

The Supreme Council had decided to hold a referendum in the Republic of Belarus on 24 November 1996 and included on the ballot paper two draft Constitutions with amendments.

The Court held that, although according to Article 149 of the Constitution of 1994 it may be amended by referendum, such a procedure may not be applied where the amendment amounts to a rewriting of the Constitution.

According to Belarusian experts and foreign scholars in the field of constitutional law, the proposed amendments to the Constitution were *de facto* drafts of a new Constitution.

The Court also underlined that under the Law "On Referenda", the ballot paper shall be formulated as a question and not in the form of a statement.

Consequently, point 3 of the Resolution concerning the submission of draft amendments to the Constitution to the obligatory referendum was found to be unconstitutional and invalid.

Supplementary information:

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

Languages:

Belarusian, Russian.

Identification: BLR-96-2-012

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 26.11.1996 / **e)** D-45/96 / **f)** / **g)** to be published in the *Vesnik Kanstitucijnaga Suda Respubliki Belarus* (Bulletin of the Constitutional Court), no. 4/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Restrictive proceedings – Impeachment.
Constitutional Justice – Procedure – Originating document – Signature.
Constitutional Justice – Procedure – Documents lodged by the parties – Signature.
Constitutional Justice – Procedure – Parties – *Locus standi.*
Institutions – Head of State – Loss of office.
Institutions – Legislative bodies – Relations with the Head of State.

Keywords of the alphabetical index:

Presidential impeachment.

Headnotes:

Under the Constitution the motion to remove the President from office requires the support of at least seventy members of the Supreme Council.

The question whether the President has violated the Constitution shall be decided by the Constitutional Court.

Summary:

The proceedings on the presumed violation of the Constitution by the President of the Republic of Belarus A.G. Lukashenko were brought as a result of a constitutional motion filed by seventy-three members of the Supreme Council of the Republic of Belarus.

In the course of one week twelve of these delegates applied to the Court for the withdrawal of their signatures. The Court ruled that the Constitution and the laws of the Republic of Belarus do not prohibit the withdrawal of signatures in such a case.

The Court held that the number of Supreme Council members required during the examination of such a case on the merits should also be at least seventy. A lower number of signatures would result in an absence of due process.

The Court decided to terminate the case "On the violation of the Constitution of the Republic of Belarus by the President of the Republic of Belarus A. G. Lukashenko".

Supplementary information:

The decision was taken with one dissenting opinion.

This is the last decision adjudicated by the Constitutional Court of the Republic of Belarus in the composition which was formed in April 1994. Following this decision, seven judges of the Court, including the Chairman, the Deputy Chairman and the liaison officer Mr Pastukhov, have resigned.

Languages:

Belarusian, Russian.

Belgium
Court of Arbitration

Statistical data
1 May 1996 – 31 August 1996

- 25 judgments
- 29 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 27 new cases
- Average length of proceedings: 9 months
- 10 judgments concerning applications to set aside
- 9 judgments concerning preliminary points of law
- 2 judgments concerning an application for suspension
- 3 judgments settled by summary procedure (one preliminary point of law and two applications to set aside)

Important decisions

Identification: BEL-96-2-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15.05.1996 / **e)** 31/96 / **f)** / **g)** *Moniteur belge*, 25.06.1996; *Cour d'arbitrage – Arrêts* (Court of Arbitration – Judgments), 1996, 403 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Failure to pass legislation.
General Principles – Sovereignty.
General Principles – Separation of powers.
General Principles – Proportionality.
Institutions – Legislative bodies – Organisation.
Institutions – Legislative bodies – Guarantees as to the exercise of power.
Institutions – Executive bodies – The civil service.
Institutions – Courts – Jurisdiction.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Parliamentary Assembly, officials, right of appeal.

Headnotes:

The lack of a procedure granting officials of legislative assemblies the right to appeal against the administrative decisions of these assemblies or their bodies, while officials of administrative authorities can appeal to the *Conseil d'Etat* to have these authorities' administrative decisions set aside, infringes the constitutional principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution. However, this discrimination stems from a loophole in the law which the Court cannot fill. Only the introduction of relevant legislation could remedy this situation.

Summary:

A candidate for a post in the Regional Council of Brussels Capital, the legislative body of the Brussels Capital Region, appealed to the *Conseil d'Etat*, the highest administrative court, against the decision of the panel set up by the Council not to place him on the reserve list for the post. Without prejudicing the protection of their individual rights before the ordinary courts and tribunals, persons who can establish an interest may file an application to the *Conseil d'Etat* to have "the decisions and rulings of various administrative authorities" set aside by virtue of Article 14.1 of the *Conseil d'Etat*'s consolidated Acts. This provision is, however, interpreted in such a way that it does not allow for appeals to have the administrative decisions of legislative assemblies or their bodies set aside.

The *Conseil d'Etat* asked the Court of Arbitration the preliminary question as to whether Article 14, thus interpreted, did not violate the principle of equality established in Article 10 of the Constitution. The Court confirmed that the particular nature of legislative assemblies, which are elected and hold residual sovereignty, requires that their independence be fully guaranteed, but added that this did not justify the fact that officials of legislative assemblies could not appeal against the administrative decisions of these assemblies or their bodies. The lack of this judicial review procedure, which is available to officials in administrative authorities, is disproportionate to the legitimate concern of safeguarding the freedom of action of elected representatives, because the interest protected by an application to have a decision set aside is as real and legitimate for officials of legislative assemblies as it is for those of administrative authorities.

According to the Court, the real discrimination does not arise from Article 14 but from a loophole in the law, namely the fact that there is no right of appeal against the administrative decisions of legislative assemblies

or their bodies. The Court held that this situation could only be remedied by the introduction of relevant legislation, at which point consideration could be given to providing specific safeguards taking into account the independence that must be guaranteed to legislative assemblies.

Languages:

French, Dutch.

Identification: BEL-96-2-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.06.1996 / **e)** 36/96 / **f)** / **g)** *Moniteur belge*, 10.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Failure to pass legislation.
Sources of Constitutional Law – Categories – Written rules – Convention on the rights of the Child.
General Principles – Proportionality.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.
Fundamental Rights – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Maternity / Parental rights / Paternity / Recognition.

Headnotes:

Article 319.3.2 of the Civil Code, which makes recognition of paternity subject to the consent of the child when the child is over the age of 15 and when paternity has not been established by marriage, means that late recognition can be avoided and gives the child a role, which is not in itself disproportionate, in view notably of Articles 3.1 and 7.1 of the New York Convention of 20 November 1989 on the Rights of the Child. But this possibility is only open to the child in the case of late recognition by the father, not in that of late recognition by the mother. This is contrary to the constitutional principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution. The discrimination is the result of a loophole in the law which the Court cannot fill.

Summary:

A man – whose paternity was not disputed – wished to recognise a child of over 15 (ie establish the child's relationship with him by descent), but did not receive the child's consent as required by Article 319.3.2 of the Civil Code. He maintained before the court that this legislative provision was contrary to the constitutional principle of equality and non-discrimination. The court submitted this as a preliminary question to the Court of Arbitration. The Court replied that the fact that there was no procedure whereby a minor of over 15 years could refuse consent to recognition by a woman, when such a procedure existed enabling him or her to refuse consent to recognition by a man, was contrary to Articles 10 and 11 of the Constitution, but held that this discrimination did not arise from the provision to which the preliminary question related, but rather from the lack of any such measure in provisions relating to the establishment of maternal descent.

Languages:

French, Dutch.

Identification: BEL-96-2-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 12.07.1996 / **e)** 45/96 / **f)** / **g)** *Moniteur belge*, 27.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Genocide / Negationism / Revisionism.

Headnotes:

Freedom of expression is one of the fundamental requisites of a democratic society. It holds good not only for "information" or "ideas" that are received favourably or considered inoffensive or innocuous, but also for opinions that shock, disturb or go against the State or some fraction of the population. Freedom of expression is not, however, absolute. Furthermore, freedom of expression as guaranteed by Article 10 ECHR cannot be used as an argument when it goes against Article 17 ECHR.

The activities established as offences by the Act of 23 March 1995, which was designed to make negation, minimisation, justification or approval of the genocide committed by the German national socialist regime during the second world war an offence, are similar in that it is hardly conceivable to engage in such activities without wanting, if only indirectly, to rehabilitate a criminal ideology hostile to democracy and to cause serious offence to one or more categories of human beings. The Act challenged can be considered as meeting an imperative need, because the expression of such opinions is dishonourable and offensive to the memory of the victims of genocide, its survivors and in particular the Jewish people themselves. The Act can also be regarded as necessary in a democratic society: it is punitive, does not provide for any preventive measure to hinder the circulation of opinions and only punishes opinions expressed in certain places and certain circumstances, not because of their content but because of their injurious consequences for others and for democratic society as such. The Act at issue certainly does not aim to hinder scientific and critical research into the historical reality of the genocide in question or to obstruct any form of factual information on the subject.

The Act of 23 March 1995 does not violate the constitutional principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution, when read either in isolation or in combination with Articles 10 and 17 ECHR and Article 19.3 of the International Covenant on Civil and Political Rights.

Summary:

Two private individuals requested that the Act of 23 March 1995, designed to make negation, minimisation, justification or approval of the genocide committed by the German national socialist regime during the second world war an offence, be declared void. The petition of the first applicant, who was known to be revisionist and denounced the restriction of the right to freedom of expression, was held to be admissible. However, the petition of the second, who considered that the Act did not go far enough, was inadmissible. The applicant's disapproval of a law on the basis of a subjective, personal viewpoint or the feelings it evoked in him could not be accepted as evidence of the interest required by law.

With regard to the merits of the case, the Court concluded – after a thorough examination of the provisions of the Act at issue and the Court's *travaux préparatoires*, and in the light of Articles 10 and 17 ECHR and Article 19.3 of the International Covenant on Civil and Political Rights – that the applicant's claim that the Act comprised a discriminatory restriction of the right to freedom of expression in that its scope was too widely defined and that the consequences of the Act were disproportionate to the objectives pursued, could not be admitted. The grounds for the decision summarised here are particularly detailed.

Languages:

French, Dutch, German.

Bulgaria
Constitutional Court

Statistical data
1 January – 31 August 1996

Number of decisions: 13

Important decisions

Identification: BUL-96-2-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 09.02.1996 / **e)** 03/96 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette), no. 14 of 16.02.1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Legality.
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:

Taxation, principle of lawfulness.

Headnotes:

Taxation and tax assessment is an exclusive power of Parliament and in no way can it be delegated to the Executive.

Summary:

Fifty-four Members of Parliament challenged the constitutionality of Article 13.2 of the Law on Local Taxes and Fees, claiming that the provision challenged allowed the Government to apply the rate used for buildings in the assessment of the taxes for buildings, yards and sites.

The Constitution of the Republic of Bulgaria provides that taxation and tax assessment is an exclusive power to Parliament and cannot be delegated to the Executive.

The Constitutional Court ruled that the provision in question contravened the Constitution.

Languages:

Bulgarian.

Identification: BUL-96-2-002

a) *Bulgaria* / ***b)*** *Constitutional Court* / ***c)*** / ***d)*** *27.02.1996* / ***e)*** *04/96* / ***f)*** / ***g)*** *Darzhaven Vestnik* (State Gazette), no. 21 of 12.03.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Inheritance / Ownership transformation / Property seizure under communist regime.

Headnotes:

The right to inheritance is a fundamental constitutional right which cannot be limited.

Summary:

The Chief Prosecutor of the Republic of Bulgaria challenged the constitutionality of the provision of Article 90a of the Inheritance Act, specifically the text invalidating a will written after joining a co-operative farm or other related entity pooling the property of members of a co-operative the property of which is liable to restitution under the Law on Agricultural Land Ownership and Use.

Right to inheritance is a fundamental constitutional right. The real content of property as of the day of making a will is irrelevant.

The Constitutional Court ruled that the provision of Article 90a of the Inheritance Act contravened the Constitution.

Languages:

Bulgarian.

Identification: BUL-96-2-003

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 18.04.1996 / **e)** 06/96 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette), no. 40 of 10.05.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Property, control and use / Property rights, inviolability.

Headnotes:

The right to property is a fundamental constitutional right of Bulgarian citizens regardless of their residence. The Administration cannot intervene in civil proceedings to dictate the terms of a transaction.

Summary:

Fifty-one Members of Parliament challenged the constitutionality of Articles 5 and 23 of the Law on Foreign Exchange Transactions and Foreign Exchange Control. These texts qualify Bulgarian citizens to be foreign nationals depending on their residence, and compel them to approach the Ministry of Finance for a license before they transact.

The right to property is a fundamental constitutional right of Bulgarian citizens regardless of their location. The Administration, in the person of the Ministry of Finance, cannot intervene in civil proceedings and dictate the terms of a transaction. Such a move is tantamount to encroachment on the rights of the citizen and in principle limits their scope.

The Constitutional Court ruled that the above-quoted texts of the Law on Foreign Exchange Transactions and Foreign Exchange Control contravened the Constitution.

Languages:

Bulgarian.

Identification: BUL-96-2-004

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 04.06.1996 / **e)** 07/96 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette), no. 55 of 28.06.1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental rights – General questions – Limits and restrictions.
Fundamental rights – Civil and political rights – Freedom of opinion.
Fundamental rights – Civil and political rights – Freedom of expression.
Fundamental rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Media law, formal constitutionality.

Headnotes:

Freedom of opinion, freedom of expression and dissemination and the right to seek, obtain and disseminate information are fundamental human rights. Restrictions on these rights fall within the powers of the judiciary and have to comply with the Constitution.

Summary:

The President of the Republic of Bulgaria asked for a binding interpretation of the provisions of Articles 39, 40 and 41 of the Constitution of the Republic of Bulgaria. The three provisions of the Constitution cover one and the same range: freedom to express and publicise opinions; the right to seek, obtain and disseminate information; and the definition of the restrictions on these rights as laid down in the Constitution.

1. The provisions of Articles 39, 40 and 41 of the Constitution of the Republic of Bulgaria provide that the freedom to express and publicise opinions and the right to seek, obtain and disseminate information shall be fundamental human rights.

   These provisions defend the right to free expression and the dignity of the individual as an equal participant in the social community. In addition, they guarantee that everyone be informed about reality and that the public be informed about the conditions of life and development in conformity with public

opinion formed as a result of the free exchange of views.

These functions of the rights define them as essential for individual and public development. They underpin the democratic process, and more particularly the democratic manner of institutionalisation of the bodies that the Constitution provides for and the control on their functions.

The proclamation of these rights in the Constitution and their full exercise is related to a number of other fundamental human rights like the dignity of the individual, freedom of thought and freedom of conscience and political pluralism.

2. Together the three provisions defend various aspects of the right to freely express and publicise opinions and to seek, obtain and disseminate information. The three provisions are systematically and functionally related.

In addition to the fundamental right of every individual to freely express and publicise opinions, the Constitution lays down the principle that the press and other mass media shall be free. Censorship is explicitly prohibited.

The right of any physical person or legal entity to seek, obtain and disseminate information defends both the interest of the individual and the interest of the public to be informed. It covers the press and any other media. On the other hand, the Constitution guarantees that citizens should have access to information from State bodies or agencies on any matter of legitimate interest to them.

3. The rights spelled out in Articles 39, 40 and 41 of the Constitution oblige the Government to refrain from interference when these rights are exercised.

Restrictions on these rights are permissible only if other rights and interests laid down in the Constitution are to be defended constitutionally. These shall not be restricted by a law on grounds other than those described in the Constitution.

When such restrictions are imposed, the legislature, the executive and the judiciary shall take into account the high public importance of the right to express opinions, the freedom of the media and the right to information, which require that any restrictions (exceptions) to which these rights are subjected be applied restrictively and only to defend competing interests.

Among these grounds, the possibility of protecting the rights and reputation of another person is the greatest, as in this way the honour, dignity and reputation of the individual are defended. This constitutional restriction is not to be interpreted to the effect that public criticism, particularly of politicians, civil servants and government institutions, is not allowed.

The restriction of statements instigating hostility is based on the values laid down in the Constitution: tolerance, mutual respect, and the prohibition of incitement to hatred on racial, national, ethnic or religious basis. That restriction does not deny a defence to the diversity of opposite opinions. The very nature of the right to freely express and publicise opinions is based on the value attached to the competition of ideas and the opposition of differing viewpoints.

4. Along with the right to freely express and disseminate opinions in various ways, the Constitution proclaims freedom of the press and other media and prohibits censorship.

The categorical prohibition of censorship expresses the principle which rejects any interference in the activities of media by government institutions, whether by resorting to official institutionalisation of the instrument of interference or in informal ways.

For legal and technical reasons it is admissible to regulate by law organisational, structural and financial aspects of the activities of electronic media. The Transitional and Concluding Provisions of the Constitution expressly provide for the passage of such legislation in respect of National Radio and Television. Such legislation should guarantee the independence of these media in terms of organisation, structure, staff, programming and finance. The maintenance of the national electronic media as independent institutions requires the institution of corresponding governing and/or supervising bodies in a way which will frustrate attempts at undue interference by government institutions, political factors or other stakeholders in a private capacity. Such interference by government institutions would constitute censorship. The guarantee of the right of the public to obtain full, pluralist, balanced and precise information is found in the independence of operational management, editorial independence and responsibility *vis-à-vis* programme schemes and programme content, the free selection of staff and the mechanisms of funding. The right of the individual and the public to obtain full, pluralist, balanced and precise information determines the limits of legislative

competence which Parliament possesses and must exercise within the limits of the Constitution in order to enable the media to perform their functions.

The legislative competence of Parliament includes also the passing of laws to establish the procedure of licensing non-governmental electronic media in compliance with the principle in Article 40.1 of the Constitution, as well as the application of constitutional restrictions while at the same time ensuring transparency and fairness of procedures.

Measures falling within the scope of competence of the judiciary and in the conditions spelled out in the Constitution are the only permissible instruments of direct interference in the activities of the media. In the first place these are motives associated with safeguarding decorum, which is understood as a criterion of public decency established to shield the public. The interest of maintaining the moral integrity of society is a guiding principle.

5. The right to seek and obtain information covers the obligation of government institutions to ensure access to information of public significance. The content of this obligation is subject to definition by the legislature. It includes the obligation of government institutions to release official information and to ensure access to sources of information. The legislature is called upon to name the government institutions that can have free air time in the National Television and Radio, and to say when and how much time is allocated, while taking account of their prerogatives and the principle of the separation of powers, of the freedom of the media and of the right to obtain and disseminate information.

That right is granted to all, the media included. Its restriction requires that the legislature defines the relevant circumstances of national security or of public order.

This holds true of the grounds on which citizens may be refused information by government institutions or offices. The right established by these regulations is personal, being connected to a citizen's legitimate interests, and it may be restricted on the grounds that such information constitutes a State secret or other secret for which the law provides non-disclosure.

Languages:

Bulgarian.

Identification: BUL-96-2-005

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 23.07.1996 / **e)** 12/96 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette), no. 67 of 06.08.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Head of State – Status.
Institutions – Head of State – Appointment.

Keywords of the alphabetical index:

Elections / Presidential candidates, citizenship, requirements.

Headnotes:

A natural-born Bulgarian citizen who is running for President of the Republic of Bulgaria in the sense of the Constitution can only be a person who acquired Bulgarian citizenship by origin or place of birth as of the date of birth under the Bulgarian law then in force.

Summary:

Fifty-four Members of Parliament asked for a binding interpretation of the provision of Article 93.2 of the Constitution of the Republic of Bulgaria as it bore upon the question "when is a person a natural-born Bulgarian citizen and on the basis of which law shall it be judged". The request emphasised the fact that, in view of the forthcoming presidential elections, there had to be complete clarity regarding the requirements that the Constitution poses to presidential candidates.

The Constitutional Court discussed the arguments and views of the parties concerned that had approached it, and ruled as follows:

Article 93.2 of the Constitution defines the circumstances under which a person shall be eligible to be the President of the Republic. The requirements are that he or she

shall be a natural-born Bulgarian citizen over 40 years of age and qualified to be elected in the National Assembly, who has resided in the country for five years preceding the election.

Bulgarian citizenship by birth in the sense of the Constitution shall be acquired on the basis of birth and *ex lege* and not by virtue of a legal act. Acquisition of citizenship by birth is primary and is not preceded by any other citizenship.

Citizenship by birth is acquired once in a person's life, and that moment is clearly defined: the date of birth. A statutory act following a person's birth cannot deprive the person of a citizenship that has already been acquired on birth. It may happen after birth, and after the acquisition of citizenship on birth, that a person acquires new citizenship. However, this cannot be citizenship by birth. Citizenship by birth is determined by the fact of birth and by the law in force as of that date, which is what the Bulgarian legislation has always been.

The Constitutional Court did not share the concept expressed in some of the views, viz. that the discussion of the applicable law in the definition of the notion "natural-born Bulgarian citizen" is outside the prerogatives of the Court. The Court rulings concerning the applicable law are indissolubly related to the judgment as to who is a natural-born Bulgarian citizen in the sense of the Constitution.

The Constitutional Court presumed that a person acquires Bulgarian citizenship on birth if and when the provisions of the national law in force then defined him as a natural-born Bulgarian citizen.

Languages:

Bulgarian.

Canada
Supreme Court

Summaries of important decisions of the reference period 1 May 1996 – 31 August 1996 will be published in the next edition, *Bulletin* 96/3.

Croatia
Constitutional Court

Statistical data
1 May 1996 – 31 August 1996

- Cases concerning the conformity of laws with the Constitution:
  received 42, resolved 27;
  in 24 cases proposals to review the constitutionality of laws were not accepted, in 1 case the proposal was dismissed and in 2 cases the procedure was terminated.

- Cases concerning the conformity of other regulations with the Constitution and laws:
  received 23, resolved 14;
  in 6 cases the proposals to review the constitutionality and legality of regulations were not accepted, in 7 cases the proposal was dismissed and in 1 case the procedure was terminated.

- Cases concerning the protection of constitutional rights:
  received 207, resolved 121;
  in 7 cases the constitutional action was accepted, in 69 cases rejected, in 35 cases dismissed, in 3 cases forwarded to other bodies, in 4 cases the procedure was terminated and in 3 cases the petitioners were instructed on the right to submit a constitutional action.

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

- Cases concerning supervision of the constitutionality of the programmes and activities of political parties:
  received none, resolved 1.

- Cases concerning appeals to suspend temporarily the execution of individual acts based on a provision of law the constitutionality of which is under review or of acts disputed by constitutional action:
  received 18, resolved 22;
  in 8 cases the claim to suspend was accepted, in 5 cases rejected, in 6 cases dismissed, and in 3 cases the petitioners were instructed on their rights.

Important decisions

Identification: CRO-96-2-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.05.1996 / **e)** U-III-260/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 38/1996, 1469-1472 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Budget, City / Local self-government / Municipal assembly, dismissal / Statement of reasons.

Headnotes:

The effective use of a legal remedy requires that a person who is entitled to lodge this remedy must know the reasons given for the disputed act.

Summary:

According to Article 81 of the Act on Local Self-government and Administration, the government can – on the proposal of the Ministry of Administration, and if one or more prerequisites listed in that legal provision exist – dismiss the representative body of the local self-government unit and appoint its commissioner to that unit, who holds the office until a new representative body is elected. In such a case the president of the dismissed representative body is entitled to submit a constitutional action.

The mentioned prerequisites, among others, are: if a representative body fails to pass the annual budget within a period set by law; if it repeatedly passes general acts contradicting the Constitution, laws or other regulations; or because of repeated grave violations of the laws and other regulations.

The constitutional action was submitted by the President of the dismissed City of Zagreb Assembly.

The Court found that the disputed decision of the government did not state the reasons or sufficient reasons for the dismissal of the Assembly. The fact that the City of Zagreb 1996 Budget was adopted according to a procedure which was not in conformity with law – which fact later led to its repealment by the Constitutional

Court's decision of 29 April 1996 – could not be interpreted to mean that the City of Zagreb 1996 Budget had not been adopted within the period of time specified by law.

The Court accepted the claim of the constitutional action, and repealed the decisions of the government by which the Assembly of the City of Zagreb was dismissed and the commissioner of the government appointed.

Supplementary information:

A dissenting opinion of one justice states that the City of Zagreb 1996 budget was passed in the period of time prescribed by the law, but since it was later repealed by the decision of the Constitutional Court, the conclusion to follow should be that the City of Zagreb Assembly had failed to pass its annual budget within a period set by the law; since this condition provided one of the legal grounds for the dismissal of the representative body by decision of the government, there were grounds for the government's decision.

Cross-references:

The City of Zagreb 1996 Budget was repealed by decision U-II-204/1996 of 29 April 1996, published in *Narodne novine*, 33/1996.

Languages:

Croatian, English.

Identification: CRO-96-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.06.1996 / **e)** U-I-200/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 51/1996, 2178 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Boundaries, municipal / Local self-government.

Headnotes:

The constitutional right to local self-government does not include the right of a local unit to decide on its boundaries.

Summary:

A city council claimed a violation of its self-government rights arising from the law regulating territories of counties, cities and municipalities. The stated grounds of review were that the legal criteria for the determination of boundaries of municipalities failed to ensure that certain unities remained whole and complete and that they were not disrupted.

The disputed law prescribed that the boundaries of municipalities and cities should follow the borders of the cadastral communes or borders of settlements presented in the official register of spatial units. In cases when the borders are not completely determined, neighbouring local self-government units settle the boundaries by agreement, but if the agreement is not reached, the boundary shall be determined by the government on the proposal of the central State authority competent for matters concerning cadastral registers.

The Court rejected the claim of unconstitutionality.

Languages:

Croatian.

Identification: CRO-96-2-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.06.1996 / **e)** U-I-321/1992 / **f)** / **g)** *Narodne novine* (Official Gazette), 54/1996, 2232-2234 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Institutions – Executive bodies – Application of laws.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Civil law.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Flats, privatisation / Social ownership.

Headnotes:

Since the privatisation of flats is regulated by a special law, the contracts concerning sale of socially-owned flats are governed by this *lex specialis* and not by general laws regulating contractual relations.

According to the Constitution, individual provisions of a law may have a retroactive effect.

Summary:

The Court dealt with proposals to review the constitutionality of provisions of a law regulating the sale of socially-owned flats which concerned the determination of the price of flats when paid for in instalments and the manner of subsequent alterations to that price by acts of government.

The claim of unconstitutionality was not accepted.

Supplementary information:

By its ruling U-I-697/1995, also of 26 June 1996, the Court accepted 37 proposals to review the constitutionality of other provisions in the law regulating the sale of socially-owned flats, having found in connection with these provisions reasonable doubts concerning their conformity with the Constitution.

Languages:

Croatian.

Identification: CRO-96-2-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.07.1996 / **e)** U-I-274/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 61/1996, 2877-2878 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Organisation – Prosecutors / State counsel.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Freedom of opinion.
Fundamental Rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Libel / Media, press, liability of a newspaper director.

Headnotes:

Although unlawful acts against a person's honour and reputation, among which is libel, are in general prosecuted by private actions of the persons concerned, there is no violation of the constitutionally guaranteed principle of equality if the Criminal Code prescribes a special procedure for criminal prosecutions in cases of libel undertaken *ex officio* by the Prosecutor General in order to protect the work or the position of persons who perform certain duties.

Summary:

According to the Criminal Code of the Republic of Croatia as amended in March 1996 (*Narodne novine*, 28/96), if libel are committed towards the President of the Republic of Croatia, or towards the presidents of the *Sabor*, the government, the Constitutional Court and the Supreme Court, in connection with their work or position, a criminal prosecution shall be undertaken *ex officio* by the Prosecutor General after obtaining the written consent of the persons concerned; this consent may be withdrawn at any time before the sentence becomes valid.

The Croatian journalists' Association proposed the review of the constitutionality of this provision on the grounds that it differentiated as between citizens according to their social position, that it limited freedom of opinion and that it had the affect of leading self-censorship.

The Court did not accept the claim of unconstitutionality. The opinion of the Court held that the Criminal Code protects all citizens under equal conditions in cases of libel and injury. This legal protection is not lessened or changed by the disputed provision, which rather prescribed the procedure for criminal prosecutions in connection with the work or position of persons listed in that provision.

Languages:

Croatian.

Czech Republic
Constitutional Court

Introduction

1. The Constitutional Court of the Czech and Slovak Federal Republic (CSFR) was in operation from February 1992 until 31 December 1992 when the CSFR dissolved. The Constitution of the Czech Republic, adopted on 16 December 1992, made provision in Chapter 4 for the establishment of the Constitutional Court of the Czech Republic (hereinafter "the Court"). The statute regulating its operations in detail (Act no. 182/1993 Sb., on the Constitutional Court) was adopted on 16 June 1993, after which in July 1993 the first 12 members were appointed and the Court began operations. By January 1994 three other members had been appointed, making up the total membership of 15 provided for in the Constitution. Of the current Justices, four were formerly members of Parliament, four were former Justices of the CSFR Constitutional Court, four are professors, five are professional judges, and several had been lawyers in private practice.

2. The Court does not form part of the system of ordinary courts.

I. Basic texts

Chapter Four, Articles 83-89 of the Constitution.

Act no. 182/1993 Sb., on the Constitutional Court.

II. Composition and organisation

1. Composition

The Constitution provides that the Court shall consist of 15 Justices, and there are currently 15 sitting Justices. All members are appointed by the President with the consent of the Senate (the Senate was not yet established when the first 15 Justices were appointed, so the Assembly of Deputies approved them in its stead). The Chairperson of the Court and two Vice-Chairpersons are appointed by the President (consent of the Senate is not required). The Justices are appointed for a 10-year term of office, and there is no restriction on reappointment.

The minimum qualifications for appointment as a Justice of the Court are that the person have a character beyond

reproach, be eligible for election to the Senate (which means that they must have reached the age of 40 and be eligible to vote), have a university legal education, and have been active for at least ten years in the legal profession. There is no limitation on a person's eligibility to be appointed merely because she was a member of the government or of Parliament prior to her nomination. However, while holding office, a Justice may not be a member of a political party. In addition, a Justice is restricted from holding any other compensated position or engaging in any other profit-making activity with the exception of managing her own assets and engaging in scholarly, teaching, literary, or artistic activities.

Justices assume their office upon taking the following oath of office administered by the President: "I pledge upon my honour and conscience that I will protect the inviolability of natural human rights and the rights of citizens, adhere to constitutional acts, and make decisions according to my best convictions, independently and impartially."

Justices enjoy a general immunity from criminal prosecution: they may not be prosecuted for misdemeanours and may be prosecuted for felonies only if the Senate consents to the prosecution (failing which, they are for ever exempt from prosecution for the act at issue). They may be arrested only if caught in the act of committing a felony *(flagrante delicto)* or immediately afterwards. A Justice has a privilege to refuse to testify concerning matters about which he learned in connection with his judicial duties, and otherwise has a positive obligation to maintain confidentiality about such matters.

A Justice may be deprived of his seat only in a very limited number of cases: loss of eligibility for the Senate, final conviction for an intentional criminal offence, or a decision by the Court's Plenum to terminate his office due to a disciplinary infraction. The definition of a disciplinary infraction is any conduct which "lowers the esteem and dignity of the office or tends to undermine confidence in the independent and impartial decision-making of the Court, as well as any other culpable violation of the duties of a Justice" or any conduct qualifying as a misdemeanour.

The Court administration is directed by the Chairperson. Each Justice has her own staff made up of a legal assistant and a secretary. More detailed rules are contained in Act no. 182/1993 Sb.

2. Procedure

The Court acts in its Plenum or in three-Justice chambers (of which there are four). Only the Plenum may decide to annul an Act of Parliament or another generally applicable enactment, or make decisions concerning the impeachment or incapacity of the President or the dissolution of a political party. All other matters are heard by chambers: constitutional complaints by persons or municipalities, electoral or eligibility disputes concerning members of Parliament, and conflicts of competence between central State authorities and local autonomous bodies.

Oral hearings are not mandatory if parties agree to dispense with them. For the Plenum to make a decision, at least 10 Justices must be present. A super-majority of 9 Justices is required to vote in favour of a decision to annul an Act of Parliament, as well as for decisions concerning the impeachment or incapacity of the President.

III. Powers

The Court has jurisdiction over the following matters:

1. Abstract constitutional review of enacted norms (*ex post facto* or repressive control):
   a. Petitions lodged as a prerogative of office *(ex officio)*:
      i. Acts of Parliament, if proposed by the President or a group of either 41 deputies or 17 senators;
      ii. other enactments, if proposed by the government or a group of either 25 deputies or 10 senators.
   b. Petitions lodged incidental to a dispute:

      Within the context of a specific dispute, an ordinary court hearing a case, a panel of the Court when deciding a constitutional complaint, or a person in conjunction with his submission of a constitutional complaint, may submit a petition to annul an Act of Parliament or another enactment.
2. Concrete constitutional review of decisions and official Acts – Constitutional complaints:
   a. a person submitting a complaint must claim that their constitutionally protected rights have been violated and that they have exhausted all other legal remedies. Citizens do not have a general right to complain of unconstitutionality *(actio popularis)*. A petition to annul an Act of Parliament or other enactment may be attached only if it formed the basis of the violation;

b. a municipality or self-governing region must claim that the State has encroached upon its right to self-government;

c. a political party or movement must claim that it was dissolved by the government in violation of the Constitution or laws.

3. Cases concerning impeachment of the President or his incapacity to hold office.

4. Disputes concerning a member of Parliament's election or eligibility for office.

5. Jurisdictional disputes between State bodies and self-governing regions.

6. Decisions on how to implement decisions of international tribunals.

The Court has no preventive norm control and has no power to give advisory opinions.

IV. Nature and effect of judgments

1. If the Court finds a legal provision to be unconstitutional, it annuls it in whole or in part. Generally, the provision shall be annulled on the day the judgment is published in the Collection of Laws, unless the Court decides otherwise (delays it, for example, to allow Parliament time to adopt substitute legislation). Judgments concerning the impeachment or incapacity of the President or a member of Parliament's election or eligibility for office are enforceable when announced by the Court. Other judgments are enforceable when an official copy of it has been delivered to the parties.

2. Article 89 of the Constitution states that all judgments of the Court are binding on all governmental bodies and persons (*erga omnes* effect). It is still unclear whether that holds true as well for constitutional complaints, or whether they have merely *inter partes* effects. If the judgment annulled a provision on the basis of which a person was criminally convicted, the case may be reopened. Otherwise, legal decisions made or legal relations created on the basis of an unconstitutional statute remain unaffected if they arose prior to the statute being declared unconstitutional.

3. Judgments annulling an Act of Parliament or other enactment, or concerning the impeachment or incapacity of the President, must be published in the Collection of Laws *(Sbírka zákonů České republiky)*. Other judgments containing legal principles of general significance may be published in the Collection of Laws. The Court publishes its own collection at least once annually *(Sbírka nálezů a usnesení Ústavního soudu)*. This collection contains all of its judgments (including concurring and dissenting opinions).

Statistical data

1 May 1996 – 31 August 1996

- Decisions by the Plenary Court: 6
- Decisions by chambers: 26
- Number of other decisions by the Plenary Court: 9
- Number of other decisions by chambers: 356
- Number of other procedural orders: -
- Total number of decisions: 408

Important decisions

Identification: CZE-96-2-004

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 05.05.1996 / **e)** II.ÚS 98/95 / **f)** Violation of the right to counsel by the refusal to permit counsel to be present while his client is making a statement to the police / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal proceedings, safeguards / Right to counsel.

Headnotes:

By not permitting the complainant's authorised attorney to be present while the complainant was making a statement required by § 12 of the Czech National Council Act no. 283/1991 Sb., on the Police of the Czech Republic, the police violated the complainant's rights under Article 37.2 of the Charter of Fundamental Rights and Basic Freedoms, which guarantees each person in proceedings before courts or other State or public administrative bodies the right to the assistance of counsel from the very beginning of the proceedings.

Summary:

The complainant brought an action against the conduct of a policeman who had called him in to make a statement pursuant to § 12 of Act no. 283/1991 Sb., on the Police of the Czech Republic, but who did not allow his attorney to be present. The reason given for this omission was that the Act on the Police of the Czech Republic did not provide for the right of the assistance of counsel, in the circumstances in question, since the making of a statement is only a preliminary act and, under the Code of Criminal Procedure, a person's right to the assistance of counsel does not arise until the actual criminal proceeding.

The Constitutional Court came to the conclusion that the lack of appropriate legal provisions in the Act on the Police in no way alters a person's fundamental right under Article 37.2 of the Charter of Fundamental Rights and Basic Freedoms, which provides that in proceedings before a court or other State or public administrative body, any person shall be entitled, from the very beginning of the proceeding, to the assistance of counsel. In the case under consideration, the police violated this fundamental right. Therefore, the Constitutional Court ordered them to cease their unconstitutional conduct.

Languages:

Czech.

Identification: CZE-96-2-005

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 28.05.1996 / **e)** I.ÚS 127/96 / **f)** Legal definition of a coalition in an election / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a private body or individual – Political parties.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Electoral coalition, definition / Elections / Electoral subject, definition.

Headnotes:

Act no. 247/1995 Sb., on Elections to the Parliament of the Czech Republic, does not set forth conditions of public law for the creation of coalitions, nor for their activities, and does not grant to any State body the authority to decide the question whether a political party or a movement or a grouping of them should be considered to be a coalition taking part in the elections. Consequently, no State or other public body is authorised to take decisions interfering with the pre-election activities of political bodies, and it manifestly was not the intention of the legislature to intervene by public authority into the creation of electoral coalitions.

It may be inferred from the present state of the law, that it is only political bodies themselves who may decide whether they want to participate in an election as an independent (electoral) subject or as part of an (electoral) coalition. When there is a lack of other legal rules, the only relevant issue is the means by which the subject registered its list of candidates. This follows also from the fact that, in addition to political parties, the cited law also lists coalitions as among those persons authorised to submit lists of candidates for elections without any further specification or characteristics. The creation of an (electoral) coalition is subject to the agreement of the parties, which public law in no way regulates or forbids. The cited law does not attach to such actions any legal consequences for the parties presenting candidates, nor does it designate that only members of such a party may be registered in the list of candidates. Under the present legal rules, the creation of a coalition is a free act, that is, it is an expression of intention on the part of two or more political parties or movements to create a coalition, which is not subject to any further approval or review by State bodies.

