Bulletin

on Constitutional Case-Law

Edition 1997 1

Venice Commission

Council of Europe
Conseil de l'Europe

THE COUNCIL OF EUROPE
5 4003 00188553 1

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 1997 Edition in 1997, volumes 2 and 3 in 1998.

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*
3. *Keywords of the alphabetical index*
4. *Headnotes*
5. *Summary*
6. *Supplementary information*
7. *Cross-references*
8. *Languages*

G. Buquicchio
Secretary of the European Commission for Democracy through Law

Editors:

Ch. Giakoumopoulos, R. Dürr

Liaison officers:

Albania . . . . . F. Jakova
Argentina . . . . . H. Masnatta / R. E. Gialdino
Armenia . . . . . K. Soukiassian
Austria . . . . . A. Elhenicky
Belgium . . . . . R. Ryckeboer / P. Vandernoot
Bulgaria . . . . . K. Manov
Canada . . . . . O. Calder
Croatia . . . . . M. Salečić
Cyprus . . . . . P. Kallis
Czech Republic . . . . . I. Janů
Denmark . . . . . J.-C. Bülow
Estonia . . . . . H. Schneider
Finland . . . . . P. Lindholm / T. Kuosma
France . . . . . D. Rémy-Granger
Georgia . . . . . L. Bodzashvili
Germany . . . . . R. Jaeger / W. Rohrhuber
Greece . . . . . K. Menoudakos / O. Papadopoulou
Hungary . . . . . P. Paczolay
Ireland . . . . . J. Comerford
Italy . . . . G. Cattarino / N. Sandulli / E. Bianchi Figueredo
Latvia . . . . . A. Ušacka
Liechtenstein . . . . . H. Hoch
Lithuania . . . . . K. Lapinskas
Luxembourg . . . . . R. Everling
Malta . . . . . A. Ellul
Moldova . . . . . N. Osmochescu
Netherlands . . . . . W.A.J.P. van den Reek
Norway . . . . . A.M. Samuelson
Poland . . . . . H. Plak
Portugal . . . . . A. Duarte Silva
Romania . . . . . G. Iancu
Russia . . . . . E. Pyrickov
Slovakia . . . . . J. Drgonec
Slovenia . . . . . A. Mavčič
South Africa . . . S. Luthuli / K. O'Regan / N. Morris
Spain . . . . . P. Bravo Gala
Sweden . . . . . L. Lindstam / J. Munck
Switzerland . . . . P. Tschümperlin / J. Alberini-Boillat
"The former Yugoslav Republic of Macedonia" . . . . . Z. Pulejkova
Turkey . . . . . M. Turhan
Ukraine . . . . . P. Martinenko
United States of America . . . . . J. Lorson / J.C. Duff

European Court of Human Rights . . . . . H. Petzold / N. Sansonetis
Court of Justice of the European Communities . . . . . Ph. Singer

Layout: Graphic Design Studio - SEDDOC
Cover design: A. Staebel, S. Reading

Secretariat of the Venice Commission
Council of Europe
F-67075 STRASBOURG CEDEX
Tel: (33) 3 88412000 - Fax: (33) 3 88413738

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.

CONTENTS

Albania
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 January 1997 – 30 April 1997.

Armenia
Constitutional Court

Introduction

1. Date and context of foundation

In December 1988 the Constitutional Review Committee was set up under the amendment to the Constitution of the Soviet Union. The relevant law of the Union also provided for the creation of a Constitutional Review Committee in each Republic of the Union, but this never eventuated.

The Armenian legislator in 1991 also contemplated, but did not proceed with, the creation of a Constitutional Court (mentioned in two laws, the first relating to the President of the Republic, dated 1 October 1991 and the second relating to the Supreme Soviet of the Republic of Armenia, dated 19 November 1991). However, no law or amendment to the Constitution of the Armenian SSR followed this statement of intention.

It was the new Constitution, promulgated by referendum on 5 July 1995, which established a Constitutional Court in Armenia. The law concerning the Constitutional Court was passed by the National Assembly on 20 November 1995 and ratified by the President of the Republic on 6 December 1995. On 5 and 6 February 1996, the members of the Constitutional Court were appointed and the Court began to function on 6 February 1996 when the judges were sworn in before the National Assembly.

2. Position in the judicial order

The Armenian Constitutional Court is a judicial body, separate and independent from the executive, the legislature and the judiciary. It is responsible for verifying the constitutionality of laws and other enactments.

Under the Constitution, the judicial system of the Republic of Armenia comprises three levels of jurisdiction: the courts of first instance, and the courts of appeal and the Court of Cassation (reform of the judicial system is in hand). The Constitutional Court does not stand at the apex of any hierarchy of courts and is not part of the ordinary judicial system, in which the court of cassation represents the supreme authority. The Constitutional Court's case law is not subject to censure by the other courts. The relationship between the ordinary courts and the Constitutional Court is not defined by the Constitution or by the laws of the Republic.

I. Statutory foundations

- Articles 55.10, 57, 59, 83, 116.5 and Articles 96, 97, 98, 99, 100, 101 and 102 of Chapter 6 of the Constitution;
- Law of 6 December 1995 on the Constitutional Court.

II. Composition and organisation

1. Composition

The Constitutional Court is made up of nine members. Any citizen of the Republic aged 35 or over may become a member. Members (including the President and Vice-President) hold office until the age of 70.

Power to appoint members of the Constitutional Court is shared between the National Assembly and the President of the Republic.

The National Assembly elects five members, chosen by the majority of representatives present at the National Assembly sitting, while the four remaining members are appointed at the discretion of the President of the Republic.

The President of the Constitutional Court is not elected by its members but chosen from among them by the National Assembly, whose President nominates the candidates. The President of the Republic designates a President of the Constitutional Court if the National Assembly has not done so within 30 days of the Court's formation.

Appointment as a member of the Constitutional Court is possible for any person who meets the following requirements:

- citizenship of the Republic, age 35 or over, full electoral rights;
- higher education;
- 10 years' professional experience; experience in the legal sphere with public or scientific institutions;
- irreproachable moral character;
- command of the Armenian language.

Although there are no rules requiring members of the Constitutional Court to be lawyers, seven of the nine members appointed in February 1996 actually have a legal background.

Membership of the Constitutional Court is incompatible with other public office or remunerated activity, except of a scientific, educational or creative nature. Political party membership or political activity are forbidden, but an active political record is not precluded by the Constitution.

Members of the Court enjoy immunity. Only on a finding of the Court itself may a member's immunity be revoked by the appointing authority.

According to a constitutional principle, a member of the Constitutional Court is irremovable. A member's dismissal must be moved by the appointing authority (ie the President of the Republic or the National Assembly; in the latter case, the motion must be supported by at least a third of the representatives). If the question of dismissal is raised, the Constitutional Court considers the case in the absence of the member concerned and, by vote of at least two-thirds of its members (ie 6 out of 9) makes a finding as to termination of the member's functions, arrest, official liability or criminal responsibility. Upon delivery of this finding, the actual decision on the member's removal rests with the appointing authority (no dismissal of a member of the Constitutional Court has occurred since it was formed).

The fact that members of the Constitutional Court are subject only to the Constitution and the relevant law secures their independence. It is prohibited and punishable by law to bring any influence to bear on a member of the Constitutional Court.

Members cease to perform their functions when:

1. the age limit for holding office is attained;
2. death occurs;
3. loss of Armenian nationality occurs;
4. they are declared unfit for office, missing or dead by valid decision of the courts;
5. they are serving a sentence passed by the courts which has become enforceable.

A member is dismissed, pursuant to the Constitutional Court's finding, if he/she has:

1. made a written request to that effect to the appointing authority;
2. failed to attend three consecutive sessions of the Court;
3. been unavailable for duty for four consecutive months because of ill-health or other duly notified reasons;
4. committed an act unbefitting the reputation or dignity of a member of the Constitutional Court.

2. Procedure

Procedure before the Constitutional Court is governed by the law relating to the Court as such.

Under the Constitution, the following may petition the Constitutional Court:

1. the President of the Republic;
2. at least one-third of the representatives in the National Assembly;
3. presidential and parliamentary candidates in disputes over election results;
4. the Government in the case prescribed by Article 59 of the Constitution (inability of the President of the Republic to perform his/her duties);
5. the National Assembly in the case prescribed by Article 57 of the Constitution (removal of the President of the Republic from office).

The Constitutional Court delivers decisions and findings only in respect of the referrals made and has no right to entertain a case of its own motion. Referrals are made to the Court in writing and submitted to its President, with no charge for the procedure.

If the subject-matter referred to the Constitutional Court is not within its jurisdiction, or the referral is formally inconsistent with the procedures prescribed by the law relating to the Constitutional Court, or it is made by someone not entitled to do so, the applicant is notified accordingly by administrative reply within five days after the referral.

Each application to the Constitutional Court is considered when its members are convened; if it is within the Court's jurisdiction and formally consistent with the procedures prescribed by the law relating to the Constitutional Court, and the applicant is entitled to petition the Court, the President designates one or more members to make a preliminary examination of the case. This must be completed not later than 12 days after registration of the application, unless other time-limits are prescribed by the Constitution or the law relating to the Constitutional Court.

On completion of the preliminary examination, the conclusions are reported to the President of the Constitutional Court by the responsible member(s).

Within the three days following the report, the members of the Constitutional Court are called together by the President to decide as to admissibility. If the referral is deemed valid, the President convenes a session of the Court, which is required to consider the case not later than 40 days after registration of the application, unless other time limits are prescribed by the Constitution or the law relating to the Constitutional Court. The individuals and bodies concerned are informed of the Court's decision to admit the case before it.

The Constitutional Court appoints one or more rapporteurs. The rapporteur(s) and the President designate the persons to be summoned to appear at the session. The file made up by the rapporteur(s) is forwarded to each member of the Constitutional Court, to the parties as a matter of course and, if the President so decides, to the persons summoned (experts and witnesses), not later than three days before the session. The Secretary of the Court is required to inform the parties and the persons summoned of the session date.

The parties may appear before the Constitutional Court either in person or through their representatives, not more than three per party being allowed. The parties are entitled to consult all documents in the case file.

The Court can request and obtain additional information and documents. The Constitutional Court's requests and summonses are binding on State authorities, public office holders, institutions, enterprises, organisations and citizens.

Sessions are normally held in public and inter partes, and each application is dealt with at a single hearing. The Court is entirely free to decide to sit in camera.

At the hearing, the President of the Constitutional Court verifies that the majority of its members, the parties and the persons summoned are present, declares the hearing open, and informs the parties of their rights and duties. Following the submissions of the rapporteur(s), they may be questioned by the members of the Court and the parties. Each party states its position and contentions in the case with no restriction on speaking time.

The Constitutional Court may defer the proceedings if it sees fit to clarify circumstances which have decisive bearing on the outcome of the case.

The Court deliberates in private. A member of the Constitutional Court is not entitled to abstain or refuse to vote. A ruling is made only with the majority of all the members present at the hearing (the Constitutional Court has no separate chambers). The President votes last. Concurring or dissenting opinions on the Court's decision or finding are not allowed.

Proceedings before the Court are conducted orally and must at all times be recorded in writing. Decisions and findings adopted by the Court are announced in public session.

The Constitutional Court's decisions and findings must be delivered within 30 days after the filing of the application, this being the time limit stipulated by the

Constitution. Certain types of application must be brought before the Court within a specified time:

1. the President of the Republic must refer an international treaty to the Constitutional Court for verification of its compliance with the Constitution up to the time of its ratification by the National Assembly;
2. petitions concerning disputes in connection with the results of referenda and presidential and parliamentary elections may be made in the month following official publication of the results;
3. a petition relating to certification of insuperable obstacles for a presidential candidate must be made not later than 5 days before the presidential elections. The Constitutional Court must reach a decision in the matter within 5 days of filing.

Any decision or finding by the Court is transmitted within three days of adoption to the parties in the case, the President of the Republic, the National Assembly, the Government, the Court of Appeals and the Prosecutor General.

From March 1996 to 23 May 1997, the Constitutional Court heard 57 cases; in three only it held that an international treaty was not in conformity with the Constitution (4.5% of the cases). Of all referrals, 55 (about 95%) concerned the constitutionality of international treaties. One related to the September 1996 presidential elections. To date there has been a single referral, moved by 65 parliamentarians, concerning the constitutionality of the law on local government elections.

3. Organisation

The rules governing the operation of the Constitutional Court and the organisation of its business are laid down in the rules of procedure adopted by the Court itself.

The Court's director of personnel is responsible for all its administrative work, which involves appointment of staff and management of human resources, running of the library, and publication of the Constitutional Court Bulletin.

The staff (technical services excepted) is 41 strong, 9 being assistants to the members of the Court.

Legal aid is provided by the Legal Department consisting of 7 lawyers apportioned between the International Law Section (3 persons) and the Legislative Section (3 persons).

The Secretariat has 18 clerks (including staff of the library, the press service and the registry). Another six work for the finance department (5) and the data processing department (1). The Adviser to the Constitutional Court is responsible for external relations.

The Constitutional Court's financial resources and staff are controlled by its President.

The President submits annual estimates to the Government for the operation of the Constitutional Court. Its budget is established each year by the National Assembly within the State budget. The Constitutional Court has complete independence in the management of its financial resources.

III. Functions

In pursuance of Article 100 of the Constitution and according to the procedures established by law, the Constitutional Court:

1. decides whether the laws, the resolutions of the National Assembly, the orders and decrees of the President of the Assembly and the resolutions of the Government are in compliance with the Constitution;
2. before the ratification of international treaties, determines their conformity with the Constitution;
3. rules on disputes concerning referenda and the results of presidential and parliamentary elections;
4. ascertains whether an obstacle to a presidential candidature is insuperable;
5. makes findings as to whether there are grounds for the removal of the President of the Republic;
6. makes findings concerning measures prescribed by Articles 55.13 and 55.14 of the Constitution (extraordinary powers of the President of the Republic);
7. makes findings as to whether the President of the Republic is incapable of performing his/her functions;
8. makes findings with regard to termination of the functions of members of the Constitutional Court, their detention, and criminal proceedings against them for criminal or administrative offences;
9. in the cases prescribed by law, decides on the suspension or prohibition of a political party's activities.

IV. Nature and effect of judgments

According to Article 102 of the Constitution, the Constitutional Court shall render decisions and findings.

1. The Court's decisions concern Articles 100.1, 100.2, 100.3, 100.4 and 100.9 of the Constitution. They are taken by majority vote of the total number of

members, except for the purpose of suspending or prohibiting a political party's activity, which requires a two-thirds majority.

The Constitutional Court's decisions are final, not subject to review, and acquire legal force on publication. They are binding throughout the territory of the Republic. Any law or enactment which the Court declares inconsistent with the Constitution ceases to be effective upon publication of the decision. Liability is incurred, under conditions defined by the legislation, for failure to execute a decision of the Constitutional Court, improper execution or hindrance to execution.

2. The findings of the Constitutional Court concern Articles 100.5, 100.6, 100.7 and 100.8 of the Constitution, and are reached by a two-thirds majority of the total number of members.

The Court's decisions and findings are published in the official press and the Constitutional Court Bulletin *(Téghékaguir)*.

Conclusion

Review of constitutionality is a recent practice in the Armenian institutional order. Reform is needed principally as regards the conditions of referral:

- granting the citizens access to the Constitutional Court for the protection of their constitutional rights;
- enabling the Court of Cassation to refer cases;
- reducing the number of parliamentarians stipulated for petitions to the Constitutional Court.

Statistical data

1 March 1996 – 30 April 1997

53 referrals made and decisions delivered, including:

- 52 decisions concerning the compliance of international treaties with the Constitution. All referrals were initiated by the President of the Republic. Three treaties were declared incompatible with the Constitution.
- 1 decision concerning the presidential elections on an application made by two presidential candidates.

Important decisions

Identification: ARM-1997-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 22.11.1996 / **e)** DCC-26 / **f)** Decision on a dispute concerning the results of the election of the President of the Republic of Armenia of 22.09.1996 / **g)** *Téghékaguir* (Bulletin on the Constitutional Court) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction.
Constitutional Justice – Types of litigation – Electoral disputes – Presidential elections.
Constitutional Justice – The subject of review – Administrative acts.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Presidential elections.

Headnotes:

Under Article 100.3 of the Constitution and Articles 9, 10, 11, 13, 18, 21 and 30 of the law on the presidential elections of the Republic of Armenia, the Constitutional Court lacks jurisdiction to examine concrete evidence of infringements relating to the presidential elections at the stage of preparation, organisation or returns. The Constitutional Court nevertheless examined the presidential election results and, while it took the counting errors into consideration, found that they did not affect the final outcome of the elections.

Summary:

The referral to the Constitutional Court was made by two opposition candidates in the presidential election seeking annulment of the decision by the Central Electoral Commission declaring the President of the Republic elected on the presidential election results which it had published.

The Constitution provides that the Constitutional Court "shall rule on disputes concerning referenda and the results of presidential and parliamentary elections" (Article 100.3 of the Constitution).

The law on presidential elections requires the higher electoral commissions to review and invalidate any improper decision or act by a subordinate electoral commission. Such improper decisions or acts may also be appealed, either before the higher electoral commission or before the courts. Decisions of the Central Electoral Commission – apart from those relating to the outcome of the election – may be challenged before the Supreme Court; however, no appeal was made to these authorities.

The Constitutional Court found that the Central Electoral Commission had acted in accordance with the legislative provisions and that the results issued by the Commission tallied with the figures of the regional and local commissions; it therefore dismissed the application and upheld the election of the President of the Republic.

Languages:

Armenian.

Austria
Constitutional Court

Statistical data

1 January 1997 – 30 April 1997

- Financial claims (Article 137 B-VG): 7
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Review of regulations (Article 139 B-VG): 56
- Review of laws (Article 140 B-VG): 206
- Review of elections (Article 141 B-VG): 2
- Appeals against decisions of administrative authorities (Article 144 B-VG): 813
  (347 declared inadmissible)

The Court convened for a session in February/March, and there were two intermediate sessions in January and April.

Composition of the Court

In January 1997 a seat became vacant when Mr Dietrich Roessler reached the age limit. He was succeeded by Mrs Eleonore Berchtold-Ostermann, lawyer, who was nominated by the National Council.

Connection of the Court to the Internet

In May 1997 the Court set up a home page on the Internet (http://www.vfgh.gv.at).

Important decisions

Identification: AUT-1997-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 24.01.1997 / **e)** G 388-391/96 / **f)** Mindestkörperschaftsteuer / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments and decisions of the Constitutional Court) / **h)** *Juristische Blätter*, 1997, 162.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Costs.
Constitutional Justice – Decisions – Types – Annulment.

Constitutional Justice – Effects – Temporal effect – Retrospective effect.
Constitutional Justice – Effects – Consequences for other cases – Ongoing cases.
General Principles – Rule of law.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Mass appeals / Company tax / Taxation, objective justification / Legal protection / Economic performance capacity, principle.

Headnotes:

A legal rule subjecting all companies to a minimum annual tax on company profits *(Mindestkörperschaftsteuer)*, regardless of their income, is contrary to the principle of equality. Taxpayers who earn little are taxed proportionately more than larger earners. Such a departure from the principle of economic performance capacity, which is inherent in profits-tax law, has no objective foundation.

In view of eleven thousand similar pending applications for the annulment of an administrative decision, the Court ruled that the provision set aside was no longer applicable. In the interests of prompt and effective legal protection, the retroactive effect of the annulment of the law was extended to all the decisions of the administrative authorities, which thus lost their legal basis and no longer had legal force. Thus all the cases pending before the Court were settled. Except in four cases which were the occasion for the introduction of the *ex officio* review of constitutionality of the law concerned, the Court will not rule on those appeals.

The decision stipulates that the legal provisions annulled by the law which the Court declared unconstitutional are now applicable again.

Summary:

The Constitutional Court annulled a provision of the company tax law, as amended as of 1 January 1996. It had taken up the matter *ex officio*, following appeals against administrative decisions on the grounds that they were unconstitutional. In the space of three months, the Court was faced with more than eleven thousand appeals, mostly based on a model appeal drawn up by the Federal Chamber of Auditors and Tax Consultants.

Since dealing with these appeals individually would have taken several years, causing delays in the other cases before it, the Court did not hesitate to make full use of the power vested in it in the event of repeal of a law: in general judgments are effective *ex nunc* and for the future. With the exception of the specific case *(Anlaßfall)* which set the proceedings in motion, the law remains applicable to events prior to the annulment "unless otherwise stipulated in the judgment".

In this instance, the annulment applies not only to the four cases in which the Court reviewed the constitutionality of the law applied, but also to all other final administrative decisions.

These no longer have any legal basis, and are thus null and void as if they too had been set aside. As a result, there is no need for the Court to rule on similar appeals, or on the petitions in them (for an administrative decision to be set aside, for the appeal to have suspensive effect, for award of costs, or for the appeal to be forwarded to the Administrative Court). Stressing the importance of its essential supervisory role in a state governed by the rule of law, the Court held that delays in the other cases pending before it were not acceptable. On balance, applicants' interest in having the Court determine each case individually (including the refund of costs) was necessarily outweighed by the individual's interest in legal protection.

Supplementary information:

After the judgment on the constitutionality of the legal provision had been delivered, proceedings in the four cases continued. The Court granted the applications, set aside the administrative decisions concerned, and ordered the losing party to pay the costs.

The lawyers criticised the Court's approach, arguing that the (other) applicants had been refused costs.

In its annual report, the Court demands legislative action to make a challenge comprising thousands of appeals unnecessary while not impairing legal protection. The "model appeal", once proven effective, could be used again in the future, and possibly paralyse the Court.

Legal provisions to which the Court referred:
Articles 140.1, 140.6, 140.7 of the Federal Constitutional Law (B-VG).

Languages:

German.

Identification: AUT-1997-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 14.03.1997 / **e)** G 392, 398, 399/96 / **f)** Werkverträge / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of judgments and decisions of the Constitutional Court) / **h)** *Österreichisches Recht der Wirtschaft*, 1997, 245.

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 – Abstract review.
Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Constitutional Justice – Procedure – Grounds.
Constitutional Justice – Procedure – Hearing – Address by the parties.
Constitutional Justice – Effects – Temporal effect.
General Principles – Rule of law.
General Principles – Legality.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Social insurance / Employment contracts / Income tax / Wage-earners, social insurance / Legislation, understanding / Insufficient grounds.

Headnotes:

Parliamentary appeals may not be filed against laws which have not yet entered into force.

The Constitutional Court cannot rule on unconstitutionality allegations made for the first time during the hearing and not set out in the appeal or dealt with in the preparatory procedure.

An application by National Council members for the annulment of a "regulatory system" introduced in 1996 and repeatedly modified is not exempt from the absolute requirements of federal constitutional law and the law on the Constitutional Court, which requires that an application be "precise".

Even if it seeks an abstract review of the constitutionality of legal standards, an application must state, *inter alia*, the provisions concerned and the exact grounds on which their annulment is requested. It is a fundamental principle of the case law that annulments should make as little difference to the existing law as possible; it is for the Court to make sure that in setting aside a provision it does not change the meaning of the law too radically.

An extensively unclear – indeed, partially contradictory – set of legal rules is not determinate enough under the legality principle enshrined in Article 18 of the Federal Constitution.

Summary:

In 1996 the National Council adopted the Structural Adjustment Law ("*Strukturanpassungsgesetz* 1996"), amending 98 federal laws, including the income tax law, the law on general social security and the federal tax code. The new rules *("Werkvertragsregelung")* subjected two categories of people to social insurance for the first time: service providers not bound by the client's instructions ("*freie Dienstnehmer*"), and those providing specific services under contract to a company (persons comparable to salaried employees – "*dienstnehmerähnlich*"); both are liable for income tax (deducted at source) and the tax authorities are required to make a declaration to the sickness insurance fund in respect of the people concerned.

The Court annulled the "*Werkvertragsregelung*" rules in the law on general social security, as not meeting the legality principle. The legislator had not succeeded in fitting compulsory insurance of the target group into the existing compulsory insurance system in a comprehensible and acceptable manner. The wording was particularly obscure, and even contradictory in part, in relation both to the actual existence of compulsory insurance and to its organisation (commencement, duration, end). For the same reasons the Court ruled the corresponding tax regulations unconstitutional. It set aside the "directly unconstitutional" provisions and all those passages of the legislation which were inextricably linked to them.

It did not consider it unconstitutional to bring employees in the "*freie Dienstnehmer*" category into the compulsory social security system.

The application was dismissed as inadmissible in respect of several of the impugned provisions – for example, the exemption from compulsory social security of certain types of workers, such as street newspaper sellers – because of non-existent or insufficiently precise unconstitutionality arguments.

The annulment took effect on the date of publication of the judgment in the Federal Official Gazette. The Court did not set an execution date in stating the grounds for its decision: such a regulation was impossible to execute.

Supplementary information:

Legal provisions to which the Court referred:
Articles 18, 140.1, 140.3 and 140.5 of the Federal Constitution (B-VG); Article 62.1 of the Law on the Constitutional Court.

Languages:

German.

Belgium
Court of Arbitration

Statistical data

1 January 1997 – 30 April 1997

- 25 judgments
- 27 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 55 new cases
- Average length of proceedings: 11 months
- 14 judgments concerning applications to set aside
- 7 judgments concerning preliminary points of law
- 2 judgments concerning an application for suspension
- 2 cases settled by summary procedure (one application to set aside and one preliminary point of law)

Important decisions

Identification: BEL-1997-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.02.1997 / **e)** 6/97 / **f)** / **g)** *Moniteur belge* (Official Gazette), 04.03.1997; *Cour d'arbitrage – Arrêts* (Court of Arbitration), 1997, 77 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Community law.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and other domestic legal instruments.
General Principles – Fundamental principles of the Common Market.

Keywords of the alphabetical index:

Preliminary point of law for the Court of Justice of the EC / Teaching, medicine / Teaching, general medicine / Medical profession / Free movement of persons / Free movement of services / Right of establishment, mutual recognition of diplomas.

Headnotes:

The Court referred three preliminary points of law to the Court of Justice of the European Communities, concerning the interpretation of the provisions of Council Directive 93/16/EEC of 5 April 1993 designed to facilitate the free movement of doctors and the mutual recognition of diplomas, with particular reference to training in general medical practice (Title IV of the directive). The questions asked were:

1. Should the directive, and in particular Title IV, be interpreted as meaning that specific training in general medical practice cannot begin in Belgium unless the person concerned has obtained a diploma of doctor of medicine, surgery and obstetrics ("physician" in the Flemish community?

2. Does the requirement laid down by Article 31 of the Directive, in accordance with which specific training in general medical practice must "entail the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works", mean that the candidate may perform the activities of a doctor, which in Belgium are restricted to those holding the diploma of doctor in medicine, surgery and obstetrics ("physician" in the Flemish community)?

3. If so, should that provision be interpreted as meaning that the candidate may perform such activities from the beginning of the specific training in general medical practice, which in the Flemish community begins in the seventh year of medical studies, i.e. before being awarded the diploma in medicine, surgery and obstetrics ("physician" in the Flemish community)?

Summary:

This judgment is the first in which a Constitutional Court refers a preliminary point of law to the Court of Justice of the European Communities.

A medical union filed an appeal to set aside a decree of the Flemish Community relating to specific training in general medical practice, adopted primarily in order to transpose the provisions of Title IV of Council Directive 93/16/EEC of 5 April 1993 to the Flemish Community.

In Belgium, basic medical studies last seven years. The contested decree authorises students to begin specific training in general medical practice at the beginning of the final year of seven years of studies. This first year of specific training is supplemented by two additional years of general medical training.

There are problems in interpreting the European Directive: Articles 23 and 30 stipulate that students having completed six years of medical training may be admitted to specific training in general medical practice, whereas Article 3 considers that the basic diploma of formal medical qualifications in Belgium is that of doctor of medicine, surgery and obstetrics ("physician" in the Flemish community). In Belgium, this diploma is awarded only after seven years of studies, but the contested decree authorises the start of the specific training from the beginning of the seventh year. Does the Directive authorise this specific training from the beginning of the seventh year of studies or is it necessary to wait until the basic training has been completed? This is the subject matter of the first preliminary point of law.

The second relates to one aspect of the specific training required by the Directive: does the personal participation of the trainee in the professional activities and responsibilities of the person with whom he or she works imply the exercise of activities restricted to those holding the basic diploma of formal medical qualifications? The reply to this question is relevant for consideration of the grounds: the applicant relies on the provisions of Belgian law on medical monopoly with regard to the healing profession.

The third preliminary point of law will be considered only if there is an affirmative reply to the second. Should this personal participation of the trainee be initiated at the beginning of the specific training, i.e. from the seventh year of basic training (in accordance with the contested decree), or should it wait until the beginning of the additional two years of training which do not commence until the diploma of doctor has been awarded?

Languages:

French, Dutch, German.

Identification: BEL-1997-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.02.1997 / **e)** 7/97 / **f)** / **g)** *Moniteur belge* (Official Gazette), 28.03.1997; *Cour d'arbitrage – Arrêts* (Court of Arbitration), 1997, 93 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
General Principles – Rule of law – Certainty of the law.
General Principles – Proportionality.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Pension system , harmonisation.

Headnotes:

The principle of the non-retrospective effect of laws, established by a law (Article 2 of the Belgian Civil Code), is a general legal principle. By giving retrospective effect to rules, there is a danger of creating legal uncertainty, such that, having regard to Articles 10 and 11 of the Constitution guaranteeing equality and non-discrimination, any resulting difference in treatment could only be acceptable if warranted by special circumstances.

In the case in question, the retrospective effect of the provision referred to the Court has the result that the legislation, in pursuing its aim of aligning retirement and survivors' pensions, represents undue interference with the pension rights of a single category of pensioners, whereas others who are entitled to the pension are not affected at all. Accordingly, the effects of the means employed are held to be disproportionate to the aim pursued.

Summary:

This case concerns a legislative provision aimed at harmonising the retirement pension scheme and the survivors' pension scheme. The new provision has an 8-year retrospective effect but only with regard to one category of pensioners (those who retired from working life after 31 December 1993).

The principle of the non-retrospective effect of laws is not as such a constitutional principle. It derives from legislation, primarily Article 2 of the Civil Code, and has the character of a general principle of law; accordingly, parliament may in theory rule out its application.

The case-law of the Court of Arbitration, as shown by this judgment, restricts this ability to depart from the principle of the non-retrospective effect of legislation. The constitutional principle of equality and non-discrimination means that no category of the population may be treated in a discriminatory way as regards compliance with the principle of the non-retrospective effect; here, the principle of legal certainty is also relevant. The guarantee of equal treatment confers a constitutional status on these latter principles when taken in conjunction with the principle of equality and non-discrimination.

Languages:

French, Dutch, German.

Identification: BEL-1997-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 05.03.1997 / **e)** 9/97 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.04.1997 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Town planning / Compensation, fair.

Headnotes:

Proceedings to hold a forced public auction, portrayed as the enforcement of a legal obligation incumbent upon the owner of a disused business site by virtue of town planning legislation, but nevertheless pursuing the same aim and achieving the same results as a compulsory purchase order, i.e. depriving the owner against his will of his property at the instigation of a public authority on public interest grounds, must, insofar as the legislator has the authority to introduce limitations to the right to property, comply with the judicial compulsory purchase procedures laid down by law and the principle of fair compensation paid in advance.

Summary:

This case concerns a provision in a Walloon Region decree on town planning which, in cases where the owner

of a disused business site fails to carry out renovation work, authorises the Region to proceed *ex officio* with a forced public auction.

The Court of Arbitration examined this *ex officio* measure and found that it pursued the same aim and achieved the same results as a compulsory purchase order. It concluded that the requirements of the special law of 8 August 1980 (regulating regionalisation in Belgium) as regards compulsory purchase proceedings, which reaffirm the relevant constitutional conditions, must be complied with. These requirements are aimed at ensuring compliance with the judicial compulsory purchase procedures laid down by law and the principle of fair compensation paid in advance.

Languages:

French, Dutch, German.

Identification: BEL-1997-1-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 30.04.1997 / **e)** 24/97 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** *Revue de Jurisprudence de Liège, Mons et Bruxelles (J.L.M.B.)*, 1997, 788-796.

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

Keywords of the alphabetical index:

Expert opinion, criminal / Adversarial principle.

Headnotes:

Articles 43, 44 and 148 of the Code of Criminal Procedure and Articles 962 *et seq* of the Judicial Code, interpreted as meaning that an expert designated by a criminal court acting as a trial court is not obliged to comply with any of the regulations on inter partes proceedings contained in the aforementioned articles of the Judicial Code, violate Articles 10 and 11 of the Constitution which guarantee the principle of equality and non-discrimination, read separately or in conjunction with Article 6 ECHR.

The same provisions, interpreted in the light of Article 2 of the Judicial Code as not exempting the expert, designated by the criminal court acting as trial court, from complying with the regulations on *inter partes* proceedings contained in the aforementioned articles of the Judicial Code, insofar as their application is compatible with the principles of criminal law, do not violate Articles 10 and 11 of the Constitution, read separately or in conjunction with Article 6 ECHR. Under the terms of Article 2 of the Judicial Code, it cannot be inferred that the provisions of the Code referring to the agreement of the parties or making certain effects subject to their initiative can be applied in criminal proceedings where the freedom of individuals to arrange their own affairs is not a relevant issue.

Summary:

The Code of Criminal Procedure contains few regulations governing expert opinions ordered by the trial court in criminal matters. Nevertheless, established case-law holds that Articles 962 to 991 of the Judicial Code relating to expert opinions, certain provisions of which state that such opinions must comply with the adversarial principle, do not necessarily have to be applied to expert opinions submitted to criminal courts.

This judgment considers that such an interpretation violates the principle of equality and non-discrimination. However, it also holds that, without prejudice to the specific features of criminal procedure, the articles in question can be interpreted as requiring a criminal expert opinion to adopt the adversarial principle. Such an interpretation does comply with the principle of equality and non-discrimination.

This case relates only to expert opinions ordered by the trial court and not those prepared during the public prosecutor's preliminary investigations and the inquiries into the facts.

Languages:

French, Dutch, German.

Identification: BEL-1997-1-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 30.04.1997 / **e)** 25/97 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts.
Institutions – Federalism and regionalism – Distribution of powers – System.
Institutions – Federalism and regionalism – Distribution of powers – Subjects.
Fundamental Rights – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Federalism, power to create courts / Court, criteria.

Headnotes:

In principle, only the federal state, to the exclusion of communities and regions, can create courts.

The Appeals Board, which examines appeals against the decisions taken by the Flemish Fund for the Social Integration of People with Disabilities, is a court. This is the conclusion to be drawn from the intention stated in the course of the parliamentary work on the decree inaugurating that board, provisions relating to the composition of the board and those aimed at guaranteeing its independence: it is presided over by a judge; members of the Flemish Fund may not be members of the Appeals Board; decisions of the board constitute *res judicata.* The quasi-judicial nature of appeal is confirmed by the provisions of an implementing regulation for the decree in question: the president and deputy presidents must be judges; appeals must be in writing and contain reasons; the appellant may be represented by counsel; the parties may submit a memorial; the Appeals Board must take account of this; the decision of the Appeals Board must contain reasons; proceedings are *inter partes.*

Summary:

On the date on which the decree in question was adopted (27 June 1990), the rules governing the attribution of powers to the federal state and the federate entities (communities and regions) were conceived in such a way that, in accordance with the established case-law of the Court, those matters which the Constitution makes the exclusive preserve of the law could be dealt with only by the federal parliament and not a community or region.

Since the institutional reform of 1993, this rule has been maintained, but communities and regions are now authorised, through the exercise of their implicit powers, to regulate the so-called "reserved" powers. This was not allowed according to the case-law of the Court. By virtue of these implicit powers, "the decrees [of the communities and regions and the orders of the Region of Brussels-Capital] may contain legal provisions relating to matters for which the Councils are not competent, insofar as such provisions are necessary for the exercise of their responsibilities" (Section 10 of the special law of 8 August 1980 on institutional reform and Sections 4 and 63 of the special law of 12 January 1989 on the Brussels institutions).

The Court concluded from the parliamentary work on the decree and the various criteria referred to in the headnotes above, that the Appeals Board constituted a court and, applying the rules in force prior to the 1993 reforms, since the decree had been adopted in 1990, it ruled that the Community was not competent to adopt such a provision.

It should be noted that restricting to the federal state the power to create courts and determine their jurisdiction does not exempt such courts form applying the whole of Belgian legislation, including legislation whose source is to be found in the regulations adopted by communities and regions.

Languages:

French, Dutch, German.

Bulgaria
Constitutional Court

Statistical data
1 January 1997 – 30 April 1997

Number of Decisions: 6

Summaries of important decisions of the reference period will be published in the next edition, *Bulletin* 1997/2.

Canada
Supreme Court

Important decisions

Identification: CAN-1997-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 06.02.1997 / **e)** 24668 / **f)** Eaton v. Brant County Board of Education / **g)** [1997] 1 S.C.R. 241 / **h)** Internet: http://www.droit.umontreal.ca/doc/csc-scc/en/index.html; [1997] Supreme Court Judgment no. 98 *(QuickLaw)*, (1997); 142 *Dominion Law Reports* (4th) 385; 207 *National Reporter* 171.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Disability, discrimination / Canadian Charter of Rights and Freedoms.

Headnotes:

The equality provision of the Constitution, which specifically prohibits discrimination based on disability, is not infringed by a placement of a severely disabled child in a special education class pursuant to the recommendations of the child's teachers, teachers' assistants and a specialised placement committee notwithstanding the absence of consent by the child's parents.

Summary:

A severely disabled child with communications difficulties was classified as a special pupil by an Identification, Placement, and Review Committee established pursuant to education legislation. The child was placed in a mainstream classroom for a trial period. After three years, the teachers and assistants concluded that this placement was not in the child's best interests and indeed that it might well harm her. The Committee then decided that the child should be placed in a special education class. The Committee's decision, which was appealed by the

child's parents, was upheld first by a Special Education Appeal Board and on further appeal by the Ontario Special Education Tribunal. The parents' application for review of the Tribunal's decision was dismissed by the Ontario Divisional Court but the Court of Appeal allowed an appeal from that judgment and set aside the Tribunal's order.

The recognition of the actual characteristics of a disabled person and reasonable accommodation of these characteristics is the central purpose of the Constitution's equality provision (Section 15 of the Canadian Charter of Rights and Freedoms) as it relates to disability. The failure to make reasonable accommodation results in discrimination against the disabled. Discrimination occurring because of disability has an individual variation and so differs from discrimination occurring because of other enumerated grounds based on the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions (such as sex or race) which have no such individual variation. Disability means vastly different things depending upon the individual and the context and this produces the "difference dilemma" where segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. The decision-making body must ensure that its determination of the appropriate accommodation for an exceptional child is from a subjective, child-centred perspective which attempts to make equality meaningful from the child's point of view as opposed to that of the adults. To do so, it must decide what is in the child's best interests. The views of older children and those able to communicate their wishes and needs will play an important role in the determination of best interests. In this case, the Supreme Court found that the child's placement in the special education class was in the child's best interests. Accordingly, no Charter infringement occurred.

