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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 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 courts, but will also enrich the case-law of the existing courts. The main purpose of the Bulletin on Constitutional Case-law is to foster such an exchange and to assist national judges in solving critical questions of law which often arise simultaneously in different countries.

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

The decisions are presented in the following way:

1. *Identification*
    - *a) country or organisation*
    - *b) name of the court*
    - *c) chamber (if appropriate)*
    - *d) date of the decision*
    - *e) number of decision or case*
    - *f) title (if appropriate)*
    - *g) official publication*
    - *h) non-official publications*
2. *Keywords of the systematic thesaurus*
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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, 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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Constitutional Court

Important decisions

Identification: ALB-96-3-005

a) Albania / **b)** Constitutional Court / **c)** / **d)** 24.09.1996 / **e)** 34 / **f)** / **g)** to be published in the Official Gazette / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Constitutional Court, jurisdiction / Unconstitutional Act.

Headnotes:

The functions of the Constitutional Court may be modified, limited or extended only as provided by constitutional law.

Summary:

The proceedings, instituted by the Constitutional Court of its own motion, relate to the constitutionality of statutory provisions enacted by the People's Assembly of the Republic of Albania. Specifically, the Constitutional Court established the unconstitutionality of Section 16 of Act no. 8151 of 12 September 1996. According to its terms the Constitutional Court, rather than the Court of Cassation, is the authority competent to receive petitions contesting decisions of the Central Committee for Local Government Elections.

The People's Assembly of the Republic of Albania, under Section 16 of Act no. 8151 of 12 September 1996 amending Act no. 7573 of 16 June 1992 on the election of local government bodies, modified the first and second paragraphs in Section 40 of the aforementioned Act by replacing the words "Court of Cassation" with "Constitutional Court" as the authority competent to examine complaints against decisions of the Central Committee for Local Government Elections.

The Constitutional Court found that the provision in Section 16 of the aforementioned Act, which is moreover an ordinary statute, conflicted with Article 24.7 of Constitutional Act no. 7561 of 20 April 1992 modifying and amending Main Constitutional Provisions Act no. 7491 of 29 April 1991, which provides in definitive terms that the Constitutional Court "resolves questions concerning the lawfulness of the election of the President of the Republic and of the Members of Parliament, and questions concerning the people's referenda, proclaiming the final results".

Consequently, the Court found that Section 16 of Act no. 8151 of 12 September 1996 amending Act no. 7573 of 16 June 1992 on the election of local government bodies must be declared void on the ground of unconstitutionality.

Languages:

Albanian.

Identification: ALB-96-3-006

a) Albania / **b)** Constitutional Court / **c)** / **d)** 14.10.1996 / **e)** 36 / **f)** / **g)** to be published in the Official Gazette / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Provinces.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

District council, head / People's Assembly, candidacy.

Headnotes:

The Constitutional Court is competent to examine petitions by Heads of District Councils, in the capacity of local government bodies, requesting that Council of Ministers orders to replace Heads of District Councils temporarily by other persons be ruled unlawful and unconstitutional.

Summary:

The Council of Ministers, by Order no. 525 of 12 August 1996, paragraph 2, appointed Mr Fiquiri Gjeta as its delegate holding the position of Head of Kukës District Council on the ground that "the Head of Kukës District Council, Mr Ukë Todaj, was relieved of that office as from 1 May 1996 upon presenting himself as candidate for the office of Member of the People's Assembly of the Republic of Albania". The Head of Kukës District Council petitioned the Constitutional Court against this order appointing another person to fill his position.

The Council of Ministers issued the order on the basis and within the forms of Amendment Act no. 8158 of 31 July 1996 relating to Act no. 8068 of 15 February 1996 amending certain provisions of Act no. 7572 of 10 June 1992 on the organisation and functioning of local authorities, which expressly stipulates that "where the District Council does not succeed in electing its own Head within the specified time, an official shall be appointed by the Council of Ministers to act as Head of the District Council".

During the proceedings in the case, it emerged that Mr Ukë Todaj had indeed been relieved of office as Head of Kukës District Council on 1 May 1996 upon his presentation as candidate for the office of Member of the People's Assembly of the Republic of Albania in the election held on 26 May 1996, in which he was unsuccessful.

However, by Kukës District Council Order no. 12 of 7 June 1996, Mr Ukë Todaj was re-elected as Head of the Council without the Prefect objecting as provided by Section 6 of Act no. 7608 of 22 September 1992 concerning Prefectures.

The foregoing is based on Kukës District Council Order no. 12 of 7 June 1996 and recorded in the minutes of the meeting.

The authority of the Council of Ministers to appoint one of the district councillors as Head of the District Council stems from Section 45, paragraph 1 of Act no. 7572 of 10 June 1992 on the organisation and functioning of local authorities.

In the circumstances of the case, the Court held that the Council of Ministers, in appointing a delegate on 12 August 1996 to act as Head of Kukës District Council when the District Council had already elected its own Head with effect from 7 June 1996, infringed Section 45, paragraph 1 of Act no. 7572 of 10 June 1992 on the organisation and functioning of local authorities, and also offended against the principle of local government bodies' independence enshrined in Section 3 of Constitutional Act no. 7570 of 3 June 1992 amending Main Constitutional Provisions Act no. 7491 of 29 April 1991. The court found that paragraph 2 of the aforementioned Order appointing a delegate of the Council of Ministers to act as Head of Kukës District Council was unlawful and unconstitutional.

Languages:

Albanian.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court
during September/October 1996

- Financial claims (Article 137 B-VG): 6
- Conflicts of jurisdiction (Article 138.1 B-VG): 7
- Review of regulations (Article 139 B-VG): 24
- Review of laws (Article 140 B-VG): 53
- Appeals against decisions of administrative authorities (Article 144 B-VG): 921
  (718 declared inadmissible)

Important decisions

Identification: AUT-96-3-007

a) Austria / **b)** Constitutional Court / **c)** / **d)** 28.09.1996 / **e)** G 50/96 / **f)** / **g)** to be published *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments and decisions of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the formal validity of enactments.
General Principles – Federal State.
General Principles – Publication of laws.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Legislation, formal requirements / Publication of laws / Laws of the *Land*, publication.

Headnotes:

The remaining part of a law of a *Land* which includes provisions which according to the Constitution of the Federation, have to be approved by the Federal Government but have been rejected by it must not be published without a new adoption of the Parliament of the *Land*.

The Court handled the case of its own motion following an appeal alleging the unconstitutionality of an administrative decision. It found that an amendment to the Law of the Tyrol *Land* on the transfer of real property (*Novelle zum Tiroler Grundverkehrsgesetz*) was unconstitutional.

Summary:

A law passed by the Parliament of the *Land* of Tyrol, requiring for its execution the participation of the federal bodies, did not receive the approval of the federal government in accordance with Article 97.2 of the Constitution of the Federation. The publication in the Tyrol Law Gazette of the adopted law, with the text in question deleted, is not in compliance with the Constitution of the Tyrol *Land* if the amended draft law has not been separately adopted by the Parliament.

Supplementary information:

Legal provisions to which the Court referred:
Articles 97 and 140.3 of the Constitution; Article 38.7 *Tiroler Landesordnung* 1989.

Languages:

German.

Identification: AUT-96-3-008

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08.10.1996 / **e)** G 66/95 / **f)** / **g)** to be published *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments and decisions of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Legislative amendment / Specific request.

Headnotes:

An appeal to annul an unconstitutional law must specify the legal rule at issue. A court, which can only challenge a law if it is a legal rule which it must apply, must clearly indicate the provisions to be investigated. Having regard to the legislative practice of frequent amendments, often found in a collective law (*Sammelgesetz*), it can be difficult to identify the relevant version. This fact may not dispense the applicant court from adequately indicating the provisions at issue. This non-rectifiable flaw results in the *a limine* rejection of the application.

Summary:

Rejection of an appeal claiming unconstitutionality, lodged by the Administrative Court, of several provisions of the Labour Code. The Constitutional Court considers itself bound, in its investigation, by the application. The provisions that were challenged were no longer in force in the version indicated in the application at the time in question (in other words, the date of the notification to the applicant of the administrative decree before the Administrative Court).

Supplementary information:

Established case-law (in principle). Legal rules to which the court referred: Article 140.1 of the Constitution; § 67.1 VerfGG.

For some time, the Federation's legislation has been the subject of lively debate in the daily newspapers and in law publications (considerable increase in the number of laws and amendments; legislator's practice of adopting several laws – with different subjects – promulgated under the same number in the law gazette; numerous retroactive laws).

Languages:

German.

Identification: AUT-96-3-009

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08.10.1996 / **e)** G 93/96 / **f)** Kabelrundfunk-Werbeverbot / **g)** to be published *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments and decisions of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Decisions – Types – Annulment.
Constitutional Justice – Effects – Influence on State organs.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and other domestic legal instruments.
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 – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Broadcasting freedom / Television, cable / Legislation, adoption measures / Audiovisual advertising / Media, television.

Headnotes:

The provisions of the Broadcasting Regulations (regarded as a federal act), which prohibit private cable television companies from making commercial advertising broadcasts, are not compatible with the principles of freedom of expression and freedom to work for remuneration. When the Constitutional Court's decision concerning the annulment of the provisions of the said act relating to active cable television came into effect, these provisions became unconstitutional.

Summary:

A direct appeal was introduced by several cable television companies challenging a provision of the Broadcasting Regulations prohibiting advertising broadcasts, having regard to freedom of expression and freedom to work for remuneration. This text results from the scope of the annulment, pronounced by Decision no. G 1256-1264/95 of 27.05.1995, *Bulletin* 95/3 [AUT-95-3-009], in which the Court intended to comply as much as possible with the wishes of the legislator by avoiding an annulment which would profoundly alter the meaning of the law (this would have resulted in unlimited advertising broadcasts in cable television). The Court set a deadline for the entry

into force of this annulment, in order to allow the legislator to adopt regulations in compliance with the requirements of the case-law of the European Court of Human Rights, having regard to Article 10 ECHR and to European Community law. The legislator did not take advantage of this opportunity, and abstained from drafting new legislation, in compliance with the Constitution, to limit advertising broadcasts. The absolute ban on advertising broadcasts, which cannot be regarded as appropriate transitional regulations, is an infringement of the constitutional rights referred to by the applicants. The provision at issue was no longer justified after the expiry date set by the annulment decision of 27.05.1995.

Supplementary information:

Legal provisions to which the Court referred:
Article 140 of the Constitution.

Cross-references:

Decision no. G 1256-1264/95 of 27.09.1995 *Aktiver Kabelrundfunk, Bulletin* 95/3 [AUT-95-3-009].

Languages:

German.

Belgium
Court of Arbitration

Statistical data

1 September 1996 – 31 December 1996

- 29 judgments
- 40 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 46 new cases
- Average length of proceedings: 10.5 months
- 15 judgments concerning applications to set aside
- 10 judgments concerning preliminary points of law
- 1 judgment concerning an application for suspension
- 3 judgments settled by summary procedure (one application to set aside and two preliminary points of law)

Important decisions

Identification: BEL-96-3-006

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 03.10.1996 / **e**) 54/96 / **f**) / **g**) *Moniteur belge* (Official Gazette), 10.10.1996; *Cour d'arbitrage – Arrêts* (Court of Arbitration – Judgments), 1996, 661 / **h**).

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
Institutions – Federalism and regionalism – Distribution of powers.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.
Fundamental Rights – Economic, social and cultural rights – Right to culture.

Keywords of the alphabetical index:

Territorial jurisdiction, cultural matters / Extra-territorial effects.

Headnotes:

The French-speaking, Dutch-speaking and German-speaking communities in Belgium may take any initiative to promote culture and to give concrete effect to each person's right to cultural fulfilment. In doing so, they must comply with the distribution among the communities of exclusive territorial jurisdiction in cultural matters. Given the very nature of the promoting culture of the territorial delimitation does not mean that a community ceases to have jurisdiction in this sphere solely because initiatives taken may have an effect outside the territory for which it is competent in cultural matters. However, such potential extra-territorial effects of measures aimed at promoting culture must not run counter to another community's cultural policy. Nor does the delimitation restrict the right of every individual – irrespective of the linguistic region where they live – to make their own free choice regarding cultural fulfilment.

The challenged provision, which allows the funding of French-speaking associations in municipalities of the Dutch-speaking region, cannot be considered as having the promotion of culture by the French-speaking community as its objective. In fact, it amounts to a protection measure in favour of the French-speaking minority living in those municipalities. A provision of that kind is contrary to the distribution of jurisdiction between the French-speaking and Dutch-speaking communities in Belgium.

It is for the respective legislatures of the entities of the Belgian federal system to afford protection to minorities, within the limits of their powers, such protection being guaranteed, *inter alia*, by Article 27 of the International Covenant on Civil and Political Rights.

Summary:

The speaker of the Dutch-speaking community's parliamentary assembly had applied to the Court of Arbitration seeking the annulment of a budget allocation decreed by the French-speaking community, which permitted the granting of subsidies to French-speaking associations in municipalities within the Dutch-speaking region, where facilities were in place so that French-speakers could use their mother tongue in their relations with public authorities.

In Belgium, the French-speaking, Dutch-speaking and German-speaking communities have the power to issue legally binding instruments (decrees) concerning cultural matters. By virtue of this power, they may take any initiative to promote culture and to give concrete effect to each person's constitutional right to cultural fulfilment, on condition that they comply with the distribution of exclusive territorial jurisdiction provided for in the Constitution on the basis of the linguistic regions in Belgium.

The Court held that the challenged provision could not, in the instant case, be deemed to have as its objective the promotion of culture by the French community, but must in fact be regarded as a measure intended to protect the French-speaking minority living in municipalities within the Dutch-speaking region. The communities were not empowered to take unilateral action to protect French-speakers, Dutch-speakers, or German-speakers living in a linguistic region of Belgium where the single official language was not their mother tongue. It was for each legislature to afford protection to the minorities living on the territory over which it has jurisdiction.

Languages:

French, Dutch and German.

Identification: BEL-96-3-007

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 18.12.1996 / **e**) 76/96 / **f**) / **g**) *Moniteur belge* (Official Gazette), 31.01.1997; *Cour d'arbitrage – Arrêts* (Court of Arbitration – Judgments), 1996, 969 / **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 Economic, Social and Cultural Rights.
Fundamental Rights – Economic, social and cultural rights – Freedom to teach.
Fundamental Rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

Schools, Steiner / Decree, objectives.

Headnotes:

The freedom of education, which is guaranteed under Article 24.1 of the Constitution, entitles education

authorities to organise and propose teaching based on specific pedagogic or educational concepts, without reference to any given denominational or non-denominational philosophy, while remaining eligible for public funding and subsidies. It does not prevent the relevant legislator from taking measures in respect of schools to ensure the quality and equivalent standard of education provided with public funds, if these measures are generally applicable regardless of the specific educational ideology those schools apply.

This freedom of, or right to, education according to fundamental rights and freedoms, as guaranteed in Article 24.3 of the Constitution – whether considered on its own or in conjunction with Article 13 of the International Covenant on Economic, Social and Cultural Rights or Article 2 Protocol 1 ECHR – is not infringed where a decree makes a school's authority to issue legally valid certificates and diplomas without any intervention by the public authorities, contingent on the achievement of certain minimum objectives, which, without attempting to interfere with the school's own teaching methods, are designed to guarantee and improve the quality of education, whether the school is part of the community's public education system or subsidised by the community.

However, freedom of education *is* infringed where it appears that development objectives for nursery schools (2 1/2- to 5-year-olds) and final objectives for primary schools (6- to 12-year-olds) and secondary schools (12- to 18-year-olds) are so wide-ranging and detailed that they cannot reasonably be regarded as minimum objectives, with the result that they do not allow schools sufficient scope to realise the objectives of their own pedagogic approach.

By ratifying these developmental and final objectives, without setting up a procedure allowing limited exemptions for schools that provide or wish to provide an education based on specific pedagogic concepts, which are respectful of fundamental rights and freedoms and do not interfere with either the quality of that education or its compulsory content, the parliament issuing the relevant decree encroaches upon the freedom of education guaranteed in Article 24.1 of the Constitution.

Summary:

The parliamentary assembly of the Dutch-speaking community had empowered the Dutch-speaking government, subject to ratification by decree, to set minimum objectives (known as development and final objectives), which schools were to pursue or achieve on completion of each level of education, according to a number of categories. Schools which complied with certain conditions were allowed to issue legally valid diplomas to pupils who had achieved the mandatory final objectives and their own specific objectives.

Several associations and a number of schoolchildren's parents, who mainly drew their inspiration from the pedagogic concepts of Rudolf Steiner, asked the Court of Arbitration to annul both the initial decree permitting the setting of development and final objectives and the decree (of the same date) ratifying the objectives set. The applicants complained that, when the education objectives were set, their own ideas about teaching had been given insufficient or no consideration, and freedom of education had thus been interfered with.

The Court of Arbitration noted that the freedom of education guaranteed in Article 24.1 of the Constitution secured the right to run – and hence to choose – schools based on a given denominational or non-denominational philosophy; that freedom meant that private persons could, without prior permission and subject to the requirement that they respect fundamental rights and freedoms, arrange for the provision of an education consistent both in form and content with their own way of thinking, for instance by setting up schools applying specific pedagogic or educational concepts.

The Court held that the principle of laying down rules requiring schools to pursue minimum objectives with a view to ensuring the quality of education and the equivalence of diplomas did not infringe freedom of education. On the other hand, it objected to the implementation of this principle by means of rules which a) involved development and final objectives which were so wide-ranging and detailed that they did not leave sufficient scope for schools to realise the objectives of their own pedagogic approach and b) made those objectives binding on all educational authorities, including schools providing or wishing to provide an education based on specific pedagogic concepts, without the slightest possibility of an exemption.

Languages:

French, Dutch and German.

Bulgaria
Constitutional Court

Statistical data
1 September 1996 – 31 December 1996

Number of decisions: 9

Important decisions

Identification: BUL-96-3-006

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 22.10.1996 / **e)** 18/96 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette), no. 92 of 29.10.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Presidential elections.
Institutions – Head of State – Appointment.

Keywords of the alphabetical index:

Elections / Presidential candidates.

Headnotes:

A run-off vote shall be held even if less than half of the eligible voters have cast their ballots at the presidential elections.

Summary:

Fifty-two members of Parliament asked for a binding interpretation of Articles 93.3 and 93.4 of the Constitution, viz. whether more than half of the eligible voters should have cast their ballots in order to allow a run-off vote between the top two candidates.

The Constitutional Court stated that, under Article 93.3 of the Constitution, when the President of the Republic of Bulgaria is elected after the first vote, the candidate shall require more than one half of the valid ballots provided that more than half of all eligible voters have cast their ballots in the election. The two requirements are cumulative and equally binding. Should one of these two requirements or both be missing, the election (the first run) shall not be invalid but there shall be a run-off vote within seven days. The run-off vote provided for in Article 93.4 of the Constitution shall also be held when less than half of the eligible voters have cast their ballots at the first vote.

Languages:

Bulgarian.

Canada
Supreme Court

Important decisions

Identification: CAN-96-3-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 21.08.1996 / **e)** 23801 / **f)** R. v. Gladstone / **g)** [1996] 2 S.C.R. 723 / **h)** Internet: http://www.droit.umontreal.ca/gladstone.en; [1996] Supreme Court Judgment no. 79 *(QuickLaw)*; [1996], 23 *British Columbia Law Reports* (3d) 155; 137 *Dominion Law Reports* (4th) 648; 109 *Canadian Criminal Cases* (3d) 193; [1996] 9 *Western Weekly Reports* 149; [1996] 4 *Canadian Native Law Reporter 65.*

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.
Fundamental Rights – Economic, social and cultural rights – Right to culture.

Keywords of the alphabetical index:

Aboriginal rights / Customary law.

Headnotes:

In considering a claim based on aboriginal rights, the courts must consider: (1) nature of the aboriginal right; (2) whether the right has been extinguished; (3) if not extinguished, whether the right has been infringed; and (4) if infringed, whether that infringement has been justified.

Summary:

The applicants were natives charged with attempting to sell herring spawn on kelp caught without the proper licence contrary to the Fishery Regulations. One of the applicants, on arrest, produced an Indian food fish licence which permitted the harvesting of herring spawn on kelp but not its sale. The applicants were convicted at trial and the convictions were upheld by both the Supreme Court of British Columbia and the Court of Appeal. At issue was whether the regulations restricting the right to harvest and sell herring spawn on kelp were of no force or effect because of their alleged conflict with aboriginal rights recognised by the Constitution.

To constitute an aboriginal right recognised by Section 35 of the Constitution Act, 1982 an activity must be an element of a practice, custom or tradition extant prior to contact with Europeans and integral to the distinctive culture of the aboriginal group claiming that right. Any extinguishment of an aboriginal right must be evidenced by a clear and plain intention to do so. The test for determining infringement of an aboriginal right involves asking whether the legislation has the effect of interfering with an existing aboriginal right and includes consideration of whether the impugned action was unreasonable, imposed undue hardship, and denied the right holders their preferred means of exercising that right. The test is partly determined by the factual context. Infringements can be justified if the government is acting pursuant to a valid legislative objective and if its actions are consistent with its fiduciary duty towards aboriginal peoples. Where the aboriginal right is internally limited as in the case of the right to fish for food and ceremonial purposes so that it is clear when that right has been satisfied and other users can be allowed to participate in the resource, priority can be allocated to the aboriginal people. Where the aboriginal right has no internal limitation as in the case of the right to fish for commercial purposes, however, the doctrine of priority requires that the government demonstrate that it has taken the existence of the aboriginal right into account in allocating the resource as between aboriginal peoples and other users. This right as it affects determination of priority is both procedural and substantive. Some limitation of aboriginal rights may be justifiable in order to pursue objectives of compelling and substantial importance to the community as a whole (taking into account the fact that aboriginal societies are a part of that community).

Languages:

English, French.

Identification: CAN-96-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 21.08.1996 / **e)** 23803 / **f)** R. v. Van der Peet / **g)** [1996] 2 S.C.R. 507

/ **h)** Internet: http://www.droit.umontreal.ca/peet.en; [1996] Supreme Court Judgment no. 77 *(QuickLaw)*; [1996], 23 *British Columbia Law Reports* (3d) 1; 137 *Dominion Law Reports* (4th) 289; 109 *Canadian Criminal Cases* (3d) 1; 200 *National Reporter* 1; [1996] 9 *Western Weekly Reports* 1; [1996] 4 *Canadian Native Law Reporter* 177.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.
Fundamental Rights – Economic, social and cultural rights – Right to culture.

Keywords of the alphabetical index:

Aboriginal rights / Customary law.

Headnotes:

The expression "existing aboriginal rights" in the Constitution Act, 1982 refers to those practices, customs and traditions which are integral to the culture of the aboriginal group claiming the right and which existed at the time of contact with Europeans and continue to exist although not necessarily without interruption.

Summary:

The applicant, a native, was charged with selling salmon caught under an Indian food fish licence contrary to the regulations prohibiting such sale. The trial judge held that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish and found the applicant guilty. The summary appeal judge found an aboriginal right to sell fish and ordered a new trial. The Court of Appeal allowed the Crown's appeal and restored the guilty verdict. The Supreme Court of Canada in a majority judgment upheld that judgment.

To be an aboriginal right recognised by Section 35 of the Constitution Act, 1982 an activity must be an element of a practice, custom or tradition integral (of central and defining significance) to the distinctive culture of the aboriginal group claiming the right. Claims are not to be determined on a general basis. Practices, customs or traditions constituting aboriginal rights must have continuity with those existing prior to contact with European society but they need not be uninterrupted. That they adapted to subsequent European influence is irrelevant. The evidence need not be conclusive but rather only be directed at demonstrating which aspects of aboriginal society have pre-contact origins. A frozen rights approach is therefore avoided. The rules of evidence should be applied in a manner cognisant of the difficulties in proving rights which pre-date written records. In applying this test, the court must take into account the aboriginal perspective but that perspective must be framed in terms cognisable to the Canadian legal and constitutional framework. The applicant failed to demonstrate that the exchange of fish for money or other goods was an integral part of her distinctive culture which existed prior to contact with Europeans and which was therefore protected by the Constitution.

Languages:

English, French.

Croatia
Constitutional Court

Statistical data
1 September 1996 – 31 December 1996

- Cases concerning the conformity of laws with the Constitution:
  received 169, resolved 31:
  in 5 cases the provisions of a law were repealed, in 6 cases the motions to review the constitutionality of laws were not accepted; in 2 cases the motion to review was rejected; in 16 cases the procedure was terminated; in 2 cases the petitioners were instructed about their rights.

  In 1 case the Court set into motion proceedings for reviewing the constitutionality of laws.

- Cases concerning the conformity of other regulations with the Constitution and laws:
  received 23, resolved 27:
  in 1 case the provisions of regulations other than laws were repealed, in 8 cases the motion to review the constitutionality and legality of such regulations was not accepted, in 11 cases the motion to review was rejected, in 6 cases the procedure was terminated; in 1 case a petitioner was instructed about his rights.

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

- Cases concerning the protection of constitutional rights:
  received 219, resolved 115:
  in 9 cases the constitutional action was accepted, in 36 cases the claim was dismissed, in 56 cases rejected, in 10 cases the action was withdrawn, in 4 cases the petitioner was instructed on the right to submit a constitutional action.

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

- In 7 cases the Court was asked to suspend the execution of individual acts; 2 claims were accepted.

Translations do not bind the Court.

Important decisions

Identification: CRO-96-3-014

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.10.1996 / **e)** U-III-623/1996 / **f)** / **g)** *Narodne novine*, 88/1996, 3831-3833 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Supervision.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, substitutes / Local self-government / Local councillor, mandate, termination.

Headnotes:

Political parties have the right to appoint substitutes for the resigned members of representative bodies.

The Government's right to dissolve a representative body of entities of local self-government is to be interpreted to the benefit of the functioning of local self-government.

Summary:

The Court accepted the constitutional action of the president of the municipal council against the Government's decisions by which the municipal council was dissolved and commissioner of the Government in the municipality was appointed.

The Government argued that after the resignation of nine councillors the representative body did not have enough members to pass its decisions, including the decision on the termination of the mandate of members of the representative body who resigned, and on the verification of the mandates of the substitutes of the resigned members.

The decision of the Court was based on provisions of the law regulating election according to which the substitutes of members of representative bodies are elected together with the members; the law states expressly that a substitute of a member of the assembly starts to perform his duties after a member of the representative body has resigned from his office.

Languages:

Croatian, English.

Identification: CRO-96-3-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.10.1995 / **e)** U-III-840/1995 / **f)** / **g)** *Narodne novine*, 92/1996, 4018 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental Rights – Civil and political rights – Right to a nationality.

Keywords of the alphabetical index:

Nationality.

Headnotes:

If it follows from the contents of an application that a person's claim for citizenship is grounded on one provision of the Law on Croatian citizenship (Article 5 of the Law, regulating citizenship by origin) and the claim is refused on the grounds of another provision (Article 13, regulating citizenship by naturalisation) then the constitutional rights of the person, stemming from the constitutional provision according to which individual decisions shall be based on law, are violated.

Since the applicant in this case was a minor, the bodies which decided upon her rights were obliged to pay special attention to the case, because according to the Constitution the State shall protect children and young people.

Summary:

The decision of the Court repealed the judgment of the Administrative Court, and a decision by the Ministry of Internal Affairs, in the case of a minor born abroad who applied for Croatian citizenship on the basis of the fact that her father acquired his right to Croatian citizenship by origin and that she fulfilled the other requirements in Article 5 of the Law.

Languages:

Croatian, English.

Identification: CRO-96-3-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 13.11.1996 / **e)** U-I-248/1994 / **f)** / **g)** *Narodne novine*, 103/1996, 4234-4235 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Reasoning.

Keywords of the alphabetical index:

Right to appeal / Statement of reasons.

Headnotes:

The right to appeal or to other legal protection is effectively realised only if a body which decides about one's right states the reasons for its decision.

Summary:

The Court repealed two provisions in the Law on general administrative procedure on the ground of which the deciding bodies did not have to state the reasons for their decisions.

The Court held that the consequence of such a regulation was that the right to appeal cannot be effective and that the principle of equality is violated because persons who know the reasons against which to appeal are in a privileged position. According to the Constitution freedoms and rights may be restricted by law in order to protect the freedoms and rights of other people, public order, morality and health. The regulation in question does not protect public order, but violates it.

Supplementary information:

Settled case-law.

Languages:

Croatian.

Identification: CRO-96-3-017

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.11.1996 / **e)** U-I-892/1994 / **f)** / **g)** *Narodne novine*, 99/1996, 4177-4178 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
General Principles – Rule of law.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Eviction / Right to appeal / Suspensive effect.

Headnotes:

The Constitutional Court reviews laws in force but if the provisions of an already ineffective law are to be applied in procedures initiated while the law was in force, the law which has ceased to be valid is also the subject of constitutional review.

Summary:

The Court found provisions of Article 94 of the Act on Dwelling Relations unconstitutional although at the time of the Court's decision the Act was no longer in force, but its provisions were – according to the final provisions of the new law – to be applied in procedures which began while the Act on Dwelling Relations was valid. The provision was repealed where it remained effective in cases of eviction.

The Court held that eviction proceedings by administrative bodies, while an appeal had been lodged with the courts which did not delay the enforcement of the decision, are unconstitutional where the person occupying the flat has a claim concerning the use of the flat; the validity of this claim is to be judged before courts.

The found unconstitutionality concerned violations of the principles of the rule of law, the separation of powers, equality before the law and the right to appeal.

Cross-references:

See also the decision concerning Article 70 of the Act on Dwelling Relations, U-I-130/1995, of 20.11.1996; published in *Narodne novine*, 99/1996.

Languages:

Croatian, English.

Czech Republic
Constitutional Court

Statistical data
1 September 1996 – 31 December 1996

- Decisions of the Plenary: 10
- Decisions of Chambers: 62
- Other Decisions by the Plenary: 1
- Other Decisions by Chambers: 392
- Other Procedural Measures: 13
- Total: 478

Important decisions

Identification: CZE-96-3-008

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 17.09.1996 / **e)** Pl.ÚS 33/95 / **f)** Local self-government right to adopt generally binding regulations / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Acts issued by decentralised bodies – Territorial decentralisation.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Executive bodies – Territorial administrative decentralisation – Supervision.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Local Self-Government / Languages, imposition of use by municipality / Signs, use of language / Language, official.

Headnotes:

The Trades Licensing Act and the Commercial Code leave it to the discretion of every entrepreneur to decide what range of clients to target and in what manner. In doing so, the entrepreneur is obliged to perform legal acts under a single name which has been registered in the Commercial Register. Otherwise the signs and identification are part of market competition, where the principle of an official language does not apply. It is a known fact that companies' signs and new advertisements commonly appear in foreign languages and that size of letters thereof is not regulated in any manner either.

Summary:

The town of Znojmo has adopted a generally binding ordinance which, according to the law on misdemeanours, puts limitations on the language used in identification and signs of companies operating within the town's jurisdiction also sets forth that any names and headings must be in Czech and that any foreign text must appear after or below the Czech sign and such sign must be half the size and less expressive.

The District Municipality in Znojmo suspended the execution of the ordinance on the ground that it contravened Act of the Czech National Council no. 367/1990, on Municipalities (Municipality Proceedings), as subsequently amended, and the head of the District Municipality filed a petition with the Constitutional Court for annulment of this ordinance.

The Constitutional Court concluded that the ordinance was issued in contravention of the Act on Municipalities, according to which the municipality must, when exercising independent power and fulfilling tasks related thereto, comply with law and generally binding implementary regulations of law issued by central bodies. The ordinance is therefore not in compliance with Article 104.3 of the Constitution of the Czech Republic, in accordance with which local authorities may issue generally binding regulations within the limits of their competence.

The Constitutional Court annulled the contested binding ordinance and pronounced it to be in contravention of the Constitution because neither the Act on Municipalities, the Commercial Code, the Trades Licensing Act, nor the Act on the Carrying out of Exchange Activities, which deals with the question of identification of branch offices, authorise municipalities to issue generally binding regulations in this respect.

Languages:

Czech.

Identification: CZE-96-3-009

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 24.09.1996 / **e)** Pl.ÚS 18/96 / **f)** The Parties' Right to a Hearing in Judicial Review of Administrative Decisions / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Temporal effect – Postponement of temporal effect.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Procedural safeguards.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Right to a court hearing / Civil procedure.

Headnotes:

If senates of local courts at all levels are the first and only independent tribunal at which the right for court protection can be sought, then § 250.f of the Code of Civil Procedures which, given this organisation of administrative justice, permits that the proceedings may be excluded at the sole discretion of the court irrespective of the opinion of the participants on the necessity or requirement for a hearing, and where such an opinion is not legally significant, is in contravention of the provisions contained in Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms and Article 6.1 ECHR.

Summary:

Pursuant to § 250 of the Code of Civil Procedure (CCP), the court may, without holding proceedings, pass a verdict with respect to a simple case, in particular, if it is beyond doubt that the administrative body acted on the basis of correctly ascertained facts of the case and if only the legal side of the case is examined. The court takes the same course of action if the contested decision cannot be examined due to incomprehensible or insufficient reasons.

The unconstitutionality of § 250 CCP not only ensues from the analysis of this provision as such, but also, in particular, from the essence of the existing regulations of administrative justice in the Czech Republic. Administrative justice in the Czech Republic is formed as a one-instance procedure without the possibility of regular or exceptional remedies. Administrative senates of the local courts at all levels are, therefore, the first and only court tribunals at which the right for court protection can be sought. If the valid regulations of law, namely § 250.f CCP, permit, given such an organisation of administrative justice, that the proceedings may be excluded at the sole discretion of the court irrespective of the opinion of the participants on the necessity or requirement for hearing, and where such an opinion is legally insignificant, then this is not in compliance with the provisions of Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms and Article 6.1 ECHR.

Nothing could alter the Constitutional Court's opinion, not even the fact that in administrative justice, the courts only examine the legality of the decision and are bound by the facts of a case as ascertained by administrative bodies. In administrative justice, it is impossible to divert from the facts of a case. In other words, the court cannot consider the legality of the decision without considering the facts. This, *inter alia*, ensues from § 250.j.2 CCP, which charges the court to examine whether the finding of the facts on which the administrative decision was based contradicts the contents of the files. If it does, the court is obliged to cancel the contested administrative decision and return the case to the administrative body for further proceedings. During such evaluation and examination, direct participation of the disputing parties can only be beneficial. In this respect, a reference can be made to the decision of the European Court for Human Rights of 1994 in the matter Fredin (Series A-283). In this case, and in spite of the State's objection that the Supreme Administrative Court could annul the decision but not replace it with another decision and thus decide in the matter only on the basis of documents and without hearing the plaintiff, the Court clearly stated that if the Supreme Administrative Court is the first and the only court tribunal which made decisions in the matter, then non-public proceedings are in contravention of Article 6.1 ECHR. The Court also concluded that the evaluation of a legal issue is impossible without referring to relevant facts.

The publicity of the proceedings protects the parties against secret justice which is out of the public's control and is one of the means for the creation and preservation of trust in courts (Decision of the European Court in Pretto case, 1983, Series A-71). From the constitutional point of view, the proceedings do not have to be ordered if the parties expressly or silently waiver this right (see similarly the decision of the European Court for Human rights in Hakansson and Sturesson case, 1990, Series A-171), for instance, in a manner regulated by Act no. 182/1993, on Constitutional Court, § 44.2.

The Plenum of the Constitutional Court holds the same view as that expressed by the Senate at the end of its resolution on suspension of the proceedings, viz., that non-public proceedings regarding the matter and the absence of any remedy against the decision passed in such proceedings deprives the participant of the possibility to demand the observance of the principles of fair procedure, such as, for instance, raising objections against a biased judge, requesting interpretation into his or her mother tongue, etc. In this connection, the Plenum of the Constitutional Court only notes that this constitutional-law problem arises in non-public proceedings of other fields of justice too.

On the other hand, the Constitutional Court is aware of the fact that, regarding the observance of fundamental human rights, the most problematic is the existing system of administrative justice in the Czech Republic, where the non-existence of an independent body to decide on the "right itself", in combination with the limited jurisdiction of courts, is in contravention of the obligations arising for the Czech Republic from the provisions of Article 6.1 ECHR. The Constitutional Court is fully aware of the fact that senates of local courts, as they are today, can hardly become such bodies. The Constitutional Court does not believe either that the current situation could be rectified by cancelling § 250.f or any other single provision of the CCP. The Court also knows that the regulation will probably have to be positive: the annulment of the administrative decision without proceedings would be upheld in cases which cannot be examined or lack reasoning, as well as of the proceedings held in this manner with express, or otherwise communicated, agreement of the participants. Last but not least, it is understood that the annulment of the contested provision will put a heavier load on the court even if accompanied by the aforementioned positive regulation.

However, in the opinion of the Constitutional Court, all the above mentioned problems and circumstances are just reasons for the suspension of the applicability of the verdict on the cancellation of § 250.f CCP. Nontheless, the basic requirement is that, for the above given reasons, this provision be repealed as non-constitutional. Therefore, the Constitutional Court cancelled § 250.f CCP as of 1 May 1997.

Languages:

Czech.

Identification: CZE-96-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 15.10.1996 / **e)** IV.ÚS 275/96 / **f)** Interpretation of statutes affecting constitutional rights / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
Sources of Constitutional Law – Techniques of interpretation – Teleological interpretation.
General Principles – Democracy.
Fundamental Rights – General questions – Entitlement to rights – Nationals.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Election, candidate, requirements / Nationality.

Headnotes:

The basic interpretation guideline for laws which regulate the exercise of political rights in greater detail is Article 22 of the Charter of Fundamental Rights and Basic Freedoms from which it ensues that anybody applying law is obliged to construe and use provisions of law so as to enable and protect the political pluralism in a democratic society.

This principle demands that disputed provisions of the Act on Election be construed and used in favour of the purpose and meaning of the law. The purpose and meaning of the law, at the same time, cannot be found in words and sentences contained in a legal regulation only; principles recognised by democratic States governed by the rule of law must also be considered. The Czech Republic claims to be such a State in Article 1 of the Constitution.

If, therefore, the purpose of the Act on Election to the Parliament of the Czech Republic is to implement and more closely define the fundamental political right to elect and be elected, than the disputed provisions must be construed in favour of this right, viz., that a citizen be, if possible, enabled to elect and be elected. This opinion is also supported in Article 4.4 of the Charter of Fundamental Rights and Basic Freedoms, according to which, in employing the provisions concerning limitations upon the fundamental rights and basic

freedoms, the essence and significance of these rights and freedoms must be preserved.

Summary:

The District Election Committee and, on appeal the Central Election Committee and the Supreme Court refused to register PhDr. J. as an independent candidate during the elections to the Senate of the Parliament of the Czech Republic on the grounds that he did not provide proof of his Czech citizenship, which is the basic prerequisite for the exercise of the right to be elected, in time.

All the aforementioned bodies presumed that although an identification card is a sufficient proof of Czech citizenship under the Act on Acquisition and Loss of Czech Citizenship, it is insufficient for the purpose of candidates' registration for the Senate in accordance with the Act on Election. The Act on Election does not contain any special provision in this respect, because the clerk of the election committee is not authorised to receive an identification card, which exists only as an original and a copy of which cannot be officially verified, in accordance with laws concerning identification cards, verification of copies or transcripts and the genuineness of signatures.

The Constitutional Court concluded that both the election committee and the Supreme Court, as bodies applying law, raised aspects of suitability and practicality over law, and in particular, over constitutional principles, and construed the incompatibility of laws to the detriment of the person exercising his constitutional rights.

In the opinion of the Constitutional Court, the identification document which the candidate presented to the election committee, is a sufficient proof of citizenship. In addition to this, the candidate did present the requested certificate of citizenship, albeit after the lapse of time period for registration set by law. For these reasons, the Constitutional Court has annulled all three contested decisions. As a result of this measure, the appropriate election committee registered the candidate.

Languages:

Czech.

Identification: CZE-96-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 05.11.1996 / **e)** I.ÚS 5/96 / **f)** Inactivity of a Court as a Denial of the Right to Judicial Protection / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Judicial Protection, right / Housing, eviction / Court inactivity.

Headnotes:

Inactivity of a court or possible unreasonable delay in the processed matter constitute a breach of Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms, according to which everyone has the right to have his or her case considered in public, without unnecessary delay.

Summary:

In January 1996, the plaintiffs filed a complaint against the District Court in Ústí nad Labem on the grounds that they were evicted from flats rented from the owner of the flats, the municipality of Ústí nad Labem, with police assistance against the law. Therefore, the plaintiffs lodged the complaint against the owner of the flats, requesting that they be recognised as tenants of these flats, that the owner be obliged to allow them access to the flats, and that the owner issue tenancy agreements which had been taken away from them upon eviction from the flats.

The Constitutional Court learnt that the District Court of Ústí nad Labem had performed no act in this respect. With respect to inactivity for such an unreasonably long time, the Constitutional Court considers the conduct of the Court of Ústí nad Labem, as a body of public power, unacceptable for it encroached upon the fundamental right of the plaintiffs to legal protection contained in Articles 36.1 and 38.2 of the Charter of Fundamental Rights and Basic Freedoms, according to which everyone may assert, through the legally prescribed procedure, his or her rights before an independent and unbiased court and everyone has the right to have his or her case considered without unnecessary delay. Therefore, the

Constitutional Court charged the District Court of Ústí nad Labem not to continue delaying the proceedings and to take immediate action in the plaintiff's case.