Summary:

The complainant, the political party Free Democrats – National and Social Liberal Party (SD-LSNS), submitted a constitutional complaint against the decision of the Central Electoral Commission (CEC) to the effect that a registered list of candidates of SD-LSNS in the elections to the Assembly of Deputies of the Czech Parliament, held on 1 May and 1 June 1996, was in fact a list of candidates of a coalition between SD-LSNS and SPR (Party of Entrepreneurs, Farmers and Tradesmen). It objected that if this decision, which the CEC was

authorised to issue, remained in effect, then the SD-LSNS would be disadvantaged in relation to other political parties, because, instead of needing to receive 5% of all votes cast, which is what individual parties need in order to secure representatives in the Assembly of Deputies, as a two-member coalition it would need at least 7%. This decision accordingly diminished their chances for success in the elections.

The Constitutional Court agreed with the complainant because no law, not even the Electoral Act, no. 247/1995 Sb., either defines a coalition or authorises anybody, even the CEC, to decide with binding force whether a political body is a coalition or not. The term coalition is well known from political practice, deriving mostly from the co-operation between the parties of a governing coalition, which has already for a long time had a settled meaning. In other situations, the term coalition can designate various types of relationships, from mere co-operation between any parties, closer and freer liaisons, up to a level of co-operation that precedes the merging of parties. In the case that legal rules are lacking, it is necessary to be guided by the rule that only a political party itself may freely decide if it will take part in the elections as a party or as a coalition, and the political party SD-LSNS has registered as an independent electoral subject.

For these reasons, the Constitutional Court ordered the Central Electoral Commission to annul its decision, to return the SD-LSNS its status in the elections as an independent subject, and to inform the voters thereof by means of the press.

Languages:

Czech.

Identification: CZE-96-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary Session / **d)** 10.07.1996 / **e)** Pl.ÚS 35/95 / **f)** Executive bodies may not issue regulations implementing a constitutional provision where the Constitution itself requires a statute / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
General Principles – Separation of powers.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental Rights – Economic, social and cultural rights – Right to social security.
Fundamental Rights – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Fundamental rights, implementation by statute / Health care, cost-free / Health insurance, cost-free / Medical assistance.

Headnotes:

The content and extent of the conditions for and manner in which citizens may assert their right to cost-free health care can only be defined by statute. The legislature cannot avoid this duty by giving full power to an executive body to issue legal regulations having a force lesser than a statute.

The right of citizens to cost-free health insurance and medical assistance is bound to constitutional requirements as well as to the system of public health insurance. The system of public health insurance, like any other insurance system, is limited by the volume of financial resources that it receives as the result of mandatory payments made into the universal health insurance scheme under Czech National Council Act no. 592/1992 Sb., as amended.

Summary:

A group of Deputies submitted a proposal seeking the abrogation of the provisions of the Act on National Health Care and on Universal Health Insurance which empowered the government and the Ministry of Health to issue implementing regulations. They also submitted a proposal seeking the abrogation of such implementing regulations as had already been passed. The petitioners objected that limits could be placed on the constitutional right to cost-free medical health care based on public health insurance exclusively by statute.

The Constitutional Court found the petitioners' view to be correct. According to Article 31 of the Charter of Fundamental Rights and Freedoms, citizens have, on the basis of public health insurance, the right to cost free health care and to obtain medical assistance under the

conditions set by statute. The legislature's obligation to define the content and extent of the conditions for and the manner in which cost-free health care will be provided may not be discharged by authorising an executive body, i.e., the government or a Ministry, to enact legal regulations having a force lesser than a statute for defining the limits to these fundamental rights and freedoms. Under Article 78 of the Constitution of the Czech Republic, the government is empowered to issue regulations for the implementation of a statute within the limits thereof, and under Article 79.3, a Ministry may enact legal regulations, on the basis of and within the limits of a statute, only when so authorised by that statute. However, executive bodies may not assert this power in the regulation of matters which, under the Charter of Fundamental Rights and Basic Freedoms, may be regulated only by statute.

For the above-stated reasons, the Constitutional Court annulled the contested legal provisions with effect from 1 April 1997, so that a new statute in conformity with the Constitution could be adopted by that time.

Languages:

Czech.

Identification: CZE-96-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 11.07.1996 / **e)** III.ÚS 127/96 / **f)** A court's duty to amend the designation of the defendant / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Right to correct formal errors in court pleadings.

Headnotes:

If the pleadings of a party to litigation should contain an obvious error, the correction of which would cure the failure to meet procedural requirements, and if it would not require any procedural acts on the part of the court (such as the taking of evidence) to observe this obvious error, the parties to the proceeding must be given the opportunity to correct the error. To hold otherwise would be to exalt formalism, and the result would be a sophisticated justification for a manifest injustice which would, in consequence, touch upon the meaning of § 1 of the Code of Criminal Procedure, Article 90 of the Constitution, and Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms.

Summary:

The case under consideration was concerned with a restitution claim, the return of property pursuant to Act no. 87/1991 Sb., on Extra-Judicial Rehabilitation. The action was originally brought against the Municipal Office of the City of R. and, after leave was given to change the naming of the defendant to the City of R., the district court dismissed the petitioners' action. On appeal the regional court modified the judgment of the lower court in that it granted the action demanding the return of the property. The defendant appealed to the Supreme Court by means of an extraordinary remedy. However, the Supreme Court did not deal with the merits of the case. Rather it set aside the regional court decision on procedural grounds and dismissed the proceeding, stating as its reason that the Municipal Office of R., the defendant in the original complaint, as a State administrative body had no independent capacity to be a party to litigation. It stated that this is an incurable defect in meeting the procedural requirements, so that it could not be corrected by changing the name of the defendant to the City of R., which is a self-governing entity that possesses legal personality.

A constitutional complaint was filed against the Supreme Court ruling.

The Constitutional Court came to the conclusion that the complainants obviously corrected the original defect in the pleadings when, instead of a State administrative body possessing no capacity to be sued and which is not in possession of the property and hence incapable of returning it to the complainants, they filed, in the course of the litigation, a complaint against the City of R. as a local self-governing unit, which does have capacity to be sued. By deciding otherwise, the Supreme Court violated the complainant's fundamental right to a fair procedure before a court in accordance with the Constitution of the Czech Republic and the Charter of Fundamental Rights and Basic Freedoms. The Supreme Court's ruling was, therefore, quashed.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-96-2-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 12.08.1996 / **e)** I 272/1994 / **f)** / **g)** *Ugeskrift for Retsvæsen* (Danish Law Reports), 1996, 1300 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Parties – Interest.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
General Principles – Sovereignty.
General Principles – Separation of powers.
Institutions – Transfer of powers to international institutions.
Institutions – European Union – Distribution of powers between Community and member States.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Maastricht Treaty.

Headnotes:

The Treaty on European Union implies a transfer of legislative powers to the Union in respect of a number of general and important aspects of life. This is why the Act of Accession in itself is of vital importance to the Danish population in general. Ordinary citizens have thus a legal interest in having the constitutionality of the Act of Accession tried on the merits.

Summary:

In this case a judgment of the High Court *(landsret)* was quashed and the case remitted for trial before the High Court because the Supreme Court was of the opinion that the plaintiffs (the appellant) – a number of citizens of varying occupation – had the necessary legal interest in having the question of the constitutionality of the Act of Parliament regarding accession to the Treaty on European Union (Maastricht) tried. The citizens invoked especially the provision in the Constitution regarding the

powers of the legislature in foreign affairs as well as the provision regarding amendment of the Constitution.

A number of citizens had instituted legal proceedings before the High Court against the Prime Minister, claiming that the Act of Parliament regarding accession to the Treaty on European Union (Maastricht) – the Act of Accession of 28 April 1993 – was not in accordance with the provisions of Article 20.1 of the Constitution regarding the legislature's powers in foreign affairs. The plaintiffs argued that the transfer of legislative powers to the European Union was not "to a more specified extent", as required by Article 20.1 of the Constitution. Thus, accession to the treaty – according to the plaintiffs – required an amendment of the Constitution in accordance with the procedure pursuant to Article 88 of the Constitution. The High Court dismissed the plaintiffs' claim on the grounds that the citizens in question had no specific and present legal interest in having the claim admitted for the purpose of trying the question in substance. The plaintiffs appealed to the Supreme Court.

In the Supreme Court, the appellant plaintiffs argued in addition that it would constitute a violation of Article 6.1 ECHR if the Court dismissed the claim to have the constitutionality of the Act of Accession tried on the merits. This was disputed by the defendant, who moreover argued that it would be possible for citizens, in connection with legal challenges to acts of the EU institutions which affected them individually and directly, to challenge also the constitutionality of the Act of Accession.

The Supreme Court stated that the Treaty on European Union implied a transfer of legislative powers to the Union in respect of a number of general and important aspects of life. This was why the Act of Accession itself was of vital importance to the Danish population in general. The present case differed in this respect from previous cases concerning the constitutionality of Acts of Parliament. The Supreme Court therefore considered that under the circumstances there was not a sufficient basis – contrary to what was the case in the Supreme Court judgment reported in *Ugeskrift for Retsvæsen*, 1973, page 694 – to call for the demonstration of a direct and individual affect on their affairs arising from the Act in question. The Court moreover stated that such a demand was not appropriate in that it would not lead to a better clarification of the case.

The Supreme Court therefore ruled that the judgment by the High Court be quashed and that the case be remitted for trial in the High Court. The appellants were thus given an opportunity to have the case examined by a court on the merits. The judgment was given by nine judges and was unanimous.

Supplementary information:

The judgment resulted in a comprehensive public debate on the question of the relationship between the courts and the legislature, and on a possible amendment to the Constitution.

Cross-references:

Judgment of the 3rd division of the Eastern High Court of 30.06.1994.

Supreme Court judgment of 28.06.1973 in case 321/1972, reported in *Ugeskrift for Retsvæsen*, 1973, page 694.

Languages:

Danish. An English translation is pending.

Estonia
Supreme court

Statistical data
1 May 1996 – 31 August 1996

Number of decisions: 1

Important decisions

Identification: EST-96-2-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 10.05.1996 / **e)** / **f)** Declaring unconstitutional of the Law on Non-profit Unions / **g)** *Riigi Teataja I* (Official State Bulletin I) 1996, no. 35, Article 737 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Convention on the rights of the Child.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
Institutions – Legislative bodies – Relations with the Head of State.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental Rights – General questions – Entitlement to rights – Legal persons.
Fundamental Rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Non-profit association, membership / Treaties, publication / Vienna Convention on the Law of Treaties, 1969.

Headnotes:

Freedom of association, known from international law, is established in the Constitution. Article 48.1 of the Constitution reads: "Everyone has the right to form non-profit undertakings and unions. Only Estonian citizens may belong to political parties." For the purposes of the Constitution "everyone" implies all natural persons (individuals) falling within the jurisdiction of a legislative act. Pursuant to Article 9.2 of the Constitution, the rights, freedoms and duties as set out in the Constitution shall extend to legal persons.

The Constitution does connect the right to form non-profit associations to an individual's capacity under civil law. Therefore, according to the Constitution, freedom of association must also be guaranteed to minors.

Summary:

On 21 February 1996 the *Riigikogu* (Parliament) passed the Non-Profit Associations Act. The President of the Republic did not proclaim it, and sent it back to the *Riigikogu* for further discussion and re-adoption. The *Riigikogu* re-adopted the Act without any amendments to it, and the President subsequently petitioned the Supreme Court for a declaration that the Non-profit Associations Act was unconstitutional. He argued in the petition that several provisions of the Act were ambiguous, allowing for misinterpretation of the rights and freedoms of the members of non-profit associations, including religious societies. He also held that the Act was in conflict with the UN Convention on the Rights of the Child.

The Constitutional Review Chamber of the Supreme Court held that pursuant to the Constitution non-profit associations and their unions constitute one form of exercising the right of association. Article 2.1 of the Non-Profit Associations Act recognises non-profit associations that have the status of a private law legal person and Article 5 of the same act provides that only capable natural or legal persons may be the founders of such associations. Therefore, the Act restricts freedom of association as it has been established by the Constitution and by international treaties. The Non-Profit Associations Act does not allow persons under 18 years of age to found non-profit associations and thus does not give them the possibility to realise their constitutional right of association. Persons of full age who do not want to associate as private law legal persons or who, because of religious beliefs, cannot associate as private law legal persons, are also deprived of the possibility to fully realise their constitutional right of association. The Act deprives the aforementioned persons' right of association of constitutional protection.

Article 16.2 of the Act provides: "A member of a non-profit association may be excluded from the association, irrespective of what has been provided in the Statutes of the association, upon his failure to fulfil the provisions of the Statutes, decisions of the General Assembly or the board of the association or other authority, when he has caused essential damage to the association or for other weighty reasons." This provision is not in accordance with Article 14 of the Constitution which establishes that the guarantee of rights and freedoms is the duty

of the legislature, because the regulation provided by the Act is inconsistent and indefinite. The provision makes it possible to exclude members from an association on the basis and according to procedures that have not been stipulated by the Act or by the Statutes.

The Constitutional Review Chamber also found the Act to be in conflict with the UN Convention on the Rights of the Child. The Republic of Estonia acceded to the Convention on the Rights of the Child on 26 September 1991 (*Riigi Teataja* 1991, 35, 428). The accession became effective on 20 November 1991. Article 15.1 of the Convention provides that States Parties recognise the rights of the child to freedom of association, which embraces the freedom to form associations and freedom of peaceful assembly. Pursuant to Article 1 of the Convention, a child means every human being below the age of 18 years. According to Article 3 of the Convention, in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. By its accession to the Convention, Estonia recognised the rights of the child to freedom of association and the obligation of the State power to establish a pertinent legal mechanism for its protection. Proceeding from the aforesaid, Article 5 of the Non-Profit Associations Acts was held to be in conflict with Article 15.1 of the Constitution. The Constitutional Review Chamber therefore upheld the petition of the President and declared the Non-Profit Associations Act to be unconstitutional.

Supplementary information:

Pursuant to Article 3.2 of the Constitution, only published laws have obligatory force. Paragraph 5 of the decision of the Supreme Soviet of the Republic of Estonia, dated 26 September 1991, on accession to international treaties, the depository of which is the UN Secretary General, reads: "To publish in *Riigi Teataja* the UN Charter, the Statute of the International Court and the texts of all the treaties and declarations included in the appendices 1, 2 and 3 of this decision." Up to now, the decision of the Supreme Soviet on publishing international instruments has not been fulfilled. Pursuant to Article 24.1 of the Vienna Convention on the International Law of Treaties (*Riigi Teataja II* 1993, 13/14), an international treaty enters into force in such manner and upon such conditions as established by the treaty. Thus, publication of a international treaty is not a condition for its implementation, and the Convention on the Rights of the Child is binding on Estonia irrespective of the fact that it has not been published in the *Riigi Teataja*.

Languages:

Estonian.

Finland
Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 May 1996 – 31 August 1996.

France
Constitutional Council

Statistical data

1 May 1996 – 31 August 1996

34 decisions including:

- 2 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.1 of the Constitution
- 3 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution
- 28 decisions on electoral matters pursuant to Article 59 of the Constitution
- 2 decisions on the dismissal of a member of parliament pursuant to Articles LO 136 and L 202 of the Electoral Code

Important decisions

Identification: FRA-96-2-003

a) France / **b)** Constitutional Council / **c)** / **d)** 16.07.1996 / **e)** 96-377 DC / **f)** Act to strengthen the suppression of terrorism and offences against persons exercising public authority or entrusted with public service duties and containing provisions relating to the criminal police / **g)** *Journal Officiel de la République Française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 23.07.1996, 11108 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Right to a nationality.
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:

Nationality, deprivation / Night searches / Public order / Terrorism.

Headnotes:

By classifying as terrorist a mere form of behaviour, namely direct or indirect assistance to persons whose legal situation is not in order, the legislature's assessment was vitiated by manifest disproportion notwithstanding the fact that when such behaviour is directly related to the perpetration of a terrorist act it may come within the scope of penalties provided for elsewhere. The Constitutional Council also criticised the legal classification as terrorism of the offence provided for in Article 21 of the Order of 2 November 1945 on conditions of entry and residence for foreigners in France, which would have been accompanied by stiffer penalties and the application of rules of procedure deviating from the ordinary law.

Personal liberty, including in particular the inviolability of the home, is one of the civil liberties guaranteed by the Constitution. However, nocturnal visits, searches and seizures may be carried out in cases where a crime or an offence capable of being defined as terrorist is being or has just been committed (flagrante delicto cases); the requirement that authorisation to carry out such operations should emanate from the judicial authorities, as the guardians of personal liberty, and that it should be subject to appropriate procedural guarantees, may be met in such circumstances. On the other hand, these requirements are not fulfilled in the case of a preliminary inquiry or a preliminary judicial investigation.

Summary:

By providing that persons who had acquired French nationality and been convicted of a crime or an offence defined as terrorism could be deprived of French nationality, a provision of the Act in question supplemented Article 25 of the Civil Code relating to cases where deprivation of nationality may be ordered in respect of persons who have acquired French nationality. The Constitutional Council acknowledged that, in view of the extreme gravity of terrorism, this administrative penalty could be applied to persons convicted of a crime or offence constituting an act of terrorism. But it strongly underscored the principle to the effect that "From the standpoint of the law relating to nationality, persons who have acquired French nationality and persons to whom French nationality was assigned at birth have the same status".

Supplementary information:

While the Court refrained from criticising the enacted legislation, it pointed out that the text in question nevertheless fell within the case-law arising from Decision 85-187 DC, according to which the constitutionality of statutory provisions already enacted may be verified in connection with appeals contesting the constitutionality of legislative provisions by which they are amended or supplemented or by which their scope is affected.

Languages:

French.

Identification: FRA-96-2-004

a) France / **b)** Constitutional Council / **c)** / **d)** 23.07.1996 / **e)** 96-378 DC / **f)** Telecommunication Regulation Act / **g)** *Journal Officiel de la République Française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 27.07.1996, 11403 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Institutions – Courts – Jurisdiction.
Institutions – Courts – Ordinary courts.
Institutions – Courts – Administrative courts.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Administrative authority / Administrative sanctions / Fees for service provided / Local authorities / Ownership, public / Regulation of telecommunications / Telecommunications.

Headnotes:

The legislature may delegate the implementation of a constitutionally protected freedom to the regulatory

authority only on condition that the latter define the guarantees attaching thereto.

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

Summary:

The text in question raised only one other substantive question, but one specific to the French legal system, namely that of the respective areas of jurisdiction of the judiciary and the administration. In this case, the Constitutional Council acknowledged that the principle of the sound administration of justice could provide justification, in the light of the subject matter, namely a set of specific disputes relating to the interconnections of telecommunication networks, for the judiciary to be assigned jurisdiction over contentious proceedings relating to enforceable decisions adopted by an administrative authority in the exercise of public authority prerogatives.

Languages:

French.

Identification: FRA-96-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 23.07.1996 / **e)** 96-380 DC / **f)** Act relating to the national enterprise France-Télécom / **g)** *Journal Officiel de la République Française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 27.07.1996, 11408 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Powers.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.
Fundamental Rights – Collective rights.

Keywords of the alphabetical index:

Public service, privatisation.

Headnotes:

The State's guaranteed majority shareholding in a national enterprise has the effect of establishing it as community property within the meaning of the ninth preambular paragraph of the 1946 Constitution which states that "any asset or any enterprise, the operation of which has or acquires the characteristics of a national public service or a de facto monopoly, must become community property".

Compliance with the provisions of Article 34 of the Constitution, which empowers the legislature to lay down "the rules (...) concerning transfers of property in enterprises from the public to the private sector" requires that any abandonment by the State of its majority shareholding in the enterprise France-Télécom can only be the result of subsequent intervention by the legislature.

It lies within the competence of the judicial and administrative authorities to ensure strict compliance by the national enterprise with the constitutional principles governing public service from the standpoint of equality, continuity and neutrality.

Languages:

French.

Germany
Federal Constitutional Court

Statistical data

1 May 1996 – 31 August 1996

- 7 decisions by a panel *(Senat)* comprising:
  - 1 judgment concerning the forfeiture of basic rights
  - 1 judgment concerning a conflict between organs
  - 5 judgments concerning individual constitutional complaints
- 5 cases dealt with (taking into consideration the joinder of cases)
- 1510 cases rejecting decisions of the chambers *(Kammern)*, 65 cases dealt with (taking into consideration the joinder of cases), 34 cases confirming decisions of the chambers, 29 cases dealt with
- 1685 new cases

Important decisions

Identification: GER-96-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 12.03.1996 / **e)** 1 BvR 609/90; 1 BvR 692/90 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift*, 1996, 419.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Temporal effect – Postponement of temporal effect.
General Principles – Social State.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Social security.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Pensions, parents / Welfare State.

Headnotes:

It violates the principle of equality if a law on pensions takes into account the period of one year after the birth of a child for calculating the pension rights of parents who take care of their children, but limits the effects of such an entitlement if the person concerned has a right to receive a pension for this period for another reason.

Summary:

A law on pensions adopted in 1985 *(Hinterbliebenenrenten- und Erziehungszeiten-Gesetz)* provided that the period of one year after the birth of a child had to be taken into account for the calculation of the pension rights of the father or mother who took care of the child. However, if the period in question was taken into account for another reason – for example if the father or the mother paid a social security contribution during this time – the effects of such an entitlement could be limited if, taken together with the other basis on which the pension could be founded, the amount of the pension exceeded a certain sum fixed by law.

Some persons who were entitled to a pension because they took care of their children and paid a social security contribution complained that this role violated their right to equal treatment and their right to property, and brought their cases before the Federal Constitutional Court.

The Federal Constitutional Court granted the individual constitutional complaints. It held that the right to property was not violated by the law in question, notwithstanding its case-law to the effect that pensions fall under the guarantee of property. In the present case, however, the right to property could not be violated by the law, as the law in question only created the right to a pension. The Federal Constitutional Court, however, declared the law unconstitutional for violation of the right to equality; the legislator is not obliged to treat all persons equally; it may fix the criteria according to which the treatment of different persons can differ. The differentiation must be reasonable. This was not the case in the impugned law. The provision that the period in which a person takes care of his/her children has to be taken into account for the calculation of the pension did not aim at filling a gap in social security contributions, as the structure of the law showed. Therefore, the partial limitation of the effects of the entitlement by reference to whether a right to a pension arose at the same time from social security contributions could not be justified. Nor could the differentiation be based on the principle of the social welfare State, which distributes State benefits to meet concrete needs. The consideration of periods in which a person takes care of his/her children does not serve to satisfy a need, but to recognise a non-monetary

contribution to the pension system, namely that one's future pension will be paid out of the future income of the children.

As the legislator had various possibilities to remove the violation in question, the Federal Constitutional Court limited the effects of the decision to declare the law incompatible with the Basic Law, and set a time-limit of 30 June 1998 to allow the legislator to amend the law. Proceedings concerning the fixing of pensions based on the law in question had also to be suspended.

Languages:

German.

Identification: GER-96-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.04.1996 / **e)** 1 BvR 712/86 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Proportionality.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.
Fundamental Rights – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

Employment contracts / Scientific institutes / Universities.

Headnotes:

The law on fixed-term employment contracts concluded with persons working in scientific fields at universities and research institutes was found to be compatible with Article 9.3 of the Basic Law, guaranteeing the freedom to conclude employment contracts.

Not all activities of trade unions and their contractual partners are protected to the same extent by Article 9.3 of the Basic Law. Provisions of a collective agreement enjoy a stronger degree of protection than the contractual freedom of the partners in a field which had not been regulated by the partners to an agreement.

Summary:

In 1985, the legislator adopted a law providing that employment contracts with persons working at a university or a research institute in scientific fields could be limited in time. Two trade unions brought an individual constitutional complaint before the Federal Constitutional Court alleging that this power violated their freedom to conclude collective agreements as guaranteed by Article 9.3 of the Basic Law.

The Federal Constitutional Court rejected the complaint. It held that the legislative regulation infringed upon the constitutionally guaranteed freedom of association, which implies the freedom to conclude collective agreements, but it considered this infringement to be justified. The Federal Constitutional Court stated that freedom of association is guaranteed without any reserve; however, this does not impeach upon the legislator's power to rule on questions which can be subject to a collective agreement. A legislative provision can be adopted in all cases in which fundamental rights of third persons or other constitutional rights are involved. The legislative act must be proportional, i.e. freedom of association has to be taken into consideration. The constitutional protection afforded by Article 9.3 of the Basic Law against State actions is all the stronger in cases where the parties to a collective agreement are more apt to regulate a certain question. The regulation of wages and other material conditions of work as a matter of rule falls within their competence. The establishment of the possibility to conclude limited employment contracts, however, does not belong to the core of matters falling within the competence of parties to a collective agreement. By adopting a legislative provision to this end, the legislator aimed to protect freedom of research as guaranteed by Article 5.3 of the Basic Law. Because, by limiting the employment contracts of persons working in the scientific field, new persons with new ideas – in a permanently changing environment – will have access to research institutes and universities. As trade unions never were willing to regulate the question, the legislator was not obliged to wait for a contractual agreement.

The Federal Constitutional Court took a decision of the European Court of Justice into consideration in which the latter had declared that the law violated the law of the European Communities insofar as it provided for limitations on lecturers of foreign languages who are citizens of the European Communities; it rejected the arguments of the European Court of Justice, holding that it was reasonable to renew the native speakers lecturing foreign languages from time to time because otherwise

they would lose a close contact with their own language. Nonetheless, it declared that the law would not apply to lecturers from member States of the European Communities.

Supplementary information:

a. One justice wrote a dissenting opinion that the legislative regulation of fixed-term employment contracts was not necessary and, therefore, constituted a disproportionate infringement upon freedom of association. The justice argued that the universities and research institutes themselves always had refused to conclude unlimited contracts in the given field, and that there was no reason to assume that they would change their opinion in the future; legislative action was therefore not necessary to maintain the existing position.

b. Decision of the European Court of Justice concerning the compatibility of the law in question with Community law in *Neue Zeitschrift für Arbeitsrecht*, 1994, p. 115; to the same effect, cf. decision of the *Bundesarbeitsgericht*, *Neue Zeitschrift für Arbeitsrecht*, 1995, p. 1169 <1171>.

Languages:

German.

Identification: GER-96-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 29.04.1996 / **e)** 2 BvG 1/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court / **h)** *Europäische Grundrechtezeitschrift*, 1996, 319.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Sources of Constitutional Law – Categories – Written rules – Quasi-constitutional enactments.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.

Keywords of the alphabetical index:

Expropriation, compensation / Treaty on unification, competent courts.

Headnotes:

The Federal Constitutional Court is competent to decide on conflicts between the federal State and a Land which arise out of the unification treaty.

It falls within the competences of the federal State to impose a solution to a conflict of interests between land owners, whose property had been expropriated in the former zone under Soviet occupation, on the one hand, and the present users of such land, on the other hand.

Summary:

According to the Treaty on Unification, the Federal Republic of Germany committed itself vis-à-vis the German Democratic Republic not to annul the expropriations which had taken place in the Soviet occupation zone between 1945 and 1949. It reserved the right to the Parliament of the unified Germany to fix compensation for the persons who lost their property during this period.

In 1992, the government of the federal State and the governments of the new *Länder* adopted a directive according to which land should be leased to persons wanting to use it as farm land. If several persons applied for such land, in the first place the person with the best economic proposal would get the land; if the applicants had proposals of the same quality, former owners of the land would be given preference over other persons.

The Land of Brandenburg complained that this privilege of former owners constituted a violation of the Treaty on Unification by the federal State.

The Federal Constitutional Court held that, according to Article 44 of the Treaty on Unification, a Land was entitled to insist upon the fulfilment of commitments undertaken by the Federal Republic of Germany vis-à-vis the German Democratic Republic. The Federal Constitutional Court was competent to decide such a conflict, as the Treaty on Unification is itself part of constitutional law. However, it declared the application to be manifestly ill-founded. The obligation of the Federation to weigh the interests of the persons concerned in dealing with the question of the former expropriations allowed for a margin of appreciation to the legislator. A violation of this obligation could be established only if the goal of balancing the interests involved had clearly been missed. The Land of Brandenburg had not presented facts which

could support the conclusion that the Federation had violated its obligation in this sense.

Languages:

German.

Identification: GER-96-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 13.05.1996 / **e)** 2 BvL 33/93 **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift*, 1996, 407.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.

Keywords of the alphabetical index:

Forced labour, compensation / Generally recognised norm, international law / Generally recognised norm, municipal law / Qualification of a norm of public international law.

Headnotes:

There is no rule of public international law which provides that claims based on war events can be maintained only by States, not by individuals.

Summary:

According to Article 1.1 of the Law on the Consequences of the War *(Kriegsfolgengesetz)*, all claims against the German Empire lapse save as otherwise provided by this law. Article 101 of the law provides that the London Agreement on German External Debts is not affected. Article 5.2 and Article 5.4 of the Agreement declare that claims by States which were at war with Germany and those of their nationals will be examined only when all questions concerning reparations are definitively settled. Claims by States which were allies of Germany or incorporated into Germany and those of their nationals will be settled on the basis of respective treaties.

Three persons, a Hungarian, a Pole and a German, were forced to work in Auschwitz during the Second World War. They claimed between 8.700 and 22.200 DM as compensation for the work from the Federal Republic of Germany and brought the case before a German court. This court suspended its proceedings and put two questions to the Federal Constitutional Court, first, as to whether Article 1.1 of the Law on the Consequences of the War was in conformity with the Constitution and second, if there was a generally recognised rule of public international law that claims based on domestic law which follow out of war events cannot be maintained by individuals.

The Federal Constitutional Court rejected the questions of the civil court. It held that the question concerning the constitutionality of Article 1.1 of the Law on the Consequences of the War was inadmissible, as the civil court did not give sufficient reasons why this provision was relevant in the case before the Court; the civil court did not explain why the plaintiffs might have a claim under German law. Only if this question were answered positively could the question of whether a claim was precluded by the provision in question become relevant. The question concerning the existence or not of a rule under public international law to the effect that a foreign person could bring a claim before a German court was for the same reasons inadmissible. For as long as it was not proven that the plaintiffs had a claim under German law, the question of whether they as individuals could bring it before a German court or whether they were precluded by a norm of public international law to the effect that only States can claim reparation for war damages could not be proved to be relevant to the resolution of the case. The Federal Constitutional Court, however, added that an individual is not so precluded, either under municipal law or under public international law. Public international law does not include a norm which conveys the exclusive right to bring a claim for compensation for war damages only on States.

Supplementary information:

The Federal Constitutional Court declared in several decisions that Article 1.1 of the Law on the Consequences of the War was constitutional: BVerfGE 15, 126 <149 f.>; 19, 150 <165>; 23, 153 <166>; 24, 203 <214 f.>.

Languages:

German.

Identification: GER-96-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.05.1996 / **e)** 2 BvR 1938/93; 2 BvR 2315/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift*, 1996, 237.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Constitution.
Fundamental Rights – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
Fundamental Rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Refugees / Secure third country.

Headnotes:

The legislator is free to amend the Constitution within the limits of Article 79.3 of the Basic Law, which declares that certain fundamental principles such as the protection of human dignity as laid down in Article 1.1 of the Basic Law are unalterable; this establishes the criteria to be applied by the Federal Constitutional Court. The right of asylum does not fall under the special guarantee of Article 79.3 of the Basic Law.

Article 16a.2 of the Basic Law, providing that a person who enters the country from a Member State of the European Communities or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is assured, limits the right to asylum with respect to the described group of persons.

The Member States of the European Communities are by operation of the Constitution secure third States in the sense mentioned above.

The qualification of a State as a secure third country requires such a State to be party to the Geneva Convention relating to the Status of Refugees and to the European Convention on Human Rights, and it is a requirement also that it does not deport foreigners to countries where they, as they allege, are persecuted without examining whether they really are threatened by persecution, torture or inhuman treatment.

The legislator has a margin of appreciation when qualifying a country as a secure third State where the application of the above-mentioned Conventions is assured.

A foreigner subject to deportation to a secure third State where the applications of the above-mentioned Conventions is assured is precluded from alleging that this State is not secure.

The Federal Republic of Germany has to grant protection if obstacles to the deportation arise which cannot be taken into consideration in the legislative or constitutional procedure for determining the existence of a secure third State in the above-mentioned sense.

An examination of whether such obstacles exist can be required by a foreigner only if certain circumstances make it probable that he is concerned by special conditions not considered by the legislative norm which characterises the country in question as a secure third State.

Summary:

In 1993 the Federal Republic of Germany amended the constitutional provision on the right of asylum. It introduced a provision according to which a person cannot invoke the right of asylum in circumstances where such person entered the country from a Member State of the European Communities or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is assured (Article 16a.2 of the Basic Law).

Two persons entering Germany – an Iraqi woman coming from Greece and an Iranian coming from Austria – had their applications for asylum rejected because according to the courts these persons came from secure third States where the application of the above-mentioned Conventions was assured. The two persons brought individual constitutional complaints before the Federal Constitutional Court. The Federal Constitutional Court rejected the complaints on the following grounds: The constitutional legislator decided that a person who enters the Federal Republic of Germany from a secure third State cannot invoke the right of asylum. The Member States of the

European Communities – future Member States included – are determined as secure third States by the Basic Law itself. According to Article 16a.2 of the Basic Law, other States may be so characterised by the legislator if they are parties to the Geneva Convention on Refugees and to the European Convention on Human Rights and if they apply these treaties. However, the qualification as a secure third State does not presuppose that this State provides for a procedure concerning the right of asylum which is similar to that of Germany; this qualification requires only that asylum seekers must have the possibility of invoking their asylum rights before competent authorities. The legislator has a margin of appreciation in determining secure third States; its decision must be reasonable.

An authority or a court is not obliged to prove through which country the asylum seeker came. As all neighbour States of the Federal Republic of Germany are considered to be secure third States, a foreigner entering the Federal Republic of Germany by land cannot invoke the right of asylum. He/she is also precluded from alleging that the third State qualified as secure does not respect the Geneva Convention on Refugees or the European Convention on Human Rights. The Federal Republic of Germany, however, must grant protection if there exist circumstances which exclude a deportation and if these circumstances were not considered by the actual legislation on asylum – as for example the threat of the imposition of the death penalty in the third State.

Supplementary information:

On the same day, the Federal Constitutional Court issued two other decisions concerning the constitutional amendments of the right of asylum, namely: 2 BvR 1507/93; 2 BvR 1508/93, *Bulletin* 96/2 [GER-96-2-015] and 2 BvR 1516/93, *Bulletin* 96/2 [GER-96-2-016].

Languages:

German.

Identification: GER-96-2-015

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.05.1996 / **e)** 2 BvR 1507/93; 2 BvR 1508/93 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift*, 1996, 256.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Constitution.
Fundamental Rights – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
Fundamental Rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Refugees / Secure State of origin, presumption.

Headnotes:

Article 16a.3 of the Basic Law, which provides for the possibility of rejecting an application for asylum by persons who come from a secure State of origin, does not limit the effects of the right of asylum enjoyed by such persons, because Article 16a.4 of the Basic Law provides for the possibility for those persons to prove that the State presumed to be secure persecutes them.

The qualification of a State as a secure State of origin requires that there exists in such a protection against any political persecution in all parts of the country and for all groups of persons.

The guarantee of protection against inhuman and degrading punishment or treatment, as required by Article 16a.3 of the Basic Law, ensures with reference also to Article 3 ECHR that such State acts are considered in examinating whether a person is politically persecuted.

The qualification of a State as a secure State of origin requires that the legislator bases its judgement on the circumstances which are relevant to political persecution and on the legal situation, the application of the law, and the general political situation.

The law qualifying a State as a secure State of origin implements the Constitution. The legislator has a margin of appreciation in collecting and evaluating the facts.

The review of the legislative decision is limited to the question of whether the legislator based its decision on good reasons.

Article 16a.3 of the Basic Law does not establish a presumption that a foreigner is not threatened by inhuman and degrading treatment. The presumption that a State of origin is secure can only be defeated by the allegation that the fear of political persecution is based on an individual risk of persecution.

Summary:

The amendment of the constitutionally guaranteed right of asylum in 1993 introduced in its Article 16a.3 of the Basic Law the possibility for the legislator to establish by law that a certain State was to be considered as a secure State of origin. However, a person who claims to be politically persecuted can present facts to this end.

Two persons coming from a so called secure third State – both from Ghana – applied for asylum in the Federal Republic of Germany. Their applications were rejected, and the asylum seekers brought individual constitutional complaints before the Federal Constitutional Court. The Court rejected the complaints. It stated that Article 16a.3 of the Basic Law – contrary to Article 16a.2 of the Basic Law – does not generally restrict the right of asylum of certain persons, namely those coming from secure countries of origin. It just modifies the procedure. The legislator may determine those States which are to be qualified as secure States of origin, whereas the courts have to investigate all facts presented by an asylum seeker which could prove that in a given case the State in question persecutes the person on political grounds. The ordinary courts have to state if the qualification of a State as secure by law violates the Basic Law; in such a case they have to bring the question before the Federal Constitutional Court.

The determination of a secure State of origin presupposes that there is no persecution on any part of the territory of this State and of no group, and that no inhuman or degrading treatment takes place. The mere fact that the death penalty is applied does not exclude that such a State can be declared secure. If an asylum seeker from a secure State of origin is threatened by the death penalty, he/she has a right to stay in Germany. The legal practice and the general political situation have to be taken into account for the qualification of a State as a secure one. The legislator has a margin of appreciation in determining if a State can be considered to be secure. The Federal Constitutional Court can only review the question of whether the qualification of a State of origin by the legislator is reasonable.

The presumption of a secure State of origin encompasses not only that there is no political persecution in this State but, further, that there is no other obstacle to deportation to this State. However, it is not extended to the absence of inhuman and degrading treatment. The presumption that a State is secure can be removed by concrete facts which give reason to think that an asylum seeker will be persecuted in the State presumed to be secure.