Languages:

English, French.

Identification: CAN-1997-1-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 27.02.1997 / **e)** 23811 / **f)** Benner v. Canada (Secretary of State) / **g)** [1997] 1 S.C.R. 358 / Internet: http://www.droit.umontreal.ca/doc/csc-scc/en/index.html; [1996] Supreme Court Judgment no. 26 *(QuickLaw)*, (1997); 143 *Dominion Law Reports* (4th) 577; 208 National Reporter 81 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Citizenship.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Citizenship, acquisition by descent.

Headnotes:

Denying children born abroad of Canadian mothers before 15 February 1977 the same treatment under citizenship legislation as those born abroad of Canadian fathers offended the equality provision of the Constitution.

Summary:

Citizenship legislation provided that persons born abroad of a Canadian father before 15 February 1977 would be granted citizenship on application while those born abroad of a Canadian mother would have to undergo a security check and swear an oath. The application for citizenship of a U.S.-born son of a Canadian mother was rejected by the Registrar of Citizenship after a security check revealed several criminal offences. The Federal Court of Appeal upheld a decision of the Federal Court, Trial Division dismissing an application by way of *certiorari* to quash the Registrar's decision.

In applying the Constitution's equality provision to questions of status, the critical time is not when the individual acquires the status in question but when that status is held against the person or disentitles the person to a benefit. The Supreme Court of Canada found the applicant's situation to be one of status which was an on-going affair. It also found the Charter guarantee of equal benefit of the law was infringed by the imposition of the more onerous requirements imposed on children born abroad of Canadian mothers as opposed to those imposed on children born abroad of Canadian fathers. No general doctrine of "discrimination by association" with another (the mother) was created. The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. The infringement was not justifiable in a free and

democratic society. The impugned provision accordingly was not saved.

Languages:

English, French.

Croatia
Constitutional Court

Statistical data

1 January 1997 – 30 April 1997

- Cases concerning the conformity of laws with the Constitution:
  received 176, resolved 77;
  in 45 cases provisions of unconstitutional laws were repealed;
  in 13 cases proposals to review the constitutionality of laws were not accepted, in 19 cases the procedure was terminated.

- Cases concerning the conformity of other regulations with the Constitution and laws:
  received 23, resolved 30;
  in 2 cases the proposals to review the constitutionality and legality of regulations were not accepted, in 10 cases the proposal was dismissed and in 18 cases the procedure was terminated.

- Cases concerning the protection of constitutional rights:
  received 150, resolved 108;
  in 17 cases the constitutional action was accepted, in 43 cases rejected, in 37 cases dismissed, in 8 cases the procedure was terminated and in 3 cases the petitioners were instructed on the right to submit a constitutional action.

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

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

- Cases concerning supervision of the constitutionality and legality of elections and electoral disputes which do not fall within the jurisdiction of other courts:
  received 139, resolved 139;
  in 36 cases the proposals were accepted, in 91 cases rejected, in 2 cases dismissed, in 1 case the procedure was terminated and in 9 cases the petitioners were instructed about their rights.

- Cases concerning appeals to suspend temporarily the execution of individual acts based on a provision of

law the constitutionality of which is under review or of acts disputed by constitutional action:
received 2, resolved 6;
6 cases were dismissed.

On February 25th 1997 Milan Vuković, who until then was a judge of the Constitutional Court of the Republic of Croatia, became president of the Supreme Court of the Republic of Croatia.

Local and parliamentary elections were held on 13 April 1997: elections for authorities in municipalities and counties and for one house of the republic parliament, *Sabor*, the House of Counties.

All electoral decisions in this issue concern these elections. The term "decision" used here is a general term which includes second instance rulings of the Constitutional Court following an appeal against a ruling of the first instance of an electoral commission and also notifications and admonitions issued in general supervision of constitutionality and legality of elections. The public was informed about all of these decisions through the media.

Important decisions

Identification: CRO-1997-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.01.1997 / **e)** U-IV-947/1996 / **f)** / **g)** *Narodne novine* (Official gazette), 2/1997, 98-100 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Powers.
Institutions – Courts – Jurisdiction.
Institutions – Courts – Organisation – Members – Discipline.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Impartiality.

Keywords of the alphabetical index:

Judge, exclusion / Judge, challenging.

Headnotes:

The State Judiciary Council itself decides on the motion for the exclusion of its president and/or of its members in disciplinary proceedings conducted before it against a president of a court or a judge.

Denial of exclusion in cases of disciplinary proceedings before the State Judiciary Council would mean the acceptance of partial judges in some cases, which would be a violation of the constitutional right to a fair trial.

Summary:

The decision concerns the conflict of jurisdiction between legislative and judicial bodies, in this case between the House of Counties of the Parliament and the State Judiciary Council which appoints judges, relieves them of duty and deals with their disciplinary responsibility.

A president of a court and a judge may appeal to the House of Counties against decisions by which punishments are imposed upon them in disciplinary proceedings before the State Judiciary Council.

In disciplinary proceedings against him, the then president of the Supreme Court of the Republic made a motion for the exemption of the president of the State Judiciary Council and two of its members, justifying the motion by the circumstances which made their impartiality doubtful.

The State Judiciary Council deferred the motion to the House of Counties, which also declared its incompetence in cases of exemption, and expressed the view that exemption is not acceptable in proceedings before the State Judiciary Council.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 29.01.1997 / **e)** U-I-697/1995 / **f)** / **g)** *Narodne novine* (Official gazette), 11/1997, 678-683 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law – Certainty of the law.
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:

Flats, privatisation / Property, socially owned / Privatisation, pricing.

Headnotes:

If the legislator establishes differences among subjects who are in the same position, these differences must be objectively founded and acceptable from the point of view of the Constitution.

There is no constitutional ground for differences between buyers of flats on the basis of the legal entity which is the seller of the flat – whether it is the state or other subjects – or the way in which the flats were acquired in the first place.

The State, when it sells the same commodity as other sellers – namely flats burdened by rights of tenants who live in them – should not be in a position essentially different from the position of other sellers.

The legal provision which defines a flat as adequate if one person is allocated one room with a surface up to 17 square metres is insufficiently precise to be consistent with the principles of the rule of law and legal certainty.

Summary:

In this case nine provisions in the Law on Amendments to the Law on the Sale of Flats with Tenancy Rights were repealed.

These Amendments changed the position of tenants essentially as compared with their position in legal text before the Amendments.

The Court held that it is possible and sometimes even necessary to introduce differences, but these should be a result of objectively and legally relevant circumstances, such as different economic conditions, changes of laws which are being brought into conformity with the Constitution, new laws concerning ownership and the land register, improved care for war invalids or changes of stability of domestic currency.

Acts regulating the sale of flats to tenants who live in them are transitional regulations through which the state changes its legislation to bring it into conformity with the Constitution which has eliminated socially owned property and tenancy rights based on such property. This privatisation is carried out through the sale of flats under more favourable conditions than market ones, because the majority of tenants would not be able to buy the flats they live in at the market prices.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.02.1997 / **e)** U-III-231/1995 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Foreigners.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Citizenship.
Fundamental Rights – Civil and political rights – Procedural safeguards – Non-litigious administrative procedure.

Keywords of the alphabetical index:

Evidence, submission / Documentation required, information by administration.

Headnotes:

The constitutional guarantee of equal treatment of all citizens before the law is violated if a party in the proceedings is not informed which documents are required for realisation of a right he/she wishes to achieve. Since the Ministry of Internal Affairs and the Administrative Court did not inform the petitioner in the proceedings about the necessary documentation invite him to present necessary documentation, and did not state in the disputed acts which documents are necessary to classify someone as a "member of the Croatian ethnic community" the above mentioned bodies have violated that person's constitutional rights.

Summary:

A citizen of the Former Yugoslav Republic of Macedonia applied for Croatian citizenship on the grounds of the provision which – among other prerequisites – demands

the written statement that he/she considers himself/herself a Croatian citizen and his claim was denied.

The denial contained the point that there was no enclosed documentation which proves that the claimant considers himself to be a member of the Croatian ethnic community.

The constitutional action was accepted and the case returned to the competent body for renewal of procedure.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.03.1997 / **e)** U-VII-152/1997 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Electoral candidature / Electoral irregularities, substantial venues.

Headnotes:

In electoral procedure only those irregularities which had substantially affected, or could have affected, the results of the elections are annulled. The fact that the complainant was not allowed to put a desk in a public place in order to collect signatures to support his independent candidacy is not such an irregularity.

Summary:

The Court held that the appeal is unfounded because the complainant could have collected the required signatures in some other manner, not only by putting up a desk in a public place.

Languages:

Croatian, English (translation by the Court)..

Identification: CRO-1997-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.03.1997 / **e)** U-VII-162/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 26/1997, 1257-1258 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral candidature / Electoral lists, changes.

Headnotes:

Denial of legal remedy against a decision of a county Electoral Commission violates constitutional rights.

Summary:

The Serb National Party had – after the time for submitting lists of candidates had expired but before the expiry of the time for publication of the final list of all proposed candidates – applied to the Electoral Commission of the Republic for correction of an error in a list of candidates.

The Electoral Commission decided that after the expiry of the time for lists of proposed candidates to be submitted it was no longer possible to correct the lists.

The Court accepted the appeal against that decision and returned the case for renewal of procedure before the Electoral Commission. It found that the Electoral Commission of the Republic had no jurisdiction in this case because a request for a correction relating to a list of candidates may only be submitted to the electoral commission to which the proposal of the list of candidates

has been submitted and so the Electoral Commission should have referred the request to the competent electoral commission or informed the Party to do so. By not doing so, the Electoral Commission of the Republic denied the Party a legal remedy against a decision of the competent county electoral commission.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.03.1997 / **e)** U-VII-192/1997, U-VII-193/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 28/1997, 1342-1343 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral campaign, media coverage / Electoral coalitions.

Headnotes:

The provision in Program Rules of Croatian Radio Television which attributes the same treatment to a coalition of several parties and to a party acting independently is not consistent with the electoral laws.

Electoral laws guarantee to all candidates and all political parties the right to present and to expound their election programs under equal conditions.

The Croatian Radio Television has to grant equal time to each political party participating in the elections in order to present its electoral program, regardless of the fact whether it appears in the election independently or as a member of a coalition.

Summary:

Two political parties disputed those provisions in the Program Rules for covering of elections those of their provisions according to which a coalition of several parties shall enjoy the same treatment as a single party acting independently.

The disputed provisions were annulled and two rulings of the Electoral Commission of the Republic – according to which the objections of the parties were refused – repealed.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.03.1997 / **e)** U-VII-245/1996 / **f)** / **g)** *Narodne novine* (Official gazette), 33/1997, 1418-1419 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Elections, observers / Elections, minutes, access / Directive.

Headnotes:

The sense and objective of including observers in electoral procedure are basically the same as those of including representatives of political parties. Thus it follows that they should have equal rights.

Observers in election proceedings have the same right concerning the minutes of electoral body as representatives of political parties, namely they are also entitled to a photocopy of the minutes.

Summary:

The decision concerns mandatory directives issued by the Electoral Commission of the Republic of Croatia. The Court held that the disputed directive is not clearly formulated and lacks precision because it grants the right to receive a photocopy of the minutes to a political party, but not to observers.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.03.1997 / **e)** U-II-136/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 33/1997, 1417-1418 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Municipal bodies, mandate / Local self-administration.

Headnotes:

The mandate of members of a Municipality Council expires in case of new elections even if it did not last four years.

Summary:

The subject of review were Decisions of the Government concerning elections in all local units. The proposal claimed that the Decisions should not concern the Municipality Council in G.K. because its mandate started only recently, in 1995, after the dissolution of the previous representative body. The proposal claimed that the Municipality Council's mandate in G.K. should last for the next four years.

The proposal was not accepted.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 27.03.1997 / **e)** U-VII-257/1997 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections, reimbursement, deadlines / Campaign expenses, reimbursement.

Headnotes:

The Government of the Republic is obliged to respect deadlines set forth in electoral laws concerning the amount of reimbursement of electoral campaign expenses.

Summary:

The Government was warned that according to the electoral law the amount of reimbursement of expenses in electoral campaigns should be determined at the latest 20 days prior to the election day, a deadline which expired on 24 March 1997.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 30.03.1997 / **e)** U-I-138/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 48/1997, 1801-1802 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Citizenship, profession / Medical profession, access.

Headnotes:

The provision which prescribes Croatian citizenship as one of the conditions for entering the medical profession is not unconstitutional: It is a matter of legislative policy to determine which professions foreigners are allowed to enter and under what conditions.

Summary:

The proposal to review the constitutionality of the Act on Health Protection was submitted by a member of the medical profession. The disputed provision prescribes the conditions which are to be fulfilled to start an independent private practice in health protection and one of these conditions is Croatian citizenship.

The loss of citizenship is also prescribed as a reason for loss of a right to perform such a practice.

Languages:

Croatian.

Identification: CRO-1997-1-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 02.04.1997 / **e)** U-I-148/1996 / **f)** / **g)** *Narodne novine* (Official gazette), 36/1997, 1473 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental Rights – Civil and political rights – Right to information.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Shares, sale / Joint stock company.

Headnotes:

It is not unconstitutional if the statute of a joint stock company prescribes that the transfer of shares is subject to the approval of the company; the statute may also determine the reasons for refusing the approval.

Summary:

The proposal for the review of the constitutionality and legality of a provision in the Act on Joint Stock Companies was not accepted. The Court held that one becomes a shareholder voluntarily and by the acquisition of shares one also accepts the statute of the company. Since the shareholder is thus informed about certain limitations when acquiring the shares, it was his/her decision to accept or not to accept them.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 02.04.1997 / **e)** U-VII-271/1997 / **f)** / **g)** *Narodne novine* (Official gazette) 35/1997, 1462-1463 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral campaign, media access / Media, State, access to archives.

Headnotes:

Each political party may obtain materials from the archives of the Croatian Radio Television which are part of historical documentation of this people under equal conditions.

The use of military uniform for the purposes of promoting a political party is not admissible.

It follows from the Defense Act that the armed forces, military personnel and persons in service in the armed forces are prohibited from taking part in a political activity and in the organisation of political parties and political gatherings and events. The armed forces are also not allowed to participate in gatherings, parades and demonstrations in uniform. Performance in uniform on TV is to be regarded as a form of participation in gatherings in uniform.

Summary:

A promotional video of the Croatian Democratic Union, shown on TV, which featured a singer dressed in a military uniform, was found inadmissible by the Court. The changes in the video were demanded before further broadcasting.

Supplementary information:

In decision U-VII-318/1997 of 10 April 1997, the Court also held that Croatian Radio Television is obliged to grant to every political party, under equal conditions, even for purposes of election promotion, access to and the possibility to use recordings from the archives which are part of the historical documentation of the Croatian people.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.04.1997 / **e)** U-VII-274/1997 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles – Publication of laws.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Publication, municipal regulations / Electoral campaign, use of coat of arms.

Headnotes:

Only those regulations which have been published and are made known to the citizens are binding.

Summary:

A County Electoral Commission claimed that the Decision on the coat of arms and the flag of the town of B. became legally effective on the day it was rendered and that its effectiveness was not affected by the fact that it was not published in the county official gazette.

From that point of view the objection raised against prohibition of the use of the coat of arms of the town for the purposes of the electoral campaign was dismissed.

The Court found that the Decision on the coat of arms and the flag was not legally valid at the time of prohibition because it had not been published. Therefore there was no legal ground for prohibition of the use of the coat of arms for purposes of electoral campaign.

Languages:

Croatia, English (translation by the Court).

Identification: CRO-1997-1-014

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.04.1997 / **e)** U-VII-289/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 37/1997, 1479 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral campaign, media supervision.

Headnotes:

Supervision by the Electoral Commission of the Republic of the elections campaign should not concern only items broadcast in News and programs under the title "1997 Elections" but also reports, talk-shows and other programs, because all these programs may contain contributions which serve the purposes of the electoral campaign.

Summary:

The Electoral Commission of the Republic of Croatia held that only programs, contributions and reports broadcast by the Croatian Radio Television in the News and programs titled "1997 Elections" are to be considered part of the electoral campaign which is subject to the supervision of the Commission.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.04.1997 / **e)** U-VII-291/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 37/1997, 1479-1480 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral campaign, media supervision / Electoral broadcasts, standards.

Headnotes:

A promotional video which violates the constitutional principles of freedom, equality before the law and democratic multiparty system, electoral laws, Program Rules of the Croatian Radio Television and achievements of civilisation of the Republic of Croatia as a democratic state must not be broadcast.

Summary:

The Court demanded that the promotional video of the Croatian Democratic Union under the title "Neighbours" be withdrawn from circulation and broadcasting after it found that it violates constitutional, legal and moral norms and the Program Rules of the Croatian Radio Television itself.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.04.1997 / **e)** U-VII-295/1997, U-VII-297/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 37/1997, 1480-1481 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections, corrections of lists.

Headnotes:

Grave and obvious errors in the published list of candidates may be eliminated by corrections done by

electoral commission by which the list is approved off and published.

Corrections of lists cannot be undertaken at any time, and in particular not at the time when such a correction would obstruct rather than help lawful implementation of the elections. A correction done only ten days before the elections consisting in changing the order on the Collective list could affect results of the elections, which is a reason for its annulment.

Summary:

The Court annulled an act correcting a list of candidates for members of the city council rendered by the county electoral commission. The correction consisted in changing the order of the parties so that the complainants were moved from position number one to position number three on the list.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-017

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.04.1997 / **e)** U-VII-307/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 37/1997, 1480 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral campaign, media supervision / Electoral broadcast, standards.

Headnotes:

The use of a promotional video and a poster which present another party in such a way as to imply that today's party and its leaders represent the continuation of the repressive regime from the past is not permitted.

Summary:

The Social Democratic Party of Croatia submitted a motion for supervision of the constitutionality and legality of elections in connection with the promotional video of the Croatian Democratic Union. The video linked pictures of leaders of the Social Democratic Party with misdeeds of communists. The poster featured a picture of policemen arresting a young man. On that poster in large red letters it was written "Work and honesty?" which was an allusion to the electoral slogan of the Social Democratic Party "Work and honesty".

The Court prohibited broadcasting of the video and demanded that the poster be used without the red letters "Work and honesty?"

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-018

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.04.1997 / **e)** U-VII-316/1997 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Decisions – Delivery and publication – Press.

Keywords of the alphabetical index:

Elections, control.

Headnotes:

Croatian Radio Television and all other means of public information have the duty to publish and inform the public on the content of every decision rendered by the Constitutional Court exercising supervision of the constitutionality and legality of elections.

Summary:

The Croatian Radio Television was particularly admonished that the above rule also includes decisions of the Court concerning activities of Croatian Radio Television in covering the elections.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-019

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.04.1997 / **e)** U-VII-323/1997, U-VII-324/1997 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections, media supervision / Elections, access to media.

Headnotes:

Effective supervision of the constitutionality and legality of elections implies immediate forwarding and publication of decisions concerning that supervision.

Croatian Radio Television is obliged not only to provide equal treatment for all parties in its informative and special broadcasts, but also to act in a manner which is not harmful to any party in the commercial promotion and not serve to favour any party.

Summary:

The Electoral Commission of the Republic passed a Notification and Admonition by which it decided that the promotional video "Vote for me" of the Croatian Democratic Union was not to be broadcast any more. Nevertheless it did not forward its decisions immediately to all the parties concerned, but did so the next day, thus enabling many public and private TV stations to run the disputed video.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-020

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.04.1997 / **e)** U-VII-370/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 42/1997, 1614-1615 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Electoral law, infringement / Elections, ballot papers.

Headnotes:

Omission of a name of a candidate, the bearer of the list, from voting papers is an irregularity which could effect the results of elections.

Summary:

The Court accepted the appeal of the Independent Democratic Serbian Party, annulled the elections for members of the City council of the town of P. and ordered a re-run of elections.

Languages:

Croatian.

Identification: CRO-1997-1-021

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.04.1997 / **e)** U-VII-376/1997 / **f)** / **g)** *Narodne novine* (Official gazette), 43/1997,1442 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections, errors / Elections, vote count, irregularity, relevance.

Headnotes:

The fact that there were errors in the count of votes in one voting place is not itself a reason to conclude that the same or similar errors took place in other voting places too.

Summary:

The Court did not accept the demand for a new count of votes in the electoral unit. It was held that the opposite opinion, namely that errors in one voting place are grounds for reasonable doubts about the regularity of elections in other voting places, would lead to the conclusion that one error in one voting place would mean the need to count the votes in the whole country again.

Languages:

Croatian.

Identification: CRO-1997-1-022

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.04.1997 / **e)** U-VII-387/1997 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections, D'Hondt's method.

Headnotes:

Although the relevant provision of electoral law provides no clear answer, from its sense it follows that the common divisor in a mathematical operation by which a number of seats is distributed is a full number without decimals.

Summary:

The number of seats in bodies of local units after elections is distributed by adapted D'Hondt's method explained in provisions of electoral laws. The Court did not accept the appeal which dealt with the differences between the results in case that the common divisor is 220 or that it is 220,71 rounded off as 221.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-1997-1-023

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.04.1997 / **e)** U-VII-417/1997 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections, control / Electoral Commission, exclusive competence.

Headnotes:

Protection of election rights is performed through procedures prescribed by laws on the election of representative bodies. Unauthorised control is not legal.

Summary:

The Court warned the Electoral Commission of the town of M. that it did not act in compliance with electoral laws when it allowed representatives of local authorities (the mayor, the town secretary, the head of a department etc.) to perform a control of the election results after they claimed that there are indications of manipulations with the voting papers, especially those proclaimed to be invalid.

Languages:

Croatian, English (translation by the Court).

Czech Republic
Constitutional Court

Statistical data

1 January 1997 – 30 April 1997

- Decisions by the plenary Court: 6
- Decisions by chambers: 40
- Number of other decisions by the plenary Court:16
- Number of other decisions by chambers: 489
- Number of other procedural orders: 8
- Total number of decisions: 559

Important decisions

Identification: CZE-1997-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 06.03.1997 / **e)** III.ÚS 271/96 / **f)** Proper statement of reasons as necessary attribute of a just trial / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Decisions.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Court findings / Statement of reasons in a court decision.

Headnotes:

In appellate decisions dismissing complaints against decisions not to release the complainant from custody, the statement of reasons must be concrete and clear to meet the requirement of a fair and just trial.

Summary:

1. The independence of decision making by ordinary courts is achieved within a framework of constitutional and statutory rules of material and procedural character. The procedural legal framework is represented first of all by the principles of proper

and fair trial as set out in Articles 36 *et seq.* of the Charter of Fundamental Rights and Freedoms, as well as in Article 1 of the Constitution. These principles – as applied in criminal proceedings before court – prescribe for a well-balanced and argued statement of reasons in a manner specified *inter alia* by Section 134.2 of the Code of Criminal Procedure.

2. The statement of reasons must show the relationship between the established facts and considerations when evaluating them, on the one side, and the legal findings of the court, on the other. If the statement of reasons does not contain concrete evidence but a mere reference to the content of the file – including in cases the court decision in question is not capable of reviewing due to unintelligibility and lack of evidence – the legal finding of the court represents a violation of the constitutional rule that prohibits arbitrariness in decision making and, thus, this decision must be held contrary to Article 36 of the Charter of Fundamental Rights and Freedoms as well as to Article 1 of the Constitution.

3. By revocation of the decision of the Regional Court in Ostrava of 11 September 1996, File no. 4 to 370/96, the proceedings gave rise to the possibility of passing a decision on the discharge of the complainant from custody with effects *ex tunc*. For these reasons other decisions of the Regional Court in Ostrava on confining the custody that followed after the decision complained of cannot succeed. Those decisions must be reviewed as a result of the new decision on the complaint against the decision of District Court in Vsetín of 21 August 1996 on release from custody. The review may only occur by quashing the two decisions of the Regional Court in Ostrava of 19 December 1996, File no. 4 to 480/96 and 4 to 523/96. For the above reasons the Constitutional Court quashed these decisions without dealing with the constitutionality of their content.

Languages:

Czech.

Identification: CZE-1997-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 02.04.1997 / **e)** Pl.ÚS 25/96 / **f)** Five percent limit of votes as minimum required for obtaining mandates by parties in parliamentary election / **g)** *Sbírka zákonů*, 88/1997, 2018-2024 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Parliamentary elections.
General Principles – Democracy.
General Principles – Proportionality.
Institutions – Legislative bodies – Composition.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Restriction on minimum percentage of votes / Elections, threshold / Democracy, representative.

Headnotes:

The five percent threshold for political parties to be represented in the House of Representatives is in conformity with the Constitution due to the need of integrity and stability of the political scene.

Summary:

The Constitutional Court dismissed a proposal of the Democratic Union to repeal the provision of the electoral law according to which only a political party that receives at least 5 percent of votes in total may be represented in the House of Representatives.

In the stage of the election proceedings in which the distribution of mandates takes place, the integration principle conflicts with the principle of differentiation because the House of Representatives should by its composition allow for the representation of a political majority capable both of building a government and of exercising legislative power accorded to it by the Constitution.

The principle of representative democracy enables to integrate into the electoral mechanism some elements of stimulation when necessary – especially in cases where, by an uncontrollable proportional system, the splitting of votes among a large number of political parties, the substantial "overmultiplication" thereof and the

endangering of the functioning of the electoral system and of the parties' ability to take action may occur.

After a negative experience with the splitting of parliamentary composition, European countries widely introduced – when applying the system of proportional representation – integrating stimuli, in particular a restriction rule, which usually took the form of the five percent minimum thereshold. There is a generally recognised right by the legislator to regulate the differentiation of votes for a successful representation in the proportional system and thereby treat political parties differently when necessary to ensure the integrating character of the elections in creation of the political will of the people, in the interest of the unity of the electoral system as well as to ensure the achievement of the legal and political aims pursued by parliamentary election.

The restriction rule may only be compromised for serious reasons, whereas the reason for increasing the limit of the restriction rule is given by the intensity of its importance. It must be noted that the increase in the limit for the restriction rule cannot be unlimited so that e.g. a ten percent rule may be held to be a regulation that constitutes a threat to the democratic essence of the proportional system. Therefore, one must consider whether the restriction of the equity of electoral rights represents the minimum measure necessary for providing the integration of political representation that enables for the composition of the legislative body to form a majority desirable for passing decisions and for the creation of a government that receives the confidence of the parliament. Thus, even for the restriction rule the principle of minimisation of state interference in relation to the aim pursued shall apply. Therefore the need for electoral restrictions must be interpreted narrowly.

From this point of view, the limits in place for the restrictive rule may not have any absolute value, but rather a relative one, which depends from the actual relation of political powers in a given country and from the structure of its differentiation.

A comparison with the majority electoral system will work in favour of the restriction clause. The majority electoral system is understood by constitutional courts unconditionally as a democratic one, although the political opinions of a large majority of voters are not represented in the parliament at all or at least in proportion to their strength. In fact, some sort of restriction rule follows from the very essence of the majority electoral system, a rule that goes much further than it is usually the case for the proportional system. The result of the majority electoral system is that only the votes for the winning candidate can count as a success factor: all others "fall through". In the final result of the elections, in the composition of the elected body this significant difference is only compensated somewhat by the diversification of the results in individual districts so that the disparity in one part of the district is balanced by the opposite disparity in other districts. The majority system preserves in that way the equity of votes as to the balance of numbers, but an individual vote's chance of succeeding is sharply differentiated. Votes for the successful candidate hold a hundred percent success share, whereas all other votes have a success share of zero.

It follows from the aforegoing that the five percent restriction rule may not be refused *a priori* as a restriction of aforegoing electoral rights contrary to the Constitution. As the principle of differentiation, in consideration of this question, conflicts with the principle of integration, one must examine whether in the case of the Czech Republic the five percent rule is the minimum necessary for the creation of a House of Representatives capable of action, taking decisions and fulfilling its legislative mission, as well as for establishing a majority which would provide the government with political support, and whether the amount of interference into the principle of proportionality is not too high and could represent a threat to the democratic character of the elections.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-1997-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 09.12.96 / **e)** I 488/1995 / **f)** / **g)** *Ugeskrift for Retsvæsen* (Danish Law Reports), 1997, 260 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and other domestic legal instruments.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Criminal conviction / Defamation / Media, press.

Headnotes:

Since the interference with their freedom of expressi on was not necessary in a democratic society for the protection of the reputation or rights of others, the Supreme Court acquitted a journalist and an editor responsible under the press from a criminal charge.

Summary:

The Danish High Court of Justice had sentenced a journalist and an editor responsible under the press for having referred in a number of articles to defamatory statements originating in a complaint lodged by a citizen to the Disciplinary Board of the Danish Bar and Law Society *(Advokatnæv net)*.

The Supreme Court recalled that since the European Convention on Human Rights had been incorporated into Danish law in 1992, the defamation provisions in the Danish Criminal Code must be read in the light of Article 10 ECHR. This means that any restriction of the right to freedom of expression must be neces sary in a democratic society, *inter alia* in the interest of the protection of the reputation or rights of others.

In weighing respect for freedom of expression against protection against defamation, attention must be drawn to the media's role as "public-watchdog" and restrictions which in an unreasonable manner interfere with that role cannot be made.

In the light of these considerations the Supreme Court found the journalist and the editor responsible under the press not guilty.

Cross-references:

In the judgement reference is made to a Supreme Court judgement published in *Ugeskrift for Retsvæsen*, 1994, 988.

Languages:

Danish.

Estonia
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 1997 – 30 April 1997.

Finland
Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 1997 – 30 April 1997.

France
Constitutional Council

Statistical data
1 January 1997 – 30 April 1997

7 decisions including:

- 3 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution
- 1 decision downgrading a law, taken pursuant to Article 37.2 of the Constitution
- 1 decision on electoral matters pursuant to Article 59 of the Constitution
- 2 decisions on the internal workings of the Constitutional Council
- 1 appointment of a deputy rapporteur to the Constitutional Council
- 1 decision by the President of the Constitutional Council on the creation of an Internet site pursuant to Act no. 8-17 of 6 January 1978 on data processing, computer files and freedoms.

Important decisions

Identification: FRA-1997-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 21.01.1997 / **e)** 96-387 DC / **f)** Legislation, pending passage of an Act instituting a self-reliance benefit for dependent elderly persons, to provide for the needs of the elderly by introducing a specific attendance allowance / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 25.01.1997, 1285 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Interpretation, attenuating / Solidarity / Local government, freedom / Devolution / Elderly persons.

Headnotes:

The legislator may delegate to a lower-tier authority the responsibility for implementing the principle stated in the eleventh indent of the Preamble to the 1946 Constitution, guaranteeing adequate means of support for any person rendered incapable of working by age, physical or mental health or the economic situation, provided that the regulations, issued in accordance with the law and under judicial supervision, do not give rise to any infringement of the relevant constitutional provisions. It rests with the legislator to make suitable provisions guarding against exaggerated differences between *départements* which may give rise to blatant breaches of the principle of equality.

Summary:

The parliamentary opposition had referred an Act introducing a specific benefit for dependent elderly persons to the Constitutional Council, the point at issue being the determination, by a lower-tier authority (the *département* in this instance), of the benefit rate and recipients. This made it necessary for the Constitutional Council to reconcile the principle of equality in respect of social welfare with the principle of local authorities' freedom to conduct their affairs.

The legislator was deemed to have adopted rules and procedures as to the conditions of award and management of the benefit which ensured the requisite uniformity of criteria.

Languages:

French.

Identification: FRA-1997-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 20.03.1997 / **e)** 97-388 DC / **f)** Act establishing individual retirement accounts / **g)** *Journal officiel de la République française* –

Lois et Décrets (Official Gazette of the French Republic – Acts and Decrees), 26.03.1997, 4661 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Social security.
Fundamental Rights – Economic, social and cultural rights.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.
Fundamental Rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social security / Pension fund / Individual retirement account / Social contributions, basis / Worker participation in collective settlement of working conditions.

Headnotes:

Worker participation in the collective settlement of working conditions, secured by the eighth indent of the Preamble to the 1946 Constitution, entails appropriate consultation between employers and employees or their representative organisations, but neither in purport nor in effect does it require this settlement to be made in every case by concluding collective agreements.

The principle of equality does not prevent the legislator from dealing with different situations in different ways; making individual retirement accounts available solely to employees affiliated to the general social security scheme is not at variance with the principle of equality as long as the position regarding protection under retirement schemes is different for the other category of employees, i.e. those working for state enterprises and institutions.

Summary:

Reference is made to earlier case-law (no. 85-187 DC of 25 January 1985) without concrete application in which the Council confirmed its jurisdiction to rule on the constitutionality of an Act which has already been promulgated when it reviews legislative provisions which amend, supplement or affect the scope of the Act.

Languages:

French.

Identification: FRA-1997-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 22.04.1997 / **e)** 97-389 DC / **f)** Act making various provisions in respect of immigration / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 25.04.1997, 6271 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
General Principles – Proportionality.
General Principles – Equality.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Right to emigrate.
Fundamental Rights – Civil and political rights – Rights of domicile and establishment.
Fundamental Rights – Civil and political rights – Right to private life.
Fundamental Rights – Civil and political rights – Right to family life.
Fundamental Rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Judicial impoundment / Administrative detention / Marriage / Freedom of movement / Administrative sanctions / Public order / Personal data, electronic processing.

Headnotes:

Allowing Interior Ministry staff and gendarmerie officers access to the computerised file of fingerprints of applicants for refugee status constitutes a violation of the right of asylum, in that the confidentiality and inviolability of the data held by the OFPRA *(Office Français de Protection des Réfugiés et des Apatrides – French Agency for the Protection of Refugees and Stateless Persons)* represent legal guarantees inseparable from the right of asylum.

Aliens whose residence in France is stable and lawful are entitled, like nationals, to lead a normal family life. Serious breaches of the right to respect for the private life of aliens and nationals alike may prejudice their individual freedom. When applying for renewal of the residence permit issued for a term of ten years, an alien may invoke the fact of having been lawfully present for at least ten years on French territory. This stability of

residence is likely to have created numerous ties between the alien and the host country. The Constitution is therefore infringed by a provision denying automatic renewal of the residence permit where "the alien's presence poses a threat to public order", since it is elsewhere provided in the current legislation that even aliens holding a residence permit may be expelled at any time in the event of serious threat to public order.

Summary:

Following decision no. 93-325 DC of 13 August 1993, *Bulletin* 1993/2 [FRA-1993-2-007], likewise concerning an Act on immigration control and conditions of entry and residence for aliens, a revision of the Constitution was voted by parliament. The Act discussed below, amplifying that of August 1993, aroused extensive prior debate and agitation. The Constitutional Council delivered only two censures but restricted the interpretation of the statute by one of its regular methods, that of attenuating interpretations, which may be illustrated by two cases in point.

The Act under review enables the police and gendarmerie to impound the passport of an illegal alien. According to the Constitutional Council, the sole purpose of such impoundment is to ensure effective possession of a document which will allow the alien to leave French territory. It further emphasised that in exchange for the passport the alien should be issued with a receipt securing the exercise of fundamental rights and freedoms not contingent on the legality of residence, that impoundment, subject to judicial supervision, be applied only for as long as strictly necessary, and lastly that the alien be able to recover the passport promptly at the point of exit from French territory.

Another provision enables the Prefect to re-impose administrative detention, after an interval of not less than one week, on an alien who has not complied with a removal order at the conclusion of a previous term of detention. This provision was considered admissible under the Constitution only in so far as it must be construed as permitting a single re-imposition of detention, and only in the event of the foreigner's wilful refusal to comply with the removal order.

Languages:

French.

Georgia
Constitutional Court

Important decisions

Identification: GEO-1997-1-001

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 20.02.1997 / **e)** 1/3/21 / **f)** Citizen O. Zoidze v. President of Georgia / **g)** Official gazette / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Executive bodies – Powers.
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:

Government, taxation, imposition.

Headnotes:

According to Article 94 of the Constitution taxes and duties must be paid in the amount and order defined by law. Thus the imposition of taxes by the Executive violates the principle of separation of powers and infringes the constitutional right to property since Article 94 of the Constitution empowers only the legislature to impose taxes and duties and to define rules for their payment.

Summary:

The plaintiff, a Georgian citizen, appealed to the Constitutional Court of Georgia against the unconstitutionality of the temporary regulation on Imposition of Tax on Environmental Pollution and Rules of Payment adopted by the Government, and referred to Article 94 of the Constitution which provides that taxes and duties must be paid in the amount and order defined by law. Article 21 of the Constitution ensures the right to property and tacitly empowers the legislature to protect property from illegal encroachment against it. Thus the imposition of unconstitutional taxes breaches the right to property.

The Constitutional Court holds that the adoption of the normative act by the Executive, which defines the amount

and rules of payment of a certain tax, is impermissible and in conflict with Article 94 of the Constitution; additionally it violates the principle of separation of powers enshrined in Article 5 of the Constitution.

Thereto Article 106.2 of the Constitution states that the President and Parliament of Georgia undertake to promulgate and ensure the compliance of normative acts with the Constitution and legislation of Georgia within a two-year term from the Constitution's entry into force. In this respect the Constitutional Court indicated that Article 106 of the Constitution does not provide for the unconditional enforcement of unconstitutional legal acts for two years; this would otherwise prevent the Constitutional Court from considering the constitutionality of such normative acts.

Languages:

Georgian, English.

Identification: GEO-1997-1-002

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 25.03.1997 / **e)** 2/31-5 / **f)** Citizen L. Purtskhvanidze v. Parliament of Georgia / **g)** Official Gazette / **h)**.

Keywords of the systematic thesaurus:

Institutions – Courts – Jurisdiction.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Residence, tenancy contract, eviction.

Headnotes:

Article 154 of the Residential Code of Georgia provides that a tenancy contract may only be terminated on the basis of the owner's demand if a Court determines that the owner or members of his or her family may use the apartment for their personal needs. This provision is unconstitutional since it prevents owners from exercising their right to property, in particular their right to possess, use and dispose of property, which is entrenched in Article 21 of the Constitution of Georgia.

Summary:

The Supreme Court of Georgia had rejected a civil claim by the plaintiff for the eviction of tenants from his private apartment holding that under Article 154 of the Residential Code of Georgia an owner may only suspend a tenancy contract following a court's verification that the premises are urgently required for the personal needs of the owner and members of his family. This requirement was not fulfilled.

Following the rejection of this claim, the plaintiff appealed to the Constitutional Court against the unconstitutionality of Article 154 of the Residential Code as it was in conflict with Article 21 of the Constitution which ensures the universal right to property, and in particular the right to dispose of property freely.

Although Article 21.2 of the Constitution provides that the restriction of the right to property is permissible in cases of public emergency as provided for by the law, in the present case the Constitutional Court held that there was no sufficient social necessity for the restriction of the constitutional right.

Languages:

Georgian, English.

Germany
Federal Constitutional Court

Statistical data
1 January 1997 – 30 April 1997

- 6 decisions by a panel *(Senat)*
  - all judgments concerning individual constitutional complaints
  - 1 case dealt with (taking into consideration the joinder of cases)

- 1024 rejecting decisions of the chambers *(Kammern)*,
  - 12 cases dealt with (taking into consideration the joinder of cases)

- 12 granting decisions of the chambers,
  - 2 cases dealt with (taking into consideration the joinder of cases)

- 1679 new cases

Important decisions

Identification: GER-1997-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 10.04.1997 / **e)** 1 BvR 79/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Languages.

