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THE BULLETIN

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four months period (volumes numbered 1 to 3). The last two volumes of the series concerning the same year are actually published and delivered in the following year, i.e. volume 1 of the 1998 Edition in 1998, volumes 2 and 3 in 1999.

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)*
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2. *Keywords of the systematic thesaurus*
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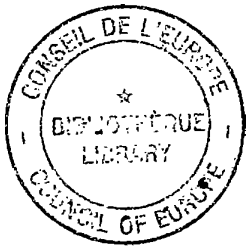

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THE VENICE COMMISSION

The European Commission for Democracy through Law, also known as the Venice Commission, was established in 1990 pursuant to a Partial Agreement of the Council of Europe. It is a consultative body which co-operates with member States of the Council of Europe and with non-member States. It is composed of independent experts in the fields of law and political science whose main tasks are the following:

- to help new Central and Eastern Europe democracies to set up new political and legal infrastructures;
- to reinforce existing democratic structures;
- to promote and strengthen principles and institutions which represent the bases of true democracy.

The activities of the Venice Commission comprise, *inter alia*, research, seminars and legal opinions on issues of constitutional reform, electoral laws and the protection of minorities, as well as the collection and dissemination of case-law in matters of constitutional law from Constitutional Courts and other courts.

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Albania
Constitutional Court

Important decisions

Identification: ALB-1998-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 03.06.1998 / **e)** 16 / **f)** / **g)** *Official Gazette*, no. 15, June 1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Type of review – Preliminary review.
Constitutional Justice – The subject of review – International treaties.
General Principles – Separation of powers.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Constitutional Court, powers / Constitution, international treaties, compatibility / Treaties, scrutiny by Constitutional Court.

Headnotes:

The Constitutional Court is competent to review the compatibility with the Constitution of all Treaties signed in the name of the Republic of Albania prior to their ratification.

Summary:

Article 24.4 of the Constitutional Law no. 7561 of 29 April 1992 reads: "The Constitutional Court has the following powers: ..... to decide on the compatibility with the Constitution of international agreements concluded in the name of the Republic of Albania, and those prior to their ratification, and also on the compliance of laws with generally accepted norms of international law and with agreements to which Albania is a party".

The Parliamentary Group of the Social Democratic Party asked the Constitutional Court to undertake a partial interpretation of Article 24.4 by stating "whether this provision should be applied in every case and for each international agreement, especially before they have been ratified by the competent institutions, or only in cases where it is not clear whether there is an incompatibility of interests between them and the Constitution or the Interim Constitutional Laws".

The Constitutional Court of the Republic of Albania, on the basis of Article 24.1 of Law no. 7561 of 29 April 1992, held that the Constitutional Court is competent to review the compatibility with Constitution only of international agreements which have been signed in the name of the Republic of Albania and always before their ratification.

Languages:

Albanian.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-1998-1-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 25.11.1997 / **e)** P.1413.XXXIII / **f)** Solá, Roberto y otros c. Estado Nacional – Poder Ejecutivo s/ empleo público / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 320 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Administrative acts.
General Principles – Separation of powers.
General Principles – Legality.
General Principles – Reasonableness.
General Principles – Prohibition of arbitrariness.
Institutions – Executive bodies – Powers.
Institutions – Executive bodies – The civil service.

Keywords of the alphabetical index:

Public prosecutors (*Fiscales*) responsible for administrative cases, stability / Civil servant, dismissal / Administrative decisions, discretionary.

Headnotes:

The judicial control of administrative decisions traditionally classed as discretionary or purely administrative applies, on the one hand, to those elements of the decision subjected to rules – including the jurisdiction, the form, the grounds and the purposes of the decision – and, on the other, to the reasonableness of the decision, a criterion which must apply to any decision by the public authorities.

The fact that the authorities exercise their discretionary powers in no way justifies arbitrary behaviour on their part or failure to satisfy the conditions set by the Law on Administrative Procedures when any administrative decision is taken. It is precisely the legitimacy – a combination of lawfulness and reasonableness – given to the exercise of such powers which constitutes the principle according validity to the decisions of state institutions and enabling judges, when faced with the claims of an interested party, to check whether the aforementioned requirements have been fulfilled without violating the principle of the division of powers set out in the Constitution.

Summary:

The four parties, who were deputy public prosecutors (*fiscales adjuntos)* in the national public prosecutor's department (*Fiscalía*) with responsibility for administrative enquiries, had decided to verify the situation of the son of the Principal State Prosecutor (*Fiscal general*) who also worked in this public prosecutor's department. This prompted the Principal State Prosecutor to request that an administrative investigation be conducted and that the deputy prosecutors be suspended. The investigation established that the charges against the deputy prosecutors did not amount to an irregularity for which disciplinary sanctions could be envisaged, and therefore the Minister of Education and Justice decided to discharge them of all responsibility. However, on the very day on which this decision was taken, the government issued an order for the dismissal of the deputy prosecutors – countersigned by the same minister – by reason of the "situation of conflict" which had arisen within the national public prosecutor's department.

Following this, the deputy prosecutors brought actions to set aside the government decree ordering their dismissal in order to obtain reinstatement, have the period of investigation prior to the trial taken into account when calculating their pensions and receive compensation for non-pecuniary damage. The action was allowed at first and second instance, whereupon the state lodged an extraordinary appeal (*recurso extraordinario*) with the Supreme Court of Justice of the Nation.

The Supreme Court upheld the judgment, in accordance with the doctrine outlined in the headnotes above. It also stated:

a. that, under the law which applied in the instant case, the deputy prosecutors' dismissal was subject to verification that their behaviour had been "reprehensible";

b. that the decree ordering their dismissal had adduced no tangible fact constituting "reprehensible" behaviour on their part and contained no grounds for complaint other than those examined during the investigation;

c. that the "situation of conflict" mentioned in the decree stemmed exclusively from the facts leading to the investigation in which it had been established that there had been no irregularity. Accordingly, the Supreme Court annulled the impugned decree on the ground of a grave substantive defect.

Supplementary information:

Of the eight judges who decided the case, three submitted their own separate concurring opinions.

The national public prosecutor's department is the non-judicial body responsible for investigations into the administrative behaviour of civil servants.

Languages:

Spanish.

Identification: ARG-1998-1-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 23.12.1997 / **e)** P.772.XXXI / **f)** Pellicori, Oscar A. y otros s/ denuncia por defraudación / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 320 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – Vienna Convention on the Right of Treaties of 1969.
Sources of Constitutional Law – Categories – Written rules – Other international sources.
General Principles – *Nullum crimen sine lege.*
Fundamental Rights – Economic, social and cultural rights – Right to intellectual property.

Keywords of the alphabetical index:

Bern Convention for the protection of literary and artistic works of 1886 / Geneva Universal Copyright Convention of 1952 / Trips Agreement / International obligations of the State / Software / Copyright.

Headnotes:

International treaties must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969, which establish the principle of good faith, in keeping with the ordinary meaning that treaty provisions are deemed to have in the context of the treaty, bearing in mind its aim and purposes.

The Bern Convention for the protection of literary and artistic works of 1886 (Article 2.5) and the Geneva Universal Copyright Convention of 1952 do not oblige the signatory states to provide for criminal penalties to protect the rights established therein.

Neither do the aforementioned international instruments establish a criminal offence "*per se*".

The Trips (Trade Related Aspects of Intellectual Property Rights) Agreement does not apply in this case because it was not yet in force at the material time.

Summary:

Companies holding copyrights brought criminal proceedings for violation of the Intellectual Property Law (no. 11.723), having found software which was not original on the defendants' hard disks.

The Criminal Division of the Court of Cassation upheld the judgment discharging the accused in this case, on the ground that, in its opinion, software was not covered by the criminal safeguards provided for in the above-mentioned law. The complainant lodged an extraordinary appeal (*recurso extraordinario*) with the Supreme Court of Justice of the Nation.

The Supreme Court considered, in the first place, that it was not competent to examine the interpretation given by the Court of Cassation to the intellectual property law, as this was not a federal law. On the other hand, it did declare admissible that part of the appeal relating to the interpretation of the international treaties relied on by the appellant, although it upheld the impugned judgment.

Apart from the grounds referred to in the headnotes above, the Supreme Court upheld its established case-law: Article 18 of the Constitution requires that provision must be made by law in the strict sense for both the offence and the penalty prior to the commission of the offence, and the legislature has exclusive power to determine what interests should be protected by means of a criminal deterrent and to what extent this deterrent should be deployed so as to ensure sufficient protection, the criminal law being the last resort of the legal system. It added that, since the aforementioned Bern and Geneva conventions did not include any obligation to make provision for criminal penalties, it could not be inferred that the state was guilty of failing to honour its international commitments because it had not introduced legislation to this effect.

Supplementary information:

One judge submitted a separate concurring opinion.

Languages:

Spanish.

Identification: ARG-1998-1-003

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 05.02.1998 / **e)** S.526.XXVI / **f)** Sisto, Verónica Eva y Franzini, Martín Ignacio s/ información sumaria – sumarísimo / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 321 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Systematic interpretation.
General Principles – Separation of powers.
General Principles – Relations between the State and bodies of a religious or ideological nature.
General Principles – Public interest.
General Principles – Reasonableness.
General Principles – Prohibition of arbitrariness.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Religion.
Fundamental Rights – Civil and political rights – Freedom of conscience.
Fundamental Rights – Civil and political rights – Freedom of worship.
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:

Marriage / Divorce, renunciation of right / Public order / Canonic law.

Headnotes:

Article 230 of the Civil Code does not violate the Constitution by rendering void any renunciation on the part of either partner of the right to seek divorce.

Summary:

The parties lodged an application to have Article 230 of the Civil Code – which renders void any renunciation on the part of either spouse of the right to seek divorce – declared unconstitutional and to obtain full recognition of the effects of the renunciation which they had presented in the court of first instance. They argued that the aforementioned rule violated the right to freedom of religion and conscience, imposed a single pattern of marriage, impinged on individuals' private affairs and affected the principle of equality before the law. Their claim having been rejected at first and second instance, the parties lodged an extraordinary appeal (*recurso extraordinario*) with the Supreme Court of Justice of the Nation.