Languages:

Czech.

Identification: CZE-96-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 28.11.1996 / **e)** IV.ÚS 246/96 / **f)** Maximum Period for Police Detention of Suspect prior to Turning Him over to a Court / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus*.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Police detention, maximum period / Criminal procedure, guarantees.

Headnotes:

If a suspect is apprehended on the grounds of committing a crime, the 24-hour period in accordance with § 14.3 of the Act of the Czech National Council no. 283/1991 on the Police Force of the Czech Republic should be included in the 24-hour period applicable for detention in accordance with § 75 and § 76 of the Penal Code. A different approach in relation to apprehension in accordance with § 14.1.d and § 14.1.e of the Act of Czech National Council no. 283/1991 and in relation to detention in accordance with § 75 and § 76 of the Penal Code, which, so far, is common during proceeding before local courts, is in contradiction with Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms, according to which the apprehended person must be either freed or brought before a court within 24 hours. The judge, then, must hear the person, pass a decision on detention or release of the person within 24 hours from accepting such a person.

Summary:

According to Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms, a person who is convicted or suspected of committing a crime may be detained only in cases set forth by law. The detained person must immediately be familiarised with the reasons for detention, heard, and not later than within 24 hours be released or brought before a judge. The judge must hear the detained person within 24 hours from accepting the person and pass a decision on detention or release.

The plaintiff filed a constitutional complaint against the resolution of the Regional Court in Ústí nad Labem – Liberec branch which rejected his complaint against the resolution of the District Court in Liberec on detention at the proposal of a state representative, because his constitutionally guaranteed right to personal freedom was violated by extending the 24-hour apprehension period.

The Constitutional Court found that the local courts calculated the limitation of personal freedom, which the Act on Police Force of the Czech Republic and the Penal Code in accordance with Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms reduce to 24 hours for the purpose of apprehension, separately.

The Constitutional Court concluded that there is only one 24-hour period during which the personal freedom of the person suspected of committing a crime may be limited before being brought before a court, regardless of whether this period commenced by apprehension in accordance with the Act on Police Force of the Czech Republic or by detention in accordance with the Penal Code, and, therefore, the Constitutional Court granted the complaint and annulled the contested resolution.

Languages:

Czech.

Denmark
Supreme Court

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

Estonia
Supreme Court

Statistical data

1 September 1996 – 31 December 1996

Number of decisions: 3

Important decisions

Identification: EST-96-3-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 08.11.1996 / **e)** 3-4-1-2-96 / **f)** Disputed amendments to laws / **g)** *Riigi Teataja I* (Official Gazette), 1996, Article 1558 / **h).**

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Type of review – Abstract review.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
General Principles – Rule of law – Public interest.
Fundamental Rights – Civil and political rights – Right to property – Nationalisation.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Re-nationalisation / Expropriation / Compensation / Public interest / Forced alienation.

Headnotes:

Pursuant to Article 32 of the Constitution, the property rights of all persons shall be inviolable and shall enjoy equal protection. No property may be expropriated without the consent of the owner, except in cases of public interest, in accordance with procedures established by law, and in exchange for equitable and appropriate compensation. Any person whose property has been expropriated without his or her consent shall have the right to bring a case before the courts and to contest the expropriation and the nature and the amount of compensation.

Summary:

One year before the Constitution was enacted, the Law on the Principles of Property Reform was adopted, with the aim of re-organising ownership relations in order to guarantee the inviolability of property and free entrepreneurship, to make up for the wrong done by violations of ownership and to create the necessary preconditions for the transformation into a market economy. The law provides that 1) the land that is owned by the state shall be given into municipal ownership free of charge (municipalisation of property); 2) state property or municipal property shall be given, either for a charge or free of charge, into private ownership (privatisation of property); 3) the property which previously had been given, free of charge, into the ownership of co-operative, State co-operative and social organisations, shall be returned into state ownership (re-nationalisation of property).

The Law on Privatisation of Dwellings, enacted on 6 May 1993, provided that all co-operative organisations shall re-nationalise and privatise their property regardless of whose resources had been used to build the dwellings. With its decision of 12 April 1995, reviewing the proposal by the Tallinn City Court to declare Articles 3.1, 6.5 and 6.6 null and void (*Bulletin* 95/1 [EST-95-1-002]), the Constitutional Review Chamber of the Supreme Court found that the Law on Privatisation of Dwellings prescribes that a co-operative organisation also has the obligation to privatise property which had not been obtained from the state free of charge. This constitutes expropriation of the property of co-operative organisations and is only allowed in cases and according to procedures prescribed in Article 32 of the Constitution. The Constitutional Review Chamber satisfied the petition, but this does not prevent privatisation of dwellings or other property on the basis of mutual agreement for special securities meant for privatisation or for some other mutually agreed form of compensation.

Pursuant to the decision of the Chamber, on 20 December 1995, the *Riigikogu* adopted the Amendments to the Law on Privatisation of Dwellings and to the Law on "Re-nationalisation and privatisation of the property of co-operative, State co-operative and social organisations". The *Riigikogu* amended the laws on privatisation of dwellings and on re-nationalisation to bring Article 3.1 of the Law on Privatisation into conformity with the Constitution, but at the same time clause 1 was added to the effect that, pursuant to Article 40 of the Law on Property Reform Foundations and to the Law on Privatisation of Dwellings, the dwellings owned by persons who have the obligation to re-nationalise their property may be privatised. The words "to whom state property had been transferred free of charge" were omitted from Article 1.2 of the Law on Re-nationalisation. Thus, the *Riigikogu*, bypassing the decision of the Constitutional Review Chamber and ignoring the Constitution, put the obligation on private-law persons to privatise the property that they had not obtained from the state free of charge. The Law on Privatisation of Dwellings was adopted on 6 May 1993, that is after the Constitution had come into force. The Implementation Act of the Constitution of the Republic of Estonia does not provide any exceptional grounds for enacting laws which are inconsistent with the principles and norms of the Constitution.

As the *Riigikogu* did not agree, on proposal by the Legal Chancellor, to bring Articles 1.2, 6.1 and 7 into accordance with Article 32 of the Constitution, the Legal Chancellor petitioned the Supreme Court to declare the said provisions null and void. The Constitutional Review Chamber is, on proposal by the Legal Chancellor, entitled to exercise abstract norm control. Unlike the case which was solved by constitutional review procedure on 12 April 1995, this particular case was not initiated on the grounds of a concrete case.

Pursuant to the Constitution, expropriation without the consent of the owner is allowed only in cases and according to procedures stipulated by laws, in the public interest, and for just and immediate compensation. On these grounds the Chamber viewed the Legal Chancellor's motivation, the Amendments adopted by the *Riigikogu* after 12 April 1995 and current developments.

Public interest is a criterion which should be evaluated according to changes brought about by different times. Generally, the obligation of a private-law person to give away his property can not be conceived as promoting public interests. In the case of expropriation of dwellings the general and individual interest are interwoven. Public interest is expressed in the need for a property reform. The necessity of property reform was also upheld by the fact that the *Riigikogu* has, by adopting two laws, expressed its unambiguous legislative will to expropriate dwellings. That is why the Constitutional Review Chamber found that within the framework of abstract norm control it has no right to dispute the observance of public interest.

Pursuant to Article 8 of the Law on the Privatisation of Dwellings, the dwellings may be privatised for special types of obligations, and special types of securities meant for privatisation, issued while compensating for unlawfully expropriated land, and for money or following some other procedure. The Legal Chancellor only disputed payment for expropriated dwellings for special types of obligations. As far as the compensation for the privatisation of dwellings is concerned, the *Riigikogu* has, after the Constitutional Review Chamber decision of 12 April 1995,

acted in accordance with the said decision and has looked for and found additional resources to compensate for expropriated dwellings. The Supreme Court considers that the fact that persons who have the obligation to privatise dwellings also have the possibility to use the special type of securities to privatise land, is the rise of the value of special type of securities. Within the framework of property reform this can also be viewed as just compensation, if the parties thus agree. In the process of general norm control it is not possible to assess whether such compensation is just and satisfactory to the parties in each concrete case.

Pursuant to the requirement of immediate compensation, stipulated in Article 32 of the Constitution, the persons who have the obligation to re-nationalise are entitled to just compensation at least by the time the expropriation is completed. In case of disputes the property may be expropriated only after a pertinent court decision has taken effect and the person has received the sum awarded by the decision. If the property is expropriated before the dispute has been settled or before the sum awarded by the court decision has been received, Article 32 of the Constitution provides that everyone whose property has been expropriated without his consent has the right of recourse to the courts and to contest the expropriation, the compensation, or the amount thereof.

For the aforesaid reasons, the Constitutional Review Chamber did not satisfy the petition of the Legal Chancellor.

Supplementary information:

On 13 March 1996, when ratifying the European Convention on Human Rights, Estonia made a reservation to Protocol 1 ECHR. The reservation admits that Estonia, having become newly independent, is unable to carry out "wide economic and social reforms" in full conformity with the Convention. Pursuant to Article 64 ECHR, the reservation indicates that Article 1 Protocol 1 ECHR is not extended to reform laws enumerated in the reservation. Pursuant to the spirit of the reservation, Estonia admitted the need to complete the undertaken property reform and the possibility that the reform is not in full conformity with the universally recognised principles of property protection embodied in the Convention. The Law on the Ratification of the Convention is effective and the reservation has been recognised as acceptable by State Parties. According to the spirit and interpretation practice of the Convention, the reservations may be temporary and, when making a reservation, the states undertake to eliminate the inconsistencies. Estonia has admitted the possibility of inconsistency of the property reform with the internationally recognised principles of property protection and has undertaken to eliminate these drawbacks. To admit an inconsistency does not mean it is possible to ignore the requirement that laws must be in accordance with the Constitution.

Languages:

Estonian.

Identification: EST-96-3-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 06.12.1996 / **e)** 3-4-1-3-96 / **f)** Exceeding competencies in legislative process / **g)** *Riigi Teataja* / (Official Gazette), 1997, no. 4, Article 28 / **h).**

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Punishment, administrative / Administrative implementing measure / Law-making rules / Delegation / Conflict of powers.

Headnotes:

Article 87.6 of the Constitution provides that the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of law. The same principle is stressed in Article 94.2 of the Constitution in relation to regulations and directives of ministers. These reflect the principle that the executive is bound by law, meaning that the executive must not carry out unconstitutional actions. The government and the ministers have been given the right to issue regulations in order to lessen the workload of the legislative in elaborating legal norms and to avoid overloading the laws with the solution of single cases. In order that the legislator can issue a general norm, there must be a provision of law delegating it to do so.

Summary:

When resolving the cassation appeal, the Administrative Law Chamber of the Supreme Court did not apply points 2 and 3 and the appendix of the Regulation of the Government of the Republic no. 486, and point 5 of the Directives approved by Regulation of the Government of the Republic no. 4 from 7 January 1994, and proposed that these provisions be declared null and void. The Constitutional Review Chamber upheld this proposal, because the Government, when solving the aforesaid issues, had exceeded the powers given to it by the Constitution. The government is only entitled to make regulations if a law precisely delegates it to do so. The preamble of the Regulation from 28 December 1994 states that the regulation is based upon the Law on Consumer Protection. This law contains no provision allowing the government to issue such regulations. The law only states that "the issues which are not regulated by this law shall be governed by other legal acts", so this law is not a delegating act but only gives a reference.

In a democratic society, a delegating norm can not be of general character. It should fix which administrative body is entitled to give regulations, a clear aim of the right to give regulations, its content and its extent. In the case of *intra legem* regulations, the goal, content and extent of the right to give regulations may be derived through the interpretation of laws. At the same time, an *intra legem* regulation must not exceed the scope of the issue regulated by the law.

Proceeding from the principle of the separation of powers, according to which the legislative function is vested in the legislator, a general act of state administration that exceeds the scope of the law is either a *praeter legem* or *contra legem* regulation. It follows from the Constitution that the legislator is entitled, through laws, to authorise an administrative body to give *praeter legem* regulations. Acting *praeter legem* the government takes part of the competencies of the legislator and this is only possible if the legislator has *expressis verbis* empowered it to do so. In Estonia, the possibility to give *contra legem* regulations is excluded by the Constitution.

The third paragraph of Article 11 of the Law on Consumer Protection in its new wording of 26 June 1996 meets all requirements set for delegating and empowers the government to solve, by normative means, all the issues it was previously not allowed to solve. This delegation is not extended to the regulations of government which had been issued before the new wording of the law became effective. Thus, the Law on Consumer Protection did not and can not retroactively legalise earlier acts issued by exceeding the limits of power.

Languages:

Estonian.

Finland
Supreme Court
Supreme Administrative Court

Important decisions

Identification: FIN-96-3-001

a) Finland / **b)** Supreme Administrative Court / **c)** Third chamber / **d)** 04.02.1997 / **e)** 228 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Convention on the rights of the Child.
Fundamental Rights – General questions – Entitlement to rights – Foreigners.
Fundamental Rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
Fundamental Rights – Civil and political rights – Right to family life.
Fundamental Rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Eviction, seriously ill foreigner / Eviction, family ties / Child, best interests.

Headnotes:

The eviction of a seriously ill foreigner to her home State would amount to degrading treatment.

Summary:

Under the Constitution Act of Finland no alien may be expelled if, on account of this, he risks the death penalty, torture or other degrading treatment. According to the Aliens Act all relevant facts and circumstances must be taken into account in their entirety whenever a foreigner's eviction is under consideration.

Under the Convention on the Rights of the Child in all actions concerning children, whether undertaken by courts of law or administrative authorities, the best interests of the child shall be a primary consideration. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

The Directorate of Immigration had served an eviction order on the foreigners in question (mother "A", father "B" and two minor children "C" and "D") so that they would be deported to their home State. In their appeal to the Supreme Administrative Court the foreigners demanded that the Directorate's decision be quashed. "A" suffered from a difficult posttraumatic symptom complex of stress and was very seriously depressed. The Supreme Administrative Court considered that the eviction of "A" would amount to degrading treatment. Therefore and taking into account all relevant facts and circumstances in their entirety there were not sufficient grounds to deport "A" from the country.

"A" and "B" formed, with their minor children, a family. Taking into consideration their family ties, relations between children and parents, the principle of a primary consideration of the best interests of the child and the prohibition to separate a child from his or her parents against their will as well as the fact that "A" could not be deported from the country, the eviction of "B", "C" and "D" come into question. Therefore the Supreme Administrative Court quashed the Directorate's decision by four votes to one.

Languages:

Finnish.

France
Constitutional Council

Statistical data

1 September 1996 – 31 December 1996

16 decisions including:

- 4 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution
- 2 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.1 of the Constitution
- 2 decisions downgrading laws, taken pursuant to Article 37.2 of the Constitution
- 4 decisions on electoral matters pursuant to Article 59 of the Constitution
- 1 decision on the dismissal of a member of parliament pursuant to Articles LO 136 and L 202 of the Electoral Code
- 1 decision on incompatibility of a member of Parliament pursuant to core provisions of the Electoral Code
- 2 decisions on the internal workings of the Constitutional Council: appointment of deputy rapporteurs to the Constitutional Council

Important decisions

Identification: FRA-96-3-006

a) France / **b)** Constitutional Council / **c)** / **d)** 06.11.1996 / **e)** 96-383 DC / **f)** Act on employee information and consultation in companies and community-scale company groups and on the development of collective bargaining / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 13.11.1996, 16531 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Quasi-constitutional enactments.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Worker participation in determining working conditions / Monopoly on representation / Collective bargaining / Trade union / Salaries, protection / Experimental law.

Headnotes:

Under the sixth paragraph of the Preamble to the Constitution of 27 October 1946: "Everyone may protect his rights and interests by trade-union action ...", and under the eighth paragraph of the same preamble: "All workers shall participate, through their delegates, in the collective determination of working conditions and in the management of companies". Although these provisions recognise trade unions' natural role in defending workers' rights and interests, in particular by means of collective bargaining, they nevertheless do not give trade unions a monopoly on employee representation in the sphere of collective bargaining. Employees who have been elected or who hold an office which qualifies them as representatives may also take part in the collective determination of working conditions, as long as neither the purpose nor the result of their actions is to hamper the actions of the representative trade unions. The establishing of rules allowing those authorised to conclude collective agreements to carry out their duties in a fully independent manner, in particular with regard to an employer, comes within the ambit of the guarantees to ensure the application of the principle that all workers should participate in the collective determination of working conditions.

When Parliament referred the employer and employee representatives responsible for reaching a special agreement on the protection of employees holding authorisations from representative trade unions to the procedure provided for in the Labour Code (Article L.412-18), it intended that the protection to be set up should afford guarantees equivalent at least to those already provided for by law.

Summary:

The Act referred to the Constitutional Council included a number of sections incorporating a Community directive into domestic law (Council directive no. 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale companies and Community-scale groups of companies for the purposes of informing and consulting employees). Those sections were not, however, alleged to be unconstitutional. Instead, the Council was asked to rule on section 6, which concerned experimental arrangements introducing new means of concluding collective labour

agreements in companies where there were no trade union delegates.

The Council held that the sixth and eighth paragraphs of the Preamble to the Constitution of 27 October 1946 recognised trade unions' natural role in defending workers' rights and interests, yet, these provisions, which ranked as constitutional law, did not give trade unions a monopoly on employee representation in collective bargaining. Nevertheless, the Council pointed out that freedom to negotiate with employees who had been either elected or appointed to a relevant office should neither serve the purpose of, nor result in, a hindrance to the actions of representative trade unions.

With regard to the Act's experimental provisions, the Council confirmed its earlier case-law (93-322 DC of 28 July 1993, CODICES: [FRA-93-X-003]), whereby it had held that parliament could provide for experimental practices, on condition that the nature of such practices, their scope, the cases in which they could be adopted, and the conditions and procedures for their assessment were specified.

Languages:

French.

Identification: FRA-96-3-007

a) France / **b)** Constitutional Council / **c)** / **d)** 19.12.1996 / **e)** 96-384DC / **f)** Act on the Funding of Social Security for 1997 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 29.12.1996, 19380 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Constitutional Justice – Procedure – Grounds.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Public finances.

Keywords of the alphabetical index:

Inadmissibility / Social security, generalised contribution / Taxes of all types / Social security, funding.

Headnotes:

The last paragraph of Article L.O. 111-3 of the Social Security Code, which defines the purpose of Social Security Finance Acts *(Lois de financement de la sécurité sociale)*, provides: "Amendments which fail to comply with this Article shall be inadmissible." As part of the parliamentary assemblies' special prerogatives, Rule 121-2 of the National Assembly's Rules of Procedure and Rule 45 of the Senate's Rules of Procedure specify the procedure whereby, *inter alia* at the request of any member, parliament reviews the admissibility of amendments to Social Security Finance bills. This being the case, the Constitutional Council cannot be asked to rule directly on the compliance of Social Security Finance Act provisions with the above-mentioned Article L.O. 111-3, where such provisions arise from an amendment which has not first been referred to parliament to determine its admissibility. The Council must therefore dismiss a complaint that certain provisions fall outside the purpose of Social Security Finance Acts, if those provisions result from amendments which, in the course of the parliamentary procedure, have not been challenged with regard to their admissibility under Article L.O. 111-3 of the Social Security Code. The generalised social security contribution comes under the heading "taxes of all types" mentioned in Article 34 of the Constitution, which provides that it is for parliament to lay down rules concerning the basis, rates and methods of collecting taxes. The revenue raised through this contribution has a significant role to play in ensuring the financial balance of the basic compulsory social security schemes. The way in which the contribution's basis of assessment is defined has a direct impact on the amount of revenue it provides. The rules on collection of the contribution guarantee that the rules governing its basis are actually applied and are, for that very reason, a necessary complement to the latter rules. It followed that the challenged provisions, which concerned both an extension of the basis on which the generalised social security contribution was assessed and introduction or amendment of rules concerning its collection, were among those which could be included in a Finance Act.

Summary:

This was the first of the Social Security Finance Acts instituted by the Constitutional Law of 22 February 1996, which added a new paragraph to Article 34 of the Constitution, empowering parliament to determine the

general conditions necessary for the financial balance of the social security system. The applicants' main arguments concerned the definition of the scope of these Acts, which they wanted to have restricted. The Council held that all of the provisions contained in the Finance Act were consistent with the scope defined in the Institutional Act of 22 July 1996 and, at the same time, transposed to these new Finance Acts the case-law on the review of provisions arising from amendments, which it had applied to Finance Acts thus far. It found that such provisions could not be referred to it directly where their admissibility had not been challenged in the course of a parliamentary debate.

Languages:

French.

Identification: FRA-96-3-008

a) France / **b)** Constitutional Council / **c)** / **d)** 30.12.1996 / **e)** 96-385DC / **f)** Finance Act 1997 *(Loi de Finances)* / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 31.12.1996, 19557 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Public finances – Budget.
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:

Budgetary propriety / Shops and craft industry, aid / Tax concessions / Family, tax concessions.

Headnotes:

The equality principle does not prevent parliament from deciding to apply different treatments in granting tax concessions, but such differentiation is subject to the condition that it must be based on criteria that are objective and rational in view of the goals parliament has set itself and that the differences in situations thus generated by the law must have a direct bearing on the public interest.

The restriction of the decrease in the upper limit on the tax reduction resulting from the granting of an extra half-share to widowed, divorced or single taxpayers having raised at least one child, so that that decrease only concerned divorced or single taxpayers, disregarded the principle of equality in tax matters.

Summary:

Although the equality principle does not prevent parliament from deciding on differential treatment in the granting of tax concessions, it must base its assessment of the situation on criteria that are objective and rational in view of the goals it has set itself. For the purposes of income-tax calculation, taxpayers who are widowed, divorced or single and who have raised one or more children are all treated equally as far as their extra half-share of tax concession is concerned, since the granting of this tax concession is, in each case, based on the fact that the taxpayer lives alone and on the recognition of the expense previously borne by the taxpayer in raising a family.

Applying these principles to the case under consideration, the Council rejected a provision whereby the limitation of a tax concession for parents living alone, who had borne the expense of raising a family, applied solely to divorced and single taxpayers, but the concession was maintained in full for widowed taxpayers. The Council held that widowed, divorced or single taxpayers who had raised one or more children were in identical circumstances. Parliament had therefore disregarded the equality principle.

Changing the basis of assessment of the tax levied to grant aid to shops and craft industries, by extending it to areas devoted to retail sales of fuel, and increasing the minimum and maximum tax rates in cases where the tax-paying establishment had a fuel retailing activity, parliament intended to take account, in these two respects, of the fact that such an activity has an impact on total sales. It therefore based its assessment of the situation on objective, rational criteria. Furthermore, since fuel retailers subject to the tax levied to aid shops and craft industries were not, from the point of view of the purpose of that tax, in the same situation as other commercial establishments carrying on the same activity but not subject to the tax, parliament did not disregard the principle of equality in tax matters when it failed to include the latter establishments in the tax basis.

Languages:

French.

Identification: FRA-96-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 30.12.1996 / **e)** 96-386 DC / **f)** The Revised State Budget for 1996 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 31.12.1996, 19567 / **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.
Constitutional Justice – Procedure – Originating document – Decision to act.
Constitutional Justice – Procedure – Originating document – Signature.
Constitutional Justice – Procedure – Preparation of the case for trial – Receipt by the court.
Constitutional Justice – Procedure – Interlocutory proceedings – Discontinuance of proceedings.

Keywords of the alphabetical index:

Referral by members of parliament / Signatures, authentication / Referral made by telefax.

Headnotes:

By entering their signature on applications which they intend to lodge with the Constitutional Council, applicants must make it possible to authenticate such applications. In the instant case, the Council had to deal with sixty-one applications lodged by members of parliament, which bore handwritten signatures permitting their authentication.

Under the terms of the Constitution and the Ordinance of 7 November 1958, the referral of legislation to the Constitutional Council by members of parliament joint and indivisible outcome of one or more letters, signed by at least sixty members of the National Assembly or sixty members of the Senate. The effect of such referral is to initiate, before the close of the legislative procedure, a review by the Constitutional Council of all the provisions of the legislation in question, including those which were not criticised in any way by the applicants. No provision of the Constitution or of the Statute on the Constitutional Council allows the authorities or members of parliament empowered to refer legislation to the Council to prevent it from dealing with a case by opposing the completion of a constitutionality review once that review has begun. Accordingly, except in the event of a factual error, fraud or the absence of consent, the Constitutional Council cannot take into consideration any statements to that effect.

Summary:

The referral by a group of members of parliament of the 1996 Revised State Budget resulted in two findings of unconstitutionality. However, the main legal consequences of that referral are to be found in the indications given by the Council concerning the referral procedure.

Between the date of referral and the deliberations, a number of members of parliament had sent letters to the Council, in which they stated either that they had signed the referral document "by mistake" or that they intended to "withdraw" their signature or no longer to be included on the list of signatories. This state of affairs provided the Council with an opportunity to rule on the validity of referrals made by telefax and on the notion of "discontinuance of proceedings" in the context of an abstract review which is *a priori* optional.

On the first point, the Council expressly allowed signatures to be sent by telefax on a provisional basis (implicit solution in case 94-343/344 DC of 27 July 1994, *Bulletin* 94/2 [FRA-94-2-004]). It nevertheless also required handwritten signatures to be sent, making it possible to authenticate and ensure the legality of the referral.

On the second point, basing its decision on the constitutional texts and the institutional provisions concerning the Constitutional Council, the Council held that a referral was the joint and indivisible outcome of at least sixty signatures of members of the National Assembly or the Senate and that, except in cases of factual error, fraud or absence of consent, the performance of a review, which had been properly initiated and hence concerned all the provisions of the legislation in question, could not be interrupted. Since sixty-one signatures had been authenticated, it was the Constitutional Council's duty to carry out the constitutionality review for which it was responsible under the Constitution.

Languages:

French.

Georgia
Constitutional Court

Important decisions

Identification: GEO-96-3-001

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 05.12.1996 / **e)** 2/3-13 / **f)** / **g)** / **h)** .

Keywords of the systematic thesaurus:

Institutions – Executive bodies – The civil service.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Civil servants, labour disputes / Hierarchical order.

Headnotes:

Article 213 of the Labour Code which provides that certain categories of civil servants are to have labour disputes settled by their superiors and not by the courts is unconstitutional, since it prevents these civil servants from exercising their right to appeal to court, which is provided for in Article 42.1 of the Constitution.

Summary:

The plaintiff, a former detective of the main military prosecutor's office of Georgia, was dismissed from his office. The plaintiff claimed his dismissal to be unlawful and appealed to a district court of Tbilissi. The court did not accept the appeal, holding that under Article 213 of the Labour Code, the claim of a civil servant who has been elected, appointed or designated to a position by a supreme State body relating to his or her dismissal or transfer to another position or the imposition of disciplinary sanctions should be considered by that person's superior. This rule is also applicable to disputes concerning judges, prosecutors, their deputies and assistants and detectives of the prosecutor's office.

Following the rejection of his claim by the district court, the plaintiff appealed to the Constitutional Court about the unconstitutionality of Article 213 of the Labour Code. During the course of the proceedings, the plaintiff increased the scope of his claim and demanded that

Article 214 of the Labour Code be declared unconstitutional as well. Article 214 states that where a civil servant is restored to his or her former position, he or she should receive a salary for the period of dismissal, as long as this period does not exceed one year.

The Constitutional Court held that Article 213 of the Labour Code was unconstitutional, since it infringed the right of a person to appeal to court, which contradicted Article 42.1 of the Constitution.

In respect to Article 214 of the Labour Code, the Constitutional Court considered that the claim of unconstitutionality relating to this Article was unjustified.

The Constitutional Court decided that the declaration of Article 213 of the Labour Code as unconstitutional will leave the task of amending Article 214 and other related articles of the Labour Code.

Languages:

Georgian, English (translation by the Court).

Germany
Federal Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

- 9 decisions by a panel *(Senat)*
  - all judgments concerning individual constitutional complaints
  - 4 cases dealt with (taking into consideration the joinder of cases)
- 1124 rejecting decisions of the chambers *(Kammern)*,
  - 12 cases dealt with (taking into consideration the joinder of cases)
- 12 granting decisions of the chambers,
  - 1 case dealt with (taking into consideration the joinder of cases)
- 1179 new cases

Important decisions

Identification: GER-96-3-021

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 08.10.1996 / **e)** 1 BvR 1183/90 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift*, 1997, 386.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Anonymity / Author, indication / Company objective / Conviction / Distribution, internal / Criticism / Editor / Journal, house / Injunction (restraining order) / Interdiction / Journalism / Media, press, newspaper report / Press, definition / Press, in a wider sense / Protection, scope / Public opinion forming / Receivers, group / Works council.

Headnotes:

House journals are protected by the freedom of press (Article 5.1 of the Basic Law, sentence 2).

Summary:

In 1988 a chemical company published in its house journal, which was edited by the company, several contributions by members of the company staff who criticised the activities of the staff representation (works council). The contributions appeared without the names of the authors, although the chief editor knew the names.

Upon an application by the works council, the company was prohibited by court order from publishing anonymous comments by members of the staff as far as the comments refer to, and evaluate, the works council's activities.

The Constitutional Court granted the employer's constitutional complaint on the basis of a violation of freedom of the press – but not because of a violation of freedom of expression.

1. It is decisive for the distinction between the two fundamental rights whether, in judicial proceedings, the admissibility of a certain statement published in a press medium is controversial, or the role which the editor of printed matter plays in the communication process because of his publishing activities. If – as in the present case – the shape the editor has given his journal is the subject of a constitutional complaint, the legal questions raised in this context must be answered on the basis of the freedom of the press guarantee, and not of the fundamental right of the freedom of expression.

2. As free individual and public opinion formation guaranteed by Article 5.1 of the Basic Law is rendered possible not only by generally accessible publications but also by those addressing certain groups, house journals, which are distributed exclusively within the company, belong to the press in the sense of Article 5.1 of the Basic Law, sentence 2. It is exclusively the communication medium which is decisive, and not its distribution pathway or its specific group of readers.

3. Freedom of the press comprises not only the choice of the contents of an individual issue of a periodical, or of the subject of an individual article, but even more so the basic decision about the product's orientation and shape. Not only all the editor's own contributions or those of the editorial staff protected therefore, but also the decision to publish contributions by third persons who are non-professional writers. This applies also to contributions published anonymously. On the one hand, the protection of the publication form provided by the guarantee of Article 5.1 of the Basic Law, sentence 2 extends also to the decision to publish a contribution with or without indication of the author's name. On the other hand, in cases in which anonymity has the purpose of protecting authors from disadvantages and of securing the flow of information for the journal, it must be especially taken into account that freedom of the press also includes the editor's right not to disclose sources of information as well as the confidential relationship between the press and the informant.

Supplementary information:

Further information concerning the freedom of the written press can be found in the following decisions of the *Bundesverfassungsgericht*:

- 09.10.1991; 1 BvRL 1555/88; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1992, volume 85, 1
- 25.01.1984; 1 BvR 272/81; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1984, volume 66, 116
- 05.08.1966; 1 BvR 586/62; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1967, volume 20, 162

Languages:

German.

Identification: GER-96-3-022

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 08/10/1996 / **e)** 1 BvL 15/91 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.

Institutions – Army and police forces – Army.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment – Private.
Fundamental Rights – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Co-determination / Employment, decision upon / Foreign policy / Host country / Material grounds / NATO, armed forces / NATO, Status of Forces Agreement / Participation proceedings / Civilian employees / Participation, right / Staff representation / Stationing of forces agreement.

Headnotes:

The restriction of the rights of the staff representation (right of co-determination) provided in the NATO Statute of the Armed Forces Agreement is contradictory to the general principle of equality (Article 3.1 of the Basic Law). However, this contradiction must be accepted because the Federal Republic of Germany, in negotiating the stationing of forces agreement, was restricted in its freedom of action and did not succeed, despite continuous efforts, in adapting the rights of participation of the civilians employed with foreign stationed forces to those enjoyed by the civilian staff of the Federal Armed Forces.

Summary:

The stationing of forces agreement effective from March 1955 provides for a representation of civilians employed with NATO troops stationed in Germany, whose tasks and rights correspond substantially to those of the representation of civilians employed with the Federal Armed Forces. The former, however, may only "participate in the decision-making" about employment; in contrast to the representatives with the Federal Armed Forces, they hence do not have a right of co-determination.

Despite attempts by the federal Government to achieve an amendment, it is laid down in the presently governing protocol of signature to the NATO Status of Forces Agreement that the staff representatives are only conceded a right of participation in the decision-making on civilian employment. Consequently, for civilians employed with foreign armed forces stationed in Germany, decisions on employment rest exclusively with the employer, while in comparable institutions of the Federal Armed Forces a conciliation committee consisting of equal numbers of representatives of each side will finally settle all those disputes in which agreement with the employer cannot be achieved.

1. In cases of unequal treatment of groups of persons the legislator is regularly subject to strict criteria. In particular, the reasons for a legally sanctioned differentiation must be of such nature and importance that they can justify the unequal legal consequences. By the NATO Status of Armed Forces Agreement and the pertinent agreements, civilians employed with foreign stationed forces are discriminated, in the sense of Article 3.1 of the Basic Law, as against civilians employed with the Federal Armed Forces in decisions on employment because the representatives of civilians employed with the Federal Armed Forces are conceded a greater influence by the co-determination proceedings.

2. Political agreements which gradually remove an occupational status are compatible with the Basic Law despite violation of a fundamental right, provided the status they create is closer to the Constitution than the previous one. Particularly in cases in which a better result of the negotiations cannot be achieved, the Basic Law allows, for a transitional period, a gradual approximation to the full implementation of the constitutional rules.

Even though in the present case full compliance with the principle of equality was not possible, the federal Government, ever since the stationing of forces agreement came into force, has tried to achieve the adoption of German law. Since the coming into force of the Status of Forces Agreement in March 1955, the right of the representation of civilians employed with NATO troops has already been largely adapted to the German staff representation law. Altogether, there is therefore no constitutional objection to the NATO Status of the Armed Forces Agreement as amended. This result is not altered by the fact that the sovereignty of the occupying powers in Germany ceased 40 years ago and that the Federal Republic has in the meantime gained full sovereignty. The integration of the Federal Republic in the Western alliance is one of the fundamentals of German foreign policy. Because of this integration, the federal Government is subject to external constraints in corresponding negotiations. From the constitutional point of view, these constraints are comparable to those which the federal Government faced in the negotiations for immediate removal of occupational status.

Supplementary information:

Further information concerning the hierarchy between national constitutions and multi-national treaties can be found in the following decisions of the Federal Constitutional Court *(Bundesverfassungsgericht)*:

- 14.05.1986; 2 BvL 2/83; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1987, volume 72, 200
- 04.05.1955; 1 BvF 1/55; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1956, volume 4, 157

Languages:

German.

Greece
Council of State

Summaries of important decisions of the reference period 1 September 1996 – 31 December 1996 will be published in the next edition, *Bulletin* 97/1.

Hungary
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 12
- Decisions by chambers published in the Official Gazette: 12
- Number of other decisions by the plenary Court: 28
- Number of other decisions by chambers: 27
- Number of other (procedural) orders: 24
- Total number of decisions: 103

Note:

The National Assembly elected a new judge to the Court on 12 November 1996. On 27 December a judge left the Court because he completed his 70th year. Thus at the end of the year the number of judges were nine which means that there were still two posts unfilled.

Important decisions

Identification: HUN-96-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 04.09.1996 / **e)** 36/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 75/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Influence on State organs.
Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

War crime, definition / Geneva Convention of 1949.

Headnotes:

It is contrary to the Constitution for legislation not to take into consideration the previous decision made by the Constitutional Court further to a petition concerning the preliminary review of the provisions of the unpromulgated Law.

Summary:

The petitioners requested constitutional review of Law XC of 1993 on the procedure in the matter of certain criminal offences committed during the 1956 October Revolution and Freedom Struggle. In the petitioners' opinion the Law violated the 1949 Geneva Convention on the Protection of Civilians in Time of War and it was contrary to the universally recognised rules and principles of international law.

In 1993 the President of the Republic had challenged this Law before its promulgation. As a result of the preliminary review, the Constitutional Court had annulled Article 1 of the Law in question since the crime defined in this provision did not constitute a war crime according to international law. Article 1 of the unpromulgated Law provided that in relation to limitation periods for the punishment of criminal offences, Article 33.2 of the Criminal Code was to be applied to such offences committed during the 1956 October Revolution and Freedom Struggle.

The Constitutional Court held unconstitutional the retroactive application of Article 33.2 of the Criminal Code since it could have only been applied if, at the time of the commission of the criminal offence, Hungarian law then in force had declared the non-applicability of statutory limitations.

Referring to other provisions of the Law, the Constitutional Court declared that these were constitutional within those constraints which the Constitutional Court defined in Decision 53 of 1993 (X. 13.), *Bulletin* 93/3 [HUN-93-3-015].

Since Parliament did not take into account the constitutional requirements defined by the Constitutional Court in its Decision 53 of 1993 (X. 13.), the Constitutional Court declared Law XC of 1993 unconstitutional and annulled it.

Languages:

Hungarian.

Identification: HUN-96-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 04.09.1996 / **e)** 37/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 75/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Failure to pass legislation.
Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources.

Keywords of the alphabetical index:

Compensation / Paris Peace Treaty / Expropriation during World War II, compensation.

Headnotes:

The Hungarian Parliament failed to fulfil its legislative duty to compensate those Hungarian citizens whose property was taken unlawfully during the Second World War and not returned, although according to Article 29.3 of the Paris Peace Treaty, promulgated in Hungary by Law XVIII of 1947, the Hungarian Government undertook an obligation to recompense these Hungarian citizens.

Summary:

If the Constitutional Court finds that the legislator has failed to comply with its legislative duty deriving from a legal rule and thus given rise to an unconstitutionality, according to Article 49.1 of Law XXXII of 1989 on the Constitutional Court it shall request – appointing a term – the organ in default to fulfil its duty.

Article 7.1 of the Constitution declares that the legal system of the Republic of Hungary accepts the universally recognised rules and regulations of international law, and harmonises the internal laws and statutes of the country with the obligations assumed under international law.

Article 29.3 of the Paris Peace Treaty involves the obligation of the Hungarian Government to compensate those Hungarians whose property was taken unlawfully and without compensation by enacting the needed regulation into internal law. The Hungarian Government still had not complied with this obligation, therefore in order to redress this omission, the Constitutional Court called upon the Parliament to meet its legislative duty before the end of June 1997.

The Constitutional Court also stressed that during the process of compensation the Government should take into consideration previous Decisions of the Constitutional Court on this topic.

Languages:

Hungarian.

Identification: HUN-96-3-009

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 25.10.1996 / **e)** 49/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 91/1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Constitutional Justice – The subject of review – Rules issued by the executive.
Constitutional Justice – The subject of review – Failure to pass legislation.
General Principles – Rule of law.
Institutions – Executive bodies – Powers.
Institutions – Executive bodies – The civil service.

Keywords of the alphabetical index:

Legal status / Government, members.

Headnotes:

Regulating the legal status and pay of the members of the Government and also the manner in which they may be impeached by a decision of the Council of Ministers violates the constitutional principle of the rule of law.

Summary:

The petitioner requested constitutional review of Article 13 of Law III of 1973 on the legal status of members of the Council of Ministers and the under-secretaries, according to which the head of the Council of Ministers has an authority to regulate the questions concerning the employment of the members of the Council of Ministers and under-secretaries. The petitioner also requested review of the decision of the Council of Ministers regulating the legal status of the leading civil servants. In the petitioner's opinion, the two legal regulations in question were unconstitutional, and the Constitutional Court should call upon the legislator to comply with its legislative duty concerning the legal status of the members of the Government.

The Constitutional Court declared that Article 13 of the Law in question is contrary to the rule of law since it is against the Constitution which requires that the legal status and pay of the members of the Government and also the way in which they may be impeached, should be regulated by statute (Article 39.2 of the Constitution).

The Constitutional Court also held unconstitutional the decision of the Council of Ministers based upon the unconstitutional authorisation of Article 13 of Law III of 1973.

According to Article 78.2 of the Constitution the Government bears the obligation of submitting to Parliament the Bills necessary for the enactment of the Constitution. Since the Government failed to submit the relevant bill, the Parliament could not meet its legislative obligation; therefore the Constitutional Court requested Parliament to comply with its legislative duty before 15 June 1997.

Languages:

Hungarian.

Identification: HUN-96-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.11.1996 / **e)** 52/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 97/1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Executive bodies – Powers.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Independence.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Impartiality.

Keywords of the alphabetical index:

Lawyers previously having worked as judges / Incompatibility.

Headnotes:

It is contrary not only to the constitutional principle of judicial independence but also to the separation of powers if the Minister of Justice and the Public Prosecutor have a discretionary power to decide whether a lawyer in both private and commercial practice can act as a legal representative before a court or prosecution service where he or she was employed as a judge or a prosecutor.