Keywords of the alphabetical index:

Costs, advances / Assistance under Legal Advice Scheme / Costs of the proceedings / Counselling / Exhaustion of legal remedies / Expenses / Guarantee of the course of law / Legal aid / Legal protection / Refunding / Costs, reimbursable / Subsidiarity / Translation costs.

Headnotes:

The principle of equality of access to the law upholds the equalisation of the parties' means of access, so that steps must be taken for the provision of legal aid to parties of limited financial means. However, the decision whether to provide or pay for services up front beyond the assignment of legal counsel lies in the discretion of the legal authorities. Thus, a refusal to pay an extra service is not in breach of the right to effective protection of the law.

Summary:

I. The complainant – a woman of Dutch nationality living in The Netherlands – was divorced in 1988 by a Dutch court from her husband, a German who lives in Germany. She is now seeking recognition of the divorce decree under German law, in order to allow her to receive a separate court ruling on the equalisation of her pension. As she is dependent on support by the Dutch legal aid system, she applied for support for the proceedings to be conducted in Germany. After the ordinary courts had rejected this application, legal assistance was then granted by decision of the Constitutional Court.

Within the scope of the requisite procedure for legal aid now pending, the lawyer assigned to the complainant applied for an advance on the costs of the translation of the divorce decree into German. Both the *Land* administration of justice and the competent court rejected the application.

The complainant argued that her right to effective legal protection was impaired by the decision; i.e. the rejection of the application constituted an unreasonable impediment of her access to the courts.

II. The First Chamber of the First Panel of the Constitutional Court did not accept the constitutional complaint for decision by the First Panel.

The principle of equality (Article 3.1 of the Basic Law) and the rule of law (Article 20.3 of the Basic Law) demand equal access to legal protection regardless of the party's individual financial means. For this reason, it is necessary to take measures allowing to those of limited financial means largely the same access to the courts.

An individual seeking to affirm a right, who is neither by himself nor with other official support able to pay the expenses charged, can nevertheless be required, at a stage below the constitutional level, to take several additional but in each case independent legal actions to achieve the desired legal protection. In particular, it is not determined in the Basic Law *a priori*, in which of

those actions the lack of means asserted should be considered. This is rather a question of application and interpretation of mere procedural rules and must be decided exclusively by the ordinary courts.

If a translation, according to the applicant's own statement, is not within the scope of advice and representation by counsel, but is rather the ascertainment of facts in official or court proceedings, it is justifiable for the payment of costs to be refused in proceedings for legal counselling. In any case, there is no compelling reason not to reject an application for translation costs also from a constitutional point of view, when these translation costs can still be granted in the subsequent action on recognition of the divorce decree.

Supplementary information:

Further information concerning fair trial may be found in the following decisions of the *Bundesverfassungsgericht*:

13/03/1997; 1 BvR 194/88; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1990, volume 81, 347.

Languages:

German.

Identification: GER-1997-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 18.03.1997 / **e)** 1 BvR 420/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Summary procedure.
Constitutional Justice – Decisions – Types – Interim measures.
Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.
Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Animal cells / Cell therapy / Embryonal fresh cell therapy / Freedom of therapy / Information of patient / Live cells / Live cell extract / Medicine, cell therapy, danger / Patient / Severe disadvantage / Sheep cells / Suspension / Urgent procedure / Temporary order / Weighing of the consequences.

Headnotes:

In the interests of the public good or to avoid severe disadvantages or danger, the Court may issue an interim order prior to a decision being taken on a constitutional complaint. Although strict standards must apply when assessing whether such an order may be made, the consequences of the order being made or not, combined with whether the complaint is eventually successful or not, will also be taken into consideration.

Summary:

I. By an application for temporary legal protection several physicians object to the prohibition issued by the Federal Ministry of Health against the use of live animal cells for therapeutical purposes. All complainants provide, predominantly or exclusively, embryonal living cell therapies in private clinics under their management and consider their freedom of profession violated by the prohibition.

In order to produce live-cell medication, special breeders keep sheep in so-called closed flocks. After the animals are slaughtered the physicians process the tissue of the animals into suspensions which are immediately administered to the patients by injection. Before the therapy the patients were informed by the physicians about the prohibition in force since 4 March 1997, and about the objections of the legislator.

The Second Chamber of the First Panel of the Constitutional Court issued the provisional order applied for, and declared that the regulations objected to shall be suspended until 20 September 1997 at the longest in all those cases in which living cell medication is produced for treatment of the complainants' own patients by injection or infusion.

II. The Constitutional Court may in principle settle a dispute provisionally by interim order when this is urgently necessary to avoid severe disadvantages, to avoid imminent danger, or for any other essential reason for the common good. The chances of success of the constitutional complaint are only relevant to the question whether to issue a provisional order insofar as the

complaint must not be *a priori* inadmissible or clearly unfounded.

However, the Constitutional Court must weigh up the consequences of the provisional order not being issued, but the constitutional complaint eventually being successful, against the disadvantages which would result if the provisional order were issued, but the constitutional complaint failed.

As far as the complaining physicians declare that the prohibition expressed in the ordinance affected their freedom of therapy, the necessary consideration of the consequences turns out in favour of the complainants. If the interim order were not issued, but the constitutional complaint were found to be substantiated, the complainants would have to renounce or completely change their present professional existence.

In view of these severe and irreparable drawbacks the continuing use of living cells in individual therapy may be temporarily tolerated. It is true that in this case the patients are for a while still exposed to the risks which prompted the Federal Ministry of Health to forbid the therapy. However, the significance of the risk is reduced by the fact that the patients were sufficiently informed by the complainants and wished to undergo such treatment.

Moreover, the long period of time which elapsed between the Ministry of Health's 1987 order to explain the benefits and risks of the cell therapy, and the prohibition of the therapy in 1997 makes it clear that the legislator did not see reason for immediate action so far.

In view of this background, the embryonal living cell therapy may still be allowed provisionally.

Languages:

German.

Identification: GER-1997-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 19.03.1997 / **e)** 2 BvR 463/97, **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Special procedures.
Constitutional Justice – Procedure – Costs – Party costs.
Fundamental Rights – Civil and political rights – Procedural safeguards.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Scope.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Public hearings.

Keywords of the alphabetical index:

Acceptance, prerequisite / Admissibility / Chances of success / Constitutional complaint / Hearing, right / Minor case / Misuse, fine / Examination, thorough / Right to be heard.

Headnotes:

A claim that one's right to a fair hearing has been breached can only be successful where the possibility exists of the lower court coming to a substantially different decision that would be more favourable to the applicant. Such a claim carries with it the duty on the part of the applicant to explain, in the grounds of application, what he or she would have argued had a fair hearing been granted.

Summary:

I. The applicant complained of a violation of Article 103.1 of the Basic Law (right to a hearing), stating as sole grounds the fact that he was denied an adequate hearing before the court of first instance. However, what the complainant would have set forth before the specialised court if he had been given a fair hearing was not raised in the substantiation of the constitutional complaint.

A complaint of a violation of the right to be heard may only succeed when it cannot be excluded that the hearing of the complainant before the court of first instance would have led to a different decision – one more favourable to the complainant. As the mere denial of the hearing in substantiation of an alleged violation of Article 103.1 of the Basic Law did not allow a pertinent consideration by the Court, the constitutional complaint was rejected.

II. The Constitutional Court may impose a fine in accordance with § 34.2 Constitutional Court Act where a constitutional complaint is filed vexatiously.

It is the task of the Constitutional Court to decide fundamental constitutional issues which are of relevance to public life and the public interest, and to, where appropriate, uphold the rights of the individual. The Court need not tolerate hindrances to its work by unsubstantiated constitutional complaints.

Lawyers admitted to practice in particular are under an obligation to examine the substantial and procedural rules and to assess carefully the chances of success of a legal remedy. This applies also to lawyers who happen to be litigating in their personal capacity. In the present case, any discerning individual would have realised that the complaint was vexatious as it did not provide sufficient grounds.

Supplementary information:

Further information concerning the right to a proper hearing may be found in the following decisions of the *Bundesverfassungsgericht*:

17/02/1970; 2 BvR 608/69; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1970, volume 28, 17.

Languages:

German.

Identification: GER-1997-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 05.03.1997 / **e)** 1 BvR 1068/96, 1 BvR 1071/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Right to life.
Fundamental Rights – Civil and political rights – Right to physical integrity.
Fundamental Rights – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Approval / Therapy, choice / Drug approval, obligation / Drug law / Duty of the state to protect / General Sick-Fund / Health insurance / Health insurance company / Treatment, method / Costs, payment / Prescribability / Prescription drug / Economy, principle / Prohibition / Right of self-determination / Sick fund / Statutory health insurance / Treatment.

Headnotes:

In accordance with the principle of economic viability, general health insurance funds may make their obligation to pay for a pharmaceutical product conditional upon the official approval of that product.

Summary:

I. The constitutional complaints concern the question whether (compulsory) general sick funds have to refund the costs of medication procured by the patient, for which approval has not yet been sought and circulation is forbidden under pharmaceutical law.

The complainants of the first case are a drug manufacturer and the heirs of a deceased cancer patient who was last insured with the general sick fund.

Due to a metastasising renal cell carcinoma, the insured party was treated in 1990 with the non-approved drug *Jomol*, leading to a stabilisation of the patient's health. The drug had been prescribed by a physician who was not appointed by the sick fund to provide the contractual medical care. Furthermore, the manufacturer of the medication had not yet applied for approval of the drug. The supervising authority responsible had therefore prohibited the release of the medication into circulation.

In the second case, the complainant objects to the refusal by the general health care (compulsory health insurance) to refund the costs of a drug the complainant had procured by himself.

The complainant was prescribed the drug *Edelfosin* by his physician for cancer of the lymph gland; thereupon – according to information provided by the patient – the cancer disease ceased to develop.

At the time when the patient was receiving the drug, its manufacturer had applied for its approval according to the relevant drug law. However, the approval was not yet definitely decided upon, when the manufacturer took legal action against the official rejection of his application for approval.

The application of the insured party for payment of the cost of the drug of DM 133 561.89 was rejected both by the sick fund and by the competent social courts. The reasons for the rejection of the first case were that the effectiveness of the drug had not been verified, and that the prescription of a non-approved and hence not prescribable drug did not comply with the principle of economy which the general sick funds are obliged to observe.

The second application was rejected on the ground that only by approval according to the drug law will the effectiveness of a drug be confirmed at least on principle. In addition, tests on pharmaceutical products should not be performed at the expense of the general sick funds.

II. The Second Chamber of the First Panel of the Constitutional Court did not accept the constitutional complaint for decision as it found no infringement of the Constitution.

Article 2.2 of the Basic Law, first sentence, in principle allows the patient free self-determination of therapeutical measures and leaves to the patient the choice of therapy to be applied in his case. From this fundamental right, however, no constitutional claim for the provision or payment of this medical therapy may be derived.

It is true that according to the jurisprudence of the Constitutional Court, the right to bodily integrity imposes an objective legal duty on the State to shield and promote this right. With regard to the wide scope of discretion to be conceded to the responsible state authorities in fulfilling this duty, the constitutional claim regarding this duty may be directed only towards ensuring that the public authorities take such measures for protecting the fundamental right which are not entirely inappropriate or inadequate. It is only within these narrow limits that the Constitutional Court may examine whether or not the duty to protect was fulfilled.

It is in compliance with the Basic Law for the obligation to make payments, with regard to the principle of economic viability which sick funds are obliged to observe, to be made conditional upon the official approval of a drug. With the approval according to the drug law, sick funds are given a definite and practicable criterion to decide on the prescribability of pharmaceutical products.

This criterion is also reliable, because the decision whether to approve a pharmaceutical product is made on the basis of extensive documentation provided by the applicant, and the expertise and competence of the authorities concerned.

Supplementary information:

Further information concerning the right to health may be found in the following decisions of the *Bundesverfassungsgericht*:

29.10.1987; 2 BvR 624/83; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest of the Decisions of the Federal Constitutional Court), 1988, volume 77, 170.

Languages:

German.

Identification: GER-1997-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 24.04.1997 / **e)** 2 BvR 55/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles – Reasonableness.
Fundamental Rights – General questions – Basic principles – *Ne bis in idem.*
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Cannabis consumption / Drug, conditioning / Criminal liability / Criminal offence, elements / Hashish / Marijuana / Drugs, minor quantity / Narcotic drug / Sanction, nature / Personal consumption / Passing on of drugs / Prosecution / Public interest / Restriction / Sanction / Soft drug / Threat, abstract / Threat of punishment / Threat to third persons / Unlawful possession.

Headnotes:

The fact that perceived hazards sought to be prevented by a law have reduced over time, does not invalidate a law, unless those hazards are no longer seen as substantial.

Summary:

I. In 1996 the complainant who had admitted his guilt was sentenced to imprisonment for three years and six months because of several criminal offences involving narcotic drugs. By his constitutional complaint he is objecting to the sentence of the criminal court on the grounds, *inter alia*, that the statutory range of punishment for criminal offences concerning the handling of cannabis products was completely unreasonable. In particular, he argues that the underlying assessment of the hazard potential of cannabis products can no longer be maintained in view of recent scientific findings. In his view the addictive potential of cannabis must be rated as very low, and the therapeutical effect of the substance is also increasing.

II. The Second Chamber of the Second Panel of the Constitutional Court regards the penal provision of § 30.1 Narcotics Act, on which the complaint was based, as compatible with the Basic Law, and has therefore not accepted the constitutional complaint for decision.

As the Constitutional Court declared in its decision of 9 March 1994 (see *Bulletin* 1994/1 [GER-1994-1-010]), by enacting the Narcotics Act, the legislator, in aiming to protect the health of the individual and of the population as a whole against the hazards emanating from narcotics, and to save the population, especially adolescents, from addiction to drugs, pursues public interests which are in accordance with the Constitution. This statement by the Court already allows for the fact that the legislator's original assessment of the hazards to health emanating from cannabis products no longer holds entirely. The aspects underlined by the complainant i.e. the low addictive potential of the drug, its not fully ascertainable "pacemaking function" as a conditioning drug, and the direct damage to health, considered to be slight after moderate consumption, were highlighted by the Court.

Although the dangers to health emanating from cannabis products are seen differently today than the legislator had seen them at the time the law was adopted, the Constitutional Court has nevertheless arrived at the conclusion that, according to the present state of research, cannabis products still involve substantial hazards and risks; the general concept of the law in question, with regard to these narcotics in particular, is in accordance with the Constitution.

Languages:

German.

Identification: GER-1997-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 01.03.1997 / **e)** 2 BvR 1599/89 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law – Maintaining confidence.
General Principles – Rule of law – Public interest.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Federalism and regionalism – Budgetary and financial aspects – Finance.
Institutions – Public finances – Taxation.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law.
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:

Authorisation, basis / By-laws / Occupation, choice / Municipal tax / Municipality / Confidence, circumstance / Differentiation / Discretion, scope / Entertainment tax / Excise tax, local / Federal tax / Gambling machine, installer / Legal elements of a rule, accordance / Legislative authority / Legislative competence / Luxury tax, local / Taxes, power to impose / Profession, practice / Rule of law / Sufficient specification / Gambling machines, tax.

Headnotes:

It is essential for a delegation of taxation power from the *Länder* to the municipalities to have a sufficiently definite legal basis. Where the effect of the authorisation is restricted locally, it suffices if the delegating legislator pre-defines the contents of the taxational encroachments, in particular by giving guidance as to the selection and

to the basis of tax assessment. Municipalities may, on the basis of taxation power delegated to them, pass tax regulations on gambling, for the purpose of deterring the spread of the passion for gambling.

Summary:

I. The constitutional complaints are directed against the imposition of municipal entertainment taxes on the management and operation of gambling machines and comparable installations. Three complainants, two commercial installers of gambling machines and an entrepreneur installing gambling machines in restaurants, allege in particular that the municipal tax regulations of the *Länder* concerned are unconstitutional because they do not fulfil the requirement of sufficient specification. Furthermore they are of the opinion that entertainment tax exceeds the competences conceded to the *Länder* according to Article 105.2a of the Basic Law. They claim that the taxing of gambling machines would also lead to a violation of the constitutional guarantee of the freedom of profession.

II. The Third Chamber of the Second Panel of the Constitutional Court has not accepted the constitutional complaint for decision as it found no infringement of the Basic Law.

The competence and power of taxation accorded to the *Länder* by Article 105.2a of the Basic Law may be delegated by the *Länder* legislator to municipalities. Such authorisation is constitutionally valid provided it is sufficiently specific, does not exceed the limit of competence, and sufficiently restrict the nature and intensity of the encroachment upon the Basic Law.

If legislation is passed in the form of by-laws, under Article 28.2 of the Basic Law, as in the present case, the delegation of the taxation power, which the Basic Law has conferred upon the *Länder*, to municipal legislation has no prerequisite of sufficient specification as does the freedom of profession. However, it is essential for a delegation of taxation power to municipalities for it to have a sufficiently specific legal basis as a prerequisite for any encroachment upon the Basic Law. If the authorisation remains in the tradition of a conventional local entertainment tax (i.e. a minor tax of locally restricted effect), this requirement is fulfilled if the delegating legislator substantially predefines the contents of the taxational encroachments which fall within its competences.

In particular, the authority to legislate on conventional luxury taxes may be conferred upon the local authorities in a form from which the criteria can be derived for the selection of the objectives of taxation and of the taxpayers, and for the arrangement of the basis of assessment and of tax rates.

Municipal legislators may, within the limits of their taxation authority, reorganise and further develop the arrangement of taxes on gambling machines. In particular, the restriction to conventional municipal taxes of local effect and restricted charge intensity does not exclude that the municipal legislator emphasises the controlling purpose of the tax and put its financing purpose into the background. For the taxation of gambling machines the selection of the objective of taxation is justified by the intention to prevent the spread of the passion for gambling. This controlling intention is not to protect the individual from him or herself but consists, rather, an effort towards rendering less attractive an activity which may cause losses to the community in the long term.

The fact that the tax on gambling is higher than on other games not involving the chance to win money is justified by the standard expectation that the expense for the chance of winning money will be higher than that for a mere game. Furthermore, the specific attraction of gambling to those who engage in it should be reduced in order to control the compulsion for gambling; hence, the regulations pertaining to the present case do not violate the principle of fiscal equality.

The tax on gambling machines imposed within the framework of the taxation power conferred does not exceed the limit to an encroachment upon the freedom of profession according to Article 12.1 of the Basic Law. A fiscal encroachment upon the freedom of profession only occurs where the taxation would render it impossible to make a living, either in whole or impart, from the chosen profession.

The imposition and raising of taxes as an indirect regulation of the exercise of one's profession are justified by essential public interests. It appears reasonable to give the public a share in the expense for the pleasure of gambling by imposing a (higher) tax, even if this should lower the profitability of gambling machines and thus reduce the number of machines. Thus both the threat to users and the generation of public charges may be prevented.

Furthermore, the principle of the protection of confidence in the state of the law is breached neither by the introduction nor by the increase of the tax on gambling machines. In principle, the legislator enjoys a wide discretion to change existing laws and create new duties. Only in specific circumstances of confidence may citizens expect a legal situation to remain unchanged. This applies

also to the creation of an additional tax and to a change in a tax rate.

Languages:

German.

Greece
Council of State

Summaries of important decisions of the reference period 1 September 1996 – 30 April 1997 will be published in the next edition, *Bulletin* 1997/2.

Hungary
Constitutional Court

Statistical data

1 January 1997 – 30 April 1997

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 13
- Decisions by chambers published in the Official Gazette: 17
- Number of other decisions by the plenary Court: 17
- Number of other decisions by chambers: 19
- Number of other (procedural) orders: 15
- Total number of decisions: 81

Note:

The plenary Court elected a new Secretary-General to the Constitutional Court on 18 November 1996. The new Secretary-General of the Court is Dr. Peter Paczolay, former Chief Counsellor to the Constitutional Court.

Important decisions

Identification: HUN-1997-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 22.01.1997 / **e)** 4/1997 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 7/1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Type of review – Preliminary review.
Constitutional Justice – Types of claim – Type of review – *Ex post facto* review.
Constitutional Justice – The subject of review – International treaties.

Keywords of the alphabetical index:

International treaty, control by Constitutional Court / *Ex post facto* review / Constitutional Court, powers.

Headnotes:

According to Article 1.b of the Act on the Constitutional Court, the Constitutional Court shall examine the constitutionality of the law promulgating an international treaty. The constitutional review shall cover the examination of unconstitutionality of the international treaty promulgated by law. If the Constitutional Court holds that the international treaty or any provision of it is unconstitutional, it declares the unconstitutionality of the law promulgating the international treaty. The decision of the Constitutional Court in which the Court declares unconstitutional the whole international treaty or any provision thereof has no effect on the obligations assumed by the Republic of Hungary under international law.

Summary:

According to the petitioner, those provisions of the Act on the Constitutional Court (hereinafter "the Act") according to which the jurisdiction of the Court includes only the preliminary examination of the constitutionality of international treaties and does not make it possible for citizens to exercise their rights deriving from the Constitution concerning the provisions of international treaties within the framework of an *ex post facto* review are unconstitutional. It is also unconstitutional that the Constitutional Court is not entitled to proceed *ex officio* in case of such kind of *ex post facto* review.

In the petitioner's opinion, this inadequate regulation is contrary to the constitutional principle of a constitutional state as declared in Article 2 of the Constitution, since citizens cannot initiate the constitutional review of an international treaty prior to its ratification and because the Constitutional Court does not have any competence – within the framework of an *ex officio* procedure – to institute such proceedings.

According to the petitioner, it also derives from Article 7.1 of the Constitution that the Constitution stands above the provision of an international treaty promulgated by law.

The Constitutional Court found the petition unfounded and at the same time interpreted its jurisdiction regarding the examination of the unconstitutionality of international treaties based on the Constitution and the Act.

Infringing the right to conclude a treaty is a formal way of violating the Constitution which may be examined in all proceedings for which the Constitutional Court has the competence even after concluding the treaty, namely both during preliminary and *ex post facto* review of constitutionality.

According to Article 32.A.3 of the Constitution, in certain cases determined by law anyone may initiate proceedings at the Constitutional Court. By historical interpretation of Article 32.A of the Constitution, it is clear that the legislator's intention was that the jurisdiction of the Constitutional Court should include *actio popularis* regarding *ex post facto* review of the constitutionality.

The argument of the petitioner is not adequate in relation to his claim that restricting the exercise of the right to initiate preliminary review of the unconstitutionality of international treaties is contrary to Article 8 of the Constitution. The right to initiate Constitutional Court proceedings is a basic constitutional right according to Article 32.A of the Constitution, and this Article does not include preliminary review. Neither does it derive from the principle of people's sovereignty and a constitutional state that the realisation of these would be the precondition – concerning preliminary review of the unconstitutionality of international treaties – for ensuring the right to initiate Constitutional Court proceedings for every citizen.

According to Article 20 of the Act, the Constitutional Court shall proceed based on the motion submitted by the party entitled to submit such a motion. The procedure instituted *ex officio* is a special jurisdiction of the Constitutional Court and according to Article 21 of the Act it is related to the procedure provided in Article 1.c and e. According to this, the procedure of the examination of the conformity of legal rules as well as other legal means of state control with international treaties and the procedure during which the Constitutional Court shall eliminate the unconstitutionality manifesting itself in omission are instituted *ex officio*. However, the obligation for an *ex officio* procedure is not derived either from Articles 2, 7 or 32.A of the Constitution concerning Constitutional Court proceedings. Thus, that part of the petition asserting the absence of the *ex officio* procedure is also unfounded.

There is no constitutional basis dealing with the law promulgating an international treaty different from any other legal rule concerning constitutional examination. Since it derives from the Constitution that *ex post facto* review shall cover all kinds of legal rule, this universality may not be restricted even by a law.

Article 1.a of the Act therefore does not mean that the Constitutional Court may examine only preliminarily the unconstitutionality of certain provisions of an international treaty, but it means that besides the *ex post facto* review which derives from the Constitution, the unconstitutionality of an international treaty may also be examined preliminarily under the Act and upon certain conditions set out therein. From the fact that Article 1.a specifies the preliminary examination of international treaties, it does not follow that in paragraph b the legislator should have had to mention the law promulgating a treaty, as a special type of law.

In order to confirm the foregoing, the Constitutional Court refers to the fact that concerning the relationship between domestic and international law, in the development of European law there is a tendency that the dualist-transformation system is replaced by the monist system. According to the monist-adoption concept, the concluded international treaty constitutes a component of national law without further transformation, that is it is applicable directly and enjoys supremacy over domestic law. This system is required by European integration, and for this reason, even those members of the EU which still follow the transformation system (e.g. Germany and Italy, founding members, and the Scandinavian countries which subsequently joined to the European Union) apply the law of the European Union directly, without transformation, and they ensure superiority over national law with the exception of the Constitution. As a result of this, the constitutional courts exercise their rights regarding constitutional examination concerning international treaties (international law) and the decisions of international organisations – due to the adoption system – automatically become the part of the domestic law.

The examination of international treaties – after they become part of domestic law – fits into the logic of constitutional review. Therefore, in those countries where there is no specific regulation concerning this – due to the universality of constitutional review – the constitutional courts examine the constitutionality of them in exactly the same way as in the case of domestic law.

One of the Constitutional Court Justices wrote a dissenting opinion, according to which the Constitutional Court does not have the competence for the *ex post facto* review of an international treaty. The Act on the Constitutional Court entitles the Constitutional Court to examine the unconstitutionality of international treaties exclusively prior to their ratification, but there is no possibility for an *ex post facto* review. By incorporating the international treaty into the domestic law, the treaty does not lose its specific characteristic that it was concluded as an international treaty by the agreement of two or more parties of international law, and it was not passed by the Hungarian legislation.

Languages:

Hungarian.

Identification: HUN-1997-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 19.03.1996 / **e)** 20/1997 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 24/1997 / **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.
General Principles – Proportionality.
Institutions – Courts – Organisation – Prosecutors / State counsel.
Fundamental Rights – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Prior restraint / Media, censorship.

Headnotes:

It is unconstitutional that on the prosecutor's proposal the court is entitled to prohibit publication of any printed matter which contravenes the provisions of Articles 3.1 and 12.2 of the Law on the Press, and that the prosecutor has the right to suspend publication of such printed matter immediately.

Summary:

According to Article 3.1 of the Law on the Press, information published by the press may not be aimed at committing crimes or subordinated to the commission of crimes, and may not damage others' personal rights and public morals. The provision of Article 12.2 provides that before starting a periodical it is necessary to register the intention of establishing and publishing it. Prior to registration, the periodical should not be distributed.

In the petitioner's view, all forms of censorship, including the prior restraints under Article 15.3 of the Law on the Press, are against the constitutional requirement of a free press (Article 61.2 of the Constitution). Instead of suspending or prohibiting publication of press products in the abovementioned cases, the acceptable and proportional remedy could be the press correction in the frame of due process. Since personal rights may be typically enforced personally, the prosecutor's right to propose the prohibition of publication of printed matter which contravenes Articles 3.1 and 12.2 of the Law on the Press, infringes the right to self-determination.

According to the petitioner, the Law, by authorising the court to exercise the right to prohibit publication of the printed matter, damages public morals and is also against the freedom of the press.

The provision according to which the prosecutor has the right to suspend publication of printed matter immediately is clearly unconstitutional according to the petitioner, since the court can not reverse the act of the prosecutor even with its interim decision.

The Court found only one part of the petition justified.

In Decision 1 of 1994 (I.17), *Bulletin* 1994/1 [HUN-1994-1-001] the Constitutional Court declared that the right to personal dignity includes the right to self-determination, specifically the person's right to enforce or not to enforce his or her rights either before the court or the state bodies. In the present case the Court held that the provision authorises the prosecutor to propose the prohibition of publication of printed matter if it injures others' personal rights, and the Article according to which the prosecutor has the right to suspend this kind of printed matter, infringes the abovementioned provisions of the Civil Code which limit the right to self-determination without it being in fact necessary for the validation of any other constitutional right without, that is, the limitation meeting the obligation for proportionality under Article 8.2 of the Constitution.

The Constitutional Court held that Article 3.1 of the Law on the Press is in accordance with the restrictions worded by Article 19 of the International Covenant on Civil and Political Rights, and Article 10 ECHR. Under these provisions the exercise of freedom of expression can be restricted by law if it is necessary in a democratic society for the prevention of disorder or crime. Despite that, the Court declared that it is unnecessary and against the injured party's right to self-determination that the prosecutor could propose and on the prosecutor's proposal the court could prohibit publication of a newspaper or a periodical if it aimed at committing a crime or the aim was an incitement to commit a crime and the crime punishable upon private motion.

According to the Covenant and the European Convention of the Human Rights public morals may also be subject to certain restriction, hence the Article 3.1 of the Law on the Press is not unconstitutional. Neither did the Constitutional Court hold unconstitutional Article 12.2 of the Law on the Press. According to the Court's opinion the registration of press products is traditional and crucial with regards to press policing, therefore it is not contrary to the freedom of press.

Three judges wrote dissenting opinions, and one of these opinions was concurred by another judge.

In two judges' opinions – including the opinion of the President of the Court – the prosecutor's right to suspend the printed matter at once if according to the prosecutor it damages public morals, is unconstitutional. Public morality is an abstract value, therefore in the interests of this the exercise of free expression could not be restricted. The Constitutional Court, in an earlier decision, had held that the laws restricting the freedom of expression are to be assigned greater weight if they directly serve the realisation or protection of another basic right, a lesser weight if they protect such rights only indirectly through the mediation of some institution, and the least weight if they merely serve some abstract value as an end in itself (public order) (decision 30/1992 of 26.05.1992).

According to the two judges the fact that there is no guarantee that the procedure on the prohibition of publication of press products will be finished soon or at least in a reasonable time and that the prosecutor acts as a party in this type of procedure, violates the right to self-determination.

In his dissenting opinion which was concurred in by another judge, one of the judges of the Constitutional Court stated that the prosecutor's right to propose that the court prohibit publication of press products is not unconstitutional. The decision of the court at the end of this procedure does not mean *res iudicata* concerning the persons' entitlement to enforce their rights before the court. Regardless of the prosecutor's right, persons can decide themselves whether they will bring the case before the court or not. According to the judge Article 15.3 of the Law on the Press does not create a "clear and present danger", therefore the Court should not have had to annul this provision.

Languages:

Hungarian.

Identification: HUN-1997-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.04.1997 / **e)** 29/1997 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 37/1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Constitutional Justice – Types of claim – Claim by a public body – Legislative bodies.
Constitutional Justice – Types of claim – Type of review – Preliminary review.
Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Preliminary review of a bill, limits / Preliminary review, procedure.

Headnotes:

According to the Standing Orders of Parliament and their interpretation, persons entitled by Article 21.1 of the Act on the Constitutional Court could initiate preliminary review of a bill which had not yet been decided on by the Parliament, without any further condition or agreement.

An Act which is decided on by Parliament without allowing the persons entitled to initiate preliminary review of the bill is unconstitutional and invalid.

The Constitutional Court declared that Parliament created an unconstitutional situation with respect to its own Standing Orders by failing to guarantee the practice of the right to initiate preliminary review of laws before their enactment.

Summary:

During the ongoing discussion on the draft of the Bill on Incompatibility of Parliamentary Representatives, fifty-two Members of Parliament proposed that the Constitutional Court review the constitutionality of some provisions of the bill. At the same time the petitioners asked the Parliament to postpone the final voting on the contested bill. The Parliament, referring to its Standing Orders, decided in favour of the final voting. The petitioners submitted that it was unconstitutional as, according to the Standing Orders of Parliament, it is possible to postpone the final vote on the bill by a four-fifths majority of the Members of Parliament. This thus makes it impossible for fifty parliamentary representatives to practise their right to initiate preliminary review of the bill before the Constitutional Court.

The reasoning of the Court recalled a previous decision. In 16 December 1991 (IV. 20) the Constitutional Court presented its opinion on the Court's jurisdiction concerning preliminary review. The Court pointed out that it may make sense to review the constitutionality of a bill which is already disputed during the legislative procedure because preventive norm control may prevent the annulment of an already-promulgated legal rule which has come into force. However, the Hungarian regulation does not restrict the Court's jurisdiction to the final text of the bill, but makes review possible at any stage of the legislative process. The Court declared that examining the constitutionality of some provisions of a bill, the text of which is not definitive, could possibly mean involving the Constitutional Court in the everyday legislative process. The Constitutional Court is not an advisory organ of Parliament. Its task is to judge the result of the legislative work. Therefore, the current regulation of the preventive norm control of bills is incompatible with the principle of separation of powers.

According to Article 33.1 of the Act on the Constitutional Court, upon the motion of fifty Members of Parliament the Constitutional Court shall examine the constitutionality of any contested provision of a bill. In the meantime, Parliament must not vote on the final text of the law. The postponement of the final voting on the contested bill is a constitutional obligation, since this is the only way for the fifty parliamentary representatives to practise their right to initiate preliminary review. Since the decision of the Constitutional Court is binding on everyone, the law enacted by Parliament regardless of this constitutional requirement is void and unconstitutional.

The Constitutional Court declared that Parliament created an unconstitutional situation with respect to the Standing Orders of Parliament by failing to guarantee the possibility for the fifty Members of Parliament to practise the right to initiate preliminary review of laws before their enactment. The Court, therefore, called upon Parliament to meet its legislative obligation by 15 June 1997.

Languages:

Hungarian.

Identification: HUN-1997-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.04.1997 / **e)** 30/1997 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 37/1997 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Status of members of legislative bodies.
Fundamental Rights – General questions – Entitlement to rights.
Fundamental Rights – Civil and political rights – Equality – Affirmative action.
Fundamental Rights – Civil and political rights – Right to private life.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Incompatibility / Parliament, incompatibility.

Headnotes:

A provision stipulating that current Members of Parliament can keep their "incompatible" positions, provided the second post was obtained before the representative was elected is unconstitutional.

Summary:

The petitioners contend that some of the provisions of the conflict-of-interest amendment to the Law on "Regulating the Legal Status of the Members of Parliament" are unconstitutional.

The petitioners assert that the bill's distinction between private and public companies is unconstitutional, since this kind of distinction violates Article 9.1 of the Constitution according to which Hungary is a market economy where state and private property receive equal treatment. In addition, the petitioners claimed that these amendments restricted economic competition ensured by Article 9.2 of the Constitution, because companies with Members of Parliament in their management must now refrain from public procurement activity. According to the petitioners, the law in question violates privacy and rules protecting personal data by requiring parliamentary representatives to make essentially private information available to the public or to a parliamentary committee. The petitioners also contend that the provision of the Law includes an unconstitutional distinction, according to which current Members of Parliament could keep their "incompatible" positions, provided the second post was obtained before

the representative was elected, but Members who had taken up "incompatible" posts after their election to Parliament would now have to step down from these positions.

The Constitutional Court found some parts of the petition justified. The reasoning of the Court recalled a previous decision on incompatibility. In Decision 55 of 1994 (X.10) (see *Bulletin* 1994/3 [HUN-1994-3-017]) the Court stated that the most important cases of incompatibility of the office of Member of Parliament are listed in the Constitution, which also entitles the legislature to determine further cases of incompatibility. However, while defining these further cases of incompatibility the legislation must not impose any limitations on the essential content and meaning of fundamental rights.

According to the Constitutional Court there is no direct connection between the rules regulating some positions "incompatible" with the office of the Member of Parliament and Article 9.1 and 9.2 of the Constitution. The aim of the Amendment is not to differentiate between state and private companies concerning the incompatibility of a parliamentary representative. Thus, it is not unconstitutional that the law defines some positions as "incompatible" with the function of a representative, since the profits of the companies (regardless of the fact that it is private or state property) are closely linked to government activity and rely heavily on government contracts.

The Court did not hold unconstitutional the provision according to which a Member of Parliament is excluded from holding important posts in companies defined by the Act on Public Procurement. This regulation does not restrict the company's right either to conclude a contract or to participate in public tendering procedures determined by the Act. However, if as a result of a public tendering procedure the parties conclude a contract and because of the contract the position of a parliamentary representative (who holds an important post in the company in question) becomes "incompatible", the Member of Parliament should terminate the existing cause of incompatibility. This obligation of the representative does not have any effect on the company's right of contractual freedom and its situation in economic competition.

The petitioners contend that the amendment to the Law "Regulating the Legal Status of the Members of Parliament" is unconstitutional due to the fact that the representatives are required to disclose their property, income and business interests.

The Court found this part of the petition unfounded. According to the Court, the right to privacy of personal information is not an absolute one. The legislature could prescribe the public disclosure of personal records, and this limitation on the right to privacy of personal information is constitutional if it fulfils the constitutional requirement concerning the limitation on the essential contents and meaning of fundamental rights. The aim of the disclosure of a Member of Parliament's business interests is that the representative's property interests should be transparent.

The Constitution does not regulate the "incompatibility" between the office of the Member of Parliament and some positions in either private or State companies, therefore the legislature has a discretion on determining the representatives' obligation for supplying data concerning their business interests. Taking into account all the abovementioned facts, the Court held that limitations on informational self-determination under the contested provisions are in proportion with the aims set to be achieved.

With regard to the fourth part of the petition, the Court held that the provision according to which – as an exception to the rule – the current Members of Parliament could keep their "incompatible positions" includes an unconstitutional distinction on the basis of the time when the representative was elected. This regulation differentiates between persons who are in the same legal position, since both the representative who had taken up "incompatible" position after their election to Parliament and the MP who provided the second post was obtained before the MP was elected, assumed lawfully their positions in a company. Preferring the representative who had taken up the "incompatible" post prior to the election is not affirmative action. According to the Court, positive discrimination is applicable if a social aim or a constitutional right could be enforced only in a way that the equality in the narrower sense could not be achieved.

One of the Constitutional Court Justices wrote a dissenting opinion, in which he stated that it is in conformity with the Constitution and the decisions of the Constitutional Court concerning affirmative action, that the legislature enacted the provision according to which the current Members of Parliament could keep their "incompatible" positions, provided the second post was obtained before the representative was elected.

Languages:

Hungarian.

Ireland
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 1997 – 30 April 1997.

Italy
Constitutional Court

Important decisions

Identification: ITA-1997-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 30.01.1997 / **e)** 19/1997 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 7 of 12.02.1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Admissibility of referendums and other consultations – Referendum on the repeal of legislation.
General Principles – Territorial principles – Indivisibility of the territory.
Institutions – Federalism and regionalism – Distribution of powers – International relations.

Keywords of the alphabetical index:

Region, co-ordination / Unity, principle.

Headnotes:

State and regional powers coexist in international matters: this simultaneous presence must be based on the principle of loyal co-operation between the State and the regions, which is directly anchored in Article 5 of the Constitution. This principle provides:

1. that the regions inform the State in advance of "promotional activities" which they intend to carry out abroad in matters within their competence;

2. that the State may give a reasoned refusal where it deems that such activities are contrary to its international policy.