The Supreme Court upheld the impugned decision on the following grounds:

a. the rules governing the situation of families and the dissolution of marriage are concerned with maintaining public policy rather than with the particular interests of individuals, Articles 19 and 872 of the Civil Code being applicable in that they declare renunciations such as that exercised in the instant case invalid, insofar as a contrary rule could infringe rights relating to personal freedom;

b. the fact that the legislation seeks to establish a "single pattern of marriage" does not violate the Constitution, since it is the union celebrated by the ministers of each religion which is relevant in the matter of conscience, while in the civil sphere there must be a standard set of rules which, without harming the multiplicity of beliefs existing in society, makes the distinctions considered necessary by those drafting legislation governing the dissolution of marriage;

c. the law in force does not make it inevitable that the failure of a marriage will lead to dissolution, since it also envisages applications for legal separation;

d. Article 230 cannot be challenged only on the ground of the conflict between this rule and the sacramental nature of marriage according to the Catholic religion, without also challenging the powers of the legislator to require a civil marriage ceremony – regardless of the partners' beliefs – or the granting of divorces by the courts;

e. Articles 2 and 14 of the Constitution, invoked in support of the right to enter into an indissoluble marriage, have no direct connection with the instant case, because they relate both to freedom of religion

and to state support for the Roman Catholic and Apostolic Church, which does not prove that those who drafted the Constitution intended the principles and regulatory arrangements prescribed by the state for marriages to be exactly the same as those set by the aforementioned church;

f. the full protection of the family provided for by Article 14bis of the Constitution does not rule on whether marriage is to be dissoluble or not.

The Supreme Court also added the following:

g. the claim that the consent expressed during the civil ceremony must be irrevocable in order to comply with canon 1057.2 of the Code of Canon Law is an obvious case of religious principles encroaching on the area of public policy in civil society;

h. the law cannot allow – not least for the sake of its own internal consistency – the system of civil marriage to be altered in the name of the principle of free will, since this system is a matter of public policy;

i. it is not the role of the courts to consider the expediency, efficacy or wisdom of criteria adopted by the legislature within the limits of their powers, though this does not imply that the judiciary should relinquish its own powers;

j. the right to equality before the law (Article 16 of the Constitution) means that the law is applicable in all cases, but some account of the factual differences between cases has to be taken since this equality is not absolute and inflexible; in fact it relates to all identical cases, so that no exceptions are permitted which exclude some persons from what is accorded to others in the same circumstances, though there is nothing to prevent legislation from drawing valid, non-arbitrary distinctions between what it regards as different circumstances;

k. Article 230 makes no imposition with regard to individual conscience;

l. if the applicants' claims were declared admissible, the legal system would probably be rendered ineffective by a whole series of objections and reservations by individuals holding various religious beliefs and viewpoints, and unjustified resistance by individuals would prevail over the decision of the community as expressed in the law;

m. the applicants' irrevocable will remains a matter of personal conviction and has no validity within the legal system (Article 19 of the Constitution).

Supplementary information:

One judge submitted a separate concurring opinion, and another submitted a dissenting opinion.

Languages:

Spanish.

Identification: ARG-1998-1-004

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 10.02.1998 / **e)** M.412.XXXIII / **f)** Mansilla, Mario Héctor s/ casación (infracción ley 22.737) / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 321 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Systematic interpretation.
General Principles – *Nullum crimen sine lege.*

Keywords of the alphabetical index:

Drugs, storage / Drugs, possession / Abstract danger, criminal offence / Public health.

Headnotes:

The act of storing drugs (Article 5 of Law 23.737) is regarded as an offence posing an abstract danger, since the action is separate from the result.

Within this category of offence, what determines the criminal responsibility attaching to an act is the general danger it may pose to specific legally protected interests.

The offence made punishable by the aforementioned law is that of storing or keeping drugs, in the sense of keeping a supply of them, which is punishable for the simple reason that it poses a danger to legally protected interests – in this case public health.

In cases of drug possession where the drugs are not intended for personal use, the purpose and the destination of the drug are of no importance; the distinction between mere possession and storage derives from the semantic features of the verb "to store".

Summary:

The Criminal Division of the Court of Cassation had sentenced the accused to four years' imprisonment and a fine for the offence of storing drugs. The officially assigned defence counsel lodged an extraordinary appeal (*recurso extraordinario*) with the Supreme Court of Justice of the Nation, on the grounds that the Court's interpretation had distorted the implementing regulation because, in categorising the case, it had confined itself to the quantity of drugs seized and the conditions in which they were being stored and had not required that the nature of the crime be determined in terms of whether the ultimate purpose was to deal in drugs. Defence counsel also claimed that simply keeping drugs without any profit-making intent should in any case constitute the offence of merely being in possession of drugs.

The Supreme Court declared the case admissible, considering that it involved the interpretation of a federal law, as cited in the headnotes. However, it upheld the decision of the Criminal Division of the Court of Cassation, in accordance with the principle outlined in the headnotes, restating the conclusions of the Principal State Prosecutor.

Supplementary information:

Article 5.c of Law 23.737 stipulates that a sentence of four to fifteen years' imprisonment and a fine shall be imposed on anyone who, without authorisation and for an illegitimate purpose, deals in drugs or raw materials for the production or manufacture of drugs, keeps them for commercial purposes, distributes them, gives them in payment, stores them or transports them.

Languages:

Spanish.

Identification: ARG-1988-1-005

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 24.02.1998 / **e)** C.3.XXXI / **f)** Calvo y Pesini, Rocío c/ Córdoba, Provincia de s/amparo / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 321 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Public interest.
General Principles – Reasonableness.
Fundamental Rights – General questions – Entitlement to rights – Foreigners.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment – Public.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Citizenship.
Fundamental Rights – Economic, social and cultural rights – Right to work.
Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.
Fundamental Rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Interest of the State / Civil rights.

Headnotes:

Article 16 of the Constitution states that "All [Argentina's] inhabitants are equal before the law and admissible to employment without any other condition than their ability". The notion of ability presupposes a whole range of different requirements which can be established by law or by regulations. Technical, physical and, in particular, mental abilities are requirements of a general nature, whereas others such as citizenship are only required for certain duties.

As regards the exercise of their civil rights and, in particular, their occupation, the Constitution grants the same rights to foreigners in the Republic of Argentina as to Argentine nationals. Though the Constitution does not establish absolute rights and the rights it secures must be exercised in accordance with the laws governing them, regulations may not discriminate between Argentine nationals and foreigners as regards civil rights.

Denying foreigners access to civil service posts must be justified by a reasonable interest of a state.

The validity of such denial must be judged in practical terms, i.e. with regard to the function or the post in question.

Summary:

The applicant, who has a degree in psychology and is a Spanish national, encountered difficulties in obtaining a permanent post on the "human health" team of a hospital specialising in neuropsychiatry in the Province of Cordoba, as a law in that province requires all candidates to be Argentine nationals.

Accordingly, the applicant lodged a complaint with the Supreme Court of Justice of the Nation on the ground that the aforementioned rule violated the Constitution.

The Supreme Court declared the complaint admissible in accordance with the principle outlined above. It also ruled that, in view of the general principle laid down by the aforementioned Article 16 of the Constitution as well as the full recognition of the rights of foreigners to pursue their occupation – which is a key component of the egalitarian aims of the Constitution – it was appropriate to require a sufficient justification for the restriction imposed by the contested law. The impugned province failed to give a satisfactory justification and simply held dogmatically to its position, thereby ruling out the possibility of demonstrating that the rule had been introduced for a legitimate reason or in the interest of the state.

Supplementary information:

The Supreme Court settled this particular case at first instance because a province was one of the parties to the proceedings (Articles 116 and 117 of the Constitution).

Languages:

Spanish.

Armenia
Constitutional Court

Statistical Data

1 January 1998 – 30 April 1998

26 referrals, 25 cases heard and 24 decisions delivered, including:

- 23 decisions concerning the compliance of international treaties with the Constitution. All referrals were initiated by the President of the Republic. All the treaties examined were declared compatible with the Constitution.
- 1 decision concerning the compliance of a law with the Constitution. The referral was initiated by the President of the Republic. The Constitutional Court decided that the challenged provisions of the Law on Real Property were incompatible with the Constitution.
- A referral concerning the presidential elections, made by a presidential candidate. The referral was rejected on the ground that the request of the appellant was to declare the results of the presidential elections partially invalid, on behalf of some candidate or candidates, while partial invalidation is not within the jurisdiction of the Constitutional Court, as, according to legislation, elections cannot be declared partially invalid.
- 16 cases heard by oral procedure, 9 cases heard by written procedure.

Important decisions

Identification: ARM-1998-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 18.01.1998 / **e)** DCC-90 / **f)** On the conformity with the Constitution of the provisions specified in the Development Credit Agreement (Health financing and primary health care development project) between the Republic of Armenia and the International Development Association / **g)** *Tegekaguir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – International treaties.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
Institutions – Executive bodies – Powers.
Fundamental Rights – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Health protection, governmental programme / International Development Association, treaty.

Headnotes:

The ratification and implementation of the Development Credit Agreement between the Republic of Armenia and the International Development Association is advisable in the view of the targeted State programmes developed based on the requirements of Article 34 of the Constitution and the Law on Medical Aid and Service to the Population of the Republic of Armenia. The Agreement has been published in accordance with the established procedure.

Summary:

The hearing of the case was prompted by an application by the President to the Constitutional Court concerning the conformity with the Constitution of the provisions specified in the above-mentioned Agreement. According to the Credit Agreement, the International Development Association is committed to providing the Republic of Armenia the amount of seven million two hundred thousand Special Drawing Rights units in various currencies.

The Republic of Armenia, being the recipient of the credit, is committed to implementing the Project with maximum efficiency, the main purpose being to raise the quality of primary health care, to target expenses in this area and to secure the participation of communities in determining local health care priorities and the preservation of the basic health services.