Summary:

The petitioners requested the constitutional review of Article 4 of Law Decree 3 of 1983, according to which a lawyer in commercial practice must not act as a legal representative before that court or prosecution where he or she was employed as a judge or prosecutor for two years from the termination of his/her employment. The Minister of Justice and the Public Prosecutor were able to exempt the lawyer from this restriction. The petitioner also requested the determination of unconstitutionality of Article 7 of Law Decree 4 of 1983, according to which a lawyer in private practice must not act as a legal representative for two years before that court or prosecution service where he or she was employed as a judge, a prosecutor or an administrator before he or she became a member of the Chamber of Advocates. The Minister of Justice could exempt the lawyer in private practice from this restriction.

The Constitutional Court declares that the aim of the provisions in question of Law Decrees 3 and 4 of 1983 is to ensure judicial independence and impartiality. Therefore the Constitutional Court upheld the validity of the first part of these provisions, but held unconstitutional the part which provided that the lawyer in private practice must not act as a legal representative for two years before the court or prosecution service where he or she was employed previously as an administrator.

The reasoning of the Court recalled previous decisions on judicial independence and impartiality. In Decision 67 of 1995 (XII. 17.), the Constitutional Court declared that a situation must be avoided in which the impartiality of the judge is questionable. Impartiality and a fair trial are constitutional requirements. However, there is no constitutional reason for the limitation of the administrator's representation before the court and prosecution service where the administrator was previously employed. The restriction determined by the Law Decree concerning the administrator's representation was unnecessary and disproportionate. Hence the administrator's representation does not jeopardise the fundamental right to an impartial court.

The petitioners also requested constitutional review of the second sentence of Article 4 of Law Decree 3 of 1983, according to which the Minister of Justice and the Public Prosecutor are entitled to exempt a lawyer in commercial practice from the restrictions laid down in the first sentence, and the Article 7 of Law Decree 4 of 1983. This provision declares that the Minister of Justice shall exonerate the attorney from the relevant restrictions. In the petitioners' opinion, these two legal regulations unconstitutionally provide discretionary power to members of the executive branch, while there is no possibility for controlling this power.

The Constitutional Court declared the unconstitutionality of the provisions that entitle the Minister of Justice and the Public Prosecutor to exempt lawyers from the restrictions. The discretionary power of these two members of the executive branch violates the principle of the separation of powers, because they may influence the function of the judiciary.

Languages:

Hungarian.

Identification: HUN-96-3-011

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.11.1996 / **e)** 56/1996 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 105/1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Social State.
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:

Hospital beds, reduction in number / Social rights, direct enforceability / Social rights, minimum standard.

Headnotes:

The right to the highest possible level of physical and mental health is not enforceable directly, although the basic right of people being provided for through the social security system and its institution is based upon this right.

Summary:

The petitioners requested the constitutional review of provisions, which define the minimum services which the Social Security Agency has to pay for the insured. Norms determine the number of hours concerning the out-patient service and the number of beds regarding the inpatient service. According to the petitioners, as a result of the new system of health care in some territories there will be no possibility of access to a proper health care service.

The Constitutional Court upheld the validity of the provisions in question, under which the State also assumed an obligation for ensuring health care service during periods of economic hardship. Referring to this obligation, the Constitutional Court declared that in spite of the budgetary deficit the State has a duty to ensure services guaranteed by the Social Security Act for people who live within the territory of the Republic of Hungary.

Languages:

Hungarian.

Ireland
Supreme Court

Statistical data
1 September 1996 – 31 December 1996

Important decisions

Identification: IRL-96-3-004

a) Ireland / **b)** Supreme Court / **c)** / **d)** 18.12.1996 / **e)** 369/1995 / **f)** Kavanagh v. Ireland / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
General Principles – Separation of powers.
Institutions – Executive bodies – Relations with the courts.
Fundamental Rights – General questions – Emergency situations.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Jury, trial, right / Political question, review / Presumption of constitutionality.

Headnotes:

A declaration by the executive, under Section 35.2 of the Offences Against the State Act 1939, that the ordinary courts are inadequate to secure the effective administration of justice, is essentially political in nature. While not entirely beyond the reach of judicial control, the courts should be extremely reluctant to review such a declaration.

Summary:

The appellant had been arrested and charged before the Special Criminal Court with several offences relating to robbery, false imprisonment and possession of a fire-arm. Article 38.3 of the Constitution provides that special courts may be established in cases where it is determined by law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The Special Criminal Court was set up in 1972 following a government declaration to that effect. It is empowered to try certain criminal offences without a jury. The appellant sought to challenge the legitimacy of his trial, arguing that the circumstances which gave rise to the 1972 declaration no longer existed, and consequently that its continuance in force was an unjustified interference with his constitutional right to trial by jury. He sought a declaration from the court to that effect.

The court was unanimous in dismissing the appeal. Two judges gave written judgments, with which the remaining three judges agreed. It was held that the decision as to whether the ordinary courts were inadequate to secure the administration of justice was primarily political in nature. While the courts are not completely precluded from reviewing such declarations, there is a presumption of constitutionality enjoyed by acts of the executive, which stems from the respect which the organs of state owe to one another, and from the doctrine of separation of powers. It was agreed that the appellant had failed to adduce sufficient evidence to displace this presumption, and the 1972 declaration must stand accordingly.

The appellant also argued that the Special Criminal Court had been set up in order to try offences of a subversive nature arising out of the political crisis in Northern Ireland, and should be limited in its jurisdiction to such offences. The court rejected this, holding it to be an unduly narrow interpretation of the declaration, and of the legislation under which it was made.

Languages:

English.

Italy
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Meetings of the Constitutional Court during the period from 1 September to 31 December 1996: 6 public hearings and 6 hearings in chambers. The court gave 104 decisions in all.

Decisions given in cases where constitutionality was a secondary issue: 42 judgments, 8 finding measures complained of unconstitutional and 48 court orders.

Decisions given in cases where constitutionality was a secondary issue: 6 judgments, 4 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: 3 judgments;

b. between State authorities in disputes between public bodies over the exercise of powers: 2 court orders and 3 judgments.

Important decisions

Identification: ITA-96-3-009

a) Italy / **b)** Constitutional Court / **c)** / **d)** 24.10.1996 / **e)** 360/1996 / **f)** / **g)** *Gazetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 44 of 30.10.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
General Principles – Rule of law – Certainty of the law.
Institutions – Executive bodies – Powers.
Institutions – Executive bodies – Relations with the legislative bodies.

Keywords of the alphabetical index:

Provisional nature / Exceptional nature / Legislative decrees, non-converted / Necessity and urgency / Regulations, reiteration and replication.

Headnotes:

A reiterated legislative decree, insofar as it reproduces in its text (overall and in each provision) the content of a legislative decree which has been adopted in exceptional circumstances and not converted into a law by Parliament within 60 days, without introducing any fundamental modifications, is contrary to the Constitution on a number of counts. In cases where replicated decrees merely restate and prolong the grounds already put forward in the first decree, such replication means that the emergency measure is no longer provisional since it extends, in practice, the time-limit for conversion provided for by the Constitution, thereby undermining the "exceptional" nature of the requisite conditions of necessity and urgency; this means that the penalty of the retroactive loss of effect of the non-converted decree is weakened through repeated recourse to reiteration. This introduces into the legal system an expectation in the possibility of consolidating the effects of the emergency measure through statutory conversion into law of the substance of the reiterated decree.

When its legislative decrees are not converted into law, the Government is not absolutely powerless to take action on the same matter with the same prescriptive instrument, but the decree adopted cannot, without violating the constitutional requirement that it be exceptional and provisional, be a continuation of the non-converted decree. It must have a substantially different prescriptive content or there must be exceptional new conditions justifying it.

Summary:

In accordance with the principles contained in a recent ruling of the Court 84/96, *Bulletin* 96/1 [ITA-96-1-002], considerations concerning the constitutionality of legislative decrees cannot be "transposed" wholesale to another legislative decree if the latter has fundamentally modified the subject matter of the three preceding decrees. The "transposition" can, however, be applied cautiously to a specific rule of the most recent decree, the latter having replicated the basic content and, indeed, the exact wording of rules contained in three decrees previously censured.

Articles 77.2 and 77.3 of the Constitution explicitly state that the government may take measures having force

of law (in the form of legislative decrees) in exceptional cases which comply with specifically defined conditions. These measures, which the Constitution terms "provisional", can be taken only in "exceptional" cases of necessity and urgency; they must be submitted to Houses of Parliament on the same day as they are adopted, and converted into law within 60 days of their publication, failing which they lose effect as of the date of issue. However, the Houses of Parliament may pass laws to settle legal questions arising from decrees not yet converted into law.

Constitutional law regards the 60-day time limit set for the validity of legislative decrees as the absolute maximum which cannot be exceeded under any circumstances. This is in order to ensure that the power to pass ordinary legislation continues to rest with Parliament.

The practice of reiterating legislative decrees – particularly when this is frequent and extended – has negative consequences for the balance of power in respect of the various institutions. It also changes the form of government and undermines the principle whereby the power to pass ordinary legislation rests with Parliament, and undermines the certainty of the law.

This makes it impossible to anticipate not only how long reiterated rules will remain valid but also the end result of the conversion procedure. This entails serious consequences in cases where the reiterated decree relates to fundamental rights or criminal matters; it may actually entail irreversible consequences, even if it is not eventually converted into law.

The prohibition on the reiteration of decrees, implicit in the text drafted by the authors of the Constitution, means that the Government, in the event of non-conversion, is unable to reproduce, by means of a new decree, the prescriptive content of the complete text or each of the dispositions of the non-converted decree, in cases where the new decree has not been issued on independent and exceptional grounds of necessity and urgency. Under no circumstances can these grounds be replicated simply on account of the delay caused by the failure to convert the preceding decree.

However, it is essential that a safeguard be provided for the case of successively reiterated legislative decrees which are converted or are in the process of conversion, when this takes place within the time-limit laid down by the Constitution. In cases where Parliament, by means of conversion, has embraced the content and effects of the regulations adopted by the government, no violation of the Constitution can be deemed to have occurred.

The Court is conscious of the practical problems inherent in the judgment quoted as regards the organisation of the system of prescriptive sources, but it can only remind Parliament and the Government that they are in a position to do something about the reasons for the extended practice of reiterating legislative decrees, which – setting aside a review of the Constitution – could be controlled more effectively or indeed eliminated (a) if the Government were to comply more stringently with the conditions of necessity and urgency and (b) through appropriate action which the Parliament is empowered to take.

The ruling cited declared that a rule included in legislative decree no. 462 of 6 September 1996 setting out "Regulations on waste-recycling" was contrary to the provisions on legislative decrees contained in Article 77 of the Constitution, and therefore unconstitutional, since the said rule had already appeared in previous non-converted decrees. The decision was given in reference to a question of constitutionality raised by seven orders from the same court of referral which alleged a violation of Articles 77 and 24 of the Constitution, in particular by the aforementioned rule, on the grounds that it appeared in three successive legislative decrees. Following the issue of the referral order, the rule in question was reiterated unmodified by other legislative decrees, up to the legislative decree in force when the Court gave its ruling. On the basis of judgment no. 84 of 21 March 1996 (cf. *Bulletin* 96/1 [ITA-96-1-002]), the Court considered it was entitled to "transpose" (cf. headnotes to that judgment) its examination of the constitutionality of the rule repeatedly reiterated and still appearing in the legislative decree in force, and declared – as stated at the outset – that the complaint was well-founded.

Cross-references:

As previously stated, the Court referred to its recent fundamental ruling no. 84 of 1996, *Bulletin* 96/1 [ITA-96-1-002], which in fact paved the way for judgment 360, by allowing for the "transposition" of the examination of constitutionality to rules having an identical subject matter, replicated in successive legislative decrees. The Court further referred to judgment 302 of 1988, with regard to the negative consequences of the practice of reiterating legislative decrees on the balance of power in respect of the various institutions.

Lastly, and in particular with regard to the negative consequences the reiterated decree would have if its effects were irreversible, the Court referred to judgment 161 of 1955 (see *Bulletin* 95/2 [ITA-95-2-009]) and order 197 of 1996.

Languages:

Italian.

Identification: ITA-96-3-010

a) Italy / **b)** Constitutional Court / **c)** / **d)** 02.11.1996 / **e)** 379/1996 / **f)** / **g)** *Gazetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 45 of 06.11.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between State authorities.
Constitutional Justice – The subject of review – Parliamentary rules.
General Principles – Legality.
Institutions – Legislative bodies – Guarantees as to the exercise of power.
Institutions – Legislative bodies – Relations with the courts.
Institutions – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Criminal proceedings / Parliament, independence / Forgery of documents / Public figures (*Pubblici ufficiali)* / Voting / Parliamentarians absent / Impersonation.

Headnotes:

In the constitutional system, the dividing line between the independence of the Houses of Parliament and the requirement of compliance with the law is almost invariably unequivocal: when the actions of a parliamentarian fall entirely under the rules governing Parliament, the requirement of compliance with the law and the associated precepts must be subordinate to the principle of the independence of Parliament and to the precept – paramount in such a case – of the freedom of Parliament underlying this last principle, which provides for absolute self-determination with regard to the internal organisation and activities of the Houses. If, however, the activities are, even partially, beyond the prescriptive scope of parliamentary rules of procedure, then what prevails is the overriding principle of the rule of law and submission to the courts to which, in the constitutional system in force, each legal interest and each right is subject (Articles 24, 112 and 113 of the Constitution).

Summary:

The application of the principle of equality does not mean that every aspect of parliamentary life can give rise to criminal proceedings since there is a conflict between the vision of an all-embracing criminal law and the principle of the independence of the Houses of Parliament and the associated guarantee of non-interference by the courts in the activity of these assemblies. The latter have an independent status defined in various provisions of the Constitution, primarily Articles 64 and 72 relating to parliamentary rules of procedure, the first set, internal and the second set, governing the legislative process for questions which are not directly governed by the Constitution.

The Constitution not only guarantees the independence of the Houses of Parliament (Article 64.1 of the Constitution) but also refers to the enforcement of rules of procedure, including the choice of regulations to ensure the former are observed. Consequently, the courts have no instruments with which they can guarantee observance of parliamentary law.

In the case-law of the Court, the freedom guaranteed to parliamentarians and their activities is not considered to be the privilege of a political class or an individual prerogative of the members of the Houses of Parliament, but is seen as a means of protecting the independence of the parliamentary institutions; this independence is, in turn, designed to guarantee freedom of political representation. Defence of this prerogative is entrusted exclusively to the members of parliament directly concerned, and is among the two Houses' own attributions.

Whether the activities of parliamentarians come under the independence safeguard afforded to the Houses of Parliament by Articles 64, 72 and 68 of the Constitution, or whether, on the contrary, they are governed by ordinary law, depends primarily on the constitutional system governing the interests involved in the individual case. When these activities violate the interests of members of the Parliament, account has to be taken of the difference between the rights which are theirs as individuals and the rights accorded to them as members of the Parliament, the latter being strictly related to their special status. The former are inherently enforceable in court, regardless of the independence of the Houses of Parliament: accordingly, activities which violate the rights of individuals must not be considered as beyond the jurisdiction of the courts. The latter, on the other hand, are based on the status of parliamentarian, and have a status deriving from the Constitution and shaped by

the principle of the independence of the Houses of Parliament; with reference to the latter rights, the non-interference of the courts must be considered absolute insofar as it is designed to protect the independence of the Houses of Parliament, which is guaranteed by Articles 64, 72 and 68 of the Constitution: Parliament must be free to act in its own sphere of competence and it is the exclusive responsibility of the two Houses to provide for remedies for actions which may have negative consequences for the duties of the members of parliament and for parliamentary proceedings; without any doubt whatsoever, these activities include voting in Parliament.

If it is held that the actions of parliamentarians are regulated exclusively by the rules of procedure, other forms of law, either contradictory or complementary, cannot be taken into account and the courts cannot undertake an external review; this is in fact the gist of the restrictions concerning the application of the law imposed by Articles 64 and 72 of the Constitution for each of the Houses.

The dividing line between the two supreme principles, that of the independence of the parliamentary assemblies and that of compliance with the law and submission to the courts, is monitored in Italy by the Constitutional Court, to which a matter is referred in cases of a conflict of jurisdiction between the Legislature and the Judiciary, in which one claims to have suffered prejudice or to have been weakened by the activities of the other.

In judgment 379 of 1996, the Constitutional Court resolved the conflict between the powers of the Legislature and the Judiciary, in a case brought by the Chamber of Deputies against the State Prosecutor and the Judge responsible for preliminary investigations at the Rome Court, the Prosecutor and Judge having ruled that Article 68 of the Constitution on parliamentary immunity was not applicable to the proceedings against two former deputies charged with the offences of forgery of documents by a public official and impersonation, provided for, along with sanctions, under Articles 479 and 494 of the Criminal Code. With the consent of two absent deputies, they had falsely claimed to be their absent colleagues and attended a parliamentary session in 1995 and had taken part in the vote. The Court, having rejected various objections as to inadmissibility, and basing their deliberations on the principles outlined in the Headnotes, allowed the appeal of the Chamber of Deputies, taking the view that it was not incumbent upon the aforementioned judicial authorities to take action against these parliamentarians for the above offences. In so doing, it annulled the charges brought by the authorities in question against the parliamentarians concerned.

In the case in question, the Constitutional Court confirmed that the activities of the deputies concerned, ruled by the court to be of a criminal nature, should be considered – since they fell entirely within the scope of the parliamentary rules of procedure – not to be subject to procedures other than those provided for in the rules of procedure of the two parliamentary assemblies. In practice, from the point of view of parliamentary law, the breaches which occurred affected: the voting arrangements, the legitimacy of the session, the correctness of the total of parliamentarians present, the validity of the records, the powers of the speakers to verify the vote and the announcement of the results. The Court subsequently observed that maintaining public trust should in this case form part and parcel of the procedure for assessing compliance with the rules governing parliamentary activities – a matter which falls exclusively to the Chamber itself.

Similar considerations apply to offences concerning impersonation. In the concluding part of the grounds for its decision the Court observed that "in the constitutional state in which we live, the appropriateness of monitoring mechanisms, the legitimacy of sanctions provided for in the regulations and their rapid application in the most serious cases of violation of parliamentary law present the Parliament with a problem, if not of compliance with the law, then certainly of upholding the legitimacy of the principles regarding independence, which protect parliamentary freedom".

Cross-references:

With regard to the merits of the case, the Court referred first of all to judgment 129 of 1981 on the scope of the independence of the two Houses of Parliament, guaranteed by Article 64.1 of the Constitution.

In respect of the fact that defence of the prerogative of the incontestability of opinions expressed and votes cast by the members of parliamentary assemblies in the performance of their duties was a matter for Parliament and not for each parliamentarian concerned, the Court referred to its judgment 1150 of 1988.

Lastly, with reference to the system for resolving conflicts of the type referred to above, specified by the Court in order to resolve certain hypothetical cases of conflicts between two principles, both having constitutional validity, namely on the one hand, defence of certain interests such as honour, reputation, and equal human dignity, defined by the Constitution as inviolable, and on the other, the incontestability of parliamentarians' opinions, the Court referred to judgment 129 of 1996 and, once again, judgment 1150 of 1988.

Languages:

Italian.

Japan
Supreme Court

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

Liechtenstein
State Council

Statistical data
1 July 1996 – 31 December 1996

Number of decisions: 14

Important decisions

Identification: LIE-96-3-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 30.08.1996 / **e)** StGH 1996/6, 7 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Constitution.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Techniques of interpretation – Teleological interpretation.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Disciplinary procedure / Right of reply / Right to defend oneself.

Headnotes:

In the event of disciplinary dismissal for offences under criminal law, the person concerned has the right to be heard and to have witnesses heard. This right derives from the right to a hearing and to a fair trial enshrined in the Constitution. According to Strasbourg case law, however, the right to a fair trial enshrined in the European Convention on Human Rights is not generally applicable to disciplinary procedures.

The person concerned also has the right to a public hearing, but not under Article 6.1 ECHR, because Liechtenstein entered a reservation in that respect. Nevertheless, this provision of the Convention has a definite influence on the law of Liechtenstein. As part of a modern institutional approach to fundamental rights, the principle is also based on the fundamental right, embodied in the law of Liechtenstein, to a fair trial and to a hearing.

Summary:

The two applicants were dismissed from state service by the Government for disciplinary reasons. They were accused of regularly absenting themselves from their work over a period of several months, without authorisation, and of clocking in for one another to cover up these absences.

The applicants lodged an appeal against this immediate dismissal with the Administrative Court *(Verwaltungsbeschwerdeinstanz)*. Following a non-public hearing which the two applicants were not invited to attend, the court basically dismissed the appeal and upheld the disciplinary decision (immediate dismissal).

The applicants then appealed to the State Council, pleading the right to a free and public hearing under Article 6.1 ECHR, and alleging a violation of their constitutional right to a judicial hearing. The Council noted that when Liechtenstein ratified the European Convention on Human Rights, it entered a reservation concerning the requirement under Article 6.1 ECHR for a public hearing. This reservation is generally considered to be in conformity with Article 64 ECHR. The right to a fair trial also enshrined in Article 6.1 ECHR was not included in Liechtenstein's reservation, but according to Strasbourg case law this provision is not generally applicable to disciplinary procedures. However, the right to a fair trial and to a judicial hearing is also an acknowledged fundamental right in Liechtenstein. In particularly serious cases, procedural guarantees call for a public hearing with the possibility of calling witnesses. Since immediate dismissal is the most serious form of disciplinary measure, and the applicants were accused inter alia of criminal offences, the Council considered this to be a particularly serious case.

Furthermore, in cases which receive extensive media coverage, the Council considers that it is in the interest of the law to hold a public hearing before the Administrative Court. While this interest does not derive directly from Article 6.1 ECHR, the State Council acknowledged, even before the Convention entered into force with respect to Liechtenstein, the clear influence on Liechtenstein law of certain provisions of the Convention and, subsequently, of some of its protocols which have not been ratified. In the context of a modern institutional approach to fundamental rights, and independently of

the list of fundamental rights set forth in the Convention, the basis for this legal right to a public hearing may be considered to reside in the constitutional right to a fair trial and to a judicial hearing.

As a result, the Council ruled in favour of the applicants.

Languages:

German.

Lithuania
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Number of decisions: 6 final decisions including:

- 4 rulings concerning the compliance of laws with the Constitution;
- 2 rulings concerning the compliance of governmental resolutions with the laws;
- 1 conclusion concerning review of elections.

All cases – *ex post facto* review.

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

Composition of the Constitutional Court

Changes in the composition of the Constitutional Court during the year 1996:

The first rotation of the composition of the Constitutional Court took place in March 1996. On the end of the term of office, powers of the following judges have expired: Algirdas Gailiunas, Stasys Staciokas, Stasys Sedbaras. The *Seimas* appointed new judges for a period of nine years, they are Egidijus Jarasiunas, Augustinas Normantas, and Jonas Prapiestis. The other six Constitutional Court judges were appointed by the *Seimas* in March 1993. They are as follows: Keştutis Lapinskas, Zigmas Levickis, Vladas Pavilonis, Pranas – Vytautas Rasimavicius, Teodora Staugaitiene, Juozas Zilys (the Chairman).

Important decisions

Identification: LTU-96-3-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 25.09.1996 / **e)** 16/95/ **f)** Local self-government and the possession of the State land / **g)** *Valstybės Žinios* (Official Gazette), 92-2173 of 02.10.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Local self-government, land ownership / Land, State, rights of ownership.

Headnotes:

A conclusion is to be drawn from Articles 47 and 54 of the Constitution that land is estimated as a universal value, the main social function of which is to serve the welfare of the nation. Therefore it is especially important that this value is used rationally and effectively. This grounds an objective necessity as well as a duty for the state to regulate land property relations so that all interests of subjects of land legal relations are co-ordinated and the main function of land is ensured. While regulating land relations, the provision of Article 10 of the Constitution which consolidates the principle of the integrity and indivisibility of the territory of the State of Lithuania must be takenen into account. Naturally, the rights of land owners must be such that they do not become dependent on the arbitrary will of other land legal relations' subjects, namely, its managers and users. This is also applicable to the rights of the State as the only owner of State land.

The processes of the restoration of ownership right to land and land reform which take place in the State are inseparable from each other and realised through one common object – land. When ensuring the development of these processes, it is necessary to co-ordinate interests of various subjects as much as possible. It should be noted that neither the Constitution, nor other effective laws deny the State's possibility to choose priorities in the sphere of regulated legal relations and to establish certain specific requirements to corresponding subjects, in this case to managers of State land and its users. The purpose of land determines specific features of the regulations of land legal relations.

While local governments are not land owners as yet, they may not be held subjects of land property relations which are equal with the State. Thus a conclusion is to be made that the norms of civil law regulating property relations in general and protecting the rights of property relations' subjects may not be applied to protection of not existing even though potential or attempted rights of local governments to land property. Therefore, when judging problems concerning land, one must, first of all, ground oneself on land laws.

According to the Law on Local Self-Government, the competence of local self-government institutions in the sphere of legal relations regarding possession of State land is not an independent competence but a competence delegated by the State (Articles 14 and 16). The Constitutional Court holds that pursuant to Article 6.1 of the Law on land the State shall delegate the right to possess State land to local self-government institutions by commissioning the Government to register it officially. Thus the Government as an institution which implements the functions of the State property owner is empowered to grant the right to other subjects to possess State property by the procedure established by the Constitution and laws.

Summary:

The case was brought by a group of the *Seimas* members who requested the Constitutional Court to consider if some norms of the Law on land regulating the rights of the institutions of local self-governments in the sphere of the possession of State land are in compliance with the Constitution.

Article 24.1 of the Law on Land stipulates: "State land shall be sold or in any other way transferred into private ownership by the county governors in accordance with the procedure established by law and the Government of the Republic of Lithuania."

The petitioners allege that the provision according to which the Government must establish by its decision the procedure according to which State (public) property is transferred into private ownership contradicts of Article 128.2 of the Constitution wherein it is established: "Procedures concerning the management, utilisation, and disposal of State property shall be established by law." They are of the opinion that since the Constitution provided that "procedures shall be established by law", the content of those procedures must be established by the law-maker and not the Government. Therefore, the law-maker must not transfer to anyone else, including the Government, this right which has been commended to it as it was made in regard of State land of Article 24.1 of the Law on Land.

The petitioner also assumes that the provision of Article 24 of the Law on Land that either the county governor or the head of the service for organisation of land exploitation and geodesy who is subordinate to the former shall sell, lease or transfer to use State land irrespective of who is entitled to possess it contradicts

the provision of Article 120.2 of the Constitution which reads: "Local governments shall act freely and independently within the limits of their competence which shall be established by the Constitution and laws".

The Constitutional Court assumes that the content of the right to possess land is regulated in laws (the Law on Land, the Law on Land Reform, the Law on the Leasing of Land, etc.). It means that the Seimas has not delegated the right to the Government to define the content of the right which was granted to the local governments to possess State land. The *Seimas*, however, may commission the Government to adopt a corresponding act whereby State land is transferred to local governments by the right of possession. It should be noted that after the aforesaid Constitutional Law has been applied, local governments will be permitted to have the right of ownership to land.

Such rights of local governments in the sphere of land possession are determined by the legal status of State land. The State as a subject of public property law by giving the right to manage the possessions which are its property may impose certain limitations on the management and use of its possessions, e.g., servitude, certain restrictions on the term of land leasing contracts, prohibition to change the major purpose of land use without the consent of the owner, etc. However, only law may establish restrictions for the possession of State land. As regards the disputed norm, this is established of Article 6.2 of the Law on Land and Article 9.5 of the Law on the Leasing of Land.

Thus all restraints concerning management of State possessions as established by law provide no basis to assert that this restricts economic efforts and initiative which are useful to the community.

If the *Seimas'* commission for the Government to establish the procedure of State property transfer as indicated in Article 24.1 of the Law on Land were understood as the requirement of the legislator to establish the procedure of the property transfer or as a general requirement to adopt a corresponding legal act which is in conformity with laws, the disputed norm would be in compliance with the Constitution. Therefore the doubt alone that the wording of the disputed norm of the Law on Land may be understood ambiguously is insufficient to ground the statement that the provision "in accordance with the procedure established [...] by the Government" of Article 24.1 of the Law on Land contradicts Article 120.2 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-3-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.10.1996 / **e)** 17/95 / **f)** On selling and lease of state land plots / **g)** *Valstybės Žinios* (Official Gazette), 104-2385 of 30.10.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
Institutions – Executive bodies – Powers.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Local self-government / Land, selling and leasing / Land, State, plots for non-agriculture activities.

Headnotes:

The purpose of dividing State territory into administrative units is to bring about the necessary preconditions to better organise administration and to better serve people and meet their administrative needs. In this respect, counties and municipalities are, notwithstanding the mentioned differences, united by common aims. This conditions the necessity of their co-operation, as well as the necessity to co-ordinate centralised state administration with decentralisation.

Although it is established in Article 21 of the Law on the Government that the Government shall "hold, use and dispose of State property according to the procedures and situations established by law", i.e., it performs the functions of the owner of state property (in the case under investigation – state land) it may not by its acts create new norms which are not based on provisions of law. It is only the legislator that may establish the manner

and conditions of disposing of state property (state land) as Article 128.2 of the Constitution stipulates that "procedures concerning the management, utilisation, and disposal of State property shall be established by law". Law does not establish any such right of the Government to sell or lease land. Therefore a conclusion is to be drawn that the Government by granting itself such a right without any legal grounds violated the norms consolidated in Article 128 of the Constitution.

The Constitutional Court, when interpreting the content of Article 14.1 of the Law on Territorial Planning, emphasises that co-operation is a universal constitutional principle. Its implementation creates preconditions for state institutions and local governments alike, while exercising powers consolidated in laws, to pursue the common aim of ensuring the effective regulation of the affairs of society and state. Thus the independent functions of the county governor and local governments do not deny their co-operation. This co-operation manifests itself in various spheres, and in this case it does so when territories are planned.

Summary:

The petitioner – a group of the *Seimas* members – appealed to the Constitutional Court to examine whether Government Resolution no. 987 of 17 July 1995 "On selling and leasing state land plots for non-agricultural activities" is in compliance with the Constitution as well as with laws.

The Government approved "The procedure of selling and leasing state land plots for non-agricultural activities" by Item 1 of the aforesaid resolution. In the opinion of the petitioner, the provision that the Government establishes the conditions and procedure according to which property shall be changed from state (public) into private property contradicts Article 128.2 of the Constitution which establishes that "procedures concerning the management, utilisation, and disposal of State property shall be established by law".

Item 2 of the disputed Government resolution granted the right to possess state land to executive institutions of local self-government. The petitioner is of the opinion that this provision whereby the Government by its decision shall grant the right to possess State land in different territories to executive institutions of local self-government contradicts Article 120.2 of the Constitution wherein it is stipulated that local governments shall act freely and independently within the limits of their competence which shall be established by the Constitution and laws.

Items 7.1.9 and 8.1.19 of the Procedure of Selling and Leasing provide that state land plots for non-agricultural activities shall also be sold or leased by non-auction procedure without prior conditions where the Government adopts a special decision. The petitioner alleges that such a provision which permits the Government to place certain persons in a privileged position obviously contradicts the principles of fair competition that are consolidated in Article 46.4 of the Constitution, wherein it is established that "the law shall prohibit monopolisation of production and the market, and shall protect freedom of fair competition".

The Constitutional Court has noted that the Government right provided for by Items 7.1.9 and 8.1.19 of the Procedure of Selling and Leasing to sell or lease land for non-agricultural purposes by non-auction procedure without any prior conditions may create legal preconditions to grant exclusive rights for individual subjects to acquire land plots. Thus, if compared with other claimants wishing to acquire land plots, individual subjects may be placed in an advantageous situation. Therefore a conclusion should be drawn that such an ambiguity of the said items of the Procedure of Selling and Leasing which allows the selling or leasing of State land for non-agriculture activities by non-auction procedure "by a special decision of the Government", i.e., by not binding with any prior conditions, is not in conformity with the principle of fair competition which is consolidated in Article 46.4 of the Constitution.

According to the Law on Local Self-Government, the powers of local self-government institutions in the sphere of legal relations in land possession are not independent but delegated by the State (Articles 14 and 16). The purpose of land, if compared with other objects of immovable property, conditions special legal regulation of land relations too. The State delegates the right to possess state land to local self-government institutions and commissions the Government to make it official by adopting its decision. Thus the Government as an institution which implements the functions of owner of State property possesses powers to grant the right to possess state property to other subjects pursuant to the procedure provided for by the Constitution and laws.

This commission of the legislator to grant the right to possess State land to local self-government institutions does not provide grounds to maintain that thereby the content of the right of local self-government institutions to possess land is established. The Constitutional Court has ruled that the remaining part of the disputed Resolution is in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-3-011

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.11.1996 / **e)** 8/96/ **f)** On restoration of the rights of ownership / **g)** *Valstybės Žinios* (Official Gazette), 112-2558 of 21.11.1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources.
Institutions – Economic duties of the State.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Real property / Ownership, private / Ownership rights, restoration / Norms, material / Norms, procedural.

Headnotes:

In legal theory, as well as in the practice of applying legal acts, the principle is followed that material legal norms have priority over procedural legal norms. As a rule, the latter are of official character, i.e., they are aimed at implementing material legal norms.

The guarantees established by laws as well as the programme of providing tenants with another dwelling condition the time period for restoring ownership rights in kind. However, the norm of Article 8.5 of the Law imperatively establishes a concrete time period of three months from the day of the proposal to choose the manner of buying out the house, portion thereof or an apartment.

This norm altered the principal provision of the Law that while restoring ownership rights priority shall be given to restoring property in kind. The fact that by the aforesaid short time periods the process of restoring ownership rights by retrieving the dwelling-houses, portions thereof, or apartments in kind is actually prevented contradicts the constitutional provisions protecting property rights.

Summary:

The case was initiated by a group of the *Seimas* members requesting an examination of whether certain norms of the 2 April 1996 Law 'On Amending and Supplementing Articles 8, 19, 20, 21 of the Law "On the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property" as well as Appending this Law by Article 21' are in compliance with the Constitution.

According to the provision of contested Article 19 "institutions must investigate the requests of citizens and adopt decisions regarding restoration of the right of ownership (with the exception of the restoration of the right of ownership to land and forest) within three months from the day of submission of the documents proving the right to ownership". While adopting the decision regarding restoration of the right of ownership to a dwelling-house, the decision must be taken as to whether it is possible to return the house in kind or, providing there is not such a possibility, it is necessary to compensate the former owner for the property which he used to possess. If the house subject to being returned is occupied by tenants, the institutions which are to pass the decision, must, in addition, decide whether they may provide the tenants with another dwelling place within the said three months.

The petitioner alleges that the unconditional duty of the mayor (board) or any other State institution which is set forth by the contested provisions of Article 8 of the Law means that dwelling-houses occupied by tenants will not be returned to the owners as no institution that adopts decisions regarding restoration of the rights of ownership is capable of providing the tenants with another dwelling place within three months.

The Constitutional Court ruled that the disputed supplements of Articles 8 and 19 of the Law oblige State institutions to resolve the issue of the restoration of ownership rights within a very short time period. Thereby the process of restoring ownership rights in the principal way provided for by the Law, i.e., to return the dwelling-houses, portions thereof, or apartments in kind, is actually prevented. Former owners who have not retrieved dwelling-houses, portions thereof, or apartments, in essence lose the opportunity to retrieve them under the contested supplements of the Law. This is to be treated as a violation of the principle of equality which is consolidated in Article 29 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-3-012

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.11.1996 / **e)** 2/96 / **f)** On Privatisation of Apartments / **g)** *Valstybės Žinios* (Official Gazette), 114-2643 of 27.11.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Economic duties of the State.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Purchase and sale, agreement / Apartments / Contractual freedom.

Headnotes:

The right of an individual to acquire state property to be privatised arises only on the basis of a legal act (in the case under investigation it is the Law on the Privatisation of Apartments). However, regardless of the positivist nature of the right of the individual to privatise dwelling place, the assessment whether the norm of Article 5 of the Law regulating the implementation of this right is in compliance with the Constitution may be linked with the constitutional principle of protection of human rights and freedoms, the content of which is revealed in a great many norms of the Constitution.

The inherent human right to be treated equally with others protects the sphere of human freedom as a human being is free to the extent that he is free with the others. This fundamental human right is guaranteed by Article 29.1 of the Constitution, which prescribes: "All people shall be equal before the law, the court, and other State institutions and officers."

The rights of tenants and their family members to dwellings shall be equal. This equality is guaranteed by law. Therefore disputed Article 5 of the Law also provides that the legal status of the tenant of a particular dwelling place or his family members may be changed only on the grounds of common agreement. According to the Law, the tenant, as well as his family members, has the right to purchase the dwelling subject to privatisation. However, none of them is compelled to do so by the Law. It is evident that privatisation against the will of any of the aforesaid persons would be arbitrary and contradict the equality of rights of those persons. To prevent such arbitrariness, the provision of Article 5 of the Law was designed so that if there is no agreement to purchase the dwelling-house, then the agreement of purchase and sale shall not be made.

The freedom to make an agreement is, first of all, a free expression of will of its parties in attempt to make the agreement. It is the freedom, together with the covenantee, to independently decide the issues of the agreement's content by not violating respective imperative requirements of the law, and by not restricting the rights and freedoms of other persons.

Summary:

The petitioner – a City District Court – appealed to the Constitutional Court requesting an examination of whether Article 5 of the Law of the Republic of Lithuania on the Privatisation of Apartments is in compliance with the Constitution.

According to the petitioner the said article requires the apartment purchase agreement to be made in the name of one person. If this person does not agree to purchase the apartment, then it cannot be privatised altogether. Thereby other persons are deprived of the right to become the owners of the apartment which is under privatisation.

The Law on the Privatisation of Apartments establishes the procedure of purchase and sale of the state and public housing fund, defines what dwelling place of the state and public housing fund may be sold in pursuance of this law and who is entitled to purchase them. Article 5.1 of this Law entitled "The Conditions of Making of the Purchase and Sale Agreement" prescribes: "The tenant of the dwelling-house, his family members as well as those who have temporarily moved shall agree on the purchase of the dwelling-house (apartment), and on the matter concerning in whose name the purchase and sale agreement will be made, and on who will become the owner (co-owners) of the purchased house or apartment. Such an agreement must be notarised. Where is no agreement among the tenant family members to purchase the dwelling-house (apartment), the agreement of purchase and sale shall not be made."

The analysis of the content of Article 5.1 of the Law does not provide grounds for asserting that this norm treats exceptionally and unevenly any person or group of persons who have the right to purchase their rented dwelling subject to privatisation in pursuance of the Law.

The Law permits the tenant and his family members to freely negotiate on the legal status of each of them. On the grounds of such a free agreement the purchase and sale agreement may be made in the name of not necessarily one person; one person may become the owner while one or all persons having equal rights to their rented dwelling place subject to privatisation may become the co-owners. The important thing is that this was conditioned by free agreement of all persons. The disputes regarding violations of this fundamental rule of the making of agreements shall be decided in court.

The Constitutional Court ruled that Article 5 of the Law on the Privatisation of Apartments is in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-3-013

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 23.11.1996 / **e)** 15/96 / **f)** On violation of the Law on Elections / **g)** *Valstybės Žinios* (Official Gazette), 114-2644 of 27.11.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Parliamentary elections.
General Principles – Democracy.
Institutions – Legislative bodies – Review of validity of elections.

Keywords of the alphabetical index:

Elections to the *Seimas*, law / Ballot-papers, recalculation, criteria / Election observers.

Headnotes:

One of the fundamental characteristics of a democratic state is democratic elections of representative institutions of State power. It is through elections that every citizen accomplishes his right to participate in running the country along with other citizens.

When democratic elections are held, the mechanisms of publicity and control are of crucial importance. It should be noted that the Law on Elections to the *Seimas* regulates in detail the guarantees to implement the publicity principle, as well as those for the elections of representatives, and those for the rights of election observers.

The active participation of election observers, the press and representatives of other public mass media in the process of elections within the limits provided by law ensures that the will of voters will be appropriately expressed during the elections of representatives. The remarks of the aforementioned representatives permit violations of the Law on Elections to the *Seimas* to be established. In this view, legal procedure regarding appeals against decisions of various levels of electoral committees in court as consolidated in the Law on Elections to the *Seimas* are of high importance.

Summary:

In autumn 1996 the elections to the *Seimas* took place. When the Central Electoral Committee confirmed final electoral results, the President of the Republic appealed to the Constitutional Court with his inquiries as to whether the Law of the Republic of Lithuania on Elections to the Seimas was violated in two electoral areas. Representatives of political parties grounded their complaints on remarks of election observers concerning the electoral results entered in the vote calculation records. In their opinion, even minute arithmetic mistakes may have influenced the final results of the elections.

The Central Electoral Committee considered the arguments indicated in the aforesaid complaints. When adopting its decision, it based itself on the fact that a small difference in votes in itself does not provide the grounds to recalculate the ballot-papers. It is impossible not to agree with such an argument of the Central Electoral Committee as Article 85.4 of the Law on Elections of the Seimas entitles the Central Electoral Committee to decide by itself in what cases the ballot-papers are to be recalculated.

Besides, it was established that observers expressed their remarks on alleged violations in the vote calculation

records only after the preliminary results of the elections in the area were already known. They had signed in the vote calculation records of the aforesaid electoral districts and had not made any remarks. The Central Electoral Committee, by adopting its decision to refuse to recalculate the ballot-papers in disputed electoral areas, based itself on these circumstances. Arguments which could bring into question the validity of this decision of the Central Electoral Committee have not been presented, therefore there are no grounds to conclude that the Law on Elections to the *Seimas* was violated.