Supplementary information:

The President of the Federal Constitutional Court wrote a dissenting opinion, stating that the legislator has no margin of appreciation in determining whether a country can be considered to be a secure State of origin. The legislator has no alternative but to apply the criteria set up by the Basic Law. Contrary to the majority, the President considered the qualification of Ghana as a secure State of origin to be erroneous. Two other justices joined her in this last point.

On the same day, the Federal Constitutional Court issued two other decisions concerning the constitutional amendments to the right of asylum, namely: 2 BvR 1938/93; 2 BvR 2315/93, *Bulletin* 96/2 [GER-96-2-014] and 2 BvR 1516/93, *Bulletin* 96/2 [GER-96-2-016].

Languages:

German.

Identification: GER-96-2-016

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.05.1996 / **e)** 2 BvR 1516/93 **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts*, (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift*, 1996, 271.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Constitution.
Constitutional Justice – Decisions – Types – Interim measures.
Fundamental Rights – Civil and political rights – Freedom of movement.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Judicial protection, effectiveness / Right to sojourn, exclusion.

Headnotes:

Article 16a.4 of the Basic Law restricts the possibilities of remaining in the Federal Republic of Germany during proceedings in an asylum case if the claim is manifestly ill-founded.

The administrative court has to investigate if the qualification of an application for asylum as manifestly ill-founded is justified.

The restriction of the sojourn of asylum seekers to the transit-area of the airport if they came by air is not an infringement upon their freedom of movement.

The right to effective legal protection by a court requires that the protection can realistically be availed of. A person without a lawyer must have the chance to consult with a qualified person.

The application for an interim injunction must be presented within three days. However, the reasons for the application can be presented after another four days.

The requirements of effective legal protection by a court cannot be extended to the interim injunction of the Federal Constitutional Court, as this remedy is not an ordinary one.

Summary:

In 1993 the Federal Republic of Germany amended its constitutional provisions on the right of asylum. It introduced a provision according to which, in cases in which the application for asylum is manifestly ill-founded or seems to be manifestly ill-founded, measures aimed at terminating the stay of an asylum seeker in the Federal Republic of Germany can only be suspended if the measure in question is subject to serious doubts with respect to its lawfulness.

An application for asylum is in general manifestly ill-founded if an asylum seeker comes from a country which is defined as secure by the legislator. A special procedure has been introduced for persons seeking asylum who enter the Federal Republic of Germany through an airport. Persons without a passport or an equivalent document or those coming from a State defined by the legislator as secure will not get permission to enter the Federal Republic of Germany. They may apply for asylum at the airport. If the competent authority does not decide on the application within two days, these persons may enter the Federal Republic of Germany. If this authority declares the application manifestly ill-founded, the asylum seeker does not get the permission to enter the Federal Republic of Germany. Within three days, the asylum seeker can bring a claim before the administrative court and apply for an interim injunction. This application is granted only in those cases in which the rejection of his application to enter the Federal Republic is subject to serious doubts. If the court does not decide within fourteen days, the asylum seeker has the right to enter the Federal Republic of Germany.

The Federal Constitutional Court found this procedure to be constitutional. It declared that in cases in which persons from countries defined by the legislator as secure come to Germany, the proceedings on an application for asylum can take place in accordance with this accelerated procedure, as the questions at stake generally might be quite easy. So does the extension of this procedure to persons without documents violate the Constitution, as these persons can be brought back to their countries of origin or from where they entered the Federal Republic of Germany only if the proceedings on their application were terminated before. The Federal Constitutional Court concluded that the proceedings as provided by the law on asylum fulfilled the requirements of the guarantee of legal protection by a court, on the grounds that the asylum seeker has enough possibilities to present the facts of his case and to get the help of an interpreter and a lawyer. The Federal Constitutional Court stated that the possibility of deporting an asylum seeker whose application for an interim injunction has been rejected by an administrative court before he gets the reasons of this decision in written form does not violate the right to an effective legal defence. On the one hand, the reasons will be given in oral form, and on the other hand the decision is final. Therefore the reasons for the decisions are not essential to obtaining further legal protection from a court.

The Federal Constitutional Court held that the quick return of a person who was refused entry – before such person could bring the case before the Federal Constitutional Court – did not infringe upon the right to effective legal protection by a court, as the individual constitutional complaint is not an ordinary remedy and it does not suspend the effects of a judicial decision which is subject to a proceeding before the Federal Constitutional Court. The competence of the Federal Constitutional Court to grant an interim injunction does not afford full protection against any negative consequence of the execution of a decision impugned by an individual constitutional complaint. Article 16a.4 of the Basic Law provides for the possibility of obtaining an interim injunction against

a decision of the competent authority concerning the right of asylum only in cases where there are serious doubts with respect to the legality of the respective decision. Therefore, the Federal Constitutional Court is restricted in the exercise of its power to issue an interim injunction. The interim injunction must not become the rule, but must be reserved to exceptional cases.

Supplementary information:

a. Three justices wrote a dissenting opinion. They disagreed with the majority on the question of the function of the interim injunction of the Federal Constitutional Court. They pointed out that the proceedings based on an individual constitutional complaint must grant an effective protection. If necessary, they require an interim injunction which impedes the execution of an impugned act. Otherwise the protection by the Federal Constitutional Court would become ineffective. This might be the case especially in proceedings initiated by asylum seekers. According to them, the opinion of the majority, which declares that the interim injunction issued by the Federal Constitutional Court has to be limited to very exceptional cases, is erroneous.

b. On the same day, the Federal Constitutional Court issued two other decisions concerning the constitutional amendments of the right of asylum, namely: 2 BvR 1938/93; 2 BvR 2315/93, *Bulletin* 96/2 [GER-96-2-014] and 2 BvR 1507/93; 1508/93, *Bulletin* 96/2 [GER-96-2-015].

Languages:

German.

Identification: GER-96-2-017

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 21.05.1996 / **e)** 2 BvE 1/95 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts*, (Official Digest of the Decisions of the Federal Constitutional Court) **h)** *Europäische Grundrechtezeitschrift*, 1996, 412.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Fact-finding committee / German Democratic Republic / Ministry of Counter-Intelligence.

Headnotes:

The constitutional status of a deputy is affected if the legitimacy of his mandate is put into question by an inquiry of a parliamentary fact-finding commission. Such a procedure is only admissible in exceptional cases where the federal parliament wants to inquire into the comportment of a deputy before his election in order to defend its integrity and political reliability.

Taking into account the transition from a dictatorship to a democracy in the new *Länder*, the federal parliament could introduce a procedure to inquire – under certain circumstances – into the activities and responsibilities of a deputy in respect of the Ministry of Counter-Intelligence.

Such a procedure must encompass guarantees in respect of the status of the deputy. He/she must have the possibility to participate in the procedure.

Summary:

According to a provision of the law on the status of deputies as amended in 1992, members of Parliament can apply for an inquiry into their activities in respect of the Ministry of Counter-Intelligence of the former German Democratic Republic (GDR). Such an inquiry can take place without the deputy's consent if the parliamentary commission for electoral scrutiny has a concrete suspicion that a deputy exercised such an activity.

The deputy concerned by the inquiry has to be heard by the commission. The members of the commission have to keep their knowledge on personal data of the deputy subject to the inquiry under lock and key. A deputy whose activities had become subject to such an inquiry brought the case before the Federal Constitutional Court in the form of a conflict between organs; he alleged that his rights as a deputy were violated by the provisions concerning the possibility to initiate inquiries into the activities of a deputy. Further, he alleged that his rights had been infringed by the concrete inquiry; third, his complaint was directed against the publication of an

expert opinion concerning him; fourth, he challenged the allegations of some members of the commission on scrutiny and of Parliament contained in the expertise concerning his activities for the former Ministry of Counter-Intelligence.

The Federal Constitutional Court held that the complaint was inadmissible insofar as it was directed against the provisions of the law, as the deputy was directly affected not by these provisions but by their application. The third and fourth point of the complaint were declared inadmissible, on the grounds that the complaint did not disclose a violation of one of the deputy's rights. For the rest, the Federal Constitutional Court declared the complaint to be unfounded. It pointed out that, on one hand, the status of a deputy is affected by an attack against the legitimacy of his mandate. An inquiry into the activities of a deputy may affect legitimacy in this sense. In general, Parliament had no competence to put a deputy's legitimacy into question. The Federal Constitutional Court stated, however, that the transition from a dictatorship to a democracy, as in the new *Länder*, allowed for an exception to the rule. As the Ministry of Counter-Intelligence of the former GDR violated the fundamental rights of people in many cases, there was a public interest in investigating whether deputies of Parliament were involved in the activities of this organ, in order to protect the reputation of Parliament. In this case, each deputy who is subject to such an inquiry may actively participate in the investigation.

Languages:

German.

Identification: GER-96-2-018

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 22.05.1996 / **e)** 1 BvR 744/88; 1 BvR 60/89; 1 BvR 1519/91 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court) / **h)** *Europäische Grundrechtezeitschrift*, 1996, 426.

Keywords of the systematic thesaurus:

Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Pharmacists, advertising.

Headnotes:

Far-reaching restrictions concerning advertising by pharmacists established by professional statutes of panels of pharmacists were held to violate the freedom to exercise one's profession.

Summary:

According to the professional statutes based on law and adopted by regional panels of pharmacists, pharmacists are restricted in advertising the products they sell. This shall protect their professional image as specialists who first of all serve the health of their clients and not their own profit. Further, the restrictions aim at minimising the danger of abuse of medicine.

Three pharmacists were fined for excessive advertising in newspapers and in other forms. They brought individual constitutional complaints before the Federal Constitutional Court. The Federal Constitutional Court held that the freedom to exercise one's profession guaranteed by Article 12 of the Basic Law implied the right to demonstrate one's own activity or one's own products sold in the exercise of one's profession. Any restriction required a legislative basis which is sufficiently justified by its goals and proportional with respect to the fundamental law. In this sense, the prohibition of advertising which violates the provisions of the law against unfair competition or which leads to the abuse of medicine is compatible with the Constitution. However, it violates Article 12 of the Basic Law if a professional statute forbids a pharmacist from sending advertising letters or distributing leaflets, because the public interest is not impaired by such activities.

Languages:

German.

Identification: GER-96-2-019

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 29.05.1996 / **e)** 2 BvR 66/96 / **f)** / **g)** / **h)** *Europäische Grundrechtezeitschrift*, 1996, 324.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Fundamental Rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Anti-torture Committee / Extradition and torture / Terrorist acts.

Headnotes:

An extradition is in general not prohibited by the Constitution if the respective demand is based on the allegation that the person committed terrorist acts, even if such acts may be said to serve political goals.

The principle of the State governed by the rule of law does not prohibit the use of evidence against a person which was gained by illegal acts against another person.

Summary:

A Spanish citizen, being in Germany, was blamed for having participated in terrorist acts. Spain applied for the extradition of this person. The person said that the Spanish police only got information on him because it tortured another person; that the acts of which he was accused were of a political character; and finally that he would risk his life in a Spanish prison as he suffered from Aids, for which adequate treatment could not be guaranteed in the prison. The Spaniard applied for asylum. A German court decided that he had to be extradited.

The Federal Constitutional Court rejected the individual constitutional complaint. It stated that the ordinary court did not violate the fundamental right of asylum by permitting the extradition because the activities of the Spaniard for which the extradition was demanded could not be qualified as political; membership in a terrorist group, of which he was accused, could not be considered to be a political act just because political motives were involved in the joining of this group. A person committing terrorist acts generally has no right to asylum, except for cases in which certain circumstances – for example the intensity of the measures of persecution – give reason to think that the person is persecuted on political grounds.

The Federal Constitutional Court stated further that the ordinary court did not violate the constitutional prohibition on extraditing a person to a country in which the minimum standard of public international law in a criminal persecution are not respected. A single violation of another person's rights by organs of the State demanding the extradition did not constitute proof of a risk for the person to be extradited. With reference to a report of the Committee for the Prevention of Torture, based on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Federal Constitutional Court came to the conclusion that there were no circumstances in which the Spaniard would be treated in a Spanish prison in a way which would operate to exclude his extradition. Finally, the Federal Constitutional Court did not find any facts which would lead to the conclusion that the Spanish courts would use evidence against the Spaniard which was obtained by illegal methods. This is forbidden by Spanish law. The use of evidence which Spanish organs obtained through the torture of another person was not forbidden by international law, as alleged in the given case, nor did it constitute a violation of a minimum standard of the Basic Law.

Languages:

German.

Identification: GER-96-2-020

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 15.08.1996 / **e)** 2 BvR 1075/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – International treaties.
Fundamental Rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Hague Convention, child abduction / International child abduction, civil aspects.

Headnotes:

The Hague Convention on the Civil Aspects of Child Abduction resolves the tensions between the interests of the child, of the father and of the mother in cases of child abduction in a way which does not raise doubts as to its constitutionality.

Summary:

A couple with one child, all of them living in the U.S.A., obtained a divorce. The mother was awarded physical and psychological custody of the child; the father had a right to regular contacts. The mother took the child to Germany to establish her permanent residence there without seeking the father's consent, although she was obliged to do so. A U.S. court transfered custody to the father. Upon application by the father, a German court came to the conclusion, based on the Hague Convention on the Civil Aspects of Child Abduction, that the child had to be brought back to the U.S.A. After exhaustion of all remedies, the mother brought a constitutional claim before the Federal Constitutional Court which stated that the Hague Convention is fully compatible with the right to family life as guaranteed by the Basic Law. The interests of the child were sufficiently protected by Article 13 of the Convention, according to which restitution is not mandatory if it impaired the child's well-being. Article 14 of the Hague Convention, providing for the possibility that courts may take into consideration the law and the decisions of the courts of the country in which the child used to live without a formal recognition of these acts, was not unconstitutional. The provision was justified by the necessity of a speedy decision which serves the interests of the child.

Languages:

German.

Greece
Council of State

Important decisions

Identification: GRE-96-2-001

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 24.05.1996 / **e)** 2540/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

Education, public higher.

Headnotes:

In accordance with the principle of equality, which is enshrined in the Greek Constitution, the legislature is required as far as possible to treat all Greek citizens in identical or similar circumstances in the same way. It must not create inequalities, in particular privileges or arbitrary discriminations, that cannot be justified by reference to generally accepted ideas of justice.

Under the system used to select people for admission to higher education, candidates are entitled to keep their entrance examination marks in one or more subjects and, if the candidate so desires, the selection procedure lasts for three academic years, with the result that candidates' proficiency is assessed over that three-year period.

Since all candidates can avail themselves of these mark-keeping arrangements, they are all afforded the same opportunities over a three-year period. The system established by the legislature, which is generally applicable and objective, is therefore not at variance with the principle of equality.

Summary:

Selection of candidates sitting the examination for admission to higher education, where a limited number

of places is available, is organised according to a system laid down by law. The system in question has often been criticised. The legislation provides for a procedure lasting several academic years. A candidate who so wishes is allowed to sit papers in a limited number of subjects each year and to keep the marks the following year. Moreover, candidates who sit all the papers at one time and fail to reach the minimum standard required are allowed to keep the marks they obtained in certain subjects, which they are exempted from resitting the following academic year.

In the case before the State Council the applicant, who was seeking admission to higher education, had sat the examination for the first time in 1992. Since he did not reach the minimum standard required for admission, he resat the examination in 1993 and 1994. In 1994, as part of the admission process, he sat the English papers. On taking part in the examination for the fourth time in 1995, the applicant resat papers in the general subjects but not in English since he thought that in that specific subject he would keep the mark he had obtained in 1994. When the results were published, the mark he had obtained in English in 1994 had not been added to his mark for the general subjects in 1995. Since he had not reached the required standard for admission to higher education the applicant initiated judicial review proceedings on the ground of abuse of authority, maintaining that the way in which the results had been calculated was unlawful.

In the Judicial Division having jurisdiction to deal with his application, the majority held that the rules allowing the previous year's marks to be kept were unconstitutional. Having corrected the erroneous reasons given for the impugned decision, the Division held that the applicant's exclusion was lawful, but referred the case to the State Council's General Assembly in view of the matter's importance.

In the General Assembly a large majority of the judges deemed that the rules were in conformity with the Constitution and, in particular, with the principle of equality. The majority opinion was that the system's compliance with the principle of equality was guaranteed since all candidates were granted the privilege of being allowed to carry over their marks. A dissenting opinion was issued, in which the grounds and arguments of the judgment referring the case to the Assembly were reiterated: the limited number of places available in higher education establishments made it necessary to select the most proficient candidates by means of an entrance examination. In accordance with the principle of equality, candidates sitting the entrance examination should all be examined under the same conditions with regard to the number of subjects they had to prepare and the difficulty of the questions they were asked. The system laid down by law, whereby candidates were entitled to keep their marks in one or more subjects and were at a considerable advantage when sitting the following year's papers, established an unjustified privilege in favour of candidates who resat the examination and was unfair to candidates sitting the examination for the first time.

Supplementary information:

It should be noted that the case was decided within a very short period as the constitutionality issue had to be settled before the first examination paper was sat in 1996. The application had been lodged on 26 October 1995, it was examined by the division on 11 March 1996, the General Assembly held a public hearing on 24 May 1996, and the final judgment was delivered the same day.

The rules on carrying over of marks had been severely criticised in the past. The State Council's decision led to a resumption of the debate, and the government have announced that steps will be taken to change the system.

Languages:

Greek.

Identification: GRE-96-2-002

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 14.06.1996 / **e)** 2979/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
General Principles – Relations between the State and bodies of a religious or ideological nature.
General Principles – Legality.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Administrative measure / Church / Right of appeal / Rule of law.

Headnotes:

A ban on taking and giving Communion imposed on ministers of the Orthodox Church is a measure which is religious in substance, provided for under the law of the Church, and is not an enforceable administrative measure subject to direct or interlocutory judicial review. However, a decision to dismiss a minister of the Church from administrative office pursuant to the Church's Constitutional Charter, which is a law of the State, is subject to judicial review by the State Council. That court nevertheless has no jurisdiction to determine the lawfulness of the religious measure that led to the dismissal.

Summary:

After the fall of the dictatorial regime in 1974 a constitutional law provided for measures to restore order within the Orthodox Church in Greece. Some metropolitans had been removed from office pursuant to these exceptional measures, which banned any action in the courts to challenge the purge. Subsequently the legislature took steps to restore the possibility of judicial review, and the metropolitans who had been dismissed applied to the State Council, alleging *inter alia* that the decisions concerning them had infringed their right to a fair trial in that they were not given a hearing. The State Council overturned the impugned decisions. The dismissed metropolitans' return to office led to an open conflict both within the Church hierarchy and among church-goers. Following outbreaks of violence, the Church authorities took measures against the metropolitans whose right to hold office had been called into question, banishing them from the ecclesiastical community and banning them from taking part in the rite of the Eucharist and from carrying out any liturgical act.

On the basis of the measures taken by the Church authorities, the government revoked the decrees appointing the metropolitans to office. Having been asked to set aside the government's decisions on the ground that they were *ultra vires*, the State Council reasoned that a distinction must be made between the decrees of revocation, which were enforceable administrative measures, and the measures taken by the Church against its ministers pursuant to its own law.

The majority opinion was that the ban on Communion was not provided for by a law of the State. This measure came within the ambit of the Orthodox Church's relationship with the clergy, who were members of the ecclesiastical community of their own free will. The measure had been taken by the Church in its capacity as a religious institution and was provided for in the law of the Church. Moreover, under the Church's Constitutional Charter, which was a law of the State, holders of the office of metropolitan, as an administrative office within the Church, were required to be fully capable of fulfilling the religious duties inherent in that office. Where a ban on Communion had been pronounced, the government was under an obligation to take an administrative measure removing the metropolitan from office. This administrative measure was subject to judicial review by the State Council, which nevertheless confined itself to examining whether the conditions and formalities provided for by law had been complied with. The court did not in any way review the measure taken by the Church, since the religious nature of that measure placed it outside the court's jurisdiction.

A different reasoning was followed in a dissenting opinion. Where the ban on Communion had administrative consequences such as to deprive the person concerned of all authority, the Holy Synod's decision pronouncing the ban was of the nature of an enforceable administrative measure and was subject to judicial review by the State Council. Any decision to the contrary would be incompatible with the rule whereby administrative measures must comply with the law, which was binding on the Church as a legal entity under public law. In such circumstances a finding that the State Council lacked jurisdiction would mean that a measure with administrative consequences escaped judicial review.

Languages:

Greek.

Identification: GRE-96-2-003

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 20.06.1996 / **e)** 3175/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
General Principles – Separation of powers.
Institutions – Public finances – Budget.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Legislative ratification / Regulatory authority / Right of appeal / State budget.

Headnotes:

An Act which, firstly, amends earlier rules on obligatory information to be included in regulations and, secondly, ratifies decrees already issued in disregard of the pre-existing rules, has no impact on the legal nature of the decrees in question, which remain regulatory instruments and can be appealed against on the ground that they are *ultra vires*.

The Act ratifying the impugned decrees while proceedings for their annulment were in progress was not at variance with the Constitution, which enshrines the principle of the separation of powers and the right of appeal to the State Council, since the purpose of the legislature's action was not to solve a given dispute but to guarantee the proper functioning of a large number of local authorities, which had been jeopardised by flaws in the decrees merging certain municipalities.

Summary:

Under a rule adopted to reinforce public expenditure controls, administrative regulations issued under an enabling statute are subject to special rules where expenses will be incurred in implementing them. Such regulations can be issued only where a corresponding budget appropriation has been recorded. A clause is inserted at the end of such regulations, specifying the amount of the expenditure involved, any arrangements to spread it over a number of years and the budgetary appropriations allowing the collection of the sum in question.

However, in some cases it is difficult to calculate the exact expenditure involved. In cases of this kind, in accordance with a practice approved by the State Council when the decrees were being drawn up (pursuant to the Constitution the State Council's opinion is sought before decrees of a regulatory nature are issued), the regulatory instrument stipulates that the amount of the expenditure cannot be calculated.

It had been particularly difficult to assess public expenditures in the case of the decrees merging certain local authorities. Having been asked to review the lawfulness of such a decree, the State Council's VIth Judicial Division found *ex officio* that the decree was procedurally flawed since indication of the amount of the expenditure – even if only approximate – and of the means of collection was an essential formality, failure to comply with which was a ground for annulling the merger decree.

In contrast with the flexible attitude adopted by the State Council when fulfilling its consultative role, the Judicial Division held that if it was impossible to determine the amount of the expenditure, the regulatory instrument in question could not be issued. The judges opted for this strict interpretation in order to counter any breach of the law. Under the pretext of such difficulties, an authority issuing regulations might be tempted to disregard a rule which had its basis in similar constitutional provisions and which was intended to guarantee control over the management of public funds.

In view of the question's importance, the case was referred to the General Assembly. In the meantime, the legislature, fearing the consequences of an annulment, took action to remedy the situation. An Act was passed whereby in the case of certain decrees altering the situation of local authorities – a category which included the merger decrees – it was no longer necessary to indicate the estimated expenditure. Moreover, the mergers that had already taken place were declared valid.

The question therefore arose whether the purpose of that Act was to remedy the specific flaw in the decrees in question without affecting their status as administrative decisions, or whether the legislature had ratified the impugned decrees *ab initio*, thereby changing their legal nature and making good any legal flaw whatsoever.

The majority held that the Act had in no way affected the nature of the decrees. The legislature had deemed it necessary, with regard to a specific category of regulatory instruments, to make an exception to the general rule requiring that the amount of the expenditure and the means of collection be indicated. To complete the new arrangements it had taken a transitional measure in order to settle the status of decrees already issued in disregard of the earlier rules, the lawfulness of which could be challenged in judicial review proceedings. A different position was taken in a dissenting opinion. Its authors regarded the legislature's action as an unallowable retrospective ratification; the legislature had intended to give the decrees statutory force so as to prevent their judicial review.

Having settled this preliminary question, the State Council considered whether the measure taken was constitutional. The majority held that the ratification in no way contravened the principle of the separation of powers or infringed the right of judicial review. Although the legislature had taken action as a result of the judgment referring the case to the Assembly, its aim had not been

to solve a dispute pending in the State Council but to settle the general problem of the functioning of a large number of local authorities. According to a dissenting opinion, the ratification was unconstitutional because the legislature had settled a pending dispute directly.

Legislative ratification of regulations, in particular ministerial decrees issued without an enabling statute, had been a common practice for many years and had often taken place while proceedings were in progress. Under a constant line of decisions, an Act which retrospectively gave an administrative decision statutory force was deemed to abide by the Constitution because of the regulatory nature of the instrument ratified. The State Council regarded as inadmissible any application for judicial review filed in respect of a decree which had been ratified while the proceedings were pending. This case-law, which had been much criticised, was abandoned in 1991.

Moreover, legislative ratification, which was very rarely used in the case of regulations, was often a means of remedying legal flaws in administrative decisions concerning individuals. Where an instrument was the subject of judicial review proceedings, the State Council examined the purpose of the legislature's action. Ratifications intended to settle a dispute that was pending were held to be unconstitutional.

The scope of this judgment can be understood in the light of this traditional case-law. The State Council clearly held that the practice of ratification was not at variance with the regulatory nature of the instrument, but in giving its decision as to whether that ratification was constitutional it applied the criteria developed in dealing with disputes over the ratification of decisions affecting individuals.

Languages:

Greek.

Hungary
Constitutional Court

Statistical data

1 May 1996 – 31 August 1996

Number of decisions taken:

- Decisions by the plenary Court published in the Official Gazette: 5
- Decisions by chambers published in the Official Gazette: 11
- Number of other decisions by the plenary Court: 10
- Number of other decisions by chambers: 5
- Number of other (procedural) orders: 11
- Total number of decisions: 42

Note:

The Constitutional Court of the Republic of Hungary hosted the 10th Conference of the European Constitutional Courts between 6 and 9 May 1996. The opening speech of László Sólyom, President of the Hungarian Constitutional Court, on the subject of cooperation between constitutional courts, was published in the previous issue of the *Bulletin*. At the conference two topics were discussed. On the first day, the general report on "Freedom of expression in the jurisprudence of constitutional courts with special regard to regulations on the electronic media" was presented and discussed (the general report was prepared by Antal Ádám, Judge of the Constitutional Court, and Gábor Halmai, Chief Counsellor to the Court). On the second day, the general report on "Separation of powers regarding the constitutional court's jurisdiction" was discussed (prepared by Péter Paczolay, chief counsellor of the Constitutional Court).

Important decisions

Identification: HUN-96-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 17.05.1996 / **e)** 21/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 39/1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Convention on the rights of the Child.
General Principles – Proportionality.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental Rights – Civil and political rights – Freedom of association.
Fundamental Rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, right to protection / Homosexual associations, participation of minors.

Headnotes:

The right of the child to be provided by the State with such protection and care as is necessary for one's proper physical, mental and moral development (Article 67.1 of the Constitution) establishes the constitutional duty of the State to protect the development of the child. This duty of the State serves as a constitutional basis for the legislature or for the courts to restrict – primarily in the public sphere – the child in the exercise of his/her fundamental rights, including the right of association guaranteed in Article 63 of the Constitution.

On the basis of the above, the child's membership in associations "related to homosexuality" can be excluded or restricted by law or in court decisions. The actual restriction on the child's exercise of his/her right of association must correspond to the concrete risk of endangering the development of the child. In the course of considering whether the right of the child to protection for his/her development may lead to a restriction on his/her right of association, the age of the child and the nature of the association has to be evaluated together. It is also important to note whether the child is able to know and evaluate the choices in connection with his/her relationship to homosexuality and the consequences of his/her choice for his/her own personality, later life and social adaptation.

Summary:

The President of the Supreme Court petitioned the Constitutional Court, in the framework of abstract constitutional interpretation, to examine the fundamental rights worded in Article 67 and Article 63.1 of the Constitution. The petitioner found it to be a "concrete constitutional problem" that "the right of the child to be provided by the State with such protection and care as is necessary for one's proper physical, mental and moral development (Article 67 of the Constitution) conflicts with his/her right of association (Article 63.1 of the Constitution) if the question arises about the child's membership in an association which presents itself as an association for the defence of rights of homosexual persons as a social group".

From the point of view of the right of association guaranteed in Article 63 of the Constitution, it had to be made clear that the question in this case was not about the constitutionality of an associative aim but about the restriction on the right of association in the interests of the child (Article 67 of the Constitution). That is, the present case was not concerned with the matter of constitutionally qualifying associations of homosexual persons.

Judges are required to refuse to register social associations if their aims do not comply with conditions set forth in the Act on Associations. Among other prohibitions, they cannot result in the violation of the rights and liberties of others. This latter condition is included in Article 15 of the New York Treaty on the Rights of Children – promulgated in Act 64 of 1991 – which declares that the signatory States recognise the child's right of association.

Restricting the right of association in the interests of protecting against the violation "others' rights and liberties" is constitutional if this restriction is necessary to protect the other right and if the extent of restriction is proportionate to the desired aim. This other right has to be a constitutional right or has to be capable of being deduced from such a right. The right of the child to protection and care necessary for development excludes the child's membership in certain associations. If, according to its statutes, children can be members in such an association then the association must be held not to comply with Article 2 of the Act on Associations since this would violate the right of children guaranteed in Article 67 of the Constitution. The task of the Constitutional Court in the present decision was to determine those features of homosexual associations in respect of which the child's right to protection and care necessary for development makes the restriction on the exercise of the right of association necessary and proportionate.

Article 67 of the Constitution, which compels the State to provide protection and care necessary for the personal development of the child, requires on the one hand the prevention of clearly harmful effects and on the other hand requires the avoidance of serious risks to the child's personality and thus the whole of his/her future life.

The State has to protect the child from taking risks in respect of which, because of his/her age (presumed to

correlate with physical, mental, moral and social maturity), he/she is not able to know and evaluate either the possibilities or the consequences of his/her choices for his/her own personality, later life and social adaptation. The State is thus bound as part of its duty to avert risks and to prohibit the child – at least in the public sphere – from pursuing activities or taking a stand in matters in connection with which the child is not mature enough in the above sense to develop a responsible position, since taking up a public position can prove to be decisive for the child's physical, mental and moral development and his/her later life. The risks involved are particularly increased if such a public position is related to a question which has a controversial standing in society.

The relationship between persons of the same sex – in its durable and publicly assumed form and confined to certain aspects of life – was previously recognised by the Constitutional Court, but not because the relationship was homosexual, but because the relationship was such that similar cases were elsewhere recognised by the law and the differentiation had no basis. In the course of its only judgment on homosexuality to date, the Constitutional Court remained on a neutral path, disregarding the evaluation of public morals. This neutrality was possible also in the course of interpreting the present case – in spite of the fact that the Constitution explicitly gives a right to protect the proper physical, mental and moral development of the child. There was no reason in the present case for the Constitutional Court to focus on certain questions of sexual morals instead of the protection of the child's personal development as a whole. What is more, in the present case the Constitutional Court did not even consider the problem of homosexuality to be a question of sexual morals – although it is generally regarded as such in public opinion.

The Constitution protects primarily not that decision of the child to become or not to become a homosexual, but rather assures that he/she can decide with full knowledge on the possibilities and the consequences and on how to relate to his/her discovered affections and on which role to choose from among the many social possibilities. This interpretation is in harmony with the meaning of Article 67 of the Constitution.

The Constitutional Court thus does not interpret the Constitution to say that the possibility of becoming homosexual would endanger the "moral development" of the child, because the Court cannot form a moral judgement about homosexuality on the basis of the Constitution. But it is harmful for the development of the whole personality (physical, mental, moral) and decisively affects the future of the child if he/she starts on a certain path because of the lack of maturity necessary for a decision about such vital questions.

The Constitutional Court does not qualify homosexuality from a moral point of view. In the present case, however, it cannot disregard either the peculiarities of homosexuality or the current social situation of homosexuals.

Publicly assuming homosexuality, of any kind, is an existentially decisive decision because of the current reception of homosexuality by society; socially, much is assumed, and later any change is difficult. The Constitutional Court does not qualify the problems of homosexuals in terms of social adaptation, acceptance and discrimination – which homosexuals themselves feel and experience to be more weighty than the objectively measurable social judgment – but takes them into consideration as facts to be weighed in the decision of the child.

It might prove helpful for a minor under 18 years of age struggling with homosexuality if he/she can find company in a regular framework where there are people of similar disposition and where he/she can receive psychological, medical or legal counselling if need be.

But an association of adult, practising homosexuals, one which is a part of the homosexual subculture, is different. In this context – completely excluding the criminal law aspect – there is an increased possibility that a minor whose homosexuality has not yet been fixed and who has not chosen a role, excludes his/her possibilities by a premature decision.

An association fighting actively for the rights of homosexuals does not allow for the possibility that a person might not differ completely with the heterosexual world, that a person might choose to conceal his or her sexuality or to live a "double" life as a bisexual. Membership of children in such associations is the most problematic, since this constitutes the most public commitment and thus provides hardly any possibility for different roles.

Thus, such associations have to go along with the age limit in the interest of minors of the age-group to be protected. Setting an age limit for membership primarily protects the responsible and mature decision of those who must accept the consequences of their decision for their entire life.

Languages:

Hungarian.

Identification: HUN-96-2-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 25.06.1996 / **e)** 22/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 51/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a public body – Legislative bodies.
Constitutional Justice – Types of claim – Type of review – Preliminary review.
Fundamental Rights – Civil and political rights – Right to life.
Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Compensation for past injustices / Dignity.

Headnotes:

It is unconstitutional if the amount of compensation for those deprived of their life is substantially unequal for different groups of people. In respect of compensation for similar grievances – in the present case for the loss of life – equal standards should apply. However, slight differences due to the historical shaping of the regulation can be accepted.

Summary:

The Constitutional Court adjudicated upon the constitutionality of Act 32 of 1992 regulating the question of compensation for those wrongfully deprived of their life and liberty due to political reasons in its decision no. 1/1995. In that ruling, among other matters the Court had obliged the legislature to add further provisions to the compensation law, mainly on the grounds that the previous law restricted the possibility of compensation to those whose rights were arbitrarily violated in connection with a formal criminal procedure. In addition, the legislature had been obliged to replace some other unconstitutional provisions in the law.

The legislature finalised the text of the bill amending the compensation law, and before the final vote the Human Rights Standing Committee submitted it to the Constitutional Court for preliminary review.

The Court, in an earlier decision (no. 16/1991), had defined the prerequisites of a preliminary review. The preliminary review of any contestable provision of a bill can be initiated by Parliament, by any one of its standing committees, or by fifty Members of Parliament. The Court in 1991 declared that adjudicating upon the constitutionality of provisions in a pending bill, the text of which is not definitive, would mean the possibility of involving the Constitutional Court in the every-day legislative process, which would be incompatible with the principle of separation of powers.

In the present case, the legislature finalised the text of the bill and excluded the possibility of any further changes. Thus the Court accepted the demand for the preliminary review.

As to the merits of the case, the Court acknowledged that the legislature redressed its former mistake by creating a new group of persons entitled to compensation, specifically those persons deported either to Nazi Germany or the Soviet Union, because deportation, as explained already in decision no. 1/1995, is not merely a form of deprivation of liberty.

The Court, however, found it to be unconstitutional for the bill to establish substantially different standards for similar grievances, namely for the loss of life. Loss of life is so serious a grievance that it "absorbs" all previous injustices. It would be arbitrary and at the same time would violate human dignity to differentiate among the diverse ways of losing life.

The Constitutional Court added that if as a result of this change the legislature had to enlarge the range of persons entitled to compensation (because of the above constitutional requirements), it would not be unconstitutional to redistribute the overall budget allowed for such compensation, thus reducing the amount of the original compensation for each individual.

Cross-references:

A previous decision on the constitutionality of the same Act was decision 1/1995 of 08.02.1995, *Bulletin* 95/1 [HUN-95-1-001].

Languages:

Hungarian.

Ireland
Supreme Court

Important decisions

Identification: IRL-96-2-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 01.03.1996 / **e)** 48/96 / **f)** Hanafin v. Minister for Environment and Others / **g)** to be published in the *Irish Reports* / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Courts.
Constitutional Justice – Types of litigation – Litigation in respect of jurisdictional conflict.
Sources of Constitutional Law – Techniques of interpretation – Literal interpretation.
General Principles – Separation of powers.
Institutions – Legislative bodies – Relations with the courts.
Institutions – Courts – Jurisdiction.

Keywords of the alphabetical index:

Referendum / Right of appeal.

Headnotes:

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

Summary:

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

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

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

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

Languages:

English.

Identification: IRL-96-2-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 31.07.1996 / **e)** 272/95 / **f)** Croke v. Smith and Others / **g)** to be published in the *Irish Reports* / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Referendums and other consultations.
Constitutional Justice – Effects – Influence on everyday life.
Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Advertising campaign, governmental / Referendum, validity.

Headnotes:

Any unconstitutional advertising campaign conducted by the executive constitutes an interference with the conduct of a referendum but, since the Court of First Instance had decided on issues of fact, supported by credible evidence, that the result of the referendum has not been materially affected, the appeal of the petitioner failed.

Summary:

The petitioner brought an appeal to the Supreme Court with regard to whether the result of a referendum as a whole was materially affected by unconstitutional governmental interference with and/or obstruction of the conduct of the referendum.

The Government had expended State monies on funding a publicity campaign directed to persuading the public to vote in favour of a proposed amendment to abolish the provision within the Constitution which sets down that no law shall be enacted providing for a dissolution of marriage.

The Supreme Court examined the standard of proof which lay on the petitioner to establish his case and found that as the case was a civil one, the onus was on the balance of probabilities.

The Court had to decide two fundamental issues. Firstly, they had to examine the meaning of the words "conduct of the referendum" within the relevant statute and, secondly, whether the Court of First Instance was correct in determining that the result as a whole was not materially affected by the government's campaign.

The Supreme Court were satisfied that the campaign did amount to an interference with the conduct of the referendum, as any unlawful activity which would interfere with the vote expressing the free will of the people.