In accordance with Article 34 of the Constitution, "...each person has the right of health protection. The procedure for medical assistance and service is defined by law. The State implements the programmes of health protection of the population".

However, during 1996-1997 the Government failed to take the necessary and proper steps to meet completely the requirements of Article 34 of the Constitution and the Law on Medical Aid and Service to the Population of the Republic of Armenia.

According to the Constitution, the Government is responsible for the implementation of programmes on health protection of the population. These are characterised by law as annual target programmes directed at providing the population with health protection; following their approval by the Government, the programmes are to be published by the mass media (Article 1.3 of the Law on Medical Aid and Service to the Population of the Republic of Armenia). Moreover, the Law secures to every person the right to medical aid and service free of charge within the framework of the special state programmes (Article 4.2); Article 10 of the Law secures this right specifically for children.

Despite the fact that the said Law officially entered into force in April 1996, the first attempt to adopt a State targeted programme took place in May 1997 and was not in complete conformity with current legislation.

Such a situation resulted in a significant distribution in 1997 of assets allocated for health care within the State budget (Government Edict no. 44, 19 January 1998), when the said projects did not exist and State health care institutions were not developed properly and could not ensure implementation of Article 1 of the Constitution, which declares the Republic of Armenia to be a social State paying the proper attention to the health protection of the population.

The task of the targeted use of credit and budgetary assets provided for the health care system is directly linked with conformity with constitutional requirements, and that system requires substantial improvement.

Although the Constitutional Court found that the provisions of the Agreement are in conformity with the Constitution, the Court proposed that the Government take urgent measures to create the necessary prerequisites for the targeted use of credit and budgetary funds in the field of health care, so as to secure the complete and continuing implementation of Article 34 of the Constitution as well as the Law on the Medical Assistance and Service.

Languages:

Armenian.

Austria
Constitutional Court

Statistical data

Sessions of the Constitutional Court
during November/December 1997

- Financial claims (Article 137 B-VG): 3
- Conflicts of jurisdiction (Article 138.1 B-VG): 3
- Review of regulations (Article 139 B-VG): 38
- Review of laws (Article 140 B-VG): 90
- Challenge of elections (Article 141 B-VG): 3
- Complaints against administrative decrees (Article 144 B-VG): 490 (358 refused to be examined)

and during February/March 1998

- Financial claims (Article 137 B-VG): 2
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Review of regulations (Article 139 B-VG): 17
- Review of laws (Article 140 B-VG): 66
- Challenge of elections (Article 141 B-VG): 2
- Complaints against administrative decrees (Article 144 B-VG): 463 (311 refused to be examined)

Composition of the Court:

On 5 February 1998, Dr Rudolf Müller was appointed member of the Constitutional Court by the Federal President.

Important decisions

Identification: AUT-1998-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 04.12.1997 / **e)** G 124/96 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Constitutional Justice – Procedure – Parties – *Locus standi.*
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.
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:

Name, family, free choice / Name of children, agreement.

Headnotes:

The legal obligation to bear a certain name encroaches on one's right to private and family life. However, the regulation of the use of names supports important public interests as a means of maintaining public order and is therefore open to legislation.

A subsidiary rule stipulating that a child must bear the father's surname, in cases where parents not having chosen a common family name at marriage cannot come to an agreement on their child's name, meets the requirements of Article 8 ECHR and of the equal protection clause. This is so, in particular because the child is not bound to bear this name for ever due to the legal opportunity which exists to change one's name.

When the legislator decided to liberalise the law concerning names acquired through marriage, fiancés were offered the opportunity each to keep their (previous) names. Because of that the legislator was confronted with the question which name should be given to such a couple's children. It was the clear objective to avoid different names among children (no switching for example from the mother's name for one child to the father's name for another one) as well as endless double-names as well as any random solution (e.g. decision by casting lots). The legislator decided that fiancés are free to come to an agreement as to which name – the mother's or the father's – should be used for their children. Only in the absence of such an agreement should the father's name be given automatically to the child. Such a subsidiary rule lies within the legislator's margin.

Summary:

An application was filed with the Court by a minor and his mother – also representing her son – directly challenging a provision of the Civil Code. According to the incriminated statute, the minor was obliged to bear his father's name because his parents – using no common family name – did not determine a name for him by agreement. The applicants alleged that this provision breaches their right to private and family life

and causes unequal treatment of men and women. It would still be harder for women to convince men of an agreement according to which the woman's name should be used for their children.

The Constitutional Court considered the individual complaint directly against the act available admissible because there was no other reliable procedure by which the constitutionality of the statute at issue could be challenged. The Court did not follow the applicants' arguments but dismissed their application.

Languages:

German.

Identification: AUT-1998-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 05.12.1997 / **e)** G 23-26/97 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Consequences for other cases.
Sources of Constitutional Law – Categories – Written rules – Community law.
General Principles – Proportionality.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Community law, directly applicable / National law, application.

Headnotes:

A provision which is actually applied by an administrative authority issuing an administrative decree must also be applied by the Constitutional Court examining whether the provision was legally applied and irrespective of the question whether the administrative authority had applied not the (national) provision but rather directly applicable Community law.

According to the clear jurisprudence of the European Court of Justice (ECJ) the special charge (taxation) on petroleum cannot be considered as VAT in the meaning of Article 33 Council Directive 91/680.

Although the Court already annulled a provision imposing tax on petroleum (of the same law) the incriminated provision of the present case is not identical in legal meaning with the annulled one.

Tax which is levied disproportionately – without reasonable, justified differentiation – on petroleum products contradicts the equal protection clause.

Summary:

Petroleum companies lodged complaints raising the question whether the impugned administrative decrees had to be regarded as void and, therefore, violating constitutionally guaranteed rights. The complainants argued that the national tax provision applied by the administrative authority was in conflict with directly applicable Community law. Thus, national law should not apply.

The Court having opened proceedings for judicial review *ex officio* denied this view following relevant rulings of the ECJ: The special charge (tax) on petroleum is levied on oil production and on petroleum products; it does not, therefore, refer to delivery of goods or to services. Furthermore, it is restricted to petroleum and petroleum products, thus imposed only on a certain group of products (no general taxation) and – contrary to a VAT levied at every step of the production – it is just collected when these articles are produced.

However, the Court annulled parts of the provision causing unequal taxation.

Languages:

German.

Identification: AUT-1998-1-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 02.03.1998 / **e)** G 37/97 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Public interest.
General Principles – Proportionality.
Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Pharmacies, establishment / Approval system, pharmacies / Remedy supply.

Headnotes:

The requirement for the establishment of a new pharmacy, that at least 5.500 persons will be supplied by it, is disproportionate and does not serve the public interest. Therefore, it is unconstitutional.

Summary:

The Austrian Pharmacy Act *(Apothekengesetz)* requires prior approval for the operation of a pharmacy. The requirements are set forth in Section 10 of the Pharmacy Act. The approval may be obtained *inter alia* if:

1. at least 5.500 persons will be supplied with pharmaceutical products by the new pharmacy;
2. the new pharmacy is at least 500 meters away from the next, already existing pharmacy;
3. the number of 5.500 persons who are already furnished by an existing pharmacy will not be reduced due to the operation of the new pharmacy.

The Constitutional Court annulled the first prerequisite for obtaining the approval of the operation of a pharmacy because it restricted the right to work for remuneration in a way that did not support any public interest.

Due to several applications to overrule certain provisions of the Pharmacy Act filed by the Administrative Court, the Constitutional Court once again had to review the constitutionality of the approval system for opening a new pharmacy. The Court came to the conclusion that (only) parts of the provisions regarding the prerequisites for the prior approval of a new pharmacy violated fundamental constitutional rights.

The Court explicitly confirmed the constitutionality of the second and the third above-mentioned prerequisites as they guarantee an in-depth examination of the question whether the existence of established pharmacies would be jeopardised by a new one. It is of high public interest that the supply of remedies to consumers works efficiently and smoothly. This presupposes that pharmacies keep a certain amount of supplies in stock. Thus, pharmacies are required to be of a minimum size, and this is safeguarded by the relevant provisions. Therefore the provisions are an appropriate means for realising the objective of supply of remedies to consumers; the encroachment upon the right to work for remuneration is not disproportionate.

Supplementary information:

Though this annulment will result in approval being granted for more pharmacies, it has little effect on the liberalisation of the operation of pharmacies. However, the judgment may cause the closing down of "pharmacies" run by physicians in their surgeries, an issue which is heavily discussed in the mass media. According to a subsidiary system of remedy supply they were settled in regions where (up to now) no pharmacy was established. The closing of such "pharmacies" is not a direct consequence of the Court's judgment but of the actual establishment of a new pharmacy.

Languages:

German.

Identification: AUT-1998-1-004

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11.03.1998 / **e)** G 363/97 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – General questions – Entitlement to rights – Foreigners.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Social security.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Unemployment / Emergency assistance / Pecuniary right.

Headnotes:

Entitlement to emergency assistance is linked to payment of contributions to the unemployment insurance fund. Emergency assistance is a pecuniary right for the purposes of Article 1 Protocol 1 ECHR.

The different treatment between Austrian citizens (including some foreigners) and the group of non-Austrians as regards entitlement to emergency assistance pursuant to the relevant provisions of the Unemployment Insurance Act is not based on any objective and reasonable justification. Therefore, those provisions are discriminatory and contrary to Article 14 ECHR taken in conjunction with Article 1 Protocol 1 ECHR.

Summary:

Section 33 of the Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz*) granted emergency assistance to persons having exhausted their entitlement to unemployment benefits or parental leave allowance. Among other statutory conditions set forth in Section 33.2.a, persons applying for emergency assistance had to have Austrian citizenship. According to Section 34.3 explicitly named groups of foreigners were to be treated equally to Austrian nationals while Section 34.4 granted emergency assistance to another group of foreigners just once and just for a period of 52 weeks. Their emergency assistance was restricted although this group had paid contributions to the unemployment fund on the same basis as Austrian employees.