The Constitutional Court concluded that the decisions of the Central Electoral Committee regarding the results of the elections in disputed electoral areas are in compliance with the Law on Elections to the *Seimas*.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-96-3-014

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.12.1996 / **e)** 3/96/ **f)** On State secrets and their protection / **g)** *Valstybės Žinios* (Official Gazette), 126-2962 of 31.12.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Constitutional Justice – The subject of review – Rules issued by the executive.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Information, restrictions / State secrets / Information, right to seek, obtain and disseminate.

Headnotes:

It is universally recognised that in today's society information is a need of the individual, as well as the measure of his knowledge. Information eliminates ignorance and makes human behaviour meaningful. The implementation of human rights and freedoms is directly linked with the individual's opportunity to obtain information from various sources and make use of it. This is one of pluralist democracy's achievements ensuring the progress of society.

The right of the individual to seek, obtain and disseminate information is not an absolute right. The relation of this constitutional value to other legal values expressing the rights and freedoms of other persons as well as necessary public needs determines the restrictions of the right to information. One such need is to protect certain information for the good of interests of the society and individuals. This covers State, commercial, professional or technological secrets or information concerning the private life of individuals. The State designates some especially important military, economic, political or other information, the disclosure of which may harm national interests, as a State secret. In an attempt to prevent disclosure of such information, its protection is established by law and the use of such information is restricted. However, the protection of common interests in a democratic State may not deny the right to information as such. The doctrine of human rights and freedoms, as well as the international and national law which are based on the former, links the solution of this issue to the rational relation of legal values which guarantees that the essence of the respective human right is not violated.

Human rights and freedoms are the most important legal value. Therefore, as a rule, the legislator establishes ways and means to protect state secrets which do not create conditions to restrict the right of the individual to information without good reason. The law, along with the manner of its adoption, is the best guarantee that the common interests conditioned by the constitutional order to protect a state secret are co-ordinated with ensuring the right of the individual to seek, obtain and disseminate information. Such rights of the individual, along with the observance of the reciprocity principle of the law restricting them, are a significant guarantee for the implementation of human rights and freedoms.

Summary:

The case was brought by a city district court requesting to investigate if Articles 5 and 10 of the Law on State Secrets and their Protection are in compliance with Article 25.3 and 25.5 of the Constitution as well as if the

provisions of two Governmental resolutions are in compliance with the Constitution and laws.

The petitioner based its request on the following arguments. Articles 5 and 10 of the Law on State Secrets and Their Protection which restrict the right and freedom of people to obtain information contradict the provisions of Article 25.3 and 25.5 of the Constitution as Article 5 delegates to the Government the right to restrict obtaining information. Besides, the disputed articles do not implement the requirement of the Constitution to regulate the procedure according to which citizens should obtain any available information which concerns them from State agencies. The contested resolutions of the Government restrict the opportunities of persons participating in a case to implement the rights established by Article 31 of the Code of Civil Proceedings as well as the opportunity to appropriately implement the provisions of Articles 4, 197, 222, 253, and Article 220.3 of the said code. This contradicts the principle of equality which is consolidated in Article 29 of the Constitution.

Article 5.2 of the law provides that the Government shall approve the list of state secrets. The State protects the information entered into the list and a special procedure concerning its use is established. Therefore the approval of the list of State secrets (respective selection of information, the establishment of the content of the list, etc.) is directly related to restricting the right to information.

Thus, there being no precise criteria formulated by law for recognising which information is a State secret, the Government is virtually commissioned to regulate relations which are the matter of legal regulation but not to particularise the law. Thereby the constitutional principle of human rights legal protection is violated. The Constitutional Court, taking account of the motives set forth, concluded that items 1 and 2 of Article 5 of the disputed law contradict Article 25.3 of the Constitution.

Taking account of the aforementioned motives and the disputed Government resolutions, certain provisions have been ruled to be inconsistent with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Malta
Constitutional Court

Court description

I. Introduction

The Constitutional Court is composed of three judges (the Chief Justice and two other judges) and is at the apex of the courts' structure. Its jurisdiction is appellate except in cases connected with elections and vacancy of parliamentary seats. The court hears and determines appeals from decisions of the First Hall of the Civil Court on applications for redress in respect of alleged violations of the human rights protected by the Constitution and by the European Convention on Human Rights and appeals from decisions of any court of original jurisdiction on questions as to the interpretation of the Constitution and as to the validity of laws.

II. Composition

Section 95.2 of the Constitution provides that

> *"One of the Superior Courts, composed of such three judges as could, in accordance with any law for the time being in force in Malta, compose the Court of Appeal, shall be known as the Constitutional Court".*

Judges are appointed by the President of Malta acting in accordance with the advice of the Prime Minister (Section 96 of the Constitution). Furthermore the President of Malta shall assign to each of the judges the court or the chamber of the court in which he is to sit, and may transfer a judge from one court or chamber of a court to another. A judge may be removed from office by the President of Malta upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for removal on the grounds of proved inability to perform the functions of his office or of proved misbehaviour (Section 97.2 of the Constitution). The salaries and allowances payable to judges shall be a charge on the Consolidated Fund and their salaries and terms of office cannot be altered to their disadvantage during their tenure of office (Section 107 of the Constitution). The Chief Justice is one of the members of the Constitutional Court as he also presides in the Court of Appeal.

Section 95.5 of the Constitution guarantees the composition of the Constitutional Court at all times.

"If at any time during an election of members of the House of Representatives and the period of thirty days following any such election, the Constitutional Court is not constituted as provided in this section, the said Court shall, thereupon and until otherwise constituted according to law, be constituted by virtue of this subsection and shall be composed of the three more senior of the judges then in office, including, if any is in office, the Chief Justice or other judge performing the functions of Chief Justice; and if at any other time the said Court is not constituted as provided in this section for a period exceeding fifteen days, such Court shall, upon the expiration of the said period of fifteen days and until otherwise constituted according to law, be constituted by virtue of this subsection and shall be composed of the three more senior judges as aforesaid."

III. Jurisdiction

Under Section 95.2 of the Constitution, the Constitutional Court shall have jurisdiction to hear and determine:

"a. such questions as are referred to in section 63 of the Constitution; [1]

b. any reference made to it in accordance with section 56 of this Constitution and any matter referred to it in accordance with any law relating to the election of members of the House of Representatives; [2]

c. appeals from decisions of the Civil Court, First Hall, under section 46 of this Constitution; [3]

d. appeals from decisions of any court of original jurisdiction in Malta as to the interpretation of this Constitution other than those which may fall under section 46 of this Constitution; [4]

e. appeals from decisions of any court of original jurisdiction in Malta on questions as to the validity of laws other than those which may fall under section 46 of this Constitution; and

f. any question decided by a court of original jurisdiction in Malta together with any of the questions referred to in the foregoing paragraphs of this subsection on which an appeal has been made to the Constitutional Court:

Provided that nothing in this paragraph shall preclude an appeal being brought separately before the Court of Appeal in accordance with any law for the time being in force in Malta."

1. Section 63 of the Constitution concerns the determination of questions as to membership of the House of Representatives such as whether any member of the House has been validly elected; whether any member is bound by law to cease to perform his functions as a member of the House of Representatives.

2. In terms of Section 56 of the Constitution the Electoral Commission may suspend a general election if for example it has reasonable grounds to believe that illegal or corrupt practices or other offences connected with the elections have been committed or there has been foreign interference. In this case the Commission is bound to refer the issue immediately to the Constitutional Court for the total or partial annulment of the election. The Constitution also provides for such reference to be made, not later than three days after the publication of the official election result, by any voter.

3. Appeals from decisions delivered by the Civil Court, First Hall, concerning allegations made by individuals that any fundamental freedom as entrenched in Sections 33 to 45 of the Constitution has been, is being or is likely to be contravened in relation to him. These articles guarantee such fundamental freedoms as the right to life, protection from forced labour, inhuman treatment, privacy of property, freedom of expression. However, no such appeal shall lie where the court of first instance has declared that an application is merely frivolous or vexatious.

All human rights issues are in effect channelled into one centralised court of original jurisdiction, the ordinary "superior" court of civil jurisdiction, saving of course an appeal as of right to the Constitutional Court. Thus, if a human rights issue is raised in criminal proceedings, the court is bound to refer the issue to the First Hall of the Civil Court unless it is of the opinion that the raising of the question is merely frivolous or vexatious; the Civil Court will give its decision on any such question referred to it and the court in which the question arose shall dispose of the question in accordance with the decision delivered by the Civil Court saving the right of appeal to the Constitutional Court.

Furthermore, the European Convention Act (Act XIV of 1987) provides that the Constitutional Court has the jurisdiction to hear and determine appeals filed under this Act, which incorporated the substantive provisions of the European Convention on Human Rights and its first Protocol, appended to the Act itself, into domestic law.

4. Decisions of the Constitutional Court are not subject to appeal. Judgments do not contain dissenting opinions. In this respect Article 218 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) provides that:

   "In a court consisting of more than one member, the decision of the majority shall form the judgment which shall be delivered as the judgment of the whole court."

5. Section 95 of the Constitution may only be amended by a two-thirds majority of all members of the House of Representatives (Section 66 of the Constitution).

6. According to Act XIV of 1987 (Chapter 319 of the Laws of Malta), the Constitutional Court also has the function of enforcing judgments delivered by the European Court of Human Rights. The procedure contemplates the filing of an application by the interested party, which must be notified to the Attorney General (Article 6 of the relevant Act).

7. Although the Constitutional Court has the jurisdiction to declare the constitutionality or otherwise of a law, it cannot annul a law. It then rests with Parliament to take the relevant action it deems necessary to comply with the court's decision. In this respect Article 242 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) stipulates that:

   "When a court, by a judgment which has become res judicata, declares any provision of any law to run counter to any provision of the Constitution of Malta or to any human right or fundamental freedom set out in the First Schedule to the European Convention Act, or to be ultra vires, the registrar shall send a copy of the said judgment to the Speaker of the House of Representatives, who shall during the first sitting of the House following the receipt of such judgment inform the House of such receipt and lay a copy of the judgment on the table of the House."

IV. Procedure

Article 4 of Legal Notice 35 of 1993, entitled Regulations Regarding Practices and Procedures of the Courts provides that:

"The application to appeal (in the Constitutional Court) shall be made within eight working days from the date of the decision appealed from, and the respondent may file a written reply within six working days from the date of service.

The Court which gave a decision subject to appeal to the Constitutional Court, may in urgent cases upon demand, even by any of the parties immediately upon delivery of such decision, abridge the time for making the appeal or for the filing of a reply.

If no such demand is made by any of the parties immediately upon the delivery of the judgment, any one of the parties may make such a demand by application, upon which, the court which gave the decision shall, after summarily hearing the parties if it thinks necessary, give the requisite order."

The Netherlands
Supreme Court

Important decisions

Identification: NED-96-3-016

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 01.10.1996 / **e)** 103.094 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 97.034.

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 – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rules of evidence.

Keywords of the alphabetical index:

Evidence obtained through torture.

Headnotes:

Witness statements obtained through torture may not be admitted in evidence.

Summary:

In appeal court proceedings the accused claimed that the identification procedures and interviews had been conducted in such a fashion as to render the gathering of evidence unlawful and to call for an acquittal. The accused's allegation was based on the fact that in several cases only one photograph was used for identification purposes, and on allegations that witnesses had been tortured and that suspects had been promised reduced sentences in return for full cooperation in the investigation.

The appeal court considered that these circumstances in themselves constituted insufficient grounds for ruling the evidence unlawful. Additional facts would be needed for the identification procedures and interviews to be deemed unlawful.

In cassation proceedings, the Supreme Court considered that the appeal court's assumption that more would be needed than the torture of witnesses for the way in which the interviews had been conducted and the evidence obtained from them to be ruled unlawful displayed an incorrect interpretation of the law, and in particular of the provisions of Article 3 ECHR and Article 7 of the International Covenant on Civil and Political Rights. For it follows from these provisions of international law that if a witness statement is obtained by torture, this in itself means that any such statement, having been unlawfully obtained, cannot be admitted in evidence. As the appeal court's judgment included the ruling that it was implausible that the witness statements had been obtained under the influence of torture, the appeal was dismissed.

Languages:

Dutch.

Identification: NED-96-3-017

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 15.10.1996 / **e)** 104.267 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 97.047.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Institutions – Executive bodies – Powers.
Institutions – Courts – Jurisdiction.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Extradition, assurances by receiving State / Extradition, information about receiving State.

Headnotes:

The decision concerning whether a request for extradition should be denied on the grounds of an anticipated

violation of fundamental rights, in particular of Article 3 ECHR, is the sole prerogative of the Minister of Justice.

Summary:

In this extradition case, it was argued in the district court proceedings, on behalf of the accused, that on the grounds of the rules that apply in the requesting state, the United States of America, she may expect to serve a minimum of 18 years in prison. It was submitted that extradition to the United States should be declared inadmissible on the grounds of an anticipated flagrant violation of Article 3 ECHR. The district court rejected this defence.

In cassation proceedings, the Supreme Court held that it follows from the Extradition Act system that it is the sole prerogative of the Minister of Justice to decide whether a requested extradition must be refused on the basis of a well-founded suspicion that, if the request is granted, the person requested will be exposed to a violation of her fundamental rights. It is clear from the passage through parliament of the Bill that led to the Extradition Act that this is based on the view:

> "that the government has at its disposal information concerning the political situation and the dispensation of the criminal law in other countries which are inaccessible to the court. If the government were bound to uphold the judgment handed down by the court, it could not be held accountable for the decision. This would attenuate the force of any intervention on the part of the Netherlands Government if, contrary to expectation, discriminatory prosecution were nevertheless to occur."

The Supreme Court said that it should also be taken into account that the court ruling on the extradition request does not have the power to insist on the requesting state giving assurances that the person requested will not be deprived of any fundamental rights subsequent to extradition. As the court cannot judge whether the requested extradition should be refused on the grounds of the accused's defence in connection with the provisions of Article 3 ECHR, the district court was right to reject this defence.

Languages:

Dutch.

Identification: NED-96-3-018

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 15.11.1996 / **e)** 8770 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 221.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
Sources of Constitutional Law – Techniques of interpretation – Margin of appreciation.
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.
Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, subscriber television / Exclusive licence / Monopoly.

Headnotes:

The rejection of an application for a licence to run a subscriber television company does not constitute a violation of Article 10 ECHR.

A restriction to the freedom of expression consisting of the granting of a monopoly position to a single enterprise in the establishment and running of a pay-TV service is permissible where there are compelling reasons for it. It is important to establish whether the refusal of a licence is justifiable in principle and proportionate.

Summary:

By Country Decree of 26 February 1991, TDS was granted a licence, excluding other potential applicants, to establish and run a pay-TV service on Curaçao. For this reason, Multivision's request for a similar licence was turned down. In the interlocutory injunction proceedings at issue here, Multivision asked the court to order the Netherlands Antilles to grant it a licence to establish and run a pay-TV service. This application was denied.

The Joint Court of Justice dismissed Multivision's complaint that the refusal of its application for a licence constituted a violation of Article 10 ECHR. The Court considered *inter alia* with reference to the Lentia judgment (European Court of Human Rights, 24 November 1993, Series A no. 276) that restricting freedom of expression by granting a monopoly position to a single enterprise (TDS) is permissible only where there are compelling reasons for it, but that in deciding when this is the case, the authorities should be allowed a certain margin of appreciation within the context of local conditions. Briefly summarised, the Joint Court's view was as follows:

a. that against the backdrop of the above-mentioned margin of appreciation of national governments and the requisite circumspect examination of this by the court ruling in interlocutory injunction proceedings, it may be deemed financially and economically impossible at present for any company to establish and run a paid television system covering the entire island if a second provider were to be admitted;

b. that it is furthermore of importance that TDS's monopoly position is attached to a set period of time which cannot be extended – the ten-year period that now applies not necessarily being unreasonable in this respect – and that the point of granting TDS a monopoly is to enable it to earn back its start-up expenses, and finally that it is significant that TDS is under an obligation to provide the entire island of Curaçao with high quality television signals to which everyone is free to subscribe;

c. that under these conditions, it must be held, for the present, that there is sufficient proportionality between the violation of the fundamental right enshrined in Article 10 of the ECHR and protecting the interest of – in this case – preventing "harmful competition between providers of subscriber television that would be detrimental to viewers" and protecting the rights of others (TDS).

Ruling in cassation proceedings, the Supreme Court considered that the Joint Court had been right to ascertain whether the refusal of the licence had been justifiable in principle and proportionate. In answering this question in the affirmative, the court's reasoning, according to the Supreme Court, was evidently that allowing competition at present between a number of paid television providers would mean that none of those authorised to broadcast would be capable of running a paid television system at a profit, so that ultimately the viewers would suffer, and for this reason TDS's rights merit protection. Only if these rights are protected can the information supply of the viewers as a whole be safeguarded. This line of reasoning, in the view of the Supreme Court, does not display an incorrect interpretation of the law, and is interwoven with assessments of the facts to such an extent that its soundness is not susceptible to further examination.

Languages:

Dutch.

Identification: NED-96-3-019

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 15.11.1996 / **e)** 8857 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 224.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Medical malpractice / Public hearing, right, waiver.

Headnotes:

A waiver of the right to a public hearing must be made either expressly or tacitly, in an unambiguous manner, and may not conflict with any significant public interest.

In determining whether a medical practitioner has waived his right to a public hearing, it is significant that the Medical Malpractice (Disciplinary Sanctions) Act is based on the assumption of a hearing in camera, but that it does give the disciplinary court the power to hear the case in open court. It is also significant that the medical practitioner had legal counsel to assist him.

Summary:

In this medical malpractice case, the appeals hearing, as it is clear from its official report, did not take place in public. It was therefore contended in the appeal in cassation that there had been a violation of Article 6.1 ECHR.

There is no evidence in the disputed appeal court judgment or in the official report of the proceedings either that the medical practitioner requested the appeals court for his appeal to be dealt with in a public hearing or that he expressly waived his right to such a public hearing.

The Supreme Court considered that someone who is entitled to a public hearing pursuant to Article 6.1 ECHR may waive his right to this either expressly or tacitly, provided that this occurs in an unambiguous fashion and does not conflict with any significant public interest.

In deciding whether the medical practitioner waived his right it is significant on the one hand that he was represented at the hearing by legal counsel, and on the other hand that the Medical Malpractice (Disciplinary Sanctions) Act, in contrast to Article 6.1 ECHR, proceeds on the assumption of a hearing in camera, but does give the disciplinary tribunal the competence to hear the appeal in public, so that the medical practitioner, if he had wanted a public hearing, could have made a request to this effect to the appeal court. All things considered, the Supreme Court believes that it should be considered that the failure on the part of the medical practitioner and his counsel to make such a request constituted a tacit but nevertheless unambiguous waiver of the medical practitioner's right to a public hearing (cf. European Court of Human Rights, 21 February 1990, Series A no. 171 and 24 June 1993, Series A no. 263). Furthermore, since it cannot be said that a public hearing of the appeal at issue was required by any significant public interest, the appeal court did not violate the provision of international law invoked by the medical practitioner.

Languages:

Dutch.

Norway
Supreme Court

Important decisions

Identification: NOR-96-3-007

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 08.11.1996 / **e)** Inr 76B/1996 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Civil law.
Fundamental Rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Pension entitlements / Pension, spouse-supplement.

Headnotes:

The pension entitlements according to the National Insurance Act are protected against clearly unreasonable or unjust retroaction. The amendment in 1990 to the National Insurance Act of 17 June 1966 which led to encroachment on current benefits was not contrary to the prohibition against retroactive statutes stated in Section 97 of the Constitution.

Summary:

The Supreme Court in plenary session handed down two judgments concerning the question of protection according to Section 97 of the Constitution against encroachment on current benefits according to the National Insurance Act of 17 June 1966.

The first case dealt with an amendment in 1990 to the National Insurance Act which led to termination or reduction of spouse-supplement for old-age pensioners with incomes beyond a certain amount. The applicant had lost all of his spouse-supplement which earlier amounted to 1/2 of the annual basic pension amount.

The Supreme Court found that the encroachment was not contrary to the prohibition against retroactive statutes stated in Section 97 of the Constitution.

The majority of the Supreme Court – ten judges – held that the pension entitlements according to the National Insurance Act of 17 June 1966 are protected against clearly unreasonable or unjust retroaction. The reasoning contains a discussion as to which elements are relevant in this evaluation. The majority pointed out that one had to take into account the pensioner's security and expectations of future benefits. On the other hand the legislator was entitled to considerable freedom to act in this field. The majority concluded that the pensioner's position, his expectations to maintain the supplement for spouse and the effect of the termination, could not be decisive, considering the needs which the amendment should satisfy. Section 97 of the Constitution was thus not violated.

The rest of the judges agreed to the result. Six judges held that the entitlement to benefits as in this case is dependent on the statutory rules in force at the time and that it is for the legislator to decide whether they shall be maintained or limited. Exercise of judicial review was not applicable in the case in question.

One judge held that the pension entitlements had considerable protection against retroaction according to Section 97. But since the pensioner had made no payment for the benefit, no constitutionally protected right had been established.

Cross-references:

See also the case Inr 77B/1996, *Bulletin* 96/3 [NOR-96-3-008].

Languages:

Norwegian.

Identification: NOR-96-3-008

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 08.11.1996 / **e)** Inr 77B/1996 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Social security.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Civil law.
Fundamental Rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Pension entitlements / Pension supplement, disability benefits.

Headnotes:

The standard of judicial review – according to Section 97 of the Constitution – concerning reduction of supplementary pension for pensioners who receive disability benefits is equivalent to that of basic pension with spouse-supplement. However, the elements of the evaluation can have different weight. In relation to the supplementary pension the elements of payment and earning could have independent significance.

Summary:

This case dealt with an amendment in 1990 to the National Insurance Act concerning a lower earning of pension points in cases of incomes beyond a certain level. The amendment led to a reduction of the supplementary pension for pensioners who received disability benefits. The part of the pension which was granted on the basis of the assumed future pension points was converted according to the amended rules from the time the amendment act came into force. The plaintiff's monthly supplementary pension of 10,000 Norwegian Crowns was reduced by 200 Norwegian Crowns. For other pensioners the reduction could be larger.

The case raised a question concerning the significance of the fact that the supplementary pension is earned by contribution from employees.

The majority of the Supreme Court – eleven judges – held that the standard of judicial review according to Section 97 of the Constitution had to be the same as for the basic pension with spouse-supplements in case Inr 76B/1996, *Bulletin* 96/3 [NOR-96-3-007]. But the elements of the evaluation of the protection could have different weight, and in relation to the supplementary pension the elements of payment and earning could have independent significance.

The reasoning contains a further individual evaluation of the circumstances of the case. The majority concluded that the amendment was not contrary to the prohibition against retroactive statutes stated in Section 97 of the Constitution.

One judge was of a dissenting opinion. He held that in this case the benefit was paid for, and thus the benefit must be protected by Section 97.

The other five judges agreed to the result of the majority, but expressed the same fundamental view on the question of protection by Section 97 as in the case of spouse-supplement.

Cross-references:

See also case Inr 76 B/1996, *Bulletin* 96/3 [NOR-96-3-007].

Languages:

Norwegian.

Identification: NOR-96-3-009

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 26.11.1996 / **e)** Inr 72/1996 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Techniques of interpretation – Margin of appreciation.
General Principles – Proportionality.
Fundamental Rights – General questions – Entitlement to rights – Foreigners.
Fundamental Rights – Civil and political rights – Right to private life.
Fundamental Rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Expulsion of an offender / Drugs trafficking.

Headnotes:

Courts can examine whether an expulsion order is contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The national authorities have a "margin of appreciation". Courts have to make a balanced evaluation between the reasons for expulsion and the right to respect for the applicant's private life and family life.

Summary:

A foreign national was expelled from Norway after a judgment of 10 years' imprisonment for keeping and attempting to sell one kilo of heroin. He filed a case against the State/Ministry of Justice and claimed that the expulsion order was invalid, especially as regards Article 8 ECHR which protects the right to private and family life.

The applicant had lived in Norway since he was 16 years old and had established a family life with a Norwegian woman before the imprisonment in 1987. They married while he was in prison and had two daughters, born in 1990 and 1996. The eldest daughter suffered from considerable health problems.

The City Court, the Court of Appeal and the Supreme Court maintained the expulsion order. The issue was whether the expulsion order was "necessary in a democratic society" to achieve the purpose stated in Article 8.2 ECHR.

The Supreme Court held that the expulsion order would lead to a separation of the family since the applicant's wife and children would not settle in his native country because of the eldest daughter's health problems. This was not decisive considering the serious crimes the applicant was convicted of. The expulsion order was therefore not disproportional and not contrary to Article 8 ECHR.

Cross-references:

See also decision Inr 38/1996 of 29.04.1996, *Bulletin* 96/1 [NOR-96-1-002], decision Inr 39/1996 of 29.04.1996, *Bulletin* 96/1 [NOR-96-1-003], decision Inr 40/1996 of 29.04.1996, *Bulletin* 96/1 [NOR-96-1-004].

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data

1 September 1996 – 31 December 1996

Constitutional review

Decisions:
- Cases decided on their merits: 16
- Cases discontinued: 1

Types of review:
- *Ex post facto* review: 17
- Preliminary review: -
- Abstract review (Article 22 of the Constitutional Tribunal Act): 15
- Courts' referrals ("legal questions", Article 25 of the Constitutional Tribunal Act): 2

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 13
- Cases on the legality of other normative acts under the Constitution and statutes: 4

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): 9
- Upholding the constitutionality of the provisions in question: 7

Universally binding interpretation of laws

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

Subject matter of important decisions:

Housing
3 December 1996, K 25/96
16 December 1996, U 1/96

Labour disputes
11 December 1996, K 11/96

Local self-government
30 October 1996, K 3/96

Mass privatisation
3 September 1996, K 10/96

Political parties
Property of the State Treasury
5 November 1996, K 6/96

Taxation rules
29 October 1996, U 4/96

Trade unions
11 December 1996, K 11/96

Social security
10 December 1996, P 6/96

Important decisions

Identification: POL-96-3-013

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.09.1996 / **e)** K 10/96 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal), no. 4(7)/96, item 33 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Social State.
General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Privatisation, mass / Permanent residence, registration / Social justice.

Headnotes:

The constitutional principles of equality and social justice have been infringed by refusing citizens without registered permanent residence the right to purchase mass privatisation certificates.

Summary:

The Ombudsman requested the Constitutional Tribunal to declare unconstitutional one of the provisions of the 1993 law on national investment funds (NFI Law), according to which Polish citizens residing in Poland but without permanent residence registered by the relevant local authority had no right to purchase mass privatisation certificates. In the Ombudsman's opinion, the provision in doubt was adopted without considering the interests of citizens who, very often for reasons beyond their control, did not register or could not register themselves as permanent residents of any commune (homeless etc.).

The Tribunal referred to its numerous judgements regarding the principle of equality and stressed that any departure from the principle of equal treatment of similar instances must be adequately justified:

- differentiation must be of rational character, i.e. must not be based on arbitrary criteria;

- interests in favour of which the differentiation is introduced must be proportional to the interests sacrificed;

- differentiation should be motivated by constitutional values, rules or principles which may explain different treatment of similar groups.

According to the Tribunal, none of the above arguments might apply to the provision in question.

i. The Tribunal examined provisions of the 1974 law, which introduced the obligation to register as a resident, and concluded that the lack of residence registration may be caused by reasons under the citizens' control (non compliance with the law) as well as by reasons beyond the citizens' control (being homeless). Subsequently, refusing the right to purchase the certificates may not be imposed upon a citizen as a sanction for neglecting legal obligations towards the State (mainly tax obligations).

ii. According to the Tribunal neither technical nor administrative difficulties in the process of certificates' distribution may serve as an acceptable justification for not granting all citizens the right to purchase them.

iii. The Tribunal observed that the main goal of the mass privatisation program is to enable adult citizens to acquire a share in a certain part of the up-to-date state-controlled national industry. Therefore, denying this right to certain groups of citizens, who are not able, often for reasons beyond their control, to adjust to the new economic and social order but who supported the growth of national economy in the past would be unfair and unjustified.

The Tribunal concluded that the legislative authorities differentiated the rights of citizens without a reasonable justification. It constitutes the violation of the principle of equality under law (Article 67.2 of the Constitution)

and the principle of social justice (Article 1 of the Constitution).

Supplementary information:

The decision was not executed by the legislative before the end of the certificates' distribution (i.e. 22 November 1996).

Cross-references:

Decision of 09.03.1988 (U 7/87), decision of 12.12.1994 (K 3/94), decision of 25.10.1995 (K 4/95), *Bulletin* 95/3 [POL-95-3-014], decision of 28.11.1995 (K 17/95).

Languages:

Polish.

Identification: POL-96-3-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.10.1996 / **e)** U 8/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review.
Constitutional Justice – Procedure – Interlocutory proceedings – Discontinuance of proceedings.
Constitutional Justice – Decisions – Types – Procedural decisions.

Keywords of the alphabetical index:

Laws under scrutiny, changes / Laws under scrutiny, deletion / Discontinuance of proceedings.

Headnotes:

The Tribunal recalls the procedural rules that require the proceedings to be discontinued if the provision subject to the Tribunal's examination becomes non applicable (Article 4 of the Constitutional Tribunal Act). The Tribunal supports the view that a legal provision becomes non applicable if:

i. it has been deleted;
ii. it has been considerably changed (its content and the scope of applicability have been modified).

Languages:

Polish.

Identification: POL-96-3-015

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.10.1996 / **e)** U 4/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
Institutions – Executive bodies – Powers.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
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:

Tax, exemption / Tax privileges, discrimination / Regulation / Executive order / Ministers, law-making powers / Tax justice, horizontal aspect.

Headnotes:

The principle of tax justice requires that all entities subject to the same economic conditions should be treated by the tax provisions and authorities in the same way.

Regulations and executive orders are two different legal vehicles. The scope of these two legal acts, the procedures of their adoption and the methods of publication are different. Generally binding secondary provisions may be introduced to the legal system only in the form of a regulation.

Summary:

The Polish Association of Employers requested the Constitutional Tribunal to examine the provisions of the 1995 executive order of the Minister of Finance, according to which fuel products produced or purchased by a petroleum refinery were exempted from excise. The exemption was not concurrently available to other entities manufacturing petroleum products.

The Tribunal found that by issuing the executive order in question the Minister of Finance violated the scope of its competencies. The 1993 Law on Value Added Tax and Excise authorised the Minister of Finance to exempt from excise certain categories of products which should have been defined taking into account their general features. Therefore, the Minister had no right to limit the exemption to products produced or purchased by particular entities, while not exempting at the same time other products having the same features.

According to the Tribunal, the principle of tax justice in its "horizontal" aspect requires that all entities subject to the same economic conditions be treated, as far as taxes are concerned, in exactly the same way (prohibition to grant tax privileges). The executive order in doubt is contrary to the constitutional principles of equality and justice since it differentiates, from the tax point of view, the rights of entities producing the same products and employing similar production methods.

In the Tribunal's opinion, tax privileges granted to refineries were a proof of different treatment offered to state-owned economic entities (refineries are still owned by the State Treasury). Therefore, the executive order in question violated the constitutional principle of economic freedom and equality of all sectors of the national economy. It was also contrary to the 1988 law on economic activities, which introduced the principle of freedom of initiating and conducting any business activity.

In addition, the Tribunal decided that the executive order of the Minister of Finance regulated matters reserved for acts of legislative only. It was issued contrary to the law-making authority granted to the Minister by the respective law and it did not have the aim of achieving goals set forth in the law. Therefore, it violated Article 6.2 of the Small Constitution, which regulates the scope of law-making powers of ministers.

Languages:

Polish.

Identification: POL-96-3-016

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.10.1996 / **e)** K 3/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Legality.
General Principles – Proportionality.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Public finances.
Fundamental Rights – General questions – Entitlement to rights – Legal persons – Public law.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Commune, budget / Local self-government / Reserve fund / Budget reserve, imposed.

Headnotes:

The legislative authorities are entitled to interfere with the powers of local self-governments, nevertheless their actions must comply with the principle of proportionality.

Summary:

According to the budgetary law, each commune must establish a reserve fund in order to finance unexpected expenses. According to the Constitutional Tribunal, such an obligation fully corresponds with the constitutional principle of legality, protection of property, and does not interfere with the commune's right to its property.

In the Tribunal's opinion the legislative is entitled to interfere with the powers of local self- governments, provided the interference is not exaggerated and remains in compliance with the principle of proportionality. The provision in question should be understood as a guarantee of public interest, since its purpose is to make the commune budget more balanced. The provision does not impose upon citizens any additional tax obligations. Although it limits the financial policy of the commune, it does not refuse the commune the right to decide about the designation of the budget reserve fund or any other financial resources.

Languages:

Polish.

Identification: POL-96-3-017

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.11.1996 / **e)** K 6/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of 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 – Democracy.
General Principles – Rule of law.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Civil and political rights – Right to property – Nationalisation.

Keywords of the alphabetical index:

Political parties, assets / Political parties, freedom / Political plurality, principle / State Treasury, property.

Headnotes:

The legislative authorities are entitled to dispose of the property of the State Treasury only in order to satisfy common needs of all citizens. Diminishing the State Treasury property may not be in contradiction with basic principles of the Constitution.

Summary:

The subject of the Tribunal's control (conducted upon a request of the members of parliamentary opposition) were two provisions of the 1994 law amending the law on taking over the property of the former Polish United Workers' Party of 1990 (hereinafter, the "Amending Act"). The law on taking over the property of the former Polish United Workers' Party of 1990 (hereinafter, the "Take-over Act") was examined by the Constitutional Tribunal in 1992 and considered in compliance with all relevant provisions of the Constitution (Tribunal's decision of 25 February 1992, K 3/91).

The first provision of the Amending Act examined by the Tribunal, provided for types of movables and immoveables of the former Polish United Workers' Party subject to nationalisation. It was declared to be in compliance with the Constitution subject to the condition that it would not serve as a legal basis for the use of movables and immoveables of the former Polish United Workers' Party by the new Social Democratic Party. Any other interpretation aimed at assigning assets of the former Polish United Workers' Party to any other political party would be – according to the Tribunal – contrary to basic principles of the Constitution (principle of political plurality, principle of protection of property and the principle of the rule of law).

The second of the questioned provisions referred to the receivables and other property rights of the former Polish United Workers' Party. According to the Take-over Act, only members' contributions existing in cash at the moment when the Take-over Act came into force are excluded from nationalisation. Only such receivables constituted – in the legislator's opinion – legally acquired property of the former Polish United Workers' Party. The 1994 Amending Act expanded the scope of receivables and other property rights excluded from nationalisation. Movables, immoveables and other property rights of the former Polish United Workers' Party which were purchased with money from members' contributions were decided to be excluded from the nationalisation. The Tribunal stated that such legislative change limited the rights acquired by the State Treasury by virtue of the Take-over Act and resulted in transferring certain property assets of the former Polish United Workers' Party to the Social Democratic Party.

Therefore, the Tribunal assessed the above provision as contrary to the Constitution. According to the Tribunal, the legislative authorities are only entitled to decide on the designation of property of the State Treasury in order to satisfy common needs of all citizens. Assigning any property or property rights to any political party does not meet this test. All such practices must be understood as gross violations of democratic rules, including the principle of the state ruled by law (Article 1 of the Constitution) and the principle of political plurality and equality of political parties (Article 4 of the Constitution).

Languages:

Polish.

Identification: POL-96-3-018

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.12.1996 / **e)** K 25/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Social State.
General Principles – Rule of law – Certainty of the law.
General Principles – Rule of law – Maintaining confidence.
Fundamental Rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Living premises, lease.

Headnotes:

Maintaining citizens' confidence in the law requires that issues of critical importance for citizens and society, which were explicitly regulated in the provisions of law, be regulated in the same way after the change of law.

Summary:

According to the revoked provisions of the Civil Code and the law concerning the lease of apartments administered by the State authorities (later by the local governments) of 1974, a person who signed with the lessee of the apartment an agreement to take care of him or her, was understood as a relative. In the case of death of the lessee, such person automatically became the lessee of the apartment. Therefore, the conclusion of such an agreement for taking care of the lessee required the consent of the local administrative authorities. The possibility of signing such agreements (and subsequently taking over all rights of the lessee) was revoked by the new law on the lease of apartments enacted in July 1994 (entered into force as of November 1994).

The Ombudsman requested that the provisions of the 1994 law be examined by the Constitutional Tribunal because of the lack of temporary regulation of rights of persons which signed agreements for taking care of the lessee under the old law. The new law did not regulate rights and obligations of persons which signed the respective agreement in good faith under the old law and believed that they would become lessees in the future.

In the Tribunal's opinion, the lack of temporary regulation violated the principle of the state ruled by law since it put in question the legal certainty, the citizens confidence in state actions as well as the principle of protection of rights acquired justly. Maintaining citizens' confidence in the law requires – according to the Tribunal – that issues of critical importance for society, which were explicitly regulated in the provisions of law, be regulated in the same way after the change of law.

However, the Tribunal did not find any violation of the principle of social justice in this case – the Ombudsman did not present sufficient arguments to support such view. It was stressed that the presumption of constitutionality is of particular importance during the period of economic and social transition. The main purpose of the new law was to adjust the system of commune-owned apartment administration to market rules. Making any decisive judgement on this process from the point of view of the principle of social justice is at the moment extremely difficult.

Cross-references:

Decision of 25.11.1995 (K 4/95), *Bulletin* 95/3 [POL-95-3-014], decision of 16.12.1996 (U 1/96), *Bulletin* 96/3 [POL-96-3-021].

Languages:

Polish.

Identification: POL-96-3-019

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.12.1996 / **e)** P 6/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Social State.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Unemployment benefit / Discrimination on grounds of self-employment.

Headnotes:

Differentiation of social rights of citizens may be done only for very important social and economic reasons. Unjustified differentiation of rights of unemployed persons, only on the basis of their former professional activity in connection with which they paid social security contributions, violates the constitutional principle of citizens' equality and social justice.

Summary:

In this decision the Constitutional Tribunal ruled on the unconstitutionality of one of the provisions of the 1994 law on employment and preventing unemployment. The provision in question provided for two different methods of calculating the minimal period of being subject to the social security system, which gives the right to receive unemployment benefits. One method applied to employees, the other one to persons conducting business activity.

Cross-references:

Decision of 13.07.1993 (P 7/92), *Bulletin* 93/2 [POL-93-2-011].

Languages:

Polish.

Identification: POL-96-3-020

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.12.1996 / **e)** K 11/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Legal persons – Private law.

Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Collective labour agreements / Collective labour disputes / Remuneration, fair, principle / Trade unions, representativeness.

Headnotes:

Authorising only some so-called "representative" trade unions to negotiate and sign intercompany collective bargaining agreements does not violate the constitutional principle of equality if differentiation is based on reasonable criteria and for a legitimate purpose.

The fact that remuneration of employees paid from the State budget is negotiated within the framework of the Tripartite Social-Economic Committee while remuneration of employees in the private sector is negotiated directly with the employer does not violate the constitutional principle of equality.

Summary:

i. Two nation-wide trade unions representing employees of the medical sector requested the Tribunal to examine the provisions of the Labour Code providing for the procedure of concluding intercompany collective bargaining agreements. Trade unions were concerned that only some of the so-called "representative" trade unions (gathering more than 500,000 employees or at least 10% of the interested employees of a certain sector) were authorised to negotiate and sign intercompany collective bargaining agreements according to this regulation. This may result – according to the applicants – either in the dominance of the authorised trade unions over others, even grouping the greater number of employees or, in case of lack of consent among the trade unions, in a breakdown of the negotiations. It was argued by the applicants that such regulation should be perceived as an unjust differentiation of the rights of employees, depending on which trade union they belong to (also lack of equality of trade unions). In the applicants' opinion, any collective labour agreement may not be signed without simultaneous approval of two leading nation-wide trade union associations. The above violates the constitutional principle of equality and the principle of state ruled by law.

The Constitutional Tribunal rejected the objection that the above provisions violated the Constitution. In the Tribunal's opinion, the legislative authority differentiated the status of trade unions on the basis of reasonable criteria and in order to facilitate the process of negotiating collective bargaining agreements. The criterium of being "representative" used by the legislative was aimed at balancing the freedom of creation of trade unions on the one hand and the efficiency of negotiations of intercompany collective bargaining agreements on the other. Differentiation introduced by the concerned regulation fully respected the rule that similar entities (trade unions) must be treated in the same way only if they were subject to the same factual conditions. Therefore, the constitutional principle of equality was not violated.

ii. In the same motion to the Constitutional Tribunal, trade unions questioned the rule, provided for in 1994 law, that the remuneration of employees paid from the state budget was negotiated within the framework of the Tripartite Social-Economic Committee while remunerations of employees employed in the private sector were negotiated directly with the concerned employer. Also this rule was perceived by the trade unions as a violation of the constitutional principle of equality (by differentiating rights of employees depending on the legal status of the employer) as well as the principle of fair remuneration.

The Tribunal decided that negotiating the remuneration in the public sector within the framework of the Tripartite Social-Economic Committee was an important element of the state budget construction and was of political character. Therefore, such procedure may not be compared with procedures foreseen in legal acts to negotiate collective agreements.