Summary:

The Court declared inadmissible the application for a popular referendum to repeal provisions requiring regions which wanted to engage in "promotional activities" abroad to arrive at a "prior understanding" with the government and to conduct these activities in a manner in keeping with the State's policy and co-ordination efforts. The Court found that the referendum, which would rule out any

possibility of co-ordination between the State and the region in matters of "promotional activities" engaged in abroad by the regions in areas falling within their competence, would affect the constitutional rule concerning the unity and indivisibility of the Republic, which is given effect through such co-ordination.

Languages:

Italian.

Identification: ITA-1997-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 30.01.1997 / **e)** 20/1997 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 7 of 12.02.1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Admissibility of referendums and other consultations – Referendum on the repeal of legislation.
General Principles – Territorial principles – Indivisibility of the territory.
Institutions – Federalism and regionalism – Distribution of powers – International relations.

Keywords of the alphabetical index:

European Union / Regions / Unity, principle.

Headnotes:

The principle of the unity and indivisibility of the republic prevents the regions from being able to replace the State in the exercise of functions which the State is called upon to fulfil in relations with the European Union.

Summary:

The Constitutional Court declared inadmissible the application for a referendum to repeal rules falling within the jurisdiction of the State, including those concerning matters delegated to the regions, powers to direct and co-ordinate the activities of the regions and authorities that replace the State in the framework of relations with the Community.

The Court ruled that although the Community accords the regions a growing role, the set of functions which the State is required to exercise in relations with the European Union cannot be removed from the State and entirely assumed by the regions themselves.

Cross-references:

For the basis of the principle of the indivisibility of the Republic regarding the powers and functions in question, see judgment no. 126 of 1996.

Languages:

Italian.

Identification: ITA-1997-1-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 03.03.1997 / **e)** 58/1997 / **f)** / **g)** to be published in *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 10 of 05.03.1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – International treaties.
Sources of Constitutional Law – Categories – Written rules – Other international sources.
Sources of Constitutional Law – Techniques of interpretation – Logical interpretation.
Fundamental Rights – General questions – Basic principles – *Ne bis in idem.*
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Rights of the defence.

Keywords of the alphabetical index:

Prosecution, obligatory nature / European Convention on Extradition / Extradition, possibility / Prohibition / Lawfully established court / Criminal proceedings pending.

Headnotes:

The rule contained in Article 8 of the European Convention on Extradition, which gives a State from which extradition is requested and in which criminal proceedings

are pending for the offence in respect of which the application for extradition has been made, the right to refuse is, because it is a rule of international law, aimed at the contracting States and does not directly affect their domestic law. It stipulates only one condition, and when this condition applies, there is no international obligation to extradite. Consequently, from the practical point of view, regardless of the solution adopted under the domestic law of the State from which extradition is requested, the above-mentioned international rule is still observed.

Pursuant to the above-mentioned treaty provision, which means that there is no obligation on the part of the State towards other States when the situation arises, the internal regulations governing the conditions under which extradition may be granted, including Article 705.1 of the Code of Criminal Procedure, may definitely be applied, just as they may be applied in the absence of criminal proceedings for the offence for which extradition is requested.

In any event, it would not be correct to deduce from the treaty provision referred to above (Article 8 of the European Convention on Extradition) that the Minister of Justice has discretionary power to decide whether or not to grant extradition while criminal proceedings are pending in the requested State, because the treaty provision only establishes the relevant international obligations and limits, or to attribute a different scope to the internal rule for enforcing that provision.

With the entry into force of the new Code of Criminal Procedure, and thanks to the principle of *non bis in idem* (although it cannot be included yet among the generally recognised rules of international law and although it has not yet been accepted without reservations in the international conventions which make reference to it, notwithstanding the fact that it is a fundamental principle which the international system increasingly uses as a basis, thereby meeting the individual's need for protection against the concurrent punitive powers of different States), the new internal rule prohibits extradition pending criminal proceedings for the same offence as the one for which extradition is requested, and, consequently, obliges the competent court authority to rule against extradition.

Summary:

The question of the constitutionality of the rules of international law to which reference has been made several times and of regulations concerning ratification and exemption under the Italian system was declared to be unfounded in an interpretative ruling, for the reasons set forth in the headnotes.

The question had been raised by the Court of Cassation, which had been asked to rule on an appeal against measures confirming the provisional decision concerning extradition and against the application of the coercive measure of imprisonment. These measures were adopted in respect of an accused German soldier, Priebke, who was being tried in Italy for the same offence, the massacre of the Ardeatine pit on 24 March 1944, as the one to which the extradition request entered by the Federal Republic of Germany referred.

Interpreting the law of international conventions and internal regulations, the judge found that in the case concerned, the Minister of Justice had broad discretionary powers with regard to the possibility of extraditing the accused; according to the Court of Cassation, that placed the contested regulations in contradiction with Articles 24, 25 and 112 of the Constitution (right to protection, right to a lawfully established court and obligatory nature of prosecution, respectively), not only because they were at variance with the principle of *non bis in idem*, but also because they would allow a person against whom criminal proceedings have already been opened in Italy to be extradited for judgment by the judicial authority of another State.

As can be deduced from the Headnotes, however, the Constitutional Court did not agree with the interpretation of the above-mentioned regulations given by the judge *a quo*, which was, moreover, confirmed by two previous decisions of the Court of Cassation.

Cross-references:

The Court referred to the two previous decisions mentioned above, but noted that these did not necessarily constitute existing law: Stokman, 29 April 1992, and, implicitly, Celik Oral, 27 September 1995.

The Court then referred to what is, in practice, the sole internal law to lay down rules on the possibility of extradition in cases where criminal proceedings are pending in Italy, namely its own sentence no. 446 of 1990.

Languages:

Italian.

Identification: ITA-1997-1-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 22.04.1997 / **e)** 112/1997 / **f)** / **g)** to be published in *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 18 of 30.04.1997 / **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.
Fundamental Rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Adoption / Denial of paternity / *Favor veritas* / Natural child, recognition.

Headnotes:

Refusal to recognise natural children in the absence of veracity, which the Court has already upheld in one of its earlier decisions, is based on the "principle of a higher order according to which any false appearance of status must be refuted", because true paternity is necessarily a value which must be protected. From this follows the approach which the law has taken to the capacity to take part in court proceedings of the person concerned, criminal intent, false recognition and proceedings which cannot be disregarded: the intention of the law was to give priority to *favor veritas* because of the requirement that there be certainty about paternity.

The steps taken to ensure the veracity of paternity are also linked to the desire to prevent fraudulent acts of recognition from making it possible to circumvent adoption provisions and provisions for the protection of minors, who have a right to a status corresponding to biological reality or, where this proves impossible, the acquisition of a status corresponding to that of legitimate children, but solely by virtue of guarantees set out in adoption regulations; for this reason, *favor veritas* and *favor minoris* are not contradictory, since false recognition violates the right of a minor to an identity.

The at times serious distress for a minor which the effort to establish paternity may cause is not due to the alleged unconstitutionality of the rule guaranteeing that false recognition may be contested, but is the result in most cases of the duration of the relevant proceedings and the time spent waiting for a ruling, during which emotional ties may strengthen which later are not easy to break. It is, however, possible to remedy this state of affairs by means of institutions designed to protect minors, for example adoption by the person who had been regarded as the natural parent.

Summary:

The Court deemed unfounded, for the above-mentioned reasons, the question concerning the constitutionality of Article 263 of the Civil Code raised in connection with Articles 2, 3, 30 and 31 of the Constitution, in respect of the fact that it is only in cases where the judge deems it to be in the interest of the minor that a challenge to the recognition of a natural child on the grounds of lack of veracity may be upheld.

Cross-references:

The Court referred to its sentence no. 158 of 1991, in connection with the objective of the challenge in question, as a specific precedent.

Languages:

Italian.

Liechtenstein
State Council

Statistical data
1 January 1997 – 30 April 1997

Number of decisions: 9

Important decisions

Identification: LIE-1997-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 24.04.1997 / **e)** StGH 1996/29 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles – Democracy.
General Principles – Rule of law.
Institutions – Legislative bodies – Powers.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Right to property.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Referendum-based democracy / Regulations, legal, explicit / Prohibitions, private swimming pools / Arbitrary decisions, prohibition / Clarity and definitiveness, principle.

Headnotes:

In a referendum-based democracy, the people are also part of the legislative power. In particular, legal provisions which interfere with fundamental rights must be worded in sufficiently clear terms to enable both Parliament and citizens to be fully aware of their implications. If this were not the case, the right of referendum would be meaningless. For this reason, an unclear legal regulation is contrary to the constitution.

Summary:

In an application for planning permission, the applicant was granted a building permit in principle, but the planned construction of an indoor swimming pool was not approved. The reason for this was that the law on building constructions stipulated that private indoor swimming pools could be heated and ventilated only by solar energy. Given the current level of technology, this was not possible in view of the prevailing climatic conditions in Liechtenstein.

The applicant filed an appeal with the Administrative Court of Appeal, submitting that the regulations currently in force in effect amounted to a ban on the construction of private indoor swimming pools. Consequently, the legislation should have contained an explicit legal prohibition if indeed its aim was to prevent the construction of private indoor swimming pools.

The Administrative Court of Appeal held that when the legislation was being debated, Parliament was aware that by laying down environmental requirements, it was in fact imposing a ban on indoor swimming pools. Since this was a consequence of the intention of the legislation, the appeal had to be dismissed.

Thereupon, the applicant filed an appeal with the State Council, alleging a violation of the free enjoyment of property and relying on the prohibition of arbitrary decisions. The State Council found for the appellant and declared void the relevant provision of the law on building constructions. It maintained that Parliament, in accordance with the Liechtenstein constitution, of which direct democracy was a major feature, was not the only legislative body; the people also had a legislative role to play. In order to avoid rendering the right of referendum meaningless, laws had to be worded clearly, so that any interference with fundamental rights, such as the guarantee of enjoyment of property in the case in question, could be recognised as such by non-specialists. The State Council observed that the law on building constructions contained explicit prohibitions in respect of other facilities which were heavy energy consumers, but not in respect of indoor swimming pools. The confirmation that there was an explicit legal prohibition of indoor swimming pools was tantamount to deceiving the citizens. This was indefensible in a democratic state and represented a violation of the constitutionally guaranteed prohibition of arbitrary decisions.

Languages:

German.

Lithuania
Constitutional Court

Statistical data
1 January 1997 – 30 April 1997

Number of decisions: 4 final decisions including:

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

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

The content of the cases was the following;

- damage compensation: 1
- advertising: 1
- pensions: 1
- confiscation: 1

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

Important decisions

Identification: LTU-1997-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.01.1997 / **e)** 14/96 / **f)** On Damage Compensation / **g)** *Valstybės žinios* (Official Gazette), 7-130 of 24.01.1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
General Principles – Separation of powers.
Institutions – Economic duties of the State.
Fundamental Rights – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Damage compensation / Salary, minimal monthly.

Headnotes:

The necessity to compensate material and moral damage inflicted on a person is a constitutional principle. When implementing this constitutional principle, one must attempt to ensure that the persons who suffered material or moral damage are compensated for it. This must also be considered at the legislative stage.

Article 30.2 of the Constitution clearly indicates the form of legal act whereby compensation for material and moral damage must be regulated. By establishing the form the legal regulation must take, an attempt is made to create fixed legal preconditions to secure the rights and legitimate interests of persons who have been crippled or whose health has otherwise been harmed.

The following conclusions are to be drawn from an analysis of the law:

1. the amount of compensation depends on the wage received prior to injury at work;

2. the amount of the damage in monetary terms is that portion of income which corresponds to the percentage of working capacity lost;

3. the damage is compensated to the person who suffered injuries so that the damage incurred does not exceed the sum of the benefit received or the pension designated and actually received;

4. if the income of an employee who incurs damage was less than the minimum remuneration established by the State prior to the injury, the compensation is calculated according to the minimum wage established by the State. The said provisions concerning damage compensation may only be consolidated or changed by law.

Summary:

The case was initiated by a local court which investigated a civil case concerning damage compensation on the grounds of harm to health. By an interlocutory ruling, the said court suspended the investigation of the case and appealed to the Constitutional Court with the request to investigate Item 3.1 of Government Resolution no. 1004 "On increase of minimal remuneration for work", 23 August 1996, is in compliance with the Constitution and the laws of Lithuania.

The disputed Government Resolution provides that the compensation awarded to persons who suffered injury when at work may not be less than the proportion of the

sum of 420 Lt which corresponds to the percentage of loss of professional working capacity.

The petitioner alleges that the Constitution and the laws establish that compensation for material damage due to injury to health when at work may be regulated only by law. In the opinion of the petitioner, the Government is entitled to index constant payments (grants, wages, pensions, social benefits) but it has no right to change the amount of the damage which is to be compensated.

The Constitutional Court ruled that the Government, by establishing the minimum compensation to be awarded to persons for injury to health at work by Item 3.1 of its 23 August 1996 Resolution "On increase of minimal remuneration for work", changed the provisions of material damage compensation which are established by law and thereby encroached into the sphere regulated by the legislator. Therefore Item 3.1 of the said Government Resolution contravenes the Constitution and laws of Lithuania.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-1997-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 13.02.1997 / **e)** 6/96, 10/96 / **f)** On advertising for alcohol and tobacco / **g)** *Valstybės žinios* (Official Gazette), 15-314 of 19.02.1997/ **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
General Principles – Legality.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Advertising / Alcohol / Information / Tobacco products.

Headnotes:

Although advertisement is information, not all information is advertisement. Thus the ban on the advertisement of alcohol and tobacco products only prohibits a certain type of information (the supposed commercial, or marketing, information) which, when seen against the whole spectrum of information, may be assessed as a mere restriction of and does not constitute a breach of the freedom of information.

The ban on advertisement for tobacco products and alcohol alone may not be treated as discrimination, because such a ban concerns the whole of society and not particular groups of people. On the other hand, such a ban strives, in the public interest, to protect young people from psychological pressure to smoke or consume alcoholic beverage, to stop the spread of smoking and drinking among women, to protect consumers from generally biased and incomplete information, to affirm the view that the consumption of tobacco products and alcoholic beverages is harmful to public health. These purposes go hand in hand with the tasks stressed by the World Health Organisation in the sphere of public and human health.

Summary:

The petitioner – a group of the *Seimas* members and the *Seimas* as a whole – applied to the Constitutional Court requesting it to investigate whether Articles 1 and 30 of the Law on Alcohol Control of the Republic of Lithuania, Articles 1, 3 and 11 of the Law on Tobacco Control of the Republic of Lithuania as well as the Government Resolution no. 179 "On the Control of Advertising for Alcohol", 2 February 1996, are in compliance with the Constitution.

The petitioners allege that the disputed norms prohibit advertisement for alcohol beverages and tobacco products in Lithuania. This raises the question whether the legal acts listed above are in compliance with Article 25 of the Constitution which provides that individuals shall have the right to hold their own convictions and express them freely; individuals must not be hindered from seeking, obtaining, or disseminating information or ideas; freedom to express convictions, as well as to obtain and disseminate information, may not be restricted in any way other than established by law, when it is necessary for the safeguard of the health, honour and dignity, private

life or morals of a person, or for the protection of constitutional order.

The Constitutional Court holds that the question of legitimacy of the ban on advertising of alcoholic beverages and tobacco may only be resolved in the wider context, by examining the concept of freedom of information as well as the possibility of restricting this freedom. At the same time, it is necessary to elucidate the reciprocity between information and advertising and the possible consequences of the consumption of alcohol and tobacco for human and public health.

According to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the established practice of the European Court of Human Rights, rights and freedoms of individuals may be restricted if the restriction meets two conditions: 1) it is legitimate, and 2) it is indispensable in a democratic society. The requirement of legitimacy means that restrictions may only be effected by publicly proclaimed law; the norms of the law shall be formulated with sufficient clarity. When defining the limits of the implementation of laws, it is necessary to consider the purpose and meaning of a corresponding right (or freedom) and the possibilities for and conditions of its restriction set out in the Constitution. When considering the question whether a concrete restriction is indispensable in a democratic society, the first step is to ascertain the aims and purpose of the restriction, and the second is to find out whether the means of the restriction are proportionate to the legitimate aim.

Since alcoholic beverages and tobacco products belong to the group of materials the consumption of which is undoubtedly harmful to human health, under Article 25.3 of the Constitution, the legislator was entitled to restrict information regarding alcoholic beverages and tobacco products. The laws in question, in essence, constitute a restriction of commercial information concerning alcoholic beverages and tobacco products in the form of the prohibition of advertising of alcoholic beverages and tobacco products, and promoting their sale and consumption. Thus the petitioner's allegation that the laws prohibit any information concerning alcoholic beverages and tobacco products is not supported by fact.

The Constitutional Court ruled that the restrictions on advertising of alcoholic beverages and tobacco products in the laws in question are in compliance with the Constitution. However, the definitions of indirect advertisement for alcohol and tobacco products, as well as the delegation of the right to restrict advertising for alcohol and tobacco products to the Government and the relevant part of the Government Resolution contravenes the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-1997-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.03.1997 / **e)** 5/96 / **f)** On social insurance pensions / **g)** *Valstybės žinios* (Official Gazette), 23-546 of 15.03.1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
Institutions – Economic duties of the State.
Fundamental Rights – Economic, social and cultural rights – Right to social security.
Fundamental Rights – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Pensions / State Social Insurance.

Headnotes:

The constitutional provisions which guarantee citizens the right to social maintenance oblige the state to establish sufficient measures to implement and protect that right. By their work, insured employees create material preconditions for social insurance. The main portion of the budget of the Social Insurance Fund is comprised of deductions from calculated remuneration for work. On the other hand, the purpose of social insurance is to provide these persons with finance and services necessary for living if, for reasons set out under the law, they are unable to subsist on their income or they have additional expenditures. Therefore the social insurance system established by legal norms only has meaning if it affords effective enjoyment of the constitutional right to social maintenance under the aforesaid conditions.

In order to implement the right of a person who is insured on a compulsory basis, one may not interpret the period

of state social insurance and the person's period of state social pensions insurance on the basis of whether the employer or institutions of social insurance fulfilled their duties properly or not. If the insured person's period of state social pension insurance were interpreted in such a way, the essence of the right to social maintenance provided for in the Constitution would be denied.

Summary:

A city district court applied to the Constitutional Court with the request to investigate whether Article 5 of the Law on State Social Insurance, Article 8.2.1 of the Law on State Social Insurance Pensions, and some norms of Government Resolution no. 142 of 26 January 1996, are in compliance with the Constitution. The petitioner alleges that the norms in question establish whether or not the period for which the employer has not paid insurance contributions may be calculated into the period under which pension payments are received by persons who are insured by the compulsory social insurance of the State. Therefore, Article 5 of the Law on State Social Insurance and Article 8.2.1 of the Law on State Social Insurance Pensions violate these persons' rights when they associate the period of state social pension insurance with the payment of insurance contributions. The petitioner doubts whether these norms are in compliance with Article 52 of the Constitution, which provides that the State shall guarantee the right of citizens to old age and disability pension, as well as to social assistance in the event of unemployment, loss of spouse, loss of income earner, and other cases provided by law.

The Constitutional Court noted that the legal norms in question are of mandatory character. The institutions that monitor the provision of insurance must take all measures available under the law to ensure that the employer, who is an insurance payer, fulfils his or her duty to assess and pay contributions payable for employees into the State Social Insurance Fund. Non payment of state social insurance contributions constitutes a violation of the law. The insured persons should not suffer from performance or non-performance by the employer or other institutions responsible for insurance. The existing legal mechanisms established for the realisation of constitutional rights would otherwise fail to serve its purpose.

Furthermore, the Constitutional Court emphasised that in the granting of pensions to a person insured on a compulsory basis, that person's insurance period is understood as a certain time period during which the person either pays contributions themselves or they are paid for them, i.e. the time period during which a person generates wealth, as well as the means of social insurance through his or her work. Therefore the length of a person's period of state social pension insurance may not be associated with or dependent upon the fact whether the employer actually paid the finances prescribed by the law. This interpretation of the period of social insurance and a person's period of state social insurance is in conformity with the essence of the system of social insurance relations guaranteed by the Constitution, and ensures the implementation of rights for persons who are insured on a compulsory basis in the sphere of social insurance. By this interpretation of the period of social insurance and the period of state social pension insurance of persons who are insured on a compulsory basis, the conclusion must be drawn that Article 5 of the Law on State Social Insurance and Article 8.2.1 of the Law on State Social Insurance Pensions are in compliance with the Constitution.

The Government Resolution in question was recognised as contrary to the Constitution and law of Lithuania.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-1997-1-004

a) Lithuania / b) Constitutional Court / c) / d) 08.04.1997/ e) 12/96, 5/97 / f) Confiscation of smuggled items / g) *Valstybės žinios* (Official Gazette), 31-770 of 11.04.1997 / h).

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Administrative penalty / Confiscation / Property / Smuggling.

Headnotes:

The principle of the inviolability of property entrenched in Article 23.1 of the Constitution provides for the right of the owner, as the possessor of subjective rights to

property, to demand that other persons, including the State, do not violate his/her ownership rights. Furthermore, this norm imposes a duty on the State to safeguard and protect property from unlawful encroachment upon it. This reading of Article 23.1 of the Constitution indicates that this norm should ensure that the property belonging to the owner will be afforded extensive protection, i.e. by legal means. At the same time, this norm does not give grounds to a claim that the Constitution affords absolute protection of property. Absolute ownership rights are liable to cause conflicts, such as with competing property interests of other persons. One way to solve these conflicts is to place appropriate restrictions or restraints on ownership rights.

The protection of ownership rights by law, provided for in Article 23.2 of the Constitution establishes that property relations are the matter of legal regulation. In order to protect property, a system of laws must also be created to ensure the protection of the range of property relations and the possibility for the efficient use of property the owner's interests as well as those of society. This essentially entails the coordination of legal norms aimed at the protection of property and the elimination of existing or prospective contradictions in the protection of ownership rights.

Various sanctions, including proprietary ones, may be imposed for the transgressions, eg. a fine or a confiscation of property. A fine, as well as a confiscation of property, is the seizure of property from the transgressor and its conversion into state property as a result of his/her transgression of law. Therefore, the protection of property of the transgressor is limited by sanction. Such a limiting provision may be derived from the Constitution, as well as from international legal acts which have been ratified by Lithuania and which are a constituent part of its legal system, such as Article 1 Protocol 1 ECHR, which establishes that States shall have the right to enforce such law as they deem necessary to control the use of property in accordance with public interests or to secure the payment of taxes or other contributions or penalties.

One of the elements restricting property rights is the prohibition against the use of property in a way inflicting harm on other persons or on society in general. This prohibition applies irrespective of the fact whether the owner himself/herself manages, uses and disposes of his/her property, or whether it has been transferred to other persons for its management or use.

Summary:

The case was initiated by two local courts requesting the Constitutional Court to investigate whether Article 26.1 of the Code of Administrative Transgressions of Law (CATL) was in compliance with the Constitution. The second sentence of Article 26.1 stipulates that "Only an item which is the property of a transgressor shall be subject to confiscation unless the item was either an immediate instrument or an immediate object of the administrative transgression of the law as provided for by Article 210 of this Code". In the opinion of the petitioners, this violates Article 23.1 of the Constitution, which provides for the inviolability of Article 23.2, which provides for the legal protection of ownership rights, as well as Article 23.3, which provides that "property may only be seized for the needs of society according to established legal procedure and must be adequately compensated". This amendment of the law violates the ownership rights of other persons who have not committed administrative transgressions of law. The provision in question also contradicts the objectives of administrative penalty defined in Article 20 of the CATL.

The petitioners are of the opinion that the CATL sets out the requirement that a person may only be penalised where he or she is guilty of having (deliberately or negligently) performed an act resulting in the violation of interests protected by law. However, Article 26.1 of the CATL provides grounds for penalise person who is innocent but not the one who committed a transgression of law.

The Constitutional Court has noted that the smuggling of goods, currencies and other items into or out of the country inflict great damage on Lithuania's economy and system of finance as smugglers thereby evade duty taxes by illegally importing and exporting goods. Thus they illegally compete with goods manufactured in Lithuania or legally imported from abroad. If one considers illegally imported weapons, gas pistols, psychotropic substances, goods of poor quality, etc., danger may arise for public health in Lithuania. The illegal exportation of national currency may also lead to irreparable harm to national culture or economy. Thus smuggling is one of the most dangerous transgressions of administrative law. This transgression causes damage not only to the economic interests of the country into which the goods are imported, but often also to those of the country from which they are exported. Thus virtually all states have an interest stopping to smuggling in the most efficient way. For this reason, States generally impose stringent property sanctions for smuggling offences and also employ other financial and economic measures in order to prevent such offences.

A person who transports smuggled goods belonging either to himself/herself or to another person, deliberately transgresses Lithuanian duty law and thereby causes danger to the system of economy and finance of Lithuania, or to the health or even life of its people, i.e.

he or she uses them as an object of transgression of law as provided for by Article 210 of the CATL. Illegally imported goods are serious danger to public and state interests irrespective of the fact whether they belonged to the person who was transporting them or to other persons. Therefore, one may conclude that the legislator has established an essentially adequate complementary penalty – i.e. the confiscation of the object of smuggling – for the said transgression of administrative law.

The Constitutional Court notes that laws have also been passed in foreign countries, allowing third party property to be confiscated where it has been used during the commission of a crime or transgression of law. In some countries the law also provides for an opportunity to confiscate not the item itself but a sum of money equivalent in value from the immediate offender. At the same time, the attempt is made for laws providing for confiscation of property in connection with an offence not in value to violate the property rights of the offender or third party without good reason. Where the question arises whether such a sanction shall apply to an offender, the law allows consideration of the danger posed by the transgression, as well as the indirect culpability of the third party in complicity of the offence. In exceptional cases, it provides for an opportunity to confiscate only part of the property, or not to confiscate it at all.

The Constitutional Court finds that the disputed provision of the CATL is in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Netherlands
Supreme Court

Summaries of important decisions of the current reference period will be published in the next edition, *Bulletin* 1997/2.

Norway
Supreme Court

Important decisions

Identification: NOR-1997-1-001

a) Norway / **b)** Supreme Court / **c)** Division / **d)** 10.04.1997 / **e)** Inr 24/1997 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a private body or individual – Trade unions.
Constitutional Justice – The subject of review – Acts of government.
Sources of Constitutional Law – Categories – Written rules – Constitution.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Categories – Written rules – European Social Charter.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Economic, Social and Cultural Rights.
Sources of Constitutional Law – Categories – Written rules – Other international sources.
Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources.
Fundamental Rights – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Compulsory arbitration / International obligations / Strike, prohibition / Provisional ordinance / ILO Convention no. 87 / ILO Convention no. 98.

Headnotes:

Freedom of association as well as the right to strike have been recognised in Norway for a long time as a legal means of solving labour conflicts. Moreover, there has been a general acceptance that the right to strike is not unlimited, but can be restricted if the effects on society are considerable. This practice is not considered contrary to common legal principles of a constitutional character or Norway's international obligations.

Summary:

The parties in a labour conflict in the oil sector failed to reach an agreement during a mediation by the national labour arbitrator on 30 June 1994. The Parliament was not in session at this time. The Government therefore adopted a provisional ordinance on compulsory arbitration according to Section 17 of the Constitution on 1 July 1994. The provisional ordinance contained a prohibition against strike or blockade. The Norwegian Oil Workers' Federation filed a case against the State claiming that the use of compulsory arbitration and the prohibition against strikes stated in the provisional ordinance were invalid. The organisation alleged that the prohibition was contrary to common principles of constitutional character. Alternatively, it was argued that the prohibition violated Norway's obligations according to international law, and that in case of violation, international law must have supremacy over Norwegian law.

The City Court found in favour of the State. The organisation pleaded that the City Court's decision was based on an error of law and was granted the right to appeal directly to the Supreme Court.

The Supreme Court upheld the judgment of the City Court.

The Supreme Court held that the applicant had a current legal interest in the matter.

The Supreme Court stated that in Norway compulsory arbitration had been used to end labour conflicts since 1915 in cases where considerable social interests were at stake. The Supreme Court held that this long practice was not contrary to common legal principles of a constitutional character. Such inconsistency could only be conceivable as a rare exception.

The Supreme Court held that the right to strike is not directly expressed in ILO Conventions no. 87 and no. 98, and that Norway and the other member states neither during the preparatory work nor with the adoption of the Convention intended to restrict the possibility of regulating the right to strike. The Norwegian State had not at any time accepted that use of compulsory arbitration, when considerable social interests were at stake, was contrary to ILO Convention no. 87 and no. 98. While evaluating whether Norway had taken on an international obligation to restrict the use of compulsory arbitration in relation to ILO, the Norwegian courts had to pay considerable

attention to the Parliament's and the Government's assumptions at the time Norway was committed.

Furthermore, the applicant had referred to Article 6.4 of the European Social Charter, Article 8.1.d of the International Covenant on Economic, Social and Cultural Rights, Article 22 of the International Covenant on Civil and Political Rights and Article 11 ECHR.

The Supreme Court did not consider the provisional ordinance of 1 July 1994 contrary to Norway's obligations as far as international law was concerned.

In an *obiter dictum* the Supreme Court held that in case of an obvious conflict between international law and Norwegian law, the main rule must be that the internal law takes precedence over international law. The Supreme Court referred to Section 110.c of the Constitution and to the preparatory work of this section. The Supreme Court also made reference to the preparatory work of the provisional ordinance which stated that the provisional ordinance should be applicable in any case.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data

1 January 1997 – 30 April 1997

Constitutional review

Decisions:
- Cases decided on their merits: 9
- Cases discontinued: 2

Types of review:
- *Ex post facto* review: 11
- Preliminary review: 0
- Abstract review (Article 22 of the Constitutional Tribunal Act): 9
- Courts' referrals ("legal questions", Article 25 of the Constitutional Tribunal Act): 2

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 10
- Cases on the legality of other normative acts under the Constitution and statutes: 1

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 4
- Upholding the constitutionality of the provisions in question: 5

Universally binding interpretation of laws

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

Subject matter of important decisions

Access to courts
8 April 1997 (K 14/96)

Electoral law
30 April 1997 (W 1/97)

Housing
4 February 1997 (P 4/96)
18 February 1997 (K 16/96)

Labour disputes, Trade unions
24 February 1997 (K 19/96)

Publication of laws
21 January 1997 (K 18/96)

Right to work for remuneration
7 January 1997 (K 7/96)

Social benefits
25 February 1997 (K 21/95)

Status of members of parliament
18 March 1997 (K 15/96)

Important decisions

Identification: POL-1997-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.01.1997 / **e)** K 7/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Prisoners, employment / Minimum wage / Prisoners, minimum wage.

Headnotes:

Prisoners may not be remunerated for their work below the minimum wage provided for other categories of employees.

Summary:

According to the Penal Code, as amended in 1995, a person in custody is remunerated for his/her work on the same basis as all other employees, until he/she agrees to work for a lower wage. The above rule has been introduced to increase the chances of prisoners being employed.

The applicant (the Commissioner for Civil Rights Protection) argued that the provision in doubt infringed the constitutional principles of equality and social justice as well as the principle of remuneration being proportional to quantity and quality of work. In the Ombudsman's opinion the Penal Code provided for less advantageous conditions of remuneration of prisoners than those applying to the rest of employees.

The Tribunal found the provision in question constitutional, provided it would not be construed as authorising the employers to remunerate prisoners below the legally established minimum wage.

Languages:

Polish.

Identification: POL-1997-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.01.1997 / **e)** K 18/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
General Principles – Rule of law.
General Principles – Legality.
General Principles – Publication of laws.

Keywords of the alphabetical index:

Normative act, unified text.

Headnotes:

The unified text of a normative act (text edited and promulgated by the executive, incorporating all previous amendments and deletions) must not create any new legal norms.

Summary:

It was found by the Tribunal that the 1994 announcement of the Minister of Environmental Protection on the promulgation of the unified text of the 1980 Law on the Protection and Development of the Environment violated the constitutional principles of rule of law and legality as well as the principle of separation of powers. According to the Tribunal, the Minister did not have any power to decide, while editing the above mentioned unified text, that certain duties of the former "local organs of state administration" with respect to cleansing and refuse management had been vested exclusively with municipalities after the 1990 local self-government reform.

The Tribunal recalled that the unified text of a normative act (text edited and promulgated by the executive, consolidating all previous amendments and deletions) should consist of the binding provisions of law only and must not create any new legal norms. Accordingly, any announcement on the unified text modifying the contents of the legal provisions in force must be found in breach of the constitutional principles of state ruled by law and of separation of powers.

Supplementary information:

The Tribunal held that its decision repealed only the unified text publication but did not directly refer to the 1980 Law on the Protection and Development of the Environment. This law should therefore not be subject to any scrutiny by the *Sejm*.

Languages:

Polish.

Identification: POL-1997-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.02.1997 / **e)** P 4/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Social State.

Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Civil and political rights – Right to family life.
Fundamental Rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Housing, allowance.

Headnotes:

Certain limitations of the right to housing allowance which are discriminatory to families of low income with many children have been found in contradiction to the principles of the Constitution.

Summary:

Benefits provided for in the 1994 Law on the Lease of Apartments and Housing Allowances are intended to compensate a part of housing expenditure for families who spend a relatively big part of their total income on housing rent.

The aforementioned law provides that the right to housing allowance depends on:

- *per capita* income of the family concerned,

- *per capita* housing space and the number of members of the family concerned.

Once the space of premises (located in a multi-flat building) occupied by the family applying for allowance exceeds 91 square metres, no allowance may be granted, notwithstanding the number of family members. As a result, even an eight-person family living in an apartment of 114 square metres is not entitled to any allowance (example taken from the court case from which the referral to the Constitutional Tribunal was made).

According to the Tribunal, the provision in doubt infringes the constitutional principles of social justice and equality since it discriminates against families of low income with many children, who – because of reasons being beyond their control – are not able to move to a smaller apartment. The Tribunal decision's reasoning compares their situation to the situation of families earning similar *per capita* income, but occupying smaller apartments, who may be granted the allowance. Additionally, the Tribunal found the disputed provisions in breach of the constitutional principle proclaiming the special protection of the State to families with many children.

Languages:

Polish.

Identification: POL-1997-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.02.1997 / **e)** K 16/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
General Principles – Social State.
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 lease / Justice, principles / Housing, social premises / Social premises, right / Housing, eviction.

Headnotes:

Courts deciding on the eviction of lessees and granting them the right to "social premises" should consider the financial standing and family situation of persons being evicted in comparison with the situation of other persons from the social premise waiting list.

Summary:

Under the 1994 law on the lease of apartments and housing allowances, a lease agreement for social premises may be concluded by a municipality with an indigent person who is not able to satisfy his/her housing needs by renting an apartment on a regular basis. Granting social premises is one of the tasks of municipalities, which *inter alia* determine rents for such premises and the priority list of families entitled to social premises.

Similarly, the courts deciding on eviction of lessees may rule on the right of such persons to social premises. The relevant municipality is obliged in that case to conclude the lease agreement for social premises with the evicted lessee first of all.

The applicant (one municipal council) argued that the above rule contradicted the constitutional principles of social justice and equality by diminishing the scope of municipality powers to decide on the priority of concluding the lease agreements for social premises. It infringed in their opinion also the rights of families already put by the relevant municipality on the social premise priority list.

The Tribunal held that the provisions in doubt were not in breach of the aforementioned principles of the Constitution provided they were applied after consideration of the difficult financial standing and family situation of the considered persons in comparison with the situation of other persons from the municipality's social premises waiting list.

The Tribunal found no violation of the principle of equality as it believed that the correct application of the provisions in question should secure equal rights for persons in a similar situation to conclude agreements on lease of social premises with the same priority.

Languages:

Polish.

Identification: POL-1997-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.02.1997 / **e)** K 19/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.

Constitutional Justice – Types of claim – Claim by a private body or individual – Trade unions.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Collective labour agreements / Collective labour disputes / Constitutional Court, powers.

Headnotes:

The Constitutional Tribunal is not empowered to verify the political decisions of the legislature provided they were transformed into law with no breach of the norms, principles or values of the Constitution.

Summary:

The applicants challenged one of the provisions of the 1991 law on the settlement of collective labour disputes according to which the manager of a relevant public sector unit, instead of the relevant governmental minister or municipal executive, is a party to a dispute initiated by a public sector trade union.

According to the Tribunal, under the Labour Code the "direct" employer of persons hired by units which are part of governmental or municipal administration is the relevant unit represented by its manager. It has been clearly intended by the legislator not to involve ministers or municipal executives as parties to collective labour disputes carried on in the public sector.

The above rule does not contradict the constitutional provision according to which the trade unions play an "important public function" representing the interests and rights of working people. In the Tribunal's opinion the collective labour disputes legal regulations do not annul the constitutionally determined role of trade unions and do not put this role below the constitutionally indicated level of "importance".

Supplementary information:

The Tribunal recalls that it is not entitled to examine the accuracy of the legislature's decisions. A law may be only exceptionally found unconstitutional because it lacks certain specific provisions. Unless the political decisions of the legislature infringe the norms, principles or values of the Constitution, they are beyond the scope of the Tribunal's control.

Languages:

Polish.

Identification: POL-1997-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.02.1997 / **e)** K 21/95 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Social State.
General Principles – Rule of law.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Economic, social and cultural rights – Right to social security.
Fundamental Rights – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Social benefits / Acquired rights / Social justice.

Headnotes:

The constitutional principles related to the system of social assistance must be construed in the light of the principle of a state ruled by law and the principle of social justice and upon consideration of the common need to create a healthy economy and a balanced State budget.

Summary:

The Ombudsman, who filed the application in the present case, argued that some provisions of the 1994 law on family and medical-care allowances substantially limited the rights to these benefits, *inter alia* by narrowing the category of persons entitled to family allowances. The Constitutional Tribunal found no reason to declare the provisions in question contrary to the constitutional principles of equality and of social justice.

The Tribunal defined family and medical-care allowances as forms of State financial aid directed at people in need.

According to the Tribunal, the legislature enjoys a relatively wide range of discretion when transforming its political and economic decisions into law while creating or reforming the systems of national product redistribution of that kind. The legislature must not, however, trespass the limits set forth in the Constitution. The Tribunal itself is not empowered to verify the accuracy of the detailed provisions of law or instruct the legislature how to achieve specific social or economic aims. Particularly, a law may not be presumed unconstitutional solely on the basis that it is less advantageous for persons concerned compared to legal regulations previously in force.

The principle expressed in Article 70 of the constitutional provisions of 1952 which is still in force providing for "development of social assistance of the State" must be re-interpreted in the light of the fundamental amendments introduced to the Constitution after 1989, namely the principles of the rule of law and social justice. According to the Tribunal, the "development" of social assistance must now consider the need to create a healthy economy and a balanced State budget. Therefore "development" of social assistance must not be identified with expanding the various forms of social assistance or widening the categories of persons entitled to assistance.

Languages:

Polish.

Identification: POL-1997-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.03.1997 / **e)** K 15/96 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
Institutions – Legislative bodies – Status of members of legislative bodies.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Deputies, incompatibilities.

Headnotes:

Statutory rules intended to encourage deputies and senators to favour their political work over any additional employment or business activity, are intended to result in parliamentary mandate being more professional and do not infringe the principles of the Constitution.