Such different treatment would be unconstitutional according to Article 14 ECHR requiring that the enjoyment of rights and freedoms safeguarded by the Convention shall be secured without discrimination. As Article 14 ECHR has no independent existence but complements the other substantive provisions of the Convention and the Protocols the facts at issue have to fall within the ambit of one or more of those provisions.

Rejecting the Government's view that emergency assistance was not to be considered as an insurance benefit but as an emergency benefit granted by the State to people in need, the Court found as follows: Admittedly, the award of emergency assistance also contains components of welfare benefits. But its entitlement results from the payment of contributions to the unemployment insurance fund. Benefits granted by unemployment insurance are by and large covered by the payment of those contributions. Thus, emergency assistance comes within the scope of Article 1 Protocol 1 ECHR. It follows that Article 14 ECHR – taken together with Article 1 Protocol 1 ECHR – is applicable.

Departing from its earlier case-law, the Constitutional Court agreed with the European Court of Human Rights' view (see the *Gaygusuz v. Austria* judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV) that the right to emergency assistance is a pecuniary right within the meaning of Article 1 Protocol 1 ECHR.

According to the European Court of Human Rights' case-law, a difference in treatment is discriminatory for the purposes of Article 14 ECHR if it has "no objective and reasonable justification", that is if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".

The Constitutional Court could not find any reasons justifying the different treatment of the two groups of unemployed persons concerning their right to emergency assistance. Consequently, it annulled the relevant provisions causing the discriminatory treatment.

Given that the unconstitutionality of the provisions lies in an infringement of the Convention, the Court refused to set a deadline for their nullification.

Supplementary information:

Regarding the *Gaygusuz v. Austria* judgment of the European Court of Human Rights, the Austrian legislator had already prepared a bill amending the Unemployment Insurance Act accordingly. The annulment of the above-mentioned provisions by the Constitutional Court forced the legislator to realise this project earlier than planned.

Languages:

German.

Belgium
Court of Arbitration

Statistical data

1 January 1998 – 30 April 1998

- 48 judgments
- 71 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 63 new cases
- Average length of proceedings: 9 months
- 18 judgments concerning applications to set aside
- 16 judgments concerning preliminary points of law
- 6 judgments concerning an application for suspension
- 7 cases settled by summary procedure (0 applications to set aside and 7 preliminary opinions)
- 1 preliminary decision (re-opening of the hearing)

Important decisions

Identification: BEL-1998-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.01.1998 / **e)** 4/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 17.02.1998 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Budgetary and financial aspects – Finance.
Institutions – Federalism and regionalism – Distribution of powers – Principles and methods.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Fiscal competence / Federal tax / Taxes, authority to levy / Tax system of the federated entities / Taxes / Value-added tax / Tax on television advertising.

Headnotes:

By levying a tax on the broadcasting of advertisements by a television broadcaster, while this taxable item was

already subject to a federal tax (VAT), the legislation of the French Community violates Article 170.2 of the Constitution and the law of 23 January 1989 which forbid the communities from taxing an item which is already subject to a federal tax.

Summary:

Télévision Française 1 (TF1), a public limited company under French law, asked the Court of Arbitration to set aside a French Community legislative provision obliging TV broadcasting companies to pay BEF 1,500 per minute of television advertising.

In Belgium, the federal government and the communities and regions (which together form the federation) all have their own fiscal competence. However, federal legislation may stipulate the items on which no tax may be levied by the federated entities. In addition, the communities and the regions may not levy taxes on items which are subject to a federal tax.

After outlining the basic rules as regards the apportionment of fiscal competences in federal Belgium and making a detailed analysis of the taxable item on which the challenged Community tax was levied, the Constitutional Court found that it was already subject to a federal tax, i.e. VAT on services provided by radio and television broadcasting companies and ruled that the impugned decision should be set aside.

Languages:

French, Dutch, German.

Identification: BEL-1998-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.03.1998 / **e)** 26/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 21.05.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Referral by a court.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights of 1966.
Institutions – Federalism and regionalism – Basic principles.
Institutions – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione loci*.
Fundamental Rights – Civil and political rights – Right to participate in political activity.
Fundamental Rights – Civil and political rights – Linguistic freedom.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Municipalities / Municipal councils / Mayor / Deputy mayor / Municipal councillor / Languages used by the administrative authorities.

Headnotes:

The fact that the mayor and the members of the corporation of mayors and deputy mayors in the Dutch-speaking part of the country are prohibited from including or commenting upon items on the agenda of the municipal council meeting in a language other than Dutch or from replying in another language to statements made by municipal councillors is not contrary to the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution, even in the case of municipalities where certain facilities are granted with regard to the use of languages in administrative matters. The obligation to speak in the language of the region does not apply to other directly elected members of the municipal council.

Summary:

An appeal was lodged with the *Conseil d'État*, the highest administrative court in Belgium, to set aside a ministerial decree nullifying a number of decisions of the municipal council which had been taken following replies given in French by the mayor or deputy mayor to questions from municipal councillors. (In Belgium, the municipalities have autonomous powers at local level with the municipal council being the democratically elected organ and the corporation of mayors and deputy mayors being the executive organ, headed by the mayor).

The municipality in question is Linkebeek which, although situated in the Dutch-speaking region, has been granted a number of facilities with regard to the use of languages by the general public because of the large number of

French-speaking residents. Accordingly, public municipal services must, in their dealings with private individuals, use the language spoken by the people concerned, be this Dutch or French. However, within the services themselves only Dutch may be used.

The municipality of Linkebeek argued before the *Conseil d'État* that the legislation on the use of languages in administrative matters was discriminatory since the mayor and deputy mayor were forbidden from using French to include items on the agenda or to reply to questions from municipal councillors asked in French, and was therefore putting this preliminary point of law to the Court of Arbitration, which was the only competent court to verify whether legislation conformed to the constitutional principle of equality.

The Court first observed that the obligation to use the language of the region applied exclusively to the mayor and the deputy mayor and not to the other members of the municipal council and that the complaint referred not so much to a question of unequal treatment whereby everyone was required to use Dutch, but rather to unfair equal treatment between purely monolingual municipalities and those, situated in the same region, which had been granted certain linguistic facilities (the applicants objected to the fact that, bearing in mind these facilities, there was no difference in treatment between French-speakers and Dutch-speakers).

In the Court's view, given the (in principle) monolingual character of the Dutch-speaking region and the supremacy guaranteed to this language in that linguistic region, it was not unreasonable for legislation to prohibit the mayor and deputy mayors of such municipalities from using a language other than Dutch during municipal council meetings and the provision at issue did not prevent electors from exercising their democratic control on elected representatives.

The Court held therefore that there was no violation of Articles 10 and 11 of the Constitution, neither separately nor taken jointly with Article 3 Protocol 1 ECHR and with Article 27 of the International Covenant on Civil and Political Rights: the aforementioned Article 3 is not designed to apply to municipal councils and Article 27 does not relate to the use of languages by administrative authorities.

Languages:

Dutch, French.

Identification: BEL-1998-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 22.04.1998 / **e)** 43/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 29.04.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a private body or individual – Non-profit-making corporate body.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Fundamental Rights – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts – *Habeas corpus*.
Fundamental Rights – Civil and political rights – Right of asylum.
Fundamental Rights – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Foreigners / Refugees, expulsion / Social assistance, termination.

Headnotes:

Foreigners refused entry or residence in Belgian territory may be subject to a custodial measure for periods of between two and eight months at the most provided the necessary steps have been taken with regard to their deportation. This measure is not discriminatory in comparison with the situation of individuals on remand because the latter are charged with an offence.

However, in so far as the law, as a transitional measure, provides for unlimited extensions of these custodial measures against foreigners, it constitutes disproportionate interference with personal freedom.

Legislation may stipulate that foreigners who have received an order to leave the country by a fixed date will no longer receive social assistance, with the exception of urgent medical assistance, as a means of encouraging the person concerned to comply with the order.

Nevertheless, this measure is discriminatory in respect of those who are entitled to social assistance and the effective exercise of the right to seek a judicial remedy in so far as foreigners are given no further assistance, even though their appeal before the superior administrative court against the decision rejecting their request for asylum has not yet been settled.

Summary:

Two human rights organisations submitted an application to set aside the new Belgian legislation concerning foreigners.

One of the measures at issue concerned the fact that foreigners may be subject to a custodial measure for up to a maximum of eight months with a view to their deportation. In view of Article 5.4 ECHR and the strict conditions under which the measure may be extended, under the supervision of the court, for periods of two months, the administrative deprivation of freedom was considered not to be discriminatory. However, in so far as the limitation to a maximum of 8 months came into effect only on 1 January 1998, which meant that in the transitional phase unlimited periods of deprivation of freedom were possible, the Court observed that there was disproportionate interference with personal freedom.

Another measure at issue concerned the fact that foreigners whose request for asylum has been rejected and who have received an order to leave the country are deprived of the right to social assistance. In a previous judgment (no. 51/94 of 29 June 1994), the Court had already found that such a measure was not unconstitutional. It now ruled that there was disproportionate interference with fundamental rights in so far as it would also bring to an end assistance provided to foreigners whose case was still pending before the *Conseil d'État*.

Cross-references:

See the Court of Arbitration's judgment no. 51/94 of 29 June 1994, *Bulletin* 1994/2 [BEL-1994-2-013].

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 January 1998 – 30 April 1998.

Bulgaria
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

Number of decisions: 9

Important decisions

Identification: BUL-1998-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 18.02.1998 / **e)** 2/98 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette), no. 22 of 24.02.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – International treaties.
Fundamental Rights – Civil and political rights – Freedom of association.
Fundamental Rights – Civil and political rights – Linguistic freedom.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Treaty, international, fundamental rights / Minorities, national / Language, minority.

Headnotes:

The Framework Convention on the Protection of National Minorities is consistent with the Constitution of the Republic of Bulgaria.

Summary:

A group of MPs approached the Constitutional Court with a request to pass judgment on whether certain provisions of the Framework Convention on the Protection of National Minorities and the Convention as a whole were consistent with the Constitution of the Republic of Bulgaria.