Languages:

Polish.

Identification: POL-96-3-021

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16.12.1996 / **e)** U 1/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Collection of decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Housing, benefits / Families, financial situation.

Headnotes:

Criteria for the allocation of housing allowances have to refer to the financial situation of families interested in the allowances in order to conform to the principle of equality.

Summary:

The decision regards the constitutionality of provisions of the 1994 Council of Ministers' regulation on housing allowances (grants for families on low income to compensate part of housing spending). The regulation provided for different methods of allowance calculation, depending what was the family's legal title to its house or apartment. According to the Ombudsman, the above regulation privileged lessees and members of housing cooperatives and did not offer the same rights to the owners of houses and apartments. The Constitutional Tribunal shared the view of the Ombudsman. The Tribunal stated that criteria used by the Council of Ministers did not comply with provisions of the 1994 law on the lease of apartments, which was the legal basis for issuing the questioned regulation. In particular, the criteria used by the Council of Ministers did not refer to the financial situation of families interested in the allowance. Therefore, the Tribunal decided that different treatment of similar persons must be perceived as the violation of the constitutional principle of equality.

Languages:

Polish.

Portugal
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Total of 223 judgments, of which:

- Subsequent scrutiny *in abstracto*: 11 judgments
- Appeals: 190 judgments
- Complaints: 15 judgments
- Electoral disputes: 6 judgments
- Property and income declarations: 1 judgment

Important decisions

Identification: POR-96-3-005

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 08.10.1996 / **e)** 1010/96 / **f)** / **g)** *Diário da República* (Official Gazette) (Series II), no. 288, 13.12.1996, 17301-17303 / **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.
Fundamental Rights – Civil and political rights – Procedural safeguards – Non-litigious administrative procedure.

Keywords of the alphabetical index:

Firearms / Hunting, licence / Administrative procedure / Firearm permit.

Headnotes:

The Constitution provides citizens with various guarantees for fair and adequate administrative procedure regulating access to law and the application of law. The essential guarantees are the right of individuals to participate in decision-making processes and deliberations which relate to them, and the principles of impartial public administration, defence in disciplinary procedure, information by the public authorities, grounding of administrative decisions, and compliance of procedure with fundamental civic rights.

When an administrative authority is vested with power to withdraw a firearm permit from a person manifestly unfit to retain it, the conferment of such power cannot be challenged since there is no constitutional right to bear arms. At all events, confiscation of the permit constitutes revocation of an administrative authorisation which has an effect comparable to that of a penalty and is therefore subject to the constitutional principle that the person concerned shall receive a prior hearing.

A constitutional construction of the law involves an interpretation aimed at integrating the law with the Constitution, that is allowing the constitutional provisions of direct relevance to a given law (whose provisions are insufficient and therefore potentially unconstitutional) to be used to interpret that law.

Summary:

In the case in point, the Constitutional Court had to rule on an appeal against an administrative court decision not to enforce, on the grounds of unconstitutionality, a legal norm enabling the police authority to order confiscation of firearm permits and forfeiture of firearms (hunting licences and sporting guns included) whenever it sees fit, in particular when the owner of the firearm is known to have used it in an unauthorised place or in a reckless manner.

The legal norm at issue may nevertheless be interpreted by the strict constitutional method, to the effect that a procedure ensuring a hearing for the party is mandatory. Assuming that the impugned decision entails refusal to apply a norm which the Constitutional Court then declares consistent with the Constitution on the basis of a specific interpretation, the norm must be applied in the instant proceedings according to that interpretation.

Supplementary information:

The Court's judgment is founded on the rule of law principle (Article 2 of the Constitution), the guarantees secured to citizens in respect of administrative procedure (especially Article 269.3), and on Article 80.3 of the Law on the Organisation, Operation and Procedure of the Constitutional Court where the specifics of interpretation and the effects of the decision are concerned.

Languages:

Portuguese.

Identification: POR-96-3-006

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 12.11.1996 / **e)** 1146/96 / **f)** / **g)** *Diário da República* (Official Gazette) (Series I-A), no. 294, 20.12.1996, 4557-4565 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Type of review – Abstract review.
Constitutional Justice – Effects – Effect *erga omnes* – Limits of *stare decisis*.
Fundamental Rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Extradition / Macao / Death penalty / Repeated similar judgments.

Headnotes:

The substantive unconstitutionality of a norm concerning extradition must be assessed in the light of the constitutional text in force at the time when the norm is applied. In fact the Portuguese Constitution prohibits extradition where the crime may incur the death penalty under the law of the requesting State.

Because it prohibits extradition for crimes legally punishable by death according to the criminal law and procedure of the requesting State, the Constitution is incompatible with any guarantee given by the requesting State that it will commute or refrain from executing the death penalty.

Summary:

In Portugal, the absolute prohibition of extradition for crimes carrying the death penalty dates from the 1976 Constitution.

Macao is a Portuguese-administered Asian territory subject to a special status, where the provisions of the Portuguese Constitution relating to fundamental rights are directly applicable and where a number of legal norms approved by the Portuguese legislative bodies both before and after the 1976 Constitution are in force. Thus the ordinary statute (amended in Portugal by the new legislation on mutual assistance in criminal law matters) permitting extradition for crimes punishable by death or life imprisonment where the requesting State guaranteed commutation was still in force in Macao.

This norm was nevertheless held unconstitutional by the Constitutional Court in appeals lodged against three decisions of the Macao High Court of Justice, all approving the extradition requested by the People's Republic of China.

The judgment in question derives from an abstract review of constitutionality actuated by two appeals which were joined, one brought by a group of Members of the Assembly of the Republic and the other by the Attorney-General's Office (the latter being founded on the reiteration of similar judgments).

After resolving the question of the appellants' *locus standi* the Court, on the merits, reiterated its case law and declared the norm at issue unconstitutional with universal binding effect.

Supplementary information:

The provision relating to extradition is Article 33.3 of the Constitution, of which stipulates that no-one shall be extradited for crimes which carry the death penalty under the law of the requesting State.

Abstract constitutional review of a norm, once it has been ruled unconstitutional in three specific cases (repeated similar judgments), is provided for in Article 281.3 of the Constitution and Article 82 of the Law on the Organisation, Operation and Procedure of the Constitutional Court.

Cross-references:

For the earlier judgments on the same issue, see *Bulletin* 95/2 [POR-95-2-010].

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data
1 September 1996 – 31 December 1996

- Decisions on the constitutionality of legislation prior to its enactment: 5
- Decisions on objections alleging unconstitutionality: 45
- Decisions on compliance with the procedure for the election of the President of Romania: 77

Important decisions

Identification: ROM-96-3-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 19.11.1996 / **e)** 140 / **f)** / **g)** *Monitorul Oficial al României* (Official Gazette of Romania), no. 324/04.12.1996 / **h)**.

Keywords of the systematic thesaurus:

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:

Honour, insult / Public figures, condition.

Headnotes:

The right to freedom of expression implies the right to unrestricted expression of any opinion or comment but also the duty to provide evidence in support of statements relating to an alleged offence committed by a person exercising a public function and to refrain from insults.

Summary:

During an *ex-post* review, the Constitutional Court ruled on a complaint that certain provisions of the Criminal Code concerning insults to authority were unconstitutional.

Article 16.1 of the Constitution, which sets out the principle of equality before the law, states that: "Citizens are equal before the law and public authorities, without any privilege or discrimination".

Regarding the principle of equality before the law, one of the fundamental rights of the citizen, namely the right to freedom of expression, including the freedom of the press, was dealt with in the aforementioned decision.

According to the Constitution, freedom of expression must not be prejudicial to the dignity, honour, privacy of person, and the right to one's own image.

These constitutional guarantees apply to all citizens equally, whether or not they exercise a public function.

In a trial relating to the aforementioned limits to freedom of expression, the question was raised whether freedom of expression could be limited in cases where statements were made concerning a person exercising a public function or who is identified with the authority on behalf of which he or she performs the duties pertaining to that function.

In the case of public authorities, particularly those consisting of a single person (eg. the President), the authority itself cannot be dissociated from the person who symbolises it and on behalf of which he or she performs his or her functions, under the conditions provided for in law.

The core of freedom of expression is the freedom to express opinions or comments which can also relate to simple facts. The limits on acceptable allegations are much broader when they relate to a politician than when they relate to other citizens, given the politician's role in society and the fact that, by its very nature, politics concerns everybody. However, this does not mean that the content and presentation of certain allegations can be used to damage the reputation of a politician by claiming that he or she is the perpetrator of certain imagined offences for which there is no evidence and no factual basis.

This is why the Constitutional Court ruled that opinions on political or moral issues or other comments could not constitute facts likely to damage the reputation of a person exercising a public office, but that insults or statements referring to unproven offences were an exception not covered by freedom of expression.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Total number of decisions: 5

Types of decisions:

- Rulings: 5
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of State bodies: 5
- 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: 0
- Complaints of individuals: 3
- References from courts: 3 (Some claims were dealt with jointly during the same proceedings).

Important decisions

Identification: RUS-96-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 28.10.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Collection of Laws), 06.11.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedure.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

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

Keywords of the alphabetical index:

Criminal case, termination of proceedings / Presumption of innocence.

Headnotes:

The termination of criminal proceedings following a change in circumstances does not mean that the accused is guilty of committing an offence, does not prevent him or her from exercising his or her right to legal protection, and presupposes that he or she agrees to the termination of the proceedings for the reasons given.

Summary:

Criminal proceedings were brought against Mr O.V. Sushkov, for abuse of authority, under Article 6 of the Code of Criminal Procedure, which provides for the possibility of terminating criminal proceedings because of a change in circumstances, if the act committed by the person concerned no longer constitutes a threat to society or if the person has ceased to be a danger to society.

In his complaint to the Constitutional Court of the Russian Federation, the applicant asked the Court to recognise that Article 6 of the Code of Criminal Procedure did not comply with the Constitution because it violated the constitutional principle of presumption of innocence, failing to give the accused the right to object against the termination of proceedings and demand that the court consider the merits of the case.

Under the Constitution of the Russian Federation, any person charged with an offence is presumed innocent until his or her guilt has been proven in accordance with the procedures provided for by the federal legislation and confirmed by a court sentence which is final (Article 49.1); everyone is guaranteed legal protection of his/her rights and freedoms and has the right to appeal in court against decisions and actions (or inaction) on the part of state authorities and officials (Articles 46.1 and 46.2). Presumption of innocence and the right of citizens to legal protection are among the rights referred to in Article 56.3 of the Constitution of the Russian Federation which may not be restricted under any circumstances.

To resolve the matter of the constitutionality of Article 6 of the Code of Criminal Procedure, it is necessary to compare it systematically with the aforementioned provisions of the Constitution as well as the provisions of other articles of the Code of Criminal Procedure, particularly Article 13, which states that justice in criminal cases can only be administered by courts.

On this basis, the decision to terminate proceedings, taken in accordance with the disputed rule, does not replace a court judgment and therefore it is not an act which establishes the guilt of the accused under the terms of Article 49 of the Constitution.

However, Article 6 of the Code of Criminal Procedure contains no direct instructions as to the need to obtain the agreement of the person concerned before terminating criminal proceedings. Moreover, an agreement of this nature was not demanded in practice, which led to violations of the constitutional right to legal protection and presumption of innocence.

Nonetheless, Article 6 of the Code of Criminal Procedure, both in its strictest sense and in the meaning which is now attributed to it by case-law, does not prevent an appeal in court against the decision to terminate proceedings, and, by extension, is not in breach of the Constitution of the Russian Federation.

Languages:

Russian, French (translation by the Court).

Identification: RUS-96-3-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 28.11.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Collection of Laws), 06.12.1996 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Courts – Jurisdiction.
Institutions – Courts – Procedure.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Impartiality.

Keywords of the alphabetical index:

Criminal proceedings / Indictment.

Headnotes:

The initiation of a public prosecution and the presentation of charges in court are the responsibilities of the specialised agencies of inquiry, preliminary investigation and prosecution. The court is required to scrutinise the results of their work and make an objective and impartial ruling on the lawfulness and the merits of the charges against the accused, as well as considering complaints against the acts and decisions of law officers administering criminal justice prior to consideration of the case in court.

Summary:

The Constitutional Court of the Russian Federation held a public hearing of a case relating to the verification of the constitutionality of Article 418 of the Code of Criminal Procedure.

The proceedings were instituted as a result of an application from the Karatuzskoyey District Court in the territory of Krasnoyarsk, concerning verification of the compliance of Articles 418 and 419 of the Code of Criminal Procedure with the Constitution. According to the applicant, the provisions of the Code of Criminal Procedure giving the court the power to initiate criminal proceedings and bring charges are not consistent with the legal functions performed by the above court in this case and are in violation of Articles 118 and 123.3 of the Constitution.

The Articles of the Code of Criminal Procedure challenged by the applicant relate to criminal proceedings which are not prepared during the process of inquiry or preliminary investigation but in the form of an official report. Under this procedure, the investigating body, acting on the complaints and allegations relating to the crime and without issuing an order initiating criminal proceedings, collects the evidence required to prove that the offence was committed by a given person, draws up the report containing the finding that the offence has been committed and, subject to the approval of the public prosecutor, sends this to the court. Having acknowledged that there is sufficient evidence to hear the case, the court issues the order initiating criminal proceedings which includes a description of the charge along with a reference to the section of the criminal law under which the accused is charged, after which it deals with the merits of the case.

Article 10 of the Constitution views the division of State power among the Legislature, the Executive and the Judiciary as the basis of the constitutional system.

Under Article 118.1 of the Constitution, justice can only be administered by the courts. The effect of these provisions is that, on the one hand, no other body can take over the administration of justice, and, on the other, a court cannot be assigned incidental functions which are incompatible with its role as a judicial body. This issue was approached in the same way in resolution 1989/60 of the UN Economic and Social Council of 24 May 1989, which approved of procedures for the effective application of the fundamental principles of the independence of judicial bodies, which stipulate in particular that no judge may be asked to perform duties which are incompatible with his/her independent status.

Entrusting a court with the power to initiate criminal proceedings and draw up the charge is not in keeping with the principle of the objectivity and the impartiality of the court, which, as the judicial body, passes judgment in the same proceedings. This is contrary to the constitutional rules on independent judicial review of the protection of citizens' rights during criminal proceedings embodied in Articles 18, 46.1 and 120 of the Constitution, according to which human and civil rights and freedoms shall be guaranteed by the law and the protection of these rights and freedoms in independent courts shall be guaranteed. The International Covenant on Civil and Political Rights is based on the same notion of the status of the court, in that it states that everyone charged with a criminal offence shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal (Article 14.1). In particular this means that one of the prerequisites for a fair system for the administration of justice is that the court is only responsible for passing judgment on the criminal charge brought against the person concerned and should not be given the freedom to draw up the charge.

Having initiated criminal proceedings against a specific person and drawn up the charge, the court is bound by the decisions it has taken. Consequently, the independent stance of the judge is jeopardised and, hence, the human right to have one's case considered by an independent and impartial tribunal as guaranteed by Article 120 of the Constitution is violated. This is also extremely detrimental to the confidence which the institutions of justice are supposed to inspire in a democratic society.

The provisions of Article 418 of the Code of Criminal Procedure giving the court the right to initiate proceedings and present the description of the charge against a specific person are also in breach of Article 123.3 of the Constitution which establishes the principle that court

proceedings are carried out on the basis of the adversarial principle. This constitutional principle implies that judicial proceedings must be organised in such a way that the administration of justice (and the settlement of a case), which is carried out by the court alone, is separate from the functions of the litigants.

This principle also covers cases where preparation prior to consideration by the court is carried out, in accordance with Article 414 of the Code of Criminal Procedure, in the form of a report. Although this procedure differs from the procedures of inquiry and preliminary investigation, it does not imply that the agency of inquiry and the public prosecutor are exempt from their duties in respect of criminal proceedings. On the contrary, Article 414 of the Code of Criminal Procedure stipulates that the method of conducting proceedings in the cases listed in this Article shall be determined by the general rules of the legislation on criminal procedure if the contrary is not expressly provided for in Chapter 34 of the Code of Criminal Procedure, which specifies the form of report to be drawn up during pre-trial preparations.

The report drawn up by the agency of inquiry and approved by the public prosecutor contains information on all the circumstances of the offence committed, which are vital for initiating proceedings and drawing up the charge, including the time and the place of the offence, the methods, motives and consequences, evidence confirming that the offence was committed and the classification of the offence according to the Code of Criminal Procedure of the Russian Federation. What is more, this kind of report clearly reflects the desire on the part of the competent authorities and the law officers to initiate criminal proceedings against the offender in court.

The report on the circumstances of the crime, confirmed by the head of the agency of inquiry and approved by the public prosecutor, is actually a substitute for the customary documents containing the decision to initiate criminal proceedings against a specific person and notify that person of the charge.

Having received the report on the crime and the other documents attached and deemed them sufficient for consideration in court, the court has the right and indeed the duty to issue a decree which should only fix a date for the trial and settle matters covered by the general rules of the Code of Criminal Procedure of the Russian Federation on the subject (Chapter 20).

The Constitutional Court found that:

The provisions of Article 418.1 of the Code of Criminal Procedure, giving judges the power to initiate, or refuse to initiate, criminal proceedings on the basis of evidence relating to the crime, presented in the form of a report, along with paragraph 2 of the same article, which states that judges must include a description of the charge in the order initiating proceedings, were in breach of Articles 120 and 123.3 of the Constitution of the Russian Federation.

The recognition that the aforementioned provisions of Article 418 of the Code are not in accordance with the Constitution does not preclude the application of its other provisions when the question of bringing the case to trial is being considered, owing to the fact that the decision on the initiation of criminal proceedings and the description of the charge is contained in the report confirmed by the head of the agency of inquiry and approved by the public prosecutor.

Languages:

Russian.

Identification: RUS-96-3-009

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.12.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Collection of Laws), 26.12.1996 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Public finances – Taxation.
Fundamental Rights – General questions – Entitlement to rights – Legal persons.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Right to property.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax inspectorate / Payment of taxes.

Headnotes:

Provisions of the Federal Tax Inspectorate Act giving the tax inspectorate the right to recover tax arrears from

legal entities along with any fines incurred by late payment without there being any right to lodge an objection were not in breach of the Constitution since under Article 46 of the Constitution, legal entities from which such tax arrears have been recovered without the right to lodge an objection are entitled to appeal against the tax inspectorate's decision in court.

Summary:

The tax inspectorate recovers tax arrears from legal entities without there being any right to lodge an objection or object to the amounts of fines or other penalties prescribed by the law. A failure to pay taxes in time must be offset by a reimbursement of the overdue tax and complete compensation of the loss incurred by the State owing to the late payment of the tax. It is for this reason that the legislator has the right to demand payment of a sum in addition to the unpaid tax (the arrears) to cover the losses of the Treasury caused by the fact that they are prevented from collecting the entire sum of tax they are owed in time.

The strict system for the recovery of payments from such taxpayers stems from the compulsory and coercive nature of taxation under the law.

Recovery of the entire amount of tax on income (or profit) that has been concealed or only partially declared, as well as any fine, is, to all intents and purposes, more than just recovery of tax arrears as such. The strict system of recovering these payments, in the event that the taxpayer does not consent, through a decision of the tax inspectorate constitutes an excessive restriction on the right enshrined in the Constitution whereby nobody may be deprived of his/her property other than by a decision of the courts.

The case was brought to court following complaints from a group of legal entities that their constitutional rights and freedoms had been violated under Section 11 of the Russian Federation's Federal Tax Inspectorate Act in a number of specific cases.

The reason for initiating proceedings was the uncertainty as to whether the disputed provisions of the aforementioned Act were in accordance with the Constitution of the Russian Federation.

Fiscal law relationships are based on the subordination of one party to another. It is assumed that the fiscal authorities, working on behalf of the State, will have all the power whereas the taxpayer only has the duty to obey. The tax authorities' claim and the taxpayer's debt derive from the law and not from an agreement.

Legal entities are guaranteed judicial protection of their rights in rem. The strict system of tax recovery followed up by a judicial review designed to protect the rights of legal entities is not in breach of the provisions of the Constitution. The constitutional rights of the individual and the citizen enshrined in the Constitution also cover legal entities in so far as they can, by their very nature, be applied to them.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Number of decisions taken:

Decisions on the merits by the plenum of the Court: 7
Decisions on the merits by panels of the Court: 4
Number of other decisions by the plenum: 7
Number of other decisions by panels: 35
Total number of cases brought to the Court: 234

Important decisions

Identification: SVK-96-3-005

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 04.09.1996 / **e)** II.ÚS 8/96 / **f)** Petition from a natural person / **g)** to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej Republiky* (Collection of judgments and decisions of the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Freedom of movement.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Positive obligation / Right to free entry to a country / Homeland / Consular assistance / Failure to act / Extraterritorial obligations / Counsel, right.

Headnotes:

Fundamental rights and freedoms are protected by the Slovak Republic within the jurisdiction of its bodies.

The positive obligation provided for within the European Convention on Human Rights is incorporated also in the Constitution of the Slovak Republic. What is more, the rights and freedoms entrenched in the Constitution are also covered by the positive obligation of the Slovak Republic.

The right to defence can not only be asserted in person by the bearer of the right, but also by a lawyer acting in the name of the bearer.

Summary:

The petitioner, a Slovak citizen, brought a petition to the Court claiming that his constitutional right to free entry to the Slovak Republic had been violated. He also claimed that his right to privacy and family life had been violated along with the right to have matrimony, parentage and family protected and the right for him or his counsel to have the opportunity to prepare his defence and to defend his case. The constitutional rights claimed by the petitioner to have been violated were supported by identical rights and freedoms guaranteed by international treaties on human rights which were also claimed to have been violated.

The petition was grounded on the following facts. The petitioner was found in a small town in Austria in the vicinity of the Slovak border. He was taken into custody by Austrian authorities for being suspected of having committed a crime in the Federal Republic of Germany. From September 1995 until February 1996 he was detained in Austria. On 20 February 1996, an Austrian court refused to extradite him to Germany. Following this judgment he returned to Slovakia. During the petitioner's stay in Austria he addressed the bodies of the Slovak Republic – the Ministry of Foreign Affairs, the Ministry of Justice, and the Attorney General – with requests for help. As no help was rendered to him, he brought a petition to the Constitutional Court in January 1996 claiming to have had two constitutional rights violated. The petition was supplemented in March 1996 by the claim that two further constitutional rights had been violated: the right to be free from unjustified interference into private and family life, which is guaranteed under Article 19.2 of the Slovak Constitution, and the protection of matrimony, parentage and family guaranteed under Article 41.1 of the Constitution.

The petitioner never made a claim as to the latter rights during the petitioner's stay in Austria. They were claimed before the Constitutional Court in March 1996. As a result, these two rights could not have been violated by reason of the government's failure to intervene. Thus, the petition was dismissed in the part claiming that the constitutional rights under Article 19.2 and 41.1 had been violated. The issue of the violation of Article 23.4 and Article 50.3 was decided by the Court on the merits of the case.

According to Article 23.4 of the Slovak Constitution every citizen has the right to free entry to the territory of the Slovak Republic. No citizen may be forced to emigrate or be expelled from his or her native country or be extradited to a foreign country. The petitioner claimed that the governmental bodies were obliged to act towards Austria in a manner to enable his return home. As the governmental bodies made no attempt to do so, his constitutional right was violated due to their failure to act.

The very first issue relevant to the case was the relationship between Articles 12.2 and 23.4 of the Slovak Constitution. According to Article 12.2 fundamental rights shall be guaranteed in the territory of the Slovak Republic. Non-activity of the governmental bodies occurred with respect to events within the territory of another country, namely Austria. The Court ruled on this issue that fundamental rights and freedoms afforded by the Constitution are guaranteed within the jurisdiction of the Slovak Republic, not only within its territory. This is so because any citizen of the Slovak Republic during his or her stay in the territory of a foreign country does not lose his or her rights and freedoms as guaranteed by the Slovak Constitution. The right to free entry into Slovakia in its very essence acquires its true meaning especially for a citizen who is abroad. Solely while abroad, a citizen is in a position to apply for entry into the Slovak Republic. This right is claimed by a citizen staying outside the territory of the Slovak Republic, and within the jurisdiction of competent bodies of the Slovak Republic.

The next step in settling the petition with respect to the claim that the petitioner's right under Article 23.4 had been violated was to examine the obligation of the Slovak Republic to adopt positive measures aimed at enabling the enforcement of the right to free entry.

The petitioner claimed the existence of a positive obligation under Article 8 ECHR. Upon this basis, he derived a positive obligation also for his case.

The Constitutional Court ruled that the Slovak Republic is obliged to guarantee not only those rights and freedoms which are protected via positive obligation under judgments of the bodies of the Council of Europe. Rights and freedoms guaranteed by the Slovak Constitution are protected with the help of positive obligation directly under the Constitution even if no such obligation exists under case-law of the European Court of Human Rights. The constitutional right to free entry to the territory of Slovakia is one of such rights. It is protected by way of positive obligation because only governmental bodies, and no citizen on his or her own, can act with equal legal status in relationship to the bodies of another country. In such a relationship the governmental bodies, of course, have no competence to enforce the right to free entry for a citizen demanding to have this right satisfied, but the governmental bodies have authority enough to make attempts to help a citizen to reach the purpose of the right. No such attempt was made, however, in the case at hand by the Ministry of Foreign Affairs. Therefore, the Court found this body guilty of infringing the petitioner's right to free entry to the territory of the Slovak Republic.

On the other hand, no infringement of the constitutional right guaranteed by Article 50.3 of the Constitution was found. According to this provision, "Any person charged with an offence shall have the possibility to prepare his or her defence during such time as may be deemed necessary and shall have the right to defend the case by himself or herself and be represented by counsel." The petitioner claimed that his right had been violated when criminal proceedings against him were opened on 27 December 1995. Owing to his stay abroad at that time, he had no opportunity to defend himself. The Court did not accept this statement. During his stay in Austria, the petitioner was represented by a barrister acting in his name in the affair. The barrister acting in this case was hired by the petitioner. All his demands were satisfied by the bodies involved in the criminal case. Thus no infringement of the constitutional right was found.

Cross-references:

The judgment of the European Court of Human Rights – *Pakelli* (Series A, no. 64) has also served as a legal basis for this part of the judgment passed by the Constitutional Court.

Languages:

Slovak.

Identification: SVK-96-3-006

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 10.09.1996 / **e)** PL.ÚS 43/95 / **f)** Case of constitutionality of statute / **g)** *Zbierka zákonov Slovenskej Republiky* (Official Gazette), no. 281/1996 Z.z., in brief; to be published in *Zbierka nálezov a uznesení Ústanvého súdu Slovenskej Republiky* (Collection of judgments and

decisions of the Constitutional Court), complete version / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Institutions – Courts – Organisation – Prosecutors / State counsel.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Independence.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Equality of arms.
Fundamental Rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Civil Procedure, remedies.

Headnotes:

The Attorney General, the Minister of Justice, and the Chief Justice of the Supreme Court must not intervene in civil proceedings against the will of the parties.

Summary:

The President of the Slovak Republic claimed a constitutional conflict between Article 35.2.f, Article 241.a of Act no. 232/1995 amending the Code of Civil Procedure, and Articles 1, 12.1, 16.1, 47.3, 55.1, 55.2, 141.1, 141.2 and 144.1 of the Constitution.

According to the Amendment to the Code of Civil Procedure the Attorney-General is vested with the power to step into civil proceedings on demand from a party to the dispute or from the court (Article 35.2.f). The Attorney-General, the Minister of Justice, and the Chief Justice of the Supreme Court were vested with comparable power to bring an extraordinary remedy named *dovolanie* (Article 241.a) on conditions provided for by the Amendment.

The Constitutional Court ruled that the very purpose of the right to privacy is to protect the social values respected as private from intrusions by a public authority or a natural or legal person. If the Attorney-General steps into a civil proceeding on the court's demand, the constitutional right to privacy is infringed. Infringement of the right to privacy will also occur where the Attorney-General, the Minister of Justice or the Chief Justice of the Supreme Court exercises the right to bring an extraordinary remedy for the purpose "of harmonising court decisions in similar matters" under Article 241.a.

Not only the right to privacy but also that of equality of all parties before the law was ruled to be infringed by the provisions of the Amendment to the Code of Civil Procedure. Any prosecutor, while acting in a civil dispute, cannot perform the function of a representative of the State, as the State is not party to the civil dispute to be decided by the Court. As a consequence, the prosecutor comes to be "a helper", a supporter to one party of the dispute. This in fact means that the position of the supported party is stronger in comparison to the position of the counter-party. This disadvantage is not in conformity with Article 47.3 of the Constitution according to which all parties to any proceedings shall be treated equally before the law.

Moreover, the participation of a prosecutor in civil proceedings is also not in conformity with Article 141.1 of the Constitution. Under this provision "The judiciary shall be administered by independent and impartial courts." The principle of the independence of the judiciary means *inter alia* that a judge may not be exposed to third-party interests and may not take third-party interests into consideration when passing judgment. If a judge asks a prosecutor to step into the proceedings, this judge exposes himself to influences from the third party. In this manner the independence and impartiality of the judge, and the judiciary as well, is infringed.

Languages:

Slovak.

Identification: SVK-96-3-007

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 14.11.1996 / **e)** PL.ÚS 1/96 / **f)** Case of constitutionality of statute / **g)** *Zbierka zákonov Slovenskej Republiky* (Official Gazette), no. 352/1996 Z.z., in brief; to be published in *Zbierka nálezov a uznesení Ústanvého súdu Slovenskej Republiky* (Collection of judgments and decisions of the Constitutional Court), complete version / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Powers.
Institutions – Executive bodies – Powers.

Institutions – Executive bodies – Sectoral decentralisation.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

National Property Fund, powers / State enterprises, sale / Government prerogatives.

Headnotes:

Any decision that according to the Constitution shall be adopted by the Government of the Slovak Republic may not be overridden by a decision made by a single member of the Government or by another institution or person. The competence to decide on matters provided for within Article 119 of the Constitution may not be circumvented by a governmental statement, opinion, conclusion or any other expression of non-binding character.

Summary:

The petitioner, a group of 56 members of the National Council of the Slovak Republic, claimed that there was a constitutional conflict between Act no. 369/1994 on Privatisation as amended by Act no. 190/1995 and Article 119.d of the Slovak Constitution.

According to Act no. 369/1994 as amended by Act no. 190 of 1995, a legal person, the National Property Fund *(Fond národného majetku SR)* was a subject vested with the power to decide on privatisation of state enterprises through a direct sale. According to Article 119.d of the Constitution, "The Government shall decide collectively on principal measures to be taken to implement the economic and social programmes of the Slovak Republic". The petitioners shared the view that privatisation is a principal measure seriously affecting economic and social programmes of the Slovak Republic, therefore it was the Government which had been vested through the Constitution with exclusive power to adopt all decisions concerning privatisation.

The opponent in this case, the Slovak Parliament, refuted that view and argued that the Government made principal decisions on privatisation when it determined the branches of national economy which would be privatised. In its reply to the petition, the Slovak Parliament explained that the decisions adopted by the National Property Fund according to which the holders of single enterprises are determined, meant nothing more than acts in law with the help of which the Governmental decision on privatisation was transferred into detail.

The Court examined Article 119.d of the Constitution first. The Court ruled that the decision which under the Constitution must be made by the Government collectively may not be delegated to anyone else regardless whether he or she is a member of the Government or a legal or natural person. The power vested in the Government may also not be exercised through a non-binding opinion of the Government substituting its binding decision.

The Court considered the constitutional wording "principal measures to be taken to implement the economic and social programmes of the Slovak Republic". The Court ruled that the context, scope and degree of detail within principal measures taken by the Government cannot be defined in general. Only due to the very essence of the social relationship established it is possible to determine whether the Government may exercise its competence by expressing a concept for the case concerned, or whether other very concrete issues must also be decided by the Government.

Both parties to the case agreed that there has been no dispute over privatisation as such. The process of economic deregulation and restoration of private property and a market economy is closely connected to privatisation. For this reason there was never a doubt whether privatisation is a "principal measure" within the meaning of Article 119.d of the Constitution. Subject of the dispute was just the procedure of privatisation.

The Court considered the legal status of the National Property Fund, and found that there was no legal opportunity for the State bodies to control the decisions on privatisation adopted by the National Property Fund. Then the Court ruled that privatisation by way of direct sale of state enterprises to a new owner is the only form of privatisation in which the identity of the owner may be determined by the seller. The purpose of the owner's determination at the direct sale is to decide on the structure of the privatised branch of the economy and its orientation for the future. For this reason, this decision constitutes a decision on principal measures within the wording of Article 119.d of the Slovak Constitution. The Parliament had taken away from the Government that power which, under the Constitution, was vested in the Government, and had attributed it to a legal person. The parliament is not authorised to exercise its legislative power in such a way. Thus, statute no. 369/1994 as amended by provisions of Act no. 190/1995 was proclaimed not to be in conformity with Article 119.d of the Constitution.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Number of decisions

The Constitutional Court had 13 (plenary) sessions during this period, in which it dealt with 134 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 38 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 session closed to the public). There were 348 U- and 330 Up-unresolved cases from the previous year at the start of the period (1 September 1996). The Constitutional Court accepted 107 U- and 106 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

- 55 cases (U-) in the field of protection of constitutionality and legality, of which there were (taken by the Plenary Court)
  - 28 decisions and
  - 27 resolutions.

- 97 cases (U-) were joined to above mentioned cases because of common treatment and decision; accordingly the total number of resolved cases (U-) is 152.

In the same period, the Constitutional Court resolved:

- 93 cases (Up-) in the field of protection of human rights and basic freedoms (8 decisions taken by the Plenary Court, 85 decisions taken by the 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, and 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 extracts, 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 1996, in full text in Slovene as well as in English "http://www.sigov.si/us/eus-ds.html"); since 1 January 1997 also on the mirror site in U.S.A.: "http://www.law.vill.edu/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 the *BookWorld Publications*, The Netherlands. The *East European Case Reporter of Constitutional Law* is available also on Internet.

Important decisions

Identification: SLO-96-3-010

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.09.1996 / **e)** U-I-279/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 51/96; *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.
General Principles – Democracy.
General Principles – Separation of powers.
Fundamental Rights – Civil and political rights – Right to participate in political activity.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Referendum, statutory / Elections to the National Assembly / Referendum, constitutional right to request / Retroactivity, statute / Participation in managing public affairs / Rationality, principle / Economy, principle / Regulations, validity and promulgation.

Headnotes:

The provision of the Referendum and Popular Initiative Act authorising the National Assembly to determine the day of calling a referendum in the act calling the referendum does not allow the voting to be postponed for a long period of time since the purpose of the provision is only instrumental or technical. The provision has the same effect as the *vacatio legis* time limit, which means that, as a rule, if there are no sound technical reasons (eg. longer holidays), 15 days at the most can elapse between when an act calling a referendum is promulgated and the day determined as the day of calling the referendum.

Summary:

Statutory referendum is regulated by Article 90 of the Constitution, which in paragraph 2 provides that "The National Assembly may call such a referendum on its own initiative, but must call such a referendum if the same is demanded by no less than one third of all elected deputies of the National Assembly, by the National Council or by no less than forty thousand voters".

The Referendum and Popular Initiative Act (ZRLI) provides, in Article 19, that the time limit for the National Assembly to call a provisional statutory referendum is 30 days from the request for a referendum being submitted or 7 days from a Constitutional Court decision on the constitutionality of the referendum request. Article 33 stipulates that the referendum must be carried out not less than 30 days and not more than 45 days after the day of calling the referendum.

In its decision U-I-265/96 of 31 July 1996, the Constitutional Court examined, at the request of the National Assembly, the constitutionality of questions included in two requests for referendum submitted by the National Council and 43 710 voters respectively. The Court found the National Council's question to be consistent with the Constitution but found part of the question submitted by the voters to be inconsistent. The Court therefore directed the National Assembly to call a referendum on the National Council's question and the remaining part of the voters' question.

The National Assembly called a provisional statutory referendum in the act calling for the referendum (OdRZRV) which came into force on 10 August 1996. The OdRZRV fixed the date for calling the referendum as the ninetieth day after the new National Assembly had been constituted and stipulated that the referendum

would be held on the first Sunday 30 days after the day calling the referendum.

The Court noted that the provisions of the ZRLI providing that a special day should be fixed as the day of calling the referendum were taken from the Act on Election to the National Assembly and have a purely technical or instrumental meaning. They are not to be interpreted as authorising a delay in the carrying out of the referendum. The purpose of these provisions is to inform those proposing a referendum and organs competent for its carrying out of the content of the act on calling the referendum or for other more practical reasons, such as the need to fix the day of voting on a Sunday or other free day or together with elections. The time limit between the act calling the referendum being promulgated and the day fixed as the day for calling the referendum has the meaning and effect of *vacatio legis* (ie. the period of time that must elapse from the day an act is promulgated until the day the act comes into force).

Since the ZRLI sets relatively short time limits for all actions to be carried out in respect of referendum, the National Assembly cannot abuse the concept of *vacatio legis* when passing an act on calling the referendum nor can it abuse the authorisation to determine the day of holding the referendum by postponing it for an unreasonable period. Since the ZRLI does not stipulate what the period should be between promulgating an act calling the referendum and the day fixed as the day of calling the referendum, it appears that the constitutionally determined presumed *vacatio legis* of 15 days is reasonable. This means that the day set as the day of calling the referendum should be not more than 15 days after the act on calling the referendum has been promulgated, except where there are well grounded reasons of a technical or instrumental nature.

Supplementary information:

Legal norms referred to:

- Articles 3, 44, 90, 154 of the Constitution;
- Articles 17, 18, 19, 30, 31, 32, 33 of the Referendum and Popular Initiative Act;
- Articles 16, 21, 40.2 of the Constitutional Court Act.

Two dissenting opinions of a judge of the Constitutional Court.
One concurring opinion of a judge of the Constitutional Court.

Cross-references:

In the reasoning to the decision, the Court refers to its decision no. U-I-265/96 from 31 July 1996.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-3-011

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.11.1996 / **e)** U-I-75/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 68/96; *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 – Techniques of interpretation – Teleological interpretation.
General Principles – Social State.
General Principles – Rule of law.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Equal protection of rights / Due process of law / Right to private property and inheritance / Denationalisation, the obligation to return denationalised property / Denationalisation, municipality as an entity subject / Local self-government.

Headnotes:

It is not inconsistent with the Constitution that the Local Self-Government Act does not prescribe:

- that property subject to restitution according to the Denationalisation Act, shall be exempted from the obligation of restitution if it is property which, pursuant to the Local Self-Government Act, shall be divided among municipalities established on the territory of a former municipality or sociopolitical community, and

- that the person subject to denationalisation of real estate be a municipality on the territory of which the real estate lies.

Summary:

The Denationalisation Act (ZDen) provided in Article 88 for the security of denationalisation claims pending a final and executable decision by placing a ban on the use of real estate or property subject to an obligation of restitution. This provision ceased to apply 30 days after the expiring of a time limit set for the bringing of denationalisation claims from Article 64.1 of the ZDen, except in case of real estate or property on which a denationalisation claim was already made. Additional security of claims is also possible to be achieved by a temporary injunction pursuant to Article 68 of the ZDen, by which an organ, deciding upon denationalisation in the first instance, for the purpose of securing claims or for some other weighty reason, may place a ban on the use of real estate, the partial or complete transformation of companies' and other legal persons' capital or may allow the transfer of real estate for its temporary use by the claimant. The Privatisation of Companies Act (ZLPP) regulated the security of denationalisation claims as to property or companies being subject to denationalisation according to this statute. Until 7 June 1993 claimants were able to apply for a temporary injunction, by which a competent organ was empowered to place a ban on the use of property or the transfer of shares to the Development Fund of the Republic of Slovenia.

By the Establishment of Municipalities and Determination of their Boundaries Act (ZLS), a network of new municipalities, these being essentially self-governing local communities, was established in Slovenia. The borders of some new municipalities remained intact in comparison to the old municipalities, yet for the most part changes as to territory nevertheless occurred. In the area of former municipalities, new municipalities were found, these being the legal successors to the old ones. The ZLS determined in Article 100.1 that municipalities were to settle their mutual property relations by 30 September 1995. In Article 100.2 the criteria for dividing property were set out, whereas Articles 100.3 and 100.4 laid down the rules of procedure where a conflict as to the division of property occurs. These statutory provisions do not provide any exception, thus they apply to all property figuring on the balance sheets of former municipalities.

Although the ZLS does not contain explicit provisions on legal succession or alterations to the legal nature of property rights existing in social ownership and managed by former municipalities after new municipalities were established, it is possible to understand from Article 100 in conjunction with Article 51.1 of the ZLS that the legal nature of this property right was changed. Out of social ownership, where municipalities had the right to use this property, public (municipal) ownership emerged. For most of this property, these alterations occurred a while ago – e.g. with the coming into force of the Public Economic Services Act.