However, as the Court of First Instance had concluded that it had not been established by the petitioner on the facts that the result of the referendum had been materially affected, this was clearly binding on the Supreme Court.

Languages:

English.

Identification: IRL-96-2-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 31.07.1996 / **e)** 272/95 / **f)** Croke v. Smith and Others / **g)** to be published in the *Irish Reports* / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Constitutional Justice – Effects – Influence on everyday life.
Sources of Constitutional Law – Categories – Unwritten rules – Constitutional custom.
Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Incapacitated.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Detention order, indefinite period / Patient, unsound mind / Presumption of constitutionality.

Headnotes:

Detention orders of persons of unsound mind for an indefinite period under a legislative provision are constitutionally valid having regard to the provisions of the Constitution.

Summary:

This case came before the Supreme Court by means of case stated questioning the constitutional validity of a legislative provision allowing for the indefinite detention of a patient who is of unsound mind.

The Court had first to examine the presumption of constitutionality afforded to an Act of the *Oireachtas* (parliament) and found that this presumption must be granted unless and until the contrary is clearly

established. In addition, a Court would not be permitted to declare an impugned legislative provision invalid if is possible to construe it in accordance with the Constitution. An impugned legislative provision must be construed in the light of its own language and must be construed within the framework of both the legislation in its entirety and within the Constitution.

The Supreme Court had to consider the power given to a mental hospital authority and its officers under the legislation to detain patients for an indefinite period. They found that the Oireachtas had not failed to exercise its constitutional obligation to respect and so far as practicable to defend the applicants right to liberty. The *Oireachtas* are obliged to ensure that a citizen who is of unsound mind, is not unnecessarily deprived of his liberty, even for a short period of time. Legislation which permits the deprivation of such liberty must contain safeguards against abuse and error.

The Supreme Court were satisfied that no judicial intervention is necessary unless there has been a failure to comply with the requirements of fair procedures and constitutional justice or failure to have regard to the constitutional right to liberty of the citizen.

Languages:

English.

Italy
Constitutional Court

Statistical data

1 May 1996 – 31 August 1996

Meetings of the Constitutional Court during the period from 1 May to 31 August 1996: 5 public hearings and 6 hearings in chambers. The court gave 193 decisions in all.

Decisions given in cases where constitutionality was a secondary issue: 79 judgments, 26 finding measures complained of unconstitutional and 94 court orders.

Decisions given in cases where constitutionality was the main issue: 9 judgments, 2 finding measures complained of unconstitutional.

Decisions given in constitutional proceedings concerning conflicts of jurisdiction:

a. between the State and the regions (or the autonomous provinces of Trento and Bolzano) over the definition of their respective powers: 7 judgments;
b. between State authorities in disputes between public bodies over the exercise of powers: 2 court orders.

Important decisions

Identification: ITA-96-2-005

a) Italy / **b)** Constitutional Court / **c)** / **d)** 27.06.1996 / **e)** 223/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 27 of 03.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – International treaties.
Sources of Constitutional Law – Categories – Written rules – Other international sources.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
Fundamental Rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Death penalty / Extradition, treaty.

Headnotes:

The death penalty and punishments contrary to humane precepts are both expressly prohibited under Article 27 of the Constitution. This ban, which is of particular importance, has always applied in Italy during periods of freedom and has only ever been lifted during reactionary periods or times of violence. It should be seen as the logical consequence of the principle underlying the fundamental right to life, which is first and foremost among the inviolable human rights recognised in Article 2 of the Constitution.

The unconditional nature of the right to life and the prohibition of the death penalty also has a direct bearing on the authority to engage in international mutual legal assistance, particularly under extradition treaties.

As the Court has already found, it is contrary to the Constitution for Italy to help execute penalties which cannot be imposed for any offence in Italy.

Summary:

The Constitutional Court found that Article 698 of the Code of Criminal Procedure and Law no. 225 of 26 May 1984 (Ratification and Execution of the Extradition Treaty between Italy and the United States, signed in Rome on 13 October 1983), applying Article IX of the treaty, were unconstitutional (contravening Articles 2 and 27 of the Constitution). The constitutionality issue in the case had been raised by the Lazio Regional Administrative Court in proceedings brought by Mr P. Venezia against the Minister of Justice, who, by a decree of 14 December 1993, had authorised Mr Venezia's extradition to the United States. Mr Venezia had had a detention order placed on him by a Florida court in connection with a charge of first degree homicide, a crime for which Florida prescribed the death penalty.

The Administrative Court had held that the prime consideration was Article 2 of the Constitution, which protected the right to life above all else and which, in its Judgment no. 54/1979, the Constitutional Court had held to take absolute precedence.

The Administrative Court had likewise found that Article 27 of the Constitution, which prohibited imposing the death penalty in Italy, was contravened by the clause of the extradition treaty which gave the Minister of Justice discretionary power to decide, on the basis of somewhat obscure criteria, whether the assurances given by the requesting State were reliable in cases where, as here, the guarantee depended exclusively on whether the body giving the undertaking was able to compel the competent legal authorities to comply with it. In the opinion of the Administrative Court, Article VI of the United States Constitution could not be invoked because the Treaty did not compel the Federal Government to give specific assurances, which in any case would infringe on the independence of the individual States.

The Administrative Court had also held that the provisions in question breached Articles 3 and 11 of the Italian Constitution.

The Constitutional Court, under the principles set out in the headnotes above, ruled that Articles 2 and 27 of the Constitution were indeed contravened. The procedure provided for in Article 698(2) of the Code of Criminal Procedure was based on double review, by the courts and the Minister of Justice. What needed to be ascertained was whether the guarantees which the State applying for extradition was capable of providing with regard to the death penalty were adequate to ensure that the death penalty was not imposed even though the law provided for it or at least that it would not be applied in the case in question.

Under Italian law, however, the prohibition of the death penalty was unconditional and enshrined in the Constitution; and the reference in the provision at issue to "adequate assurances" by the requesting State could not be regarded as in keeping with the Constitution. Protection of life necessitated an absolute guarantee.

In this connection, neither the reliability of judicial safeguards against application of the death penalty nor the interpretation of Article VI of the Constitution of the United States should be called in question. The crucial point in the present case was that the mechanism provided for by the Code of Criminal Procedure and the law implementing the treaty were incompatible with the constitutional provisions cited.

Cross-references:

As indicated, in its statement of reasons the Court referred to Judgment no. 54 of 1979, which had declared the 1870 extradition treaty between Italy and France unconstitutional because it provided for the extradition to France of individuals accused of crimes for which the death penalty could be imposed. The death penalty was of course subsequently abolished in France.

Languages:

Italian.

Identification: ITA-96-2-006

a) Italy / **b)** Constitutional Court / **c)** / **d)** 18.07.1996 / **e)** 303/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 31 of 31.07.1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Reasonableness.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental Rights – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Adoption, age limits.

Headnotes:

Under its discretionary powers, Parliament has set the minimum and maximum permissible age differences (18 and 40 years respectively) between adoptive parents and those they adopt so as to ensure that adoption serves its proper purpose, bearing in mind the social circumstances in which the institution of adoption is intended to have effect.

The Constitutional Court previously decided that the rule regarding the maximum allowable age difference between adopter and adopted was not an absolute one, and that such reasonable exceptions could be made to it in specific and exceptional cases as served the interests of the child or its family which were integral to the Constitution and protected by it, and of whose genuine existence the courts had thoroughly satisfied themselves (Judgment no. 148 of 1992).

In line with existing constitutional case-law on exceptions to the legal provisions regarding the permissible age difference between adopter and adopted, the courts must be able to assess, after thorough investigation, whether there are exceptional reasons, exclusively in the child's interests, to allow the child's adoption by the only family which matches those interests even though, while no greater than the age difference which is sometimes found between parents and children, the age difference between the child and the adopting spouse is, with reasonable limits, greater than the 40 years prescribed by the law. Any exception must meet standards of necessity appropriate to the constitutional values and principles against which is to be measured the constitutional legitimacy of the challenged rule. These are contained in Articles 2 and 31 of the Constitution, which protect the social groups in which the individual's personality finds expression (Article 2) and more specifically the family (Article 31).

Summary:

The Court found that Article 6.2 of the law on adoption and the adoptive family (Law no. 184 of 4 May 1983) was "partially" unconstitutional in so far as it did not allow the courts to authorise adoption when, although one of the parents wishing to adopt was more than 40 years older than the intended adoptee, the age difference was no greater than often existed between children and parents, and the courts, having regard solely to the child's interests, had concluded that, if the adoption did not go ahead, the child would suffer serious harm which only the adoption could prevent.

Cross-references:

This judgment is in accordance with the Court's case-law on exceptions to the legal provisions as to the age difference between adoptive parents and the person adopted.

In Judgment no. 44 of 1990, the Court held that, where the adopter wished to adopt a child already adopted by his/her spouse, the minimum age difference of 18 years could reasonably be relaxed at the court's discretion after a thorough investigation of the circumstances, regard being had to the values of family unity.

See Judgment no. 183 of 1988 as regards allowing the maximum age difference to be exceeded in the interests of the values embodied in Articles 2, 30.1 and 30.2 of the Constitution. In Judgment no. 148 of 1992, the Court followed the principles laid down in the European Convention of 24 April 1967 on the Adoption of Children, whose particular concern is "providing the child with a stable and harmonious home", and declared unconstitutional the provision in Article 6.2 of Law no. 184/1983 that did not allow the adoption of one or more siblings of adoptable age when the age difference between any of them and the adopter was greater than the allowed 40-year maximum and serious harm would result from

separating the children and depriving them of a common life and upbringing.

Languages:

Italian.

Identification: ITA-96-2-007

a) Italy / **b)** Constitutional Court / **c)** / **d)** 18.07.1996 / **e)** 311/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 31 of 31.07.1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Equality.
Fundamental Rights – Civil and political rights – Freedom of conscience.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Good conduct, political.

Headnotes:

In respect of access to employment in the private or public sector or authorising the individual to perform certain work, qualities or guarantees of reliability can be required so as to ensure that the work will be carried out properly. The qualities or guarantees may be deduced even from conduct not contrary to the criminal code and which has not been the subject of a court decision provided that the conduct concerned is relevant to the duties or work to be performed. Such requirements must be capable of impartial verification or reasonable appraisal by the authorities and there must be provision for judicial review of such verification or appraisal.

To ensure compliance with constitutional principles, particularly the principle of equality and the fundamental freedoms embodied in the Constitution, it is necessary to set precise limits to the types of conduct that the authorities can legitimately assess. Even though it is impossible to specify all the types of behaviour which may be taken into consideration, the types of behaviour open to appraisal may not include conduct in the ideological, religious or political sphere or membership of associations, movements or parties if such membership is not incompatible in law with the duties for which the appraisal is being carried out.

Accordingly, it is not constitutionally acceptable to specify "political" good conduct as a condition of taking up an occupation. The rule forbidding political discrimination or any discrimination on grounds of "political opinions" is one of the fundamental principles of the democratic system, forming an essential part of equality "before the law" and of the guarantee of everyone's right to participate fully in the "political" life of the country, as laid down in Articles 3.1 and 3.2 of the Constitution. The prohibition on discrimination is confirmed in other constitutional rules and principles. For example, the rule forbidding measures which restrict legal capacity for "political reasons" (Article 22 of the Constitution), the right to form associations without authorisation for reasons not forbidden to individuals by criminal law (Article 18 of the Constitution), the right freely to form parties acting in accordance with democratic norms (Article 49 of the Constitution), and subject only to any limitations laid down in law (Article 98.3 of the Constitution), the right to express one's thoughts freely (Article 21 of the Constitution), and the democratic and pluralist ideals generally upon which the Constitution is based, all entirely rule out the individual's being discriminated against as a result of his/her political choices.

Secondly, with regard to behaviour which may be assessed in terms of "morality", a distinction must be made between conduct which may influence the assessment of a person's fitness to perform duties or work and which therefore may legitimately be scrutinised, and conduct which is solely of a "private" nature or comes within the scope of private life or individual freedom and, as such, which cannot be assessed to decide fitness for public employment or in any way be subjected to public scrutiny.

Furthermore, no account may be taken or assessment made of skills which, by their inherent or incidental nature, or because of their distance in time, or for other reasons, cannot reasonably be held at the relevant time (the point at which the conduct requirement assumes importance) to affect fitness to perform duties or work.

Summary:

Under Article 138.1.5 of the 1931 consolidated laws on public security, vigilantes were required, among other things, to be "persons of very good political and moral conduct", and the Prefect's approval of their appointment

was conditional on verification that they met this requirement. In the present case the prefect had refused to approve the appointment of a vigilante on the ground that the person concerned was not of "good political and moral conduct", having once harboured in his home a terrorist who was under a compulsory residence order and having attended a terrorist trial although he was not among the accused. The person not appointed had brought the matter before the appropriate Administrative Court, which had asked the Constitutional Court to rule on the constitutionality of Article 138 of the consolidated laws.

The Court found that Article 138 was "partially" unconstitutional to the extent that it stipulated the qualities expected of vigilantes:

a. allowed an assessment to be made of the candidate's "political" conduct;
b. required "very good" moral conduct as opposed to the "good" moral conduct required for entry to the national police force;
c. allowed an assessment of "moral" conduct which took account of matters having no bearing on the candidate's current attitudes or his/her fitness for the duties involved.

Cross-references:

Judgment no. 108 of 1994 (*Bulletin* 94/1, 38, [ITA-94-1-005] and Judgment no. 440 of 1993 (*Bulletin* 93/3, 26, [ITA-93-3-018]) are important precedents.

Languages:

Italian.

Identification: ITA-96-2-008

a) Italy / **b)** Constitutional Court / **c)** / **d)** 23.07.1996 / **e)** 297/1996 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 31 of 31.07.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Child, illegitimate / Name, previous / Child, recognition by one of the parents.

Headnotes:

As already held in a previous judgment, names have special protection as being essential to personal identity, and as such they are fundamental to personality and cannot be renounced; the right to one's name is one of the fundamental and absolute rights of the individual and cannot be renounced (see Article 2 of the Constitution).

Summary:

The Constitutional Court held that Article 262 of the Civil Code was unconstitutional because, when a parent recognised his/her illegitimate child and the child took that parent's name, Article 262 did not allow the child to have the courts recognise its right to keep its previous name, placed before or after its new name, where the previous name was a part of his or her personal identity.

In its statement of reasons, the Court noted that, where the father recognised the child after the mother had done so, the child was entitled to keep its original name, placing the mother's name before or after it.

However, there was no guarantee whereby the child could keep its original name when (as in the present case) recognition by one of the parents occurred well after the original name had been given to the child by the registrar. Yet here, too, the original name might have become a fundamental part of the illegitimate child's identity. For that reason the provision was declared unconstitutional.

Cross-references:

At the beginning of its statement of reasons, the Court reiterated the principles (see headnotes) set forth in Judgment no. 13 of 1994 in which it had declared Article 165 of the civil-status regulations unconstitutional because, when civil-status records were corrected for reasons unconnected with the data subject and the changes included a change of name, that Article did not allow the data subject to ask the courts to be allowed to keep the original name in circumstances where it had become an important mark of identity.

Languages:

Italian.

Japan
Supreme Court

Important decisions

Identification: JPN-96-2-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 20.01.1993 / **e)** 111/1991 / **f)** Kawahara et al. v. The Tokyo Prefecture Election Administration Commission (1993); The 1993 House of Representatives Malapportionment Case / **g)** *Minshu* 47-1, 67 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Parliamentary elections.
Constitutional Justice – The subject of review – Failure to pass legislation.
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 vote.

Keywords of the alphabetical index:

Demographic shifts, consequences / Electoral caucus, disparities / Electoral laws, requirement to amend / Voting rights, inequality.

Headnotes:

In a case, in which apportionment provisions of the Public Office Election Law were constitutional when enacted or amended, but due to population shifts the disparity in the number of electors or population per Diet member elected under such provisions increases and has reached a point at which the disparity violates the constitutional requirement of electoral equality, the apportionment provisions in question should not immediately be held unconstitutional on that basis alone; rather, the above provisions should first be declared unconstitutional when the correction has not been carried out within a reasonable period of time as constitutionally required.

Summary:

On 18 February 1990, when the general election of the members of the House of Representatives was held, the *ratio* between the number of electors and representatives of the Kanagawa Prefecture Fourth District to that of the Miyazaki Prefecture Second District was 3.18 to 1. The plaintiffs, electors in the Tokyo Prefecture Fifth District, claimed that the apportionment provisions of the Public Office Election Law, which did not satisfy the constitutional requirement of equality of voting rights, were unconstitutional, and therefore the election was invalid.

Article 14.1 of the Constitution, which guarantees equality under the law, requires equality of vote value concerning the inherent right of the people to elect members of both the House of Representatives and the House of Councillors of the Diet. On the other hand, the Constitution in principle entrusts to the discretion of the Diet the concrete determination of the framework of the election system for the election of members of both Houses of the Diet. Therefore, in a case in which inequality of vote value exists under the concrete framework of the election system determined by the Diet, in order to determine whether such inequality violates the constitutional requirement for equality of vote value, a court must examine whether the inequality is within the limits of rationality of the Diet's exercise of its discretion.

The Supreme Court in the present case, following the line of thinking set out in the above *Headnotes* held that the disparity in the *ratio* between the number of electors and the representatives among electoral districts at the time of the election at issue had reached a level that violated the constitutional requirement of equality of voting rights. But the Court held that it was difficult to conclude that a correction had not been made within a reasonable period of time as constitutionally required from the fact that the provisions had not been amended to correct the disparity during the period from when the disparity in the *ratio* between the number of electors and representatives among electoral districts had reached the point of violating the constitutional requirement of equality of voting rights until the election in question. Therefore, the Court held, it could not conclude that the Diet member apportionment provisions at issue on the date of the election had been unconstitutional.

Supplementary information:

Two justices gave concurring opinions. Five justices gave dissenting opinions.

Languages:

Japanese, English (translation by the Court).

Liechtenstein
State Council

Statistical data
1 January 1996 – 30 June 1996

Number of decisions: 14

Important decisions

Identification: LIE-96-2-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 23.05.1996 / **e)** StGH 1995/21 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Criminal conviction / Extradition / Sentences, cumulative.

Headnotes:

The prohibition on torture and inhuman treatment also includes sentences which, although not in themselves inhuman or degrading, appear to be extremely harsh in relation to the offence committed. Extradition breaches this prohibition if there is a real danger that a sentence might be passed in the State requesting extradition which is much harsher than the maximum sentence possible in the requested State.

Summary:

The Supreme Court authorised the extradition of American citizen B. to the United States for various offences of fraud for which the maximum prison sentence in Liechtenstein would probably be 10 years. Owing to the system of cumulative sentences applied in the United States, the sentences for these offences added up to 310 years in that country. The Supreme Court considered that the danger of a sentence being passed which was much harsher than the maximum sentence in Liechtenstein had not in fact been established, since B.'s accomplice had been given a sentence of less than 10 years.

B. lodged a constitutional appeal with the State Council, claiming a violation of Article 3 ECHR. Unlike the Supreme Court, the State Council considered that a real danger that a significantly harsher sentence might be passed in the United States than the maximum sentence in Liechtenstein had been established, given that it was only through plea bargaining that B.'s accomplice had received a sentence of less than 10 years. Extradition of the appellant without the explicit condition that his sentence would not be significantly harsher than the maximum sentence in Liechtenstein was therefore considered to be a violation of Article 3 ECHR. On the other hand, the extradition which the Government had proposed to the American authorities in an exchange of letters, stipulating the condition that a maximum sentence of 12 years be passed, was considered to be in conformity with the European Convention on Human Rights.

In spite of these considerations, the State Council rejected B.'s constitutional appeal on the grounds that responsibility for determining the conditions governing extradition lay with the Government, not the State Council. Nevertheless, the State Council informed the Government of its decision, explicitly stating its view that extraditing B. without imposing a corresponding obligation on the American courts to comply with a maximum sentence would be contrary to Article 3 ECHR.

Languages:

German.

Lithuania
Constitutional Court

Statistical data
1 May 1996 – 31 August 1996

Number of decisions: 4 final decisions including:

- 1 ruling concerning the compliance of laws with the Constitution
- 2 rulings concerning the compliance of governmental resolutions with the laws
- 1 decision concerning the compliance of a Presidential decree with the constitution

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

The content of the cases was the following:

- privatisation: 1
- financial questions: 1
- civil service: 1
- the Bar: 1

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

Important decisions

Identification: LTU-96-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.05.1996 / **e)** 14/95 / **f)** On Privatisation of Apartments / **g)** *Valstybės žinios* (Official Gazette), 50-1208 of 29.05.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
Institutions – Economic duties of the State.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Apartments, privatisation / Co-operatives, consumers.

Headnotes:

A governmental decree excluding from privatisation rooms in hostels belonging to consumer co-operatives was held to be incompatible with the Law on Privatisation of Apartments and with the principle of equality.

Summary:

The case was initiated by a local court following a citizen's complaint against measures hindering him from privatising an empty room in a hostel of Consumer Co-operatives.

In 1993, the government issued two regulations which established that as from 1 February 1993 consumer cooperatives had completely settled their accounts with the State. Henceforth, hostels, together with other possessions, were to be treated by consumer cooperatives as their own property.

Before State and co-operative property in Lithuania were separated, the Law on Privatisation of Apartments was passed (on 28 May 1991). Following this law, apartments were privatised which were at the disposal of consumer cooperatives. When separating State and co-operative property, and deciding to whom hostels must belong, the government had to take account of the aim of the Law on Privatisation of Apartments. Moreover, in the said law there was no exception providing that rooms in hostels transferred to consumer cooperatives should not be privatised. Thus the disputed Resolution and Decree did not correspond to the aim and content of this Law, and the argument to the effect that prescriptions in the Law on Privatisation of Apartments should not be applied to rooms in hostels transferred to consumer cooperatives was accordingly groundless.

At the same time, the contested legal acts in fact restricted the rights of one social group to privatise residential lodgings possessed on the basis of labour and lease agreements. This was found to constitute a disregard of the principle of all people's equality before the law.

In the opinion of the petitioner, it being prescribed in Articles 1 and 2 of the Law on Privatisation of Apartments that the public housing fund shall consist of dwelling-houses and buildings which belong to co-operative organisations, these lodgings must also be the objects of the Law on Privatisation of Apartments.

The Court found that the distinct Law on Privatisation of Apartments was devoted to the privatisation of the State and public housing fund. Privatisation of apartments had become one of the main elements of State social policy, in order that the owner of lodgings should ordinarily

be the person residing in the said lodgings. Upon adoption of the Law on Privatisation of Apartments, the rights of the population as a whole to acquire as private property their rented dwelling-houses, apartment buildings and hostels was consolidated.

The persons who were allocated rooms in hostels on the grounds of labour relations, save for the Union of the Blind and Weak-Sighted and those of the Lithuanian Society of the Deaf and of the Lithuanian Society of the Disabled, acquired the right to buy residential lodgings pursuant to the Law on Privatisation of Apartments. In this respect, the rights of employees of consumer cooperatives residing in hostels to privatise residential lodgings were equalised with those of employees of other enterprises, offices, and organisations.

Taking into account these arguments, the Constitutional Court ruled that the disputed Resolution and disputed Decree contradicted Part 1 of Article 1 and Part 1 of Article 2 of the Law on Privatisation of Apartments in so far as they applied to the transfer of rooms in hostels to consumer co-operatives.

Languages:

Lithuanian, English (translation by the court).

Identification: LTU-96-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.05.1996 / **e)** 1/96 / **f)** Military service – civil service / **g)** *Valstybės žinios* (Official Gazette), 57-1364 of 19.06.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Organisation.
Institutions – Executive bodies – The civil service.
Institutions – Army and police forces – Police forces.

Keywords of the alphabetical index:

Military servicemen / Minister of Defence.

Headnotes:

The nature of institutions of democratic power is that all persons who implement the political will of the people are subject to various forms of control so as to ensure that this will is not distorted. In the exercise of such control, the activity of officials is inspected. In addition, the independence of the activity of persons who fulfil political programmes is of crucial importance.

The guarantees of democracy are also emphasised by the fact that the norm of part 3 of Article 140 of the Constitution contains an imperative prohibition on the Minister of National Defence: The Minister of National Defence may not be a serviceman who has not yet retired from active service. Thus there were no reasons in the present case to invoke the separate rule that a soldier, police officer or officer of the internal service or any other person indicated in Article 141 of the Constitution may not be a minister or hold other positions pointed out in this Article without having first retired from active service.

Summary:

The petitioner – a group of *Seimas* members – appealed to the Constitutional Court requesting it to investigate whether a presidential Decree appointing an officer of the internal service as the Minister of Internal Affairs was in compliance with the Constitution. According to Article 141 of the Constitution, officers of the national defence forces, of the police or of the internal service may not hold elected or appointed posts in State civil service. Therefore, in the opinion of the petitioner, the appointment of the Minister of Internal Affairs contradicted Article 141 of the Constitution.

Article 2 of the Law on Officials provides that employees who are directly or indirectly elected by citizens or who are appointed to fulfil a political programme by the legislative or executive powers or by institutions of local self-government, shall be politicians. The President of the Republic, members of the *Seimas*, the Prime Minister and Ministers shall be politicians of the State. The members of councils of local self-governments shall be politicians of such local authorities.

The government is the part of State power which carries out a political programme. It is accountable to the *Seimas*, whereas Ministers are answerable to the *Seimas* and to the President of the Republic and are under direct subordination of the Prime Minister.

The relationship of strict subordination and certain other rules governing one's position *vis-à-vis* the authorities are of great importance to soldiers in active military service, officers of the national defence forces and of the internal service, non-commissioned officers, officers of security services and other officials mentioned in Article 141 of the Constitution. Therefore, there may appear to be an internal conflict between the necessity

to carry out the functions of State power and the requirements of the regulations governing these and other persons mentioned in Article 141 of the Constitution. This may be one reason why the functioning of democratic institutions could be frustrated by such a double exercise of functions.

Therefore, taking account of the motives and arguments set forth, there were sufficient grounds in the present case to find that the nomination of the Minister in question contradicted Article 141 of the Constitution. However, the President of the Republic, by his 29 January 1996 Decree no. 22, had in the meantime dismissed the military serviceman from the Position of Minister of Internal Affairs, and consequently the disputed part of the legal act ceased to be legally valid. On this ground, the Constitutional Court ordered that the legal proceedings commenced in this case.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-2-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.06.1996 / **e)** 6/95 / **f)** On indexation of people's savings / **g)** *Valstybės žinios* (Official Gazette), 63-1480 of 03.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Powers.
Institutions – Economic duties of the State.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Deposits, devaluation, compensation / Deposits, State guarantee / Indexation / Inflation / Savings.

Headnotes:

The State must fulfil its obligation to compensate property owners for devalued deposits in respect of which it has taken over a guarantee. The establishment of the amount of compensation is a prerogative of the *Seimas*, as it is established in Article 128 of the Constitution that decisions concerning State loans and other basic property liabilities of the State shall be adopted by the *Seimas* on the recommendation of the government. The Constitutional Court also noted that the *Seimas* is not bound by earlier adopted legal acts. Therefore, by taking account of actual possibilities, it may establish other compensation coefficients to be applied to devalued deposits and insurance payments.

Summary:

The case was brought as a result of a petition submitted by a group of the *Seimas* members requesting a ruling on whether the application of a coefficient of 10 in the government's Resolution no. 562 of 23 July 1993 "On the Indexation of People's Savings" was in compliance with Article 23 of the Constitution.

Upon the reinstatement of the independent State of Lithuania, the Soviet Union undertook military, political, and economic actions against Lithuania. Among them, the actual seizure of the savings of Lithuanian citizens which were then accumulated in savings banks was used as a means of economic and financial pressure.

Under such a situation, on 28 April 1990 the government of Lithuania adopted two resolutions which attempted to ensure the functioning of the national economy. Banks of the Republic of Lithuania and self-government bodies of cities and districts were obliged to induce, in every way possible, the concentration of people's savings into deposits in the offices of the Lithuanian Savings Bank as well as in those of other banks. The Republic of Lithuania guaranteed with its property that people's deposits would not be lost. In particular, Article 471 of the Civil Code provided that the State shall guarantee privacy, security and payment of deposits on the first demand of the depositor. This norm remains valid at present.

The government, following the passing of laws on the issuing of the national currency and on the withdrawal of temporary coupons from circulation, adopted its Resolution no. 526 "On the Indexation of People's Savings". In the preamble of the aforesaid Resolution it was indicated that the government had taken into consideration the grave economic and financial situation of the Republic of Lithuania. Therefore in item 1 it was

provided that State banks and the State Insurance Office would index by applying a coefficient of 10 to the savings of citizens as well as those of persons who permanently lived in the Republic of Lithuania and those of rehabilitated persons who were exiled from Lithuania and now lived abroad.

In a further Resolution passed by the *Seimas* on 15 December 1993, it was established that the State would compensate people's savings in 1994 according to the government resolutions then in force. Thus the *Seimas* in fact agreed that the government by its Resolutions over different periods of time had established a right to compensation in discharge of what was, in effect, a loan to the State by the account holders.

The legal acts of the Supreme Council and of the Government whereby it pledged the repayment of the deposits of the people prior to the adoption of the Constitution continued to bind the institutions of power and government after the Constitution went into effect. The permanence of these commitments was confirmed by the subsequently adopted legal acts of the *Seimas* and of the Government, too.

According to legal doctrine, the right to claim is a type of property. Therefore the right to claim, as well as any other property, is the object of private ownership. Thus the object of the right of the depositor to ownership is the right to claim, whereas the object of the right of tangible property is particularised property. The owner's property rights are protected to the same extent irrespective of the object of the right to private ownership, providing always that the law does not establish exceptions. Thus the subjective rights of claim of the owner must be protected along with his rights to tangible property following the principles of protection developed in property law.

The notion of security of deposits which is used in legal acts is a juridical notion which is interpreted as the safekeeping of deposits in credit offices which are responsible for the preservation of the deposits' nominal value and which guarantee their payment on the first demand of the depositor with the interest established by law or by agreement of the parties.

The preservation of the value of the deposits is interpreted as an economic category. Devaluation of deposits, as a rule, is caused by objective economic developments (as well as inflation) which are not dependent upon the will of the credit office that keeps people's deposits.

Thus the notions of security of deposits and of the preservation of value of the deposits cannot be identified according to the juridical and economic meaning of their content.

Deposits, in part, may be preserved from devaluation by paying interest on them, by forming individual or joint insurance systems of private banks, etc. However, even though a deposit insurance system is created for the purpose of deposit protection, as a rule only the payment of a nominal value sum is guaranteed and not compensation for losses suffered because of inflation.

The Constitutional Court concluded that there were insufficient legal arguments to identify what amount of indexation coefficient must be held as corresponding to the constitutional principle of inviolability of property. Therefore, the provision of the disputed Resolution could not be held to contradict Article 23 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-2-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.07.1996 / **e)** 11/95, 9/96 / **f)** Requirements for education to an advocate / **g)** *Valstybės žinios* (Official Gazette), 67-1628 of 17.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance – The Bar.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Advocate, professional requirements / Education, requirements / Higher education / Legal studies / University studies.

Headnotes:

The right to defence, as well as the right to have an advocate, is one of the fundamental human rights promoted to secure the person's freedom and inviolability in the protection of constitutional rights and freedoms. The implementation of the constitutional right to defence is particularly dependent on the level of an advocate's professional preparedness, i.e., on the qualifications acquired by the lawyer and the skills of his legal practice. International documents also mention corresponding education as a necessary requirement for persons who aspire to work as advocates.

Thus the education requirement established in the Law on the Bar may not be held to be either a restriction of discriminative character, or as an undue constraint on citizen's rights and freedoms. It is rather to be judged merely as a requirement of qualification and character for persons who wish to work at the bar.

Summary:

The Vilnius City District Court suspended the investigation of two civil cases and appealed to the Constitutional Court for a ruling on whether the provision whereby a citizen of the Republic of Lithuania may be an advocate provided that he / she has university higher legal education, provided for in Article 8 of the Law on the Bar, was in compliance with the Constitution. The petitioner reasoned that such a requirement of the law might contradict Article 48.1 of the Constitution wherein it is established that every person may freely choose an occupation or business.

The Court found that the purpose of university legal education is preparation of specialists who had a wide outlook and who were able to asses the entire legal system and decide difficult problems. A much wider and varied syllabus of university studies, studies which took place over a longer time period and which more fundamental and paid greater attention to general subjects of humanities, private law, etc., helped to achieve this aim. Therefore legal education which was acquired in an institute, academy or higher educational establishment of the former USSR Ministry of Internal Affairs could not be unconditionally held to be analogous to university education, even though the former is recognised as higher education.

To foresee a necessary level and type of legal education for advocates, as well as other additional requirements, is an internal affair of every State. Some countries require not only corresponding legal education but also additional practical training and examinations.

The Lithuanian legislature had come to a conclusion that legal education of wide outlook which could be secured only by university higher legal education was necessary for lawyers who work at the bar. The Constitutional Court recognised that this could result in increased educational requirements for the lawyers of this profession. However, such requirements had the aim of ensuring that people be supplied with more qualified legal assistance, i.e., of strengthening the protection and defence of human rights and freedoms.

The Constitutional Court therefore ruled that the disputed provision was in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

The Netherlands
Supreme Court

Important decisions

Identification: NED-96-2-008

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 19.04.1996 / **e)** 15.980 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 92.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Exhaustion of remedies.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Institutions – Courts – Jurisdiction.
Fundamental Rights – General questions – Limits and restrictions.

Keywords of the alphabetical index:

Effective remedy, right, scope.

Headnotes:

The right to an effective remedy, enshrined in Article 13 ECHR, cannot be invoked to guarantee the possibility of appeal to a higher court against a judgment given by another judicial tribunal if there is no domestic statutory provision for such a remedy.

Summary:

The plaintiff lodged an appeal to overturn a judgment given by the Agricultural Tenancies Division of Arnhem Appeal Court. Pursuant to the provisions of the Agricultural Tenancies Act, however, such an appeal does not lie against such judgments, so that the Supreme Court cannot admit an appeal of this kind. This remains the case, according to the Supreme Court, even if the statement of grounds for appeal must be understood as an allegation that the Appeal Court's decision was in violation of Article 6 ECHR and Article 1 Protocol 1 ECHR, simply because Article 13 ECHR, which the statement of grounds for appeal invokes in this connection, cannot create the possibility of appeal to a higher court where domestic law does not provide for such.

Languages:

Dutch.

Identification: NED-96-2-009

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 23.04.1996 / **e)** 101.367 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1996, 275.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of movement.

Keywords of the alphabetical index:

Order to move on.

Headnotes:

An order to move on, issued in the interests of preserving public order, does not violate the right to freedom of movement.

Summary:

The accused was ordered to leave an area that the burgomaster of Amsterdam had designated as liable to emergency measures. Some time later, the accused was found within this area once again. The police court convicted the accused of intentional non-compliance with an order issued in accordance with statutory provisions by an officer in the performance of his duties. The Appeal Court upheld the judgment of the police court.

The Supreme Court held that where an alleged violation of Article 6 ECHR was concerned, the statement of grounds for appeal in this case overlooked the fact that

the order to leave the area was not issued to the accused on the basis of criminal proceedings against him, but as a public order measure. In accordance with Article 2.3 Protocol 4 ECHR, the exercise of the right to freedom of movement is subject to restrictions which are provided for by law and which are necessary in a democratic society, among other reasons, to preserve public order. The Supreme Court held that the order to leave the area issued to the accused, an order which was based on the Municipalities Act and which was issued on account of disruptive conduct within the area concerned (the use of narcotics in public), was not in violation of Article 2 Protocol 4 ECHR, nor of Article 12 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

Identification: NED-96-2-010

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 23.04.1996 / **e)** 101.655 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1996, 548.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Institutions – Army and police forces – Police forces – Functions.
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:

Home, limits / Premises, inviolability.

Headnotes:

Opening a movable roof to look inside a garage which neither the occupant or the accused is using as residential accommodation does not constitute a violation of the right to respect for private life.

Summary:

The police suspected on the basis of surveillance activities that criminal offences within the meaning of the Opium Act were being committed in a garage. As part of their investigation, the police opened up the movable portion of the garage roof and looked into the garage through the opening thus created. On the day of the investigation the garage was not being used as residential accommodation either by the occupants of the house to which the garage belonged or by the accused, who had been given the use of the garage.

In response to complaints about an invasion of privacy, the Supreme Court held as follows: The concept of "home" or "domicile", as these terms appear in the English and French texts, respectively, of Article 8.1 ECHR, is not confined to dwellings but may in certain circumstances include premises used for business or other work. In the Supreme Court's opinion, where a garage belonging to a home is being used by the occupant, it will in general come under the protection of Article 8 ECHR because the garage is part of the home. Where a garage that belongs to a home is not being used by the occupant, or is otherwise not in residential use, a court, in coming to a decision on whether action taken in the course of an investigation such as that referred to in the case at hand breaches the right of the user of the garage to respect for private life, having regard to the customary purpose of a garage, is entitled to proceed on the assumption – unless exceptional circumstances have either been established or brought forward with respect to the use of that garage – that there is no question of any such violation. In the case at hand, the Supreme Court found no exceptional circumstances that would have called for an investigation to determine whether the garage was in fact covered by the protection to which the accused was entitled under Article 8 ECHR. The Supreme Court then went on to dismiss the allegation that the disputed investigative activities had constituted an invasion of the accused person's privacy.

Languages:

Dutch.

Identification: NED-96-2-011

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 26.04.1996 / **e)** 15.951 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 99.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – General questions – Effects – Vertical effects.
Fundamental Rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Contractual freedom / Hypnosis show / Preventive restriction.

Headnotes:

Public authorities may not introduce any preventive restrictions to the right of freedom of expression for reasons of content.

Summary:

The interim injunction proceedings at issue concerned the question of whether the municipality of Rijssen was entitled to refuse to hire out a hall in a centre under its management on the grounds of objections to a hypnosis show which the applicant hirer wished to organise there. The municipality of Rijssen is a particular type of community: the majority of the population are Orthodox Protestants, and they roundly reject much of what is common in the realm of theatre and show business. The Appeal Court upheld the applicant hirer's invocation of the right of freedom of expression, and dismissed the municipality's invocation of the principle of freedom of contract.