The Framework Convention on the Protection of National Minorities was signed by the President of the Republic of Bulgaria on 9 October 1997 in Strasbourg.

The provisions of the Convention that were alleged to be inconsistent with the Constitution were the following:

- Article 7, providing for the right of association of any person who is a member of a national minority;

- Article 8, providing for the right of any person who is a member of a national minority to set up religious institutions, organisations and associations;

- Articles 7, 8, 9, 10, 11 "and others from the Convention" that mention "a minority language", specifically the possibility of using a minority language in dealings with the public administration and of writing traditional local names, names of streets and other place names intended for public use in the minority language as well as in the language of the majority.

The entire Convention's compliance with the Constitution was challenged claiming that "in the past and today and in view of the Constitution and international law there exist no national minorities and no minority languages in this country" and that "the Constitution rules out the possibility of vesting collective rights in one religious or ethnic group or another". In the opinion of the claimants this raises the question of the Convention's effect on a territory and of its consistence with the Constitution.

Having compared the challenged texts of the Convention as a whole with the corresponding texts of the Constitution, the Constitutional Court held that the relevant provisions of the Framework Convention on the Protection of National Minorities signed on 9 October 1997 and the Convention as a whole are consistent with the Constitution of the Republic of Bulgaria.

Languages:

Bulgarian.

Identification: BUL-1998-1-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 19.03.1998 / **e)** 6/98 / **f)** / **g)** *Darzhaven Vestnik* (State Gazette), no. 35 of 27.03.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Legality.
Institutions – Executive bodies – Relations with the legislative bodies.
Institutions – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Administrative authority, discretionary power / Taxes, approval / Taxes, power to impose.

Headnotes:

Taxes and duties shall be imposed and their level established only by a law enacted by Parliament.

Summary:

The decision was in response to the Chief Prosecutor and found Article 33.3 of the Law on the Income Tax of Physical Persons (LITPP) and Clause 5 of the Transitional and Concluding Provisions of the same law (*Darzhaven Vestnik*, no. 118 of 1997) to be unconstitutional.

The final annual (patent) tax is imposed by Article 30 of the LITPP. A floor and a ceiling for the tax is set for the tax payers involved in trade, manufacturing or any other business. The challenged provisions assign the fixing of the level of the tax within this limit to the municipal councils which have to notify the Minister of Finance of the decisions they have taken.

The grounds for the decision state that the constitutional principles with which the tax legislation must comply include the requirement that the imposition of taxes and the establishment of their amount shall be decided by Parliament. The conclusion derives from Article 60.1 of the Constitution and it is to be inferred that taxation shall be imposed by a law and not by an act of another government agency. The conclusion also derives from Article 84.3 of the Constitution which reads that only Parliament is competent to impose taxes and establish their amount. The imposition of taxes and the establishment of their size requires a law and not a statutory act. It is also the law which must establish all the parameters that go into individualising the amount of tax for which each tax payer is liable.

The provisions in question do not contain such parameters. These provisions require that municipal councils specify the amount of the tax within the limit they have set while the relevant circumstances are not given.

With these considerations in mind the Constitutional Court ruled that the provisions in question contravened the Constitution.

Languages:

Bulgarian.

Canada
Supreme Court

Important decisions

Identification: CAN-1998-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 02.04.1998 / **e)** 25285 / **f)** Vriend *v.* Alberta / **g)** *Canada Supreme Court Reports*, [1998] 1 S.C.R. 493 / **h)** Internet: http://www.droit.umontreal.ca/doc/csc-scc/en/index/html; (1998), 156 *Dominion Law Reports* (4th) 385.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Employment, discrimination / Sexual orientation / Canadian Charter of Rights and Freedoms / Discrimination, list of prohibited grounds.

Headnotes:

The failure to include sexual orientation as a prohibited ground of discrimination in human rights legislation infringes the equality provision of the Constitution. As a remedy, the words "sexual orientation" should be read into the prohibited grounds of discrimination in the legislation.

Summary:

A teacher's employment at a college in Alberta was terminated because of his homosexuality. He was advised by the provincial Human Rights Commission that he could not file a complaint under the Individual's Rights Protection Act because it did not include sexual orientation as a protected ground. The Alberta Superior Court found that the omission of protection against discrimination on the basis of sexual orientation from the legislation was an unjustified violation of the Constitution's equality provision (Section 15 of the Canadian Charter of Rights and Freedoms) and ordered that the words "sexual orientation" be read into the legislation as a prohibited ground of discrimination. The Court of Appeal found that the legislation was constitutional.

The Supreme Court of Canada held that the omission of sexual orientation from the prohibited grounds of discrimination in the legislation was unconstitutional. By reason of its underinclusiveness, the Individual's Rights Protection Act creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which is analogous to those enumerated in Section 15.1 of the Charter. This, in itself, is sufficient to conclude that discrimination is present and that there is a violation of Section 15. The serious discriminatory effects of the exclusion of sexual orientation from the Act reinforce this conclusion. The exclusion of sexual orientation from the legislation cannot be justified under Section 1 of the Charter. Where a legislative omission is on its face the very antithesis of the principles embodied in the legislation as a whole, the Act itself cannot be said to indicate any discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights. Far from being rationally connected to the objective of the provisions, the exclusion of sexual orientation from the Act is antithetical to that goal. With respect to minimal impairment, the Alberta government failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the legislation. Finally, since the Alberta government failed to demonstrate any salutary effect of the exclusion in promoting and protecting human rights, there is no proportionality between the attainment of the legislative goal and the infringement of the equality rights. A majority of the Court found that reading sexual orientation into the various provisions of the legislation was the most appropriate way of remedying this underinclusive legislation.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-1998-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.01.1998 / **e)** U-II-119/1994 / **f)** / **g)** *Narodne novine* (Official Gazette), 15/1997, 236-237 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Taxation law.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Local government regulation, retrospective effect.

Headnotes:

Local regulations and all regulations other than laws passed by Parliament must not have retrospective effect since the Constitution allows such an effect only to individual provisions of the State law.

Summary:

A decision of a city council regulating taxes was published on 1 February 1994, and became valid on 9 February 1994, but it stated that it was to be applied since 1 February.

According to the Constitution, laws shall come into force at the earliest on the eighth day after publication, unless otherwise specified by law for especially justified reasons, and only individual provisions of State law may have a retroactive effect. Parliament's Rules of Procedure prescribe a special procedure in cases of retrospective effect of those provisions, which includes a resolution stating the existence of especially justified reasons for such an effect.

Provisions which gave retrospective effect to the city council's disputed decision were repealed.

Supplementary information:

Settled case law.

Languages:

Croatian.

Identification: CRO-1998-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.01.1998 / **e)** U-II-633/1994 / **f)** / **g)** *Narodne novine* (Official Gazette), 31/1998, 699-701 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Legality.
Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality – Scope of application.
Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Noise, reduction / Tourism / Construction works, prohibition.

Headnotes:

Local government bodies are not authorized to prohibit performance of activities connected with construction works between 15 June and 15 September; in order to promote tourism other entrepreneurial activities are not to be completely abolished.

Summary:

A local government's decision regulating public order and peace prohibited construction works in all settlements in the peak of tourist season between 15 June and

15 September. The Decision was disputed by a construction firm which claimed violation of its entrepreneurial freedom and equal legal status on the market.

The Court examined what the Constitution and laws authorise local government bodies to regulate – local government, misdemeanours against public order and peace and protection from noise – and in none of them found grounds for such a prohibition.

The disputed provisions were repealed.

Languages:

Croatian.

Identification: CRO-1998-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.02.1998 / **e)** U-I-474/1996, U-I-733/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 27/1998, 581-585 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Property of legal persons / Ownership, social / Ownership transformation / Assets, public / Compensation.

Headnotes:

After completion of the procedure transforming ownership of "Zagreb Fair", a socially owned public enterprise founded by the City of Zagreb, into property of the City of Zagreb, "Zagreb Fair" was registered as a limited liability company. Since no one, including the relevant bodies of the State, had disputed the registration, the Republic had no right to pass the Act on Transformation of "Zagreb Fair", and to determine itself as one of the owners of the company.

Summary:

The Act (which followed the completed transformation of ownership) regulated that after it became valid, "Zagreb Fair" ceased to be a company with limited liability owned exclusively by the City of Zagreb and became a company with limited liability owned by the Republic of Croatia and the City of Zagreb, in a way that 60% of its share capital belonged to the Republic of Croatia and 40% to the City of Zagreb.

The proposals to review the constitutionality of the Act claimed a violation of property rights guaranteed by the Constitution, and they were found to be justified by the Court.

The Court held that transformation is a process of change of socially owned property into the ownership of a known owner, who may be a legal or a natural person. That process in the case of "Zagreb Fair" had already been completed.

The disputed Act, although called the Act on Transformation, did not transform the ownership but altered the shares in the property, depriving the City of Zagreb of 60% of its shares and assigning them to the Republic. From the constitutional point of view this was deprivation of property, without legal grounds for the expropriation, and without indemnification prescribed by the Constitution.

The whole Act was repealed.

The dissenting opinion of two judges considered that the decision was based on two incorrect premises: that the disputed Act was not a law concerning transformation because the transformation had already been performed, and that the Republic of Croatia was entitled to dispute the previous procedure of transformation of "Zagreb Fair" before the registration court.

Among the essential elements of the dissenting opinion was the fact that the period for making the laws comply with the Constitution expired on 31 December 1997, and the disputed Act on Transformation of "Zagreb Fair" was passed before that date.

The Assembly of the City of Zagreb according to the laws valid at the time of the transformation had no authority to organize "Zagreb Fair" as a public enterprise, since such enterprises are intended for activities which concern indispensable conditions for the work and lives of citizens and other enterprises and "Zagreb Fair" deals with the organization of fairs and exhibitions in Croatia and abroad, or carry out its transformation.

The State was not able or supposed to dispute, during the transformation period, each decision passed by individual subjects. The fact that the transformation was not disputed by relevant State bodies does not make valid the acquisition of ownership of the public enterprise by the City of Zagreb.