Until property relations are settled by a contract, an arbitration decision, or a Supreme Court judgement delivered in an administrative lawsuit, all property managed by former municipalities passed over to the ownership of new municipalities established in the territory of the old municipality. Pursuant to Article 18.2 of the Basic Ownership Relations Act (ZTLR), applied on the basis of Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia as a Slovene law, ownership by more than one person of undivided property, where each person's share can be determined yet they were not determined in advance, is deemed to be joint ownership. The ZTLR, however, does not provide the manner of disposal of jointly owned property. Individual statutes regulating legal relations in regard to joint ownership (Inheritance Act – hereinafter: ZD, Marriage and Family Relations Act – hereinafter: ZZZDR) provide that joint ownership is disposed of by owners "jointly and with one mind" (Article 52.1 of the ZZZDR) or "jointly" (Article 145.1 of the ZD). Considering the analogy with the cited provisions, which regulate cases of joint ownership, and considering the legal nature of joint ownership, municipalities – the often multiple legal successors to a former municipality – dispose of joint property as if they were one owner with one mind.

The contractual division of property among new municipalities constitutes a legal disposition of this property in the sense of Article 88 of the ZDen. Article 100 of the ZLS and Article 88 of the ZDen contradict each other, for the former provision puts municipalities under an obligation to divide among themselves all the property managed by the former municipality, whereas the latter bans the disposal of property which is subject to an obligation of restitution. Therefore, it is first necessary to find out by the rules of statutory interpretation which one of these two provisions applies to municipal property subject to restitution. The ZLS is the later statute, thus according to the principle of *lex posterior derogat legi priori* it abrogates the former statutory provisions which are contrary to it. On the other hand, the ZDen regulates a specific category of property, and is therefore related to the ZLS as *lex specialis*. When a contradiction between both rules of systematic statutory interpretation occurs, one must look to the intention of a law or to its teleological

interpretation. The purpose of Article 88 of the ZDen is to prevent the legal position of a denationalisation claimant to deteriorate until the final decision upon a claim is made. The purpose of the ZLS, on the other hand, is to settle property relations among municipalities. In order to establish which one of the contradictory provisions applies to certain property, it is essential to question whether the position of a claimant will be aggravated by the division of the property, for which a (probable) obligation of returning exists. By the division, the ownership right of one municipality or the co-ownership right of two or more municipalities is re-established. In the first case the claimant is actually in an even better position, for the person obliged to return property is only one, a condition which will alleviate the whole course of proceedings. In the second instance, the position of the claimant is similar to the one which existed at the time when the property was not yet distributed. Since the use of Article 88 of the ZDen – providing for the ban on disposing of municipal property – would in no manner contribute towards achieving an end for which this provision was enacted, a teleological interpretation would not make its use mandatory. Thus, Article 100 of the ZLS applies to all property of former municipalities, including property that is subject to returning. Yet the ban on disposing of property, which would compromise the legal position of the claimants (e.g. legal transactions by which or on the basis of which the ownership right is transferred to private legal persons), nevertheless applies to this property, for Article 100 of the ZLS does not invalidate it.

The plaintiff has asserted that the legal position of the claimants has been compromised due to the division of municipal property. If this assertion had been supported by sound evidence, it would have been possible to solve this problem by an interpretation of the ZDen and the ZLS. If the division of property in a particular case worsened the legal position of the claimant, out of the two conflicting provisions, Article 88 of the ZDen would apply.

Supplementary information:

Legal norms referred to:

- Articles 2, 22, 23, 25, 33 of the Constitution;
- Articles 64, 88 of the Denationalisation Act;
- Article 18 of the Basis of Ownership Relations Act;
- Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia;
- Article 52 of the Marriage and Family Relations Act;
- Articles 56, 156 of the General Administrative Procedure Act;
- Articles 295, 332 of the Civil Procedure Act;
- Article 145 of the Inheritance Act;
- Article 21 of the Constitutional Court Act.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-96-3-012

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.12.1996 / **e)** U-I-107/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 1/97; *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 – Social State.
General Principles – Rule of law.
General Principles – Proportionality.
Institutions – Legislative bodies – Law-making procedure – Right of amendment.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Denationalisation, returning of property, moratorium / Agricultural lands / Woods / Inheritance rights / Natural and cultural heritage, protection.

Headnotes:

Provisions interfering with denationalisation rights which are crucial for the transition must not only have a defined legislative intent and be justifiable and constitutionally legitimate, but their application must also respect the principles of proportionality and necessity. If these conditions are respected and a suspension of denationalisation rights is found to be permissible, such a moratorium may not last too long.

Summary:

The claimants challenged the validity of the Partial Suspension of Returning of Property Act. By suspending the denationalisation of agricultural land and woods exceeding 200 ha for no justifiable reason, the legislator discriminated between denationalisation claimants, thereby violating the rule of law (Article 2 of the Constitution) and the principle of equality before the law (Article 14.2 of the Constitution). The claimants affected by the statute are in an unequal position compared to those claimants who are entitled to the return of up to 200 ha of agricultural lands and forests, and to those to whom land and forests were already returned to a large extent. The legislator should have based the differential treatment on defined, realistically justifiable and constitutionally legitimate reasons. The Constitutional Court held that the suspension is contrary to the Constitution. Differential treatment among denationalisation claimants would only be admissible if the safeguarding principles of proportionality and necessity are observed. However, the legislator had observed these principles.

The rule of law requires that measures adopted by the legislator in interfering with constitutional rights be limited to the shortest possible time, so as not to leave claimants in uncertainty for too long a period of time.

The Constitutional Court held that the three-year suspension of the claimed denationalisation rights was not appropriate to the aims of the legislation. The Court's decision would begin to take effect six months after the decision's publication in the Official Gazette of the Republic of Slovenia. Thus the Court effectively gave the legislator an opportunity to see whether it could come up with a constitutionally valid justification for the suspension, or alternatively, to see to the valid regulation of the return of lands and forests subject to denationalisation by amending the statute.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 7, 14, 33, 67, 73 of the Constitution;
- Article 1 of the Enabling statute for the Implementation of the Constitution;
- Articles 1, 2, 10, 14, 27, 58, 63, 92 of the Denationalisation Act;
- Article 145 of the Punishment Enforcement Act;
- Article 4 of the Agricultural Lands Act;
- Article 125 of the Housing Act;
- Articles 10, 12 of the Liquidation of Agrarian Reform Act;
- Article 67 of the Inheritance of Agricultural Lands Act;
- Article 7.b of the Slovene Compensation Fund Act;
- Articles 21, 26, 43 of the Constitutional Court Act.

Four concurring opinions of judges of the Constitutional Court.

Cross-references:

In stating the reasons for its decision, the Constitutional Court made reference to its decisions nos. U-I-140/94 of 8 January 1995 (OdlUS IV, 124), U-I-95/91 of 14 May 1992 (OdlUS I, 35), U-I-22/95 of 14 March 1996 (OdlUS V, 29), U-I-119/94 of 21 March 1996 (OdlUS V, 32), U-I-105/91 of 23 April 1992 (OdlUS I, 28), U-I-122/91 of 10 September 1992 (OdlUS I, 56), U-I-57/92 of 3 November 1994 (OdlUS III, 117), U-I-25/92 of 4 March 1993 (OdlUS II, 23), U-I-10/92 of 5 November 1992 (OdlUS I, 79), U-II-119/96 of 6 July 1996 (OdlUS V, 93).

For reasons of joint consideration and adjudication, the Constitutional Court decided by its resolution to attach to the case under consideration cases U-I-12/96, U-I-67/96, U-I-88/96, U-I-133/96, U-I-244/96, U-I-255/96, U-I-277/96.

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-96-3-015

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.09.1996 / **e)** CCT 15/96 / **f)** *Ex parte* Speaker of The Kwazulu-Natal Provincial Legislature: In re the Certification of the Constitution of the Province of KwaZulu-Natal, 1996 / **g)** 1996 (4) *South African Law Reports* 1098 (CC) / **h)** 1996 (11) *Butterworths Constitutional Law Reports* 1419 (CC).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Constitution.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
Institutions – Federalism and regionalism – Distribution of powers.
Fundamental Rights – General questions – Basic principles – Nature of the list of fundamental rights.

Keywords of the alphabetical index:

Constitution, provincial, certification / Provincial Constitution, compliance with national Constitution / Provincial Constitution, nature / Provincial powers, extent.

Headnotes:

A provincial constitution passed by a provincial legislature is of no force and effect unless the Constitutional Court has certified that it fulfils the requirements laid down in the national Constitution.

In this case, the constitution of the province of KwaZulu-Natal was not certified by the Court due to:

- fundamental flaws relating to the purported usurpation of national powers;
- provisions that certain clauses are of no force or effect if inconsistent with the national Constitution; and
- provisions suspending the operation of certain clauses.

Summary:

In terms of the Constitution of the Republic of South Africa, Act 200 of 1993, (the Interim Constitution – IC), any provincial legislature is entitled to adopt a constitution for its province. However, such a provincial constitution is of no force and effect unless the Constitutional Court has certified that it fulfils the requirements laid down in the IC. In terms of the IC, a provincial constitution may provide for legislative and executive structures and procedures different from those provided for in the IC and the province of KwaZulu-Natal must, if it passes a constitution, make provision for the Zulu Monarch. In no other respect can a constitution passed by a provincial legislature be inconsistent with any provision of the IC or the Constitutional Principles set out in Schedule 4 to the IC.

In this case, the Constitutional Court declined to certify the constitution of the province of KwaZulu-Natal (KZNC) for the reasons set out below:

- KwaZulu-Natal is not an independent state and has no original legislative or executive powers. The only legislative and executive powers that it has are those given to it by the Interim Constitution. The KZNC claimed to give powers to the KwaZulu-Natal legislature and executive above and beyond those allowed by the IC, and in doing so its provisions conflicted with the IC. The Court pointed to the following examples of provisions which attempted to usurp the powers of the National Government: those which enact that the province of KwaZulu-Natal is a self-governing province; which regulate the relationship between the province and the National Government; which provide for a constitutional court and which grant certain exclusive legislative powers to the province and confer on it executive powers.

- The Constitutional Court decided that a province was permitted to pass a bill of rights provided that it was limited to dealing with matters in respect whereof the province had legislative and executive power and that its provisions did not conflict with those of the bill of rights in the IC. The Court came to the conclusion, however, that certain of the provisions of the bill of rights in the KZNC fell outside the province's legislative or executive powers or were inconsistent with the provisions of the bill of rights in the IC. These included provisions relating to fair criminal trial rights; labour relations and declarations of states of emergency.

- The KZNC contained various devices aimed at eliminating or remedying the above defects. One such device was the suspension of certain provisions until a later date, or the happening of a future event, such

as the coming into operation of the new national constitution. Other provisions enacted that the defective clauses would only come into operation to the extent that they were not in conflict with provisions in the new national constitution when it came into effect. The Court held that all these devices were in conflict with the provisions of the IC and could not be used to remedy the defective provisions.

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 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC), *Bulletin* 96/1 [RSA-96-1-003];
Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), *Bulletin* 96/3 [RSA-96-3-016];
Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, *Bulletin* 96/3 [RSA-96-3-020].

Languages:

English.

Identification: RSA-96-3-016

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.09.1996 / **e)** CCT 23/96 / **f)** *Ex parte* Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 / **g)** 1996 (4) *South African Law Reports* 744 (CC) / **h)** 1996 (10) *Butterworths Constitutional Law Reports* 1253 (CC).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Constitution.
Sources of Constitutional Law – Categories – Written rules – Constitution.
Sources of Constitutional Law – Categories – Written rules – Quasi-constitutional enactments.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
Institutions – Courts – Jurisdiction.
Institutions – Federalism and regionalism – Distribution of powers.
Fundamental Rights – General questions – Basic principles – Nature of the list of fundamental rights.

Keywords of the alphabetical index:

Constitution, certification / Constitutional Principles, compliance.

Headnotes:

The Court declined to certify the Constitution of the Republic of South Africa 1996, because a number of its provisions do not comply with the Constitutional Principles contained in schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).

Summary:

The Constitutional Principles, a set of guidelines contained in the Interim Constitution (the current constitution), with which the proposed new constitution (NT) had to comply, were agreed upon by the erstwhile government of the Republic of South Africa, the liberation movements and other minority groups. The Constitutional Court acting as an independent arbiter, in terms of Section 71.2 of the Interim Constitution (IC), was called upon to ascertain and declare whether or not all the provisions of South Africa's proposed new constitution complied with the Constitutional Principles. After considering objections lodged by five political parties and 84 private objectors, the Court found that it could not certify that all the provisions of the NT complied with the Constitutional Principles. The Court held that the following provisions did not comply with the Constitutional Principles (CP):

- NT 23, failed to comply with the provisions of CP XXVIII in that the right of individual employers to engage in collective bargaining was not recognised and protected.

- NT 24.1, failed to comply with the provisions of CP IV and CP VII in that it impermissibly shielded an ordinary statute from constitutional review.

- NT sch 6s 22.1.b, failed to comply with the provisions of CP IV and CP VII in that it impermissibly shielded an ordinary statute from constitutional review.

- NT 74, failed to comply with CP XV in that amendments of the NT did not require "special procedures and special majorities"; and CP II in that the fundamental rights, freedoms and civil liberties protected in the NT were not "entrenched".

- NT 194, failed to comply with CP XXXIX in respect of the Public Protector and the Auditor-General in that it did not adequately provide for and safeguard the independence and impartiality of these institutions.

- NT 196, failed to comply with CP XXIX in that the independence and impartiality of the Public Service Commission was not adequately provided for and safeguarded; and CP XX in that the failure to specify the powers and functions of the Public Service Commission rendered it impossible to certify that legitimate provincial autonomy had been recognised and promoted.

- NT chapter 7, failed to comply with CP XXIV in that it did not provide a "framework for the structures" of Local Government; CP XXV in that it did not provide for appropriate fiscal powers and functions for Local Government; and CP X in that it did not provide for formal legislative procedures to be adhered to by legislatures at Local Government level.

- NT 229, failed to comply with CP XXV in that it did not provide for "appropriate fiscal powers and functions for different categories of local government".

- The provisions relating to the powers and functions of the provinces (to the extent set out in the judgment) failed to comply with CP XVIII.2 in that such powers and functions were substantially less than and inferior to the powers and functions of the provinces in the IC.

Supplementary information:

As a consequence of this decision the Constitutional Assembly had to amend the provisions of the NT and to submit the amended text to the Constitutional Court for certification.

Cross-references:

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, *Bulletin* 96/3 [RSA-96-3-020];
Ex Parte Speaker of The Kwazulu-Natal Provincial Legislature: In Re the Certification of the Constitution of the Province of KwaZulu-Natal, 1996, 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC), *Bulletin* 96/3 [RSA-96-3-015].

Languages:

English.

Identification: RSA-96-3-017

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.09.1996 / **e)** CCT 42/95 / **f)** Scagell and Others v Attorney-General of the Western Cape and others / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Scope.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Presumptions, constitutionality / Burden of proof / Gambling / Reasonable doubt.

Headnotes:

Statutory provisions which place a legal burden on an accused and which require innocent persons, against whom there is no evidence suggestive of criminal conduct, to defend themselves, unjustifiably violate an accused's right to a fair trial and are therefore unconstitutional.

Summary:

The applicants challenged the constitutionality of various provisions of the Gambling Act (the Act). Firstly, in terms of Section 6.4 of the Act an accused is presumed to have permitted the playing of a gambling game at a place over which he or she is in control or in charge, in circumstances where a member of the police force is wilfully prevented from, or obstructed or delayed in, entering the place. The Court held that this provision imposed a burden of proof on an accused which could result in

conviction despite the existence of a reasonable doubt as to the accused's guilt, and therefore the section infringed the right to be presumed innocent (Section 25.3.c of the interim Constitution – the Constitution). The Court further held that the section could not be justified in terms of the limitations clause (Section 33.1 of the Constitution) as its purpose did not outweigh the significant infringement of the right to a fair trial which it occasioned.

Second, in terms of Section 6.3 of the Act, if items, such as playing-cards or dice, used or capable of being used for playing any gambling game are found at a place or on a person at such place, this is *prima facie* evidence of a contravention of Section 6.1 of the Act. The Court held this section was an evidential burden which could result in requiring innocent persons, against whom there was no evidence suggestive of criminal conduct at all, to defend themselves. The Court held that Section 6.3 breached the right to a fair trial (Section 25.3 of the Constitution) and was not saved by the limitations clause since cogent reasons were not advanced as to why it was necessary for an evidential burden of such considerable scope to be employed and it was also not explained why the necessary evidence of the statutory offence could not be obtained through well-tried police methods. The Court rejected the argument that a portion of Section 6.3 could be severed from the provision on the ground it was not persuaded that severance would not give rise to a constitutional complaint noting the broad definitions given to "place" and "gambling" would remain.

Third, Section 6.5 of the Act provides that, where it is proved at the trial of an accused charged with contravening Section 6.1 of the Act, that any gambling game was played or intended to be played, it shall be presumed, until the contrary is proved, that the game was played or intended to be played for stakes. The Court found that this provision did not impose a burden of proof upon the accused because once it had been proved that a gambling game was played, it will have been proved that the game was played for stakes. The provision was thus held not to be unconstitutional.

Fourth, under Section 6.6 of the Act, any person supervising, directing, assisting or acting as banker, dealer, croupier or in like capacity, at the playing of a gambling game at any place and further, any person acting as porter, doorkeeper, servant or holding any other office at such place, shall be deemed to be in control or in charge of the place. The Court held that this provision defined who was in control or in charge of a place where a gambling game was held for the purposes of a conviction under Section 6.1 of the Act. As an element of the offence, it could not be attacked in terms of the presumption of innocence because it merely defined an element of the offence. In addition, the Court held that severance of the word "servant" was unnecessary to save the provision from constitutional invalidity.

Cross-references:

State v Zuma and Others (CCT 5/94) 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA); *Bulletin* 95/3 [RSA-95-3-001];
State v Bhulwana; 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 (3) BCLR 293 (CC) *Bulletin* 96/1 [RSA-96-1-001].

Languages:

English.

Identification: RSA-96-3-018

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.09.1996 / **e)** CCT 41/95 / **f)** Mohlomi v Minister of Defence / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Army and police forces – Army.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Defence Force, civil actions against / Time limit / Civil action, time limit.

Headnotes:

A section in the Defence Act which places a six month time limit on a plaintiff who wishes to bring a civil action against the State is an unjustifiable and unreasonable infringement of the right of access to court.

Summary:

This case involved a challenge to the constitutionality of a section of the Defence Act on the basis that it violated the rights to equality, property and access to court, contained in the interim Constitution (Sections 8, 28 and 22 respectively).

The impugned section provided that a civil action could not be instituted against the State if: (1) the action had not been instituted within six months from the date on which the cause of action arose and (2) the defendant had not been given notice in writing of the intended civil action, and the cause thereof, at least a month before the commencement of the action.

In a unanimous judgment delivered by Justice Didcott, the Court held that the section infringed the applicant's right of access to court, because it did not afford claimants an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. The Court referred to the background of conditions prevailing in South Africa, such as poverty, illiteracy, cultural and language differences, which rendered the legal system inaccessible to many.

The Court held further that the infringement of the right could not be justified in terms of the limitations clause of the constitution because it would be possible to satisfy the state's legitimate objectives through means which were less stringent and detrimental to the interests of claimants.

In light of its finding that the right of access to court had been unjustifiably and un-reasonably violated the court found it unnecessary to consider the applicant's assertion that the section also violated his rights to equality and property.

Languages:

English.

Identification: RSA-96-3-019

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.11.1996 / **e)** CCT 49/95 / **f)** JT Publishing (Proprietary) Limited and Another v Minister of Safety and Security and Others / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Referral by a court.
Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Constitutional Justice – Procedure – Parties – Interest.
Constitutional Justice – Effects – Scope.
Institutions – Courts – Jurisdiction.

Keywords of the alphabetical index:

Appeal, decision of Supreme Court / Jurisdiction of Supreme Court / Legislation, effect of repeal / Remedies, declaration of rights.

Headnotes:

The question of the constitutionality of impugned legislation which has been repealed and replaced is wholly academic. Therefore the declaration of invalidity sought should be refused as no advantage can be obtained from an order concerning the repealed legislation.

Summary:

The applicants, producers and distributors of pornographic material, appealed against the decision of the Supreme Court refusing to refer, to the Constitutional Court, the question of whether the Publications Act of 1974 and the Indecent or Obscene Photographic Matter Act of 1967, or sections thereof, infringed various provisions of the Interim Constitution. The applicants had sought a declaratory order after the repeated banning of their magazine and seizure of their merchandise. The Supreme Court had refused to refer the matter on the ground that the question that called for the Constitutional Court's consideration was the sole issue raised.

In a unanimous decision prepared by Justice Didcott, the Court upheld the appeal with costs. It rejected the finding of the Supreme Court that the referral was not competent. Having found that the applicants' request for a declaratory order should have been referred, the court turned to the merits. The Court decided that a declaratory order was a remedy which the court had a discretion to grant. It decided not to grant it in this case because the legislation challenged had been repealed and subsequently replaced by a new Films and Publications Act of 1996, which rendered the questions of constitutional validity sought to be determined wholly

academic. The Court noted that although the new Act was not yet in operation, it soon would be, and found that the applicants would obtain no advantage from an order dealing with the repealed legislation.

Cross-references:

Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) *Bulletin* 96/1 [RSA-96-1-006];
Brink v Kitshoff NO 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) *Bulletin* 96/1 [RSA-96-1-009].

Languages:

English.

Identification: RSA-96-3-020

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 04.12.1996 / **e)** CCT 37/96 / **f)** *Ex parte* Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Constitution.
Sources of Constitutional Law – Categories – Written rules – Constitution.
Sources of Constitutional Law – Categories – Written rules – Quasi-constitutional enactments.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
Institutions – Federalism and regionalism – Distribution of powers.
Fundamental Rights – General questions – Basic principles – Nature of the list of fundamental rights.

Keywords of the alphabetical index:

Constitution, certification / Constitutional Principles, compliance.

Headnotes:

The Court certified that the Amended Text of the constitution complies with the 34 Constitutional Principles contained in the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).

Summary:

In September 1996 the Constitutional Court ruled that the new constitutional text adopted by the Constitutional Assembly in May 1996 could not be certified because it failed to comply with the Constitutional Principles (CPs) set out in the interim Constitution (IC) *Bulletin* 96/3 [RSA-96-3-016]. The Constitutional Assembly then had to reconsider the text, taking the Court's reasons for non-certification into account.

Hence, the Constitutional Assembly reconvened and adopted an amended constitutional text (AT), which was then sent to the Constitutional Court for essentially the same certification exercise as before. Political parties, the general public and the Constitutional Assembly were again invited to make representations to the Court. Objectors were free to raise issues not raised before, or to submit that the Court had erred in some or other finding in the previous certification judgment. Objections to certification were received from two political parties, a provincial government and eighteen private individuals and interest groups.

The scope of the certification exercise, and consequently of the judgment, was much narrower than before. The court found that most of the grounds for non-certification of the earlier constitutional text had clearly been eliminated in the amended text and the judgment focused on the remaining areas of contention, namely:

a. the Bill of Rights
b. amendments to the Constitution
c. Local Government
d. transitional provisions
e. traditional monarch
f. intervention permitted by AT 100
g. Public Protector, Auditor-General and the Public Service Commission
h. compliance with CP XVIII.2

The Court considered four objections under a. First, the Court rejected the contention that the right to choose

a trade, occupation or profession is a universally accepted fundamental right that cannot be afforded to citizens only. Second, the Court rejected a submission that the amended text fails to recognise and protect collective rights of self-determination sufficiently. The institutional structures of the amended text, the protection of rights of association and the procedural provisions for their enforcement were held to be adequate. Third, the exclusion of certain rights from those which cannot be derogated from under a state of emergency did not constitute grounds for non-certification. Fourth, the Court rejected the contention that Section 203 of the amended text in effect provides for a declaration of martial law.

With respect to b the Court concluded that the provisions of the amended text dealing with special procedures and special majorities for amendments to the Constitution and for entrenchment of the Bill of Rights were adequate.

In the section on "Local Government" the Court dismissed objections to new features of the amended text, holding that it had remedied the shortcomings expressed in the Court's earlier finding that the NT failed to provide a framework for the structures of local government in accordance with CP XXIV.

The Court dismissed objections to two provisions of schedule 6 of the AT in the section headed "Transitional Provisions".

On the issue of the traditional monarch, the Court rejected an objection that the AT failed to afford protection to provisions in a provincial constitution relating to the institution, role, authority and status of the traditional monarch.

In the section dealing with "Intervention Permitted by AT 100" the Court held that there was no substance in the contention that Section 100.1.b of AT violated the principle of separation of powers and held that the provision for intervention by the national government in provincial government complies with CP XX1.2

The Court thereafter noted the enhancement of the independence of the Public Protector and Auditor-General in the AT and confirmed the adequacy of these amendments. The analysis focused on the AT provisions dealing with the Public Service Commission, which strengthen the protection of the Commission to an extent compatible with the demands of CP XXIX.

A substantial portion of the judgment is devoted to an assessment of the extent to which the AT complies with the requirements of CP XVIII.2, which requires that the powers and functions of the provinces in the AT should not be substantially less than or substantially inferior to their powers and functions in the IC. The Court concluded that although the powers and functions of the provinces under the AT are still less than or inferior to those accorded by the IC, the disparity is not substantial.

Supplementary information:

The AT was signed by the President of South Africa on 10 December 1996.

Cross-references:

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) *Bulletin* 96/3 [RSA-96-3-016)];
Ex Parte Speaker of The Kwazulu-Natal Provincial Legislature: In Re the Certification of the Constitution of the Province of KwaZulu-Natal, 1996, 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC) *Bulletin* 96/3 [RSA-96-3-015].

Languages:

English.

Spain
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Type and number of decisions:

- Judgments: 77
- Decisions: 150
- Procedural decisions: 1358

Cases submitted: 1453

Important decisions

Identification: ESP-96-3-025

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.10.1996 / **e)** 157/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 267 of 05.11.1996, 43-48 / **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 – Freedom of expression.

Keywords of the alphabetical index:

Lawyer, freedom of expression.

Headnotes:

Short of abusive language and insulting behaviour, lawyers' freedom of expression while conducting the defence of their clients must be upheld by the Constitutional Court wherever they use this freedom to voice assertions and value-judgments in support of the submissions made to ensure that the judicial authorities safeguard the citizens' enjoyment of their lawful rights and interests. This is especially true when the case concerns a fundamental right deemed to have been infringed, as in the present appeal which the Court decided to allow.

Summary:

In an appeal lodged by the appellant, a lawyer, against an arrest warrant issued by the investigating judge responsible for the preliminary measures taken against the lawyer's client, the judge directed the lawyer to specify what type of appeal she had lodged and to confirm the expressions used in her notice of appeal, warning her that such expressions could constitute unlawful conduct under criminal law. Subsequently, the court in question fined the lawyer for using "disrespectful" expressions in the aforementioned notice. The lawyer thereupon challenged the decision to fine her before the appropriate High Court of Justice, which ruled that the only expressions warranting a sanction concerned an alleged practice in that judicial district of systematically assigning certain types of case to the same court. In the light of this qualificatory ruling, the lower court decided to reduce the amount of the fine imposed on the lawyer. She then introduced the present appeal for constitutional protection against the two earlier court rulings, complaining that they infringed several fundamental rights (right to be tried with all the proper guarantees, principle of equality, prohibition of *reformatio in pejus* and presumption of innocence), including the fundamental right to freedom of expression enjoyed by all lawyers in defending their clients.

After rejecting the first contentions, the Constitutional Court adverted to the last-mentioned right in order to determine whether it had been infringed. The Court prefaced its decision on this question with a recital of the main rights and duties of the legal profession embodying (Article 473.1 of the Judiciary Act) a proclamation of freedom of expression, defined as an essential and indispensable aspect of the function of defence recognised in Article 24.1 of the Constitution and implying the right to a freely pleaded defence. Consequently, lawyers' freedom of expression in their practice must be perceived as a particularly determinate case of this fundamental freedom, one in which, so to speak, freedom of expression is reinforced by its immediate relationship with the effective exercise of another fundamental right.

Concerning the reasoning of the High Court ruling that the protection applying to the exercise of the rights of the defence did not generally licence the aforementioned assessments for the purposes of other court proceedings, the Constitutional Court held that in the case in point the lawyer, when engaged in defending her client's freedom, was entitled to make assertions such as those stated concerning other irregularities of the same type, in so far as they might have bearing on the client's defence.

Languages:

Spanish.

Identification: ESP-96-3-026

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 28.10.1996 / **e)** 166/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 291 of 03.12.1996, 14-19 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Freedom of conscience.
Fundamental Rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Private clinic, reimbursement / Jehovah's Witnesses / Treatment, choice.

Headnotes:

A person registered with social security cannot invoke the religious freedom of the patient to demand surgery without on any account receiving a blood transfusion, in so far as a decision of this kind is subject to the *lex artis* of the medical profession.

Summary:

The facts underlying this appeal are as follows. The appellant, belonging to the religious congregation "Christian Jehovah's Witnesses" and registered with social security, was admitted to a hospital coming under the public health service, where he had surgery for a duodenal ulcer. After the operation it proved necessary to give the patient a blood transfusion, for which purpose the doctors requested a court order in the knowledge that the appellant refused to undergo such treatment because of his religious convictions. On his subsequent readmission to hospital, the patient was informed that he must submit to a further blood transfusion. The patient objected to this treatment and demanded his certificate of voluntary release from hospital, which was granted. He then entered a private clinic where he underwent surgery performed at his explicit request without a blood transfusion. A few months later, the appellant claimed reimbursement of the medical expenses paid following his admission to the private clinic. The claim was dismissed by various court rulings delivered at first and last (but not second) instance. The present appeal for constitutional protection challenged the last of the aforementioned court rulings (Supreme Court judgment). The appellant complained of violation of the rights secured by Articles 16.1 and 14 of the Constitution (freedom of religion and principle of equality).

The Constitutional Court's finding as to the first of the rights allegedly violated was that only medical practitioners could instruct the social security authorities to refrain from applying a given remedy (blood transfusion) in so far as its application was subject to the *lex artis*, considering that reasons unrelated to medicine, however creditable, could in no circumstances obstruct or restrict the technical requirements of medical practice. The Constitutional Court therefore held that the doctors' refusal to prescribe the medical treatment specifically requested by the patient was not comparable to the cases of mistaken diagnosis or unjustified denial of assistance which constitute the sole exceptions to the rule (Article 17 of the General Health Act) according to which costs incurred for using services other than those provided are not reimbursed. The Constitutional Court held that the duty of the State to ensure the genuine and effective operation of the right to freedom of religion (Article 16.3 of the Constitution) did not entail any obligation to provide services of another kind for adherents of a given faith so that they might fulfil the requirements of religious observance.

As to the appellant's second contention (principle of equality in the application of the law), the Constitutional Court held that the precedent invoked was inapplicable to the present case because the conditions defined in several earlier pronouncements of the Court were not fulfilled. The conditions were that the impugned decisions must have been given by the same judicial body, there must be a valid basis for comparison (decisions in substantially similar cases), and there must be no cause to alter the criterion; plainly the case disclosed no such circumstances.

The Court therefore dismissed the application for constitutional protection.

Supplementary information:

One judge gave a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-96-3-027

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 29.10.1996 / **e)** 170/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 291 of 03.12.1996, 33-37 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Proportionality.
General Principles – Reasonableness.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental Rights – Civil and political rights – Confidentiality of correspondence.
Fundamental Rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Prison administration / Communications, secrecy.

Headnotes:

Any measure taken to restrict a prisoner's fundamental rights – in this case, interception of communications with the outside world – without a sufficient cause demonstrating that the measure is proportionate and reasonable, infringes the fundamental right in question.

Summary:

This appeal for constitutional protection lodged by a prison inmate challenged a decision by the disciplinary and administrative board of the prison, ordering interception of the prisoner's verbal and written communications as a disciplinary sanction. The appeal also challenged successive judgments of the court responsible for execution of sentences upholding the previous administrative decision, and a decision by the Court of Appeal declaring inadmissible the notice of appeal against the aforementioned decisions. The appellant principally alleged a violation of the right to secrecy of communications recognised in Article 18.3 of the Constitution.

The Constitutional Court firstly recalled in its judgment that the legal relationship established between prisoners and the prison administration was governed by special rules which must be regarded in limitative terms as compatible with the superior value given to fundamental rights. Even so, it held that neither the trial court's conviction and sentence, nor the grounding thereof, nor even the legislation on prison conditions could normally suspend the right to secrecy of communications while serving a custodial sentence, notwithstanding that the general organic law on prisons restricted the exercise of this right owing to the peculiarities of the aforementioned relationship. Article 51 of the organic law does not recognise any restriction of this fundamental right as lawful unless the reasons warranting the adoption of such a measure at any time continue to obtain. This provision treats the interception of communications as an exceptional measure. Suspension of the right must therefore be of the extent strictly necessary to attain the ends which justify it. In order to fulfil this condition, the Constitutional Court held that the reasons for adopting such a measure must be set out in the statement of the grounds for the disciplinary decision.

Next, the Constitutional Court adverted to the fact that its function was not to ascertain the existence or non-existence of the actual circumstances warranting interception of communications. However, in the case of a measure restricting rights it did have jurisdiction to verify the grounds stated, not only to ascertain the proper foundation or reasoning of the decision but also to test the reasonableness and proportionality of the restriction, its compatibility with the aims of the institution and its consistency with the outcome of a court procedure establishing the relative weight of the fundamental rights at issue. In fact it emerged, according to the Constitutional Court, that apart from placing the inmate in the category of prisoners subject to the third-degree prison regime and listed in the file of prisoners requiring special surveillance, the disciplinary decision disclosed no other circumstance which might warrant the sanction imposed (eg justified suspicion of a fresh escape relying on contacts with the outside world), except for a reference to the various escape attempts recorded in the prisoner's file. The Court therefore granted the appellant its protection.

Supplementary information:

One judge gave a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-96-3-028

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 12.11.1996 / **e)** 179/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 303 of 17.12.1996, 27-34 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.
Institutions – Executive bodies – Sectoral decentralisation – Universities.
Fundamental Rights – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

University education, organisation.

Headnotes:

The right of universities to autonomy (Article 27.10 of the Constitution) secures an area of freedom for organising university courses and countering outside interference. Freedom of instruction (Article 20.1 of the Constitution), in the form of the teacher's individual freedom, is a ramification of freedom of opinion and the right freely to disseminate thoughts, ideas and opinions which all teachers assume as personal rights in relation to the subject-matter taught, to which they are therefore entitled to impart an essentially, though not exclusively, negative content.

Summary:

This judgment of the Constitutional Court decided the appeals for constitutional protection lodged by a university and by one of its professors following a university department's decision to introduce a common system of student assessment and qualification and to assign a specific teaching subject to that professor; the first resolution on assessment had been set aside by judicial procedure.

The appellant university submitted that the judicial ruling placed a broad construction on the right to freedom of instruction (Article 20.1.c of the Constitution) in acknowledging the appellant professor's right to set an examination of his own choice for his students, which the university considered contrary to its autonomy (Article 20.1.c of the Constitution). The university contended that options regarding student assessment did not form part of the freedom of instruction secured to teachers. The professor for his part considered that the impugned ruling interfered with this right where he was concerned by declaring lawful the university department's decision to assign him a specific teaching subject in full awareness that it was outside his range of knowledge.

The Constitutional Court dismissed the appeal for constitutional protection lodged by the university considering that, contrary to its contention, the impugned ruling was not founded on the notion that freedom of instruction gave all teachers the right to set an examination of their own choice for their students, but rather on a very definite circumstance, namely that the university department's decision to introduce a common assessment system was made without good cause in the specific case of the subject to be taught by the appellant professor.

The Constitutional Court also dismissed the appeal for constitutional protection lodged by the professor, as it held that the subject which he was required to teach did in fact come within his range of knowledge. In so doing, the Court emphasised that control over the organisation of courses must rest with the universities by operation of their autonomy, it being understood that freedom of instruction could not possibly be equated with a right which someone enjoying that freedom might have to regulate every aspect of the teaching function personally, to the exclusion and quite irrespective of the organisational criteria applied by the administration of the university centre. However, while it was true that freedom of instruction in no way secured a putative right of teachers to choose one specific subject from among those relating to a given field of knowledge, and that organisation of courses was a matter for the university departments, the fact remained that freedom of instruction could be violated in certain cases through arbitrary decisions which compelled teaching staff with full teaching and research capacity to teach subjects other than those corresponding to their level of training.

Languages:

Spanish.

Identification: ESP-96-3-029

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 12.11.1996 / **e)** 180/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 303 of 17.12.1996, 34-38 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.
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 – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Administrative procedure, appeal / Undue delay, compensation.

Headnotes:

In the same way as Article 14.3.c of the International Covenant on Civil and Political Rights of 19 December 1966 and Article 6.1 ECHR of 4 November 1950, Article 24.2 of the Constitution recognises the fundamental right to a trial without undue delay.

Contravention of procedural time limits do not always constitute an infringement of the aforementioned fundamental right. Indeed, the concept of undue delay is an indeterminate or open concept on which a precise construction must be placed in each case according to the circumstances seen in the light of objective and subjective criteria that concord with the general terms of the concept, such as the complexity of the case, the time ordinarily required for that class of litigation, its importance to the parties, and the conduct of the parties and of the authorities during the proceedings.

Summary:

This appeal for constitutional protection alleges violation of the appellant's right to a trial without undue delay (Article 24.2 of the Constitution), after a delay ascribable to a judicial body which occurred in court appeal proceedings on an administrative dispute. According to the appellant, the violation of the aforementioned right was due to the time which had elapsed between the date of his appearance before the judicial authority – 15 May 1992 – after giving an address for service on 13 April 1993, and the date on which the appeal for constitutional protection was lodged – 17 November 1994 – when he had still not received any news concerning the position of the appeal proceedings at issue; these were at a standstill and the period of judicial inaction had prevented enforcement of the decision granting his claims which had been delivered at first instance.

As a preliminary consideration, the Constitutional Court held that the possible delivery of the administrative appeal judgment after the lodging of the appeal for constitutional protection would by no means render the constitutional appeal void. Therefore it was appropriate to determine whether, at the time the constitutional appeal was lodged, there existed a violation of the right invoked, it being understood that the tardy settlement of the administrative appeal would make no difference to the presumed violation of the right to a hearing without undue delay.

In this respect, the Constitutional Court emphasised that the right in question was infringed not only when the time taken to give final ruling in a case exceeded what was reasonable, but also when the proceedings were virtually halted because inordinate and unjustified protraction effectively disrupted their normal course. This was so whether or not the delay arose from structural deficiencies in the organisation of the courts, it being inappropriate to restrict the scope and substance of this right in view of the essential role performed by proper and effective administration of justice in any democratic society. Consequently, it was fitting to demand that judges and courts should perform their judicial function so as to guarantee freedom, justice and security with all the celerity permitted by the normal duration of proceedings, hence the need to provide the judicial bodies with the necessary staff and facilities.

In the case before it, the Constitutional Court held that the right to a trial without undue delay had been infringed in that the procedure where the delay occurred had been brought to a standstill at a stage where the action required was not at all complex as it involved pure formalities, and the relevant judicial authority could have decided the appeal promptly because it was quite plainly inadmissible. Furthermore, the delay could on no account be ascribed to the appellant because without doubt the entire responsibility lay with the judicial authority for having failed to observe the normal time limits in this class of litigation.

Lastly, considering that the lapse of the proceedings precluded *restitutio in integrum* of the fundamental right violated, the Constitutional Court recognised the right of the appellant to receive the appropriate compensation, to be borne if necessary by the state authorities.

Languages:

Spanish.

Identification: ESP-96-3-030

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 16.12.1996 / **e)** 207/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 19 of 22.01.1997, 12-21 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Proportionality.
General Principles – Reasonableness.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Right to physical integrity.
Fundamental Rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Right to personal privacy / Physical interventions.

Headnotes:

The recognition of the right to physical and moral integrity (Article 15 of the Constitution) safeguards the inviolability of the person not only against assault with intent to commit bodily or mental harm but also against any form of physical or mental interference without the person's consent.

The right to personal privacy secured by Article 18.1 of the Constitution has a far wider substantive scope than the right to bodily privacy, and presupposes the existence of a sphere which is strictly individual, preserved from the action and knowledge of others, and moreover necessary according to the norms of our culture for maintaining a minimum standard of quality of life.

Summary:

This appeal for constitutional protection was lodged against a court order for an investigative measure involving physical intervention and analysis of the appellant's hair to establish whether he had consumed cocaine or other toxic or narcotic substances and if so, for how long. For this purpose, the appellant was expected to let a forensic medical expert remove hair from several regions of the head together with all the hair of the armpits, and could not object without criminally resisting the judicial authority. This measure related to the investigation of a case involving suspected offences against public health regulations in which the appellant faced various charges of corruption and abuse of office for having abetted persons implicated in a drug trafficking affair, supposedly in return for a share of the drugs.

The Constitutional Court began by determining whether or not the measure in question lay within the protected constitutional sphere of the right to physical integrity (Article 15 of the Constitution) and the right to personal privacy (Article 18 of the Constitution). In the circumstances, the Court's judgment stressed that the measures which could be ordered in the course of criminal proceedings, such as searches or taking of evidence on the person of the accused or of third parties, fell into two categories with reference to the fundamental right principally affected. The first category comprised procedures defined as body inspections and searches, i.e. all manner of procedures involving scrutiny of the human body either to identify the accused (measures of identification, fingerprinting, anthropometry, etc.), or to establish circumstances relating to the commission of a punishable offence (electrocardiograms, gynaecological examinations, etc.), or to find the *corpus delicti* (anal or vaginal inspections, etc.), which might infringe the right to personal privacy (Article 18.1 of the Constitution). The second category of measures defined as physical interventions, comprised extraction from the body of certain internal or external substances for the purpose of subjecting them to expert examination (blood sampling, urine analysis, removal of hair and nails, biopsies, etc.) or exposing them to radiation (X-ray, tomography, magnetic resonance, etc.) in order to establish certain circumstances relating to the commission of a punishable offence or to the accused's implication in it, measures generally coming within the ambit of the right to physical integrity (Article 15 of the Constitution).