Summary:

According to the 1996 law on exercising the parliamentary mandate, parliamentary salaries (and other forms of compensation derived from it) are paid from the State budget only to deputies and senators who decide that the parliamentary duty will be their predominant professional activity. In the Tribunal's opinion the above rule does not contravene the constitutional principles of state ruled by law or equality. The wide prohibition (subject to very few exceptions) against deputies holding posts and being employed by organs of state administration (as well as the courts, the prosecutors' offices, the army, etc.) is not contrary to the Constitution either.

In the Tribunal's opinion the above rules are intended to encourage deputies and senators to favour their professional political work over any additional employment or economic activity. They are intended to result in parliamentary mandates getting a more professional character. The legislature's preference for persons who consider parliamentary activity as their predominant occupation is adequate to the public interest which is supported this way, namely the financial independence of deputies and senators.

Languages:

Polish.

Identification: POL-1997-1-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.04.1997 / **e)** K 14/96 / **f)** / **g)** to be published in *Orzeczictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
Institutions – Army and police forces.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

State security, organs.

Headnotes:

The suppression of judicial control over decisions on the dismissal of State Security Office employees is contrary to the constitutional principle of access to courts.

Summary:

According to the Tribunal, the 1995 law revoking the possibility to appeal against decisions to dismiss officers of the State Security Office (SSO) because of the "important interest of service" is contrary to the constitutional principle of access to courts (derived from the principle of state ruled by law). The Tribunal also found a violation of the constitutional principle declaring that the Republic of Poland is a state that "strengthens and extends the rights and freedoms of citizens", but the majority of the panel did not declare the provision in question contrary to the principle of equality.

The Tribunal considered the provision in question to be a regression in comparison to rules previously in force. Before the amendment came into force, the law provided the right for SSO officers to bring the dismissal decision before an administrative court regardless of the grounds for dismissal.

Languages:

Polish.

Identification: POL-1997-1-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.04.1997 / **e)** W 1/97 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official collection of the decisions of the Tribunal) / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Electoral law / Electoral Commission / Minorities, electoral privileges.

Headnotes:

The Tribunal decided *inter alia* that the electoral committees of "registered" organisations of national minorities may, upon their request, be released from the obligation to achieve at least 5% of the vote cast on a nation-wide scale and included in the division of seats in the Parliament. The State Electoral Commission may request the electoral committees of national minorities to prove their entitlement to the above privilege.

Summary:

The present resolution clarifies some doubts on the interpretation of the 1993 law on elections to the *Sejm*.

The Tribunal also provided for conditions upon which certain electoral committees may be released from the duty to submit at least 3000 signatures of voters supporting their district list of candidates. According to the Tribunal, the above privilege may only be applied to electoral committees which – immediately after a previous general election – formed a parliamentary caucus consisting of at least 15 deputies and which kept the political identity during the term of Parliament.

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 January 1997 – 30 April 1997

Total: 354 judgments, of which:

- Prior scrutiny: 1 judgment
- Subsequent scrutiny *in abstracto*: 7 judgments
- Appeals: 308 judgments
- Complaints: 38 judgments

Important decisions

Identification: POR-1997-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.01.1997 / **e)** 1/97 / **f)** / **g)** *Diário da República* (Official Gazette) (Series I-A), no. 54, 05.03.1997, 966-987 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between State authorities.
General Principles – Separation of powers.
General Principles – Rule of law – Certainty of the law.
General Principles – Rule of law – Maintaining confidence.
Institutions – Legislative bodies – Relations with the executive bodies.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

University entrance examination / Fixed number of places / Reserved administrative powers / Powers, separation and interdependence, principle.

Headnotes:

The idea of "general powers reserved for the administration" is not in keeping with the meaning currently given to the principles of the rule of law and of the separation and interdependence of powers; nor does this ensue from the text of the Constitution. Under the Constitution, the general principle of the separation and interdependence of powers establishes a rationale of co-operation and co-ordination between State powers and bodies.

Although the Constitution assigns the key elements of the executive function to the Government as the highest organ of public administration, areas which may be the subject of administrative activity (eg issuing of the regulations needed to implement laws) may also be the subject of a law passed by the Assembly of the Republic.

The Constitution does not uphold the argument that the administration has "reserved powers in respect of specific functional matters" since the assignment of a specific field of action to the executive, as a corollary of the separation and interdependence of the organs of supreme authority, does not imply that certain matters are reserved originally and absolutely for the executive; it simply implies the power to choose from among several possible decisions, in an area not dealt with in detail in parliamentary legislation.

"*Maßnahmegesetze*" (laws not making general provisions but dealing with special individual cases) are not necessarily at variance with the separation of powers because of their form (ie the fact that they are not abstract and general in nature), although – like any other law – they can violate the principle of equality.

Summary:

The case concerns an application for prior scrutiny of constitutionality made by the President of the Republic, who argued that the provisions in question could have an adverse retrospective effect on the rules governing the national university entrance examination for the 1996/1997 academic year, through the creation of additional places for specific individuals by the Assembly of the Republic.

The provisions in question were contained in a decree submitted to the President of the Republic for enactment in the form of a law, having been approved with the support of all parliamentary opposition parties and notwithstanding the opposition of the deputies of the Socialist Party (the party in government, which, however, has only a relative majority).

The President of the Republic stated as the first ground of his application the principle of the separation and interdependence of powers, laid down explicitly in Article 114 of the Constitution. He submitted several possible arguments:

a. the Assembly of the Republic could be regarded as encroaching, by way of legislation, on core administrative functions;

b. independently of the idea of "general powers reserved for the administration", the Assembly of the Republic could be regarded as having encroached on the area of administrative powers which the Constitution assigns specifically to the Government, thus violating the principle of the separation and interdependence of powers, which represents both a constitutional guarantee of the powers reserved specifically for the administration and the imposition of functional limits on the legislature;

c. the Assembly of the Republic could be regarded as having violated the principle of the separation and interdependence of powers because, without an adequate legal basis and without prior legal authority, it generated a crisis in the Government's constitutional function as the highest organ of public administration.

The President's second complaint concerned a possible violation of the principle of equality since the provisions under scrutiny seemed to establish situations of advantage and discrimination, without an adequate substantive basis.

Lastly, the President of the Republic alleged a possible violation of the principle of the protection of the trust and legitimate expectations of citizens as a corollary of the principle of the democratic state governed by the rule of law since there would be retrospective application of special rules.

In its final decision, the plenary assembly of the Constitutional Court ruled that the provisions under scrutiny were not unconstitutional with reference to the principle of the separation and interdependence of the organs of supreme authority, but that the first two articles of the decree concerned were unconstitutional because, taken together, they conflicted with the principles of legal certainty and equality (particularly the principle of equality of access to higher education). As a result, it also ruled that the other provisions of this decree were unconstitutional.

Supplementary information:

Several judges issued a dissenting opinion on some of the questions of unconstitutionality.

The constitutional provisions referred to were Articles 114, 185 and 202 of the Constitution (separation and interdependence of organs of supreme authority, definition of the Government, administrative powers of the Government respectively) and in particular – since they were referred to explicitly in the final decision – Articles 2, 13 and 76 of the Constitution (democratic state based on the rule of law, principle of equality, university and access to higher level education respectively).

Languages:

Portuguese.

Identification: POR-1997-1-002

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 19.02.1997 / **e)** 121/97 / **f)** / **g)** *Diário da República* (Official Gazette) (Series II), no. 100, 30.04.1997, 5148-5154 / **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 – Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Equality of arms.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Secret investigation / Criminal procedure, access to the file / Judicial protection / Adversarial principle / European Court of Human Rights / European Commission of Human Rights, case law, interpretation in conformity.

Headnotes:

It is unconstitutional to interpret the provisions of the Code of Criminal Procedure in such a way as to deny accused persons and their defence counsel the right during the investigation to be informed of the contents of the file and therefore the right to appeal against the decision ordering or maintaining detention on remand. It is contrary to the guarantees of access to the law and to the courts

and to the guarantees provided by criminal procedure, and above all to the principles of adversarial hearings and equality of arms, contained in Articles 20.1, 32.1 and 32.5 of the Constitution.

Summary:

The applicant claimed, with reference to several principles of the Portuguese Constitution and the European Convention on Human Rights, that accused persons in criminal proceedings who are detained on remand, in addition to their right to be immediately and clearly informed of the reasons for their detention and their rights, also have the right – they themselves or their defence counsel – to be informed of the contents of the file. He thus questioned the constitutionality of the provisions under which (a) the rule that criminal proceedings must be conducted in public is not fully valid until the Public Prosecution Office has brought charges and (b) the file remains inaccessible to the defence during the first stage of the proceedings "*fase de inquerito*".

As regards access to the file, Portuguese legislation was therefore more restrictive than many other national criminal procedures in western Europe.

In the case in point, the Court did not deem it essential to assess whether the provisions were unconstitutional on the grounds that they violated Articles 5.1, 5.2 and 6 ECHR, since these international legal principles have been incorporated into several articles of the Portuguese Constitution. Accordingly, international case law on this matter, especially that of the European Commission of Human Rights and the European Court of Human Rights (see, for example, the judgment of 30 March 1989 in the case of *Lamy v. Belgium*) was only taken into consideration as an element in interpreting the applicable constitutional provisions.

Supplementary information:

Three judges issued a dissenting opinion.

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data

1 January 1997 – 30 April 1997

The Constitutional Court has handed down 97 decisions, as follows:

- 2 decisions on the constitutionality of legislation prior to its enactment;
- 1 decision on the constitutionality of Parliamentary rules;
- 94 decisions on objections alleging unconstitutionality.

In addition, two judgments have been given on, respectively, ascertainment that the conditions for the exercise of the right of citizens to initiate legislation have been satisfied, and the amendment of the Court Rules in respect of holidays.

Important decisions

Identification: ROM-1997-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.04.1997 / **e)** 73/1997 / **f)** Decision on the constitutionality of the law supplementing Law no. 35/1991 on the rules governing foreign investment / **g)** *Monitorul Oficial al României* (Official Gazette of Romania), no. 75/29.04.1997 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – General questions – Entitlement to rights – Legal persons – Private law.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Foreigners / Nationality, commercial company / Commercial company, foreign capital / Land ownership, foreigners.

Headnotes:

In law, citizenship for a natural person corresponds to nationality for a legal entity. Under Romanian law, the nationality of a legal entity – a concept expressing the fact that the latter belongs to a particular system of national law – is not determined by the status (citizen, foreigner or stateless person) of the natural persons who have formed a partnership (in the case of commercial companies) in order to set up the legal entity.

Rather, the legal entity has the nationality of the State on whose territory it has established its registered office, in accordance with the instrument whereby it was set up. The nationality of the legal entity determines the law applicable to the rules governing the commercial company – and any other legal entity – during its establishment, existence and liquidation.

Any legal entity with Romanian nationality may acquire ownership of the land which it needs to achieve the purpose of its activity. This corresponds to the speciality rules on the permitted activities of legal entities in contrast with natural persons, who may use their property for general purposes. In this specific area, legal entities may acquire ownership of land which is publicly owned either by the State or by local or regional authorities, which along with other property in this category is deemed inalienable under Article 135 of the Constitution.

Summary:

In the context of the review of the constitutionality of legislation prior to its enactment, a case was brought before the Constitutional Court by 27 Senators on the unconstitutionality of the law supplementing Law no. 35/1991 concerning the rules governing foreign investment, which introduced a new section stating that: "Commercial companies with partially or entirely foreign capital, constituted as Romanian legal entities, may, at any time while they are in operation, acquire a property right and all other rights *in rem* over the land which they require in order to achieve the purpose of their activity."

All the arguments put forward by those who had brought the case to support their objection alleging unconstitutionality expressed the concern that the newly introduced law should not breach the explicit prohibition enshrined in Article 41.2 of the Constitution and that it should not be allowed to result in avoidance of this prohibition and, implicity, contravention of constitutional texts which enshrined the constitutional basis of the Romanian State (the national, sovereign, independent, unitary and indivisible nature of the Romanian State).

In accordance with Article 41.2 of the Constitution, foreign citizens and stateless persons may not acquire the right to own land. The Basic Law draws upon the concepts of constitutional law, namely that of "citizen" and, in provisions with a broader scope, of "person".

A legal entity has separate legal personality from the natural persons who – in the case of legal entities constituted by a legal act of partnership – have set it up.

The constituent elements of a legal entity are: its independent organisation, its own assets and a specifically defined aim. Of these elements, the most important for the purposes of assessing an objection alleging unconstitutionality is the existence of assets independent of any other natural person or legal entity. The assets of a legal entity include, above all else, a property right over goods which it possesses including, if appropriate, ownership of land.

Regardless of the origin of their authorised capital, commercial companies whose registered office is in Romania have Romanian nationality. There is no legal rule allowing a distinction to be made between the legal status of commercial companies – and more generally, of legal entities – of the same nationality, i.e. in our case, Romanian nationality. Therefore, it is not permissible to discriminate between Romanian commercial companies on the grounds that the natural persons who have entered into partnership to establish or subsequently acquire shares in these firms all have Romanian citizenship or are partially or entirely foreigners or stateless persons.

National sovereignty and the inalienability of Romanian territory mean that the national territory is regarded as a concept of constitutional law, and ownership of land applies to the surface of the land, a concept derived from civil and related areas of law.

In the light of these considerations, the Constitutional Court declared the impugned law constitutional.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 January 1997 – 30 April 1997

Total number of decisions: 7

Types of decisions:

- Rulings: 7
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of State bodies: 7
- 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: 6
- Complaints of individuals: 2
- References from courts: 2
  (Some claims were dealt with jointly during the same proceedings).

Important decisions

Identification: RUS-1997-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 24.01.1997 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 06.02.1997 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Federalism and regionalism – Institutional aspects.
Institutions – Federalism and regionalism – Distribution of powers – Subjects.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Local authorities / Self-governing territories / Local self-government.

Headnotes:

In the setting up or changing of the territorial administrative structure and types of self-governing territories, it is unacceptable to terminate prematurely the powers of local self-government bodies without taking account of the opinion of the population of these territories. This would amount to a violation of the constitutional right of citizens to exercise local self-government. The transformation of local self-government bodies into organs of state authority and the exercise by the latter of local government is not admissible either.

Summary:

The Constitutional Court examined the case relating to the review of the constitutionality of the Udmurtian Republic's law on "the system governing the organs of state authority in the Urdmurtian Republic". Proceedings were opened in response to applications from the President of the Russian Federation and a group of parliamentarians in the State Duma of the Federal Assembly as well as a complaint lodged by citizens of Ijevsk against the violation of their constitutional right to exercise local self-government.

The Constitutional Court found that the law at issue provided for the setting up of representative and executive organs of state authority for territorial administrative entities (*raion* or town) and for city sub-districts; this means that villages, market towns and the urban centres are regarded as municipalities within which local self-government is exercised.

In accordance with the Constitution, State authority in the subjects of the Russian Federation is exercised by the organs of State authority that they set up. The system of such organs is established by the subjects of the Russian Federation autonomously and in accordance with the foundations of the Russian Federation's constitutional order and the general principles governing the organisation of representative and executive organs of State authority, laid down by federal law.

The nature of the State of Russia means that the federal structure is the responsibility of the federation and the territorial structure of their republics making up the federation is the responsibility of those republics. The Constitution of the Republic of Udmurtia deals with this matter. It lists the *raions* and Republican main cities which are directly part of the Republic of Udmurtia as territorial administrative entities. Territorial entities at a different level, namely *raion* capitals, towns and villages within the *raion* and other urban centres (parts of towns, sub-districts, residential complexes) inside the republican main cities, do not have this status. For this reason representative and executive State authorities of such entities cannot be created. At this level, public authority is exercised through local self-government and bodies which are not part of the State authority system.

The Constitutional Court decided to recognise the provision at issue, according to which the State Council of the Republic of Udmurtia is free to establish a system of State authority within the Republic of Udmurtia, as complying with the Constitution of the Russian Federation.

The provision for the setting up of representative and executive State authorities within urban centres (city sub-districts and towns within the *raion*) which do not have the status of territorial administrative entities, was found to be not in compliance with the Constitution. For the same reasons, the provisions governing the status of representative and executive bodies of State authority of city sub-districts and towns within the *raion*, and the status of their officials were also found to be unconstitutional.

The provision stating that the *raion* Soviet of deputies shall appoint the "administrators of the Soviets and rural towns" is also unconstitutional.

The provision stating that villages, market towns and residential parts of urban centres represent municipalities exercising self-government, is unconstitutional because it rules out the creation of municipalities in other residential areas (towns within the *raion*, city sub-districts, etc) without the status of territorial administrative entities. If organs of state authority are set up within *raions* and republican main cities and the respective transformation of types of municipalities, the local self-government bodies of *raions* and cities with the status of territorial administrative entities may not be terminated prematurely, without consulting the population as regards the motives and in the form stipulated in the Urdmurtian Republic's legislation, adopted in accordance with the Constitution of the Russian Federation. The most appropriate means of consulting public opinion in such circumstances is by referendum.

The provisions providing for the creation of unified Soviets of deputies for the transition period, the conversion of governors of municipalities into State officials, and their appointment or dismissal by State authorities of the Republic of Udmurtia, were regarded as unconstitutional, in so far as the organs of self-government of the raion and the town are virtually incorporated into the State authority system.

Languages:

Russian.

Identification: RUS-1997-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 18.02.1997 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 26.02.1997 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
General Principles – Legality.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Licence, duty / Alcohol production.

Headnotes:

The introduction by act of government of a tax on the issuing of licences for the exercise of any activity represents the establishment of a new tax. This is contrary to the Constitution, which provides that new taxes must be introduced by a fiscal law passed according to the statutory procedure.

Summary:

The Constitutional Court examined the case relating to the review of constitutionality of the government decision "on the introduction of a tax on the issuing of licences for the production, bottling, stocking and wholesale of spirits". Proceedings were opened following applications by the People's Assembly of the Republic of Daghestan, the State Duma of Stavropol kray (territory) and the

regional Duma of Toula. According to the applicants the government has introduced new federal taxes infringing several articles of the Constitution, according to which federal taxes and duties fall within the competence of the Russian Federation and can be established only by federal law.

The Constitutional Court found that the government decision regulated:

1. taxes on the production, bottling and storing of spirits and a tax for the inspection of the companies to establish whether they operate in accordance with the regulations;

2. the amount of the aforementioned taxes and the distribution of the amounts of these taxes;

3. penalties for operation without a licence.

According to the Constitution, everyone is required to pay legally established taxes and duties. The Constitution provides that federal taxes and duties are the responsibility of the Russian Federation, that the system of taxes collected for the federal budget and the general principles of taxation are established by federal law, and that the federal laws passed by the State Duma on matters of federal taxes and duties must be examined by the Council of the Federation.

According to these provisions, federal taxes and duties are regarded as "legally established" if they have been established in the statutory form by the federal legislative organ.

The above-mentioned taxes were not established in that way, even though it is stipulated in several federal budget laws that they are one of the sources of federal budget revenue. However, the mere fact that they are mentioned in budget laws does not amount to their being legally established since these laws do not contain any substantial elements of fiscal obligations. According to the Constitution, federal taxes and duties and the federal budget are autonomous spheres of legal regulation, which means that federal duties and taxes must be established by federal fiscal legislation.

Consequently, when presenting the draft budgets for 1995, 1996 and 1997, the government was required to present the draft federal laws on the establishment of taxes (licence duties) for the production, bottling, storing and wholesale of ethyl alcohol and spirits. Therefore from the point of view of limits to the powers of the central authority federal organs, the establishment by the government of the above-mentioned taxes is not in compliance with the Constitution.

The Constitutional Court of the Russian Federation is also required to consider that the licence duty introduced by the government is a source of federal budget revenue. Consequently, the immediate finding that the decision at issue is invalid could result in the non-execution of the federal budget as a whole and lead to a violation of a series of constitutional rights and freedoms and citizens. For this reason, the Constitutional Court thought it necessary to grant the Federal Assembly the possibility of settling the matter by legislative means.

Languages:

Russian.

Identification: RUS-1997-1-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 04.03.1997 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta*, 18.03.1997 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Distribution of powers – Subjects.
Institutions – Economic duties of the State.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Advertising.

Headnotes:

Relations arising during the production, placing and circulation of advertising are by their nature civil law relationships. They are linked to the establishment of the legal foundations of the single market of the country and to the guarantee of freedom of information. Such relationships are regulated by the Russian Federation and must be done so through federal legislation.

Summary:

Proceedings were opened further to the applications of the Legislative Assembly of Omsk oblast and the Duma

of the city of Moscow for a verification of the constitutionality of Section 3 of the Federal Law on Advertising. The reason for which proceedings were opened was uncertainty about the constitutionality of these provisions.

In its application, the Moscow Duma relies on the fact that legislation on advertising is not mentioned either in Article 71 of the Constitution (powers and responsibilities of the Russian Federation) nor in Article 72 of the Constitution (joint powers and responsibilities of the Russian Federation and its subjects) and advertising cannot therefore be regulated by normative acts of the subjects of the Russian Federation. Given that Section 3 of the federal law on advertising does not provide for the adoption by subjects of the Russian Federation of normative acts on matters regulated by that law, the applicant considers that the above section of the law is not in compliance with the Constitution of the Russian Federation.

In the opinion of the Legislative Assembly of Omsk oblast, legislation on advertising is a part of legislation on culture, and is therefore the joint responsibility of the Russian Federation and its subjects.

The meaning of Section 3 of the federal law on advertising cannot be considered to be unconnected with the purpose of the regulation, the objectives and the field of implementation of the law.

The law in question regulates relationships arising during the production, placing and circulation of advertising on the goods, works and services markets.

These relationships are governed by civil law because they are created during the exercise of business activity and must be regulated by civil legislation.

The Constitution states that civil legislation is the competence of the Russian Federation. This means that legislation on advertising, regulating civil law relations in the field of advertising activity, may not be the joint responsibility of the Russian Federation and its subjects nor the responsibility of the subjects of the Russian Federation, such that they are not entitled to produce their own regulations in this field.

Since Section 3 of the law in question deals with normative acts regulating relations under civil law, this section does not comply with the Constitution of the Russian Federation, with regard to sharing of responsibilities among the Russian Federation and its subjects.

Article 8 of the Constitution mentions as a foundation of the constitutional system, unity of the economic area, the free movement of goods, services and financial resources, competition and freedom of economic activity, which are guaranteed in the Russian Federation. Establishing this as a State obligation, the Constitution assigns responsibility for laying down the legal foundations of the single market to the Russian Federation.

Under Section 2 of the federal law on advertising, advertising is regarded by the legislator as a means of promoting goods, works and services in the market of the Russian Federation and, consequently, contributes to the creation of the economic area. The federal law on advertising also aims to provide protection against unfair competition in advertising.

This means that legal regulations on advertising also in the field in which such regulations are related to the laying down of legal foundations for the single market, is the competence of the federal legislator. Consequently, Section 3 of the law is not contrary in this respect to the Constitution.

Unity of the economic area can not be achieved without the creation of a single information system. In this respect, advertising (advertising information) is the foundation for such an information system.

The right to seek, obtain, convey, produce and circulate information freely is enshrined in the Constitution and relates to the fundamental rights and freedoms of individuals, responsibility for the regulation of which lies with the Russian Federation. The rights and freedoms of citizens including those relating to advertising information, cannot be limited by a federal law.

Consequently, in this respect the provisions of Article 3 of the law are not contrary to the Constitution of the Russian Federation.

The Constitutional Court decided to recognise Section 3 of the federal law of 18 July 1995 on advertising as complying with the Constitution of the Russian Federation, because it regulates relations in the field of advertising which belong to the domain of civil legislation and form the foundations of the single market.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data
1 January 1997 – 30 April 1997

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 1
- Decisions on the merits by panels of the Court: 10
- Number of other decisions by the plenum: 3
- Number of other decisions by panels: 43
- Total number of cases brought to the Court: 242

Important decisions

Identification: SVK-1997-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 27.02.1997 / **e)** PL.ÚS 7/96 / **f)** Petition from 46 members of the parliament / **g)** *Zbierka zákonov Slovenskej Republiky* (Official Gazette), no. 77/1997 Z.z in brief; to be published in *Zbierka nálezov a uznesení Ústanvého súdu Slovenskej Republiky* (Collection of judgements and decisions of the Constitutional Court) in complete version / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Rules issued by the executive.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Competition, economic, protection / Court of Justice of the European Communities.

Headnotes:

Fundamental rights and freedoms guaranteed by the Constitution may not be restricted by subordinate legislation passed by the government and other authorities of the executive power.

The Government is not vested with power to restrict the right to property or anti-trust law through governmental decrees.

Summary:

The petitioner, a group of 46 members of the Slovak parliament, brought a petition to the Court claiming the constitutional conflict between twelve provisions of the Governmental Decree no. 139/1996 amending Governmental Decree no. 134/1994, and a series of constitutional provisions, *inter alia* Articles 120.1, 20.1 and 55.2 of the Constitution.

Governmental Decree no. 139/1996 was adopted in order to give more detailed regulation on privatisation.

According to Article 120.1 of the Constitution: "The Government shall have the power to pass regulations for the implementation of laws within limits defined by law." The provision of Article 20.1 of the Constitution: "Property rights of all owners shall be uniformly construed and equally protected by law" was the other reason for bringing the case to Court. According to Article 55.2 of the Constitution: "The Slovak Republic shall protect and encourage economic competition. Details shall be provided by law".

The Court ruled that the Government, the ministries and any other authority of the executive power are not vested with power to pass a regulation on relations which are not regulated by laws passed by the parliament. Relation regulated through the parliamentary law may not be regulated by the executive power through its rules to an extent which exceeds the law or is contrary to the law. When passing subordinate legislation the government is obliged to observe all laws in force. The government was authorised by the parliament to pass the secondary rules on strictly defined issues concerning privatisation. This authorisation was far exceeded by the Government when passing the Governmental Decree no. 139/1996. Due to this seven provisions of the governmental decree were declared unconstitutional.

On economic competition the Court ruled that economic competition is a value guaranteed by the Constitution which is only protected relatively, not *erga omnes* values guaranteed by the Constitution. There are other public interests and according to the circumstances of the case they might be worthy of stronger constitutional protection. This legal opinion of the Court is explicitly compared to the legal opinion of the Court of Justice of the European Communities of 19 January 1994. According to this Court: "air navigation control, which is not directly at issue in the main proceedings, is a task involving the exercise of public authority and is not of an economic nature, since that activity constitutes a service in the public interest which

is intended to protect both the users of air transport and the populations affected by aircraft flying over them" *(Sat Fluggesellschaft mbh v. Eurocontrol)*. Although other public interests might be worthy of stronger protection than the interest in economic competition, the constitutional guarantee to protect and encourage economic competition within the limits defined by law means that the authorities of the executive power have no power to pass provisions restricting economic competition. This power is vested exclusively with the parliament. Neither the government, nor any other administrative authority may pass subordinate legislation restricting economic competition. As Governmental Decree no. 139/1996 had done this, the Government had infringed Article 55.2 of the Constitution.

Languages:

Slovak.

Identification: SVK-1997-1-002

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 26.03.1997 / **e)** II. ÚS 8/97 / **f)** Petition from the Attorney-General of the Slovak Republic / **g)** *Zbierka zákonov Slovenskej Republiky* (Official Gazette), no. 96/1997 Z.z. in brief; to be published in *Zbierka nálezov a uznesení Ústanvého súdu Slovenskej Republiky* (Collection of judgements and decisions of the Constitutional Court) in complete version / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Acts issued by decentralised bodies.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Local self-government, law-making power / Car, immobilisation by police.

Headnotes:

Fundamental rights and freedoms guaranteed by the Constitution may not be restricted through "generally binding directives" passed by local self-government bodies.

Summary:

The petitioner, the Attorney-General of the Slovak Republic, brought a petition claiming constitutional conflict between a generally binding directive passed by a local self-government body in Bratislava no. 3/1991 amended by two other generally binding directives, and the Constitution. The generally binding directive authorised the local police to immobilise cars parked "in forbidden places". Articles 20.1 and 20.4 of the Constitution plus Article 68 of the Constitution on self-government authority for law-making were the constitutional provisions allegedly infringed.

According to Article 68 of the Constitution: "In matters of local self-government competence a municipality is vested with power to pass generally binding directives."

The municipality is a legal entity (Article 65 of the Constitution). The local police operating under powers of the municipality is a very different body from the state police which is vested with power to immobilise cars according to the Law On Police Corps of 1993. The municipal police is the "watchdog" of a legal entity – the municipality. This is why the municipal police is also a person established under rules of private law. Not taking into account its name (the police), this body is not vested with the same powers as the state police. The "immobilising power" in the state police was vested through law adopted by parliament. Identical power may not be vested in municipal police through the generally binding ordinance passed by the self-government body because exercise of this power means an interference with the property right guaranteed by Article 20.1 of the Constitution. The right to property is guaranteed amongst the fundamental rights and freedoms according to the Slovak Constitution. Similarly to law-making authority of the executive bodies, any body of self-government has no power to impose restrictions on fundamental rights and freedoms of citizens. That is why the generally binding directive of 1991 as amended later was held to be unconstitutional.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data

1 January 1997 – 30 April 1997

Number of decisions

The Constitutional Court had 12 (plenary) sessions during this period, in which it dealt with 141 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 39 cases in the field of protection of human rights and basic freedoms (cases denoted Up- in the Constitutional Court Register and submitted to the plenary session of the Court; other Up- cases were processed by chambers of three judges at sessions closed to the public). There were 295 U- and 343 Up- unresolved cases from the previous year at the start of the period (1 January 1997). The Constitutional Court accepted 121 U- and 138 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

- 58 cases (U-) in the field of protection of constitutionality and legality, of which there were (taken by the Plenary Court)
  - 22 decisions and
  - 31 resolutions

- 23 cases (U-) were joined to the above mentioned cases because of common treatment and decision; accordingly the total number of resolved cases (U-) is 76.

- In the same period, the Constitutional Court resolved 78 cases (Up-) in the field of protection of human rights and basic freedoms (6 decisions taken by the Plenary Court, 72 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, but are rather handed over to the participants in the proceedings.

However, all decisions and resolutions are published and distributed:

- in an official yearly collection (Slovene full text version, including dissenting/concurring opinions, and English abstracts);
- in the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts, with the full text version of 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 both in Slovene and 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* is available also on Internet (http://www.bwp-mediagroup.com/bookworld/-eecrcl.html).

Important decisions

Identification: SLO-1997-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.01.1997 / **e)** U-I-23/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 5/97; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), VI, 1997 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
General Principles – Legality.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Institutions – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Tax, sales tax on services / Regulating statutory matters by executive regulation / Implementing statute by executive regulation.

Headnotes:

In view of the Constitution and the provisions of the Sales Tax Act, the obligation to pay tax on trade in services

may be introduced only by statute. Rules, as executive regulations, must be in compliance with the Constitution and may not contain provisions for which there is no statutory basis, in particular they may not independently determine rights and obligations such as the introduction of an obligation to pay sales tax.

Summary:

The first paragraph of Article 34.b of the Regulations on the use of the Sales Tax Act was severed.

Article 147 of the Constitution determines that the State shall prescribe taxes, customs and other levies by statute.

The ZPD (Sales Tax Act) regulates the sales tax system and introduces obligations to pay tax on trade in products and tax on trade in services (Article 1), and determines tax levels and the sales tax tariffs on products and services on which sales tax is levied. The tariff is an integral part of the Act (Article 2).

In the framework of provisions regulating the obligation to pay tax on the sale of services, Article 23 of the ZPD prescribes general tax bases for all kinds of service. Under these statutory provisions, the basis for tax on the sale of services is the amount paid for performing the service, which does not include tax on the sale of services paid in money or in kind or in return for other services (first paragraph, which considers the amount of payment as the entire gross payment), which also includes necessary expenses (cost of materials and other services) that the provider of the service bore in connection with providing the service and with which he charges the user of the service, unless the Act provides otherwise (Article 23.2). Article 24 enumerates eleven cases in which the tax basis is determined otherwise. Under the provisions of point 3 of Article 24, the tax basis on the sale of services for agency, mediation, representation and commission services is the commission in addition to other payments earned.

The provision of the impugned first paragraph of Article 34.b of the Regulations, referring to point 3 of the first paragraph of Article 24 of the ZPD, adopts the statutory definition of tax basis for the calculation or payment of sales tax on agency, mediation, representation and commission services, so that for determining the tax basis at the level of the commission or other payment it adds two conditions:

- the person ordering the agency, mediation, representation or commission services must be aware of the level of commission and
- the commission must be clear from the account rendered.

As the claimant properly noted, in relation to the statutory arrangement, the conditions cited raise the statute-determined tax bases to the level of "the amount paid for performing the service" as the "entire gross payment" under the first paragraph of Article 23 ZPD for the calculation and payment of sales tax for all tax payers who have received higher payments than the amount of the commission in connection with agency, mediation, representation or commission services, and who do not meet the above conditions, with the result that their tax burden is increased.

Executive regulations must comply with the Constitution and statutory law and may not themselves contain provisions for which there is no statutory basis; in particular they may not independently determine rights and obligations such as an obligation to pay sales tax.

Under Article 120.2 of the Constitution, administrative bodies are bound in their work, which also involves the issuing of regulations within their jurisdiction, by the framework defined by the Constitution and statutory law, and especially to constitutional and legal foundations (the principle of legality), and they do not have the right to issue regulations without relevant legal basis. The principle of the separation of powers, and the obligation of administrative bodies to remain within the framework determined by the Constitution and statutory law, excludes the possibility for administrative bodies to adopt or regulate statutory matters independently.

Supplementary information:

Legal norms referred to:

Articles 3, 120, 147 of the Constitution.
Articles 1, 2, 23, 24, 79 of the Sales Tax Act (ZPD).
Articles 26, 45.3 of the Constitutional Court Act (ZUstS).

Cross-references:

In its reasoning, the Constitutional Court refers to its cases no. U-I-38/95 (OdlUS IV, 64), *Bulletin* 1995/2 [SLO-1995-2-010] and no. U-I-73/94 (OdlUS IV, 51).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1997-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 16.01.1997 / **e)** U-I-273/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 13/97; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), VI, 1997 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles – Rule of law – Public interest.
General Principles – Proportionality.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Freedom of enterprise, restriction / Public benefit / Medicinal products, trade / Educational background, responsible person.

Headnotes:

The provision in the Constitution on free enterprise protects individual freedom and at the same time allows the legislature to prescribe special restrictive conditions with respect to the carrying out of specific activities to ensure the protection of public benefits.

Restrictions on the freedom of involvement in business activities are justified if they are indispensable for the safeguarding of public benefits and if a measure selected interferes as little as possible with the freedom of enterprise. Restrictions can be subjective (educational background, experience, personality characteristics etc.) or objective in nature (equipment, procedures etc.), and in this respect the constitutional principle of proportionality of measures designed to safeguard public benefits applies. The measure must be one that protects public benefits against obvious or highly probable damage or risk, which cannot be prevented by any less restrictive measure. The safeguarding of public benefits is indispensable, particularly where the health and life of humans are at risk. Wholesale trade in medicinal products is also comprised in this category, thus the measure introduced by the present statute is not in conflict with the Constitution.

Summary:

The Court rejected an application contesting the constitutionality of Article 64.1.2 of the ZZdr (Medicinal Products Act).

Under Article 74 of the Constitution, free enterprise shall be guaranteed. The establishment of businesses must be regulated by statute. The Constitution also provides that business activities in conflict with public interest may not be pursued. An extremely liberal understanding of entrepreneurship would not be in conformity with the Constitution, therefore the legislature may restrict certain forms of business (monopolies, cartels); and if such a measure is in the public interest (human health and life, protection of nature, consumers, employees etc.), it may impose special subjective and/or objective conditions with respect to some business activities. The imposition of special conditions with a view to protecting important general assets and rights of others is also in conformity with Article 15.3 of the Constitution.

Thus, constitutional rights may be restricted by statute if the legislature has established, on the balance of public interests and individual rights, that the restriction is indispensable. In enacting a restriction, the legislature must choose a measure which will ensure the effective protection of public benefits and which will, in the given circumstances, interfere as little as possible with constitutionally guaranteed rights. A measure employed by the legislature for the purpose of restricting constitutional rights in the public interest must be proportionate with the interference with the constitutional rights. For these may be interfered with only to the extent which is indispensable to ensure special protection. A measure introduced by the legislature to restrict a constitutional right is justified if, from the nature of the particular activity, it follows that the activity requires specific knowledge, skills and personality characteristics for it to be carried out, without which harmful consequences or a hazardous situation could result for the buyer of the goods manufactured or supplied. Therefore the operators of some activities must normally meet certain conditions in order to carry out these activities. This is true for health care and pharmacy activities. The rate of social development and knew findings (new substances, environmental protection, safety as regards legal transactions, etc.), however, demand that the legislature extend the prescribing of conditions also to other activities. In this respect, the legislature must, on the basis of forecasts and probability judgements, formulate the restricting provision so that it will be tailored to actual requirements and circumstances. Such restricting provisions as have been enacted in the public interest must be appropriate from an objective viewpoint and tailored to the aim pursued in accordance with the principles of a social state governed by the rule of law (Article 2 of the Constitution).

By the disputed provision the legislature has prescribed that legal entities and natural persons engaging in the wholesale of medicinal products must appoint a person

responsible for the receipt and dispatching of medicinal products and the examination of documents. Such person must have in addition to a Bachelor of Science degree in pharmacy, also completed specialisation studies in the field of the testing of medicinal products. The Constitutional Court agrees with the applicant that the disputed part of Article 64 of the ZZdr enacts a restriction imposing conditions relating to the carrying out of business operations of legal entities and natural persons, wholesale traders in medicinal products, but it finds that the statutory restriction is not in conflict with the Constitution. For it is in the public interest for the manufacture of and trade in medicinal products to be organised in such a way as to ensure the safety of consumers of medicinal products. The trade in medicinal products is a primarily pharmaceutical activity, and the freedom of trade is essentially subordinated to safety in pharmaceutical activities. The Constitutional Court considers that the condition – that traders engaging in the wholesale of medicinal products must appoint a person responsible for the testing of medicinal products – has been enacted in conformity with the nature of medicinal products, because such goods could be dangerous to human health and life. The enacted measure would reduce to the minimum the possibility of damage occurring as a result of the use of medicinal products.

Supplementary information:

Legal norms referred to:

Articles 2, 15, 74 of the Constitution.
Articles 26, 21 of the Constitutional Court Act (ZUstS).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1997-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.01.1997 / **e)** U-I-139/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 10/97; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), VI, 1997 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles – Proportionality.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Right to private life.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law.
Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Personal data, protection / Detective activities, conditions for issuance of a license / Constitutional Court, review of appropriateness of a statutory provision / Competition clause.

Headnotes:

Statutory provisions are not in conflict with the Constitution:

- when among conditions for the issuance of a license for detective work they require *inter alia* that during the two preceding years the applicant should not have carried out the tasks of a public law enforcement official of the Ministry of the Interior or of intelligence and security agencies;

- when they require firms registered for carrying out detective work to obtain the relevant licenses also for its employees who have previously engaged in such activity.