The registration would have become valid by the expiry of the term for making laws comply with the Constitution (31 December 1997), if the Republic, before that date, had not passed the law disputed in this case concerning this transformation. Then the constitutional guarantee of ownership rights would have come into effect and the lawmaker would no longer have been authorised, except under the conditions of Article 50 of the Constitution (indemnity equal to market value, the purpose being the interests and security of the Republic, nature, the human environment and human health) to restrict property rights.

Languages:

Croatian, English.

Identification: CRO-1998-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 18.02.1998 / **e)** U-I-20/1992 / **f)** / **g)** *Narodne novine* (Official Gazette), 31/1998, 697-699 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – National service.

Keywords of the alphabetical index:

Conscientious objection, time limits, deadlines.

Headnotes:

The exercise of the constitutional right to conscientious objection cannot be limited by prescribing time limits in which conscientious objection may be expressed or deadlines after which it can no longer be claimed. The exercise of this right may also not be connected with the manner of performing civilian service instead of national service.

Freedom of conscience implies also freedom to change one's conviction and this is also the reason not to tie the right to conscientious objection to time limits after which it cannot be claimed.

Summary:

The Defence Law contained provisions according to which the claim to serve in civilian service instead in national service had to be lodged not later than 90 days from the day of entry in the military register or, in certain cases, within 24 months from the day on which the Defence law became valid.

Another provision stated that a conscientious objector who performs his civilian service in an indolent way and violates its disciplinary rules was to undergo re-examination of conditions for civilian service with the consequence that he may be ordered to quit civilian service and serve in the armed forces.

The Court repealed these provisions.

Languages:

Croatian, English.

Identification: CRO-1998-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 25.02.1998 / **e)** U-III-1238/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 43/1998, 899-901 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
General Principles – Rule of law.
General Principles – Certainty of the law.
Fundamental Rights – General questions – Basic principles.
Fundamental Rights – General questions – Limits and restrictions.

Keywords of the alphabetical index:

Family members, interpretation / Family, blood relation.

Headnotes:

Application of a legal norm which concerns a right of a person may not be interpreted by courts in a way that their interpretation introduces more restrictions for the subject than the legislator prescribed, otherwise legal certainty and the rule of law are violated.

Summary:

The interpretation in question concerned "closer members of a family" and whether they included a grandmother. The question arose in connection with free days which an employee asked for in case of his grandmother's death. The courts denied his right stating that "closer members of a family" include a spouse, children and parents.

The action was found justified and the case returned for renewal of procedure.

According to the law relevant for the case, "closer members of a family" are, among others, blood relations of direct line of succession in ancestry, in *linea recta*. The Court held that the legislator did not specify the level of blood relationship when regulating the right of employees in case of death of blood relations in direct line and that therefore the provision should be interpreted as implying all blood relations in direct line.

Languages:

Croatian.

Identification: CRO-1998-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.03.1998 / **e)** U-I-38/1997, U-I-55/1997, U-I-114/1997, U-I-120/1997, U-I-184/1997, U-I-981/1997, U-I-1262/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 35/1998, 749-755 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.
General Principles – Social State.
General Principles – Certainty of the law.
General Principles – Vested rights.
Institutions – Public finances – Budget.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law.
Fundamental Rights – Economic, social and cultural rights – Right to social security.
Fundamental Rights – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Maternity rights / Budget allocations.

Headnotes:

The legislator did not violate the Constitution when it changed, by the Law on Execution of the State Budget (which is passed every year) the amount paid to mothers during maternity leave, previously determined by Health Insurance Law. It could authorise the Government to change the minimum and maximum amount of the maternity allowance having in view the costs of living and resources of the State budget.

Summary:

The proposals to review the constitutionality of the disputed laws (the Law on Execution of the State Budget for 1997 and the Health Insurance Law) claimed that determining the amount paid in connection with a certain right through a law which is in force for only one year, instead of by a special law, leads to legal uncertainty for the beneficiary, since due to such a regulation the amount varies depending on the funds assigned from the budget.

The Court held that legal certainty was not violated because the regulation concerns equally all those who meet the legally prescribed conditions for implementation of the right for allowance during maternity leave.

From these points of view the proposals to review the constitutionality of the Health Insurance Law were not accepted and proceedings dealing with the Law on Execution of the State Budget for 1997 were terminated because the Law was no longer in force.

A dissenting opinion of the president of the Court and two judges held that Constitutional provisions defining Croatia as a social state, stating the principle of the non-retrospective effect of law, and principles of social justice and the rule of law (Article 1 and 3 of the Constitution) are violated, because the legislator, when initially granting

the rights to mothers also had to assess the necessary funds for the implementation of those rights.

Laws (and regulations in general) succeed in their guidance of people and of their behaviour (here the behaviour of future parents) when those who are subject to the provisions of the law can have confidence in the law and the *de facto* and *de iure* situation created by valid legislation. Sudden intervention of the legislator in the core of legal matter (in this case the amount of the legally promised maternity allowance) affected acquired legal positions in the duration of which mothers had every reason to trust. The legislator could have passed different regulation for the future, concerning those who did not acquire this right, but it violated the Constitution when it affected the rights already created and diminished already acquired rights.

In this case the legislator explicitly prescribed that a specific category of citizens is entitled in future to certain rights. The legal situation, created by the will of both parties – the legislator and a certain category of citizens – has to remain in force for a certain period for reasons of legal security, even if one party, the legislator, no longer wants the effects offered to the other party at the time of enactment of the regulation.

Languages:

Croatian, English.

Identification: CRO-1998-1-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 31.03.1998 / **e)** U-I-762/1996 and 18 others / **f)** / **g)** *Narodne novine* (Official Gazette), 48/1998, 995-1005 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Determination of effects by the court.
General Principles – Rule of law.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.
Fundamental Rights – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Tenants' rights / Dwellings, lease.

Headnotes:

The obligation of an owner of a dwelling to provide a lessee with another adequate dwelling in cases of cancelled lease contract is an unconstitutional restriction of the right of property, the rule of law and equality.

The consent of an owner of a dwelling for the dweller's absence from the dwelling, and disregard of the fact that there might exist justifiable reasons for the absence of the lessee and his family from the dwelling, is an unconstitutional restriction of freedoms and rights.

A provision which finds relevant the absence of a lessee from the dwelling during the period before the Lease of Dwellings Law became valid has a disguised retrospective effect introduced unconstitutionally.

The legal provision which makes cancelling of a lease contract dependent on the will of a unit of local government or the City of Zagreb, and is insufficiently determined and inadequate to function is not in compliance with the rule of law.

Summary:

In the procedure of review of the Lease of Dwellings Law four provisions of the Law were repealed; proposals disputing the constitutionality of the other 13 provisions were not accepted. The repealed provisions stated that the

a. lease of a dwelling may be cancelled only if the lessor provides a lessee with another dwelling, under conditions which are not less favourable to the lessee;

b. the right to a protected rent does not belong to a lessee who, without the consent of the owner of the dwelling, together with the members of his family household, did not use the dwelling for a period longer than the last 6 months before the Lease of Dwellings Law became valid;

c. a lease contract with a protected lessee who receives social allowance or is older than 60 may be cancelled only where a local government unit or the City of Zagreb provides him/her with another adequate dwelling for which the protected rent is paid and the lessee can afford it;

d. a lease contract with a protected lessee may be cancelled only where the lessor provides a lessee

with another dwelling, under conditions which are not less favourable to the lessee.

Supplementary information:

In connection with two of the repealed provisions a. and d. the Court determined that its decision shall not produce any effects for a period of 6 months after the day of the publication of the decision (published on 6 April 1998).

Languages:

Croatian.

Identification: CRO-1998-1-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 31.03.1998 / **e)** U-I-103/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 50/1998, 1023-1026 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Territorial principles.
Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.

Keywords of the alphabetical index:

Municipality, territory / Municipalities, merger / Boundaries, administrative, change / Right to be heard / Consultation of population.

Headnotes:

The territory of units of local self-government is determined by State law after the opinion of the inhabitants of the areas concerned has been heard. The opinion of the inhabitants has to be expressed in a way which guarantees credibility and impartiality of results.

Summary:

By the disputed law several settlements which were part of one municipality in one county became part of another municipality in another county. The Court repealed these changes of territory, holding that the opinions of the inhabitants were not supplied in a constitutional and legal way.

Languages:

Croatian.

Identification: CRO-1998-1-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.04.1998 / **e)** U-III-203/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 52/1998, 1052-1054 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Defamation through press / Libel.

Headnotes:

A scientist's scientific opus must not be evaluated through his political standpoints. To oppose a scientist in issues of his scientific discipline by arguments which are not the arguments of that discipline is to affect unjustifiably in the eyes of the profession, the public in general and – since the scientist in question is a university professor – in the eyes of the students the dignity, reputation and honour of that person.

Summary:

Constitutional action was lodged against the judgement of the Supreme Court in a procedure in which lower courts decided in favour of the private plaintiff but the Supreme Court found the defendant not guilty of defamation through press deliberately intended.

The constitutional action claimed a violation of the constitutional rights to dignity, reputation and honour (Article 35 of the Constitution).

The action was found to be justified and the case was returned for renewal of procedure.

The Court found that the disputed parts of the texts were not a scientific evaluation of the plaintiff's work, which by the nature of things could also contain negative opinions on it, but were an injurious enumeration of "labels" concerning his political opinions which violated the constitutional rights of the scientist to dignity, reputation and honour. The facts concerning to how many political parties, to which political parties, and at what time, the plaintiff was a member, illustrated only his political viewpoints, not his scientific opinions, and these facts cannot be used as an argument in challenging his scientific opus.

Languages:

Croatian, English.

Identification: CRO-1998-1-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.04.1998 / **e)** U-III-244/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 58/1998, 1342-1344 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Jurisdictional bodies – Supreme court.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
Fundamental Rights – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Judge, relief of duty / Independence / Impartiality / Disciplinary proceedings / Judicial Council / Telephone taping.