The Supreme Court held that Article 7.3 of the Constitution must be construed as a prohibition on any preventive restriction on the right to freedom of expression (by means other than the printed press, radio and television) by a public authority on grounds of content. The Supreme Court held that the Court of Appeal, in considering that the municipality's refusal to hire out the hall amounted to a "prohibition of a performance on the grounds of the show's content" evidently wished to make it clear that this refusal, in the circumstances, had the actual effect of introducing a preventive restriction on what was expressed in the show, because of its content.

The Supreme Court endorsed the Appeal Court's view, namely that the obligation to protect the public interest makes it incumbent on the authorities to observe the principles of good governance and to respect the fundamental rights of the public when it comes to entering into and implementing agreements under private law. The Appeal Court was therefore right to rule that the municipality had violated the right to freedom of expression.

Languages:

Dutch.

Identification: NED-96-2-012

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 07.05.1996 / **e)** 101.910 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1996, 286.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Documents, police photographs / File.

Headnotes:

The photograph books used by the police are not documents in a case and therefore do not have to be added to the case file.

The defence may not be refused access to documents which are not documents in the action when it is alleging in defence that the evidence has been obtained in an unreliable or unlawful manner. Whether defence counsel or the accused is entitled to access to the documentation, or to copies thereof, is assessed by striking a balance between the various interests involved.

Summary:

In this case, the police conducted an investigation relating to members of the Turkish human rights organisation Dev Sol, who were suspected of having committed certain criminal offences. In the course of this investigation, the police showed the informants books containing photographs of persons who were possibly connected with Dev Sol. The official report of these interviews includes copies of the photographs in which the accused was recognised. Counsel for the accused asked the court to incorporate the photograph books into the case file. In support of this request, she argued that the investigation, arrest and examination had been based entirely, or to a significant extent, on the recognition of photographs from these books. As these documents were available to the police and the judicial authorities, the accused and his counsel should not be refused access to them.

The District Court rejected counsel's request. In support of this decision, it held that granting the request would not have been in the general interests of the investigation. The District Court also held that the defence's right to monitor the way the photographs were being used was sufficiently safeguarded by an opportunity to consult them in court, and invited counsel to do so. Counsel then contended that the prosecution case should be deemed inadmissible. In support of this contention she alleged that there had been a violation of the fair trial principle enshrined in Article 6 ECHR because essential documents in the case had not been supplied to defence counsel and the accused well before the court hearing, having been made available for consultation only in court, and then only to defence counsel, and not to the accused. The District Court rejected counsel's defence, which ruling was upheld by the Appeal Court.

The Supreme Court held that the concept of documents in a case is not defined by law, nor does the law stipulate which official should decide the contents of a case file. Where documents are concerned that may affect the evidence, it may be assumed, according to the Supreme Court, that the public prosecutor will add the documents containing the findings of the investigation to the file. Documents which it is reasonable to assume may be of importance in that they may tend to inculpate or exculpate should also be documents which the accused and his counsel have access to in a case, barring certain exceptional cases. Given the nature and function of the photograph books, the Appeal Court's ruling that these were not in themselves documents in the case that should have been added to the case file did not display an incorrect conception of law.

The Supreme Court further held that if the defence disputed the reliability or lawfulness of the way in which any piece of evidence had been obtained, this defence should be investigated. The principles of due process of law require that the defence not be denied access to documents which are not included in the documents of the case but which are of importance to an assessment of these questions. But this does not mean that both counsel for the defence and the accused have an automatic right to access to or a copy of the documents in question. The Supreme Court found that the Appeal Court's ruling that in the case at hand the interests of the investigating authorities in future investigations of extortion practices by Dev Sol and the legitimate interests of the persons depicted in the photograph books outweighed the interests of the defence in inspecting these books, such that counsel for the accused, but not the accused himself, might be permitted to inspect them, did not display an incorrect conception of law. On the basis of the aforesaid considerations, the Appeal Court had sufficient grounds for its dismissal of the defence's contention that the case of the public prosecutor should be deemed inadmissible.

Languages:

Dutch.

Identification: NED-96-2-013

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 10.05.1996 / **e)** 8722 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 112.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – General questions – Limits and restrictions.
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:

Journalist, refusal to give evidence, right.

Headnotes:

Article 10.1 ECHR gives a journalist the right to refuse to answer questions, except in special circumstances, if he would risk exposing his source by doing so.

Summary:

This case concerns the refusal of two journalists to answer questions put to them when they were being questioned as witnesses. The purpose of this questioning was to ascertain the journalists' sources and hence to discover what information the latter had supplied to them.

The Supreme Court held that it follows from the judgment of the European Court of Human Rights of 27 March 1996 (*Goodwin vs. United Kingdom*, [ECH-96-1-006]) that it must be accepted that Article 10.1 ECHR entitles a journalist in principle to refuse to answer a question put to him if he would risk exposing his source by doing so. The court is not obliged to accept an invocation of this right, however, if it is of the opinion that in the particular circumstances of the case, revealing the source is necessary in a democratic society with a view to protecting one or more of the interests referred to in Article 10.2 ECHR, provided that the person hearing the journalist as a witness cites such an interest and, where necessary, provides a plausible case for its existence.

In the case at hand, the Supreme Court took the view that the only interest the plaintiffs had in exposing the journalists' sources was their desire to locate the "leak" so that they could go on to bring legal proceedings against the State and the parties involved, personally, both to obtain compensation and to forbid those involved, personally, to "leak" any more information to the press. On the basis of the aforementioned judgment of the European Court of Human Rights, it must however be assumed, according to the Supreme Court, that this interest is in itself insufficient to offset the compelling public interest at stake here in the protection of the journalists' sources.

Languages:

Dutch.

Identification: NED-96-2-014

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 10.05.1996 / **e)** 8728 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 113.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Temporal effect – Retrospective effect.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
General Principles – Legality.
General Principles – Reasonableness.
Institutions – Courts – Decisions.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Employee, unequal treatment.

Headnotes:

As a result of a legal rule which was formulated in a court ruling handed down at the highest level but which had not previously been regarded as valid law, the unequal treatment of married and unmarried female employees could not be redressed retroactively. This was found not to be incompatible with Article 26 of the International Covenant on Civil and Political Rights.

Summary:

Ms. Cijntje was employed as a teacher by a Foundation. In accordance with the salary scales that applied at the time, until 31 December 1991 she received a lower salary than her married colleagues. Arguing that the Foundation had discriminated against her in favour of her married colleagues, Cijntje claimed payment in these proceedings of the difference between the amounts actually paid to her in her salary up to 31 December 1991 and the salary she would have been paid as a married teacher.

The Court ruling at first instance dismissed the claim. It held that the part of the claim that related to loss of earnings in the period prior to 11 February 1989 was barred by the statute of limitation. As a result of a transitional rule, the essence of which was that "barring exceptions, claims such as the present one will not in principle be granted retroactively any earlier than 7 May 1993", the part of the claim that related to the period between 11 February 1989 and 31 December 1991 could not be granted. The Joint Court of Justice of the

Netherlands Antilles and Aruba upheld this judgment of the Court.

The Supreme Court held that the Joint Court of Justice had accepted the transitional rule disputed at appeal on the basis of its finding that the development of the law in the Netherlands Antilles, where equal pay for married and unmarried persons is concerned, had not been completed before it was established by the Supreme Court judgment of 7 May 1993 (*Nederlandse Jurisprudentie*, 1995, 259, [NED-94-2-005]) that the practice pursued up to that point by the Netherlands Antilles could no longer be deemed compatible with Article 26 of the International Covenant on Civil and Political Rights.

Furthermore, the Supreme Court held that when a stage in the development of the law is marked by a court handing down a judgment at the highest instance, formulating a rule of law that had previously not been regarded as valid law, this can be deemed equivalent to a new legal rule. In both cases, reasonableness and legal certainty may require an interim measure to be enacted which in principle excludes the retroactive application of the legal rule in question. According to the Supreme Court, the Joint Court of Justice was right to take account of this possibility.

Likewise, the Supreme Court held that the Joint Court had been correct in its opinion that, in the situation concerned, salary claims based on the interpretation and application of Article 26 of the International Covenant on Civil and Political Rights given in the judgment of 7 May 1993 could not be granted if they related to the period prior to the judgment, during which time customary practice was based on a different point of view.

Languages:

Dutch.

Identification: NED-96-2-015

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 14.05.1996 / **e)** 102.428 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1996, 305.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
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 – Freedom of movement.

Keywords of the alphabetical index:

Ban on entering a sports stadium.

Headnotes:

The obligation on a person banned from attending a sports stadium to report to an authority is not incompatible with Article 2 Protocol 4 ECHR.

Summary:

In this case, the Appeal Court ordered the accused, in pronouncing sentence, to register at the police station of his home town during half-time of every match played by Feijenoord football club. The Court held that the point of this reporting obligation was to monitor the accused's compliance with the ban on attending the stadium that had been imposed on him.

The obligation to report was necessary in order to prevent a repeat of the criminal offences of which the accused was convicted. Having regard to the Appeal Court's arguments and the limited duration and extent of the restrictions on the accused's liberty, the Supreme Court held that it was reasonable for the Appeal Court to rule that the obligation to report was an acceptable means of achieving the set goal. The Supreme Court ruled that the ban on entering the sports stadium and the accompanying obligation to report to the police were not in breach of Article 2.1 Protocol 4 ECHR, having regard to Article 2.3 ECHR and to Article 12.3 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

Norway
Supreme Court

Important decisions

Identification: NOR-96-2-005

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 24.05.1996 / **e)** Inr 53B/1996 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Interpretation by analogy.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Compensation, right.

Headnotes:

In cases of loss of property value, the 1989 amendment to the Neighbours Act which extends the scopes of compensation is of no significance to the question of compensation under an analogous application of Article 105 of the Constitution, which provides for a principle of compensation which is only directly applicable in cases of expropriation.

Summary:

Owing to the improvement of a public street in a Norwegian city, the street access of three properties had been closed, and the garages were no longer useful for their purpose and had lost their main value.

The Court of Appeal awarded compensation in reliance upon an analogous application of Article 105 of the Constitution and the principle stated in Section 2.4 of the Neighbours Act, which was passed as an amendment in 1989.

The Supreme Court disagreed with the Court of Appeal and overturned the disputed part of the decision of the Court of Appeal appealed against. It was not disputed that Section 2 of the Neighbours Act was not directly applicable in this case. The question was whether the extension of the scope of compensation which had taken place when subsection 4 was passed had significance for the question of compensation according to Article 105 of the Constitution. The parties agreed that according to the previous position in law, the landowners along the street had no claim to compensation for losses relating to the garages. The Supreme Court held that the 1989 amendment to the Neighbours Act was of no significance to the question of awarding compensation under Article 105 of the Constitution. There had been no comments on the constitutional matter at the time of the adoption of the amendment.

Languages:

Norwegian.

Identification: NOR-96-2-006

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 05.06.1996 / **e)** Inr 57B/1996, nr 134/1994 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Institutions – Courts – Ordinary courts – Civil courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Civil procedure / Compensation for damages, non-economic loss / Standard of proof.

Headnotes:

If, in a civil procedure, Article 6.2 ECHR was applicable, it was not violated if the victim was claiming damages against an alleged offender who had been acquitted of the related offence. In such cases, however, there must be a clear preponderance of probability that the acts have taken place.

Summary:

A. was charged with sexual offences during the period 1986-1990 towards the girl B., who was born in 1979. He was acquitted in the Court of Appeal. After the jury had answered no to the question of guilt, counsel for the victim maintained a claim for damages for non-economic loss. The Court of Appeal held that the strict standard of proof that the sexual abuse had taken place was not fulfilled and dismissed the claim.

B. appealed the decision on damages to the Supreme Court. The appeal concerned procedural errors, errors in law and the assessment of evidence.

The appeal was heard as a civil case, in accordance with Section 435 of the Civil Procedure Act.

The Supreme Court found that there was a clear preponderance of probability that the sexual abuse had taken place, and B. was awarded damages of Nkr 75.000.

The Supreme Court held that Article 6.2 ECHR could not prevent a victim from claiming damages against an alleged offender even if he was acquitted of the related offence, and that the court in such cases could find that the defendant had committed the act in respect of which he was acquitted in the criminal proceedings. If Article 6.2 ECHR was applicable in the hearing of such claims, it could not be violated as long as the court did not express any disagreement about the prior verdict or any doubts about it.

The Supreme Court ruled that the standard of proof that the acts had taken place was stronger than the usual standard in civil cases, but not as strong as in criminal cases. There had to be a clear preponderance of probability that the acts had taken place.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data

1 May 1996 – 31 August 1996

Constitutional review

Decisions:
- Cases decided on their merits: 7
- Cases discontinued: 0

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

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 5
- Cases on the legality of other normative acts under the Constitution and statutes: 2

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 2
- Upholding the constitutionality of the provisions in question: 5

Universally binding interpretation of laws

Resolutions issued under Article 13 of the Constitutional Tribunal Act: 4
Motions requesting such interpretations: rejected: 1

Subject matter of important decisions

Privatisation
Decision of 14 May 1996 (K 30/95)
Resolution of 15 May 1996 (W 2/96)

Banking law
Resolution of 28 May 1996 (W 8/95)

Taxation
Decision of 29 May 1996 (K 22/95)

Administration of land in the capital city
Resolution of 18 June 1996 (W 19/95)

Securities
Decision of 15 July 1996 (U 3/96)

Pensions
Decision of 17 July 1996 (K 8/96)

Important decisions

Identification: POL-96-2-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.04.1996 / **e)** W 14/95 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 63, item 303; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal), no. 2/96, item 14 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Political parties.

Keywords of the alphabetical index:

Political parties, registration.

Headnotes:

The registration court may refuse to register a political party on the basis that the party's bye-laws have not been enclosed or that the persons authorised to represent the party have been appointed contrary to the provisions of the party's bye-laws.

Summary:

The subject of the Tribunal's decision were provisions of the 1990 Law on Political Parties. Having analysed the relevant provisions of the Constitution and the Law on Political Parties, the Tribunal concluded that the Polish regime of creating political parties consisted of two elements: notification and registration. The court responsible for keeping the parties' register (Provincial Court in Warsaw) should verify the genuineness of information included in the notification form. In particular, the court is authorised to request the party's bye-laws in order to verify whether the party's purpose meets criteria provided for in the Constitution and the Law on Political Parties (to influence the formulation of the State's policies by democratic means). The registration court should also examine the party's structure (each party should be voluntarily formed and ensure the equality of all its members) as well as whether its governing bodies were elected in the manner specified in the bye-laws.

Languages:

Polish.

Identification: POL-96-2-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.05.1996 / **e)** K 22/95 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal), no. 3/96, item 21 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Taxation, deduction of housing expenses.

Headnotes:

The legislature may decide on tax deductions for citizens at its own discretion. However, in granting or cancelling certain deductions, it should take into consideration the purpose to be achieved and the consequences of such deductions for the State budget.

Deductions resulting from spending by citizens for their housing needs are an exception to the principle of the universality and equity of tax obligations.

Summary:

The 1991 Personal Income Tax Act provided for a number of deductions to which citizens building or buying houses were entitled. The First President of the Supreme Court pointed out several other forms of housing expenditure which did not give rise to any deduction. According to the applicant, the commonness and universality of such deductions makes them not exceptional but a rule.

The Tribunal concluded that the deduction rights resulting from housing expenditure constituted an exception to the principle of the universality and equity of tax obligations, and are intended to stimulate certain activities of citizens. Therefore, such deduction rights may not be perceived as a "legal standard". The Tribunal stressed

that the right to deduct certain housing expenditure was granted only to those citizens whose basic housing needs had not yet been satisfied. Those who already own a house or apartment may not make any deductions, if they only want to change the legal status of an existing house or apartment. According to the Tribunal, the legislature may decide on tax deductions for citizens at its own discretion. However, in granting or cancelling certain deductions, it should take into consideration the purpose to be achieved and the consequences of such deductions for the State budget.

Cross-references:

Decision of 28.12.1995 (K 28/95), *Bulletin* 95/3, 337 [POL-95-3-019].

Languages:

Polish.

Identification: POL-96-2-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.06.1996 / **e)** W 19/95 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), no. 91, item 414; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal), no. 3/96, item 25 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Land administration, capital city / Preemption, right of previous owners.

Headnotes:

The former owners of expropriated real estate located in the capital city or their heirs have the right of preemption with regard to such real estate currently owned by the State Treasury or communes which are offered for sale.

Summary:

According to the law on the administration of land and real estate expropriation, in respect of real estate which was expropriated in the past the former owners or their heirs have the preemption right if the same real estate is offered for sale. The same rule applies in cases where, instead of the sale, the perpetual usufruct is to be determined with regard to the real estate. This regulation is subject to the conditions both that the land is within the ownership of the State Treasury, as well as that the land passed to the communes after 1990. The right of preemption is especially enjoyed by former owners of real estate in Warsaw city which had been expropriated in 1995 and later became the property of the State Treasury.

Languages:

Polish.

Identification: POL-96-2-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 01.07.1996 / **e)** U 3/95 / **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:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
General Principles – Rule of law – Maintaining confidence.

Keywords of the alphabetical index:

Contractual freedom / Contractual stability / Foster families.

Headnotes:

In a democratic State governed by laws, provisions of executive acts may not modify terms and conditions of contracts concluded between citizens and the State Treasury.

Summary:

The Ombudsman objected to the change introduced by the Council of Minister decree which reduced the State's financial help to children in foster families from 60% to 40% of the average salary. Moreover, the decree changed provisions which had not yet entered into force. The Ombudsman stressed that in this way the State withdrew economic help previously promised by it and infringed the constitutional principles of legal security and the citizens' confidence in the State.

The Tribunal did not find a violation of the Constitution in the issuance of the decree objected to by the Ombudsman. Financial help for children in foster families is not regulated by any decree. Its terms and conditions are specified in agreements concluded between the State Treasury and the foster families. Certainly, the content of such agreements is shaped on the basis of the decree provisions, but in a democratic State governed by laws provisions of executive acts may not modify terms and conditions of contracts concluded previously between an individual and the State Treasury. This meant that the decree in question could not trigger any change in the contracts already concluded with the foster families. These contracts could be changed exclusively by the mutual consent of the parties involved.

Languages:

Polish.

Identification: POL-96-2-012

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.07.1996 / **e)** U 3/96 / **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:

Constitutional Justice – The subject of review – Rules issued by the executive.
General Principles – Rule of law.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Securities.

Headnotes:

A legal provision issued without authorisation infringes the principles of the Constitution.

Summary:

An association of stockbrokers put in question one of the provisions of a resolution adopted by the State Securities Commission. The said resolution provided for an interpretation of the law on securities, according to which the shareholder having 33% or more of votes at the Shareholders' Meeting could be compelled to purchase the shares of minority shareholders.

The Tribunal decided that since the provision in question was of a general character, it was like all legal provisions subject to the control of the Tribunal. The Tribunal declared this provision as issued without proper authorisation, which is contrary to the constitutional principle of a State governed by laws.

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 May 1996 – 31 August 1996

Total: 346 judgments, of which:

- Subsequent scrutiny *in abstracto*: 9 judgments
- Appeals: 298 judgments, of which
  - Substantive issues: 218 judgments
  - Applications for a declaration of unconstitutionality: 2 judgments
  - Procedural matters: 78 judgments
- Complaints: 30 judgments
- Access to asset and income returns: 2 judgments
- Temporary incapacity of the President of the Republic: 2 judgments
- Political parties and coalitions: 2 judgments
- Electoral disputes: 1 judgment
- Political party accounts: 1 judgment
- Direct consultation at local level: 1 judgment

Important decisions

Identification: POR-96-2-004

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 27.07.1996 / **e)** 976/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Head of State.
Institutions – Head of State – Status.

Keywords of the alphabetical index:

President of the Republic / Temporary incapacity.

Headnotes:

Where a declaration of temporary incapacity to exercise duties has been requested by the President of the Republic himself, there is no need for the Constitutional Court to solicit a hearing nor for the medical verification provided for in section 88 of Law no. 28/82.

In the case under consideration, the circumstances described in the medical report accompanying the request could reasonably be held to amount to a temporary incapacity to exercise presidential duties, as the President himself had judged.

Summary:

Under Article 135.1 of the Constitution, temporary incapacity of the President of the Republic shall entail his replacement by the President of the Assembly of the Republic.

Article 225.2.a of the Constitution provides that it shall be for the Constitutional Court to note and declare any temporary incapacity of the President of the Republic to exercise his duties.

The President of the Republic, Dr Jorge Sampaio, requested the Constitutional Court to declare his temporary incapacity as from 27 July 1996, when he was due to undergo a surgical operation. The President appended a medical report to his request, which described the condition making surgery necessary, the circumstances of the operation and the likely post-operative period, and went on to conclude, from a strictly medical point of view, that the operation would entail the President's temporary incapacity to exercise his duties.

On the basis of that information, the Constitutional Court, after considering that additional clinical examinations could be dispensed with, confirmed and declared the temporary incapacity of the President of the Republic, Dr Jorge Sampaio, as from 27 July 1996. The duties of the President of the Republic would be assumed during his incapacity by the President of the Assembly of the Republic, Dr António de Almeida Santos.

Supplementary information:

In its judgment no. 980/96 the Constitutional Court declared that the President's temporary incapacity had ceased.

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data
1 May 1996 – 31 August 1996

- 1 decision on the constitutionality of legislation prior to its enactment
- 37 decisions on objections alleging unconstitutionality

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

Russia
Constitutional Court

Statistical data
1 May 1996 – 31 August 1996

Total number of decisions: 6

Types of decision:

- Rulings: 6
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of State bodies: 6
- 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: 3
- Complaints of individuals: 2
- Inquiries of courts: 1

Important decisions

Identification: RUS-96-2-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 27.03.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 04.04.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Lawyer, right of choice / State secret.

Headnotes:

The provisions of an Act, pursuant to which a lawyer could be barred from participating as a defence counsel in criminal proceedings connected with State secrets because he was not authorised to have access to State secrets, were found to be unconstitutional.

Summary:

The proceedings were instituted in the form of individual complaints lodged by citizens against the violation of their constitutional rights by certain sections of the State Secrets Act of the Russian Federation.

The reason for instituting the proceedings was the uncertainty that had arisen as to whether the provisions of the said law, whereby a lawyer could be barred from participating as defence counsel in criminal proceedings connected with State secrets because he was not authorised to have access to State secrets, were in conformity with the Constitution of the Russian Federation.

The Constitution of the Russian Federation, international human rights instruments and federal legislation require the State to grant persons acting in the area of criminal procedure adequate guarantees of the protection of their rights and freedoms. Article 48 of the Constitution of the Russian Federation prescribes the right of everyone to receive qualified legal assistance and the assistance of a lawyer (defence counsel) at all stages of criminal proceedings. Pursuant to Article 14 of the International Covenant on Civil and Political Rights, which is part of the law of the Russian Federation, everyone, during the examination of the charges against him, shall be entitled to communicate with the defence counsel of his own choosing and to defend himself through such counsel.

Consequently, the refusal to allow the accused (the suspect) to take a lawyer of his own choosing on the grounds that the latter is not authorised to have access to State secrets, as well as the proposal made to the accused (the suspect) to choose his counsel from among a limited number of lawyers who have such access, pursuant to the application of the provisions of Section 21 of the State Secrets Act of the Russian Federation to the domain of criminal procedure, unlawfully restricted the constitutional right of citizens to receive qualified legal assistance and the right to an independent choice of counsel (Article 48 of the Constitution of the Russian Federation and Article 14 of the International Covenant on Civil and Political Rights). In conformity with Article 56.3 of the Constitution of the Russian Federation, the above-mentioned constitutional rights may not be restricted under any circumstances. The fact that the choice of counsel by the accused is subject to counsel's having authorised access to State secrets is also at variance with the adversarial principle and the principle of equal rights for the parties to proceedings, as set forth in Article 123.3 of the Constitution of the Russian Federation.

According to Article 2 of the Constitution of the Russian Federation, the individual and his rights and freedoms are the supreme value. Human and civil rights and freedoms determine the meaning, content and implementation of laws and the functioning of legislative and executive authority and are guaranteed by law (Article 18 of the Constitution of the Russian Federation).

Proceeding on the basis of these constitutional provisions, the legislator, in defining the measures and procedures for protecting State secrets, must only make use of those which, in the given situation of the application of the law, exclude the possibility of a disproportionate restriction of human and civil rights and freedoms. In the framework of criminal procedure, these may result in particular in the exclusion of the public from hearings, in warning participants in the trial not to divulge State secrets made known to them in connection with the criminal proceedings, and in the prosecution of these persons if State secrets are divulged. Protecting State secrets during criminal proceedings is also secured by the provisions of the Regulations of the Bar of the RSFSR, approved by the RSFSR Act of 20 November 1980, which require lawyers to respect professional secrecy, not to commit offences incompatible with their membership of the Bar and to demonstrate model behaviour.

The legislator is also entitled to introduce other measures for safeguarding State secrets during criminal proceedings, but these must, however, have a criminal procedure aspect and be consistent with the importance of the secret and the legal status of the participants in the criminal proceedings.

The Constitutional Court of the Russian Federation found the text of Section 21 of the Russian Federation's State Secrets Act to be in conformity with the Constitution.

The application of the provisions of this section to lawyers participating as defence counsel in criminal proceedings and the barring from participation in the case of those not authorised to obtain access to State secrets, however, was held to be unconstitutional.

The Federal Assembly of the Russian Federation must, in light of this Decision, make the necessary changes to the legislation in force.

Languages:

Russian, French (translation by the Court).

Identification: RUS-96-2-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 13.06.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 02.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Temporal effect.
Institutions – Courts – Procedure.
Institutions – Courts – Ordinary courts – Criminal courts.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Notification of charges / Police custody.

Headnotes:

The rule of criminal procedure according to which the time spent by the accused and his defence counsel consulting the case file is not taken into account in calculating the duration of police custody, is unconstitutional as a law-enforcement measure is unconstitutional because it unduly restricts the civil right to liberty and to legal protection.

Summary:

The proceedings were instituted because a citizen had complained that his constitutional rights and freedoms had been violated by Article 97.5 of the RSFSR Code of Criminal Procedure, according to which the time spent by the accused and his defence counsel consulting the case file is not taken into consideration for calculating the duration of police custody as a law-enforcement measure. According to the applicant, this rule was not consistent with a number of Articles of the Constitution, because it unduly restricted his right to individual freedom and inviolability as well as his right to legal protection and resulted in a violation of his rights and freedoms arising out of the exercise by other persons of their rights.

This unwarranted increase in the duration of police custody derived not only from the content of Article 97.5 of the RSFSR Code of Criminal Procedure as such, but also from the nature of the rules ensuring the right of the accused to receive complete information on the substance of an accusation and the evidence on which it is based. Consequently, finding the contested rule unconstitutional was not in itself sufficient for securing the rights of defence of the accused.

Given the task of protecting society against crime by a justifiable application of criminal law, the legislator must try to settle the above questions by appropriate legislation and regulations.

The most effective way to guarantee the constitutionality of criminal procedures would appear to be for the legislator to introduce the necessary changes to the system of criminal procedure in force or to create new legal instruments. If the courts were to correct legal procedure through a direct application of the right to legal protection, which is enshrined in the Constitution, it would still be difficult to guarantee the equality of citizens before the law and the courts through the practical application of the legal rules. However, the adoption of relevant legislative decisions which take into account the position of the Constitutional Court requires time.

In the event, the Constitutional Court found that Article 97.5 of the RSFSR Code of Criminal Procedure was unconstitutional.

Article 97.5 of the RSFSR Code of Criminal Procedure will therefore lapse six months after the announcement of this Decision.

The Federal Assembly of the Russian Federation must, within six months from the announcement of this Decision, resolve the question of amending the law of criminal procedure as regards the guarantee of the right of everyone to liberty, enshrined in the Constitution of the Russian Federation, in cases of arrest and remand in police custody as a law-enforcement measure.

Pursuant to Article 46.1 of the Constitution, before questions associated with the right of everyone to liberty

can be resolved by legislation, persons accused of committing a crime are entitled to submit to the court an appeal challenging the legality and the validity of remand in custody (detention on remand) at all stages of the criminal proceedings, including the period of consultation of the case file by the accused and his defence counsel.

Languages:

Russian, French (translation by the Court).

Identification: RUS-96-2-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.07.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 24.07.1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Federal State.
Institutions – Federalism and regionalism – Distribution of powers – System.

Keywords of the alphabetical index:

Federation, constituent entities, equality of rights / Federation, constituent entities, territory.

Headnotes:

The fact, enshrined in the Constitution, that a constituent entity of the Federation, ie an Autonomous District, is part of another such entity (a Region) presupposes a special State and legal relationship between them on the basis of the equality of rights of all constituent entities of the Federation. Given that the Constitution does not directly define the specific features of the delimitation of the powers of these constituent entities, the Constitutional Court considers that the fairest solution in the current situation is that the said entities should settle their disputes between themselves.

Summary:

Proceedings were instituted because of requests by the Duma of the Autonomous District of Khanty-Mansiysk and the State Duma of the Autonomous District of Yamalo-Nenets for a review of the constitutionality of certain provisions of the status of the Region of Tyumen which, in the view of the applicants, detracted from the status of the Autonomous District as a constituent entity of the Russian Federation, deprives it of the right to its own territory and violated the principles of the equality of rights and the autonomy of the constituent entities of the Russian Federation.

The Constitution proclaims the principle of the equality of rights of the constituent entities of the Russian Federation. However, the application of this principle to the Autonomous Districts that are part of a territory or Region has special features. At the time of the adoption of the Constitution of the Russian Federation (1993), the Autonomous District of Khanty-Mansiysk and the Autonomous District of Yamalo-Nenets were part of the region of Tyumen under the legislation then in force.

This situation still applies. However, through the inclusion of this constituent entity of the Federation (ie the Autonomous District) in the territory (the Region), the latter acquired a qualitatively different character in the current circumstances, now that all the constituent entities of the Federation enjoy equality of rights as proclaimed in the Constitution.

The inclusion of the Autonomous District in the territory (the Region), as enshrined in the Constitution, presupposes a particular State and legal relationship between them. The relations between the Autonomous District and the territory (the Region) of which it is a part differ from their relations with the other constituent entities of the Federation. The inclusion of the Autonomous District in the territory (the Region) requires the two constituent entities of the Federation to base their relations on the State and legal realities historically established at the time of the adoption of the Constitution and not at variance with it. It presupposes a certain extension, on the basis of reciprocal agreements and understandings, of the jurisdiction of the State power of the territory (the Region) over the territory of the Autonomous District.

Given that the Constitution does not directly refer to the special features of the delimitation of the powers of these constituent entities of the Federation, the Constitutional Court, in the absence of a federal law and/or a treaty (or treaties or other agreements) prescribed by Article 66.4 of the Constitution, must refrain from defining the concrete conditions of the relations between the region of Tyumen and the Autonomous Districts of which it is made up.

For this reason, the Constitutional Court considered that the fairest solution in the current situation would be for the constituent entities of the Russian Federation to settle

their disputes themselves. The Constitution expressly provided for this procedure, which is based on the equality of rights and all the necessary conditions existed for such a solution.

The Constitutional Court of the Russian Federation therefore postponed the case until relations between the relevant constituent entities of the Federation are settled, and recommended that the bodies concerned use the conciliation procedures under Article 85.1 of the Constitution and that the Federal Assembly of the Russian Federation step up the drafting and adoption of the federal law on this question.

Languages:

Russian, French (translation by the Court).

Slovakia
Constitutional Court

Statistical data

1 May 1996 – 31 August 1996

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 2
- Decisions on the merits by panels of the Court: 4
- Number of other decisions by the plenum: 3
- Number of other decisions by panels: 28
- Total number of cases brought to the Court: 220

Important decisions

Identification: SVK-96-2-003

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 02.05.1996 / **e)** PL.ÚS 42/95 / **f)** Case of conformity between statute and constitution / **g)** *Zbierka zákonov Slovenskej Republiki* (Collection of laws of the Slovak Republic), no. 153/1996 Z.z., in brief; to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Collection of decisions and judgments of the Constitutional Court), in complete version / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Powers.
Fundamental Rights – Civil and political rights – Right of petition.
Fundamental Rights – Collective rights.

Keywords of the alphabetical index:

Referendums, right.

Headnotes:

Parliament must not interfere in the law-making process by way of referendum instigated by citizens. Such a control by Parliament would interfere with the principles of the sovereignty of the people and the separation of powers.

Summary:

The President brought a petition claiming the unconstitutionality of Statute no. 158/1994 amending Statute no. 564/1992 "On the Manner In Which a Referendum Is Held".

According to Article 86.d of the Constitution, the National Council is vested with the power to propose the holding of a referendum.

According to Article 93.1 of the Constitution, the forming of a union with other States or a secession therefrom shall be confirmed by a public referendum; a referendum may also be used to decide on other crucial issues affecting the public interest (Article 93.2). According to Article 95 of the Constitution, a referendum shall be announced by the President upon a petition submitted by no less than 350,000 citizens, or upon a resolution of the National Council not later than thirty days after the petition or the resolution have been submitted by the citizens or by the National Council, as the case may be.

The alleged conflict between Statute no. 158/1994 and the above quoted provisions of the Constitution was found in those provisions of the Statute according to which a petition submitted by citizens was prescribed to be delivered not to the President but to Parliament. According to other provisions of the Statute, Parliament was vested with the power to authorise a governmental body or a private institution to check the submitted petition for its conformity with the Constitution and with the Statute "On the Right of Petition".

The Constitutional Court ruled that under the Constitution the law-making process in the Slovak Republic is divided into two branches. The law-making power is most frequently exercised by Parliament. However, it may also be exercised directly by the citizens. Interference by the National Council in the law-making activity of the citizens would require explicit provision to this effect in the Constitution. The Constitution, however, vests the law-making power with the citizens who shall exercise this power directly or through their elected representatives (Article 2.1). This means that the citizens, when transferring their original law-making right to Parliament, still keep a share of their law-making power which may be exercised independently from Parliament. The right of a citizen to address Parliament with a petition for a referendum also enables him or her to exercise the primary legislative power in situations when Parliament would not exercise this power. Thus, the referendum is a means of protecting a citizen from Parliament if this body has no will, no possibility or no capacity to adopt a statute or when it cannot bear sole responsibility for adopting a required statute. Parliamentary control over a petition claiming a referendum would thus breach the principle of the sovereign will of the people. Furthermore, the principle of separation of powers as between the President and Parliament would be infringed upon.

Consequently, the Constitutional Court ruled that Article 1.1 and Article 1.3 of Statute no. 158/1994 were not in conformity with Article 95 of the Constitution. Article 1.3 of the Statute no. 158/1994 was found not to be in conformity with Articles 1, 2.1 and 2.2 of the Constitution.

Languages:

Slovak.

Identification: SVK-96-2-004

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 11.07.1996 / **e)** I.ÚS 7/96 / **f)** Case of interpretation of the Constitution / **g)** to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Collection of decisions and judgments of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Head of State – Powers.
Institutions – Legislative bodies – Relations with the Head of State.

Keywords of the alphabetical index:

Competence within the executive power.

Headnotes:

In exercising his right to request reports from the government or from individual Ministers, the President must impose neither a procedure for the preparation of these reports nor a time-limit for their delivery.

Summary:

The government submitted to the Constitutional Court a petition on the interpretation of Article 102.r of the Constitution. According to that Article, the President shall have the right to be present at the meetings of the

government, to preside over those meetings and to request reports from the government or from individual Ministers.

The conflict between the government and the President resided in the exercise of this right. The President had sought to impose certain obligations on the government and on individual Ministers in terms of reporting to him. The government objected on the grounds that the President's demands would subordinate the government to the President in violation of Article 108 of the Constitution and other constitutional provisions.

The Constitutional Court ruled that under the Constitution the President has no right to impose on the government or on an individual minister the procedure and the manner in which requested reports, data or information are to be delivered to the President. This right, the right of consideration of the demand, is vested in the exclusive authority of the government or the Minister. There is also no constitutional provision authorising the President to determine any time-limit in which the government or a Minister would be obliged to deliver the reports. In cases where the framers of the Constitution considered it adequate, the Constitution itself determined the terms in which the government was obliged to exercise its authority in the State interest over the activities of some other governmental body. For example, according to Article 113 of the Constitution, the government is obliged to present itself to the members of the National Council within thirty days of its formation and to submit to them its governmental programme, thus initiating a vote of confidence. The other example of such a determination is Article 102.n of the Constitution, according to which the President may return constitutional or other bills to Parliament with his comments for reconsideration within fifteen days from their adoption. Where no such time-limit is set by the Constitution, co-operation between governmental bodies is based solely on the principle of good co-operation, and the time spent in the preparation of requested reports is determined by the objective need to obtain this information from other institutions, if any, and by the time required to prepare the report after obtaining this information.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data

1 May 1996 – 31 August 1996

Number of decisions

The Constitutional Court had 12 (plenary) sessions during this period, in which it dealt with 141 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 34 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 chambers of three judges at sessions closed to the public). There were 254 U- and 263 Up-unresolved cases from the previous year at the start of the period (1 May 1996). The Constitutional Court accepted 75 U- and 92 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

- 45 cases (U-) in the field of protection of constitutionality and legality, of which there were (taken by Plenary Court)
  - 16 decisions and
  - 29 resolutions

- 15 cases (U-) were joined to above mentioned cases because of common treatment and decision; accordingly, the total number of resolved cases (U-) is 60.

- In the same period, the Constitutional Court resolved 61 cases (Up-) in the field of protection of human rights and basic freedoms (4 decisions taken by the Plenary Court, 57 decisions taken by a Chamber of three judges).

The decisions have been published in the Official Gazette of the Republic of Slovenia, while the Resolutions of the Constitutional Court are not as a rule published in an Official Bulletin, but are rather handed over to the participants in the proceedings.