Summary:

The Court stated that Article 8.1.4 and Article 29 of the ZDD (Detectives' Activities Act) are not in conflict with the Constitution.

The contested provision in Article 8 of the ZDD provides that, to be able to carry out detective work, a detective must have the requisite license, which may be issued by the relevant Chamber upon request, *inter alia* if during the two preceding years the applicant has not carried out the tasks of a public law enforcement official of the Ministry of the Interior or of intelligence and security agencies. Such provision restricts the freedom of work granted in Article 49 of the Constitution.

The freedom of work as defined in Article 49 may be exercised directly on the basis of the Constitution in accordance with Article 15 of the Constitution. Under

Article 15.3 of the Constitution, human rights and fundamental freedoms shall only be limited by the rights of others and in cases determined by the Constitution. As the Constitution does not expressly mention a possibility for the freedom of work under Article 49 of the Constitution to be limited by statute, the Constitution only allows the restriction of this right for reasons of protection of the rights of others.

Such restriction is only permissible in observance of the principle of proportionality, according to which such a measure must be:

a. adequate for the constitutionally admissible legislative aim to be attained;

b. indispensable, meaning that the said aim is not attainable by a less restrictive measure; and

c. proportionate on the weighing-up of one constitutional right against another.

The first question which arises is what rights of other persons in the instant case require protection by way of limitation. Although this has neither been specified by the applicants nor by the National Assembly, at least two constitutional rights can be identified as having been interfered with: the right to privacy and personal rights under Article 35 of the Constitution, and the right to the protection of personal data under Article 38 of the Constitution. Individuals who carry out the tasks of public law enforcement officials come into possession of information related to personal status and relations, frequently also by the use of special methods and techniques which are determined by the Constitution and statute as admissible interference with the right to privacy and with some other rights (inviolability of the home, privacy of correspondence) when this is in the public interest. The use of such information in performing the work of private detective, however, constitutes an absolutely inadmissible interference with the right to privacy and with personal rights. The same also applies to the protection of personal data, because in carrying out their work public law enforcement officials come into possession of information in personal data files, which is permissible if it is in the public interest but not so when used in the work of a private detective.

The disputed provision of the ZDD prohibits former public law enforcement officials from carrying out private detective work anywhere in Slovenia. This prohibition in fact leads to the proscription of the use for detective work of information and contacts obtained or established during one's former employment.

Such a measure is also indispensable, since there is no other way to achieve the desired objective. It would be impossible to implement and verify a more prohibition against the use by private detectives of information and contacts acquired in the course of their former employment as a law enforcement officer. It is quite logical to expect that a private detective will use all the skills and knowledge at his or her disposal in the course of performing his or her work, therefore the use of information and contacts from previous employment can be prevented only by prohibiting him or her from being involved in such activity for a certain period of time after which the information and contacts will have become obsolete and therefore of little or no use.

This measure is also in compliance with the requirement of proportionality. The right to the protection of privacy and of personal rights, as well as the right to the protection of personal data, are important constitutional rights. The violation of these rights, which may occur in the course of detective work using information and contacts acquired during previous employment, can be quite serious. The mere possibility of a serious violation of these rights is proportionate with limiting the freedom of work of former law enforcement officials. This limitation is only temporary, two years being the shortest possible period of limitation for it to be effective, following which former public law enforcement officials can obtain a license for carrying out detective work.

The disputed Article 29 of the ZDD requires firms already registered for carrying out detective work to obtain relevant licenses also for those employees who are already engaged in such activity. As already decided by the Constitutional Court in the case U-I-67/95 (OdlUS V, 38), if a law or regulation sets conditions for carrying out an activity, this does not imply the retrospective effect of this law or regulation even if it requires that the said conditions be fulfilled also by persons who have carried out such activity at the moment of the law or regulation coming into force. This is particularly the case when the statute provides a reasonable time period to fulfil such conditions, such as the one-year period in the present case undoubtedly is.

Supplementary information:

Legal norms referred to:

Articles 15, 35, 38, 49 of the Constitution.
Articles 23, 24, 26, 40 of the Constitutional Court Act (ZUstS).

Cross-references:

In stating the reasons for this Decision the Constitutional Court refers to its decisions U-I-201/93 of 07.03.1996 (OdlUS V, 7) and U-I-51/90 of 14.05.1992 (OdlUSS I, 33).

For reasons of joint consideration and adjudication, the Constitutional Court decided by ruling of 18.01.1996 to join the case U-I-65/95 to the case under consideration.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1997-1-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.01.1997 / **e)** U-I-304/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 11/97; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), VI, 1997 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Army and police forces – Army.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Civil law.
Fundamental Rights – Civil and political rights – Right to property – Nationalisation.

Keywords of the alphabetical index:

Municipality, constitutional position / Property, public / Defence, national / Municipal assets, nationalisation.

Headnotes:

Under the new social order, the field of defence is entirely within the competence of the State, therefore it is understandable and not contrary to the Constitution for the legislature, which is responsible for the transformation of socially-owned property into public or other forms of property, to have transferred weapons and equipment that previously belonged to certain municipal bodies to the Ministry of Defence thereby transferring their ownership to the State. By so doing the legislature did not undermine the constitutional position of municipality, since the latter has no competencies in the field of defense. Since the transfer and nationalisation of property have only been in force from the effective date of the relevant statute, the prohibition against the retrospective effect of statutory law has not been infringed.

Summary:

Article 110.1 and Article 110.2 of the Defence Act are not in conflict with the Constitution.

Article 5 of the Enabling Statute for the Implementation of the Constitution of the Republic of Slovenia envisage the interim role of municipalities in defence matters pending the implementation of the Constitution and the gradual transfer of competencies from the municipality to the State. In accordance with the Defence and Protection Act, municipalities were then responsible for organising, securing and financing much of the Republic of Slovenia's defence system under instructions from the Republic authority competent for defence matters in accordance with Article 5 of the Enabling Statute. The contested provisions of the Defence Act affect those defence matters for which part the municipalities were responsible, i.e. weapons, equipment, records and documentation of liaison units and information centres among others.

In so far as each individual municipality had secured the weapons and equipment for the purposes covered by both disputed provisions already prior to the proclamation of the Constitution of the Republic of Slovenia, those goods were socially-owned property managed by a municipality, and, it is for this reason if for nothing else, that one cannot speak of the municipal property or of a municipality as having been deprived of property rights with regard to those goods. As the new constitutional system no longer recognises socially-owned property, the task of the legislature is to assign by statute an appropriate owner to each particular part of socially-owned property. In doing so the legislature must ensure, when the ownership of goods intended for public use is concerned, *inter alia* the continuity and good husbandry in the management of specific tasks of the State. The disputed Article 109.2 assigned to an owner the above-mentioned part of socially-owned property – this being a matter falling within the competence of the legislature; as the new constitutional system has made defense a matter which is entirely within the competence of the State, the selection of the owner is also in conformity with the Constitution.

With the coming into force of the Defence Act, defense matters came entirely within the competence of the State

(Article 3.5 of the Act), including the tasks (and employees, Article 111) where (or by whom) the items under the disputed provisions were used. In accordance with the legal nature of public property, public property assigned for specific tasks follows such tasks, and the competence for using and managing such specific part of public property is also transferred together with such tasks.

The measure envisaged by the disputed provisions does not interfere with the constitutional position of municipality, because, in accordance with the Constitution, new municipalities as local self-government units do not have any such tasks or powers, the implementation of which could be hindered by the disputed provisions.

Supplementary information:

Legal norms referred to:

Article 5 of the Enabling Statute for the Implementation of the Constitution (UZIU).
Articles 21, 23 of the Constitutional Court Act (ZUstS).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1997-1-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 06.02.1997 / **e)** U-I-322/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 11/97; *Odločbe in sklepi Ustavnega sodišča* (Official Digest of the Constitutional Court), VI, 1997 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles – Rule of law – Certainty of the law.
Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Local government regulation, retrospective effect / Ordinance of an Urban Municipality / Property tax / Acquired rights.

Headnotes:

A local government ordinance which imposes an increase in property tax applying to a period prior to its coming into force conflicts with the constitutional prohibition of retrospective effect of legal acts.

Summary:

The provision in Article 2 of the Ordinance on Property Tax in Celje Urban Municipality, which reads: "and shall be applied starting with 1 January 1996" shall be severed *ab initio*.

The disputed Article provides that the Ordinance shall come into force on the first day following the date of its publication in the Official Gazette, that is, on 8 June 1996, and shall apply from 1 January 1996. On 3 December 1996 the Municipal Council of Celje Urban Municipality passed an Ordinance on amendments and supplements to the Ordinance on property tax in Celje Urban Municipality (Official Gazette, no. 75/96, which was published on 20 December 1996 – hereinafter: "the amending Ordinance"), by which Article 1 of the disputed Ordinance was amended. The amending Ordinance came into force 8 days after its publication in the Official Gazette, and its application was to commence on 1 January 1997. However, with this ordinance the Municipal Council of Celje Urban Municipality did not repeal *ab initio* the provision of the disputed Ordinance which dealt with its application. With the amending Ordinance, the Municipal Council of Celje Urban Municipality modified only Article 1 of the disputed Ordinance (which is not contested by the applicant), and set as the date of commencement of application a time period following the date of its coming into force, which is in conformity with Article 155.1 of the Constitution.

According to Article 155.1 of the Constitution, no statute, regulation or other legislative measure shall be interpreted as having retrospective effect. The fact that the disputed Ordinance came into force on 8 June 1996, and that its application started from 1 January 1996, means that property tax was increased not only prospectively, from its coming into force, but also retrospectively.

The prohibition of retrospective effect is one of the basic concrete realisations of the constitutional principle of a state governed by the rule of law (Article 2 of the

Constitution). Legal certainty does not exist if one cannot trust the law in force and if one cannot rely on laws and regulations in force. Everybody has the right to trust in the law in force and to direct his or her acts and expectations in conformity with the law in force. A regulation which increases obligations retrospectively weakens such trust and thus decreases legal certainty. Retroactive effect, it is true, is allowed in exceptional cases, but is reserved just for statute, if the latter provides that a specific provision of it shall have retrospective effect, but only if this is in the public interest and provided that no acquired rights are thereby infringed (Article 155.2 of the Constitution). Consequently, local government regulations can never have retrospective effect.

This decision of the Constitutional Court repeals *ab initio* the disputed portion of Article 2 of the Ordinance and in so far as it had retrospective effect, that is, solely with respect to the period of interference of the regulation with the past, and in the said period, solely in reference to the difference represented by the increase in property tax. Those who suffered a loss or disadvantage on the basis of the repealed provision may, in accordance with Article 46 of the Constitutional Court Act (ZUstS), request restoration of the former position.

Supplementary information:

Legal norms referred to:

Articles 2, 155 of the Constitution.
Articles 24, 26, 45, 46 of the Constitutional Court Act (ZUstS).

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-1997-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.02.1997 / **e)** CCT 31/96 / **f)** Fraser v. Children's Court, Pretoria North, and Others / **g)** *South African Law Reports* 1997 (2) SA 261 (CC) / **h)** *Butterworths Constitutional Law Reports*, 1997 (2) 153 (CC).

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Determination of effects by the court.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Religion.

Keywords of the alphabetical index:

Marital status, discrimination / Matrimonial unions, discrimination / Validity, interim.

Headnotes:

A section of the Child Care Act insofar as it does not require the consent of the father of an "illegitimate" child before an order is made for the adoption of such child is inconsistent with the right to equality in the interim Constitution but remains in force until corrected by Parliament.

Summary:

The applicant, the father of an "illegitimate" child, challenged a section of the Child Care Act (the Act) which dispensed with the consent of the father of an "illegitimate" child before an order is made for the adoption of such child. The applicant challenged the section on the grounds that it violated the right to equality in terms of Section 8.1 of the Interim Constitution and the right of every person not to be unfairly discriminated against in terms of Section 8.2 of the Interim Constitution.

In a unanimous judgment delivered by Deputy President Mahomed the Court held that the impugned section of

the Act was inconsistent with the equality provision to the extent that it dispensed with the father's consent for the adoption of an "illegitimate" child in all circumstances.

In terms of the Act, "legitimate" children includes those children born of a relationship solemnised by a civil marriage recognised by the State and children born of a customary union solemnised according to Black law or custom, as defined by the Black Administration Act.

The Court held that the section impermissibly discriminated between the rights of fathers in Black customary unions and the rights of fathers in marriages contracted according to the rites of religions such as Islam. The impugned section thus unfairly discriminated between matrimonial unions.

The invasion of the right to equality was said to be unreasonable and unjustifiable in an open and democratic society based on freedom and equality.

The Court noted that there were other strong attacks that might be advanced against the impugned section of the Act, in particular that it discriminated unfairly against fathers on the basis of their gender or their marital status. For example, the consent of the father to the adoption of his "illegitimate" child would be unnecessary even if the child was eighteen years old and had the strongest bonds with the father; yet the mother's consent was necessary even if she had not shown the slightest interest in the child.

The Court was of the view that the anomalous results it had identified would not be remedied by a simple deletion of those parts of the section which offended the Constitution. The result of such a deletion would have been to make every father's consent necessary for every proposed adoption of a child, regardless of the circumstances, even, for example, if the child was born in consequence of the rape of the mother. The Court concluded that a nuanced and balanced consideration of the factual demographic picture in South Africa, the nature of parental relationships and the interests of the child were all necessary before the challenged section could be remedied.

The Court declared the impugned section invalid, but required Parliament to correct the defective section, this it did in terms of Section 98.5. In the result the impugned section of the Act was to remain in force pending its correction by Parliament.

Cross-references:

The President of the Republic of South Africa and Another v. Hugo, CCT 11/96; *Bulletin* 1997/1 [RSA-1997-1-004];

Prinsloo v. Van Der Linde and Another, CCT 4/96; *Bulletin* 1997/1 [RSA-1997-1-003].

Languages:

English.

Identification: RSA-1997-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.03.1997/ **e)** CCT 50/95 / **f)** State v. Coetzee and Others / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Decisions – Types – Modification.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Presumptions, constitutionality / Burden of proof.

Headnotes:

Statutory provisions which place a legal burden on an accused and which require him/her to prove or disprove a fact on a balance of probabilities unjustifiably violate an accused's right to a fair trial and are therefore unconstitutional.

Summary:

The applicants, charged with, inter alia, twelve counts of fraud challenged the constitutionality of Sections 245 and 332.5 of the Criminal Procedure Act in terms of the Interim Constitution. They contended that the sections imposed an onus on an accused person which violated the right to be presumed innocent (Section 25.3.c of the Interim Constitution).

Justice Langa, delivering the majority opinion of the Court held that Sections 245 and 332.5 were unconstitutional and could not be saved by the limitations clause

(Section 33.1 of the Interim Constitution). With regard to Section 245 the Court was unanimous in holding that it was unconstitutional. The decision in regard to Section 332.5 was not unanimous.

Section 245

Section 245 provides that in criminal proceedings where an accused is charged with an offence of which a false representation is an element and it is proved that the false representation was made by the accused, he/she shall be deemed to have made the representation knowing it to be false, unless the contrary is proved. The Court held that the provision clearly infringes the presumption of innocence because it requires the accused to prove the absence, on a balance of probabilities, what is essentially an element of the offence. The Court also held that Section 245 could not be saved by the limitation clause of the Constitution, which requires that the infringement be reasonable, justifiable and necessary. The fact that it is difficult for the prosecution to prove an element of the offence which falls peculiarly within the knowledge of the accused was held not to be sufficient reason to warrant overriding the right in question. Section 245 was accordingly held to be invalid and of no force and effect.

Section 332.5

Section 332.5 provides as follows:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

The applicants contended that the section infringed the presumption of innocence and the cluster of rights associated with it, the right to freedom and security of the person and the right to property. The Court was most concerned with the following issues: which rights were violated; whether the section was justifiable; and whether words could be severed from the section to render it constitutional.

Justice Langa held that the section breaches the presumption of innocence in that it allows the accused to be convicted despite the existence of a reasonable doubt as to his or her guilt. He held further that the section did not constitute a justifiable limitation of the right. He recognised the fact that directors bear a special responsibility to society and that the state has an interest in ensuring that the affairs of a corporate body are conducted properly. He held however that these ends could adequately be achieved by means which would not be inconsistent with the Constitution. In his view, the ambit of the section was too far-reaching in that it was applicable to any possible offence, serious or minor, to any type of liability and to any type of penalty, grave or trivial.

Having come to this conclusion on the question of the presumption of innocence, Justice Langa found it unnecessary to address the challenges based on the right to freedom and security of the person and the right to property which were also raised. In his opinion, the section was inconsistent with the Constitution and could not be saved. He disagreed with the view that a severance of the words "it is proved that", as proposed by Acting Justice Kentridge, or the words "it is proved that he did not take part in the commission of the offence and that", as suggested by Justice O'Regan, would keep the section within the bounds of constitutionality. In his view, what remains after the suggested excision would be a provision that still requires the accused to discharge a legal burden of proof in respect of an important aspect of the charge in order to avoid being convicted. Justice Kriegler concurred in the judgment of Justice Langa. Chaskalson P, Mahomed DP and Didcott J, in their separate judgments, concurred in Justice Langa's judgment and the order he proposed.

Cross-references:

State v. Zuma and Others (CCT 5/94) 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA); *Bulletin* 1995/3 [RSA-1995-3-001];
State v. Bhulwana; State v. Gwadiso (CCT 11/95; CCT 12/95) 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); *Bulletin* 1995/3 [RSA-1995-3-008];
State v. Mbatha; State v. Prinsloo (CCT 19/95; CCT 35/95) 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC);
Scagell and Others v. Attorney-General of the Western Cape and Others (CCT 42/95) 1997 (2) SA 368 (CC); 1996 (11) BCLR 1446 (CC); *Bulletin* 1996/3 [RSA-1996-3-017].

Languages:

English.

Identification: RSA-1997-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 18.04.1997 / **e)** CCT 4/96 / **f)** Prinsloo v. Van Der Linde and Another / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Presumption of negligence, constitutionality / Negligence / Burden of proof.

Headnotes:

Legislation which differentiates between persons in a manner rationally connected to its purpose and which does not unfairly discriminate against persons in a way which impairs their dignity as human beings is not unconstitutional.

Summary:

The constitutionality of a section of the Forest Act was challenged. The section provides that where the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved. In a civil trial for damages, it was argued that the section violated the right to be presumed innocent (Section 25.3.c) and the right to equality (Section 8 of the Interim Constitution).

The Court held that, the possible effect of this section in a criminal case did not arise here and that, even if the section were assumed to apply to criminal trials, the Court would have had to give it a restricted meaning to preserve its constitutionality. Therefore the challenged section did not violate the right to be presumed innocent.

The Court held that the section did not violate the right to equal protection of the law because a rational relationship exists between the means chosen and the purpose sought to be achieved by the Act.

The Court also held that section was not in breach of the prohibition against unfair discrimination. The section neither differentiated between persons in a way which impaired their dignity as human beings, nor did the differentiation impact on the interests of the affected group in some other comparably serious manner.

Cross-references:

The President of the Republic of South Africa and Another v. Hugo (CCT 11/96); *Bulletin* 1997/1 [RSA-1997-1-004]; *Fraser v. Children's Court, Pretoria North, and Others* (CCT 31/96) SALR 1997 (2) SA 261 (CC); BCLR 1997 (2) 153 (CC); *Bulletin* 1997/1 [RSA-1997-1-001].

Languages:

English.

Identification: RSA-1997-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 18.04.1997 / **e)** CCT 11/96 / **f)** The President of the Republic of South Africa and Another v. Hugo / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Presidential decrees.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Reviewability, presidential pardons / Discrimination, unfair meaning.

Headnotes:

In exercising his or her powers of pardon the President is subject to the interim Constitution, including the Bill of Rights. A Presidential pardon granting certain categories of prisoners release is not unfairly discriminatory and thus not unconstitutional.

Summary:

The case was brought on appeal against a judgment in the court below which held a Presidential pardon unconstitutional on the basis that it infringed the right to equality (Section 8 of the Interim Constitution) and ordered its correction.

The President, acting in terms of his constitutional powers to pardon and reprieve offenders, had granted release to prisoners in certain categories. One of the categories was certain "mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years". Mr Hugo, a single father of a child under twelve at the relevant date, challenged the constitutionality of the pardon, arguing that it constituted unfair discrimination on the ground of sex or gender.

In determining whether the President, in the exercise of his or her power to pardon, was subject to the provisions of the interim Constitution, the Court distinguished between a general amnesty accorded to a category of prisoners and a specific pardon granted to an individual. In the instant case, where the President had granted a general pardon to a category of prisoners, the Court found that, not only was the President subject to the Bill of rights, more particularly, he was subject to the equality clause. In the case of a single pardon the Court concluded that the equality clause would have only limited application.

The majority noted that the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups lies at the heart of the prohibition of unfair discrimination. In deciding whether or not the discrimination was unfair the majority held that regard had to be had to the impact of the discrimination on the people affected. In assessing whether the impact was unfair, it was necessary to look at the group who had been disadvantaged, the nature of the power used and the nature of the interest which had been affected by the discrimination.

Regarding the impact upon fathers of young children who were not released the majority held that, although the pardon may have denied men an opportunity it afforded women, it could not be said that it fundamentally impaired their sense of dignity and equal worth. Moreover, the pardon merely deprived them of an early release to which they in any event had no legal entitlement since the grant of a pardon is a matter purely within the discretion of the President. The Court concluded that the President had exercised his discretion fairly and in a manner consistent with the interim Constitution. The appeal was therefore allowed and the order of the Court below was set aside.

Justice Kriegler dissenting on the issue of unfair discrimination held that the pardon was based on a stereotype of women as care-givers of children and that the President's good faith could not save it from being unconstitutional. For a distinction based on a stereotype to be found constitutional, the benefits flowing from the stereotype would have to be substantial and the distinction would have to address past discrimination. That was not the case here.

Justice Didcott dissenting from the decision to substitute a declaration of validity for the one of invalidity held that Mr Hugo could derive no apparent benefit from the declaration which he sought and obtained in the court below. The issue raised by Mr Hugo had become academic as a revised decision favouring fathers as well as mothers would not result in his release.

Judgement for the majority was given by Justice Goldstone. Justices Mokgoro and O'Regan wrote separate concurring judgements.

Cross-references:

Prinsloo v. Van der Linde & Another (CCT 4/96); *Bulletin* 1997/1 [RSA-1997-1-003]. In this case the Court discussed the relationship between the right to equality before the law and equal protection of the law under Section 8.1 of the Interim Constitution and the right not be unfairly discriminated against under Section 8.2 of the Interim Constitution.

Languages:

English.

Spain
Constitutional Court

Statistical data
1 January 1997 – 30 April 1997

Type and number of decisions:

- Judgments: 87
- Decisions: 123
- Procedural decisions: 1258

Cases submitted: 1800

Important decisions

Identification: ESP-1997-1-001

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 14.01.1997 / **e)** 7/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 39 of 14.02.1997, 25-29 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Interlocutory proceedings – Challenging of a judge.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Impartiality.

Keywords of the alphabetical index:

Judge, withdrawal / Judge, challenging.

Headnotes:

According to the Constitutional Court, the principle of the right to a trial with full safeguards includes the right to an impartial judge, which has two aspects: a subjective aspect, which seeks to avoid partiality – or the least suspicion of partiality – resulting from judges' relations with the parties, and an objective aspect, which seeks to avoid partiality arising from their organic or functional relationships. Judges' withdrawal from cases, either of their own volition or following a challenge, is a way of ensuring their impartiality, and such challenges are the only procedures provided for under the legal system to safeguard this fundamental right or avoid breaches of it.

Summary:

This application for constitutional protection was lodged against two decisions of a bench of judges which, according to the appellant, infringed his rights to legal protection and a fair trial. Following the first of these decisions, handed down by the Court's fourth section, the President of the Court was withdrawn from the case as a result of a challenge which was upheld by the full court. Under the second decision, handed down by the fourth section after the President of the Court had been withdrawn from the case, the appellant's application for the first decision to be set aside was declared inadmissible.

The Constitutional Court noted firstly that in finding that there were grounds for the withdrawal of the President of the section handing down the first of the disputed decisions, the full court had implicitly recognised that this decision infringed the right to an impartial judge and that the application for that decision to be set aside was therefore legitimate. Since the appeal had been declared inadmissible under the terms of the second decision, the Constitutional Court was bound to set aside both the contested decisions.

Languages:

Spanish.

Identification: ESP-1997-1-002

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 10.02.1997 / **e)** 18/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 63 of 14.03.1997, 5-13 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Enforcement of judgments, law / Immunity from execution / Embassy, insolvency / Diplomatic immunity / Development aid, seizure / State, foreign, assets, seizure.

Headnotes:

The key feature of the right to have judicial decisions enforced is that judgments should be respected and, if necessary, vigorously applied in the event of any obstruction by third parties. It is not the Constitutional Court's duty to decide what steps should be taken in each individual case to secure the enforcement of judgments. However, it does have a responsibility to ensure that when reparation is sought for breaches of the right to judicial protection, those breaches are not the consequence of arbitrary or unreasonable decisions and do not arise from the courts' inaction or failure to take the necessary steps to enforce this right.

Summary:

This appeal for constitutional protection was lodged by a person who had been employed until 1984, the year of his dismissal, as a chauffeur at the embassy of Equatorial Guinea in Madrid. Although he had won his case in the labour court and his dismissal had been declared null and void he had not been re-employed by the diplomatic mission, as a result of which he brought a legal action for compensation. To ensure that the judgment was enforced, the courts asked various public bodies for information about any loans or subsidies granted by the Spanish government to this African country which would enable the embassy to pay the sum awarded, given that the latter had previously declared itself temporarily insolvent. Once all these efforts had proved fruitless, the court decided to terminate the proceedings, which the appellant contested in this appeal for constitutional protection.

Regarding the right relied on by the appellant – the right to the effective enforcement of court judgments as handed down, provided for in Article 24 of the Constitution – the Constitutional Court stated that the case was concerned with one of citizens' fundamental rights; however complex the case and whatever the difficulties in resolving it, the legal system required the court to use all objectively feasible and appropriate means to apply this fundamental right. As a result, legal decisions of which effect was to interrupt proceedings should not be discretionary or reflect the principle of subjective reasonability but must be based on mandatory and objective principles laid down by the legal system.

The defendant in this case was not the Republic of Equatorial Guinea but its embassy, but since the latter was simply an organ of the State concerned and its representative in Spain, the options for securing the enforcement of the judgment also extended to other assets of that State, which was in the final analysis the defendant, and any assets not subject to immunity from execution. It was clear, therefore, that the main potential owner of assets that might be used to ensure the enforcement of the judgment, in accordance with the fundamental constitutional right, had been excluded from consideration. Similarly, it also had to be emphasised that the court had not complied with the relevant labour legislation, since it had not required the object of the attachment to give details of its assets or claims which could be used to meet its liabilities or to reveal the identity of persons holding any sort of claims over these assets. The court's most serious failure to enforce the judgment concerned the follow-up to its dealings with the relevant departments of the Ministries of Economic Affairs and Finance and of Foreign Affairs. After requesting the relevant information, the court had ordered that any loans that might have been granted to Equatorial Guinea should be seized and that sums of money that had not yet been paid to that government should be withheld and made available to the court, and had also asked the Ministry of Foreign Affairs to give it access to diplomatic channels. The responses regarding the seizure and withholding of loans and aid had initially been negative, in the sense that no such funds existed at that time, and then positive, in that the existence of such funds was finally acknowledged, although the departments concerned had informed the court that it was impossible to meet its request, on the grounds that, were they to agree to take such steps, Spain would be internationally liable for failing to grant aid accorded under its treaty of friendship with Equatorial Guinea.

The decision to terminate the proceedings in such circumstances amounted to a failure to use all the options for action that the legal system made available to the courts. In the case of aid and subsidies, the court had been willing to accept the answer it was given – that no funds were available at that time – without taking the matter any further, even though it had been fully aware, as was made clear in the case file, that this type of assistance was granted on a regular basis, as had been the practice between 1989 and 1995 when Spain had granted substantial aid and subsidies to Equatorial Guinea. In addition, following the government's failure to seize the aid and subsidies ordered by the court, on the grounds that compliance with such an order would make Spain liable under international law, the court should have repeated the order, coupled with the threat of sanctions, until it had secured a positive response. Finally, regarding the proposed use of diplomatic

channels, the court should have repeated its request before terminating proceedings, rather than reacting passively to the embassy's failure to respond. The court should have demanded that the Ministry of Foreign Affairs take appropriate action against the embassy concerned, in accordance with the international law governing diplomatic relations, or even against the country itself, with regard to their economic relations. By failing to repeat the order and reacting passively to the government's failure to respond, the court had not fulfilled its obligation to use all the means made available to it by the legal system to enforce a judgment against which there was no appeal. It was possible, nevertheless, that the court had assumed that it was impossible, as the relevant ministry had stated in its response, to seize any assets. Be that as it may, in such an eventuality, the court should have explained, in a decision setting out its reasons, what were the obstacles that prevented, in its view, the seizure of aid and subsidies granted to the State of Equatorial Guinea.

Languages:

Spanish.

Identification: ESP-1997-1-003

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 10.02.1997 / **e)** 21/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 63 of 14.03.1997, 18-24 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Other international sources.
General Principles – Territorial principles.
General Principles – Legality.
Institutions – Courts – Jurisdiction.
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:

Boarding a vessel / Detainees / Territorial jurisdiction / High seas / Law of the sea / Drugs / Vienna Convention of 1988.

Headnotes:

Although freedom, as one of the fundamental rights and higher values of the Spanish legal system (Article 1.1 of the Constitution), cannot in any circumstances be subject to exceptions on the grounds of effectiveness in fighting crime, there can only be a violation of the right safeguarded in Article 17.2 of the Constitution if the boundaries of this right as laid down in the Constitution and the law are transgressed.

Summary:

This case is quite unique, in that the events which led to the judicial decisions that were challenged under Article 17 of the Constitution, which provides for the right to personal freedom, took place on the high seas, following the boarding of a ship named the *Archangelos*, sailing under the Panamanian flag and skippered at the time by the appellant, by a Spanish customs service vessel. The Constitutional Court's judgment referred to the following considerations:

a. although the Spanish authorities' action, which involved the implementation, on the high seas, of decisions handed down by a domestic court, took place outside Spanish territorial limits, they were bound by the Constitution and all other legal provisions (Article 9.1 of the Constitution), in particular the requirement to respect rights and freedoms provided for in and safeguarded by that Constitution;

b. in the light of the above and of the circumstances of the case – in particular, the fact that persons had been deprived of their liberty following the boarding of a foreign ship on the high seas – it had to be established whether or not their period in custody was compatible with the law and thus whether there had been a breach of Article 17.1 of the Constitution.

Under Spanish law, the domestic courts had jurisdiction to hear cases concerning the actions of Spaniards and foreign nationals outside the national frontiers when these actions could constitute certain types of offences, such as the "illegal trafficking in psychotropic and toxic drugs and narcotics". Such a step could conflict with the rule of international law which provided that the countries whose flags they were flying had exclusive jurisdiction

over ships on the high seas. Any exception to this rule must have a legal basis, in this case Article 17.3 and 17.4 of the Constitution, which referred to Article 4.1 and 4.2 of the United Nations Convention, which the two countries had signed in Vienna on 20 December 1988. The court had complied fully with this provision when it ordered "the boarding and inspection of the ship the *Archangelos*, which in all probability is carrying a shipment of cocaine": the terms in which the authorisation issued by the Panamanian embassy in Madrid had been drafted. Consequently, there were no grounds for maintaining that the appellant's placement in custody conflicted with his rights under Article 17.1 of the Constitution, given that there was statutory provision for such an action with regard to this type of offence. It should also be stressed that it had been carried out in a way that was fully consistent with the international rules recognised in Spanish law.

While the decision to place persons in custody was exclusively a judicial responsibility, the Constitution also required a judicial body to decide whether or not the detention in custody should extend beyond seventy-two hours. This applied even in the case of an arrest as unique as this one, in so far as, as was noted earlier, the significance and purpose of the constitutional requirement was not that persons in custody should be brought physically before a court but rather that after a specified period of time had elapsed they should no longer be under the supervision of the authorities that had made the arrest but should be placed under the supervision and subject to the decisions of the relevant judicial body. In this case, at the end of the constitutionally specified period the judicial authorities had taken full control of the restriction of the appellant's liberty.

In this case, therefore, there had been no infringement of the prisoner's rights provided for in Article 17.3 of the Constitution, since he had been duly informed of the reasons for his arrest and had received the services of a lawyer and an interpreter during the police and judicial inquiries. The Constitutional Court's legal opinion on the matter was influenced by the fact that following the boarding of the vessel and the arrest of its crew, the authorities had taken no steps to clarify the situation on board. In other words, the necessary conditions for pleading the rights of the defence concerning this police investigation, within the meaning of and having regard to the purpose of the aforementioned article, had not been met, since once they had boarded the vessel the authorities had taken no steps to clarify the situation and had confined themselves to keeping the detainees in custody, with a view to their immediate transfer to a Spanish port.

Finally, it could be argued that an extended period of custody such as that experienced by the appellant on board the *Archangelos* until his arrival in a Spanish port could have affected another key element of the legal protection of fundamental freedoms: the principle of *habeas corpus* (Article 17.4 of the Constitution). It should merely be noted in this context that this principle applies in all cases where persons are placed in custody without the authorisation of a court, and in particular in cases where the period of custody in police premises is extended improperly (which was not the case here), the main purpose being to make it possible to review the legality of custody measures and terminate them where they are ordered or implemented illegally.

Languages:

Spanish.

Identification: ESP-1997-1-004

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.02.1997 / **e)** 22/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 63 of 14.03.1997, 24-31 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Legislative bodies – Status of members of legislative bodies.
Institutions – Courts – Jurisdiction.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Parliamentary immunity, lifting / Parliament, loss of membership / Parliamentary prerogatives.

Headnotes:

Parliamentary deputies' and senators' prerogative of immunity must be strictly interpreted, having regard to the interests concerned, which disappear when their parliamentary status is lost. The courts should not allow themselves to feel intimidated by the institutional weight

of popular representative or feel hindered by the impact of their decisions on the composition of the Assembly.

Summary:

By granting certain parliamentary prerogatives, including those attached to the status of deputy or senator (Article 71 of the Constitution), the Constitution seeks to offer qualified protection to the freedom, autonomy and independence of constitutional bodies, as higher values of the legal system of any democratic State governed by the rule of law (Article 1.1 of the Constitution) and essential instruments for ensuring the effective separation of powers between the different branches of State. These prerogatives are in no sense privileges and must not be considered to be the expression of a *ius singulare*, since they do not imply any inequality or exceptional treatment. What they do offer is distinctive legal treatment of subjective situations qualitatively and functionally defined by the Constitution itself which must be applied whenever the relevant circumstances occur.

It is also necessary to define the prerogative of special immunity, which supplements and clarifies the prerogatives of inviolability and immunity, all of which have the same objective, which is ,to protect the legitimate representatives of the people against any criminal action designed either to restrict their freedom of opinion (inviolability) or to prevent them unlawfully and fraudulently from taking part in the Assembly's decision making process by removing the risk of insidious or politically motivated complaints lodged in the course of ill-advised judicial proceedings which seek to blur the distinction between political and criminal liability (immunity), and, finally, to safeguard the independence of parliament and the exercise of those of its inherent functions which are considered to be the most important from a constitutional standpoint (parliamentary immunity).

The prerogative of parliamentary immunity maintains a certain balance between the different branches of State, while ensuring greater safeguards when judicial decisions could have significant repercussions on parliament's composition. As a result, only the Criminal Division of the Supreme Court, as the highest judicial body in all branches of justice (Article 123.1 of the Constitution), can hear such cases. In the case of criminal actions against deputies or senators, this Division constitutes "the ordinary judge predetermined by law", referred to in Article 24.2 of the Constitution, that is the one constituted in accordance with the rules of procedure concerning jurisdiction laid down, in this case, in Article 71.3 of the Constitution.

Although Article 71.3 of the Constitution does not place any specific limitations on the parliamentary immunity of members of the *Cortes Generales*, there can be no question of its being interpreted in absolute terms, with no regard to its constitutional purpose. Since parliamentary immunity can only be lifted with the prior agreement of the Assembly, the latter must first deliberate on and assess the merits of any actions brought against one or more of its members in the light of their autonomy and institutional independence. For this reason, the parliamentary immunity of members of the *Cortes Generales*, particularly its provisional character, cannot be interpreted without taking account of effects related to the prerogative of immunity and, where relevant, the lifting of this immunity.

When proceedings are taken against deputies or senators, who as a result lose their parliamentary status and thus their immunity, the interpretation of the legality of the procedure applicable to determine whether the Criminal Division of the Supreme Court should retain jurisdiction or whether the case should be transferred to the competent investigating court of the *locus commissi delicti* has implications for the content of Article 71.3 of the Constitution, and of the prerogative of special immunity for which it provides, and for the fundamental right of access to an ordinary judge predetermined by law. The Court must therefore examine the problem of the *perpetuatio jurisdictionis* in the light of the aforementioned set of principles concerning the prerogatives on which parliamentarians' status is based, to determine whether adherence to this procedural rule helps to satisfy the purpose of the prerogative of special immunity which deputies and senators enjoy.

In the present case, the appellant had enjoyed parliamentary status when the criminal proceedings had been launched. The first condition for the application of the prerogative of immunity had therefore been clearly satisfied. However, the referral of the case by the second chamber of the Supreme Court to the competent investigating court following his subsequent loss of immunity had not entailed the slightest infringement of his fundamental right to effective legal protection (Article 24.1 of the Constitution) and to the judge predetermined by law (Article 24.2 of the Constitution), in that in this type of proceeding and in accordance with the Constitution, the Supreme Court could only hear cases arising out of the prerogative of immunity (Article 71.3 of the Constitution) and by virtue of its specific institutional function, and not – as was the case here – when the latter no longer applied because the appellant had lost his status as a member of the *Cortes Generales*.

Supplementary information:

Two judges submitted a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-1997-1-005

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 24.02.1997 / **e)** 30/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 78 of 01.04.1997, 5-10 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.
Institutions – Legislative bodies – Guarantees as to the exercise of power.
Institutions – Courts – Jurisdiction.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.
Fundamental Rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Right to be heard / Parliamentary inviolability / Parliamentary immunity.

Headnotes:

The parliamentary prerogative of inviolability has a negative impact in the field of judicial protection, since it prevents the introduction of all sorts of actions and proceedings the purpose of which is to make deputies and senators responsible for the views they express in the course of their duties, which in the appellant's case were the ones he exercised in the parliament of the autonomous community of Estremadura, in accordance with Article 26.1 of its statute.