Headnotes:

Evidence illegally obtained is not admitted in court and disciplinary proceedings.

Summary:

A former president of the Supreme Court of Croatia claimed a violation of his constitutional rights during the proceedings in which he was relieved of his presidential and judge's duty. The Court, finding that the decision of the State Judicial Council was based on information obtained by invalid pieces of evidence, repealed the decision of the State Judicial Council and returned the case to the Council for renewal of proceedings. The invalid pieces of evidence were tapes of telephone conversations, the surveillance of which was conducted in connection with other persons, not the former president, and also, interrogation of a witness who, as a member of State Judicial Council, participated in the same disciplinary proceedings as a judge.

Languages:

Croatian, English.

Cyprus
Supreme Court

Summaries of important decisions of the reference period 1 January 1998 – 30 April 1998 will be published in the next edition, *Bulletin* 1998/2.

Czech Republic
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

- Judgments of the Plenary Session: 4
- Judgment of the chambers: 44
- Other Decisions of the Plenary Session: 4
- Other Decisions of the chambers: 363
- Other Procedural Decisions: 39
- Total: 454

Important decisions

Identification: CZE-1998-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 02.02.1998 / **e)** IV. ÚS 154/97 / **f)** The Relationship between the Right to Personality and the Right to Disseminate Information / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles – Weighing of interests.
Institutions – Jurisdictional bodies – Organisation – Members – Status.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Freedom of the written press.
Fundamental Rights – Civil and political rights – Right to respect for one's honour and reputation.
Fundamental Rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Fundamental rights, conflict / Statutory interpretation, constitutionality / Courts, authority and impartiality / Pictures, right.

Headnotes:

Paragraph 12.3 of the Civil Code provides that pictures of an individual may be taken and used without his consent in a suitable manner and under the condition that such is not in conflict with the individual's justified

interests. This statutory provision is not in conflict with the freedom of expression, as it is meant to harmonise the fundamental political right to information and its dissemination with another right with which, in certain situations, it can come into conflict, the right to the protection of the individual and to private life. Where these two fundamental rights, which are of equivalent status, come into conflict, it will always be a matter for independent courts to carefully consider, in light of the circumstances of each individual case, whether one right has not unjustifiably been given precedence over the other. The conclusions which they reach after weighing the evidence must be respected as an outcome expressing the independence of judicial decision-making.

Summary:

In an article concerning a murder trial, a weekly magazine placed, below the heading "The Best Medicine for Murder is Oxasepam" and the text "Drunken Bully Brutally Beats his Lover to Death", a picture of the judge hearing the case. It was a picture of a private nature, taken without the judge's permission when he was neither performing official duties nor wearing his robe. The trial court deemed the picture to bear no relation to the need to inform the public concerning the judge's work and, due to its position in relation to the heading and text, to suggest that the judge was a murderer, thus threatening his personal honour. Consequently, the magazine was ordered to pay the judge 100,000 KC in monetary damage for unjustified intrusion into personal rights.

The complainant argued that its actions did not exceed the bounds of respect for the authority and impartiality of the justice system and were not in conflict with the judge's justified individual interests. The Court held that, in view of the need to respect the status of the justice system as the guarantor of the values in a law-based state, it is always necessary for a person exercising his freedom of expression to very carefully weigh the appropriateness of the expressions and means employed. The Constitutional Court did not find the ordinary court's decision that the form, extent and manner in which such a photograph is used must always correspond to the end in mind, and that for each such use, the human dignity of the affected individual must always be maintained to be unconstitutional.

Languages:

Czech.

Identification: CZE-1998-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.02.1998 / **e)** I. ÚS 283/97 / **f)** Limitation Periods not applicable due to obstruction / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Courts.
Constitutional Justice – The subject of review – Court decisions.
Constitutional Justice – Procedure – Documents lodged by the parties.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

Keywords of the alphabetical index:

Proceedings, obstruction / Constitutional Court, powers / Time-limits observance.

Headnotes:

Pursuant to Article 87.1.d of the Constitution, the Constitutional Court has jurisdiction "over constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms." Since the Supreme Court forms a part of the system of ordinary courts, which are public authorities in the sense of the cited constitutional provision, then, beyond any doubt, it is within the Constitutional Court's jurisdiction to decide constitutional complaints against final decisions by the Supreme Court.

The three-month time limit prescribed by statute for a decision on a complaint of a violation of the law should, where a statute was violated to the defendant's benefit, serve as a limit on the State for the effective correction of a non-lawful final decision. Since the State itself has set this time limit, logically it follows that exceeding it can only come into consideration when such delay came about for reasons over which the State had no influence. Where the cooperation of the accused in the proceeding can in no way be compelled by the State, then it is reasonable and just that the due administration of justice not be jeopardised by circumstances entirely beyond the State's power to control, such as obstruction of the proceeding by the defendant and his counsel.

Summary:

The Supreme Court made a preliminary objection that the complaint was inadmissible. It stated its view that

the Constitutional Court is only authorised to hear a constitutional complaint to review a Supreme Court decision where the complainant submits, in conjunction with the complaint, a petition proposing the annulment of a statutory provision. A complainant is permitted to do this pursuant to § 74 of the Act on the Constitutional Court, but only where the provision formed the basis of the Supreme Court's decision which is claimed to have violated his fundamental rights. The Constitutional Court rejected this argument referring to the rather broad constitutional text, which makes quite clear that its jurisdiction includes the power to review ordinary court decisions for the constitutionality of their interpretation or application of a statutory provision and is not limited to abstract review of those statutory provisions.

Where the Minister of Justice considers that a decision in a criminal proceeding is contrary to the law, she is entitled, under the Criminal Procedure Code, to submit a complaint of a violation of the law to the Supreme Court, which, if it agrees with the Minister, can overturn the decision and return it for further proceedings. Where the contested decision was in favour of the accused, then in order to safeguard his legal certainty, the Criminal Procedure Code prescribes strict time limits for submitting (six months) and deciding (three months) such complaints.

In this case, the Minister of Justice submitted to the Supreme Court a complaint against a decision by the State Attorney to dismiss charges against the complainant. The Supreme Court agreed with the Minister and overturned the decision, but did so more than three months after receiving the complaint. The final decision was delayed because scheduled court dates had repeatedly to be postponed either due to the defendant's attorney excusing his absence on account of illness or due to the defendant changing attorneys immediately before a court date, thus necessitating a delay to allow new counsel to acquaint himself with the case. As the defendant was charged with a type of criminal offence for which he was required to be represented by an attorney, the Supreme Court was powerless to hold a hearing and decide the complaint without the defendant's attorney being present. The Supreme Court determined that it was beyond its power to decide sooner and that it had, in any case, observed the three month deadline because the limitation period does not run while the defendant and his attorneys are obstructing the proceeding.

Cross-references:

See judgment III. ÚS 337/97, decided 13 November 1997 and reported in *Bulletin* 1997/3 [CZE-1997-3-010], in which the Third Panel dealt with, and rejected, precisely the same preliminary objection made by the Supreme Court. See also judgment I. ÚS 131/93 of 1 April 1994, reported in the *Constitutional Court's Collection*, Vol. 1, no. 18, concerning jurisdiction of the Constitutional Court over ordinary court decisions, to which the Court made reference in this case.

In 1996 the Constitutional Court decided a similar case (judgment III. ÚS 83/96, reported at 293/1996 Sb. and in the *Constitutional Court's Collection* Vol. 6, no. 87), concerning the four-year maximum period of pre-trial custody. The defendant was convicted on the very last day but succeeded in his constitutional complaint in having that conviction overturned. The Constitutional Court took into consideration the fact that the defendant and his attorney had engaged in repeated obstructions, resulting in the loss of 29 days. Therefore, it decided that those 29 days could not count against the time limit and that to retain him in custody for another 29 days would not constitute a violation of the four year maximum. The Constitutional Court referred to that case in its reasoning in this case, and it stated that "the arguments made therein are of a more general validity so that it is possible to apply them as appropriate in the given case."

Languages:

Czech.

Identification: CZE-1998-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 04.03.1998 / **e)** I. ÚS 394/97 / **f)** Odour Samples as Evidence in a Criminal Proceeding / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Techniques of interpretation – Concept of manifest error in assessing evidence or exercising discretion.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Odour samples, evidentiary value.

Headnotes:

In accordance with its consistent jurisprudence, the Constitutional Court does not re-evaluate the evaluation of evidence made by ordinary courts. However, in circumstances where a judgment of conviction rests on a single piece of indirect (circumstantial) evidence which is, in addition, merely of a subsidiary or supporting character, and where the trial court refused to admit additional evidence offered by the defendant, the ordinary court has infringed the defendant's fundamental rights and basic freedoms, in particular those under Article 8.2 of the Charter of Fundamental Rights and Freedoms ("nobody may be prosecuted or deprived of his liberty except on grounds and in the manner specified by law") and Article 6.1 ECHR, because the manner in which it proceeded – convicting a defendant on the basis of a manifestly insufficient amount of admitted evidence – overstepped the bounds of constitutionality to an extreme degree.

Summary:

The complainant was convicted of the burglary of a particular apartment on the basis of a single piece of evidence. Six months after the robbery in question occurred, police spotted the complainant acting suspiciously near the same apartment, took him into custody, and took from him odour samples. As his odour sample matched the odour traces found in the apartment six months earlier, he was charged with the burglary. The trial court refused evidence proffered by the defendant (testimony of relatives as to his whereabouts at the time the burglary occurred) because it related to events occurring too long before the trial (2 years previously), but admitted police testimony as to his behaviour at the time of his arrest (also nearly two years previously). The trial court also refused to question further police officers so as to clarify inconsistencies in the testimony of the two policemen who testified. This manner of proceeding is clearly in contradiction with § 2.5 of the Criminal Procedure Code, which provides that "State authorities active in criminal proceedings shall proceed in such a manner as to ascertain the facts of the matter, about which there is no reasonable doubt, and to the extent necessary for decision in the matter. They shall, even without motion by the parties, just as carefully clarify evidence in the accused's favour as evidence to his detriment."