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

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

- in the *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 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 in the *East European Case Reporter of Constitutional Law*, published by *BookWorld Publications*, The Netherlands. The *East European Case Reporter* is available also on Internet.

Important decisions

Identification: SLO-96-2-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 21.03.1996 / **e)** U-I-67/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 24/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), V/2, 1996 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
General Principles – Rule of law.
General Principles – Legality.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Arbitrary determination / Danger for the community / Illegal trade / Violation of basic principles recognised by civilised nations.

Headnotes:

Certain provisions of the Act on Suppression of Illegal Trade, Prohibited Speculation and Economic Sabotage were found to be in conflict with the general principles recognised by civilised nations and also contrary to the Constitution, on the grounds that they failed to consider the dangerousness for the community as an element of criminal offences, but allowed for an arbitrary application of the statute, and, what is more, violate certain human rights and fundamental freedoms.

Summary:

The Act on Suppression of Illegal Trade, Prohibited Speculations and Economic Sabotage was found to be unconstitutional to the extent that it left to the discretion of the courts the distinction, as regards some forms of illegal behaviour, between a misdemeanour and a criminal offence. The criterion which should be adopted is the danger for the community, which in many cases had not been considered by the legislator.

The same definitions of "illegal trade", "prohibited speculation" and "economic sabotage" are not clearly determined, in contrast with the principle of legality, which implies a clear definition of every criminal offence *(nullum crimen sine lege previa)*. Apart from cases where the legislator is really unable to determine in an abstract way all the possible forms of committing a special kind of crime, the use of legal analogy or *analogia iuris* is not consistent with the principle of legality.

According to the Statute, the owner of a company is responsible for the conduct of his agents or servants except when he proves that he was unaware of such conduct and that in this connection he cannot be accused of negligence.

These provisions do not respect the principle of presumption of innocence expressed by Article 27 of the Constitution.

The Statute (Article 16) authorised local people's committees to establish a commission for the suppression of illegal trade and prohibited speculation. These organs exercise a combination of functions of detection, prosecution and adjudication totally inconsistent with the constitutional system. In addition to that, these extraordinary courts do not ensure the right to defence, generally recognised by all civilised nations; nor do they provide for guarantees of the right to due process of law, as well as the right to appeal (expressed, respectively, by Articles 23 and 25 of the Constitution).

The Constitutional Court decided not to prohibit the application of the entire Act, but only of the provisions which were found to be in conflict with the basic principles of criminal law recognised by civilised nations, and which were inconsistent with the Constitution and the Convention on the Protection of Human Rights and Fundamental Freedoms.

In so doing, however, the Court declined to list in detail those provisions which could continue to be applied, giving only some examples, while indicating the criteria that must be followed by the courts.

Supplementary information:

Legal norms referred to:
Article 136 of the Constitution of the FPRY.
Articles 8, 23, 25, 27, 28 and 125 of the Constitution.
Articles 6.1, 6.2 and 7.1 ECHR.
Article 416 of the Criminal Proceedings Act (CPA).
Article 23.1.5 and Article 40.1 of the Constitutional Court Act (CCA).

One concurring opinion of a judge of the Constitutional Court.

Cross-references:

In stating the reasons for its decision, the Constitutional Court made reference to its decision U-I-6/93 (OdlUS III,33) of 1 April 1995. For reasons of joint consideration and adjudication, the Constitutional Court decided by its resolution of 22 December 1994 to attach to the case under consideration cases U-I-68/94, U-I-69/94 and U-I-70/94.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-2-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 04.04.1996 / **e)** U-I-1/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 23/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), V/2, 1996 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
General Principles – Rule of law.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Institutions – Executive bodies – Relations with the legislative bodies.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Price fixing, emergency / Prices of medical goods / *Ultra vires*.

Headnotes:

By determining maximum prices of medical goods without fulfilling all of the requirements prescribed by the relevant regulation, the government exceeded the power granted to it by the Senate.

Summary:

The Government, by adopting a decree (no. 70/95 Official Gazette of the RS), fixed the maximum prices of medical goods as they were when the Decree or the Method of Price Formation for Human Use and Medical Aids was in force (No 41/95, Official Gazette RS). However, this regulation had been partly abrogated by a decision of the Constitutional Court (U-I-145/95), and as a consequence the question as to whether Government disregarded the decision of the Court, and whether the new Decree in other respects satisfied the requirements of the authorising Statute (Prices Act).

The Constitutional Court pointed out that, in its previous decision, it had stated that it was incorrect and contrary to the Statute (Foreign Exchange Transactions Act) to link the net wholesale prices of medical goods to the foreign exchange rate applicable on a specific date (in this case on 20 June 1995).

Nevertheless the government, by its disputed decree, prescribed that maximum prices of medical goods shall be determined on the basis of the exchange rate of 20 June 1995. As a result, the actual price which the importers of medical goods were forced to pay was not considered in calculating the net wholesale price, thus interfering with the rights of such importers granted by applicable legislation.

Even if Article 5 of the Prices Act allowed for an "extension" of the price-fixing measures in cases of

emergency, it was unconstitutional and illegal for such extraordinary measures to be transformed into a permanent system by their extension. In this case, the government claimed that the existence of an oligopoly in the wholesale of medical goods justified the adopted measures. The Court found that the government failed to provide evidence of such claims, though recognising that wholesale traders of medical goods were in a privileged position in comparison with other wholesalers.

The data provided by the Government could have justified the initial adoption of the measures, but could not justify their extension. Thus, the Court stated that in extending the price-fixing measures in respect of wholesalers of medical goods, the Government exceeded the powers granted to it under Article 5 of the Prices Act.

Supplementary information:

Legal norms referred to:
Articles 1, 2, 3, 74, 120 and 153 of the Constitution;
Articles 11 and 27 of the Foreign Exchange Transactions Act (ZDP);
Article 5 of the Prices Act (ZCen).

Cross-references:

In stating the reasons for its decision, the Constitutional Court made reference to its decisions U-I-145/95 and U-I-145/93 of 17 March 1994 (OdlUS III,24).

For reasons of joint consideration and adjudication, the Constitutional Court decided by its resolution of 16 February 1996 to attach to the case under consideration case U-I-19/96.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-2-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.04.1996 / **e)** U-I-8/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 25/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), V/2, 1996 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Admissibility of referendums and other consultations.

Keywords of the alphabetical index:

Referendum, introduction of local contributions.

Headnotes:

Local community bodies must not hold a referendum on the same proposal of law within one year of such a referendum.

The identity of the two proposals must not only be verified by looking at their wording: it is necessary to compare also the contents of the proposals.

Summary:

An initiator contested the legality of two decisions of a Local Community. By the first, dated 1994, a referendum was called on a proposal to introduce local contributions; by the second, following the referendum, the contributions were actually introduced.

The initiator claimed that the referendum called in 1994 was a mere repetition of another one called in May 1993, in contrast with the provision of Article 22 of the Law on Referendums and Other Forms of Personal Expression, which states that "Local community bodies may not issue a decision that would be contrary to the result of a referendum nor may they conduct a referendum on the same proposal within one year".

The Constitutional Court held that the differences between the resolutions of 1993 and 1994 were merely formal and that there was no difference in substance between the two programmes submitted to referendum.

As a consequence, the Court annulled the resolutions taken in 1994, as well as the subsequent decision to introduce local contributions.

Supplementary information:

Legal norms referred to:
Article 22.2 of the Law on Referendums and Other Forms of Personal Expression (ZRDOOI);
Articles 26 and 45 of the Law on the Constitutional Court (ZUstS).

One separate dissenting opinion.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-2-009

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.04.1996 / **e)** U-I-159/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 25/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), V/2, 1996 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Construction land, price / Retroactivity, municipal regulation.

Headnotes:

The decision of the local community to set a higher points value for the calculation of the price of construction land for the time before the entry into force of the relevant regulation was found to be contrary to the ban on the retroactive validity of legal acts.

The Constitutional Court established that the retroactive decision of the local community, which ceased to be valid during the proceedings before the Constitutional Court, was an unconstitutional measure and that the consequences of its unconstitutionality or illegality had not yet been removed.

Summary:

A decision of a local community, which came into force on 11 August 1995, set a higher points value for certain business premises as from 1 July 1995 until the end of the calendar year.

The retroactivity of the decision was not consistent with Article 155 of the Constitution, which allows for the retroactive effect of a regulation only in cases of non-interference with accrued rights. As pointed out by the Constitutional Court, only a law (and never a local community regulation) can stipulate that individual provisions thereof apply retroactively, and even this only when acquired rights are not undermined.

The Resolution of the Court had the nature of a derogation, because, as stated in Article 45 of the "Law on the Constitutional Court", if it has been established that an unconstitutional rule causes harmful consequences, this rule must be removed, even if, as in this case, it no longer applies.

Supplementary information:

Legal norms referred to:
Articles 2, 155 and 160 of the Constitution;
Articles 21, 26, 45, 46 and 47 of the Law on the Constitutional Court (ZUstS).

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-96-2-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.06.1996 / **e)** CCT 7/96 / **f)** Die Staat v. Julies / **g)** / **h)** 1996 (7) *Butterworths Constitutional Law Reports* (CC) 899.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Drugs, dealing / Onus of proof, presumption affecting.

Headnotes:

A statutory provision providing that a person found in possession of any quantity of an undesirable dependence producing substance is presumed to be dealing therein, unless the contrary is proved on a balance of probabilities, violates an accused person's right to be presumed innocent, and is therefore unconstitutional.

Summary:

The Drugs and Drug Trafficking Act provides that an accused person shall be presumed to have been dealing in an undesirable dependence-producing substance, other than cannabis, if he or she is found to have been in possession of any quantity thereof, unless the contrary is proved. The Court in following the previously decided case of *State v. Bhulwana; State v. Gwadiso* held that the presumption violated the accused's right to silence and the presumption of innocence. The Court held that the presumed fact of trafficking in drugs could not in any reasonable way be said to flow from the proof of possession of even a negligible quantity of an undesirable dependence-producing substance other than cannabis. In the absence of any such rational connection the Court found that, regardless of any policy considerations, the presumption could not be justified in terms of the limitations clause of the Constitution.

Cross-references:

State v. Zuma and Others (CCT 5/94) 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); *Bulletin* 95/3 [RSA-95-3-001];
State v. Bhulwana; State 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];
State v. Mbatha; State v. Prinsloo (CCT 19/95; CCT 35/95) 1996 (2) SA 464 (CC); 1996 BCLR 293 (CC); Bulletin 96/1 [RSA-96-1-001];
Scagell and Others v. Attorney-General of the Western Cape and Others (CCT 42/95)

Languages:

Afrikaans.

Identification: RSA-96-2-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.06.1996 / **e)** CCT 13/96 / **f)** Rudolph and Another v. Commissioner of Inland Revenue and Others / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Temporal effect – Retrospective effect.
Institutions – Courts – Jurisdiction.
Fundamental Rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Administrative justice, right / Appellate Division, jurisdiction / Constitution, retrospective effect / Search and seizure, documents.

Headnotes:

The provisions of the interim Constitution cannot be invoked when the relevant events occurred prior to the date of its commencement.

Summary:

Prior to the date of commencement of the interim Constitution, the respondents, acting in terms of Section 74.3 of the Income Tax Act ("the Act"), had searched the appellant's home and office, and seized various documents in his possession. These documents were retained for the purposes of a tax assessment of the appellant, and for instituting criminal proceedings against him. After the interim Constitution took effect the appellants launched an application in the Supreme Court challenging the repondents' action on the grounds that it did not comply with the common law requirements of administrative justice and that the relevant section of the Act was unconstitutional. Their application failed. On appeal the Appellate Division referred a number of issues to the Constitutional Court for decision. The Court was asked to decide whether the section of the Act was contrary to the provisions of Chapter 3 of the interim Constitution which provided a protection against search and seizure; and whether the Appellate Division had jurisdiction to decide the appeal, on the point of a lack of administrative justice, on the "common law grounds of invalidity".

In a unanimous decision the Court held that the appellants were deprived of their possession, use and control of the documents in question on the 22 April 1994; the seizure was thus completed before the date that the interim Constitution took effect. The Court invoked the principle laid down in *Du Plessis and Others v. De Klerk and Another* that the interim Constitution does not operate retrospectively, in the sense of rendering unlawful an act that was lawful prior to the date of commencement of the Constitution. Hence it held that the Constitution was not applicable to the facts of this case; an answer to the question of whether a section of the Act is contrary to the provisions of the interim Constitution was, accordingly, unnecessary.

Regarding the jurisdictional question the Court held that, because the provisions of the interim Constitution were not retrospectively applicable, the Constitutional Court did not have exclusive jurisdiction over the matter, and the Appellate Division was competent to adjudicate and determine the appeal on common law grounds, in accordance with its own powers and procedures.

Cross-references:

Du Plessis and Others v. De Klerk and Another (CCT 8/95) 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC); *Bulletin* 96/1 [RSA-96-1-008].
Gardener v. Whitaker (CCT 26/94) 1996 (6) BCLR 775 (CC).
Key v. The Attorney General, Cape of Good Hope Provincial Division and Another (CCT 21/94) 1996 (6) BCLR 788 (CC).

Languages:

English.

Identification: RSA-96-2-013

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.07.1996 / **e)** CCT 96/1, CCT 6/96 / **f)** *Ex Parte KwaZulu-Natal* Provincial Legislature: *In re* Dispute Concerning the Constitutionality of Certain Provisions of the *KwaZulu-Natal Amakhosi* and *Iziphakanyiswa* Amendment Bill of 1995 and of the Payment of Salaries, Allowances and Other Privileges to the *Ingonyama* Bill of 1995 / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Distribution of powers.
Fundamental Rights – Civil and political rights – Right to property.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Economic activity, right to freely engage / Provinces, legislative competence / Provincial legislation, precedence.

Headnotes:

It is within the provincial legislative competence to prohibit the *Ingonyama* (the Zulu monarch) and traditional leaders from accepting any remuneration other than in terms determined by the provincial legislation. Such a provision does not violate the right to property or the right to freely engage in economic activity; neither does such a provision intrude on the legislative competences of other provinces, nor does it purport to confer upon provincial legislation precedence over an Act of Parliament. Such a provision does not constitute a form of taxation, and it does not

amount to a seizure of the *Ingonyama's* private possessions.

Summary:

These cases concerned a challenge by members of the *KwaZulu-Natal* provincial legislature to the constitutionality of certain provisions of two Bills before the legislature. In a unanimous judgment, the Court found that the two Bills were not unconstitutional on any of the grounds advanced.

The Bills prohibited the *Ingonyama* and other traditional leaders from accepting any remuneration other than in terms of the Bills; if they did accept such remuneration, the Bills obliged them to deposit the monies into the Provincial Revenue Fund. The Court held that because the appointment and powers of traditional leaders were within the legislative competence of the provinces, legislation dealing with the payment of remuneration to such leaders was also within such competence, as it was part and parcel of their appointment.

The Bills were challenged on several other bases:

- The Court rejected the argument that the Bills violated the constitutional right to acquire rights in property and not to be deprived thereof without compensation. The Court held that the prohibition against traditional leaders receiving other remuneration in their capacity as such was a reasonable and not uncommon condition of an appointment to an office;

- The Court rejected the argument that the Bills violated the constitutional right to freely engage in economic activity and to pursue a livelihood anywhere in the national territory; the traditional leaders concerned were free to vacate their offices and to engage in any other economic activity they chose. Otherwise, they were free to remain in office and engage in economic activity not inconsistent with their status as traditional leaders;

- The Court rejected the argument that because traditional leaders were prohibited by the Bills from accepting payments from other provincial governments, that the Bills encroached upon the legislative competences of such governments. The Court pointed out that other provinces remained free to offer payments to traditional leaders, but that recipients of such payments are subject to the legislation in terms of which they hold office, and so expose themselves to sanctions prescribed by that legislation;

- The Court rejected the argument that certain sections of the Bills violated the interim Constitution ("the Constitution") in that they purported to confer upon the provincial legislation precedence over an Act of Parliament. The Court held that these provisions were capable of a narrower interpretation which would avoid a conflict with the Constitution. The question whether the Bills, if enacted, would be inconsistent with an Act passed by Parliament, and if so, whether in terms of the Constitution they would prevail over, or be subordinate to such legislation, were not relevant to the constitutionality of the Bills;

- The Court rejected the argument that a section of one of the Bills which requires any other remuneration received by a traditional leader to be deposited into the Provincial Revenue Fund, constituted a form of taxation which was outside provincial competence. The Court held that the obligation to account for monies received in breach of conditions of appointment to an office was not a tax but a normal consequence of such breach. The Court also rejected an argument that a similar provision in the Bill regarding the Ingonyama violated the Constitution because it amounted to a seizure of the *Ingonyama's* private possessions. The Court held that as the underlying prohibition was valid, the ancillary obligation to account was not a seizure of property.

Cross-references:

Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 (CCT 46/95) 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC). *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (CCT 39/95) 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC); *Bulletin* 1/96 [RSA-96-1-005].

Languages:

English.

Identification: RSA-96-2-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.07.1996 / **e)** CCT 17/96 / **f)** Azanian People Organisation (AZAPO) and Others v. President of the Republic

of South Africa and Others / **g)** / **h)** 1996 (6) *Butterworths Constitutional Law Reports* 1015 (CC) .

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Other international sources.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
Sources of Constitutional Law – Techniques of interpretation – Historical interpretation.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Human rights violations, individual responsibility / International law, status.

Headnotes:

The broad criminal and civil amnesty for perpetrators of human rights abuses associated with political objectives that is provided for by the challenged legislation is authorised by the Interim Constitution (the "Constitution") itself.

Summary:

The epilogue to the Constitution (the "Epilogue"), requires Parliament to make provision for amnesty to be granted in respect of acts, omissions or offences associated with political objectives in the course of the civil conflict that preceded the new dispensation in South Africa under the Constitution. The Promotion of National Unity and Reconciliation Act (the "Act"), which was passed pursuant to the Epilogue, empowers the Truth and Reconciliation Commission to grant full criminal and civil immunity to persons who had perpetrated gross violations of human rights once such persons make full disclosure of all relevant facts. It also allows for the exemption of persons and organisations who might otherwise have been vicariously liable for such violations.

AZAPO challenged the provisions of the Act providing for such amnesty, on the grounds that it was inconsistent with the right of every person to have justiciable disputes settled by a court of law or another appropriate forum (Section 22 of the Constitution). It was also argued that the consequences of the Act were not authorised by the Epilogue.

The Court held that, while the Act did indeed infringe the right of access to court, it was saved under Section 33.2 of the Constitution, read with the Epilogue. Under Section 33.2, rights may be limited "as provided for in [the limitations clause] or any other provision of [the] Constitution." The Court held that the Epilogue enjoyed no lesser status than any other provision of the Constitution, and accordingly had the same effect as it would have had if incorporated into section 22 itself as a qualification to the right embodied therein.

Turning to AZAPO's argument that, even assuming the Act was authorised by the Constitution, the scope of the amnesty granted under the Act was more far reaching than envisaged in the Epilogue, the Court held that provision for immunity from criminal prosecution served the objectives of the Epilogue, by encouraging perpetrators of violations to come forward with the truth about their offenses. Moreover, the Court noted, the Constitutional negotiators had made a deliberate choice, preferring understanding over vengeance and reparation over retaliation. Without the amnesty provisions, the historic accord that allowed South Africa's transition to democracy may never have been achieved.

The Court rejected AZAPO's argument that the scope of the amnesty exceeded that permitted under international law. It held that international norms in fact sanctioned the granting of broad amnesty in states which, like South Africa, were negotiating a difficult transition after an internal conflict. Further, the Court held that while international law operated as a guide to interpretation, the ultimate question was whether the Act was inconsistent with the Constitution.

The Court also rejected AZAPO's argument that the Act went too far in immunising persons and organisations from civil liability. The concept of amnesty was not limited to providing absolution from criminal liability, and the same truth-seeking justifications that necessitated provision for criminal immunity applied to justify immunity from delictual liability arising out of human rights violations.

Finally, the Court found that the immunisation of the state itself from civil liability was justifiable in light of the fundamental objectives of the Constitution. In order to facilitate both reconciliation and reconstruction, the limited resources available to the state had to be deployed as efficiently as possible. According preference to the formidable delictual claims of the victims of past abuses might divert desperately needed funds from areas such as education, housing and health care. Rather than

allowing such a preference, the constitutional negotiators had chosen to allow for "reparations", a concept that would allow the many competing claims on the state's resources to be properly taken into account. In that light, the Court held that Parliament had not acted contrary to the Constitution in opting to enact a mechanism for amnesty accompanied by nuanced and individualised reparations.

Languages:

English.

Spain
Constitutional Court

Statistical data

1 May 1996 – 31 August 1996

Type and number of decisions:

- Judgments: 60
- Decisions: 123
- Procedural decisions: 1231

Cases submitted: 1515

Important decisions

Identification: ESP-96-2-013

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 20.05.1996 / **e)** 78/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 150 of 21.06.1996, 6-10 / **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:

Administrative decisions, judicial review / Self-protection by public authorities.

Headnotes:

In accordance with established constitutional doctrine (case-law deriving from Constitutional Court Judgment no. 148/1933), any immediate execution of an administrative decision having the effect of impeding or hindering full and effective judicial protection, and preventing restoration of the rights and interests of the persons aggrieved, is in breach of Article 24.1 of the Spanish Constitution.

Summary:

This appeal for constitutional protection was lodged against a Supreme Court decision dismissing an appeal under administrative proceedings against a decision by a hospital director immediately to execute the disciplinary sanction imposed on the appellant by the director of the health service with authority over the hospital in question. The appellant alleged that the administrative decision under challenge infringed the right to effective judicial protection (Article 24.1 of the Spanish Constitution) since it ordered the execution of an appealable disciplinary sanction; furthermore, with regard to the judgment upholding the aforesaid administrative decision, the appellant complained of the incongruity of the judgment and the unreasonable application of the rules it interpreted.

With regard to the first infringement complained of, the Constitutional Court asserted that while it was true that the privilege of self-protection granted to the public authorities was not unconstitutional, to the extent that it was in harmony with the principle of efficacy set forth in Article 103 of the Spanish Constitution, the judicial power to adopt interim measures and to suspend the execution of a decision for the reasons set forth in the law nonetheless derived from the fundamental right pleaded. The right to judicial protection consequently extended to the application for suspension of the execution of administrative decisions, an application which, when made in accordance with administrative procedure, must afford a judicial remedy against its dismissal and, when made in the course of judicial proceedings, must give rise to the corresponding judicial review.

The question put to the Court therefore concerned the execution of an appealable sanction (in this connection, it must be noted that on the date on which the sanction was notified to the appellant, the time-limit for appeal had not yet expired) in circumstances where there had as yet been no ruling on the application for judicial review or on the application for suspension. The Court found that this was tantamount to depriving the judgment on suspension of the execution of the decision of any effective judicial protection, and constituted an infringement of the right of access to the courts.

Languages:

Spanish.

Identification: ESP-96-2-014

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 25.05.1996 / **e)** 94/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 150 of 21.06.1996, 62-67 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.
Fundamental Rights – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Evidence and fair trial.

Headnotes:

Police entry and search of a home without either prior judicial authority or the owner's express consent are constitutionally inadmissible (Article 18.2 of the Spanish Constitution) unless such interference is based on knowledge or clear perception that an offence is being committed in the home in question and provided that the police action is urgently needed to prevent completion of the offence, to arrest the presumed offender, to protect the victim or, finally, to prevent the disappearance of the effects or instruments of the offence.

The dismissal by the courts of an application for adjournment of a hearing for default of appearance of witnesses whose statements have previously been declared relevant and admissible cannot be declared valid, from the standpoint of the right to utilisation of relevant evidence for the defence, except where the taking of such evidence is no longer necessary because other evidence has been taken which is sufficient in itself to satisfy the court, since the right of the defence to adduce all relevant evidence – including witness evidence – must otherwise take precedence over the power of the judicial body to consider itself adequately informed.

Summary:

This appeal was lodged against a judgment in a criminal case, which had been upheld by the Court of Cassation, convicting the appellant of an offence against public health. The appellant complained of a violation of the right to utilise evidence relevant to the defence (Article 24.2 of the Spanish Constitution) occasioned, she

claimed, by the fact of not adjourning the hearing despite the failure to appear of three witnesses whose statements had previously been duly accepted. Furthermore, the appellant pleaded an infringement of the right to presumption of innocence (Article 24.2 of the Spanish Constitution) in relation to the right to inviolability of the home (Article 18.2 of the Spanish Constitution), an infringement allegedly arising from the police entry and search of the home of one of the accused and of her own home without judicial authority and in disregard of the conditions necessitated by the constitutional notion of flagrante delicto, which, she claimed, would be sufficient to override the said presumption.

With regard to the infringement of the right to inviolability of the home, the Constitutional Court considered that the police entry and search had been conducted in accordance with the two essential aspects of the constitutional notion of "flagrante delicto": the police had been able, by means of the surveillance to which the suspects had been subjected, to acquire clear knowledge that an offence against public health had been committed at the home of the appellant; and in the case in question the requirement as to "urgency" had also been met since the aim had been to prevent, by means of police entry into the appellant's home, the disappearance of any effect or instrument of the offence, a necessity based upon the objective facts observed. The evidence obtained, as confirmed at the hearing, could therefore be regarded as sufficient prosecution evidence.

With regard to the infringement of the right to utilise relevant evidence, the Constitutional Court considered that the decision to decline to adjourn the hearing, despite the failure to appear of the three witnesses proposed, was in accordance with the law since two of those witnesses had previously given evidence before the investigating judge and since, in addition, in the light of the questions put forward by the defence, no modification of their testimony was to be expected. The Constitutional Court consequently considered that the failure to adjourn the proceedings despite the repeated failure of witnesses to appear could in no way be regarded as arbitrary or as a cause of deprivation of defence.

Languages:

Spanish.

Identification: ESP-96-2-015

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 27.05.1996 / **e)** 92/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 150 of 21.06.1996, 55-58 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Officially assigned defence counsel / Right to counsel.

Headnotes:

In accordance with various judgments of the European Court of Human Rights (Airey case, 1979; Paketti case, 1983), while it is true that refusal to afford the assistance of a defence counsel does not in itself infringe the right granted by Article 24.2 of the Spanish Constitution, the facts surrounding such a refusal may give rise to such an infringement. Thus, the fact that such refusal is occasioned by the unavailability of an official defence counsel, thereby giving rise to a real and effective situation of deprivation of substantive defence since the assumption of one's own defence proves inadequate and prejudicial to the litigant in the light of the circumstances of the case, constitutes an infringement of the rights of the defence.

Summary:

The appellant alleged deprivation of defence against a judgment given on appeal allowing an application filed by the owner of an apartment in connection with eviction proceedings instituted against the appellant for default in payment. By means of that application the owner sought not only to obtain the eviction of the tenant but also to ensure that the defendant could not be entitled to mitigation in consideration of any payment of rent due. The court handling the case had declared the request for an officially assigned defence counsel to be inadmissible on the ground that the intervention of a defence counsel was not compulsory in the case.

The Constitutional Court had declared on several occasions that the right to a fair trial comprised the right to a defence and the assistance of a defence counsel as recognised by Article 24.2 of the Spanish Constitution, not only in criminal cases but in general in any legal

proceedings. The purpose of the right was to ensure effective observance of the principle of equality of the parties and the adversarial principle, which imposed on judicial bodies the positive duty to avoid any imbalances between the parties or limitations of the defence such as might result in any lack of defence, a situation prohibited in all cases by the final clause of Article 24.1 of the Spanish Constitution. The fact that intervention by a defence counsel was not obligatory in particular proceedings (in this case, eviction proceedings) in no way deprived the person on trial of the right to a defence counsel, as granted by Article 24.2 of the Spanish Constitution. In particular, the non-obligatory character of the intervention of an official defence counsel in specific proceedings laid no obligation on the parties to act personally, but afforded them the possibility of choosing between conducting their own defence and a formal defence. There were no restrictions on the right to a defence counsel in such circumstances; hence the litigant enjoyed the right to the assistance of an officially assigned defence counsel should he be unable to afford a lawyer of his choice and should he consider such assistance to be in the interests of his defence. As a rule, courts were therefore under an obligation to suspend proceedings until such time as the litigant lacking in financial resources or unable to take a lawyer of his choice could enjoy the assistance of an officially assigned defence counsel conducting his formal defence. However, this did not necessarily imply the obligatory appointment of an officially assigned defence counsel whenever the request was made, since the right to a defence counsel had to be balanced against the right of the opposing party to a trial without undue delay.

Languages:

Spanish.

Identification: ESP-96-2-016

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 28.05.1996 / **e)** 95/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 150 of 21.06.1996, 67-75 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Legal persons.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Freedom of association, entitlement.

Headnotes:

The workers' representative may not in any circumstances suffer prejudice or be subjected to any discrimination on account of his status.

Entitlement to freedom of association lies with trade unions and not with such other collective bodies as works councils and staff representatives.

Summary:

Following a labour court judgment allowing an application in industrial dispute proceedings recognising the right of workers of a public authority to receive an increment equal to 20% of basic pay in respect of team work, whatever the number of hours worked, the appellant had claimed from his employer the difference between the aforesaid percentage and the 10% actually paid to him; to which the employer had replied that he was indeed entitled to the 20% pay increment but only up to the time of his appointment as staff representative. The employer had taken the view that only employees actually working in teams were so entitled. The appellant considered that the judgment infringed the principle of equality (Article 14 of the Spanish Constitution) and the right to freedom of association (Article 28.1 of the Spanish Constitution).

To determine whether or not there had been an infringement of freedom of association, the Constitutional Court first conducted a detailed analysis of the very different nature of the unitary or elective (as in the appellant's case) representatives of workers and of trade-union representatives. It found that there was not the slightest constitutional confusion or similarity between the two categories, even though the two channels of representation were not totally isolated from each other, and that the unitary or elective representation of workers naturally constituted an important and sometimes even preferred course of action for trade unions themselves. In short, the Constitutional Court reaffirmed, in the judgment in question, that from the collective point of

view the fundamental right granted by Article 28.1 of the Spanish Constitution lay with trade unions and not with such other collective bodies as works councils and staff representatives. Given that the appellant was a staff representative and that, under the terms of the Labour Statute, the other employees had ceded to him their monthly paid hours, the exact sum due to the appellant as a pay increment in respect of team work was not a question linked to the aforesaid right to freedom of association, but an ordinary legal issue.

With regard, secondly, to infringement of the principle of equality, the judgment pointed out that, since the employer was a public authority, it was bound by the principle of equality before the law. The point was that in that area the law established that both representative and those represented must be identically treated in the matter of remuneration but also in respect of protection against any discrimination, as required by ILO Convention no. 135, ratified by Spain. The fact that the appellant had at a particular time acquired the status of staff representative must not constitute a decisive factor for the employer since, if it had not taken account thereof in according him the 10% pay increment, it could not use such an argument to refuse to pay him the 20% increment.

Supplementary information:

Two judges issued dissenting opinions.

Languages:

Spanish.

Identification: ESP-96-2-017

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.06.1996 / **e)** 101/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 168 of 12.07.1996, 20-25 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Legal persons.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Access to the courts / *Legitimatio ad causam* / Trade unions, legitimacy.

Headnotes:

The legitimacy of trade unions in the area of administrative proceedings becoming a party to specific proceedings, also called *legitimatio ad causam*, must be assessed in connection with the notion of occupational or economic interest, the word interest having to be taken here "in its proper, qualified or specified sense".

Summary:

The trade union which initiated the appeal in question disputed a Supreme Court judgment declaring inadmissible an appeal in administrative proceedings against a decision of the governing body of a university approving the allocation of particular university teaching posts in breach, according to the appellant, of what had previously been agreed at the negotiating table (body representing the teaching staff of that university, to which a member of the appellant union belonged). The appellant considered itself to be the victim of an infringement of the rights granted by Articles 24.1 and 29.1 of the Spanish Constitution, guaranteeing access to the courts and freedom of association, and alleged that the judgment in question failed to recognise the legitimacy of the trade union.

The Constitutional Court considered such legitimacy to be indisputable, in accordance with Article 32 of the law governing administrative proceedings. In that connection, it pointed out that the function of trade unions, constitutionally speaking, was not only to represent their members within the framework of private law but also to exercise rights which, though belonging to each of the workers *ut singuli*, must of necessity be exercised collectively, provided of course that such abstract capacity of the trade union had been properly specified in each case and rested upon the existence of a link between the organisation taking the action and the claim put forward. Consequently, should that connection, link or bond give rise to an occupational or economic interest in this sense, it followed that the challenged judgment, declaring the appeal lodged to be inadmissible, was wrong in considering that the applicant lacked a status which, as a procedural element, exactly reflected the idea of legitimacy.

Languages:

Spanish.

Identification: ESP-96-2-018

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.06.1996 / **e)** 106/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 168 of 12.07.1996, 37-43 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.
Fundamental Rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Dismissal, nullity / Employment contract / Religious institutions.

Headnotes:

In view of the pre-eminence accorded to fundamental rights within the Spanish legal system, the limitations to which the exercise of freedom of expression may be subjected in the field of labour relations are justified only to the extent strictly necessary to ensure the proper and orderly conduct of productive activity.

Summary:

The appellant, a nursing auxiliary in a hospital coming under a religious order, sought the nullity of her dismissal, upheld by various court decisions, for having proffered malicious utterances during a religious ceremony when the hospital chaplain had been giving communion to the patients in their rooms. The religious order and the Public Prosecution Office both considered that the utterances in question constituted a public expression of contempt for and an insult to a religious activity, and fully justified the sanction inflicted since what was involved, according to them, was a veritable aggression against the ideology of a religious institution. For her part, the appellant considered that her freedom of expression (Article 20.1.a of the Spanish Constitution) had been violated.

Regarding the approach adopted in the challenged judgment, which was based on a weighing of the right to freedom of expression against the ideology of the owner of the hospital, the Constitutional Court emphasised the lack of rules relating to undertakings or organisations describing themselves as defenders of a particular ideological choice, and pointed out that the concept of "ideology of the institution" was not dealt with in its case-law other than in regard to private educational institutions and then always in connection with balancing it against another fundamental right (freedom of education); the Court emphasised the premise that respect for the ideology of the institution was always linked to the teaching function performed therein by the teacher. The Constitutional Court affirmed in the judgment in question that such a doctrine could hardly be applied to an employment relationship such as that established in the current case between the appellant and her employer, and that careful account had to be taken of the nature of the activity performed, namely one that was exclusively technical and medical and therefore not directly related to the ideology of the organisation running the hospital. It had further to be borne in mind that the employment relationship under consideration had been established between the applicant and the hospital, not between the applicant and the organisation running the hospital. In short, the Constitutional Court considered there to be no case for holding that an attack or aggression against the institution's ideology was a sufficient ground for dismissal.

Subsequently, to determine whether the utterances motivating the dismissal enjoyed the protection of freedom of expression (Article 20.1.a of the Spanish Constitution) or, on the contrary, exceeded the limit of that right, the Constitutional Court pointed out that the signature of a contract of service in no way deprived workers of the rights accorded them as individuals, even though the exercise of such rights was subject to certain restrictions since the contract generated a set of reciprocal rights and duties. Hence the Court had on several occasions emphasised the need, in such cases, for judgments to maintain the requisite balance between the duties inherent in the work performed and the realm of constitutional freedom. This was the standpoint from which it had to be considered whether the disputed decisions achieved a soundly balanced judgment between the fundamental right of the appellant and the duties inherent in her work which might limit the exercise of that right. After close consideration of the alleged insulting or vexatious nature of the words spoken, together with the context of the incident and the situation of social conflict existing at the time, it had to be concluded that the utterances of the appellant in no way constituted a grave insult to the religion being celebrated at the time when the words were uttered; nor were they vexatious for those participating in the event, however out of place and disrespectful they might have been.

Supplementary information:

Two judges issued dissenting opinions.

Languages:

Spanish.

Identification: ESP-96-2-019

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 12.06.1996 / **e)** 107/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 168 of 12.07.1996, 44-60 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Chambers of commerce, industry and shipping / Compulsory affiliation.

Headnotes:

The Constitution expressly recognises the legitimacy of what is termed the corporative administration, namely non-territorial corporations, sectoral corporations or public-sector associations, or what are generally regarded as a variety of social groupings established by law in the light of various social interests – essentially work-related – often enjoying public law status and to which affiliation is compulsory in most cases.

The purpose of these groupings is defined by the public interests they have to defend, which are determined by the public authorities. Consequently, while it is true that they comprise a certain associative element or basis, the word association can only be used in its widest sense. Positive freedom of association cannot therefore be advocated in respect of such corporative-type groupings, particularly in view of the considerable need for limiting the negative aspects of this right.

Summary:

The body which initiated the constitutional proceedings in question challenged the constitutionality of particular articles of Law 3/1993 of 22 March regulating official chambers of commerce, industry and shipping. The appellant considered compulsory affiliation to such chambers to be in breach of the right of association (Article 22 of the Spanish Constitution) and more particularly of the reverse of that right, namely the freedom not to associate.

After noting that the challenged provisions did indeed establish compulsory affiliation to those chambers, the Constitutional Court reiterated the three minimum and fundamental criteria to be examined in order to determine whether a legally established association of a public nature, and involving compulsory affiliation, passed the constitutionality test. The criteria involved were the following: compulsory affiliation to a corporate body could on no account be coupled with a ban on free association; recourse to this type of administrative action, which was a form of social grouping created *ex lege*, could not be accorded the status of a rule without detriment to the notion of a social and democratic State based on the rule of law and the overriding value of freedom; and compulsory affiliation to those public corporations, as an exceptional treatment of the principle of freedom, was justified only if there was sufficient evidence, based on constitutional provisions or the characteristics of the public-interest objectives sought, that it would be difficult, to say the least, to achieve those objectives without recourse to compulsory affiliation.