In accordance with its practice, the Constitutional Court held that the area of constitutional protection secured by the fundamental right of physical integrity was relevant to the intervention and analysis stipulated by the impugned court order, if only of superficial relevance, in so far as this right could be infringed without necessarily endangering or damaging the subject's health. As a result, the aforesaid order also related to the area of constitutional protection secured by the right of personal privacy, considering that an examination ordered with so much material and temporal latitude constituted an

intrusion into the private sphere, though indubitably the consumption of a certain kind of drug at a given time lay within that sphere.

The Constitutional Court next determined whether the infringement of these fundamental rights by the impugned measure had an objective and reasonable constitutional justification. In that respect, the Court referred to its doctrine of proportionality, in particular the requirements for ensuring proportionality: a) the measure restricting the fundamental right must be prescribed by law; b) the measure must be adopted under the terms of a reasoned court decision; c) the measure must be appropriate, necessary and proportional to a rightful constitutional aim. The Constitutional Court further specified the conditions of permissible interference with the right to physical integrity: the measure must be carried out by medical or health personnel, must pose no danger to health and must not involve inhuman or degrading treatment.

In the present case, the Constitutional Court held that the physical intervention restricting the rights of physical integrity and personal privacy infringed those rights owing to lack of statutory justification and breach of a requirement of constitutional law, ie the proportionality of sacrifices which must attend the adoption of measures restricting fundamental rights. In this case, the measure was really not at all indispensable for the purpose of substantiating that the unlawful acts under investigation had indeed occurred or that they had been committed by the person charged. Lastly, the Constitutional Court held that there was considerable disproportion between the impact of the measure ordered and the expected results.

Languages:

Spanish.

Identification: ESP-96-3-031

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 19.12.1996 / **e)** 212/1996 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 19 of 22.01.1997, 32-43 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
Fundamental Rights – General questions – Entitlement to rights – Natural persons.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Right to life, substantive nucleus / Human embryos and foetuses, donation and use / Organic law, reservation.

Headnotes:

Under Article 15 of the Constitution the right of every human being to life is acknowledged as a fundamental right possessed by every born individual, although this does not suffice to extend possession to the unborn. The life of an unborn individual does not in fact constitute a fundamental right as such but rather a legal interest which receives constitutional protection as part of the prescriptive content of Article 15 of the Constitution. For that reason it is inappropriate to invoke a prescriptive guarantee, in the present instance that of the essential substance, which under the Constitution is applicable precisely to the rights and freedoms secured by Chapter II of Title I of the Constitution.

Summary:

This judgment decided the constitutional appeal lodged by a group of members of parliament against Act 42/1988 of 28 December regulating the donation and use of human embryos and foetuses or their cells, tissues or organs. Among other complaints, the appellants considered this statute contrary to the protection of human life enforceable under Article 15 of the Constitution and to the principle acknowledged in Article 81.1 of the Constitution that only laws for the development of fundamental rights and civil liberties, in this case the right to life, are organic laws.

Firstly, the Constitutional Court stressed that the impugned statute was intended to regulate the donation and use of human embryos and foetuses or of their cells, tissues or organs for diagnostic, therapeutic or research purposes and to prevent manipulation and trafficking while permitting scientific research, and moreover in a manner ensuring respect for human dignity. Next, the

Court recalled the constitutional doctrine deriving from judgment 53/1985, to the effect that while all born individuals are indeed possessed of the right to life, without this being a sufficient ground for extending possession to the unborn, the fact nevertheless remains that the life of the unborn is a legal interest enjoying constitutional protection under Article 15 of the Constitution, which protection implies two general obligations for the State authorities: to refrain from interrupting or impeding the natural process of gestation, and institute a legal system to preserve life which presupposes its effective protection and, considering the essential character of life, also comprises criminal law provisions as an ultimate safeguard. In the final analysis, Article 15 of the Constitution creates the obligation referred to as the duty of protection by the State and therefore by the legislator, a duty extending to the unborn in the present case.

The Court followed the above interpretation and concluded that the right to life was not violated by the impugned statute because this was based on a situation where by definition human embryos and foetuses could not be assigned the status of unborn individuals within the meaning of the expression "unviable" human embryos or foetuses, i.e. never to be born in the sense of never being able to lead lives of their own in complete independence from the mother. Consequently, according to this judgment the Act acknowledges the reality of the existence of human embryos and foetuses, whether dead or unviable and usable for diagnostic, therapeutic, research or experimental purposes, and in any case purports to deal with this reality in a manner ensuring respect for human dignity. The occasional references to viable human foetuses are all intended to protect the viability of these foetuses, that is to guard against or to avoid hampering this viability.

In addition, the Constitutional Count held that there was no breach of the constitutional principle acknowledged in Article 81.1 of the Constitution (the reservation relating to organic laws) in that the necessarily strict interpretation of the principle made it impossible to exceed the natural ambit of the fundamental right, in this case the fundamental right of every person to life, and for other requirements embodied in Section 1, Chapter II, Title I of the Constitution to be placed on the legislator in respect of the constitutionally secured legal interest of the life of the unborn.

Supplementary information:

One judge expressed a dissenting opinion against this judgment.

Cross-References:

Constitutional Court judgment 53/1985 of 11 April.

Languages:

Spanish.

Sweden
Supreme Court
Supreme Administrative Court

Statistical data
1 September 1996 – 31 December 1996

Number of decisions taken: 1

Important decisions

Identification: SWE-96-3-003

a) Sweden / **b)** Supreme Court / **c)** / **d)** 13.06.1996 / **e)** 118/96 / **f)** / **g)** *Nytt Juridiskt Arkiv* (Official Digest of the Supreme Court), 1996, 370 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions.
Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Transfer of powers to international institutions.

Keywords of the alphabetical index:

Border river / Fishing rights / Incompatibility with superior law, manifest.

Headnotes:

According to Chapter 10 Article 5 of the Swedish Constitution Act, transfer of powers to international bodies must, with some exceptions, be decided upon by Parliament.

Summary:

The Swedish-Finnish Commission on Border Rivers was created by a treaty between Sweden and Finland in 1971. In Sweden, this treaty has been approved by the Parliament and has the validity of a Law.

In 1987 the Swedish Government delegated to the Commission the power to decide on limitations of the right to fish with stationary fishing-tackle in Torne River, which is a border-river between Sweden and Finland. The Commission decided that during certain periods the use of stationary fishing-tackle in Torne River should be forbidden. This decision was transformed into Swedish Governmental statutes, the violation of which was punishable.

A Swedish landowner was prosecuted for having fished in the river with stationary fishing-tackle during a period when such fishing was forbidden. The Supreme Court held that transfer of the power to forbid stationary fishing-tackle had not been decided by Parliament.

According to Chapter II, Article 14 of the Swedish Constitution, a provision adopted by Parliament or by the Government may be set aside by a court or any other public organ if there is a conflict with a provision of the Constitution or with a provision of any other superior statute and the inaccuracy is obvious and apparent. The Supreme court held that, in this case, there was such an inaccuracy. Thus, the landowner could not be punished.

Languages:

Swedish.

Switzerland
Federal Court

Important decisions

Identification: SUI-96-3-008

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 10.04.1996 / **e)** 1P.111/1996 / **f)** L., Ms M. and Mr D. v X. and the Higher Section of the Youth Court of the canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 109 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Parties – *Locus standi.*
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 – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Lawyer / Discrimination / Right to a hearing / Right to consult a case-file / Profession.

Headnotes:

Discrimination against a lawyer practising in another canton: refusal to send a case-file on criminal proceedings to defence counsel's chambers.

Locus standi of lawyer, the juvenile defendant and the latter's legal representative (recital 1b).

Is sending a case-file to appointed counsel an essential means of access to the file, which is in principle guaranteed under Article 4 of the Constitution (recital 2)?

The impugned decision involved unacceptable discrimination in respect of the right to a fair trial; this being the case, it breached in particular Article 6.3.b ECHR, taken together with Article 4 ECHR, Article 14.1 UN Covenant II, Article 14.3.b UN Covenant II, taken together with Article 2.1 UN Covenant II (recitals 3a – c) and, in the specific circumstances of the instant case, Article 4 of the Constitution (recital 3d).

Scope of the agreement on judicial co-operation and intercantonal co-operation in criminal matters; right not to be discriminated against in respect of procedure guaranteed by Article 60 of the Constitution (recital 3e).

The impugned decision also infringed the lawyer's rights under Article 31 of the Constitution (freedom of trade and industry) and Article 5 of the transitional provisions of the Constitution (right to practise a profession throughout the Confederation) (recital 4).

Summary:

Criminal proceedings were pending in the Youth Court of the canton of Vaud against L., who was represented by Mr D., a Neuchâtel lawyer permitted to practise in the canton of Vaud.

Mr D. asked the President of the Youth Court to transmit the case-file for consultation. His request was turned down on the ground that, although it was permissible for the Vaud court to communicate a case-file to a lawyer for a number of days, this did not give rise to any right for counsel, and it was not possible to envisage sending a file outside the canton. To avoid Mr D.'s having to travel to Lausanne, he was allowed to consult the case-file in the chambers of the investigating judge in Yverdon, a town closer to Neuchâtel.

Mr D. appealed against that decision, on his own behalf and on behalf of L. and Ms M., L.'s legal representative, in the Higher Section of the Youth Court, which dismissed the appeal. The appellants then lodged a public-law appeal with the Federal Court, which allowed that appeal and set aside the impugned decision.

The Federal Court recognised the *locus standi* of a lawyer pleading an infringement of freedom of trade and industry and a breach of the right to carry on a profession throughout the Confederation; it also recognised the *locus standi* of a minor who, as a defendant in criminal proceedings, could rely on Articles 6 and 14 ECHR and 14 UN Covenant II and, lastly, of a minor's legal representative whose procedural rights were infringed.

It left open the question whether sending the documents in a case-file to a lawyer was an essential means of access to the file, which was guaranteed under Article 4 of the Constitution.

It found that the measure appealed against contravened the agreement on judicial co-operation and intercantonal co-operation in criminal matters. Furthermore, in view of the provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights which guaranteed the time and facilities needed to prepare a defence, the Vaud authorities' practice was, in the case under consideration, clearly disproportionate and discriminatory. The measure moreover ran counter to freedom of trade and industry and breached Article 5 of the transitional provisions of the Constitution, since the profession of lawyer was a private gainful occupation and its free practice was guaranteed throughout the Confederation, notwithstanding the cantons' power to lay down rules governing access to that profession.

Languages:

French.

Identification: SUI-96-3-009

a) Switzerland / **b)** Federal Court / **c)** Second public law Chamber / **d)** 12.07.1996 / **e)** 2P.202/1995 / **f)** Adir Cumali and others v. the State Council of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 222 / **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 – Entitlement to rights – Foreigners.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Right to information.
Fundamental Rights – Civil and political rights – Confidentiality of correspondence.

Keywords of the alphabetical index:

Administrative custody / Custody, arrangements.

Headnotes:

Rules governing custody of foreigners subject to detention measures; personal liberty and freedom of expression; review *in abstracto* of a Prisons Order.

Provisions which remain unchanged when parts of an order issued by the cantonal authorities are revised may also be challenged (recital 1b).

Minimum requirements of federal law concerning administrative custody arrangements (recital 2).

Constitutional review of cantonal instructions on arrangements in respect of exercise (recital 4), visits (recitals 5 and 8), correspondence (recital 6b), printed matter (recital 6c) and work (recital 7).

Summary:

The reform of the federal law on residence and settlement of foreigners, which came into force in 1995, made it possible in various circumstances to order that a foreigner be held in custody so that a procedure of return to the country of origin could be implemented or a return or eviction order could be enforced. Responsibility for applying the new rules and putting this new form of custody into effect lay with the cantons. This being the case, the State Council of the canton of Zurich amended its Prisons Order and declared it applicable to detainees against whom an expulsion measure had been taken.

Three foreigners living in Switzerland filed a public-law appeal with the Federal Court seeking the annulment of certain provisions of the Prisons Order. They criticised, *inter alia*, the provisions on exercise, visits, inspection of mail and prisoners' possibility to work. The Federal Court partly allowed the appeal and annulled a number of the impugned provisions.

The appellants could challenge both the new and the old provisions of the Prisons Order which were applicable to custody of foreigners subject to detention measures.

The Federal Court considered whether the impugned rules were consistent with the federal law on residence and settlement of foreigners and with constitutional rights such as personal liberty and freedom of expression. It also examined the matter from the point of view of the guarantees of the European Convention on Human Rights and the International Covenant on Civil and Political

Rights. Lastly, it took into consideration the international rules on the treatment of prisoners.

In the light of those rules, the Federal Court required in particular that detainees be allowed to exercise in the open air for one hour a day, that visits should be supervised only in cases of grave suspicion or for purposes of safety, and that there should be no general ban on correspondence between detainees. Lastly, it held that the fact that work was provided only from the second week in custody did not breach federal law.

Languages:

German.

Identification: SUI-96-3-010

a) Switzerland / **b)** Federal Court / **c)** Second public law Chamber / **d)** 15.07.1996 / **e)** 2P.179/1996 / **f)** Jorane Althaus v. the municipality of Mörigen and the public education authority of the canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 236 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Unwritten rules.
General Principles – Territorial principles.
General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Linguistic freedom.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Public education / Language, school / School, choice.

Headnotes:

Linguistic freedom, attendance at a French-speaking school by children living in a German-speaking municipality.

Link between linguistic freedom and the principle of territoriality on the basis of Article 116 of the Constitution, in the version in force from 10 March 1996. Linguistic freedom did not make it binding on municipalities to provide newcomers belonging to linguistic minorities with schooling in their mother tongue (recital 2).

Under constitutional law and Bernese cantonal law a child whose mother tongue is French but who lives in a German-speaking municipality has no entitlement to a (free) education in French (recital 3).

In so far as another municipality is willing to accept the child in a French-language school and the parents bear the resulting costs, requiring a child to attend a German-language school amounts to a disproportionate restriction of linguistic freedom (recital 4).

Summary:

Jorane Althaus, who was born in 1988, lives with her parents in the German-speaking municipality of Mörigen in the canton of Bern. The family speaks French at home, but the little girl attended a German-speaking municipal nursery school.

In autumn 1995 she began her first year of primary education in a French-speaking school in the municipality of Biel (canton of Bern). Her parents sought permission to leave their daughter in this school and undertook to bear the cost. The Mörigen municipal authorities refused such permission and ordered that she be returned to the German-speaking municipal school. This decision was upheld on appeal by the cantonal public education authority.

Jorane Althaus lodged a public-law appeal with the Federal Court, alleging, *inter alia*, an infringement of her linguistic freedom. The Federal Court allowed the appeal and set aside the impugned decision.

Linguistic freedom, which was an unwritten constitutional right, guaranteed individuals' right to use their mother tongue. The principle of territoriality, which preserved language distribution and linguistic homogeneity, was derived from the constitutional provision (new and old versions). The two principles sometimes conflicted with each other.

Neither the constitutional provision nor cantonal law made it binding on a municipality to provide schooling in a language other than that traditionally spoken on its territory. However, this did not mean that a child of another mother tongue absolutely must attend school in the municipality where he or she lived.

In assessing the disputed state of affairs, the Federal Court noted that a child was entitled to attend a private school, that in the case under consideration the costs were being borne by the parents and that the child had been accepted by a French-speaking school in another municipality. In view of those circumstances, an obligation to attend the municipal German-speaking school was clearly disproportionate and infringed the appellant's linguistic freedom.

Languages:

German.

Identification: SUI-96-3-011

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 27.09.1996 / **e)** 1P.176/1996 / **f)** Hoirie Marcuard v. Yvonne Hausammann, municipality of Muri, Directorate of Justice, Municipal Affairs and Church Affairs, and Administrative Court of the canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 294 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Institutions – Courts – Administrative courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Scope.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Civil right, failure to classify / Land-use plan.

Headnotes:

Article 6.1 ECHR; determination of "civil rights" in drawing up a land-use plan.

The question whether it is mandatory when drawing up a land-use plan to classify certain areas as building zones constitutes a dispute over determination of civil rights and obligations within the meaning of Article 6.1 ECHR (recital 3e). The Bern Administrative Court had an obligation to consider an appeal against a refusal to classify (recital 4).

Summary:

The heirs to the Marcuard estate owned 60,000 m^2 of real property in the municipality of Muri (canton of Bern). Under the municipal zoning plan of 1973 the land in question was included in a low-density building zone with effect from 1987. In 1990 the municipality revised its zoning plan. In a 1993 referendum the population voted in favour of a partial revision of that plan, whereby part of the land in question was included in a building zone subject to extremely strict conditions.

The cantonal Municipal and Regional Planning Office ratified this result, while dismissing an objection by Ms Hausammann, the owner of a plot of land next to the area in issue. On an appeal from Ms Hausammann, the relevant municipal authority refused to approve the new zoning plan on nature conservation grounds, which ruled out any building on the plot in question.

The heirs to the Marcuard estate did not accept this decision and appealed to the cantonal Administrative Court, which declined jurisdiction on the ground that the matter did not come within the scope of Article 6.1 ECHR. It based its reasoning on a provision of cantonal administrative procedure whereby in regional planning matters it was competent solely in disputes coming within the ambit of Article 6.1 ECHR.

The heirs to the Marcuard estate then lodged a public-law appeal with the Federal Court, seeking to have the Administrative Court's decision set aside and to have it examine the facts of the case.

The Federal Court allowed the public-law appeal and annulled the impugned decision. In the case under consideration the issue was whether the Marcuard heirs' land should have been included in the building zone and whether the refusal to classify it amounted to a physical expropriation. Such a dispute concerned determination of a civil right and therefore came within the scope of Article 6.1 ECHR. This decision was in line with the case-law of the Strasbourg institutions, although the European Court of Human Rights had so far only been asked to rule in cases where restrictions of owners' existing rights had been challenged.

The Convention provision was therefore held to be applicable and the Administrative Court of the canton of Bern should have examined the merits of the case.

Languages:

German.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-96-3-007

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 23.10.1996 / **e)** U.216/96 / **f)** / **g)** *Sluzben vesnik* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Organisation – Members – Status.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.

Keywords of the alphabetical index:

Judges, incompatibility / Incompatibility of public offices / Electoral commission, president / Local self-government, election.

Headnotes:

The office of judge of the municipal court is not incompatible with the office of president of the electoral commission, since the judge who is appointed as president of the electoral commission has no opportunity by law to decide as a judge in cases involving unlawful activities of the electoral commission.

Summary:

The case was initiated by a citizen challenging the constitutionality of Article 9.3 of the Local Election Act. Under the challenged article, the president of the electoral commission is appointed from the ranks of judges of the municipal courts (first degree courts), and the secretary of the commission should be a jurist. According to Article 100.3 of the Constitution, the office of judge is incompatible with holding any other public office or profession, or with membership of a political party, and for this reason the applicant claimed that the office of judge is incompatible with the office of president of the electoral commission.

The Constitutional Court found that the challenged provision does not violate the Constitution, for the following reasons:

Under the Law on Courts, the office of judge is incompatible with the office of Representative in the Assembly and with the offices in the state and municipal administration. The judge cannot perform any other public office or profession, except other offices defined by law.

The Local Election Law defines the procedure and the conditions for the elections of the members of the Council of local self-government and for the elections of the mayors of the municipal communities. Under this Law, the members of the electoral commissions are appointed by the State Electoral Commission for a term of four years. They are composed of a president and four members. The president of the electoral commission is appointed from the ranks of judges of the municipal courts.

The powers of the electoral commission consist of a number of technical activities, as well as the duty to ensure the observance of electoral procedure. It is therefore not by accident that the legislator has chosen to provide that the president of the electoral commission should be appointed from the ranks of the judges of the municipal courts, having in mind the provision of the Law on Courts which allows judges to perform other offices defined by law, such as in this case.

The purpose of incompatibility of offices is to make it impossible for the same person to perform double activity and decide for the same matter in the first and second degree. In this case, in the Court's opinion, the appointing of a judge of the municipal court as president of the electoral commission does not create incompatibility of two public offices. Thus the judge of the municipal court as president of the electoral commission actually continues his professional activity, in order to provide for skilled observance and legal implementation of the electoral procedure. The judge performs this office within the competence of the electoral commission, but he has no opportunity to decide as a judge in cases involving unlawful activities of the electoral commission, since those cases, under the law, fall under the higher courts' jurisdiction.

Finally, the Constitutional Court states that the president of the electoral commission is appointed from the ranks of judges of municipal courts, precisely because he is a judge, in order to provide lawful and professional implementation of part of the electoral procedure activities.

Languages:

Macedonian.

Identification: MKD-96-3-008

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 23.10.1996 / **e)** U.205/96 / **f)** / **g)** *Sluzben vesnik* (Official Gazette), 62/96 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Freedom of opinion.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Right to participate in political activity.
Fundamental Rights – Civil and political rights – Electoral rights – Right to vote.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Candidates / Nomination / Written agreement, withdrawal / Local self-government, elections.

Headnotes:

The legal provision which provides that the agreement given by a candidate to be nominated for local councillor and mayor cannot be withdrawn enables every political party and group of voters who have nominated candidates to take part in the elections without any opportunity of violation once the electoral procedure has been started.

Such provision does not lead to a violation of the freedom of personal conviction guaranteed by the Constitution, since the candidate, by giving the agreement, has already expressed his political conviction.

Summary:

The case was initiated by the Democratic Party challenging the constitutionality of Article 18.2 of the Local Elections Act. Under the challenged article, the written agreement of candidates is required for the registration of the nominations of the candidates for local councillors and mayors, and this agreement cannot be withdrawn. In the applicant's opinion, this provision, which precludes withdrawal of the candidate's agreement, violates freedom of personal conviction, conscience, thought and public expression of thought guaranteed by the Constitution.

The Constitutional Court found that the challenged article does not violate the Constitution, for the following reasons:

Article 16 of the Constitution guarantees the freedom of personal conviction, conscience, thought and public expression of thought. Under Article 22 of the Constitution, every citizen on reaching 18 years of age acquires the right to vote. This right is equal, universal and direct, and is exercised at free elections by secret ballot. Under the Constitution, political pluralism and free, direct and democratic elections are one of the fundamental values of the constitutional order of the Republic of Macedonia.

The provision of regular and legal elections in all phases of the electoral procedure and complete protection of the citizens' right to vote is important for the functioning of elections and a state based on the rule of law.

The right to vote is one of the most important political rights, which can be active and passive. The Constitution has not made any difference between these two types of the right to vote, which means that under Article 22 of the Constitution every citizen acquires the right to vote and to be elected.

The freedom of personal conviction, conscience, thought and public expression of thought are mutual and reciprocal. The freedom of personal conviction is expressed through personal decisions and choices, depending on an individual's personal interests and his relationship with the society in which he lives. The freedom of personal conviction, as a result of the process of thinking, is especially expressed (besides in religious confession), in an individual's political conviction, which in practice means accepting or rejecting a particular political movement, actively supporting such a movement or not, founding and being a member of a political party in order to express, propagate and exercise certain political purposes.

But exercising freedom and rights must not harm other people and the community, since responsibility is one of the components for exercising human freedom and rights. Although the right to be elected is an individual right, its exercising creates rights and obligations, and that is why, in the Court's opinion, the one-sided withdrawal of one party's candidate could violate the electoral procedure, since it is a continuing process consisting of numerous mutual rules.

From the moment of accepting a particular nomination, it is not only the candidate's right to be elected which is exercised, but also the right of political parties to take part in elections and the right of citizens to nominate their candidates.

Breaking one phase of the electoral procedure by withdrawing the nominated candidate could hinder the completion of the elections, thereby violating of voters' rights or the rights of other subjects (nominators). Taking this into consideration, the Court found that the challenged article which provides that written agreement given by candidates cannot be withdrawn, actually enables every political party and group of voters who have nominated candidates to take part in elections, without any opportunity to violate the electoral procedure once it has been started.

Languages:

Macedonian.

Identification: MKD-96-3-009

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 18.12.1996 / **e)** U.160/96 / **f)** / **g)** *Sluzben vesnik* (Official Gazette), 1/97 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Admissibility of referendums and other consultations.
General Principles – Democracy.
General Principles – Rule of law.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Freedom of association.

Fundamental Rights – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Referendum on premature elections / Citizen initiative / Elections, premature.

Headnotes:

By refusing the citizen initiative to call a referendum on premature elections for Representatives in the Assembly of the Republic, because the Assembly reasoned that there was no constitutional grounds for such a referendum, the right of the citizens for political association and activity in the frames determined by the Constitution and by law was neither excluded nor limited.

Summary:

Several complaints were lodged to the Constitutional Court by citizens for protection of the freedom of political association and activity. They all claimed that their freedom of political association and activity had been violated by the conclusion of the Assembly of the Republic which stated that there were no constitutional grounds for calling a referendum on premature elections for Representatives in the Assembly of the Republic. In this conclusion the Assembly stated that a referendum on petition lodged by at least one hundred and fifty thousand electors, provided by article 73.3 of the Constitution, may be called only for questions concerning the matters within its sphere of competence, and that the matter of premature elections of Representatives of the Assembly does not belong to this sphere. The citizens who lodged the complaints to the Court had signed the petition calling for a referendum.

The Court found that a citizen initiative had been put forward by the Democratic Party and VMRO-DPMNE (political party) by collecting one hundred and fifty thousand signatures of voters calling for a referendum on the question: "Are you in favour of scheduling premature elections for Representatives of the Assembly of the Republic of Macedonia, which would be exercised at the end of 1996 ?". Over one hundred and fifty thousand signatures had been collected. The petition had been submitted to the Assembly and the Assembly adopted a conclusion that there were no constitutional grounds for calling such a referendum.

The Court refused the complaints lodged on the ground that the freedom of political association and activity had been violated, for the following reasons:

The Constitution provides direct constitutional protection of certain human and citizens rights and freedoms in cases of its violation. One of these rights is the freedom of political association and activity. Under the Constitution, citizens are guaranteed freedom of association to exercise and protect their political, economic, social, cultural and other rights and convictions. Citizens may freely establish associations of citizens and political parties, join them or resign from them. According to this, the Constitution gives legal grounds which are general and equal for all citizens and provides equal position for all citizens in their opportunity to exert influence on the political power in the State.

The freedom of political association and activity, as a fundamental right, is exercised directly under the constitutional provisions. According to the constitutional concept of indivisibility and mutuality of human and citizen freedoms and rights, the freedom of political association and activity should not be its own purpose but it is a necessary condition for a person's affirmation as a free individual in cases when he needs to exercise his conviction and interests in a political way in association with others, in order to take part or to influence the political power. The exercising of this freedom by one person is limited by the exercising of the same freedom by other persons. It is not an absolute freedom but has to be exercised according to the constitutional provisions and in the institutions provided by the Constitution. The exercising of this freedom cannot be used for violent destruction of the constitutional order or for violation of constitutional provisions.

Under Article 61 of the Constitution, the Assembly of the Republic is a representative body of the citizens and a supreme legislative body, composed of Representatives elected at general, direct and free elections. In carrying out the duties within its sphere of competence, the Assembly has adopted the challenged conclusion in which it has found that there are no constitutional grounds for calling a referendum on question for premature elections, because the Constitution has no opportunity to provide for such an election. By this conclusion, according to the Court, the right of the citizens to political association and activity in the frames determined by the Constitution and the law was neither excluded nor limited. Thus by the act of lodging the petition for calling a referendum the citizens had an opportunity to influence in a political way state power, because the Assembly as a supreme legislative power, could allow the petition if the majority of the Representatives voted for it.

Languages:

Macedonian.

Turkey
Constitutional Court

Statistical data

1 September 1996 – 31 December 1996

Number of decisions: 17

17 decisions were handed down between 1 September 1996 and 31 December 1996. Of these, 2 were refused because the courts had no competence to handle these cases, 2 were sent back to the courts because of deficiencies, 6 were dismissed and in 7 cases some legal provisions were annulled. Only 3 decisions have been published in the Official Gazette because written statements of the legal reasonings following the decisions have not yet been prepared.

In this period, a total of 5 decisions concerning the auditing of political parties were also handed down. 4 decisions of stay of execution of legislation were given in this period.

Important decisions

Identification: TUR-96-3-009

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 02.01.1996 / **e)** 1996/35 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 27.12.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Constitutional Justice – Effects.
General Principles – Separation of powers.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Decrees having force of law / Delegated legislation / Constitutional Court, decisions, binding force.

Headnotes:

In order to annul a rule of any act which is contrary to the decisions of the Constitutional Court, the provisions of this Act should be "identical" or "similar" to the provisions which were annulled before.

Summary:

According to the Constitution, the Turkish Grand National Assembly may authorise the Council of Ministers to issue decrees having force of law on "certain matters". In the Constitution it is stated that the empowering law should define the purpose, scope, principles, and operative period of the decree having force of law, and whether more than one decree will be issued within the same period. Laws of empowering and decrees having force of law must be discussed in the committees and in the plenary session of the Turkish Grand National Assembly with "priority" and "urgency". This means that resort to the institution of decrees having force of law should only be in "urgent situations". It can be understood that in the Turkish constitutional system legislative power is an original power and cannot be delegated; but authorisation to enact decrees having force of law is an exceptional and subordinate power. Decrees having force of law can only be enacted on the basis of the empowering law which must have a short operative period for the decrees for solving the urgent matters with efficient and indispensable regulations and measures.

The Turkish Grand National Assembly may authorise the Council of Ministers to issue decrees having force of law only on "certain matters". This means that the Council of Ministers can be authorised only for limited subjects with certain powers. Fundamental rights, individual rights and political rights cannot be regulated by decrees having force of law. In addition to this, the Council of Ministers cannot be empowered to amend the budget by a decree having force of law.

The subject of the power given to the Council of Ministers must be very clear and in the empowering law the purpose, scope and principles must be shown clearly. The empowering law must define the operative period of the decree having force law.

According to the Constitution, decisions of the Constitutional Court are binding on the legislative, executive and judicial organs, on the administrative authorities, and on persons and corporate bodies. This means that the legislative organ must be careful in enacting new laws and must take into account the decisions and written statements of reasons of the Constitutional Court.

The present case was brought by the President of the Republic demanding annulment of the Empowering law no. 4183, dated 31.08.1996. The Law empowers the Council of Ministers to make regulations concerning financial, social and other rights of public employees and retired public employees.

The Constitutional Court pointed out that the laws nos. 3479, 3481, 3755, 3911 and 3390 were annulled. All these empowering laws tried to give powers to the Council of Ministers to issue decrees having force of law for the regulation of social rights of public employees and organisations of public administrations. According to the Constitutional Court, the provisions of empowering Law no. 4183 were "similar" to other annulled empowering laws. And this law was contrary also to the decisions of the Constitutional Court concerning decrees having force of law.

The Court held that because the above empowering Law was "similar" or "identical" it should also be invalidated. The law was found contrary to the last provision of Article 153 of the Constitution.

The decision was unanimous.

Supplementary information:

Settled case law.

Languages:

Turkish.

Identification: TUR-96-3-010

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 13.09.1995 / **e)** 1995/41 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 18.10.1996 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Right to family life – Descent.
Fundamental Rights – Civil and political rights – Right to family life – Succession.

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

Keywords of the alphabetical index:

Family life, notion / Children, illegitimate, status.

Headnotes:

According to the Constitution the family is the foundation of Turkish society and the State should take necessary measures and establish the organisations to ensure the peace and welfare of the family. However, the notion of family life in the Constitution is confined solely to marriage-based relationships and cannot encompass other de facto "family ties" where parties are living outside marriage.

According to the Constitution everyone has the right of litigation either as plaintiff or defendant before the courts through lawful means and procedures. However all fundamental rights and freedoms may be restricted by law. For these reasons, official family life cannot be continuously under the threat of litigation. Denying the husband the right to go to court after one month of the knowledge of the birth of a child cannot be considered unconstitutional.

In Turkey everyone has the right to own and inherit property. However these rights can be limited by law in the public interest. The fact that a child cannot inherit from his/her biological father cannot be considered as unconstitutional.

Summary:

The Court of first Instance of Karşiyaka while trying a case found the denial of bringing an action in Articles 242 and 246 of the Turkish Civil Code was unconstitutional and asked the Constitutional Court to annul the said Articles. According to the Court of First Instance, the said Articles of the Civil Code are contrary to the protection of family in Article 41 of the Constitution, to the right to property in Article 35 of the Constitution and to the right to claim rights through courts in Article 36 of the Constitution.

According to the Civil Code "The husband shall be the father of a child born in wedlock or during the 300 days following dissolution of the marriage." This legal presumption may be rebutted only by the mother's husband in one month after the knowledge of the birth of a child. The Turkish Civil Code declares that "An illegitimate child and its descendants have legally recognised family ties with the child's mother and her blood relations and, after the child has been recognised, also by the father". But in order to recognise a child, first of all the husband must deny paternity of the child in one month.

In the case in question, the biological father of a child could not recognise his child because the child was born before the dissolution of the marriage and the husband missed the one month period for bringing an action to deny the paternity. For the Constitutional Court the notion of "family life" in Article 41 of the Constitution is confined solely to marriage-based relationships and cannot encompass other de facto "family ties" where parties are living together outside marriage. For that reason, the husband must deny the paternity and after that the biological father may recognise the child. One period is here to protect the family. The Constitutional Court dismissed the case.

The decision was taken unanimously.

Languages:

Turkish.

Identification: TUR-96-3-011

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 23.09.1996 / **e)** 1996/34 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 27.12.1996 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Adultery, punishment, discrimination of women / Marriage, fidelity.

Headnotes:

Even though the Court cannot apply international human rights treaties as reference norms, the provision of the Constitution concerning equality before the law is in harmony with the provisions prohibiting discrimination on the basis of sex in international covenants. Equality

of men and women embodies a common ideal to be attained by all nations. If there are contrary provisions to equality before law, these provisions must be eliminated.

Undoubtedly, the law-maker is free to make adultery a criminal norm or not and can define the crime independently. However in this process the law-maker cannot make a discrimination between husband and wife who are on an equal footing as the parties of marriage. There is no reason to give superiority to the husband; in other words, the rights of the husband cannot be more than the rights of the wife.

Summary:

The Court of First Instance of Şabanözü, while trying a case involving a claim under Article 441 of the Turkish Criminal Code put forward by the public prosecutor, asked the Constitutional Court to annul the said Article.

According to Article 441 of the Criminal Code "A married man who lives as man and wife with an unmarried woman in the house where he resides together with his wife or in another place which may be easily known by the public, shall be punished for six months to three years." However Article 440 of the Criminal Code regulates the conditions of adultery of a married woman in a different way. "A married woman committing adultery shall be punished by imprisonment for six months to three years."

The Constitutional Court pointed out that without prejudice to the principle of equal rights in the area of family, special legal regulations are sometimes permissible or even necessary. For instance, all provisions concerning the protection of the woman as mother can be counted. However there is no difference between the husband and wife in respect of the duty of fidelity in marriage. The Court found the provision unconstitutional.

The decision was given unanimously.

Languages:

Turkish.

Identification: TUR-96-3-012

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 12.12.1996 / **e)** 1996/9 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 14.12.1996 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Decisions – Types – Suspension.

Keywords of the alphabetical index:

Suspensive effect, legislation.

Headnotes:

In accordance with Turkish constitutional law, annulment decisions cannot have retroactive effect. The decisions of the Constitutional Court cannot be made public without a written statement of reasons. Laws cease to have effect from the date of publication of the annulment decision in the Official Gazette. These provisions of the Constitution reduce the efficiency of the decisions of the Court. In general, the decisions of the Court are surpassed by the course of events and the application of the contested law.

For these reasons, the Court deemed that if the implementation of a law is obviously unconstitutional and were to result in damages which are difficult to compensate then the challenged law can be suspended.

Summary:

The annulment case was filed by one-fifth of the total number of members of the Turkish Grand National Assembly for the invalidation of Law no. 4182. This law related to the selling of immovable property of public institutions and organisations. The Constitutional Court suspended the implementation of the said law because it was found clearly unconstitutional and also because the application of it would result in damages which were difficult to compensate.

The decision was given unanimously.

Supplementary information:

Settled case law.

Languages:

Turkish.

Court of Justice of the European Communities

Statistical data

1 September 1996 – 31 December 1996

Cases dealt with: 198

Court of Justice of the European Communities (CJEC):
111: 78 judgments, 12 orders and 21 orders to strike out.
Court of the First Instance (CFI): 87: 46 judgments, 29 orders and 12 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 nevertheless interesting developments concerning general principles of community law:

On the protection of the acquired rights:

CFI, 11 December 1996, *Atlanta*, Case T-521/93, not yet reported, paragraph 55

On the rights of the defence:

CFI, 18 September 1996, *Climax Paper Converters*, Case T-155/94, not yet reported, paragraphs 116-118
CFI, 18 September 1996, *Postbank*, Case T-353/94, not yet published, paragraphs 68, 71-73
CJEC, 24 October 1996, *Lisrestal*, Case C-32/95 P, not yet reported, paragraphs 21, 37
CFI, 11 December 1996, *Atlanta*, Case T-521/93, not yet reported, paragraphs 70-74

On the principle of the protection of legitimate expectations:

CFI, 18 September 1996, *Climax Paper Converters*, Case T-155/94, not yet reported, paragraphs 110-115
CFI, 18 September 1996, *Postbank*, Case T-353/94, not yet reported, paragraphs 71-73
CFI, 24 September 1996, *Compagnie Continentale (France)*, Case T-494/93, not yet reported, point 56
CFI, 16 October 1996, *Efisol v. Commission*, Case T-336/94, not yet reported, paragraphs 30-36
CJEC, 17 October 1996, *Konservenfabrik Lubella Friedrich Büker*, Case C-64/95, not yet reported, paragraph 31
CFI, 11 December 1996, *Atlanta*, Case T-521/93, not yet reported, paragraphs 55-58

CFI, 11 December 1996, *Barraux*, Case T-177/95, not yet reported, paragraphs 45, 47-52
CJEC, 12 December 1996, *Accrington Beef and others*, Case C-241/95, not yet reported, paragraphs 33, 36-37.

On the principle of subsidiarity, see in addition to judgment of 12 November 1996, *United Kingdom v. Council*, Case C-84/94, *Bulletin* 96/3 [ECJ-96-03-035], CJEC, 10 September 1996, *Commission v. Belgium*, Case C-11/95; *E.C.R.* I-4115

Decisions presented:

1. CJEC (Fourth Chamber), 26 September 1996, *Criminal proceedings against Arcaro*, Case C-168/95, *E.C.R.* I-4705; Preliminary rulings, Jurisdiction of the Court; Directives, invocation against an individual; Implementation of directives, obligations of the national courts; Interpretation of national law in the light of directives, limits.

2. CJEC (Sixth Chamber), 26 September 1996, *Criminal proceedings against Allain*, Case C-341/94, *E.C.R.* I-4631; Sanctions of Community law, obligations of the member States and competence of the national criminal jurisdictions; Consequences of German re-unification.

3. CJEC, 8 October 1996, *Dillenkofer and Others v. Bundesrepublik Deutschland*, Joint cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, not yet reported; Liability of the State for violation of Community law; Conditions for the liability; Non-transposition of a directive within the prescribed time limit; Direct effect of the provisions of a directive.

4. CJEC, 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, Case C-84/94, not yet reported; Internal competence of the Community in the social field; Acts of the institutions, legal basis; Principle of proportionality; Reasoning of the acts.

5. CJEC, 12 December 1996, *Criminal proceedings against X*, Joint cases C-74/95 and C-129/95, not yet reported; Notion of national jurisdictions; Execution of directives, obligations of the national jurisdictions; Interpretation of national law in the light of the directives, limits.

Important decisions

Identification: ECJ-96-3-012

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fourth Chamber / **d)** 26.09.1996 / **e)** C-168/95 / **f)** Criminal proceedings against Arcaro / **g)** *E.C.R.* I-4705 / **h)**.

Keywords of the systematic thesaurus:

Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Court of Justice, competence / Genuine cooperation between the institutions and the member States / Directives, possibility to be relied on / Community law and national criminal law / Direct effect / National jurisdictions, obligations

Headnotes:

Where, under the procedure provided for by Article 177 EC, questions are formulated imprecisely, the Court may extract from all the information provided by the national court and from the documents concerning the main proceedings the points of Community law needing to be interpreted, having regard to the subject-matter of the dispute (cf. point 21).

Article 3 of Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorisation. In the absence of full transposition by a member State, within the time allowed, of the directive in question and therefore of Article 3 thereof, and of Directive 83/513/EEC on limit values and quality objectives for cadmium discharges, a public authority of that State may not rely on Article 3 of Directive 76/464/EEC against an individual, since that possibility exists only for individuals and only in relation to "each member State to which it is addressed" (cf.points 32, 36, 38, disp. 1-2).