Summary:

The present application for constitutional protection was lodged against various judicial decisions declaring admissible a civil application against the appellant based on an unlawful interference with the other party's honour following statements the appellant had made in the Assembly of the autonomous community of Estremadura, of which he was the President. It first had to be decided whether, in confirming its initial decision to declare the application admissible, the civil court had violated the appellant's right to effective judicial protection, by requiring him to defend a case which had no chance of succeeding, since the judicial body was already aware of the basis of the claim and its inevitable inadmissibility *a limine*. This allegation was based on the prerogative of inviolability granted to parliamentarians by Article 71.1 of the Constitution. In practice, it is quite possible to invoke this prerogative in the context of civil proceedings which rely on a violation of an individual's honour by statements made during a parliamentary speech by a defendant, as well as an infringement of Article 23.2 of the Constitution, in particular the right to exercise public duties under equal conditions, the violation of which would arise from the fact that the relevant application had been declared admissible.

According to Spanish constitutional theory, Article 23.2 guarantees not only access to representative posts, but also their exercise without media interference or disruption, two aspects which largely coincide with the status of parliament itself. The Constitutional Court argued that "the fundamental right provided for in Article 23.2 of the Constitution was a right in legal form, which it why it was for the law alone, and thus for the various parliamentary regulations which it included, to prescribe the rights and powers of the different public posts and functions. Once they had been legally established, these rights and powers became part of the formal status of each post, as a result of which their post holders were perfectly entitled, under Article 23.2 of the Constitution, to defend in the courts – and in the last resort in the Constitutional Court – the *ius in officium* which they considered to have been unlawfully restricted or ignored by the actions of the public authorities..."

Article 71.1 of the Constitution grants deputies and senators the prerogative of inviolability for opinions expressed when in office, which extends to the legislative assembly of the Estremadura Autonomous Community in accordance with Article 26 of its Statute. This parliamentary prerogative has been described by the Constitutional Court as a privilege which is substantial in nature (unlike immunity, which is described as formal) and ensures that parliamentarians are not legally liable for opinions they express in the course of their functions. This extends to any statement made in the context of parliamentary activities or within any part of the *Cortes Generales* or, exceptionally, in the context of activities outside the parliamentary framework which nevertheless

constitute the literal reproduction of a parliamentary activity, the aim of the privilege being to safeguard the freedom of the legislative bodies to which the relevant parliamentarians belong to form their views, through freedom of expression.

The absence of jurisdiction to present and hear a claim for civil liability provided sufficient constitutional grounds for refusing to open proceedings. The decision to open such proceedings therefore infringed the parliamentarian's right to judicial protection which in this case took the form of the inadmissibility *a limine* of the application. Moreover, in so far as there were constitutional grounds for the decision it was sufficient to satisfy the civil party's same right to judicial protection since, as has been noted on several occasions, this right can be satisfied by a simple legally based inadmissibility decision. To prevent the opening of any proceedings whose purpose is to establish parliamentarians' liability for opinions they express in the exercise of their functions two steps are necessary: firstly, the existence of the circumstances which define the prerogative must be formally established and, secondly, the judicial decision must be handed down after the opposing party has been heard and the legal grounds of inadmissibility *in limine litis* must be invoked.

Thus, since it is the courts' responsibility to order the opening and possibly the continuation of proceedings, only they can be held responsible for any infringement of the fundamental right that is invoked, since the refusal to declare the application inadmissible *a limine* cannot be based, as was the case here, on the fact that the simplified procedure did not include any provisions authorising such a step. On the contrary, the rules which allowed the court to declare an application inadmissible from the outset ought to have been applied, once the applicant had been heard, which he was according to the procedure laid down for this purpose.

Languages:

Spanish.

Identification: ESP-1997-1-006

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 10.03.1997 / **e)** 41/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 87 of 11.04.1997, 3-9 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.
General Principles – Legality.
Fundamental Rights – General questions – Entitlement to rights.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.

Keywords of the alphabetical index:

Fundamental rights, criminal protection / Legality principle, inverse, non-existence / Victim, rights.

Headnotes:

While Article 25.1 of the Constitution enshrines the legality principle in terms of the right to be convicted or sentenced only for acts or omissions provided for in law, there is no "inverse legality principle", that is a fundamental right of a victim to secure the criminal conviction of another person who may or may not have violated his fundamental rights, since these involve rights to freedom into which it is impossible to introduce the least right to punitive action without radically altering the meaning of the term.

Summary:

This application for constitutional protection was directed against several judgments in which a certain number of public officials accused by the applicants of interfering with the exercise of individual rights had been acquitted. The Constitutional Court had to determine, firstly, whether substantive fundamental rights included the right to claim criminal protection in the event of their violation and, secondly, whether the final verdict of the criminal court, under which the accused had been acquitted on the substance of the case, could be set aside in the context of this application for constitutional protection.

In answer to the first point, the Constitutional Court stated that the Constitution did not grant any right to secure criminal convictions, since the protection offered by the criminal law was not directly linked to a particular form of conduct which infringed fundamental rights. Indeed, in order to have full effect, the mediation of the law was essential, since it was the latter which determined the cases and the circumstances which indicated that an offence had been committed and what legal consequence, the sentence, should be applied. While Article 25.1 of the Constitution enshrined the legality principle, victims

had no fundamental right to secure the criminal conviction of other persons who might or might not have violated their fundamental rights. It was therefore the criminal courts, not the Constitutional Court, which had jurisdiction to weigh the evidence presented by the prosecution and the defence and interpret and apply the criminal law.

In accordance with this approach, constitutional case-law sees the right to criminal action essentially as a *ius ut procedatur*, that is not as a part of some other fundamental right but strictly as a specific manifestation of the right to be heard by a court. Since in criminal proceedings, the defence's constitutional rights take on increased importance, and given that the purpose of criminal proceedings is to enable the State to take punitive action, the power of the public authorities to impose sentences cannot be protected since applications for constitutional protection are not a procedure for defending the actions and powers of the authorities but rather an instrument for carefully limiting and possibly clarifying these powers, in order to defend the fundamental rights and public freedoms of individuals.

With regard to the second point – the possibility of using an application for constitutional protection to secure the setting aside of the final judgment of a criminal court in which the accused had been acquitted – the Constitutional Court found that, since such judgments did not constitute a decision on the substantive fundamental rights of the persons levelling the accusation, judgments against which parliament had decided there could be no appeal, and given the nature of the machinery for constitutional protection, it was impossible to use an application for constitutional protection to secure the setting aside of the final judgment of a criminal court which had resulted in an acquittal, based on a cause of action which parliament had already declared to have lapsed, since this would have amounted to an unjustified extension of the criminal proceedings on the pretext of constitutional protection.

Languages:

Spanish.

Identification: ESP-1997-1-007

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 17.03.1997 / **e)** 56/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 92 of 17.04.1997, 14-25 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Remand in custody, length / Criminal procedure, military / Prison, mitigated, situation.

Headnotes:

The Constitution authorises detention on remand and recognises it as being constitutionally legitimate. Nevertheless, it has to be set against the fundamental right to freedom (Article 17.1 of the Constitution), which must be the final safeguard that the provision in question is interpreted strictly in accordance with the Constitution.

The Constitution deems the maximum length of detention on remand, which it requires parliament to establish, to be an absolute limit (Article 17.4 of the Constitution). Any failure to respect this period therefore constitutes an infringement of the right to personal freedom.

Summary:

In this application for constitutional protection, the applicant argued that the contested judicial decisions infringed his right to freedom (Article 17.1 of the Constitution), in the form of an improper extension of his detention on remand, even though the maximum period stipulated in procedural and military criminal legislation had expired without his being released from custody. The issue to be decided here was whether the period during which the applicant had been detained in the so-called mitigated prison regime should be included in or excluded from the calculation of the maximum period of detention on remand.

Referring specifically to procedural and military criminal legislation, the Constitutional Court stated that the initial maximum period of detention on remand was the rule, which meant that it could only be extended in exceptional circumstances. If at the expiry of the initial maximum period therefore this preventive measure was not lifted or alternatively its extension had not been ordered, this would constitute an automatic violation of Article 17.4 of the Constitution. It should be noted, in this context, that such a violation could not be rectified by the subsequent ordering of an extension.

Following a systematic examination of the relevant military legislation, the judgment concluded that mitigated prison represented a variant, rather than an *aliud*, of detention on remand. It could therefore be ordered when the prisoner satisfied the conditions judged necessary by the court for such a measure. A mitigated prison regime was a form of detention on remand in the generic sense. Moreover, it was a form of detention on remand within the meaning of Article 17.4 of the Constitution. As a result, the periods spent by the prisoner in a mitigated prison regime should have been taken into account in determining the maximum period of detention on remand. This was the inevitable conclusion to be drawn if account was taken not of the differences between mitigated prison and detention on remand but the ways in which both of them differed from the state of freedom. Although the two differed with respect to their rigour, since in the case of professional soldiers mitigated prison meant that they remained in their homes and could go to work and attend religious worship, from a constitutional standpoint what was important was not so much the differences between a mitigated and a full detention on remand regime as the differences between the former and the state of freedom. From this standpoint, it had to be concluded that mitigated prison represented not a restriction on but a deprivation of liberty.

Supplementary information:

Two judges submitted a dissenting opinion against this judgment.

Languages:

Spanish.

Identification: ESP-1997-1-008

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07.04.1997 / **e)** 66/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 114 of 13.05.1997, 23-28 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Logical interpretation.
Sources of Constitutional Law – Techniques of interpretation – Weighing of interests.
General Principles – Proportionality.
General Principles – Reasonableness.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Reasoning.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Detention on remand, conditions, weighing the circumstances / Flight, danger.

Headnotes:

Article 17.4 of the Constitution recognises the legitimacy of detention on remand on condition that it is defined and applied legally, is based on the prior existence of reasonable evidence that an offence has been committed and is intended to achieve constitutionally legitimate ends that are consistent with the nature of the measure ordered. The defendant's avoidance of criminal proceedings, obstructing the criminal investigation or reoffending are constitutionally valid grounds for ordering the imposition or continuation of detention on remand.

Summary:

The applicant, who had been detained on remand in the course of criminal proceedings against him, appealed to the Constitutional Court against various court decisions which had refused to grant his application for release from custody because there were insufficient grounds.

The Constitutional Court noted that decisions relating to the imposition or continuation of detention on remand had to be accompanied by reasons and must be sufficient and reasonable in the sense that, when such a measure was imposed or extended, all the circumstances justifying it had to be weighed in the balance and this process of weighing the circumstances must never be arbitrary but must adhere to the rules of logical reasoning and, more particularly, to the ends that justified the institution of detention on remand. This weighing of the relevant interests must be based on all the information available at the time the decision had to be taken, as well as on the rules of logical reasoning and the notion that detention on remand was only applicable exceptionally, subsidiarily, provisionally and proportionally to the securing of ends consistent with its nature.

The Constitutional Court also referred to the two criteria for determining whether there was a risk of flight which constituted a constitutionally valid ground for ordering the continuation of detention on remand. The first criterion made it a requirement to take account not only of the

characteristics and seriousness of the alleged offence and of the sentence that could be imposed but also the precise circumstances of the case and the personal circumstances of the accused. The second, which qualified the first, concerned the time that had elapsed up to the time when the decision on the continuation of detention on remand had been taken, since this could potentially alter the circumstances underlying the initial decision to order detention on remand, hence the need to weigh up the personal circumstances, as well as the particular circumstances of each case.

In this case, the Constitutional Court considered that, from the standpoint of the reasonableness of the grounds for the judicial decisions rejecting the appellant's application for temporary release, invoking the evident social alarm that the evidence examined would have provoked was not a legitimate constitutional ground consistent with the nature of detention on remand, since the so-called general social alarm provoked by an offence was only relevant to one of the purposes of the sentence – general prevention – and presupposed that the relevant court had first found the defendant guilty following a trial in which he had enjoyed all the safeguards concerning impartiality and the rights of the defence.

Among the grounds cited in the contested decisions, only those concerned with the sentence to which the accused was liable and the advanced stage of the proceedings could properly be used to justify an increased risk of flight. However, the Constitutional Court thought that in determining the danger of flight, the heavy sentence called for could not be taken as the sole criterion. Account also had to be taken of other factors relating both to the defendant's personal characteristics and the circumstances of the case. The reference to the advanced stage of the proceedings was also insufficient: in itself, this was an ambiguous factor, since the danger of flight diminished over time, leading to a diminution in the potential punitive consequences for the prisoner. This was why it was necessary to specify the precise circumstances of the case, which would then confirm whether or not in any particular case the time elapsed could encourage the accused to abscond. Finally, the fact that the charges had already been formulated – as the judgment states – did not constitute sufficient grounds for finding a real risk of flight justifying detention on remand, since the continuation of detention on remand could only be justified if these charges had been backed up by a conviction of a serious nature which was still subject to appeal.

Cross-References:

Constitutional Court judgments 128/1995 of 26 July, *Bulletin* 1995/2 [ESP-1995-2-025], and 62/1996 of 15 April, *Bulletin* 1996/1 [ESP-1996-1-011].

Languages:

Spanish.

Identification: ESP-1997-1-009

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 22.04.1997 / **e)** 81/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 121 of 21.05.1997, 26-31 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental Rights – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Custodial sentences, purposes / Home leave, prison permits / Prison administration / Prison, purposes / Rehabilitation, status as a fundamental right / Reintegration, status as a fundamental right.

Headnotes:

When a custodial sentence is handed down and carried out, there is no justification for claiming constitutional protection in the event of the prison authorities' refusal to issue a permit for home leave, on the basis of the fundamental right to freedom (Article 17.1 of the Constitution), since any conviction against which there is no further appeal constitutes legitimate grounds for depriving persons of this fundamental right. While the purpose of issuing such permits is to secure prisoners' rehabilitation and social reintegration, as two of the objectives of custodial sentence (Article 25.2 of the Constitution), this constitutional provision is not sufficient to give them the status of subjective rights, and even less fundamental rights.

Prison leave permits come within the scope of the ordinary law. It is therefore the responsibility of the prison authorities, and in the last resort the ordinary courts, to decide under what conditions and circumstances these permits should be granted. The Constitutional Court cannot be concerned with determining which interpretation

of the legal conditions and regulations governing their issuing is the most plausible and thus, by extension, whether or not the grounds for rejecting an application are consistent with an appropriate policy on prison permits.

Summary:

This decision was concerned with an application for constitutional protection lodged by a prisoner against a decision of the prison authorities, confirmed by the ordinary courts, to refuse to grant him a leave permit. The question to be determined was whether, apart from any infringement of the right to effective judicial protection (Article 24.1 of the Constitution), the refusal to issue the aforementioned permit could be deemed an infringement of the fundamental right to freedom (Article 17.1 of the Constitution) and of one of the key objectives of custodial sentences: rehabilitation and social reintegration (Article 25.2 of the Constitution).

Even though, according to prison legislation, the main purpose of prison leave permits was to prepare prisoners for release, the Constitutional Court did not accept that a refusal to issue them could imply an infringement of the fundamental right to freedom, in the proper sense of the term, on the grounds that, firstly, any conviction against which there was no further appeal represented a legitimate basis for depriving persons of this fundamental right and, secondly, the effect of such permits was not to enable prisoners to enjoy real freedom but simply to prepare them for subsequent release. As a result, refusal to award such permits could not be interpreted as an aggravation of prisoners' *status libertatis*, as modified by their custodial sentence.

Moreover, while decisions to issues such permits were consistent with certain basic objectives of custodial sentences, in this case rehabilitation and social reintegration (Article 25.2 of the Constitution), this constitutional provision did not represent a source of subjective rights of prisoners serving custodial sentences which penal and prison legislation had to take into account, and even less a source of fundamental rights subject to constitutional protection.

Whether such a subjective right to obtain these permits existed, and the requirements and conditions of entitlement, depended on the relevant provisions of the prison legislation. Prisoners clearly had at least a legitimate interest in obtaining such permits, on condition that they satisfied the requirements and other circumstances governing their issuing. However, it had to be emphasised that the latter was not automatic and that it was not sufficient to satisfy all of the statutory objective conditions. Other circumstances which could result in their not being issued had to be absent. In this context, it was the responsibility of the prison authorities, and in the last resort the ordinary courts, to review these decisions and assess all the circumstances.

Having regard to the relationship between the refusal to issue a prison leave permit and freedom, if judicial decisions confirming the refusal to issue such permits were to be compatible with the right to effective judicial protection (Article 24.1 of the Constitution), they must not simply mention the legal criteria on which the decision was based but must also be based on criteria which were consistent with the legal and constitutional principles governing prison leave permits. In the present case, the Constitutional Court found that there were sufficient grounds but could not rule on the substantive merits of the judicial decisions, since this would amount to adjudicating on simple questions of legality that were outside its jurisdiction.

The Constitutional Court considered that in this case the judicial decisions which confirmed the prison authorities' decision could not be deemed arbitrary or unreasonable, or even at variance with the legal and constitutional objectives of the institution of prison leave permits, and refused to grant the applicant a leave permit, since at the time that the prisoner submitted his request for such a permit, he had served far less than three-quarters of his sentence.

Languages:

Spanish.

Identification: ESP-1997-1-010

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 22.04.1997 / **e)** 82/1997 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 121 of 21.05.1997, 31-37 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Equality of arms.

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

Keywords of the alphabetical index:

Wage discrimination, burden of proof / Burden of proof, shifting.

Headnotes:

When it is claimed that a head of an undertaking's decision in fact conceals conduct that is discriminatory or infringes fundamental rights, the author of the decision is responsible for establishing that the decision was based on grounds that were reasonable and could not be associated with any attempt to infringe a fundamental right. For the *onus probandi* to be shifted onto defendants, it is not enough for applicants to deem the decision to be discriminatory; they must also produce evidence to support suspicions, appearances or reasonable presumptions in support of such allegations. If such evidence is forthcoming, defendants must then assume the burden of establishing that the facts underlying the decision were legitimate or, if they cannot establish their lawfulness, that they were unconnected with any attempt to infringe fundamental rights.

Summary:

The present application for constitutional protection was lodged against a judgment which overturned another judgment delivered by the district court after finding that the wages paid to the applicant, a female employee who was also a trade union representative, were not discriminatory. In her application, the applicant maintained that the aforementioned judgment infringed her right to equality and non-discrimination (Article 14 of the Constitution), since it was not compatible with the constitutional principles governing the distribution of the burden of proof concerning actions and decisions of heads of undertakings judged to be discriminatory or to infringe an employee's fundamental right.

After recalling the previous principles, the Constitutional Court stressed the importance of the rules governing the distribution of the burden of proof to ensure effective protection against discrimination based on trade union affiliation. The need in such cases for the burden of proof to be properly distributed was based not simply on the primacy or superior value of fundamental rights but also on the difficulties that employees experienced in establishing the intended discrimination or infringement of a fundamental right underlying heads of enterprises' decisions, thus helping to perpetuate situations which were in violation of the Constitution. Failure to require this proper distribution of the burden of proof made any prohibition of discrimination ineffective and unreal, confining it simply to declarations of good intent or mere rhetoric.

The burden of proof could only be shifted in cases involving the principle of equality. It was the employee's responsibility to show that the factor which determined equality was at issue and that the principle that enshrined it had been held in contempt. In such cases, but only in such cases, the head of enterprise must then disprove the presumption of the discriminatory nature of the decision by establishing that there were sufficient grounds to justify it.

In the light of these constitutional principles, the Constitutional Court considered that, in this case, not only had the employee supplied facts constituting evidence of apparent discrimination but the courts had also declared these facts to be established in their decisions. It was therefore for the enterprise to demonstrate that the wages paid to the applicant reflected objective criteria which had no connection with her status as an employees' trade union representative. It therefore had to establish that there were objective and reasonable grounds for what it paid the applicant and could not confine itself to claiming the freedom to set a particular level of remuneration. Since in the decision challenged in this application for constitutional protection the court had absolved the enterprise from the burden of proof and had not acknowledged the existence of reasons to justify the wages paid to the applicant that were unconnected with her personal conditions and circumstances, the Constitutional Court found that her right to equality and not to be discriminated against because of her status as an employees' representative had been infringed.

Languages:

Spanish.

Sweden
Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 1997 – 30 April 1997.

Switzerland
Federal Court

Important decisions

Identification: SUI-1997-1-001

a) Switzerland / **b)** Federal Court / **c)** Second public law Chamber / **d)** 30.09.1996 / **e)** 2P.98/1996 / **f)** D v. the Cantonal Unemployment Insurance Appeals Board, Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 209 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application – Social security.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Unemployment, temporary work / Place of residence / Equal rights / Discrimination on grounds of cantonal origin.

Headnotes:

Temporary work for the unemployed. Discrimination.

Genevan legislation requires unemployed persons from other cantons to reside in the Canton of Geneva for one year before being entitled to temporary work (recital 3).

This requirement amounts to discrimination prohibited by Article 43.4 of the Constitution. The principle of equal treatment for all citizens of the Confederation set out in Article 43 of the Constitution applies to any measures that the cantons take to counter the effects of the economic crisis (recital 4).

Summary:

D., from the Canton of Valais, was born in the Canton of Geneva, where he has had various jobs. On his return, after two and a half years abroad, he claimed unemployment benefit, which was refused.

A request for temporary work was also rejected on the grounds that he had not been resident in the canton for

one year without interruption, as required by cantonal law. Under cantonal law, self-employed workers who give up self-employment, are fit for work and available for paid work as an employee, may be offered temporary work arranged by the canton. Genevans may be given temporary work without any qualifying period whereas persons from other cantons have to have been resident in the canton of Geneva for at least one year.

In a public-law appeal, D. asked the Federal Court to set aside the last-instance decision of the cantonal authority. He relied on the principle of equal treatment established in Article 4 of the Federal Constitution and Article 43.4 of the Federal Constitution, which states that the resident Swiss citizen enjoys at his place of residence all the rights of citizens of the canton together with all the rights of citizens of the municipality.

The Federal Court declared the public-law appeal admissible and set aside the contested decision. It referred to a judgment of 1938 in which it had stated that the principle of equal treatment for all citizens of the Confederation established in Article 43 of the Constitution applied to any measures that the cantons took to counter the effects of economic crisis. It had ruled that there were no insurmountable obstacles or serious practical drawbacks to equal treatment.

Accordingly, the year's residence in the Canton of Geneva required by cantonal law of citizens of the Confederation but not of Genevans was discrimination prohibited by the Constitution. To avoid an influx, it was probably enough to prescribe the same qualifying period for all new arrivals. The public-law appeal was therefore well-founded.

Languages:

French.

Identification: SUI-1997-1-002

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 28.11.1996 / **e)** 1P.385/1994 / **f)** B. and others v. the State Council of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 122 I 360 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Categories – Unwritten rules.
General Principles – Legality.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Association, membership / Teacher / Personal data / Data protection / Files, access.

Headnotes:

Personal freedom; collecting and storing personal data.

The processing of personal data calling for special protection must have a clear legal basis, unless it is essential to responsibility expressly assigned by a law (recital 5b).

In the Canton of Zurich, there is no legal basis for systematically recording membership of an association in teachers' personal files (recital 5d).

Summary:

The appellants, who were all teachers or former teachers, had asked the Canton of Zurich Education Department for unrestricted access to their personal files. They were especially interested in data concerning their relations with a particular association and the source of this information. The department had duly granted them access and confirmed the existence of files containing data on their membership of the association; however, it had withheld the source of some of its information.

The applicants had unsuccessfully appealed to the State Council of the Canton of Zurich. In a public-law appeal alleging violation of constitutional rights, they asked the Federal Court to set aside the State Council's decision, grant them full access to their files and remove from the files all information on their relationship with the association in question. They referred in particular to their right to personal freedom and Article 8 ECHR.

The Federal Court declared the public-law appeal admissible. The collection and storing of personal data in this instance was a violation of the unwritten constitutional right to personal freedom and the guarantees

contained in Article 8 ECHR. The processing of personal data such as information about membership of an association must have a clear legal basis or be essential to performance of a function clearly assigned in a law in the technical sense of that term. Such a legal basis did not exist in the Canton of Zurich. Therefore the systematic recording in teachers' personal files of their relationship with a particular association contravened the constitution and the European Convention on Human Rights. The Court accordingly ordered the Canton of Zurich to remove the offending information from the appellants' personal files.

Languages:

German.

Identification: SUI-1997-1-003

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 14.02.1997 / **e)** 1P.48/1997 / **f)** W. v. the Zurich District Court (remand court) / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 123 I 31 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
General Principles – Reasonableness.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts – *Habeas corpus.*
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial – Reasoning.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Detention, judicial review / Detention, risk of abscondence / Right to a hearing / Review of detention at "reasonable intervals".

Headnotes:

Judicial review of detention on remand; duty to give reasons, risk of abscondence, time limits.

The right to a hearing is not infringed if the remand court justifies its decision by referring to the position adopted by the investigating authorities, provided they there gave sufficient reasons for remand (recital 2).

Risk of abscondence (recital 3).

Right to judicial review of detention at "reasonable intervals": whether the interval is "reasonable" depends on the actual circumstances of the case and the particular characteristics of the procedural provisions to be applied (recital 4).

Summary:

W. has been remanded in Zurich since 18 December 1996. On 16 January 1997, he requested provisional release. The remand court refused the request on 21 January 1997 and extended the remand until 19 March 1997, while at the same time setting a waiting period before W. could make another request for provisional release; the court warned W. that it would not consider an application lodged before the end of the waiting period.

W. lodged a public-law appeal with the Federal Court against this decision, alleging a violation of personal freedom, Article 4 of the Federal Constitution and Article 5 ECHR.

Constitutional law requires that sufficient reasons be given for a decision against an individual to enable him to appeal to a higher authority. The contested decision was mainly based on the detailed submissions of the public prosecutor; therefore W. was able to decide what action to take in full knowledge of the facts. Bearing in mind all the circumstances, the applicant's right to a hearing had not been contravened.

The Federal Court acknowledged that there was a definite risk that the applicant would abscond to a foreign country and that the risk still existed even if he went to a country which would agree to extradite him back to Switzerland or would begin criminal proceedings itself.

Under Article 5.4 ECHR, anyone in detention is entitled to have a court review the lawfulness of their detention and ask it to order their release where appropriate. This right depends on the type of detention involved, the characteristics of the procedure to be applied and the specific circumstances of the case. A one-month waiting period before being allowed to request release is not in principle contrary to the aforementioned article. A longer period would require special justification. A two-month period imposed solely on account of three successive requests for release made within one month is contrary to the European Convention on Human Rights.

From that standpoint, therefore, the public-law appeal was founded.

Languages:

German.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-1997-1-001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 25.12.1996 / **e)** U.59/96 / **f)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), no. 5/97 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Police, writ / Writ / Police, custody.

Headnotes:

No citizen can be deprived of liberty except by a court decision for his or her detention in cases determined by law.

Summary:

The initiative was lodged by the Bar Council challenging Article 151.3 of the Law of Criminal Procedure.

Under the challenged provision, the police were authorised to summon citizens by a writ stating the reasons for the summons and to take them by force to a police station if they failed to respond to the summons, upon the condition that the summons contained the warning of such a consequence.

The Court repealed the challenged provision finding it unconstitutional, for the following reasons:

By Article 12 of the Constitution, the human right to liberty is irrevocable. A person's liberty cannot be restricted except by court decision and in such cases and according to such procedure as determined by law.

The sense of this constitutional provision is that detention should be allowed only if both conditions are fulfilled cumulatively, i.e. the citizen can be detained only in cases determined by law and on the basis of a court decision for his or her detention (or any other kind of deprivation of liberty). Considering that the challenged Article envisages the apprehension of citizens who fail to respond to the summons, without the prerequisite of a court decision, the Court found that this provision is not consistent with the Constitution, since the constitutional requirement that both conditions under which the citizens could be deprived of liberty be fulfilled has not been respected.

Languages:

Macedonian.

Identification: MKD-1997-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.03.1997 / **e)** U.2/97 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), no. 17/97 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Local elections.
Institutions – Army and police forces.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Armed forces, members, right to be elected / Policemen, right to be elected / Intelligence service, members, right to be elected / Elections, local, candidates.

Headnotes:

Any citizen, on reaching 18 years of age, acquires the right to vote and to be elected unless they have been deprived of civil capacity (Article 22 of the Constitution).

The laws governing electoral procedure cannot prescribe limitations on electoral rights which extend the limitations already envisaged by the Constitution, i.e. they cannot prescribe limitation on the right to be elected for a certain category of citizens.

Summary:

The case was initiated by a citizen challenging the constitutionality of Article 5.3 of the Law on Local Elections, under which the members of the armed forces, uniformed police officers and authorised officers of the Ministry of Internal Affairs and Intelligence Agency, cannot be nominated or elected as members of Local Council or as mayor.

Under Article 22 of the Constitution, any citizen on reaching 18 years of age acquires electoral rights. This right is enjoyed equally, universally and directly and it is exercised at free elections by secret ballot. Only persons deprived of civil capacity are excluded from the right to vote and to be elected. The Constitution does not distinguish between "active" and "passive" electoral rights which means that once the determined conditions are fulfilled the citizen acquires the right to vote and the right to be elected. No special conditions for the acquisition of the right to be elected are envisaged except for the election of the President of the Republic (Article 80 of the Constitution).

In view of the fact that the Constitution has established fundamental electoral principles allowing the electoral regime and procedure to be determined by law, the legal presumption is that electoral laws should be consistent with the Constitution, i.e. they cannot contain restrictions on electoral rights which extend beyond the limits of the constitutional frame.

For these reasons, the Constitutional Court repealed the challenged provision since it restricts the right to be nominated and elected as member of Local Council or mayor for a significant number of citizens.

Languages:

Macedonian.

Identification: MKD-1997-1-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 19.03.1997 / **e)** U.180/96 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), no. 16/97 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Local communities / Financial control / Financial resources, origin.

Headnotes:

The financial control exercised by local municipalities over the finances of local communities should be limited to the financial means provided by the municipality. That is, the control should not cover the financial means of the local communities which have been provided from other sources.

Summary:

The case was initiated by the Local Communities Committee, which challenged the Articles of Statutes of several municipalities which had authorised municipal councils supervisory boards to exercise financial control over the finances of local communities.

The Constitutional Court repealed the challenged provisions finding that they were not consistent with Articles 81 and 82 of the Law on Local Self-Government. Under Article 82 of the Law on Local Self-Government, the local community could be financed from several sources and the financial means provided by the local self-government unit are merely one of these sources. Considering this manner of financing, the Court found that the financial control exercised by municipalities over the finances of local communities should be limited only to the financial means which have been provided by the municipality in question and should not extend to the financial means provided by other sources. Thus it represents an infringement of the independent self-government of local communities.

Languages:

Macedonian.

Turkey
Constitutional Court

Summaries of important decisions of the reference period 1 January 1997 – 30 April 1997 will be published in the next edition, *Bulletin* 1997/2.

Court of Justice of the European Communities

The english version of the summaries of important decisions of the reference period 1 January 1997 – 30 April 1997 will be published in the next edition, *Bulletin* 1997/2.

European Court of Human Rights

Important decisions

Identification: ECH-1997-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand chamber / **d)** 17.12.1996 / **e)** 43/1994/490/572 / **f)** Saunders v. the United Kingdom / **g)** to be published in the *Reports of Judgements and Decisions*, 1997 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Right not to incriminate oneself / Statement made under coercion, use.

Headnotes:

The use by prosecution at the applicant's trial of statements which he had given under legal compulsion during a statutory investigation conducted by independent Inspectors represents an infringement of the applicant's right not to incriminate himself and therefore of the right to a fair trial.

Summary:

The applicant was Chief Executive Officer of Guinness PLC when the company bought Distillers PLC in April 1986. In December 1986 Inspectors appointed by the Department of Trade and Industry began an enquiry into allegations that, during the takeover battle, Guinness had artificially maintained or inflated its share price by means of an unlawful share support operation.

The applicant was interviewed by the inspectors on nine occasions, on each of which he was accompanied by his legal advisers. He was required by law to answer the questions put to him. Failure to do so could lead to a determination by a court that he was in contempt and the imposition of a fine or a prison sentence of up to two years. The transcripts and documents obtained as a result of the interviews were passed on to the Crown Prosecution Service and subsequently to the police.

The applicant was subsequently charged on fifteen counts. He was sent for a trial at the Crown Court in April 1989. The prosecution sought to prove the case against him by using the transcripts of statements he made to the Inspectors. At one stage in the trial the prosecution read out to the jury over a three day period transcripts of interviews he had with the Inspectors.

In August 1990 the Court convicted the applicant on twelve counts and sentenced him to five years' imprisonment. In May 1991 the Court of Appeal rejected the appeal on all but one count, but reduced the term of imprisonment to two and a half years. In July 1991 the House of Lords refused leave to appeal.

On 22 December 1994 the Secretary of State decided to refer the case of the applicant back to the Court of Appeal in the light of new evidence. On 27 November 1995 the Court of Appeal again rejected the appeal.

Mr Saunders submitted that the use of the transcripts at the trial was a breach of Article 6.1 ECHR.

The Court firstly observed that it was not called upon to consider the conduct of the administrative investigation by the Inspectors, which in any event were not subject to the guarantees of a judicial procedure contained in Article 6.1 ECHR.

The Court then stressed that the right not to incriminate oneself, like the right to silence, was a generally recognised international standard which lay at the heart of the notion of a fair procedure under Article 6 ECHR. The right, which had close links with the presumption of innocence contained in Article 6.2 ECHR, was primarily concerned with respecting the will of the accused to remain silent. It did not extend to the use in criminal proceedings of material which might be obtained from the accused under legal compulsion but which had an existence independent of the accused's will such as breath, blood and urine samples.

In the Court's opinion, whether or not the applicant's right not to incriminate himself had been unjustifiably infringed in the circumstances of the case depended on the use made by the prosecution at the trial of the statements which he had been obliged to give to the Inspectors on pain of sanction. It was irrelevant that they may not have been self incriminating. The right not to incriminate oneself could not reasonably be confined to statements of admissions of wrongdoing or to remarks which were

directly incriminating since even neutral evidence might be deployed in the way which supported the prosecution's case.

As to the use made of the applicant's statements the Court found that the prosecution had employed them in an incriminating manner in order to cast doubt on his honesty and to establish his involvement in the unlawful share support operation. The Court noted that part of the transcript of his answers to the Inspectors had been read out to the jury over a three-day period despite his objections. Accordingly, there had been an infringement of the applicant's right not to incriminate himself, and the public interest in combating fraud could not be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate him at his trial.

There had therefore been a breach of Article 6.1 ECHR.

Cross-references:

27.02.1980, *Deweer v. Belgium*; 25.2.1993, *Funke v. France*; 21.09.1994, *Fayed v. the United Kingdom*; 08.02.1996, *John Murray v. the United Kingdom*, *Bulletin* 1996/1 [ECH-1996-1-001].

Languages:

English, French.

Identification: ECH-1997-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 17.12.1996 / **e)** 49/1995/555/641 / **f)** Terra Woningen B.V. v. the Netherlands / **g)** to be published in the *Reports of Judgements and Decisions*, 1997 / **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 – Independence.

Keywords of the alphabetical index:

Facts, scrutiny by judge / Judge, powers, self-limitation.

Headnotes:

The denial of a District Court to examine for itself facts, which where crucial for the determination of the dispute before it, amounts to a violation of the right to a fair trial.

Summary:

The land in the municipality of Maassluis, on which the buildings owned by the applicant company are situated, was levelled up with silt from Rotterdam harbour. After inspections in 1985 and 1990, it was found to be polluted. The Provincial Executive of Zuid-Holland therefore decided that its soil should be cleaned, informing residents and the Municipality of Maassluis accord ingly.

On 17 April 1991 the Rent Board of Schiedam, following a request by a tenant of the applicant company, decided that the rent of his apartment was excessive.

The applicant company requested the District Court to confirm the previously agreed rent, but, on the basis of the findings of the Provincial Executive, the District Court maintained that the soil was polluted to such an extent that there was a serious threat to public health or to the environment, within the meaning of the second sentence of Section 2.1 of the Interim Act on soil cleaning. Therefore, on 10 March 1992 it decided the rent be reduced to its minimum reasonable level, because the "absolute zero conditions" had been fulfilled for the purposes of the Rent Act. The District Court considered this fact to be established by the decision from the Provincial Executive that a soil-cleaning operation should be carried out, and it refused to determine directly or indirectly whether or not this decision was correct and well-founded.

The applicant company complained that they had not had access to a tribunal possessing jurisdiction to make an assessment of the relevance of the soil pollution and alleged violation of Article 6.1 ECHR.

The Court recalled its case-law to the effect that for the determination of civil rights and obligations by a "tribunal" to satisfy the requirements of Article 6.1 ECHR, it was necessary for the "tribunal" in question to have jurisdiction to examine all questions *de jure* and *de facto* relevant to the dispute before it.

In its judgment in the present case, the Schiedam District Court had held that serious health or environ mental risk was "necessar ily implied" by the Provincial Execu tive's decision that further soil cleaning measures were required, and it had not itself assessed the relevance of the soil pollution to the case before it. In so doing, the Schiedam District Court had deprived itself of jurisdiction to examine

facts which were crucial for the determination of the dispute.

In these circumstances, the applicant company could not be considered to have had access to a tribunal invested with sufficient jurisdiction to decide the case before it. The Court held thus that there had accordingly been a violation of Article 6.1 ECHR.

Cross-references:

23.06.1981, *Le Compte, Van Leuven and De Meyere v. Belgium*; 26.04.1995, *Fischer v. Austria*, *Bulletin* 1995/1 [ECH-1995-1-005]; 28.09.1995, *Masson and Van Zon v. the Netherlands*; 20.11.1995, *British-American Tobacco Company Ltd v. the Netherlands*; 22.11.1995, *Bryan v. the United Kingdom*, *Bulletin* 1995/3 [ECH-1995-3-022].

Languages:

English, French.

Identification: ECH-1997-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 17.12.1996 / **e)** 71/1995/577/663 / **f)** Ahmed 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 – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
Fundamental Rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Expulsion of a convicted.

Headnotes:

The order of deportation of a Somali national convicted of a criminal offence would, if it were to be enforced, violate the absolute prohibition of torture and inhuman or degrading treatment.

Summary:

The applicant, a Somali citizen, arrived in Austria on 30 October 1990. He was granted refugee status on 15 May 1992 on the ground that if he returned to Somalia, he would be at risk of persecution on account of his activities in an opposition group and the general situation there. After being sentenced to two and a half years' imprisonment for attempted robbery, the Federal Refugee Office in Graz ordered on 15 July 1994 the forfeiture of the applicant's refugee status. The Minister of the Interior dismissed an appeal by the applicant but his decision was set aside by the Administrative Court. In a further decision of 10 April 1995, upheld by the Administrative Court, the Minister again ordered the forfeiture of Mr Ahmed's refugee status. On 27 April 1995 the Graz Federal Refugee Office declared the proposed expulsion lawful, on the ground that Mr Ahmed constituted a danger to the community. On appeal by the applicant, the Graz Federal Police Authority found that in Somalia Mr Ahmed would be at risk of persecution. Accordingly, on 22 November 1995, it stayed his expulsion for a renewable period of one year.

The Court reiterated that Contracting States had the right to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State might give rise to an issue under Article 3 ECHR, where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 ECHR in the receiving country. The Court further reiterated that Article 3 ECHR prohibited in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct, and made no provision for exceptions.

The Court attached particular weight to the fact that on 15 May 1992 the Austrian Minister of the Interior had granted the applicant refugee status. Although the applicant had lost his refugee status two years later, this had been solely due to his criminal conviction; the consequences of expulsion for the applicant had not been taken into account.