With regard to the third and final condition, which had given rise to the current proceedings, the strictness of the constitutionality test had to be qualified by carefully distinguishing between cases where it was clear and manifest that the effects sought could readily be obtained without recourse to compulsory affiliation, and those where the difficulty of achieving them without the duty of affiliation was open to doubt, to the extent that, with regard to the former, the Constitutional Court was fully empowered to break the presumption of constitutionality of the law, while in the latter cases, on the other hand, it could on no account set itself up as absolute judge of that "difficulty", the appreciation of which was, by the very nature of things, a matter for Parliament, the latter requiring for that purpose a large margin of manoeuvre.

Under current legislation the official chambers of commerce, industry and shipping were established in the form of advisory bodies to collaborate with the public authorities in order to represent, promote and defend the general interests of commerce, industry and shipping. In addition to the exercise of such powers as might be

assigned to them and delegated by the public authorities under that legislation, which was therefore not simply a regulation, they also performed very tangible public and administrative functions and operated in a necessary and obligatory manner, namely as minimum obligatory services placed under the control of the supervisory government department and subjected to strict administrative regulation. In view of the powers assigned to them by law, their concrete and obligatory character, their public law guarantees and their constitutional importance, the Constitutional Court considered those functions sufficient in themselves to warrant compulsory affiliation.

Supplementary information:

Four judges issued dissenting opinions.

Cross-references:

Constitutional Court Judgment 179/1994 of 16 June, *Bulletin* 94/2, 166 [ESP-94-2-019].

Languages:

Spanish.

Identification: ESP-96-2-020

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 27.06.1996 / **e)** 118/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 182 of 29.07.1996, 32-79 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Institutions – Federalism and regionalism – Distribution of powers – System.

Keywords of the alphabetical index:

Autonomous Regions / Overland transport, distribution of powers / Subsidiarity of the law of the State.

Headnotes:

The constitutional principle establishing, in all cases, the subsidiary nature of the law of the State in relation to the law of the Autonomous Regions (Article 149.3 of the Spanish Constitution) concerns bodies applying the law and has the purpose of indicating how they must, where appropriate, remedy the shortcomings of the legal system of the Autonomous Regions. Under this subsidiarity clause, as soon as an organ applying the law, using the normal means of interpretation, detects a shortcoming in the legal system of an Autonomous Region, it is required to remedy it through reference to the relevant rules laid down by the State in the exercise of its constitutional powers. That being so, this clause on no account presupposes the attribution of any jurisdiction to the State.

Summary:

In the present constitutional proceedings instituted by the legislative and executive organs of an Autonomous Region, the appellants raised, *inter alia*, the question of the power of the State, in substantive fields where it lacked specific jurisdiction, to lay down rules having the status of law supplementing the rule-making system of the Autonomous Regions.

The Constitutional Court first pointed out that the need to guarantee the full operation of the legal system, in particular to avoid any vacuum in the legal system of Spain's regional self-government, in a context where the exercise of the various powers by each of the Autonomous Regions had been a necessarily lengthy process, had initially given rise to a situation in which the subsidiarity clause had been considered to be determined by the embryonic situation of regional self-government in Spain. Accordingly, despite the fact that the subsidiarity rule had given rise to no doubt as to the non-attribution of jurisdiction to the State in any field whatsoever, numerous State provisions had nevertheless remained valid even when pertaining to fields of competence that were the exclusive preserve of the Autonomous Regions in circumstances where the latter had declared such provisions to be purely and simply inapplicable or applicable at a subsidiary level but never null and void. The reason lay in the potential dissimilarity, within the Spanish legal system, of the fields of competence of the different Autonomous Regions, namely the difference of powers in various such Regions in respect of the same subject-matter. It had therefore seemed perfectly reasonable to acknowledge the existence of State rules having a supplementary effect, provided that the subject-matter at issue was not covered by the powers of all the Autonomous Regions in an identical or homogeneous manner.

Constitutional Court Judgment 147/1991 had given rise to a new conception of the subsidiarity clause. The progressive development of regional self-government had resulted in the attribution to each of the Autonomous Regions, through the Autonomy Statutes, of many fields of competence which were thereafter exclusively reserved for them and which empowered them not only to oppose any interference of State rules of direct application in matters covered by their sole jurisdiction, but also to decide for themselves whether those matters needed any specific regulation. That doctrine had prompted two conclusions. On the one hand, only the organ applying the law of the Autonomous Regions was empowered to assess the subsidiarity of the law of the State, using the relevant rules of interpretation. That meant that the applicability of the subsidiarity clause had to be determined on the basis of the rules governing the substantive field in which the supplementary or subsidiary law was likely to be applied, but could in no case be directly imposed by the State Parliament. On the other hand, the State could not lay down any rule of a purely supplementary nature in matters not within its jurisdiction. Consequently, the State Parliament could on no account rely on the subsidiarity principle to lay down such rules since it was in no way a universal enabling clause.

The judgment in question constituted a new step forward in the implications of the aforesaid doctrine since it declared that while, in order to lay down a rule of whatever nature, the State must be vested with a specific power justifying such a rule, on the understanding that subsidiarity was not one such power it was also unable, in matters over which it was recognised to possess shared powers, to exceed the limits of the powers attributed to it and encroach upon the sphere reserved for the Autonomous Regions by the Constitution and the Autonomy Statutes by laying down purely supplementary legal rules which could on no account be afforded the protection of such a clause as that of subsidiarity, a clause moreover not conferring any power. These factors consequently amounted to an infringement of the existing constitutional order in that respect.

Supplementary information:

One judge issued a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-96-2-021

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 09.07.1996 / **e)** 127/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 194 of 12.08.1996, 30-34 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Administrative acts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.
Fundamental Rights – Civil and political rights – Confidentiality of correspondence.

Keywords of the alphabetical index:

Prison administration.

Headnotes:

According to a teleological interpretation of the Constitution, the essential procedural principles recognised by Article 24 must be applied to the punitive activity of the administration to the extent necessary and in such a manner so as to preserve the essential values underlying such a constitutional provision and to attain the objective justifying it.

The fact that no evidence can be accepted in any proceedings whatsoever when it has been obtained through violation of a fundamental right or freedom is a consequence of the preferential position accorded to fundamental rights in the legal system, as well as of the status of inviolability granted to them and the absolute nullity of any public or private measure infringing such rights.

Summary:

This appeal for constitutional protection was lodged by a prison inmate who had been penalised for sending a written message to the judge responsible for the execution of sentences denouncing his conditions of detention, the message having been intercepted by the prison staff. In his application for constitutional protection, the appellant pleaded, in response to the sanction against him, breach of the right to secrecy of communications (Article 18.3 of the Spanish Constitution).

Since the claim concerned the penalty inflicted on the appellant for facts the knowledge of which had been obtained unlawfully, in breach of Article 18.3 of the

Spanish Constitution, the Constitutional Court considered that the appeal for constitutional protection must in fact be based upon the right to presumption of innocence (Article 24.2 of the Spanish Constitution).

In that connection, the Constitutional Court pointed out that recognition of the rights of the defence, of the right to presumption of innocence and of the right to adduce evidence had to be particularly rigorous in the case of disciplinary sanctions against prisoners since their internment could on no account presuppose the abolition of fundamental rights. The Court likewise recalled its doctrine on the absolute prohibition of taking account of any evidence obtained through violation of any fundamental right whatsoever. The right to presumption of innocence therefore required, in the last resort, the adducing of evidence obtained with due observance of fundamental rights since only evidence legally obtained and adduced, and fully respecting the Constitution, could be considered to modify the presumption of innocence.

In the case in question, the Constitutional Court considered that there had indeed been interception by the prison staff of the correspondence between the detainee and the judge responsible for the execution of sentences, such interception having been neither ordered judicially nor decided upon by the prison for security reasons or to ensure maintenance of order in the establishment, in breach of prison legislation. That interception therefore constituted an infringement of the right to secrecy of communications (Article 18.3 of the Spanish Constitution) and, consequently, on account of the sanction inflicted, constituted an infringement of the right to presumption of innocence (Article 24.2 of the Spanish Constitution). The Constitutional Court therefore declared the sanction imposed on the appellant to be null and void.

Languages:

Spanish.

Identification: ESP-96-2-022

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 11.07.1996 / **e)** 131/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 194 of 12.08.1996, 49-62 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between central government and federal or regional entities.
Constitutional Justice – The subject of review – Rules issued by the executive.
Institutions – Federalism and regionalism – Distribution of powers – Subjects.

Keywords of the alphabetical index:

Basic rules, distribution of powers / Universities, founding or recognition / University education, distribution of powers.

Headnotes:

With regard to the distribution of powers between the State and the Autonomous Regions, the Constitutional Court has on several occasions declared that, to guarantee the stability and general application of the basic rules in a given matter, such standards must be established through formal legislation, recourse to regulations being an exceptional step for very specific circumstances. It further emphasises that, formally speaking, it is absolutely necessary to specify and clarify in the basic legislation to which any regulations must refer or in the infra-legal provision itself that such rules are basic rules.

Summary:

In the constitutional appeal in question, the executive organ of an Autonomous Region disputed the "basic" character of certain provisions in a regulation issued by the State establishing the conditions that had necessarily to be met by public and private universities in respect of teaching staff, financial administration and equipment, for their founding or recognition.

The Constitutional Court placed the regulation at issue in the field of higher or university education, an area in which it was for the State to regulate the basic conditions for obtaining, awarding and validating university degrees and to issue basic rules concerning promotion of the right to education (Article 27 of the Spanish Constitution) in order to guarantee compliance with the obligations of the public authorities in that matter (Article 149.1.30 of the Spanish Constitution). For its part, in conformity with the provisions of its Autonomy Statute, the executive organ of the Autonomous Region which initiated the appeal in question was fully empowered to regulate and administer education as whole, namely at all levels and grades and in all its forms and specialist fields, without

prejudice to the powers reserved constitutionally for the State. Furthermore, to decide on the dispute, the Constitutional Court considered to be essential powers those State powers for the regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and fulfilment of their constitutional duties (Article 149.1.1 of the Spanish Constitution), particularly in the area of the promotion and general coordination of scientific and technological research (Article 149.1.15 of the Spanish Constitution) and, with regard to the articles relating to teaching staff, in the area of the statutory system for public officials (Article 149.1.18 of the Spanish Constitution).

Having regard to the above rules governing distribution of powers, and after examining the challenged provisions, the Constitutional Court considered that it was for the State to provide not only for the minimum number of teachers to work in the universities but also for the minimum standard of degrees, since that enabled a common denominator to be established for the standard of instruction in all universities. The Court further considered that it was also for the State to lay down the minimum proportion of doctors for the various faculties as well as of full-time teachers and of teachers from particular branches of the civil service, in order to guarantee a minimum quality standard in higher education and to establish the system of disqualification to which public officials teaching in universities had to submit on account of their primary attachment to the State rather than the Autonomous Regions. In addition, the Constitutional Court considered it a further responsibility of the State to require the existence of particular amenities – library and sports facilities – and to determine the maximum number of centres of an organisation that could be attached to public universities, to the extent that the arrangement guaranteed not only the statutory objectives and conditions for the founding of private universities, but also the quality of university teaching and research conducted in those establishments.

On the other hand, the Constitutional Court considered that the "basic rules", going as they did beyond the powers reserved for the State, could not apply to the regulation of particular tangible aspects of amenities (library and sports facilities), the provision of other amenities (refectory, cafeteria, lecture hall, etc) or, regarding the recognition of foreign institutions, the attribution to an organ of the central State administration of the power to issue a technical report, of a purely educational and academic nature, on such an institution planning to set up a branch in the territory of an Autonomous Region.

Supplementary information:

Two judges issued dissenting opinions.

Languages:

Spanish.

Identification: ESP-96-2-023

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 22.07.1996 / **e)** 134/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 194 of 12.08.1996, 69-76 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Pensions, tax exemption / Taxation.

Headnotes:

The principle of equality before the law, recognised by Article 14 of the Spanish Constitution, obliges Parliament to dispense the same treatment to all persons in similar legal situations and prohibits any inequality which, from the point of view of the purpose of the rule involved, is not objectively and reasonably justified or would prove disproportionate to such justification.

As regards taxation, the Constitution itself specifies and limits the principle of equality in Article 31, equality before tax law being inseparable from the principles of general application, capacity, justice and progressiveness on which the Spanish tax system rests in accordance with the aforesaid constitutional provision.

Summary:

The purpose of the judgment in question was to determine whether there had been any infringement of the principle of equality recognised by Article 14 of the

Spanish Constitution arising from different legal treatment, where taxation was concerned, of the permanent disability pensions enjoyed by civil servants and the permanent disability pensions granted to persons covered by the social security system. The former pensions were exempted from individual income tax only when the degree of disability was equivalent to major disability (ie when, following bodily or functional impairment, a disabled person required the assistance of another person to perform the most essential acts of daily living), while the latter were so exempted not only in that case but also in the event of absolute permanent disability (ie any disability preventing the worker from engaging in any occupation or trade whatsoever).

After noting the uniformity of the terms of comparison used to justify the inequality complained of, the Constitutional Court concluded that the different fiscal treatment applied by Parliament was devoid of objective and proportionate justification from the standpoint of the purpose of the rule. In this connection it emphasised that, within constitutional limits, the authority establishing fiscal legislation enjoyed a measure of discretion in setting fiscal rules, allowing it, for example, with regard to disablement pensions or benefits and while still respecting the principles and rights granted by the Constitution, to choose between taxing such benefits if it regarded them as taxable wealth, making them not taxable, or granting them exemption from tax. On the other hand, in the legitimate exercise of political opinion, it could on no account infringe the principle of equality, a principle not respected in the present case since absolute permanent disability benefits were exempted from tax if granted to a person under the social security system, but not when the disability affected an official of the public authorities covered by what was known as the State retirement and pension scheme.

In conclusion, the Constitutional Court affirmed that the granting of a tax exemption in respect of income of the same nature to persons covered by the social security system and not to those affiliated to the State retirement and pension scheme constituted a violation of the principle of equality through the use of a criterion for distribution of the burden of public expenditures that lacked any reasonable justification and was therefore incompatible with a just tax system such as that established by Article 31 of the Constitution.

Languages:

Spanish.

Identification: ESP-96-2-024

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 23.07.1996 / **e)** 136/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 194 of 12.08.1996, 81-86 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Dismissal / Pregnancy / Work, absences.

Headnotes:

Sexual discrimination (Article 14 of the Spanish Constitution) is not confined to the unfavourable treatment given a person on the grounds of sex, but extends to the combination of reasons or circumstances directly and clearly linked to the sex of the victim.

When a formally discriminatory dismissal is alleged in fact to conceal a termination of the contractual relationship infringing the fundamental rights of the employee, it is for the employer to prove that the dismissal is due to reasonable causes unconnected to any intention to infringe a fundamental right.

Summary:

The appellant, who had been dismissed for repeated unjustified absences from work and lack of punctuality during her pregnancy, challenged various judgments upholding the dismissal ordered by her employer, considering that she had been subjected to an act of sexual discrimination in breach of the principle of equality (Article 14 of the Spanish Constitution).

The Constitutional Court pointed out first of all that unfavourable treatment given to a pregnant woman, since only a woman could be concerned, constituted an act of sexual discrimination prohibited under Article 14 of the Spanish Constitution. It further emphasised that, in all cases of formally discriminatory dismissal in reality concealing a termination of the contractual relationship in breach of the employee's fundamental rights, in order to shift the burden of proof to the employer, it did not suffice to assert that the dismissal was discriminatory: the existence had to be proved of circumstantial evidence creating a suspicion, an appearance or a reasonable presumption in favour of such a plea. And only if such circumstantial evidence existed had the employer to

assume responsibility for proving that the facts behind the decision to terminate the contract of employment constituted a legitimate cause of dismissal and were reasonably to be regarded as facts unconnected to any motive infringing fundamental rights.

In the case in question, having regard to the circumstances, the Constitutional Court considered that the fact that the employee had failed to justify her absences from work by presenting the appropriate medical certificate, and that she had not promptly notified her employer of her indisposition, was by no means a sufficient basis for asserting that termination of the contract of employment was due to causes unconnected to her state of pregnancy or for sacrificing a fundamental right and adopting the most extreme disciplinary sanction for the sole purpose of safeguarding the interests of the undertaking.

Languages:

Spanish.

Sweden
Supreme Court
Supreme Administrative Court

Important decisions

Identification: SWE-96-2-002

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 26.06.1996 / **e)** 2803-1995 / **f)** / **g)** *Regeringsrättens Årsbok*, 1996, ref. 50 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Community law.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and other domestic legal instruments.

Keywords of the alphabetical index:

European Union, Council, Directive, implementation / Public procurement.

Headnotes:

A regulation in domestic law has to be set aside when it conflicts with a clear regulation in an EC Council Directive.

Summary:

According to the Law on Public Procurement, any such procurement shall be carried out using available possibilities of competition, in a businesslike manner and without taking into account irrelevant factors. A supplier of goods or services who considers that he has suffered or will suffer from a breach of that regulation has the right to have the decision on the public procurement retried by the Provincial Administrative Court. Domestic law states that a demand for retrial may not be examined by the court after the time when the supplier has been chosen. According to Article 2.6 of Council Directive 92/13 EC, an EC Member State may limit the court's competence to intervene in a matter of public procurement after the "conclusion of a contract following its award". In this case, the supplier in question was chosen by a municipal decision on 28 March 1995. On 10 May 1995,

the Provincial Administrative Court decided that it could not retry the decision. The Administrative Court of Appeal, applying domestic law, rejected the appeal against the decision. However, the Supreme Administrative Court found that domestic law cut off the right of retrial earlier than Community law, and that Community law took precedence over domestic law. Since written contracts were signed on 29 May and 6 June1995, in the opinion of the Supreme Administrative Court the Provincial Administrative Court ought to have retried the decision.

Languages:

Swedish.

Switzerland
Federal Court

Statistical data

1 January 1995 – 31 December 1995

2197 decisions of a constitutional nature, including:

- 50 based on rights derived from Article 4 of the Constitution (excluding arbitrary decisions)
- 39 based on personal liberty
- 43 concerning political rights
- 22 concerning local autonomy
- 202 based on the guarantee of enjoyment of property
- 291 concerning civil procedure
- 388 concerning criminal procedure
- 12 based on the guarantee of a fair trial
- 198 concerning taxation
- 48 concerning commercial and industrial freedom and the freedom to practise one's profession
- 477 concerning civil law
- 168 concerning criminal law

Important decisions

Identification: SUI-96-2-004

a) Switzerland / **b)** Federal Court / **c)** 2nd public-law Chamber / **d)** 05.12.1995 / **e)** 2P.239/1994 / **f)** X v. the State Council of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 121 I 326 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Proportionality.
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:

Civil servants, supplementary employment.

Headnotes:

Articles 22ter of the Constitution (guarantee of the right of ownership) and Article 31 of the Constitution (freedom of trade and industry); civil servant's supplementary employment.

A civil servant may invoke the freedom of trade and industry in order to engage in supplementary employment in the private sector (clarification of case-law). This freedom may be limited in order to preserve the reputation of the civil servant and the public's confidence in his/her impartiality. It is not incompatible with the Federal Constitution for a district public prosecutor competent to deal with economic offences to be refused the right to accept a seat on a board of directors (recital 2).

By virtue of the guarantee of the right of ownership, a civil servant may administer his/her own assets. Having a seat on a board of directors goes beyond the administration of assets (recital 3).

Summary:

A district public prosecutor in the canton of Zurich, working in the field of economic offences, applied to the State Council of the canton for authorisation to accept a seat on the board of directors of a firm. The application was rejected. The civil servant challenged this decision by filing a public law appeal to the Federal Court. He claimed in particular that this was a violation of the freedom of trade and industry and the guarantee of the right of ownership.

The Federal Court rejected the appeal. It maintained that fundamental rights could be invoked with regard to so-called special legal relationships, in particular in relations between civil servants and the State. Civil servants could avail themselves of the freedom of trade and industry in order to engage in supplementary employment.

Cantonal law allowed civil servants to engage in supplementary employment subject to prior authorisation; the impugned restriction therefore had sufficient legal basis. Moreover, it was in conformity with the principle of proportionality. It was a question of preserving both the reputation of civil servants and the confidence of the public in matters of public administration. This was all the more justified since in the case in question the applicant worked in a sensitive field.

There was no doubt that the civil servant enjoyed the guarantee of the right of ownership. He could therefore administer his assets and exercise his rights, for example as a shareholder in a public limited company. Having a seat on a board of directors, however, went beyond simple administration of assets and could therefore quite properly be proscribed.

Languages:

German.

Identification: SUI-96-2-005

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Chamber / **d)** 16.04.1996 / **e)** 1A.38/1996 / **f)** Federal police department v. company S. and the Indictments Chamber of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 II 140 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
Sources of Constitutional Law – Categories – Written rules – Other international sources.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

International judicial co-operation / International treaty, primacy.

Headnotes:

Judicial co-operation; relationship between international and domestic law; scope of the exchange of letters in 1989 between India and Switzerland; Article 2a of the federal Law on International Co-operation in Criminal Matters (ICCM).

An exchange of letters of 20 February 1989 between India and Switzerland was a treaty having precedence over domestic law. The scope of the principle of the

primacy of international law in the field of judicial co-operation (recital 2).

Implicitly, article 2a ICCM (which declares an application for co-operation inadmissible in cases where the procedure abroad does not conform to the procedural principles laid down by the European Convention on Human Rights) also refers to the procedural guarantees deriving from the International Covenant on Civil and Political Rights of 16 December 1966 (recital 5b).

In view of the terms of the judicial co-operation agreement between India and Switzerland, the applicant State enjoys a presumption of compliance with these guarantees (recital 5c).

Summary:

A New Delhi judge submitted to Switzerland a request for judicial co-operation along with an initial investigation report for the purposes of an investigation carried out by the Central Bureau of Investigations. Initially, the request was approved by the Indictments Chamber of the canton of Geneva and, on appeal, by the Federal Court.

The canton of Geneva investigating judge subsequently compiled a series of documents and decided to forward them to the requesting authority. On appeal, the Indictments Chamber of the canton of Geneva refused the forwarding of these documents. Basing its decision on various reports, it considered that respect for the rights of the defence could not be guaranteed.

Filing an administrative law appeal, the Federal Police Department asked the Federal Court to overturn the decision by the Indictments Chamber and to allow the documents to be forwarded.

The Federal Court granted the appeal and authorised the forwarding of the documents in question. Contrary to the view of the cantonal authority, it considered that in accordance with the rules of international law, the exchange of letters between India and Switzerland constituted an international treaty, irrespective of what it was actually called. Accordingly, it took precedence over domestic law relating to judicial co-operation. This did not however deprive Switzerland of the right to agree to co-operation having due regard to any broader regulations contained in domestic legislation.

A request for co-operation could, however, only be approved if the procedure abroad conformed to the principles of procedure generally accepted in democratic States and defined in particular by the European Convention on Human Rights. India was not a party to this Convention but had acceded to the International Covenant on Civil and Political Rights of 16 December 1966. On an international level, this Covenant was the counterpart of the European Convention on Human Rights; in Article 14 it lists the guarantees contained in Article 6 ECHR, even going beyond this provision, since, for example, paragraph 5 of Article 14 corresponds to Article 2 Protocol 7 ECHR. It could therefore be presumed that the Contacting Party would honour its international commitments.

Languages:

French.

Identification: SUI-96-2-006

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Chamber / **d)** 02.05.1996 / **e)** 1P.601/1995 / **f)** T. v. Public prosecution department and the court in the canton of Basel-Town / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 182 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal procedure / Evidence / Telephone conversations, secrecy / Telephone tapping.

Headnotes:

Article 36.4 of the Constitution and Article 8 ECHR; telephone tapping, use as evidence of conversations of another subscriber on the line under surveillance; right to refuse to testify.

Articles 36.4 of the Constitution and 8 ECHR guarantee the secrecy of telephone communications; conditions governing the restrictions to this guarantee (recital 3a).

The person speaking to a suspect placed under telephone surveillance, as well as other subscribers on the line under surveillance, enjoy their own constitutional protection; they can apply for the lawfulness of the tapping operation to be verified *a posteriori* and for telephone conversations not to be disclosed nor used against them (recitals 3b and 4b).

Permissibility of tapping other users of a line under surveillance and the use of telephone conversations obtained in this way as evidence must be examined by the courts, on request, at the investigation stage (recital 4c).

Telephone tapping of another user of the line under surveillance and the use of telephone conversations as evidence obtained by chance are, in fact, in conformity with the Constitution and the Convention; there is no requirement in such cases for prior suspicion (recital 5).

The person placed under lawful surveillance cannot invoke the right to refuse to testify by virtue of a family relationship nor the right to remain silent as an accused (recital 6).

Summary:

The public prosecutor's office of the canton of Basel-Town was carrying out an investigation into an armed attack at the German station in Basel during which over CHF 6 million was stolen. Initially, the investigation focused, amongst others, on Mr T. whose home telephone in Bad Säckingen in Germany was placed under surveillance. Subsequently, the investigation was widened to include Ms T. Mr T.'s wife. She was extradited and remanded in custody in Basel as an accomplice.

While in custody, Ms T. applied to the public prosecutor for all the transcripts of the telephone calls recorded (including her own conversations) or at least some of them to be removed from the criminal file, and requested also that no authority be allowed to use them; she claimed this tapping had been unlawful. The public prosecutor rejected this application. The court dealing with the case did not look into the facts of Ms T.'s appeal but rejected it, on alternative grounds.

Ms T. filed a public law appeal against this decision before the Federal Court, which was rejected. The court ruled that the secrecy of telephone conversations, while being guaranteed by the Federal Constitution and the European Convention on Human Rights, could be subject to certain restrictions.

Anyone who uses a telephone which has been placed under surveillance and whose conversations are inevitably recorded, enjoys his or her own constitutional guarantee and can consequently request even during the investigation stage that the legality of the surveillance be verified by the courts. In the case of the applicant, it was concluded that the strict conditions laid down by the Constitution and the Convention had been complied with and that the conversations recorded could be used.

A person who is placed under lawful surveillance in this way cannot invoke, as grounds prohibiting the use of such conversations, his or her right to refuse to testify against a family member or the right to remain silent as an accused.

Languages:

German.

Identification: SUI-96-2-007

a) Switzerland / **b)** Federal Court / **c)** 1st public-law Chamber / **d)** 19.06.1996 / **e)** 1P.677/1994 / **f)** M. v. Schlössli Oetwil a.S psychiatric clinic and the State Council of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 153 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Grounds.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Data protection / File psychiatric medical, right to consult / Patients, rights / Right to be heard.

Headnotes:

Article 4 of the Constitution; right to be heard; consultation of the psychiatric medical file, data protection.

From the point of view of data protection, the relationship between the Schlössli psychiatric clinic and its patients

falls under public law. It is not federal but cantonal data protection legislation which is applicable (recital 2).

There is nothing to suggest that the medical file is incomplete (recital 4).

Under cantonal law, it is permissible not to reveal information contained in the report provided by individuals who are not part of the clinic staff (recital 5).

The right to consult the file of a case which has been closed, guaranteed by Article 4 of the Constitution, depends on a balanced assessment of the public and private interests at stake. In view of all the circumstances at issue in the case in question, there was an over-riding interest in not revealing information provided by individuals who were not part of the clinic staff (recital 6).

Summary:

Patient M. had been admitted on two occasions in 1981 and 1982 into a private psychiatric clinic in the canton of Zurich. In 1993 he asked the clinic to be able to exercise his right to consult his medical file. The clinic granted him this right but only for part of the file. Following an appeal by M. the cantonal administration and the State Council of the canton of Zurich provided him with photocopies of the complete file, censoring certain passages containing information provided by individuals who were not part of the clinic staff.

M. filed a public law appeal before the Federal Court, requesting full access to his medical file held in the psychiatric clinic. The Federal Court rejected the appeal, which alleged a violation of constitutional rights.

The court first of all considered the relationship between the applicant and the clinic, and ruled that it was cantonal public law on data protection which was applicable. Accordingly the public law appeal was considered admissible.

Cantonal law explicitly provides for information from individuals who are not part of the clinic staff not to be disclosed to patients. Federal constitutional law grants everyone the right to consult his or her file. If this consultation is in connection with any case other than one which is still in progress, the applicant must justify an interest he or she considers should be protected; the public and private interests at stake will then be fully weighed up. In this connection, consideration must be given to the data protection aspects and personal freedom guaranteed both by the Constitution and by the European Convention on Human Rights.

In the instant case, the private interests of individuals who were not part of the clinic staff and the needs of the doctors to be able to obtain valid information from the patient's family took precedence over the applicant's interest in consulting the complete file.

Languages:

German.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Statistical data

1 May 1996 – 31 August 1996

- New cases: 66
- Cases resolved: 67
  - Invalidated: 2
  - Repealed: 24
  - Rejected: 14
  - Inadmissible: 13

- Structure of the cases:
  - Laws: 22
  - Other regulations approved by State authorities: 5
  - Applications concerning the protection of human rights: 2
  - Others: 37

Important decisions

Identification: MKD-96-2-005

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.06.1996 / **e)** U.27/96 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), no. 33/96 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Legality.
Institutions – Public finances – Taxation.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental Rights – Civil and political rights – Inviolability of the home.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Income tax.

Headnotes:

The Constitution guarantees the inviolability of the home. The right to the inviolability of the home may be restricted only by a court decision in case of detection or prevention of criminal offences or protection of people's health.

The provisions of a statute which authorise the officer of public tax administration to enter into the rooms of the taxpayer against his will in order to make an inventory of the objects suitable for forced tax collection and which are assumed to be found in the rooms, actually provides for the unlawful entry into the home of a taxpayer.

The Constitution guarantees the right of ownership of property. No person may be deprived of his property or of the rights deriving from it, except in cases concerning the public interest which are determined by law.

The provision which allows forced tax collection not only from the taxpayer, but also from the adult members of his family who live together with the taxpayer at the moment when the tax obligation arises, is unconstitutional since it introduces restrictions or on the deprivation of another person's property rights only because of the fact of living together with the taxpayer.

Summary:

The case was initiated by a citizen challenging the constitutionality of two provisions of the Statute on Personal Income's Tax (Official Gazette, no. 80/93).

The first provision provided that if the taxpayer declined to open his rooms by himself to allow the officer of public tax administration to make an inventory of the objects suitable for forced tax collect, which are assumed to be found in the rooms, the officer is authorised to open the closed rooms and to enter against the will of the taxpayer.

The Constitutional Court found that this provision was not in accordance with the constitutional guarantee of the inviolability of the home, which may be restricted only by a court decision in cases of detection or prevention of criminal offences or the protection of people's health. The challenged provision provided for entering into the taxpayer's rooms against his will. Since the Statute did not specifically define the kinds of rooms into which the officer may enter against the will of the taxpayer, it could mean that the home of the taxpayer is also included, which would make this provision unconstitutional.

The other challenged provision provided for forced tax collection not only from the taxpayer, but also from the

adult members of his family who lived together with the taxpayer at the moment when the tax obligation arose.

The right to ownership of property is guaranteed by the Constitution. No person may be deprived of his property or of the rights deriving from it, except in cases concerning the public interest which are determined by law. Considering that the challenged provision provided for forced tax collecting not only from the taxpayer, but also from the adult members of his family who lived together with the taxpayer at the moment when the tax obligation arose, the Court ruled that this provision expanded the constitutional framework, since it introduced a restriction on or a deprivation of another person's property rights only because of the fact of living together with the taxpayer.

Languages:

Macedonian.

Identification: MKD-96-2-006

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 03.07.1996 / **e)** U.297/95 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), no. 40/96 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Executive bodies – Powers.
Institutions – Courts – Jurisdiction.

Keywords of the alphabetical index:

Administrative offences.

Headnotes:

The Constitution does not draw any distinction between penal offences based upon the level of their social danger, and has not established different types of penal offences. Therefore, the principles of criminal procedure are applicable to all penal offences in general, including misdemeanours.

Guilt in respect of a penal offence may be established only by a court decision.

The State administrative bodies are not authorised to conduct any type of penal proceedings against citizens, nor to pronounce sentences following conviction for criminal or other offences.

Summary:

The case was initiated by a legal person challenging the constitutionality and legality of the provision contained in the Rules on the Government, which authorised the government and other bodies of the State administration to conduct penal proceedings against natural and legal persons and to pronounce sentences in some cases of minor non-criminal (administrative) offences.

The Constitutional Court repealed the challenged provision on the grounds that, according to the Constitution, guilt in respect of a penal offence may be established only by a court decision. The Constitution does not distinguish among penal offences on the basis of the level of their social danger nor in regard to the establishment of different types of penal offences, which means that only courts are authorised to conduct penal proceedings. Under the Constitution, the legislative, executive and judicial power are strictly divided and their competences may not be mixed. Therefore the State administrative bodies may not be authorised to conduct any type of penal proceedings.

Supplementary information:

In the same period of reference the Constitutional Court repealed provisions concerning the same matter which were contained in ten other statutes.

Languages:

Macedonian.

Turkey
Constitutional Court

Statistical data
1 May 1996 – 31 August 1996

Number of decisions: 28

28 decisions were handed down between 1 May 1996 and 31 August 1996. Of these, 7 were dismissed and in 8 cases some legal provisions were annulled. Only 6 decisions have been published in the Official Gazette 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. And in 3 cases the Court decided to refuse to handle the case because of the formal deficiencies.

In this period, a total of 9 decisions concerning the auditing of political parties were also handed down. All of these decisions were published in the Official Gazette.

Important decisions

Identification: TUR-96-2-006

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 14.02.1996 / **e)** 1996/6 / **g)** *Resmi Gazete* (Official Gazette), 13.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Powers of the Constitutional Court, limits.

Headnotes:

Constitutions contain general as well as special rules which regulate the special issues. If a subject is regulated by a special rule in the Constitution then the problem must be solved according to a special rule in the Constitution. The provisions of the Constitution have equal value, and in any particular case one provision of the Constitution can never be regarded as superior to any other. All the provisions of the Constitution must be applied according to the general principles of law recognised by civilised nations.

Provisional articles cannot be regarded as weak and unimportant. Usually the effective date of a statute is specified in the statute itself and, as a rule, in law statutes became effective after publication. The exception to this principle is transitional articles. For this reason, if there is any contradiction between normal articles and provisional articles, the conflict must be resolved by applying provisional articles. These principles must also be applied to constitutional law.

Legal texts must be interpreted according to their meaning in legal language. Even if it is assumed that legal rules are in contradiction with the social and economic requirements of the day, they must be applied until they are repealed.

Summary:

Associations are legal persons formed by at least seven persons who unite their activities continuously for a non-profit sharing purpose. They are regulated by the Civil Code and the Law of Associations of 1983 (dated 4 October 1983). According to Article 5 of the Law of Associations, associations against the authority or unity of the State, as well as associations to support political parties, are prohibited. In addition, associations may not engage in political activities (Law of Associations, Article 5.11).

The Court of First Instance of Giresun while trying a case found Article 5 of the Law of Associations to be unconstitutional and asked the Constitutional Court to annul the said Article.

According to the Court of First Instance, after the amendment of Article 33 of the Constitution Article 5 of the Law of Association became contrary to freedom of expression and dissemination of thought, as regulated in Articles 25 and 26 of the Constitution. According to the Court, the Constitutional Court must apply the provisions of the Constitution because, according to Article 11, laws cannot be in conflict with the Constitution.

Before the amendment of Article 33 of the Constitution associations could not pursue political aims, engage in political activities, receive support from or give support to political parties, or take joint action with labour unions, with public professional organisations or with foundations.

The amendment of the Constitution repealed these restrictions.

The Constitutional Court said that according to Provisional Article 15 of the Constitution no allegation of unconstitutionality can be made in respect of laws enacted during the period from 12 September 1980 to 6 December 1983. The Law of Associations was enacted during this period, and for this reason the Constitutional Court rejected the plea of unconstitutionality.

The decision was unanimous.

Supplementary information:

Settled case law.

Languages:

Turkish.

Identification: TUR-96-2-007

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 14.05.1996 / **e)** 1996/13 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 06.06.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Parliamentary rules.
Institutions – Legislative bodies – Relations with the courts.

Keywords of the alphabetical index:

Quorums required for sessions and decision / Quorums required for vote of confidence.

Headnotes:

In the Constitution it is stipulated that the Constitutional Court examines the constitutionality of laws, decrees having force of law and the rules of procedure of the Grand National Assembly. However, according to the settled case law of the Court, the Constitutional Court must analyse the legal enactment in order to decide whether it falls within its jurisdiction. If the decision of the Grand National Assembly is similar to the provisions of the rules of procedure of the Assembly, then the Court should examine the constitutionality of the decision, because the rules of procedure regulate the activities of the Assembly.

The Constitution does not stipulate any provision concerning quorums for sessions or for decisions for the vote of confidence after the formation of a new Council of Ministers. However, a request for a vote of confidence while in office may be rejected only by an absolute majority of the total members of the Grand National Assembly. This means that the general rule for quorums required for sessions and decisions should be applied to the vote of confidence after the formation of a new Council of Ministers.

There is no rule in the Constitution concerning "abstention". For this reason, abstaining votes cannot be taken into consideration in calculating votes for the formation of decisions in the Grand National Assembly.

Summary:

The case was brought by the main opposition party in the Grand National Assembly, requesting an annulment of the decision of the Grand National Assembly no. 398, dated 12 March 1996. This decision stated that under the provisions of the Rules of Procedure and the Constitution, the Grand National Assembly accepted the vote of confidence by a majority of its members.

According to Article 96 of the Constitution, unless otherwise stipulated in the Constitution the Grand National Assembly shall convene with at least one-third of the total number of members and shall take decisions by an absolute majority of those present. However, the quorum for decisions can, under no circumstances, be less than a quarter plus one of the total number of members.

"Taking office and votes of confidence in the new Council of Ministers" are within the field of the activities of the Grand National Assembly, and decisions concerning these matters fall within the category of Rules of Procedure in respect of the implementation of the principles of the Constitution.

Since there is no special rule in the Constitution related to quorums for the vote of confidence in the new Council of Ministers, the general rule in Article 96 of the Constitution must be applied to the vote.