Although there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court, the member States' obligation under such a directive to achieve the

result envisaged by the directive and their duty, under Article 5 EC, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are binding on all the authorities of the member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, the national court called upon to interpret a directive is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive and thereby comply with Article 189.3 EC. However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (cf.points 41-43, disp. 3).

Summary:

The Court was referred a number of questions under a request for a preliminary ruling according to Article 177 EC by the *Pretura Circondariale* (District Magistrate's court), Vicenza. The questions were raised in the course of criminal proceedings against a legal representative of an undertaking whose main activity was the working of precious metals for discharging cadmium into surface waters of a river without having submitted an application for an authorisation as required by the national legislation implementing, in particular, Council Directives 76/464/EEC and 83/513/EEC into national law. Estimating that the Italian legislation was not in conformity with Community law, the national jurisdiction solicited the Court for an interpretation of the aforementioned Directives. Additionally, the national jurisdiction asked the Court whether it could apply the Community provisions directly, in the light of a correct interpretation of Community law, and at the same time for the national provisions which are incompatible therewith to be left unapplied even though the citizen's legal position may as a result be impaired. In case the latter question was answered in the negative, the national jurisdiction asked what other method of procedure should be adopted with a view to achieving the elimination from national legislation of provisions which are incompatible with Community law.

Having judged that the first question was formulated imprecisely, the Court redrafted the first question, and held that the two aforementioned directives did not exempt the involved undertakings from obtaining authorisation prior to any disposal of cadmium. Concerning the possibility of invoking a Directive, which has not been transposed, against an individual, the Court recalled its case law according to which Directives do not impose obligations upon individuals. The Court then emphasised that the member States obligation, pursuant to Article 5 EC, to take all appropriate measures with a view to assuring fulfilment of the result envisaged by the directive, were binding also on the national jurisdictions, and in particular that the national courts were, as far as possible, obliged to interpret national law in the light of the wording and purpose of the directive. However, that obligation reaches a limit were such interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating the liability in criminal law of persons acting in its contravention.

Languages:

Italian (language of the case); English, German, Danish, Spanish, Finnish, French, Greek, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-3-013

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber / **d)** 26.09.1996 / **e)** C-341/94 / **f)** Criminal proceedings against Allain / **g)** *E.C.R.* I-4631 / **h)**.

Keywords of the systematic thesaurus:

Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Autonomy of the national procedures / Genuine cooperation between the institutions and the member States / Court of Justice, competence / National jurisdictions, competences / Sanctions in Community law.

Headnotes:

Where Community legislation does not specifically provide for any penalty for an infringement of its provisions or refers for that purpose to national legislation, Article 86 ECSC and Article 5 EC require the member States to

take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains at their discretion, they must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (cf.point 24).

Although an extension of the Community customs territory, such as that resulting from German reunification or from the accession of a new member State, may have the effect that goods originating in what was previously a non-member country become Community goods, that does not have the consequence that importation of those goods, at the time when actually effected, could be carried out without complying with the Community provisions laid down for trade with non-member countries. Such an extension constitutes a new material fact which does not have the effect of releasing member States from their obligation to take all appropriate measures for guaranteeing the operation and efficacity of the Community law applicable at the material time, and cannot therefore preclude national courts from penalising breaches of Community legislation applicable at the time of importation on conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. In particular, the Community customs provisions applicable following the unification of the Federal Republic of Germany and the German Democratic Republic do not preclude the fact of importation into a member State of goods originating in the German Democratic Republic, but declared as originating in another country, from being reclassified under national law, following that unification, with a view to penalising breaches of the Community legislation applicable when that fact occurred (cf.points 28-30 and disp.).

Summary:

The *Cour d'Appel* (Court of Appeal), Paris, referred to the Court for a preliminary ruling according to Article 177 EC in the course of criminal proceedings against an undertaking importing and distributing steel products and the managing director of the undertaking for not declaring the importing of banned goods.

At the time when the facts at issue took place, the importation of certain steel products from third countries and, in particular the former German Democratic Republic, were subjected to a special surveillance regime involving a system of import licenses obliging the importer to declare the origin of the goods by virtue of recommendations 41/85/ECSC and 3658/85/ECSC. The aforementioned recommendations were transcribed into French law. In connection with the importation of steel beams and plates into France, it was declared that the goods originated from Yugoslavia, even though subsequent national and international customs investigations established that they had originated in the German Democratic Republic. In the absence of specific sanctions against violations of the Community acts, the accused were condemned in both first instance and the court of appeal in accordance with the French Customs Code. The French *Cour de Cassation* set aside and quashed in its entirety the judgment of the appeal court on the grounds that at the time when the customs proceedings were instituted, Community law had automatically become applicable within the territory of the former East Germany by virtue of the unification of the Federal Republic of Germany and the German Democratic Republic, which was effective from 3 October 1990. Thus, the court of appeal was obliged to examine of its own motion whether by the effect of the more favourable Community provisions, which were directly applicable on the proceedings in course, the legal basis of the charge in respect of the prohibited nature of the goods was altered and, if so whether the facts were open to a different assessment. The case was referred back to the Court of appeal of Paris, which then raised the question to the Court concerning whether a reclassification of the facts was contrary to the aforementioned unification.

Languages:

French (language of the case); English, German, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-3-014

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 08.10.1996 / **e)** C-178/94, C-179/94, C-188/94, C-189/94, C-190/94 / **f)** Dillenkofer and Others v. Bundesrepublik Deutschland / **g)** not yet reported / **h)**.

Keywords of the systematic thesaurus:

Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Direct effect / State liability, conditions / State liability, principles

Headnotes:

Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes *per se* a serious breach of Community law and consequently gives rise to a right to damages for individuals if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered (cf.point 29, disp. 1).

The result prescribed by Article 7 of Directive 90/314/EEC on package travel, package holidays and package tours, which provides that the organiser and/or retailer party to the contract is to provide sufficient evidence of security for the refund of money paid over by the consumer and for his repatriation in the event of the organiser's insolvency, entails the grant to package travellers of rights, the content of which is sufficiently identifiable (cf.point 46, disp. 2).

Summary:

The *Landgericht* Bonn referred to the Court for a preliminary ruling under Article 177 EC twelve questions in the course of actions for compensation, introduced by several individuals, against the Federal Republic of Germany for damage they suffered because Council directive 90/314/EEC on package travel, package holidays and package tours was not transposed into national legislation within the period prescribed by the directive. According to Article 7 of the Directive the organiser and/or retailer party to the contract should provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency. The plaintiffs in the national proceedings had, following the insolvency of two operators from whom they had bought their packages, either never left for their destination or had to return from their holiday location at their own expense, without being able to obtain reimbursement of the sums paid or expenses incurred from the operators.

The Court responded precisely to all the questions raised, recalling its case law concerning liability of the member States in connection with violation of Community law.

Cross-references:

See *Bulletin* 96/1 [ECJ-96-1-001] and *Bulletin* 96/2 [ECJ-96-2-007].

Languages:

German (language of the case); English, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-3-015

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.11.1996 / **e)** C-84/94 / **f)** United Kingdom of Great Britain and Northern Ireland v. Council of the European Union / **g)** not yet reported / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Community law – Subordinate law.
Constitutional Justice – Decisions – Types – Annulment.
Sources of Constitutional Law – Techniques of interpretation – Concept of manifest error in assessing evidence or exercising discretion.
Sources of Constitutional Law – Techniques of interpretation – Teleological interpretation.
General Principles – Proportionality.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

Acts of the institutions, legal basis / Partial annulment / Abuse of powers / Detachable provisions / Statement of reasons / Subsidiarity

Headnotes:

Article 118a EC is the appropriate legal basis for the adoption by the Community of measures whose principal aim is the protection of the health and safety of workers, notwithstanding the ancillary effects which such measures may have on the establishment and functioning of the internal market. Since its aim is to ensure that protection, Article 118a EC constitutes a more specific rule than Articles 100 EC and 100a EC, the existence of which

does not have the effect of restricting its scope, and must be widely interpreted as regards the scope it gives for Community legislative action regarding the health and safety of workers. Such action may comprise measures which are of general application, not merely measures specific to certain categories of workers, and which have to be in the nature of minimum requirements only in the sense that member States remain at liberty to adopt more protective measures. It is for that reason that, in terms of both its aim and its content, Directive 93/104/EEC concerning certain aspects of the organisation of working time could, save for the provisions in Article 5.2 giving priority to Sunday as the weekly rest day which must therefore be annulled, be adopted on the basis of Article 118a EC (cf.points 12, 15, 20-22, 37, 45, 49).

As part of the system of Community competence, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure. A mere Council practice cannot derogate from the rules laid down in the Treaty, and cannot therefore create a precedent binding on the Community institutions where, prior to the adoption of a measure, they have to determine the correct legal basis for it (cf.points 19, 25).

Article 235 EC may be used as the legal basis for a measure only where no other Treaty provision confers on the Community institutions the necessary power to adopt it (cf.point 48).

The adoption by the Council of Directive 93/104/EEC concerning certain aspects of the organisation of working time did not constitute an infringement of the principle of proportionality. The limited power of review which the Community judicature has over the Council's exercise of its wide discretion in the area of the protection of workers' health and safety, where social policy choices and complex assessments are involved, has not revealed either that the measures forming the subject-matter of the directive, save for that contained in Article 5.2, were unsuited to achieving the aim pursued, namely workers' health and safety, or that those measures, which have a degree of flexibility, went beyond what was necessary to attain their objective (cf.points 57-67).

An act of a Community institution is vitiated by a misuse of powers if it has been adopted with the exclusive or main purpose of achieving ends other than those stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. That is not the case with Council Directive 93/104/EEC concerning certain aspects of the organisation of working time, since it has not been established that it was adopted with the exclusive or main purpose of achieving an end other than the protection of the health and safety of workers envisaged by Article 118a EC which constitutes its legal basis (cf.points 69-70).

Whilst the statement of reasons required by Article 190 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, the authority is not required to go into every relevant point of fact and law. Where a contested measure clearly discloses the essential objective pursued by the institution, it would be pointless to require a specific statement of reasons for each of the technical choices made by it (cf.points 74, 79).

Summary:

The United Kingdom brought an action before the Court under Article 173 EC for the annulment of Council Directive 93/104/EEC concerning certain aspects of the organisation of working time, laying down minimum health and safety requirements for the organisation of working time. The court rejected essentially the raised issues, but annulled nevertheless the second sentence of Article 5 of the directive.

The Government of the United Kingdom argued in particular that the legal basis of the directive, i.e. Article 118a EC which empowers the Council to adopt, acting in conformity with the procedure of Article 189c EC, by means of directives, minimum requirements for gradual implementation, in each of the member States with a view to encouraging improvements, especially in the working environment, as regards the health and safety of workers, did not constitute the correct legal basis. It was argued that the directive should instead have been adopted on the basis of either Article 100 EC or Article 235 EC which require unanimity within the Council.

The Court decided, after having carefully examined the scope of Article 118a EC, which confers upon the Community an internal legislative competence in the area of social policy, that the directive had been lawfully adopted on the basis of Article 118 EC of the Treaty considering its objective and content, but annulled nevertheless Article 5.2 therein. Whilst the question whether to include Sunday in the weekly rest period is ultimately left to the assessment of member States, the Council had failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week. As for the other measures laid down by the directive, the Court did not find that the Council had committed a manifest error in estimating that the contested measures were necessary to achieve the objective of protecting

the health and safety of workers and that the objective of the harmonisation could not be achieved by less restrictive measures. Finally, the Court rejected pleas concerning misuse of powers and of inadequate reasoning.

Cross-references:

On the principle of proportionality see:

CJEC, 12 September 1996, *Fattoria autonoma tabacchi and Others*, Joined cases C-254/94, C-255/94 and C-269/94; *E.C.R.* I-4235, paragraphs 55-62
CJEC 17 October 1996, *Konservenfabrik Lubella Friedrich Büker*, Case C-64/95, not yet reported, paragraph 29
CJEC, 12 December 1996, *British Telecommunications*, Case C-302/94, not yet reported, paragraph 65
CJEC, 12 December 1996, *Accrington Beef and Others*, Case C-241/95, not yet reported, paragraphs 28-31.

Languages:

English (language of the case); German, Danish, Spanish, Finish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-96-3-016

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.12.1996 / **e)** C-74/95, C-129/95 / **f)** Criminal proceedings against X / **g)** Not yet reported / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Referral by a court.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
General Principles – Rule of law – Certainty of the law.
General Principles – Legality.
Institutions – Courts – Organisation – Prosecutors / State counsel.
Institutions – European Union – Distribution of powers between Community and member States.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Directives, discretion of the member States / Community law and national criminal law / National jurisdictions, obligations / Legality of offence and penalty / National constitutional traditions.

Headnotes:

Reference may be made to the Court under Article 177 EC only by a body required to give a ruling in complete independence in proceedings which are intended to result in a judicial decision. The "*Procura della Repubblica*" cannot be regarded as a court or tribunal within the meaning of that article where its role is not to rule on an issue in complete independence but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body (cf.points 18-19).

The obligation on a national court to interpret and apply the relevant rules of its national law as far as possible in the light of the wording and the purpose of the directive which they implement, so as to achieve the result it seeks to achieve and thereby comply with the Article 189.3 EC, is not unlimited, particularly where such interpretation would have the effect, on the basis of the directive and independently of legislation adopted for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions. Where it is necessary to determine the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the member States, has also been enshrined in various international treaties, in particular in Article 7 ECHR. The national court must therefore ensure that that principle is observed when interpreting, in the light of the wording and the purpose of the directive, the national legislation adopted in order to implement it (cf.points 24-26).

The concept of habitual use of display screen equipment as a significant part of normal work, which is used in Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment in order to identify the workers who are to be entitled to the protective measures for which it provides, must, in the absence of any specification in the directive, be defined by the member States, which enjoy a broad

discretion for that purpose, when adopting the necessary national implementing measures (cf.points 29-31).

Summary:

The *Procura della Repubblica* (Office of the Public Prosecutor) to the *Pretura Circondariale di Torino* (Districts Magistrate's Court, Turin) and the *Pretura Circondariale* itself (in cases C-74/95 and C-129/95 respectively) referred to the Court for a preliminary ruling under Article 177 EC a number of questions on the interpretation of Council Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment. The questions were raised in the course of criminal proceedings against persons unknown for a presumed breach of the national legislation implementing the aforementioned directive.

Referring to its established case law, the Court held that reference may be made to it only by a court or tribunal within the meaning of Article 177 EC and declared the questions raised by the *Procura della Repubblica* inadmissible, but then went on to answer those posed by the *Pretura Circondariale*. Recalling its previous case law the Court underlined, considering the information supplied by the request for the preliminary ruling, the obligations of the national courts when applying its domestic law as far as possible in the light of the wording and the purpose of the Directive. However, this obligation could not have the effect, on the basis of the directive and independently of national legislation adopted for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions.

Supplementary information:

On the principle of legal certainty, see also:

CJEC, 19 September 1996, *Commission v. Greece*, Case C-236/95; *E.C.R.* I-4459, paragraphs 13-14
CFI, 16 October 1996, *Knijff*, Case T-378/94, not yet reported, paragraphs 18-19
CJEC, 7 November 1996, *Société Cadi Surgelés and Others*, Case C-126/94, not yet reported, paragraph 34
CFI, 11 December 1996, *Comafrica*, Case T-70/94, paragraphs 138-140
CFI, 11 December 1996, *Barraux*, Case T-177/95, not yet reported, paragraphs 45-52.

On the principle of legality, see also:

CFI, 12 December 1996, *Altmann*, Joined cases T-177/94 et T-377/94, not yet reported, paragraph 123.

Languages:

Italian (language of the case); English, German, Danish, Spanish, Finnish, French, Greek, Dutch, Portuguese, Swedish (translations of the Court).

European Court of Human Rights

Important decisions

Identification: ECH-96-3-012

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 16.09.1996 / **e)** 39/1995/545/631 / **f)** Gaygusuz v. Austria / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **h)**.

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 – Entitlement to rights – Foreigners.
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:

Unemployment, emergency assistance.

Headnotes:

The Austrian authorities' refusal to grant emergency assistance to an unemployed man who had exhausted entitlement to unemployment benefit on the ground that he did not have Austrian nationality infringes a pecuniary right and amounts to a discriminatory difference of treatment.

Summary:

On 6 July 1987 the applicant applied for an advance on his pension in the form of emergency assistance in accordance with the Unemployment Insurance Act. The Linz Employment Agency and the Upper Austria Regional Employment Agency refused the application on the ground that the applicant did not satisfy the conditions laid down in Section 33.2.a of the Unemployment Insurance Act, under which only Austrian citizens were entitled to benefits of that type. The applicant then applied to the Constitutional Court, which decided on 26 February 1988 not to accept his application for adjudication, as it did not have sufficient prospects of success and the case did not fall outside the jurisdiction of the Administrative Court. On 19 September 1989 the Administrative Court, to which the case had been referred, dismissed the application on the ground that questions concerning the constitutionality of a statute came within the jurisdiction of the Constitutional Court.

Mr Gaygusuz claimed to be a victim of discrimination based on national origin, contrary to Article 14 ECHR taken in conjunction with Article 1 Protocol 1 ECHR. According to the Court's established case-law, Article 14 ECHR complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The Court notes that at the material time emergency assistance was granted to persons who had exhausted their entitlement to unemployment benefit and satisfied the other statutory conditions laid down in Section 33 of the 1977 Unemployment Insurance Act. In the instant case it has not been argued that the applicant did not satisfy that condition; the refusal to grant him emergency assistance was based exclusively on the finding that he did not have Austrian nationality and did not fall into any of the categories exempted from that condition. The Court considers that the right to the emergency assistance is a pecuniary right for the purposes of Article 1 Protocol 1 ECHR. That provision is therefore applicable. Accordingly, as the applicant was denied emergency assistance on a ground of distinction covered by Article 14 ECHR, namely his nationality, that provision is also applicable.

According to the Court's case-law, a difference of treatment is discriminatory, for the purposes of Article 14 ECHR, if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Court notes in the first place that Mr Gaygusuz was a legal resident in Austria and worked there at certain times, paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals. It observes that the authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality. The applicant was accordingly in a like situation to Austrian nationals as regards his entitlement thereto. The Court considers that the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification".

There has accordingly been a breach of Article 14 ECHR, taken in conjunction with Article 1 Protocol 1 ECHR.

Languages:

English, French.

Identification: ECH-96-3-013

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 16.09.1996 / **e)** 57/1995/563/649 / **f)** Süssmann v. Germany / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Constitutional court, trial within reasonable time / Old-age pensions.

Headnotes:

Constitutional Court proceedings do not in principle fall outside the right to a fair trial, and must comply with the "reasonable time" requirement.

Summary:

The applicant, Mr Gerhard Süssman, who before his retirement held a post which carried with it civil servant status, receives, under a supplementary old-age pension scheme, a pension supplementary to the one he is entitled to under the ordinary old-age pension scheme. In 1982 and 1984 the rules governing the supplementary pension scheme were amended in order to ensure that the amounts paid under the ordinary scheme, together with those paid under the supplementary scheme, did not exceed the last net salary in the civil service. In 1988 the Supplementary Pensions Fund fixed the amount of the applicant's supplementary pension in accordance with the amended rules. On 11 July 1988 Mr Süssmann filed a constitutional complaint with the Federal Constitutional Court concerning the above-mentioned amendments. On 6 November 1991 a panel of three judges of the Federal Constitutional Court refused to accept these complaints for adjudication on the ground that they did not afford sufficient prospects of success. This decision was served on the applicant on 5 December 1991.

The Court recalls that it has had to examine the question of the applicability of Article 6.1 ECHR to the proceedings in a constitutional court in a number of cases. The Court is fully aware of the special role and status of a constitutional court, whose task is to ensure that legislative, executive and judicial authorities comply with the Constitution and, which, in those states that have made provision for a right of individual petition, affords additional legal protection to citizens at national level in respect of their fundamental rights guaranteed in the Constitution. According to its well-established case-law on this issue, the relevant test in determining whether constitutional court proceedings may be taken into account in assessing the reasonableness of the length of proceedings is whether the result of the constitutional court proceedings is capable of affecting the outcome of the dispute before the ordinary courts.

However, the present case differs from earlier cases in that it concerns the length only of proceedings in a constitutional court and not also that of proceedings conducted in ordinary courts. The applicant had first contested the lawfulness of the reduction of his supplementary pension, following the amendment of the Fund's rules, in the arbitration tribunals. The Court recalls that proceedings come within the scope of Article 6.1 ECHR, even if they are conducted before a constitutional court, where their outcome is decisive for civil rights and obligations. In the present case, if the Federal Constitutional Court had found that the amendments to the civil servants' supplementary pension scheme infringed the constitutional right of property and had set aside the impugned decisions, Mr Süssmann would have been reinstated in his rights. In these circumstances Article 6.1 ECHR is applicable to the proceedings in issue.

The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the complexity of the case, the conduct of the parties and of the authorities, and the importance of what is at stake for the applicant in the litigation. Article 6.1 ECHR imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. Although this obligation applies also to a constitutional court, when so applied it cannot

be construed in the same way as for an ordinary court. Its role as guardian of the Constitution makes it particularly necessary for a constitutional court sometimes to take into account other considerations than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms. Furthermore while Article 6 ECHR requires that judicial proceedings be expeditious, it also lays emphasis on the more general principle of the proper administration of justice. In the instant case, it was reasonable for the Federal Constitutional Court to group together the twenty-four cases pending before it and it was entitled to give priority to other appeals, stemming from German re-unification. Finally, what was at stake in the proceedings for the applicant is also a material consideration. However, the amendments to the supplementary pensions scheme did not cause prejudice to him to such an extent as to impose on the court concerned a duty to deal with his case as a matter of very great urgency.

In the light of all the circumstances of the case, the Court finds that a reasonable time within the meaning of Article 6.1 ECHR was not exceeded and that there has accordingly been no breach of that provision on this point.

Cross-references:

- *Deumeland v. Germany*, 29/05/1986, Series A no. 100
- *Bock v. Germany*, 29/03/1989, Series A no. 150
- *Boddaert v. Belgium*, 12/10/1992, Series A no. 235-D
- *Kraska v. Switzerland*, 19/04/1993, Series A no. 254-B
- *Ruiz Mateos v. Spain*, 23/06/1993, Series A no. 262
- *Schuler-Zgraggen v. Switzerland*, 24/06/1993, Series A no. 263
- *Massa v. Italy*, 24/08/1993, Series A no. 265-B
- *Muti v. Italy*, 23/03/1994, Series A no. 281-C
- *Karlheinz Schmidt v. Germany* Series A no. 291-B
- *A and Others v. Denmark*, 08/02/1996, *Reports of Judgments and Decisions*, 1996
- *Leutscher v. The Netherlands*, 27/03/1996, *Reports of Judgments and Decisions*,1996
- *Phocas v. France*, 23/04/1996, *Reports of Judgments and Decisions*, 1996.

Languages:

English, French.

Identification: ECH-96-3-014

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 22.10.1996 / **e)** 36-37/1995/542-543/628-629 / **f)** Stubbings and others v. United Kingdom / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Techniques of interpretation – Margin of appreciation.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Civil procedure / Limitation period / Child, sexual abuse / Fundamental right, essence.

Headnotes:

British rules on limitation preventing alleged victims of child sexual abuse from commencing civil proceedings do not impair the very essence of the right of access to a court nor the right to respect for private life.

Summary:

Ms Leslie Stubbings was born on 29 January 1957. She alleges that, between the ages of two and fourteen, she was sexually abused on a number of occasions by her adoptive father, Mr Webb, and by his son, which caused her to experience severe psychological problems. However, it was not until September 1984, following treatment by a consultant child and family psychiatrist, that she realised for the first time that there might be a connection between the childhood abuse and her state of mental health. On 18 August 1987 she commenced proceedings against the Webbs, seeking damages for the alleged assaults. The defendants applied to have the claim dismissed as time-barred under the Limitation Act 1980. Both the High Court and the Court of Appeal were bound by earlier authority to hold that Ms Stubbings' claim was based on a "breach of duty" within the meaning of Section 11 of the 1980 Act. The limitation period for such actions was three years, either from the date on which the cause accrued or from the date on which the plaintiff first knew the injury in question was both

significant and attributable to the defendants. The Court of Appeal accepted Ms Stubbings' argument that she did not realise she had a cause of action until September 1984, when with therapy she grasped the causal link between the abuse and her mental health problems. In any case, Section 33 of the 1980 Act provided that the court could allow such an action to proceed even if commenced after the expiry of the three-year period, where it would be equitable to do so. The defendants appealed to the House of Lords, which, having considered the background to the 1980 Act, held that the words "breach of duty" in Section 11 did not in fact embrace actions based on intentionally inflicted injuries, such as rape and indecent assault. Instead, these types of claim were subject to the six-year limitation period provided for in Section 2 of the Act. This limit, which could not be disapplied by the Court, started to run from the plaintiff's eighteenth birthday. Ms Stubbings's claim was therefore out of time.

Following the judgment of the House of Lords in Stubbings v. Webb, the applicants Mrs J.L, Mrs J.P. and Mrs D.S. abandoned their civil proceedings, the proceedings being time-barred six years after their eighteenth birthdays.

The Court recalls that Article 6.1 ECHR embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. It is noteworthy that limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.

In the instant case, the English law of limitation allowed the applicants six years from their eighteenth birthdays in which to initiate civil proceedings. In addition, subject to the need for sufficient evidence, a criminal prosecution could be brought at any time and, if successful, a compensation order could be made. Thus, the very essence of the applicants' right of access to a court was not impaired. The time limit in question was not unduly short; indeed it was longer than the extinction periods for personal injury claims set by some international treaties. Moreover, it becomes clear that the rules applied were proportionate to the aims sought to be achieved when it is considered that if the applicants had commenced action shortly before the expiry of the period, the courts would have been required to adjudicate on events which had taken place approximately twenty years earlier.

Accordingly, taking into account in particular the legitimate aims served by the rules of limitation in question and the margin of appreciation afforded to States in regulating the rights of access to a court, the Court finds that there has been no violation of Article 6.1 ECHR of the Convention taken alone.

The Court then observes that Article 8 ECHR is clearly applicable to these complaints, which concern a matter of "private life", a concept which covers the physical and moral integrity of the person. It is to be recalled that although the object of Article 8 ECHR is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: there may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. It follows that the choice of means calculated to secure compliance with this positive obligation in principle falls within the Contracting States' margin of appreciation.

In the instant case, however, such protection was afforded. The abuse of which the applicants complained is regarded most seriously by the English criminal law and subject to severe maximum penalties. Provided sufficient evidence could be secured, a criminal prosecution could have been brought at any time and could still be brought. In principle, civil remedies are also available provided they are sought within the statutory time limit.

Accordingly, in view of the protection afforded by the domestic law against the sexual abuse of children and the margin of appreciation allowed to States in these matters, the Court concludes that there has been no violation of Article 8 ECHR.

Languages:

English, French.

Identification: ECH-96-3-015

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.11.1996 / **e)** 70/1995/576/662 / **f)** Chahal v. United-Kingdom / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **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.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus*.

Keywords of the alphabetical index:

Eviction / Detention, pending eviction / National security / Terrorism.

Headnotes:

The order of eviction to India of a Sikh separatist for national security reasons violates, in the event of being implemented, the absolute prohibition of torture and of inhuman or degrading treatment. The detention for six years of the applicant pending his eviction was not tainted with arbitrariness. Absence of adequate judicial review.

Summary:

The applicants, Karamjit Singh Chahal and his wife, Indian citizens, and their two children, who are British citizens, are Sikhs. The first applicant entered the United Kingdom illegally in 1971. In 1974 he was granted indefinite leave to remain under the terms of an amnesty for illegal entrants. The second applicant settled in the United Kingdom in 1975, where the children were born.

Mr Chahal visited Punjab in 1984. During his visit he began to adhere to the tenets of orthodox Sikhism and became involved in organising passive resistance in support of an independent Sikh homeland. He was arrested, detained for 21 days and tortured by the Punjab police. On his return to the United Kingdom he became a prominent figure in the affairs of British Sikhs. He was twice charged with assault and affray arising out of disturbances in temples, but on the first occasion the Court of Appeal quashed the conviction and on the second he was acquitted. He is not known to have been charged with any other criminal offence.

On 14 August 1990 the Home Secretary decided to deport the first applicant from the United Kingdom on grounds of national security and the international fight against terrorism. It was alleged *inter alia* that he had been involved in supplying funds and equipment to terrorists in Punjab, planning and directing terrorist attacks in India, the United Kingdom and elsewhere. Mr Chahal categorically denied these allegations. On 16 August 1990 he was taken to Bedford Prison, where he has since been held. His application for political asylum, claiming that he would be a victim of torture and persecution if deported to India, was refused by the Home Secretary on 27 March 1991.

The applicant had no right of appeal to an independent tribunal because of the national security elements of the case. However, on 10 July 1991, the matter was considered by an advisory panel, including a Court of Appeal judge, Lord Justice Lloyd, and a former President of the Immigration Appeal Tribunal. Mr Chahal was not informed of the evidence supporting the Home Secretary's allegations against him, was not allowed to be represented by a lawyer and was not informed of the panel's advice to the Home Secretary, who was, in any case, not obliged to follow it.

The Home Secretary finally signed the eviction order on 25 July 1991. Mr Chahal's application for judicial review of the decision to refuse asylum was successful, because the reasoning given to explain it had been inadequate. On 1 June 1992 the Home Secretary took a fresh decision to refuse asylum. On 22 October 1993, the Court of Appeal dismissed the appeal, being not possible for the court to judge whether his decision to deport Mr Chahal was irrational or perverse, because it did not have access to the counterbalancing national security evidence. In March 1994, the House of Lords refused leave to appeal.

It was well-established in the case-law of the Court that expulsion by a Contracting State might give rise to an issue under Article 3 ECHR where substantial grounds had been shown for believing that an individual, if expelled, would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. The Court was well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibited in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the person in question.

The Court was persuaded by evidence corroborated from a number of sources (including the reports of Amnesty International, the United States' State Department and the Indian National Human Rights Commission) that until mid-1994 at least, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were capable of pursuing their targets into areas of India far away from Punjab. Complaints continued to be made in connection with the Punjab police and no concrete evidence had been produced of any fundamental reform or reorganisation of the force. The Court also found it significant that attested allegations of serious human rights violations had been levelled at the police elsewhere in India. Against this background, the assurances made by the Indian Government, that Mr Chahal "would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities" do not constitute a sufficient guarantee of the applicant's safety. In conclusion, the order for his eviction to India, if implemented, would give rise to a violation of Article 3 ECHR.

The applicant alleged that his detention pending eviction ceased to be "in accordance with a procedure prescribed by law" for the purposes of Article 5.1 ECHR because of its excessive duration. The Court reminds that under the provision of Article 5.1.f ECHR, all that was required was that action was being taken with a view to eviction. It was immaterial whether the underlying decision to expel was lawful and it was not necessary to show that the detention was "reasonably considered necessary". The eviction proceedings had, however, to be conducted with due diligence; otherwise, the detention would cease to be permissible under the Convention.

Having regard of the period of detention, it is necessary to consider whether there existed sufficient guarantees against arbitrariness. In this context, the advisory panel procedure provided an important safeguard. The Court considered that this procedure provided an adequate guarantee that there were at least *prima facie* grounds for believing that, if Mr Chahal were at liberty, national security would be put at risk, and thus that the executive had not acted arbitrarily when it ordered him to be kept in detention. It followed that there had been no violation of Article 5.1 ECHR.

Article 5.4 ECHR required that any deprivation of liberty be subject to effective judicial control. The applicant had been detained for six years. The domestic courts did not have access to the national security evidence against him, and thus unable to review whether the decision to detain the applicant was justified. Although the whole case was reviewed by the advisory panel the latter did not offer sufficient procedural safeguards to qualify as a "court" within the meaning of Article 5.4 ECHR. The Court recognised that the use of confidential material might be unavoidable where national security was at stake. This did not mean, however, that the national authorities could be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism were involved. It was possible to employ techniques which both accommodated legitimate security concerns about the nature and sources of intelligence information and yet accorded the individual a substantial measure of procedural justice. In conclusion, there had been a violation of Article 5.4 ECHR.

Cross-references:

- *Ireland v. United Kingdom*, 18/01/1978, Series A no. 25
- *Klass and Others v. Germany*, 06/09/1978, Series A no. 28
- *X v. United Kingdom*, 05/11/1981, Series A no. 46
- *De Jong, Baljet et Van den Brink v. The Netherlands*, 22/05/1984, Series A no. 77
- *Leander v. Sweden*, 26/03/1987, Series A no. 116
- *Bouamar v. Belgium*, 29/02/1988, Series A no. 129
- *Soering v. United Kingdom*, 07/07/1989, Series A no. 161
- *E v. Norway*, 29/08/1990, Series A no. 181-A
- *Fox, Campbell et Hartley v. United Kingdom*, 30/08/1990, Series A no. 182
- *Cruz Varas and Others v. Sweden*, 20/03/1991, Series A no. 201
- *Vilvarajah and others v. United Kingdom*, 30/10/1991, Series A no. 215
- *Tomasi v. France*, 27/08/1992, Series A no. 241-A
- *Kolompar v. Belgium*, 24/09/1992, Series A no. 235-C
- *Murray v. United Kingdom*, 28/10/1994, Series A no. 300-A
- *Quinn v. France*, 22/03/1995, Series A no. 311
- *Amuur v. France*, 25/06/1996, *Reports of Judgments and Decisions*, 1996.

Languages:

English, French.

Identification: ECH-96-3-016

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 18.12.1996 / **e)** 40/1993/435/514 / **f)** Loizidou v. Turkey / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Inviolability of the home.
Fundamental Rights – Civil and political rights – Right to property.
Fundamental Rights – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

State, international jurisdiction / Property, denial of access / Military intervention.

Headnotes:

The denial to the applicant of access to her property in the northern part of Cyprus and the consequent loss of control thereof is imputable to Turkey and amounted to a violation of the applicant's property rights. The notion "home" in Article 8 ECHR does not comprise property on which it is planned to build a house for residential purposes.

Summary:

The applicant is a Cypriot citizen. She grew up in Kyrenia in northern Cyprus, where she owned certain plots of land. In 1972 she married and moved with her husband to Nicosia. Since 1974, she had been prevented from gaining access to the above-mentioned properties as a result of the presence of Turkish forces in Cyprus.

The Turkish Government claimed *inter alia* that the applicant's property had been irreversibly expropriated by virtue of Article 159 of the Constitution of 7 May 1985 of the "TRNC" (the "Turkish Republic of Northern Cyprus"), prior to Turkey's declaration of 22 January 1990 accepting the Court's jurisdiction. It is evident from international practice and resolutions of various international bodies that the international community does not regard the "TRNC" as a State under international law and that the Republic of Cyprus remains the sole legitimate Government of Cyprus. The Court cannot therefore attribute legal validity for the purposes of the Convention to provisions such as Article 159 of the "TRNC" Constitution. Accordingly the applicant cannot be deemed to have lost her title to property by this article.

On the issue of Article 1 Protocol 1 ECHR, the Court observed that the concept of "jurisdiction" under the Convention was not restricted to national territory. In particular, the responsibility of a Contracting State could arise when it exercised effective control in an area outside its national territory as a consequence of military action. It was obvious from the large number of troops engaged in active duties in northern Cyprus that the Turkish army exercised effective overall control there. In the circumstances of the case, this entailed Turkey's responsibility for the policies and actions of the "TRNC". Thus, the denial to the applicant of access to her property in northern Cyprus fell within Turkey's "jurisdiction" for the purposes of Article 1 ECHR and was imputable to Turkey.

The applicant remained the legal owner of the property, but from 1974 she lost all control, use and enjoyment of it. The continuous denial of access must therefore be regarded as an interference with her rights under Article 1 Protocol 1 ECHR. Apart from passing reference to the doctrine of necessity as a justification for the acts of the "TRNC" and to the fact that property rights were the subject of intercommunal talks, the Turkish Government have not sought to make submissions justifying the above interference with the applicant's property rights which is imputable to Turkey. It has not, however, been explained how the need to re-house displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974 could justify the above complete negation of the applicant's property rights in the form of a total and continuous denial of access and a purported expropriation without compensation. Nor can the fact that property rights were the subject of intercommunal talks involving both communities in Cyprus provide a justification for this situation under the Convention. In such circumstances, the Court concludes that there has been and continues to be a breach of Article 1 Protocol 1 ECHR.

On the issue of Article 8 ECHR, the Court observes that the applicant did not have her home on the land in question. It would strain the meaning of the notion "home" in Article 8 ECHR to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives. The Court finds that there has been no interference with the applicant's right to respect to her home.

Languages:

English, French.

Identification: ECH-96-3-017

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 18.12.1996 / **e)** 100/1995/606/694 / **f)** Aksoy v. Turkey / **g)** to be published in the *Reports of Judgments and Decisions*, 1996 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – General questions – Emergency situations.
Fundamental Rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus*.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Effective appeal.

Headnotes:

The treatment suffered by the applicant in the south-eastern part of Turkey was of such a serious and cruel nature that it can only be described as torture. Under circumstances of "public emergency", however, a detention of 14 days without judicial supervision cannot be considered as "strictly required by the exigencies of the situation" and violates the right to be brought promptly before a judge. Where an individual has an arguable claim to have been tortured by agents of State, the notion of "effective remedy" entails thorough and effective investigation capable of leading to identification and punishment of those responsible.

Summary:

The applicant was arrested and taken into police custody in Kiziltepe Security Headquarters in south-eastern Turkey towards the end of November 1992. He was detained for at least 14 days and released on 10 December 1992. According to the applicant, he was subjected by the police to a form of torture known as "Palestinian hanging" which involved being stripped naked and hung up by his arms. The Government, on the other hand, denied the applicant's claims and submitted that they were completely unsubstantiated.

On 8 December 1992, the applicant was brought before the Mardin Public Prosecutor who, after questioning him, ordered his release. There is disagreement whether his physical condition at the time was mentioned at all before the Public Prosecutor and whether he complained to him about his treatment during the detention. However, on 15 December he was admitted to hospital and was diagnosed as having bilateral paralysis of the lower arms which required the application of splints.

On 21 December 1992, the Public Prosecutor decided that there were no grounds to institute criminal proceedings against the applicant.

On 20 April 1994, the Commission was informed by the applicant's representatives that Mr Aksoy had been murdered on 16 April.

The Court considers that where an individual is taken into police custody in good health but is found to be injured on release, it is incumbent on the State to provide a plausible explanation as to the cause of injury, failing which a clear issue arises under Article 3 ECHR. Even in the most difficult circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 ECHR makes no provision for exceptions and no derogation

from it is permissible even in the event of a public emergency threatening the life of the nation. The ill-treatment in the instant case was of such a serious and cruel nature that it can only be described as torture. The Court finds that there has been a violation of Article 3 ECHR.

Pursuant to Article 15 ECHR, Turkey had filed a notice of derogation from its commitments under Article 5 ECHR to the Secretary General on 5 May 1992. The Court considered that the particular extent and impact of PKK terrorist activity in south-east Turkey had undoubtedly given rise to "a public emergency threatening the life of a nation". However, it did not consider that it was "strictly required by the exigencies of the situation" to detain the applicant for at least 14 days without judicial supervision. The period in question was exceptionally long, and insufficient safeguards were provided. The Court finds that there has been a violation of the right of everyone arrested and detained to be brought promptly before a judge, as safeguarded by Article 5.3 ECHR.

The nature of the right safeguarded under Article 3 ECHR has implications for Article 13 ECHR. The Court refers to the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims. It concluded that where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation of incidents of torture capable of leading to the identification and punishment of those responsible.

Indeed, under Turkish law the Prosecutor was under a duty to carry out an investigation. However, despite the visible evidence that the applicant had been tortured, no investigation took place. Moreover, in the circumstances of the applicant's case, such an attitude from a State official under a duty to investigate criminal offences was tantamount to undermining the effectiveness of any other remedies that may have existed. Accordingly, in view in particular of the lack of any investigation, the Court finds that the applicant was denied an effective remedy in respect of his allegation of torture and that there has been a violation of Article 13 ECHR.

Mr Aksoy's representatives claimed that he was killed as a direct result of his application to the Commission. Nonetheless the Commission did not have any evidence on which to form a conclusion as to the truth of this claim or the responsibility for the killing. The Court therefore concluded that no violation of the right of individual petition under Article 25.1 ECHR had been established.

Languages:

English, French.

Systematic thesaurus

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.).*

pages

2.2 Hierarchy

2.3 Techniques of interpretation

3 General Principles

[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.
[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.*

pages

[32] *The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.*
[33] *Civil servants, administrators, etc.*
[34] *Comprises the Court of auditors insofar as it exercises jurisdictional power.*

pages

[35] *E.g. Court of Auditors.*
[36] *Ombudsman, etc.*
[37] *E.g. Court of Auditors.*

pages

5 FUNDAMENTAL RIGHTS

5.1 General questions

5.2 Civil and political rights

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[38] *Open-ended or finite.*
[39] *If applied in combination with another fundamental right.*
[40] *The question of "Drittwirkung".*
[41] *Used independently from other rights.*
[42] *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".*

Keywords of the alphabetical index *

* Page numbers of the alphabetical index now refer to the page showing the identification of the decision rather than the keyword itself.

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