In the case of an expulsion that has not yet taken place, the Court assesses the risks run at the time when it considers the case. It was not contested that there had been no change in the situation in Somalia since 1992. The Court concluded that Mr Ahemd could not return to Somalia without being exposed to the risk of treatment contrary to Article 3 ECHR. That conclusion was not invalidated by the applicant's criminal conviction or the

current lack of State authority in Somalia. Accordingly, there would be a violation of Article 3 ECHR if the deportation order were to be enforced.

Cross-references:

18.01.1978, *Ireland v. the United Kingdom*; 07.07.1989, *Soering v. the United Kingdom*; 20.03.1991, *Cruz Varas and Others v. Sweden*; 30.10.1991, *Vilvarajah and Others v. the United Kingdom*; 26.03.1992, *Beldjoudi v. France*; 27.08.1992, *Tomasi v. France*; 27.08.1992, *Vijayanathan and Pusparajah v. France*; 28.09.1995, *Masson and Van Zon v. the Netherlands*; 15.11.1996, *Chahal v. the United Kingdom*.

Languages:

English, French.

Identification: ECH-1997-1-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 29.01.1997 / **e)** 112/1995/618/708 / **f)** Bouchelkia v. France / **g)** to be published in the *Reports of Judgments and Decisions*, 1997 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expulsion of a convicted.

Headnotes:

The deportation, following a criminal conviction for rape, of an Algerian who came to France at the age of two and whose mother and nine brothers and sisters were lawfully resident in France, and who, after illegally returning to France, acknowledged the paternity of a child of a French woman whom he married, did not violate the right to respect for his private and family life.

Summary:

The applicant arrived in France in 1972. At the age of 17 he was charged with rape. He was taken into custody and escaped, for which he was sentenced to four months' imprisonment. On 31 May 1988 the Colmar Juvenile Assize Court sentenced him to five years' imprisonment. He was released on 2 May 1990 under a presidential pardon. On 11 June 1990 the Minister of the Interior, acting under Section 26 of the Ordinance of 2 November 1945 concerning the conditions of entry and residence of aliens in France, as amended, made an order for Mr Bouchelkia's deportation under the procedure for cases of extreme urgency. He was expelled on 9 July 1990. Mr Bouchelkia applied to the Strasbourg Administrative Court for an order quashing the deportation order and a stay of execution. His applications were dismissed in judgments that on appeal were upheld by the Conseil d'Etat.

He returned to France illegally in 1992. On 3 December 1993 he acknowledged the paternity of a daughter who had been born on 22 February 1993 of a French mother with whom he had had a relationship since 1986 and whom he married on 29 March 1996. In April 1993 he was sentenced by the Colmar Criminal Court to five months' imprisonment and was banned from re-entering France for three years. The Colmar Court of Appeal upheld the prison sentence but set aside the ban. On 20 December 1996 the Strasbourg Criminal Court convicted him of the offence of refusing to comply with a deportation order, but deferred sentence pending the European Court's judgment.

The Court noted that the deportation order had been made on 11 June 1990 and executed on 9 July 1990. It was with regard to the position at that time that the question whether the applicant had a private and family life within the meaning of Article 8 ECHR fell to be considered.

Mr Bouchelkia had at that point been single and had no children. He had only started his own family after the deportation order was made. At the relevant time, he was still living with his original family in France where he had lived since the age of two and where he had his main private and family ties. The Court considered that the applicant's deportation in 1990 amounted to an interference with his right to respect for his private and family life.

In accordance with its case-law, the Court had to determine whether the interference was "in accordance

with the law", pursued one or more of the legitimate aims referred of Article 8.2 ECHR and was "necessary" in a democratic society to attain such aim or aims. On the first point, it was not contested that the deportation order was based on Section 26 of the Ordinance of 2 November 1945, as amended. As regards the second, the interference in issue had aims which were entirely compatible with the Convention, namely "the prevention of disorder or crime". On the third point, the Court reiterated that it is for the Contracting States to maintain public order, in particular by exercising their right to control the entry and residence of aliens. For that purpose they are entitled to order the expulsion of such persons convicted of criminal offences. The Court noted that the applicant, who was twenty years old, single and had no children when the deportation order was executed, had maintained links with his country of origin of which he was a national and where close relatives of his lived.

In addition, it attached great importance to the nature of the offence which had given rise to the deportation order. The authorities could legitimately consider that the applicant's deportation was, at that time, necessary for the prevention of disorder or crime. The fact that, after the deportation order was made and while he was an illegal immigrant, he had built up a new family life did not justify finding, a posteriori, that the deportation order made and executed in 1990 had not been necessary. The Court found that the decision to deport the applicant was not disproportionate to the legitimate aims pursued. There had accordingly been no violation of Article 8 ECHR.

Cross-references:

26.03.1992, *Beldjoudi v. France*; 13.07.1995, *Nasri v. France*, *Bulletin* 1995/2 [ECH-1995-2-012]; 24.04.1996, *Boughanemi v. France*; 07.08.1996, *C. v. Belgium*.

Languages:

English, French.

Identification: ECH-1997-1-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 19.02.1997 / **e)** 109/1995/615/703-705 / **f)** Laskey, Jaggard and Brown v. the United Kingdom / **g)** to be published in the *Reports of Judgments and Decisions*, 1997 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

State interference, necessity / Sadomasochistic practices / Victim, consent.

Headnotes:

Prosecution and conviction of members of a group of homosexual men for sado-masochistic practices do not violate the right to respect for private live.

Summary:

The applicants, Colin Laskey (who died in 1995), Roland Jaggard and Anthony Brown, were members of a group of homosexual men involved in extreme sado-masochis tic activities. During such activities (which were consensual and took place in private among men of full age), the infliction of pain was subject to certain rules, and no permanent injury or infection was caused. Some videotapes made for private use by the members of the group fell into the hands of the police, and the applicants - amongst others- were charged with a series of offences, primarily causing bodily harm and wounding contrary to Sections 47 and 20 of the Offences against the Person Act 1861.

In the view of the applicants, the consent of the alleged "victims" to the assaults provided them with a defence, but on 19 November 1990 the trial judge ruled that it could not. After pleading guilty, on 19 December 1990 they were sentenced, in respect of the offences under the above-mentioned sections, to various terms of imprisonment. The Court of Appeal dismissed their appeals against conviction on 19 February 1992, reducing neverthe less the sentences. On 11 March 1993, the House of Lords likewise dismissed their appeals (with two of the five Law Lords dissent ing), by arguing that, in general, a "victim's" consent was no defence to charge under the 1861 Act, and that it would not be in the public interest to create an exception to this general rule for covering sado-masochistic activities. The proceedings received widespread press coverage, and all the applicants lost their jobs, while Mr Jaggard required extensive psychiatric treatm ent.

The applicants contended that their prosecution and convic tions for assault and wounding in the course of consensual sado-masochistic activities between adults was in breach of Article 8 ECHR.

While it is undis puted before the Court that the criminal proceedings against them constituted an "interfer ence by a public authority" with their right to respect for private life, that the interfer ence was carried out "in accord ance with the law" and that it pursued a legitimate aim (namely the "protection of health and morals"), the only issue left to investigate is whether such an interfer ence was "necessary in a democratic society".

The Court highlighted that the State is unquestionably entitled to regulate -through the criminal law- the infliction of physical harm, and that the determination of the sustainable level of harm, where the victim consented, is primarily a matter for State's authorities. The submission that the behaviour of the applicants belonged exclusively to the sphere of their private morality, falling thus outside the scope of the State's interven tion, does not persuade the Court, since it is evident from the facts that the applicants' activities have involved a significant degree of injury and wounding. Furthermore, State authorities are entitled to consider also the potential harm for more serious injury inherent in the activities.

Accordingly, the reasons given by the national authorities to justify the interference were relevant and sufficient. As for the parameter of proportionality, considering the degree of organisation involved, the limited number of charges eventually selected for inclusion in the prosecution case, and the reduced sentences imposed on appeal, the interference could not be regarded as disproportionate.

Cross-references:

22.10.1981, *Dudgeon v. the United Kingdom*; 24.03.1980, *Olsson v. Sweden*; 26.10.1988, *Norris v. Ireland*; 22.04.1993, *Modinos v. Cyprus*; 25.09.1996, *Buckley v. the United Kingdom*.

Languages:

English, French.

Identification: ECH-1997-1-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 21.02.1997 / **e)** 108/1995/614/702 / **f)** Van Raalte v. the Netherlands / **g)** to be published in the *Reports of Judgments and Decisions*, 1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Costs – Party costs.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Sources of Constitutional Law – Techniques of interpretation – Margin of appreciation.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Social security, contribution / Constitution, exemption / Gender, biological difference.

Headnotes:

An exemption from the obligation to pay contributions under a social welfare scheme applying to unmarried childless women aged 45 or over but not to men in the same position violated Article 14 ECHR taken together with Article 1 Protocol 1 ECHR.

Summary:

The applicant, a Netherlands national born in 1924, had never been married and had no children. On 30 September 1987 the tax authorities sent the applicant an assessment of his contributions for the year 1985 under various social security schemes, including the General Child Benefits Act. Mr van Raalte filed an objection to the Inspector of Direct Taxes in which he argued that since the General Child Benefits Act exempted unmarried women over the age of 45, as opposed to unmarried men of such age, from the obligation to pay contributions under the scheme set up by that Act, the assessment constituted discriminatory treatment. This objection was rejected on 25 November 1987. The applicant's appeal against this decision was dismissed on 6 October 1989, the Court of Appeal of Amsterdam holding that the difference in treatment complained of was based not on a difference in sex as such but on the biological difference between men and women over 45 as regards their ability to procreate. An

appeal on points of law was dismissed by the Supreme Court on 11 December 1991.

The Court recalled that Article 14 ECHR has no independent existence but complements the other substantive provisions of the Convention an its Protocols. The Court found that the present case concerned the right of the State to "secure the payment of taxes or other contributions" and therefore fell within the ambit of Article 1 Protocol 1 ECHR. Article 14 ECHR was consequently held to apply.

The Court considered the question whether there had been a difference in treatment between persons in similar situations. The question was answered in the affirmative, the Court also finding that the difference in question was based on gender. While recognising that States enjoyed a certain margin of appreciation in introducing exemptions to the obligation to contribute to social security schemes, the Court considered that such exemptions should apply even-handedly to both men and women unless there were compelling reasons to justify a difference in treatment. In the present case the Court was not persuaded that such reasons existed. Just as women over 45 might give birth to children, there were on the other hand men of 45 or younger who may be unable to procreate. Furthermore, an unmarried childless woman aged 45 or over might well become eligible for benefits under the act in question; for example by marrying a man with children from a previous marriage. In addition, the argument that to levy contributions under a child benefits scheme from unmarried childless women would impose an unfair emotional burden on them might equally well apply to unmarried childless men or to childless couples. Accordingly, irrespective of whether the desire to spare the feelings of childless women of a certain age could be regarded as a legitimate aim, such an objective could not provide a justification for the gender-based difference of treatment in the present case. There had therefore been a violation of Article 14 ECHR taken together with Article 1 Protocol 1 ECHR.

The Court further noted that the finding of a violation of Article 14 ECHR taken together with Article 1 Protocol 1 ECHR did not entitle the applicant to retrospective exemption from the obligation to pay contributions. It also considered that its judgement constituted in itself sufficient just satisfaction. On the other hand, it accepted the applicant's claims for legal costs in their entirety.

Cross-references:

28.05.1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*; 18.07.1994, *Karlheinz Schmidt v. Germany, Bulletin* 1994/2 [ECH-1994-2-011]; 27.10.1997, *Kroon and others v. The Netherlands, Bulletin* 1994/3 [ECH-1994-3-016].

Languages:

English, French.

Identification: ECH-1997-1-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25.02.1997 / **e)** 9/1996/628/811 / **f)** Z v. Finland / **g)** to be published in the *Reports of Judgments and Decisions*, 1997 / **h)**.

Keywords of the systematic thesaurus:

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

HIV (AIDS) / Medical files, seizure / Data protection.

Headnotes:

Court orders requiring medical advisers to give evidence, or with regard to the seizure of medical records and their inclusion in the investigation file in criminal proceedings, do not violate the right to respect for private and family life. On the other hand, an order to make the medical data concerned accessible to the public in ten years may give rise (if implemented) to a violation of such a right, and the publication of the applicant's identity and medical condition in a judgment is a violation thereof.

Summary:

Between December 1991 and September 1992, X – at those times hu sband of Z, the applicant – committed a number of sexual offences, being subsequently charged (after a first conviction for rape) with attempted manslaughter, on the ground that he had knowingly exposed his victims to the risk of HIV infection. On

19 March 1992, indeed, he had been informed that he was HIV positive. Also Mrs Z was infected with HIV.

During the criminal proceedings against Mr X in the Helsinki City Court, doctors and a psy chiatrist who had been treating the applicant were compelled to give evidence and to disclose informa tion about her (who had refused to testify), with a view to establishing the date at which her husband had reason to suspect of his HIV positivity. After seizure by the police, copies of the medical records relating to both Mr X and Mrs Z were added to the case file, while reports of the trial – though *in camera* – appeared in newspa pers.

On 19 May 1993, the Helsinki City Court found Mr X guilty of three counts of attempted manslaughter and sentenced him to imprisonment. The legal and operative provisions of the judgment, and a summary of its reasoning, were made public, while the full judgment and the case-documents were ordered to be kept confiden tial for ten years (despite requests from Mr X and his victims for a more extensive period of confidentiality).

The prosecution, Mr X and the victims all appealed, requesting the documents be confidential for longer than ten years.

On 10 December 1993 the Court of Appeal upheld the conviction of Mr X on three counts of attempted man slaughter and convicted him on two further such counts, increasing the terms of his imprisonment and making the judgment (which revealed the full names of Mrs Z and Mr X and went into the circum stances of their HIV infection) available to the press, not extending, moreover, the period of confiden tiality fixed by the first-instance court.

On 1 September 1995 the Supreme Court dismissed an application by the applicant for an order quashing or reversing the Court of Appeal's judgment in so far as it concerned the ten-years limita tion on the confiden tiality order. Therefore, the court documents in the case are due to become public in 2002.

The applicant alleged that she had been a victim of violations of both Article 8 and Article 13 ECHR.

According to the Court, the existence of a leak of confiden tial data concerning the appli cant -for which the State could be held responsible under Article 8 ECHR – was not established. Besides, the Court maintained not to have jurisdic tion to entertain the allega tion that the applicant has been subject to discrimina tory treatment.

After finding that the various measures complained of constituted in fact interferences with the applicant's right to respect for private and family life, the Court checked whether such interfer ences may have been justified in the light of the provisions of the Convention.

Nothing suggests that the measures did not comply with domestic law, or that the relevant law was not sufficiently foreseeable in its effects. Furthermore, orders requiring the applicant's medical advisers to give evidence, and seizure and subsequent inclusion in investigation files of medical records, were performed in accord ance with a legitimate aim – "prevention of crime", "protection of the rights and freedoms of others" – and also with the "necessary in a democratic society" criterion (the Court finds no violation by eight votes to one).

The Court took into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his of her right to respect for private and family life. These considerations were especially valid as regards the protection of confidentiality of information about a person's HIV infection, the disclosure of which is not compatible with Article 8 ECHR unless justified by an overriding requirement in the public interest. State measures compelling communication or disclosure of such information without consent of the patient called for most careful scrutiny on the part of the Court, as did the safeguards designed to secure effective protection. At the same time, it was not for the Court to substitute its views for those of national authorities as to the relevance of evidence used in judicial proceedings, and national authorities also enjoyed a margin of appreciation in striking the fair balance between interest of the publicity of court proceed ings and interests in the confidentiality of personal data.

On the ten-year limitation on the confidentiality order, the Court unanimously concluded that the order to make material accessible as early as 2002 would – if imple-mented – amount to a disproportionate interfe rence with the right to respect for private and family life of the applicant, in violation of Article 8. Furthermore, the Court unanimously held also that the publication of the applicant's identity and HIV infection, by means of the Court of Appeal's judgment, gave rise to a violation of the right guaranteed by Article 8 ECHR.

Cross-references:

06.09.1978, *Klass and Others v. Germany*; 13.06.1979, *Marckx v. Belgium*; 22.10.1981, *Dudgeon v. the United Kingdom*; 26.03.1987, *Leander v. Sweden*; 08.07.1987, *W. v. the United Kingdom*; 27.11.1992, *Olsson v. Sweden (no. 2)*; 24.06.1993, *Schuler-Zgraggen v. Switzerland*; 13.07.1995, *Tolstoy Miloslavsky v. the United Kingdom*, *Bulletin* 1995/2 [ECH-1995-2-011]; 07.08.1996, *Johansen*

v. Norway; 26.09.1996, *Manoussakis and Others v. Greece.*

Languages:

English, French.

Identification: ECH-1997-1-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 19.03.1997 / **e)** 107/1995/613/701 / **f)** Hornsby v. Greece / **g)** to be published in the *Reports of Judgements and Decisions*, 1997 / **h).**

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
General Principles – Rule of law.
General Principles – Rule of law – Certainty of the law.
Fundamental Rights – Civil and political rights – Procedural safeguards – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Administration, non-execution / Useful effect / Judicial protection, effective / Judgement, execution / Judgement, effects.

Headnotes:

The delay by the Greek administrative authorities in taking the necessary measures to comply with two judgements of the Supreme Administrative Court deprived the "right to a court" of all useful effect.

Summary:

Mr David Hornsby and Mrs Ada Ann Hornsby were born in the United Kingdom. They live on the island of Rhodes and are both qualified teachers of English.

On 5 June 1984 the second applicant applied to the competent administrative authority for authorisation to set up a private foreign language school. However, she was informed that, under the Greek legislation in force, no such authorisation could be granted to foreign nationals.

On 15 March 1988 the Court of Justice of the European Communities declared the relevant legislation to be contrary to the EEC Treaty.

On 1 April 1988 the applicants lodged two fresh applications, which were rejected by the same authority on the same grounds as in 1984. On June 1988 the applicants filed with the Supreme Administrative Court two applications to set aside those decisions. In its judgement of 9 May 1989 the Supreme Administrative Court held that, in accordance with the judgement of the European Court of Justice, nationals of member States of the European Community could not, since 1 January 1981, be prevented from setting up private foreign-language schools in Greece on the ground that they were not Greek nationals.

On 8 August 1989 the applicants unsuccessfully requested the authority to comply with the Supreme Administrative Court's decision and to grant them the authorisation they sought. Several letters sent to the Minister of Education by the applicants went unanswered.

On 10 August 1994, by Presidential Decree, Community nationals obtained the right to establish private foreign-language schools on certain conditions. On 20 October 1994 the Ministry of Education invited the authority to resume consideration of the applicant's case in the light of this decree.

The applicants alleged that the administrative authorities' refusal to comply with the Supreme Administrative Court's judge ments had infringed their right to effective judicial protection of their civil rights.

It was not contested that the proceedings in the Supreme Ad ministrative Court concerned the applicants' civil rights within the meaning of Article 6 ECHR. According to the Court, the "right to a court", guaranteed by the same article, would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6.1 ECHR should describe in detail procedural guarantees afforded to litigants without protecting the implementation of judicial decisions; to construe Article 6 ECHR as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgement given by any court therefore had to be regarded as an integral

part of the "trial" for the purposes of Article 6 ECHR; moreover, the Court had already accepted this principle in cases concerning the length of proceedings.

The above principles were of even greater importance in the context of administrative proceedings concerning a dispute whose outcome was decisive for a litigant's civil rights. By lodging an applica tion for judicial review with the State's highest ad ministrative court the litigant sought not only annulment of the impugned decision but also and above all the removal of its effects. The effective protection of a party to such proceedings and the restoration of legality presupposed an obligation on the ad ministrative authorities' part to comply with a judgement of that court. The Court observed in that connection that the administra tive authorities formed one element of a State subject to the rule of law and their interests accordingly coincided with the need for the proper administration of justice. Where administrative authorities refused or failed to comply, or even delayed doing so, the guarantees under Article 6 ECHR enjoyed by a litigant during the judicial phase of the proceedings were rendered devoid of purpose.

By refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision of the Supreme Administrative Court the Greek authorities had deprived the provisions of Article 6.1 ECHR of all useful effect.

There had accordingly been a breach of that Article.

Cross-references:

07.05.1974, *Golder v. the United Kingdom*, 27.08.1991; *Philis v. Greece (no. 1)*; 19.04.1994, *Van de Hurk v. the Netherlands*; 26.09.1996, *Di Pede v. Italy*; 26.09.1996, *Zappia v. Italy*.

Languages:

English, French.

Identification: ECH-1997-1-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 20.03.1997 / **e)** 25/1994/644/829 / **f)** Lukanov v. Bulgaria / **g)** to be published in the *Reports of Judgements and Decisions*, 1997 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.
Fundamental Rights – Civil and political rights – Individual liberty.
Fundamental Rights – Civil and political rights – Procedural safeguards – Detention pending trial.

Keywords of the alphabetical index:

Public funds, misappropriation / Collective decision, penal responsibility.

Headnotes:

The detention on remand of a Bulgarian parliamentarian on suspicion of having misappropri ated public funds when he was Deputy Prime Minister was not "lawful" because the conduct for which he had been prosecuted did not constitute a criminal offence according to the national law at the relevant time.

Summary:

The applicant was formerly a Minister, then Deputy Prime Minister and, in 1990, Prime Minister of Bulgaria. He was a member of the Bulgarian National Assembly at the time of the events giving rise to the present case.

On the 7 July 1992 the National Assembly, on demand of the Prosecutor-General, waived the applicant's parliamentary immunity and authorised criminal proceedings against him and his arrest and detention on remand. The suspicion related in particular to his participation as a Deputy Prime Minister between 1986 and 1990 in a number of decisions granting sums, totalling 34,594,500 US dollars and 27,072,000 convertible Bulgarian Leva, in assistance and loans to certain developing countries.

The Public Prosecutor charged the applicant under Article 203, in conjunction with Articles 201, 202 and 282, of the Criminal Code with having misappropriated the funds allocated to these countries: it is in breach of his official duties that he had facilitated the misappropriation in order to obtain an advantage for a third party, thereby causing considerable economic damage. The prosecutor in addition ordered Mr Lukanov's detention on remand, in view of the very large amounts of money involved and that the case was a particularly serious one.

On 9 July 1992 the applicant was arrested and remanded in custody. During his detention all his applications for release were refused. On 29 December 1992 the National Assembly reversed its decision of 7 July. On 30 December the public prosecutor decided to release the applicant on bail.

The applicant alleged a violation of Article 5.1 ECHR. After his death on 2 October 1996 his widow and two children pursued the proceedings on his behalf before the Court.

The Court's jurisdiction was confined to the period after 7 September 1992, when Bulgaria ratified the Convention and accepted the Court's compulsory jurisdiction. However, its examination took into account the fact that the grounds for the applicant's detention from 9 July to 30 December 1992 remained the same.

The central issue in the case under consideration is whether the applicant's detention was "lawful" within the meaning of Article 5.1 ECHR. The Court reiterated that the Convention here referred essentially to national law, but also required that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5 ECHR, namely to protect the individual from arbitrariness.

It was undisputed that the applicant had, as a member of the Bulgarian Government, taken part in the decisions – granting funds in assistance and loans to certain developing countries – which had given rise to the charges against him.

However, none of the provisions of the Criminal Code relied on to justify the detention (Articles 201 to 203, 219 and 282) specified or even implied that anyone could incur criminal liability by taking part in collective decisions of this nature. Moreover, no evidence had been adduced to show that such decisions were unlawful. The Court was not persuaded that the conduct for which the applicant had been prosecuted constituted a criminal offence at the relevant time.

What was more, as appeared from Bulgarian case-law, a constituent element of the offence of misappropriation under Articles 201 to 203 was that the offender had sought to obtain for himself or herself or for a third party an advantage. In addition Article 282, on which relied the prosecutor's detention order, specifically made it an offence for a public servant to abuse his or her power in order to obtain such advantage. However, the Court had not been provided with any fact of information capable of showing that the applicant was as the time suspected of having sought to obtain for himself or a third party an advantage from his participation in the allocation of funds in question. The Govern ment's submission that there had been certain "deals" remained unsubstantiated and had not even been reiterated before the Court. Indeed, it had not been contended before the Convention institu tions that the funds had not been received by the States concerned.

In these circumstances, the Court did not find that the deprivation of the applicant's liberty during the period under consideration was "lawful detention" effected "on reasonable suspicion of his having committed an offence". Having reached this conclusion, the Court did not need to examine whether the detention could reasonab ly be considered necessary to prevent his committing an offence or fleeing after having committed one.

Accordingly, there had been a violation of Article 5.1 ECHR in the present case.

Cross-references:

10.12.1982, *Foti and Others v. Italy*; 18.12.1986, *Bozano v. France*; 22.02.1989, *Ciulla v. Italy*; 23.09.1994, *Hokkanen v. Finland*, *Bulletin* 1994/3 [ECH-1994-3-015]; 28.10.1994, *Murray v. the United Kingdom*, *Bulletin* 1996/1, [ECH-96-1-001]; 24.11.1994, *Kemmache v. France (no. 3)*; 08.06.1995, *Yağci and Sargın v. Turkey*; 10.06.1996, *Benham v. the United Kingdom*; 15.11.1996, *Ahmet Sadik v. Greece.*

Languages:

English, French.

Systematic thesaurus *

* Page numbers of the systematic thesaurus now refer to the page showing the identification of the decision rather than the keyword itself.

pages

[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

[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

[21] Presumption of constitutionality, double construction rule.

[22] Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

[23] Only where not applied as a fundamental right.
Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.

pages

4 Institutions

4.1 Head of State
- 4.1.1 Status
- 4.1.2 Powers
- 4.1.3 Appointment
- 4.1.4 Loss of office
- 4.1.5 Responsibilities

4.2 Legislative bodies
- 4.2.1 Structure[24]
- 4.2.2 Powers[25] 21, 59
- 4.2.3 Composition 33
- 4.2.4 Organisation[26]
- 4.2.5 Finances[27]
- 4.2.6 Review of validity of elections[28]
- 4.2.7 Law-making procedure 52
  - 4.2.7.1 Right of amendment
- 4.2.8 Guarantees as to the exercise of power 101
- 4.2.9 Relations with the Head of State
- 4.2.10 Relations with the executive bodies 74, 84
- 4.2.11 Relations with the courts
- 4.2.12 Liability
- 4.2.13 Political parties
- 4.2.14 Status of members of legislative bodies[29] 53, 72, 99

4.3 Executive bodies
- 4.3.1 Hierarchy
- 4.3.2 Powers 39
- 4.3.3 Application of laws
  - 4.3.3.1 Autonomous rule-making powers[30]
  - 4.3.3.2 Delegated rule-making powers 61, 82, 84
- 4.3.4 Composition
- 4.3.5 Organisation
- 4.3.6 Relations with the legislative bodies
- 4.3.7 Relations with the courts
- 4.3.8 Territorial administrative decentralisation[31]
  - 4.3.8.1 Provinces
  - 4.3.8.2 Municipalities 25, 46, 78, 83, 89, 90, 113
  - 4.3.8.3 Supervision 113
- 4.3.9 Sectoral decentralisation[32]
  - 4.3.9.1 Universities
- 4.3.10 The civil service[33]

4.4 Courts 17
- 4.4.1 Jurisdiction 21, 40, 98, 99, 101
- 4.4.2 Procedure
- 4.4.3 Decisions 32

---

[24] Bicameral, monocameral, special competence of each assembly, etc.

[25] Including specialised powers of each legislative body.

[26] Presidency, bureau, sections, committees, etc.

[27] State budgetary contribution, other sources, etc.

[28] For procedural aspects see the key-word "Electoral disputes" under "Constitutional justice - Types of litigation".

[29] For example incompatibilities, parliamentary immunity, exemption from jurisdiction and others.

[30] Derived directly from the constitution.

[31] Local authorities.

[32] The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.

[33] Civil servants, administrators, etc.

pages

[34] Comprises the Court of auditors insofar as it exercises jurisdictional power.
[35] E.g. Court of Auditors.

pages

[36] Ombudsman, etc.
[37] E.g. Court of Auditors.
[38] Open-ended or finite.
[39] If applied in combination with another fundamental right.

pages

[40] The question of "Drittwirkung".

[41] Used independently from other rights.

[42] 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".

[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.

pages

[45] Militia, conscientious objection, etc.

[46] Aspects of the use of names are included either here or under "Right to private life".

[47] This keyword also covers "Freedom of work".

pages

5.3.16 Right to culture
5.3.17 Rights of control over computer facilities
5.3.18 Scientific freedom
5.3.19 Artistic freedom

5.4 **Collective rights**
5.4.1 Right to the environment
5.4.2 Right to development
5.4.3 Right to peace
5.4.4 Right to self-determination

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.

Pages

Council of Europe Publishing
Editions du Conseil de l'Europe

Order Form/Bon de commande

Surname/Nom _____ Forename/Prénom _____

Institution _____

Address/Adresse _____

Town/Ville _____ Postcode/Code postal _____ Country/Pays _____

Tel/Tél _____ Fax _____

Subscription formulas for the Bulletin on Constitutional Case-Law and the database CODICES (post and parcking free)
Formules d'abonnement au Bulletin de jurisprudence constitutionnelle et à la base de données CODICES (franco de port)

Description	Price (US$) rest of the world Prix (FF) Europe	Quantity Quantité	Total
3 Bulletins & Special Bulletins (one language) 3 Bulletins & Bulletins spéciaux (dans une langue)	500 FF/US$ 125		
3 CD-ROMs	1000 FF/US$ 250		
Internet access (one year) Accès Internet (annuel)	1000 FF/US$ 250		
3 Bulletins & Special Bulletins + 3 CD-ROMs 3 Bulletins & Bulletins spéciaux + 3 CD-ROMs	1200FF/US$ 300		
3 Bulletins & Special Bulletins + Internet access 3 Bulletins & Bulletins spéciaux + accès Internet	1200FF/US$ 300		
3 CD-ROMs + Internet access 3 CD-ROMs + accès Internet	1400FF/US$ 350		
3 Bulletins & Special Bulletins + CD-ROMs + Internet 3 Bulletins & Bulletins spéciaux + CD-ROMs + Internet	1500FF/US$ 375		
3 Bulletins & Special Bulletins (both languages) 3 Bulletins & Bulletins spéciaux (dans les deux langues)	800FF/US$ 200		
All previous Bulletins 1993-1996 (one language) Tous les Bulletins précédents 1993-1996 (dans une langue)	1000FF/US$ 250		
All previous Bulletins 1993-1996 (both languages) Tous les Bulletins précédents 1993-1996 (dans les deux langues)	1200FF/US$ 300		
1 Bulletin or Special Bulletin (specify .....) 1 Bulletin ou Bulletin spécial (spécifier .....)	200FF/US$ 50		
Total			

VAT: Note to customers from the European Union: The services of the Council of Europe, which is an international organisation exempt from VAT and whose relations with member states come under the General Agreement on Privileges and Immunities of the Council of Europe, shall be likewise free from VAT.
TVA: Mention à l'attention des clients domiciliés dans la CEE: les prestations du Conseil de l'Europe, organisation internationale non assujettie à la TVA, et dont les relations avec les Etats membres sont régies par l'Accord sur les privilèges et immunités du Conseil de l'Europe, sont exonérées de TVA.

Please make payment/Prière d'effectuer le paiement

- **By cheque to:**
  Council of Europe
  Finance Division
  F-67075 Strasbourg Cedex

- **By bank transfer to:**
  SOGENAL Bank, Strasbourg, France
  Account No. 10067 00106 10320721858/62

- **By credit card**
  ☐ Visa ☐ Mastercard ☐ Eurocard
  Card No. |_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|
  Expiry date |_|_|_|_| Signature:

- **Soit par chèque à l'ordre de:**
  Conseil de l'Europe
  Division des Finances
  F-67075 Strasbourg Cedex

- **Soit par virement bancaire à:**
  Banque SOGENAL, Strasbourg, France
  Compte n° 10067 00106 10320721858/62

- **Soit par carte de crédit**
  ☐ Visa ☐ Mastercard ☐ Eurocard
  Carte n° |_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|_|
  Date d'expiration |_|_|_|_| Signature:

Council of Europe Publishing/Editions du Conseil de l'Europe
Council of Europe/Conseil de l'Europe
F-67075 Strasbourg Cedex
Tel. + 33 (0)3 88 41 25 81 – Fax + 33 (0)3 88 41 39 10 – E-mail: ce.publishing@seddoc.coe.fr

04 532

Sales agents for publications of the Council of Europe
Agents de vente des publications du Conseil de l'Europe

AUSTRALIA/AUSTRALIE
Hunter publications, 58A, Gipps Street
AUS-3066 COLLINGWOOD, Victoria
Fax: (61) 33 9 419 7154

AUSTRIA/AUTRICHE
Gerold und Co., Graben 31
A-1011 WIEN 1
Fax: (43) 1512 47 31 29

BELGIUM/BELGIQUE
La Librairie européenne SA
50, avenue A. Jonnart
B-1200 BRUXELLES 20
Fax: (32) 27 35 08 60

Jean de Lannoy
202, avenue du Roi
B-1060 BRUXELLES
Fax: (32) 25 38 08 41

CANADA
Renouf Publishing Company Limited
5369 Chemin Canotek Road
CDN-OTTAWA, Ontario, K1J 9J3
Fax: (1) 613 745 76 60

DENMARK/DANEMARK
Munksgaard
PO Box 2148
DK-1016 KØBENHAVN K
Fax: (45) 33 12 93 87

FINLAND/FINLANDE
Akateeminen Kirjakauppa
Keskuskatu 1, PO Box 218
SF-00381 HELSINKI
Fax: (358) 9 121 44 50

GERMANY/ALLEMAGNE
UNO Verlag
Poppelsdorfer Allee 55
D-53115 BONN
Fax: (49) 228 21 74 92

GREECE/GRÈCE
Librairie Kauffmann
Mavrokordatou 9, GR-ATHINAI 106 78
Fax: (30) 13 23 03 20

HUNGARY/HONGRIE
Euro Info Service
Magyarország
Margitsziget (Európa Ház),
H-1138 BUDAPEST
Fax: (36) 1 111 62 16
E-mail: eurinfo@mail.matav.hu

IRELAND/IRLANDE
Government Stationery Office
4-5 Harcourt Road, IRL-DUBLIN 2
Fax: (353) 14 75 27 60

ISRAEL/ISRAËL
ROY International
17 Shimon Hatrssi St.
PO Box 13056
IL-61130 TEL AVIV
Fax: (972) 3 546 1423
E-mail: royil@netvision.net.il

ITALY/ITALIE
Libreria Commissionaria Sansoni
Via Duca di Calabria, 1/1
Casella Postale 552, I-50125 FIRENZE
Fax: (39) 55 64 12 57

MALTA/MALTE
L. Sapienza & Sons Ltd
26 Republic Street
PO Box 36
VALLETTA CMR 01
Fax: (356) 233 621

NETHERLANDS/PAYS-BAS
InOr-publikaties, PO Box 202
NL-7480 AE HAAKSBERGEN
Fax: (31) 53 572 92 96

NORWAY/NORVÈGE
Akademika, A/S Universitetsbokhandel
PO Box 84, Blindern
N-0314 OSLO
Fax: (47) 22 85 30 53

POLAND/POLOGNE
Główna Księgarnia Naukowa im. B. Prusa
Krakowskie Przedmiescie 7
PL-00-068 WARSZAWA
Fax: (48) 22 26 64 49

PORTUGAL
Livraria Portugal
Rua do Carmo, 70
P-1200 LISBOA
Fax: (351) 13 47 02 64

SPAIN/ESPAGNE
Mundi-Prensa Libros SA
Castelló 37, E-28001 MADRID
Fax: (34) 15 75 39 98

Llibreria de la Generalitat
Rambla dels Estudis, 118
E-08002 BARCELONA
Fax: (34) 343 12 18 54

SWITZERLAND/SUISSE
Buchhandlung Heinimann & Co.
Kirchgasse 17, CH-8001 ZÜRICH
Fax: (41) 12 51 14 81

BERSY
Route du Manège 60, CP 4040
CH-1950 SION 4
Fax: (41) 27 203 73 32

UNITED KINGDOM/ROYAUME-UNI
HMSO, Agency Section
51 Nine Elms Lane
GB-LONDON SW8 5DR
Fax: (44) 171 873 82 00

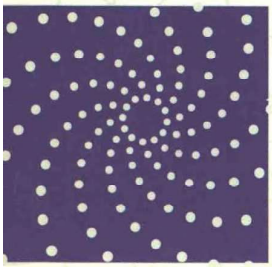
UNITED STATES and CANADA/
ÉTATS-UNIS et CANADA
Manhattan Publishing Company
468 Albany Post Road
PO Box 850
CROTON-ON-HUDSON, NY 10520, USA
Fax: (1) 914 271 58 56

STRASBOURG
Librairie Kléber
Palais de l'Europe
F-67075 STRASBOURG Cedex
Fax: +33 (0)3 88 52 91 21

Council of Europe Publishing/Editions du Conseil de l'Europe
Council of Europe/Conseil de l'Europe
F-67075 Strasbourg Cedex
Tel. +33 (0)3 88 41 25 81 – Fax +33 (0)3 88 41 39 10 – E-mail: ce.publishing@seddoc.coe.fr

recently published

No 16: Local self-government, territorial integrity and protection of minorities
Lausanne, 25-27 April 1996



Already published in the collection "Science and technique of democracy" of the Venice Commission

No.1: Meeting with the presidents of constitutional courts and other equivalent bodies
Piazzola sul Brenta, 8 October 1990[1]

No.2: Models of constitutional jurisdiction, by Helmut Steinberger[2]

No.3: Constitution making as an instrument of democratic transition
Istanbul, 8-10 October 1992

No.4: Transition to a new model of economy and its constitutional reflections
Moscow, 18-19 February 1993

No.5: The relationship between international and domestic law
Warsaw, 19-21 May 1993

No.6: The relationship between international and domestic law,
by Constantin Economides[2]

No.7: Rule of law and transition to a market economy
Sofia, 14-16 October 1993

No.8: Constitutional aspects of the transition to a market economy
Collected texts of the European Commission for Democracy through Law

No.9: The protection of minorities
Collected texts of the European Commission for Democracy through Law

No.10: The role of the constitutional court in the consolidation of the rule of law
Bucharest, 8-10 June 1994

No.11: The modern concept of confederation
Santorini, 22-25 September 1994

No.12: Emergency powers, by Ergun Özbudun and Mehmet Turhan[2]

No.13: Implementation of constitutional provisions regarding mass media in a pluralist democracy
Nicosia, 16-18 December 1994

No.14: Constitutional justice and democracy by referendum
Strasbourg, 23-24 June 1995

No.15: The protection of fundamental rights by the constitutional court[3]
Brioni, Croatia, 23-25 September 1995

1. Speeches in the original language
2. Also available in Russian
3. Abridged version also available in Russian

Council of Europe F-67075 Strasbourg Cedex - Fax: (33) 3 88 41 27 80