Provisional Article 6 of the Constitution stipulates that the provisions of the Rules of Procedure of the National Assembly which were in force before 12 September 1980

and which are not contrary to the Constitution shall apply. The last sentence of Article 105 of the rules of procedure cannot be applied because, according to provisional Article 6 of the Constitution, that part of the said article cannot be in force. Thus it is impossible to apply the last sentence of Article 105 of the Rules of Procedure, which is contrary to Article 96 of the Constitution and which also cannot enter into force before Provisional Article 6 of the Constitution.

Although the decision is in accordance with Article 105 of the rules of procedure, the absolute majority of those present could not be reached. This decision, which had the effect of becoming the new provision of the rules of procedure, was found to be contrary to Article 96 of the Constitution and for this reason it was annulled. The decision was taken by a majority of members.

Supplementary information:

Decisions of the Constitutional Court concerning the formation of the Council of Ministers and issues in the vote of confidence are rare.

Languages:

Turkish.

Identification: TUR-96-2-008

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 17.07.1996 / **e)** 1996/5-1 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 19.07.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Decisions – Types – Suspension.
Institutions – Legislative bodies – Finances.

Keywords of the alphabetical index:

Act under attack from being enforced, suspension.

Headnotes:

Should the implementation of a law result in damages which are difficult or impossible to compensate, and at the same time arise from an Act which is clearly unconstitutional, then a suspension of the legislation can be declared.

Summary:

This annulment action, initiated by a minimum of one-fifth of the total number of members of the Grand National Assembly, was directed against Budget Law no. 4139.

According to Article 163 of the Constitution, no provisions can be included in the budget to the effect that the limit of expenditure may be exceeded in pursuance of a decision of the Council of Ministers. The Council of Ministers cannot be empowered to amend the budget by a decree having force of law. In draft amendments entailing an increase in appropriations under the budget for the current fiscal year, and in draft laws and proposals for laws providing for additional financial commitments in the budgets for the current or following year, the financial resources which would meet the stated expenditure should be indicated. These are the principles governing budgetary amendments, and the Constitutional Court must review budget laws according to these principles.

Some provisions of Law no. 4139 were found to be clearly contrary to Article 153 of the Constitution, and for this reason these provisions were suspended until the case was decided.

Article 153 of the Constitution stipulates that decisions of the Constitutional Court are binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies. The legislative organ must obey the decisions of the Constitutional Court.

The decision was taken by a majority of votes.

Supplementary information:

Settled case law.

Languages:

Turkish.

Court of Justice of the European Communities

Statistical data

1 May 1996 – 31 August 1996

Cases dealt with: 130

Court of Justice of the European Communities (CJEC): 73: 47 Judgments, 14 Orders and 12 Orders to strike out.
Court of First instance (CFI): 57: 34 Judgments, 18 Orders and 5 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 principle on the protection of legitimate expectation:

CJEC, 14 May 1996, *The Queen v. Commissioners of Customs & Excise, ex parte Faroe Seafood Co. Ltd, Føroya Fiskasøla and Commissioners of Customs & Excise, ex parte John Smith and Celia Smith*, joint cases C-153/94 and C-204/94, not yet reported, paragraphs 93-95
CFI, 5 June 1996, *Günzler Aluminium GmbH v. Commission*, case T-75/95, not yet reported; paragraphs 49-55
CJEC, 6 June 1996, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte H. & R. Ecroyd Holdings Ltd* and *John Rupert Ecroyd*, case C-127/94; paragraph 80
CFI, 11 July 1996, *Urretavizcaya v. Commission*, case T-587/93, not yet reported; paragraph 57
CFI, 11 July 1996, *Aubineau v. Commission*, case T-102/95, not yet reported; paragraphs 44-47

Decisions presented:

1. CJEC, 23 May 1996, *The Queen v. Ministry of Agriculture, Fisheries* and *Food, ex parte Hedley Lomas*, Case C-5/94, not yet reported; Liability of the member State for infringement of Community law, Liability for legislative activities, Conditions of the liability, Limitations on the application of national law

2. CJEC, 13 June 1996, *Criminal proceedings against Maurin*, Case C-144/95, not yet reported; Preliminary questions, Competence of the Court, National rules outside the scope of Community law

3. CJEC, 18 June 1996, *European Parliament v. Council of the European Union*, Case C-303/94, not yet reported; Legitimation for the Parliament to act, Participation in the legislative process; Hierarchy of directives

4. CJEC, 11 July 1996, *SFEI and Others v. La Poste and Others*, Case C-39/94, not yet reported; State aid, Obligation to recover unlawful aid, Competence of the national courts

5. CJEC, 30 July 1996, *Bosphorus v. Minister for Transport, Energy and Communications e. a.*, Case C-84/95, not yet reported; Embargo against the federal Republic of Yugoslavia, State of war, Restrictions on the exercise of fundamental rights justified in the general interest

Important decisions

Identification: ECJ-96-2-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 23.05.1996 / **e)** C-5/94 / **f)** The Queen v. Ministry of Agriculture, Fisheries and Food, *ex parte* Hedley Lomas / **g)** Not yet reported / **h)**.

Keywords of the systematic thesaurus:

General Principles – Fundamental principles of the Common Market.
Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Direct effect / Exports, quantitative restriction / Genuine cooperation between the institutions and member States / Independence of national procedure / Mutual confidence / National jurisdictions, competence / Primacy, limits to the independence of national procedure / State liability, basis / State liability, conditions / State liability, forms of redress / State liability, principle.

Headnotes:

Community law precludes a member State from invoking Article 36 EC to justify a limitation of exports of goods to another member State on the sole ground that, according to the first State, the second State is not complying with the requirements of a Community harmonizing directive pursuing the objective which Article 36 EC is intended to protect.

This exclusion of recourse to Article 36 cannot be affected by the fact that the directive does not lay down any Community procedure for monitoring compliance nor any penalties in the event of breach of its provisions, since that fact simply means that the member States are obliged, in accordance with Articles 5.1 and 189.3 EC, to take all measures necessary to guarantee the application and effectiveness of Community law. In this regard, the member States must rely on trust in each other to carry out inspections on their respective territories and one member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another member State of rules of Community law (cf. points 18-21, disp. 1).

A member State has an obligation to make reparation for the damage caused to an individual by a refusal to issue an export licence in breach of Article 34 EC where the rule of Community law infringed is intended to confer rights on individuals, 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 a breach of Community law attributable to it, in accordance with its domestic law on liability. However, the conditions laid down by the applicable domestic 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 (cf. points 21, 26, 32, disp. 2).

Where the member State which committed an infringement of a provision of Community law conferring rights on individuals was, at the time when it committed the infringement, not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach, which is required in order to give rise to an obligation to make good damage suffered by individuals (cf. point 28).

Summary:

The Court was referred a number of questions under a request for a preliminary ruling according to Article 177 EC on the interpretation of Articles 34 and 36 EC and the principle of liability of the State for violations of Community law. The questions were raised in the course of a national litigation between Hedley Lomas and the Ministry of Agriculture, Fisheries and Food following that Ministry's refusal to issue a licence for the export of live sheep to Spain. The refusal was founded on the grounds that live animals exported for slaughter to Spain might be subjected to a treatment in the Spanish slaughterhouses contrary to Directive 74/577 on the stunning of animals before slaughter. Without contesting that the refusal to issue the export license constituted a quantitative restriction on exports, the Ministry considered nevertheless that it was justified under Article 36 EC, and therefore compatible with Community law.

Having underlined that Article 36 EC could not be invoked where Community directives provide for harmonization of the measures necessary to achieve the objective of that provision, the Court referred to Articles 5.1 and 189.3 EC, containing an obligation to take all measures necessary to guarantee the application and effectiveness of Community law, and to the principles contained in its previous case-law on State liability arising from a violation of Community law.

Cross-references:

On state liability, see CJEC, 5 March 1996, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for transport, ex parte Factortame Ltd and others*, joint cases C-46/93 and C-48/93; not yet reported; *Bulletin* 96/1 [ECJ-96-1-001].

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-2-008

a) European Union / **b)** Court of Justice of the European Communities / **c)** Third chamber / **d)** 13.06.1996 / **e)** C-144/95 / **f)** Criminal proceedings against *Maurin* / **g)** not yet reported / **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.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Adversarial, principle / Court of Justice, competence / Preliminary rulings, competence of the Court.

Headnotes:

The Court does not have jurisdiction, in proceedings for a preliminary ruling under Article 177 EC, to determine whether procedural rules applicable to offences under national legislation which falls outside the scope of Community law may be in breach of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings (cf. points 12-13 et disp.).

Summary:

The Local Criminal Court (le Tribunal de police de Toulouse) referred to the Court for a preliminary ruling under Article 177 EC a question on the interpretation of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings. The question was raised in the course of criminal proceedings brought against an individual who was accused of selling food products after the expiry of their use-by date. Considering that the national legislation fell outside the scope of Community law, the Court declared that it was incompetent to deliver a ruling on the question raised by the national court.

Supplementary information:

On the admissibility of preliminary rulings, see also:

Order of the ECJ, 25 June 1996, *Italia Testa*, Case C-101/96, not yet reported, paragraphs 4-7
Order of the ECJ, 19 July 1996, *Modesti*, Case C-191/96, not yet reported, paragraphs 4-7
Order of the ECJ, 19 July 1996, *Hassan*, Case C-196/96, not yet reported, paragraphs 4-7

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-2-009

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 18.06.1996 / **e)** C-303/94 / **f)** European Parliament v. Council of the European Union / **g)** not yet reported / **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 – Distribution of powers between institutions of the Community.
Constitutional Justice – The subject of review – Community law – Subordinate law.
Constitutional Justice – Procedure – Parties – *Locus standi.*
Sources of Constitutional Law – Hierarchy – Hierarchy between sources of Community law.
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Distribution of powers between institutions of the Community.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

Basic directive and implementing directive / European Parliament, capacity to bring actions / European Parliament, safeguarding of its prerogatives / Legislative procedure / Statement of reasons in the legal acts.

Headnotes:

The Parliament may bring an action before the Court for the annulment of an act of another institution provided that it does so in order to protect its prerogatives. That condition is satisfied where the Parliament indicates in an appropriate manner the substance of the prerogative to be safeguarded and how that prerogative is allegedly infringed. By virtue of those criteria, an action is inadmissible to the extent to which it is founded on infringement of Article 190 EC where the Parliament, in alleging that the contested provisions are inadequately or incorrectly reasoned for the purposes of that article, fails to provide any relevant indication as to how that infringement, assuming that it has been committed, is such as to impair its own prerogatives. On the other hand, since the right to be consulted in accordance with a provision of the Treaty is a prerogative of the Parliament, the latter is entitled to bring an action against a directive provided that it alleges that the directive regarding which it was not consulted modifies the obligations imposed on the member States by the other directives based on

provisions of the Treaty which provide that the Parliament must be consulted (cf. points 17-20).

The Council cannot be required to draw up all the details of regulations or directives concerning the common agricultural policy according to the procedure laid down in Article 43 EC. It is sufficient for the purposes of that provision that the essential elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision, and the provisions implementing the basic regulations or directives may be adopted according to a different procedure, as provided for by those regulations or directives. Nevertheless, an implementing directive adopted without consultation of the Parliament must respect the provisions which were incorporated in the basic directive after such consultation. That requirement is not fulfilled by Council Directive 94/43 establishing Annex VI to the basic directive, Directive 91/414, concerning the placing of plant protection products on the market. The basic directive, Directive 91/414, which seeks to improve agricultural production through the use of plant protection products, is also intended, by reason of the risks which the use of those products may involve for humans, animals and the environment, to introduce uniform rules on the conditions and procedures for authorization of such products. Article 4.1 of that directive thus requires the member States to ensure that a plant protection product is not authorized unless certain conditions are fulfilled and refers in that connection to the "uniform principles" mentioned in Annex VI, the content of which must be established by the Council. Article 4.1.b provides that the member States are not to authorize a plant protection product unless, in accordance with the abovementioned uniform principles, it is established that that product has no harmful effect on human or animal health, directly or indirectly, or on groundwater and has no unacceptable influence on the environment, particularly in relation to the contamination of water in general, without drawing a distinction, in that regard, between water intended for human consumption and other water. By providing only for protection of water intended for the production of drinking water and therefore failing to take account of the effects which plant protection products may have on all groundwater, and by allowing the issue of a conditional authorization, for a period of up to ten years, for a plant protection product whose foreseeable concentration exceeds that maximum permissible concentration laid down in a measure that must be taken into account, which affects the scope of the principles defined in the basic directive, Directive 94/43 modifies, without following the legislative procedure prescribed by the Treaty, which calls for it to be consulted, the scope of the obligations imposed on the member States by the basic directive. It must therefore be annulled, and the fact that it is merely incomplete on one of the points relating to the principles laid down by the basic directive, and does not thereby go beyond the limits to which the implementation of those principles is subject, is not sufficient to defeat the plea that it is illegal in the light of the latter directive (cf. points 23-33).

Summary:

The European Parliament lodged an action pursuant to Article 173 EC for annulment of Council Directive 94/43/EC establishing Annex VI to Directive 91/414/EEC concerning the placing of plant protection products on the market, adopted on the basis of Article 43 EC. The Parliament claimed that its prerogatives had been infringed and argued before the Court that the Directive unlawfully modified certain obligations imposed on the member States by the basic directive and that it contained an inadequate or incorrect statement of the reasons on which it was based.

The Court declared the action admissible when the action has as its purpose the protection of the prerogatives of the Parliament. The directive was annulled by the Court on the grounds that it modified the scope of the obligations imposed on the member States by the basic directive without following the legislative procedure prescribed by the Treaty, which calls for the Parliament to be consulted.

Cross-references:

See ECJ, 13 July 1995, *European Parliament v. Commission*, Case C-156/93, [1995] E.C.R. I-2019, *Bulletin* 95/2 [ECJ-95-2-009].

Languages:

French (language of the case); German, English, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-2-010

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 11.07.1996 / **e)** C-39/94 / **f)** SFEI and Others v. La Poste and Others / **g)** not yet reported / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Referral by a court.
Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Commission, competence / Court of justice, competence / Direct effect / Exceptional circumstances / Genuine cooperation between the institutions and member States / National jurisdictions, competence / National jurisdictions, obligations / Provisional judicial protection / Recovery of unlawful aid / State aid, definition.

Headnotes:

Under the procedure laid down in Article 177 EC, it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organization of the courts and their procedure. The Court must abide by the decision from a court of a member State requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law (cf. point 24).

A national court, seised of a request that it should draw the appropriate conclusions from an infringement of the prohibition on implementation of planned aid laid down in the last sentence of Article 93.3 EC, where the matter has also been referred to the Commission, which has not yet given a final decision on the question whether the State measures at issue constitute State aid, is not required to declare that it lacks jurisdiction or to stay proceedings until such time as the Commission has adopted a position on how the measures in question are to be categorized. The initiation by the Commission of a preliminary examination procedure under Article 93.3 or the consultative examination procedure under Article 93.2 cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification. Any other interpretation would have the effect of encouraging the member States to disregard the prohibition on implementation of planned aid, since the Commission can do no more than order further payments to be suspended so long as it has not adopted its final decision on the substance of the matter, and the effectiveness of Article 93.3 would be weakened if the fact that the Commission was seised of the matter were to prevent the national courts from drawing all the appropriate conclusions from the infringement of that provision. In that context, a national court may have cause to interpret and apply the concept of aid in order to determine whether a State measure introduced without observance of the preliminary examination procedure provided for in Article 93.3 ought to have been subject to that procedure. Where it entertains doubts, it may seek clarification from the Commission which must, as a consequence of the duty of sincere cooperation resulting from Article 5 EC, respond as quickly as possible. Furthermore, a national court may or must, in accordance of Article 177.2 and 177.3 EC, refer a question to the Court of Justice for a preliminary ruling on the interpretation of Article 92. Where it consults the Commission or refers a question to the Court, it must decide whether it is necessary to order interim measures in order to safeguard the interests of the parties pending final judgment (cf. points 45, 49-53, disp. 1).

Having regard to the importance for the proper functioning of the common market of compliance with the procedure for prior review of planned State aid under Article 93.3 EC, a national court requested to order the repayment of aid must grant that application if it finds that the aid was not notified to the Commission, unless by reason of exceptional circumstances repayment is inappropriate. Any other interpretation would encourage the member States to disregard the prohibition laid down in Article 93.3, since if national courts could only order suspension of any new payment, aid already granted would subsist until the Commission's final decision finding the aid incompatible with the common market and ordering its repayment (cf. points 69-71, disp. 3).

The recipient of aid who does not verify that the aid has been notified to the Commission in accordance with Article 93.3 EC cannot incur liability solely on the basis of Community law. The machinery for reviewing and examining State aid established by Article 93 EC does not impose any specific obligation on the recipient of aid. If, however, according to national law concerning non-contractual liability, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to hold that the recipient of aid paid in breach of Article 93.3 EC has incurred liability (cf. points 73, 75-76, disp. 4).

Summary:

The Court was referred to for a preliminary ruling, under Article 177 EC, on a number of questions on the interpretation of Articles 92 and 93 EC. The questions were raised in proceedings between, amongst others, le Syndicat français de l'Express International (SMFI) and the French Post Office (La Poste, public law

corporation since 1 January 1991) concerning logistical and commercial assistance afforded by the Post Office to SMFI and to Chronopost in their express delivery activities with respect to the Treaty provisions relating to state aids. Apart from raising the question as to whether logistical and commercial assistance could be considered as constituting an aid within the meaning of Article 92 EC, the referring court interrogated the Court more particularly as to the attitude it should adopt when seised of a request that it should draw the appropriate conclusions from an infringement of Article 93.3 EC, when the Commission was currently seized of the matter but had not yet given a decision on whether or not the State measures in question constituted state aid. The referring court asked more specifically whether it should declare that it had no jurisdiction or at least stay proceedings until the Commission has adopted a position on how the measures in question were to be categorised, or even whether it should declare itself to have jurisdiction and safeguard the rights of individuals where there is an infringement of Article 93.3 EC.

Cross-references:

See CFI, 8 June 1995, *Siemens*, Case T-459/93; E.C.R. II-1675, *Bulletin* 95/2 [ECJ-95-2-005].

Languages:

French (language of the case); German, English, Danish, Spanish, Finish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-2-011

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 30.07.1996 / **e)** C-84/95 / **f)** Bosphorus v. Minister for Transport, Energy and Communications, Ireland and the Attorney General / **g)** Not yet reported / **h)**.

Keywords of the systematical thesaurus:

Sources of Constitutional Law – Categories – Written rules – Other international sources.
Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
Sources of Constitutional Law – Techniques of interpretation – Teleological interpretation.
General Principles – Proportionality.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.
Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Economic sanctions / Embargo / International Community, general interest / Right to enjoyment property / Security Council / State of war.

Headnotes:

Fundamental rights such as the right to peaceful enjoyment of property and the freedom to pursue a commercial activity are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community. Those restrictions may be substantial where the aims pursued are themselves of substantial importance. That is precisely the case as regards Regulation No 990/93, the aim of which is to contribute at Community level to the implementation of the sanctions against the Federal Republic of Yugoslavia adopted by the Security Council of the United Nations, since that regulation pursues an objective of general interest which is fundamental for the international community, namely to put an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina. The impounding under that regulation of an aircraft which is owned by an undertaking based in the Federal Republic of Yugoslavia, but has been leased for four years to another undertaking neither based in nor operating from that republic and in which no person or undertaking based in or operating from that republic has a majority or controlling interest, cannot therefore be regarded as inappropriate or disproportionate (cf. points 21-26).

Summary:

The Supreme Court of Ireland referred to the Court for a preliminary ruling under Article 177 EC, a question on the interpretation of Article 8 of Council Regulation No 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro). The Regulation implements in the community some aspects of the sanctions adopted by the Security Council of the United Nations against the aforementioned republic. The question

arose in proceedings between a Turkish company operating principally as an air charter and travel organizer and the Irish Minister for Transport. The Turkish company had leased two aircrafts from the Yugoslav national airline. Following maintenance operations at Dublin Airport one of the aircraft was impounded after order from the Minister for Transport. The Turkish company submitted that the regulation in question was aiming at penalizing the Federal Republic of Yugoslavia and its nationals as well as to apply sanctions against them, but the sanctions could not be extended to apply to third parties that were completely innocent and exercised their activities in good faith from a neighbouring State, with which the Community had friendly relations. Furthermore the Turkish company invoked that its fundamental rights, in particular the right to peaceful enjoyment of its property and the freedom to pursue a commercial activity would be infringed if the regulation were to apply.

The Court concluded, after having examined the wording, the context and the objectives of the regulation in question in the light of the resolutions adopted by the Security Council, that Article 8 of the regulation applied to the conflict and that, considering that an objective of general interest so fundamental for the international community, which consisted in putting an end to the state of war and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft could not be regarded as inappropriate or disproportionate.

Supplementary information:

On the principle of proportionality, see also:

ECJ, 14 May 1996, *The Queen v. Commissioners of Customs & Excise, ex parte Faroe Seafood Co. Ltd, Føroya Fiskasøla and Commissioners of Customs & Excise, ex parte John Smith and Celia Smith*, joined cases C-153/94 and C-204/94, not yet reported; paragraphs 113-116
ECJ, 23 May 1996, *Maas & Co. NV v. Belgische Dienst voor Bedrijfsleven en Landbouw*, Case C-326/94, not yet reported, paragraphs 29, 36
CFI, 5 June 1996, *NMB*, Case T-162/94, not yet reported; paragraphs 69-86
ECJ, 13 June 1996, *Binder GmbH & Co. International v. Hauptzollamt Stuttgart-West*, Case C-205/94, not yet reported; paragraphs 30-37
ECJ, 4 July 1996, *Hüpeden & Co. KG v. Hauptzollamt Hamburg-Jonas*, Case C-295/94, not yet reported, paragraphs 14-40
ECJ, 4 July 1996, *Pietsch v. Hauptzollamt-Waltershof*, Case C-296/94, not yet reported, paragraphs 15-34
Order ECJ, 12 July 1996, *United Kingdom and Northern Ireland v. Commission*, Case C-180/96 R, not yet reported; paragraphs 73,76
Order of the President of the CFI, 13 July 1996, *The National Farmers' Union*, Case T-76/96 R, not yet reported; paragraphs 83-96

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations of the Court).

European Court of Human Rights

Important decisions

Identification: ECH-96-2-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 24.04.1996 / **e)** 16/1995/522/608 / **f)** Boughanemi v. France / **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:

Expulsion / Family, definition.

Headnotes:

The deportation of a Tunisian national convicted of a criminal offence, whose parents and ten brothers and sisters live lawfully in France and who had recognised as his the child of a woman of French nationality, with whom he had cohabited, does not violate the right to respect for private and family life.

Summary:

The applicant, who was born in Tunisia in 1960, arrived in France in 1968 and lived there until his deportation. His whole family is also settled there. He cohabited with a woman of French nationality who bore him a child on 19 June 1993 which he formally recognised 5 April 1994. He was convicted of various offences and was sentenced to non-suspended terms of imprisonment totalling almost four years. On 8 March 1988 an order for his deportation was made by the Minister of the Interior on the ground that his presence on French territory was a threat to public order. The deportation order was executed on 12 November 1988, but the applicant returned to France and stayed there illegally. On 26 February 1991 the Minister of the Interior refused his application to have the deportation order rescinded. Mr Boughanemi then lodged an application for judicial review with the Lyon Administrative Court, which ruled against him on 26 February 1991. On 7 December 1992 the *Conseil d'Etat* upheld that decision. The applicant was arrested for non-compliance with the deportation order and sentenced to three months' imprisonment, and on 12 October 1994 he was deported to Tunisia.

Regarding Article 8.1 ECHR (the right to respect for private and family life) the Court stated that doubts as to the reality of family ties between the applicant and the mother of the child were not wholly unfounded. However, that did not justify a finding that the applicant had no private and family life in France. The applicant had recognised the child and the concept of family life on which Article 8 ECHR is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, that can only happen in exceptional circumstances. No such circumstances existed in the present case. In addition his parents and ten brothers and sisters were legally resident in France. As his deportation had had the effect of separating him from his family and child, it amounted to an interference with the right guaranteed under Article 8 ECHR.

Regarding Article 8.2 ECHR the Court found that the interference in question was "in accordance with the law" and pursued a legitimate aim: the prevention of disorder and crime. As to whether it was "necessary in a democratic society", the Court noted that the applicant had arrived in France at the age of eight and had been legally resident there for twenty years and subsequently had lived there as an illegal immigrant for six years. He had most of his schooling there. His parents and brothers and sisters lived here and he had cohabited there with a woman of French nationality whose child he had recognised. However, the applicant had kept his Tunisian nationality and had apparently never manifested a wish to become French. It was probable that he had retained links with Tunisia that went beyond mere fact of nationality. Moreover, deportation had been decided after the applicant had been sentenced to almost four years' imprisonment non-suspended, three for living on earnings of prostitution with aggravating circumstances. Consequently there had been no violation of Article 8 ECHR.

Languages:

English, French.

Identification: ECH-96-2-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25.04.1996 / **e)** 18/1995/524/610 / **f)** Gustafsson v. Sweden / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Freedom of association.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Collective agreement, freedom not to join / Trade union action, legitimate purpose.

Headnotes:

Lack of state protection for a restaurant owner against lawful industrial action aimed at making him bound by a collective agreement does not violate the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Summary:

In the summer of 1987 the applicant owned a restaurant and a youth hostel. The restaurant hired fewer than ten employees on a seasonal basis but with the option of re-employment. The applicant was not a member of either of the two associations of restaurant employers, the Swedish Hotel and Restaurant Owners' Association (HRAF) and the Employers' Association of the Swedish Association of Restaurant Owners. As he was not a member of the association the applicant was not bound by any collective agreement between them and the Restaurant Workers Union (HRF). In 1987 he refused to sign a substitute agreement with the HRF to the effect that a collective agreement between the HRAF and the HRF should apply and reiterated his objections of principle to the system of collective bargaining. Following the applicant's refusal, the HRF picketed his restaurant and declared a boycott of it. Sympathy measures were taken by several other unions in July 1987 and the summer of 1988, with the result that deliveries to the restaurant were stopped. In August 1988 Mr Gustafsson, invoking the Convention, requested the Government to prohibit the HRF from continuing the picketing and the other unions from pursuing their sympathy measures, and to order the unions, or alternatively the State, to pay damages. On 12 January 1989 the Government refused the applicant's claim on the ground that it concerned a legal dispute between private parties which could only be determined by a Court. His application for judicial review of the Government's decision was dismissed by the Supreme Administrative Court.

The Court held that Article 11 ECHR did not as such guarantee a right not to enter into a collective agreement. The positive obligation incumbent on the State under Article 11 ECHR, including the aspect of protection of personal opinion, may well extend to treatment connected with the operation of a collective bargaining system, but only where such treatment impinges on freedom of association. Compulsion which, as here, did not significantly affect the enjoyment of that freedom even if it causes economic damage, cannot give rise to any positive obligation under Article 11 ECHR. Furthermore, the applicant had not substantiated his submission to the effect that the terms of employment which he offered were more favourable than those required under a collective agreement. Bearing in mind the special role and importance of collective agreements in the regulation of labour relations in Sweden, the Court saw no reason to doubt that the union action pursued legitimate interests consistent with Article 11 ECHR.

Languages:

English, French.

Identification: ECH-96-2-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 10.06.1996 / **e)** 7/1995/513/597 / **f)** Benham 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 – Individual liberty.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Detention for non-payment, validity / Legal assistance.

Headnotes:

The detention of an applicant by magistrates for non-payment of community charge does not infringe the right to liberty and security of person. However the fact that the applicant was not entitled to legally-aided representation before magistrates as of right contravened the right to a fair and public hearing and the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require.

Summary:

Mr Benham did not pay the community charge of GBP 325 to which he became liable on 1 April 1990. On 25 March 1991 he appeared before a Magistrate's Court for an inquiry to be made into his means and the reasons for his failure to pay, in accordance with the Community Charge Administration and Enforcement Regulations 1989. He had no legal assistance for this hearing, although he was eligible for "Green Form" legal advice and assistance prior to the hearing and the magistrates could have ordered a solicitor to represent him before them under the Assistance by way of Representation ("ABWOR") scheme if they had thought it necessary. The magistrates found that Mr Benham had no income or assets with which to pay the debt but that he had nine "O" Levels and had voluntarily left an employment training scheme in March 1990. They concluded that his failure to pay was due to his culpable neglect since he clearly had the potential to earn money, and they issued a warrant committing him to prison for thirty days. Mr Benham appealed to the Divisional Court. Bail was granted on 5 April 1991. The Court quashed the order for detention on the grounds that there had been insufficient evidence before the magistrates to support their finding that Mr Benham's failure to pay the community charge was due to culpable neglect: clear evidence that suitable employment was on offer to him would have been necessary.

Regarding Article 5.1 ECHR the Court stated that a period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. The Court did not find it established that the magistrate's order for detention was invalid under domestic law and thus that the detention which remitted from it was unlawful, nor did the Court find the detention was arbitrary. Consequently there was no violation of Article 5.1 ECHR.

Regarding Article 6.1 and 6.3.c ECHR taken together, the Court held that where deprivation of liberty is at stake the interests of justice in principle call for legal representation. The legal aid provision available to the applicant had been insufficient. Accordingly there had been a violation of Article 6.1 and 6.3.c ECHR taken together.

Languages:

English, French.

Identification: ECH-96-2-010

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 10.06.1996 / **e)** 20/1995/526/612 / **f)** Pullar 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 – Impartiality.

Keywords of the alphabetical index:

Juror, connection to prosecution witness / Juror, excuse from the jury / Witness of the prosecution, connection to juror.

Headnotes:

A trial by jury including an employee of the prosecution witness does not infringe the right to a fair trial. The reliance by the appeal court on the written statement of the prosecution witness does not infringe the right to a fair trial or the right to examine or have examined witnesses or to obtain the attendance and examination of witnesses.

Summary:

Mr Pullar was an elected member of a Regional Council in Scotland. He was called for trial on 13 July 1992 on a charge of having corruptly solicited money from Mr McLaren and Mr McCormack in exchange for offering to exert his influence in favour of their application for

planning permission. They were the two principal prosecution witnesses. Mr Pullar pleaded not guilty. One of the jurors selected, Mr Forsyth, was a junior employee in Mr McLaren's firm (although he had been given notice of redundancy on 10 July 1992 to take effect on 7 August 1992). Both Mr Forsyth and Mr McLaren told the Sheriff's clerk about the connection between them, but the latter took the decision not to inform the sheriff. On 17 July Mr Pullar was convicted and sentenced to twelve months' imprisonment. He and his lawyers did not discover the connection between Mr Forsyth and Mr McLaren until after the trial. He then appealed to the High Court of Justiciary complaining that Mr Forsyth's presence on the jury amounted to a miscarriage of justice. Before the appeal hearing, the prosecution took a written statement from Mr McLaren. On 5 February 1993, the High Court commented that if the sheriff or the parties had known about the connection between Mr Forsyth and Mr McLaren, Mr Forsyth would probably have been excused from the jury. However, there was no evidence to show that he had not been impartial, and the mere suspicion that a juror might have been biased did not justify quashing a verdict.

The Court noted that there are two aspects to the requirement of impartiality in Article 6.1 ECHR With regard to the first aspect, the subjective test, personal impartiality must be presumed even if it is difficult to procure evidence in rebuttal. Here there was no evidence of personal partiality. With regard to the objective test it does not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case that he will be prejudiced in favour of that person's testimony. It is a question of nature and degree of familiarity. In the present case, it was by no means clear that an objective observer would conclude that the juror was more inclined to believe the prosecution witness. In addition, the tribunal offered important safeguards such as random selection of jury, detailed directions to the jury by the presiding judge to impartially assess the credibility of all witnesses and the oath by the juror to the same effect. The applicant's misgivings as to the tribunal's impartiality were not found to be objectively justified.

With regard to Article 6.1 and 6.3.d ECHR taken together the Court had regard to the fact that the applicant's counsel could have objected to the written statement being seen by the appeal court judges, reserved his position as to its accuracy or called for oral evidence. He chose not to take any step to prevent the statement being accepted by the High Court, in these circumstances it cannot be said the applicant was denied rights under Article 6.1 and 6.3.d ECHR in consequence of the manner in which the appeal hearing was conducted.

Languages:

English, French.

Identification: ECH-96-2-011

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25.06.1996 / **e)** 17/1995/523/609 / **f)** Amuur v. France / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law – Certainty of the law.
Fundamental Rights – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
Fundamental Rights – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

International zone, airport / Law, quality.

Headnotes:

Prolonged holding of aliens, asylum-seekers, in the international zone of an airport without any legal, humanitarian and social assistance entails a violation of the right to liberty and security of person.

Summary:

Mahad, Lahima, Abdelkader and Mohammed Amuur belong to the Darob Marhan tribe, whose members were in power in Somalia at the time of President Mohamed Siyad Barre's regime. After the overthrow of President Siyad Barre it appears that members of the Hawiya tribe took over the government of the country. The applicants then took refuge at Kismayu. Afterwards they went to Syria. The applicants arrived at Orly Airport in Paris on 9 March 1992 from Damascus but, on presenting themselves for immigration control by the airport and border police, were refused entry into France as their travel documents were not in order. They applied for political asylum under the procedure provided for in Article 12 of the Decree of 27 May 1982. They remained in detention at the Arcade Hotel. In a letter of

25 March 1992 they applied to the French Office for the Protection of Refugees and Stateless Persons for refugees status, but that office concluded on 31 March that it had no jurisdiction. On 26 March 1992 the applicants applied to the judge for urgent applications at the Créteil tribunal de grande instance, seeking an order that what they regarded as a flagranty unlawful act should cease. On 29 March 1992 they were returned to Syria. On 31 March 1992 the President of the Créteil tribunal de grande instance held in an expedited decision that the applicants detention was unlawful and ordered their release.

Regarding Article 5.1 ECHR the Court stated that holding aliens in the international zone does indeed involve a restriction of liberty, but one which is not in every respect comparable to that which occurs in centres for the detention of aliens pending deportation. Such holding should not be prolonged excessively, otherwise a mere restriction of liberty may become a deprivation of liberty. A prolonged holding requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective acces to the procedure for determining refugee status. The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty. Thus holding the applicants in the airport's transit zone was equivalent in practice to a deprivation of liberty.

Regarding compatibility of the deprivation of liberty of article 5.1 ECHR, the Court notes that the words "in accordance with a procedure prescribed by the law" do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. In that connection, neither the decree of 27 May 1982 nor the – unpublished – circular of 26 June 1990 constituted a "law" of sufficient "quality" within the meaning of the Court's case law. Moreover, at the material time none of these texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose a limit on the administrative authorities as regards the lenght of time for which they were held. They did not provide for legal, humanitarian and social assistance, nor did they lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps.

There has accordingly been a breach of article 5.1 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. Special Law for the Punishment of Antinational Activists
(8-1 KCCR 1, 25.01.1996)

General Principles – Legality.
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 – Civil and political rights – Non-retrospective effect of law – Criminal law.

2. Special Law for the Democratisation Movement
(8-1 KCCR 51, 16.02.1996)

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

3. Pre-Inspection of Movies
(8-2 KCCR, 04.10.1996)

Institutions – Executive bodies – Sectoral decentralisation.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Right to information.
Fundamental Rights – Economic, social and cultural rights – Artistic freedom.

Systematic thesaurus

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1.1 Constitutional jurisdiction

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  - 1.1.1.1 Sources
    - 1.1.1.1.1 Constitution
    - 1.1.1.1.2 Institutional Acts
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  - 1.1.2.3 Appointment of members[1]
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---

1 *Including the conditions and manner of such appointment (election, nomination, etc.).*
2 *Including the conditions and manner of such appointment (election, nomination, etc.).*
3 *Vice-presidents, presidents of chambers or of sections, etc.*
4 *E.g. State Counsel, prosecutors etc.*
5 *Registrars, assistants, auditors, general secretaries, researchers, other personnel, etc.*
6 *E.g. assessors.*
7 *Registrars, assistants, auditors, general secretaries, researchers, other personnel, etc.*

pages

1.2 Types of claim

1.3 Types of litigation

[8] *Preliminary references in particular.*
[9] *Horizontal distribution of powers.*
[10] *Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.*
[11] *Decentralised authorities (muncipalities, provinces, etc.).*
[12] *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)).*

pages

[15] *Local authorities, municipalities, provinces, departments, etc.*
[16] *Or: functional decentralisation (public bodies exercising delegated powers).*
[17] *Political questions.*
[18] *Unconstitutionality by omission.*
[19] *Pleadings, final submissions, notes, etc.*

pages

pages

[20] *This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (Declarations of rights, Basic Charters, etc.).*

[21] *Presumption of constitutionality, double construction rule.*

[22] *Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.*

[23] *Only where not applied as a fundamental right.*
Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.

pages

4 INSTITUTIONS

4.1 Head of State

4.2 Legislative bodies

4.3 Executive bodies

---

[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.*

pages

4.4 Courts

4.5 Federalism and regionalism

[34] *Comprises the Court of auditors insofar as it exercises jurisdictional power.*

pages

[35] *E.g. Court of Auditors.*
[36] *Ombudsman, etc.*
[37] *E.g. Court of Auditors.*

pages

5 FUNDAMENTAL RIGHTS

5.1 General questions

5.2 Civil and political rights

---

[38] *Open-ended or finite.*

[39] *If applied in combination with another fundamental right.*

[40] *The question of "Drittwirkung".*

[41] *Used independently from other rights.*

[42] *This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest. Detention pending trial is treated under "Procedural safeguards - Detention pending trial".*

pages

[43] *Including the right of access to a tribunal established by law.*

[44] *Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.*

[45] *Militia, conscientious objection, etc.*

[46] *Aspects of the use of names are included either here or under "Right to private life".*

pages

[47] *This keyword also covers "Freedom of work".*

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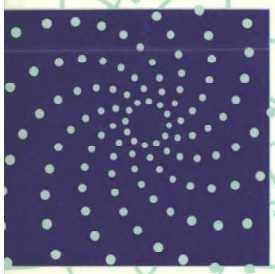

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