While the Constitutional Court does not in general question the reliability of odour tests, they are indirect (circumstantial) evidence of a merely supporting character and as such would need to be corroborated by additional evidence. The only conclusion that can be reached solely on the basis of the odour samples taken in this case is that, with the highest probability, the complainant was in the burglarised apartment at some (not more precisely specified) time. However, it cannot unequivocally and beyond all reasonable doubt be concluded with precision from the odour tests that it was the complainant who committed the criminal act of which he is accused.

Languages:

Czech.

Identification: CZE-1998-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 06.03.1998 / **e)** IV. ÚS 314/97 / **f)** The Limitation Period for Carrying out a Criminal Sentence / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Jurisdictional bodies – Procedure.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Sentence, carrying out / Health problems, convicted person.

Headnotes:

A court's decision to conduct proceedings subsequent to sentencing in a manner not explicitly prescribed by law, but which grants to the parties a wider possibility to assert and protect their rights, may result in the suspension (and consequent restarting) of the limitation period for the carrying out of a sentence. Such a measure, even though not explicitly prescribed in the Criminal Procedure Code, does not violate Article 8.2 of the Charter of Fundamental Rights and Freedoms which declares that "nobody may be ... deprived of his

liberty except on grounds and in the manner specified by law."

Summary:

Following final criminal conviction (27 June 1991) and issuance of the order to serve his sentence (9 September 1991), the complainant requested that, due to the condition of his health (psychological problems), the sentencing court delay ordering the carrying out of the sentence. After obtaining expert opinions indicating the complainant was fit to serve sentence, the court delayed its decision on the motion awaiting the results of the complainant's request for a pardon. Following a denial of the pardon, several subsequent hearing dates were cancelled due to the complainant's absence. On 14 November 1994, the court granted the State Attorney's motion that a decision should be delayed until findings on the current state of the complainant's health could be obtained, which occurred only on 13 March 1996. Following further postponement (due to the complainant's inability to attend) of the public hearing to decide his motion to delay carrying out of sentencing, the court turned down the motion in a public hearing held on 9 April 1997.

Paragraph 68.1 of the Criminal Act provides that a sentence cannot be carried out more than five years following the imposition of the sentence. §§ 68.3.a and 68.4 provide that the running of this limitation period is suspended (and in fact a new period begins) if the court takes measures leading to the carrying out of the sentence. These measures certainly include ordering the carrying out of the sentence and deciding on a motion to defer it. The Constitutional Court rejected the complainant's argument that such measures could not include, in addition, ones not explicitly provided for in law, such as the procurement of documentary evidence for decision on deferment or the ordering of public hearings on the deferment.

Languages:

Czech.

Identification: CZE-1998-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 02.04.1998 / **e)** III. ÚS 425/97 / **f)** The Binding Force of Constitutional Court Judgments / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Courts.
Constitutional Justice – Effects – Determination of effects by the court.
Constitutional Justice – Effects – Effect as between the parties.
Constitutional Justice – Effects – Influence on State organs.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Fundamental Rights – General questions – Basic principles – *Ne bis in idem*.
Fundamental Rights – Civil and political rights – National service.

Keywords of the alphabetical index:

Res judicata of Constitutional Court judgments / Constitutional Court judgments, binding effect / Constitutional Court judgments, disregard / Civilian service, evasion, punishment.

Headnotes:

According to Article 89.2 of the Constitution, enforceable decisions of the Constitutional Court are binding on all authorities and persons. Thus, such a decision is binding even on the Constitutional Court itself and as a consequence, in any further proceedings before it in which the same matter must be decided upon once again (even if in a divergent manner), that decision represents, in the sense of *res judicata*, a procedural obstacle that cannot be averted (§ 35.1 of Act no. 182/1993 Sb., on the Constitutional Court) and naturally bars any further review of the matter on the merits whatsoever. This bar extends as well to review which ensues from the Constitutional Court Plenum's adoption of a position pursuant to § 23 of Act no. 182/1993 Sb., which reads: "If in connection with its decision-making, a Panel makes a legal interpretation differing from the legal interpretation of the Court stated in an earlier judgment, it shall submit the issue to the Plenum for its consideration. The Plenum's determination is binding on the Panel in further proceedings." Therefore, the requirements arising from § 23 (in further proceedings) do not relate to a matter in which the Constitutional Court has already once decided.

In the present state of the law, the issue of the binding force of Constitutional Court judgments presents its share of difficulties, despite the fact that it represents the *conditio sine qua non* of constitutional review. Problems relating to the interpretation of that binding force, above all in relation to the jurisdiction of ordinary courts of any level, remain without clarification, both in theory and in practice, for a number of reasons. Reasons include the inconsistency of the procedural codes which, despite attention being drawn to this fact a number of times, do not take into consideration the jurisdiction (or the cassational authority) of the Constitutional Court. The result is that where the Constitutional Court annuls the decision of an ordinary court, the procedural codes do not prescribe the direct steps for subsequent proceedings in the same matter. Similarly, the insufficiently clear wording of the Constitution in relation to the binding force of constitutional judgments gives rise to disputes, for example, as to the consequences Constitutional Court judgments have (not those resulting from the statement of judgment, rather those which result from the reasoning contained in the opinion, etc.). The Constitutional Court is convinced, however, that all of the above-indicated controversies relate to the "absolute" binding force of Constitutional Court judgments (that is, the binding force even in unrelated matters), but by no means to the binding force of a judgment in relation to a specific matter already decided by the Constitutional Court in that judgment.

Summary:

The Supreme Court rejected on the merits a complaint which the Minister of Justice had submitted against a judgment convicting the complainant for the criminal offence of failing to report for civilian service (as a substitute for military service), even though he had previously been convicted of this criminal offence. The ordinary courts expressed the view that a person commits an additional criminal offence each time he fails to obey a conscription order, since his acts are not identical due to the fact that they occurred at a different time and place.

In contrast to this, the Constitutional Court has taken the position that if the Criminal Act defines the elements of the criminal offence of the failure to report for civilian service with the intention permanently to evade it, it follows from the element of "permanently" that a person can commit this criminal offence only once. Accordingly, on the first constitutional complaint in this matter, the Court annulled the Supreme Court decision and stated in its judgment that Article 4.1 Protocol 7 ECHR enshrines the principle *ne bis in idem*, which provides that "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and the penal procedure of that State". In the Czech Republic, this provision of the European Convention of Human Rights is, in accordance with Article 10 of the Constitution, directly effective and takes precedence over statutes. Thus, it is necessary to apply it.

Nonetheless, in subsequent proceedings on referral back to the Supreme Court, it confirmed the correctness of its previously expressed conclusion of law, took the same decision as before and proposed that the Constitutional Court should change its position on the matter. In view of the generally binding force of Constitutional Court judgments, however, in the subsequent constitutional complaint against this second Supreme Court judgment, the Constitutional Court had to annul this decision as well.

Supplementary information:

On 9 February 1998, the Fourth Panel issued a similar judgment. On a previous occasion the Constitutional Court overturned, as a violation of the complainant's fundamental rights, a decision of the Superior Court in Prague. On referral back to the Superior Court, it rejected the binding effect of the Constitutional Court decision by "in essence merely reproducing" its earlier decision. In the judgment given on the complainant's second complaint, the Constitutional Court then annulled the Superior Court's second decision as a violation of the complainant's right to legal protection.

Cross-references:

The Constitutional Court has on many previous occasions dealt with the substantive question at issue and come to the conclusion that a second prosecution in such circumstances violates the constitutional principle *ne bis in idem*. See judgment IV. US 81/95 of 18 September 1995, reported in the *Constitutional Court's Collection* at Vol. 4, no. 50 and in the *Bulletin* 1995/3 [CZE-1995-3-010]. See also the original Constitutional Court decision in this complainant's matter, judgment I. US 184/96 of 20 March 1997 (reported in the *Constitutional Court's Collection* at Vol. 7, no. 32), judgment IV. US 82/97 of 28 August 1997, judgment I. US 322/96 of 14 October 1997 (which was reported in the *Bulletin* [CZE-1997-3-009]), and judgment I. US 400/97 of 4 March 1998.

Languages:

Czech.

Denmark
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 1998 – 30 April 1998.

Estonia
Supreme Court

Important decisions

Identification: EST-1998-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 05.02.1998 / **e)** 3-4-1-1-98 / **f)** Review of the constitutionality of the requirements of knowledge of the Estonian language / **g)** *Riigi Teataja I* (State Gazette), 1998, no. 14, Article 230 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Democracy.
General Principles – Separation of powers.
General Principles – Certainty of the law.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

Electoral qualifications / Legislative delegation / Language, official / Municipality, elections.

Headnotes:

The enactment of a requirement of knowledge of the Estonian language for candidates to the *Riigikogu* and to the representative bodies of local government is justified under Articles 6, 52.1 and 51.1 of the Constitution. However, the *Riigikogu* Election Act and the Elections to Local Government Councils Act, respectively, as constitutional laws referred to in Article 104.2 of the Constitution, are the only laws designed to regulate matters concerning the elections to the *Riigikogu* and to the local governments, and electoral qualifications in particular. References to ordinary laws or delegation for enactment of executive regulations in constitutional laws are not permitted in matters which essentially belong to the sphere of relevant constitutional laws.

Summary:

The *Riigikogu* passed the Language Act and the State Fees Amendment Act on 19 November 1997. The President refused to sign the law, since he considered that the Act contradicted Articles 4, 10 and 11 of the Constitution. Under the new wording of Article 5.1 of the Language Act, the enactment of the terms of the requirement of knowledge of the Estonian language for candidates to the *Riigikogu* and to the representative bodies of local government was delegated to the Government. According to the President, the Act would grant the Government disproportionally broad powers in setting the requirements of knowledge of the Estonian language and in evaluating the language knowledge of the representatives already elected. Article 5.2 of the Act, enacting language knowledge requirements for several categories of employees and entrepreneurs, was found to contradict Articles 10 and 11 of the Constitution for being too general and allowing the Government arbitrarily to impose restrictions and duties upon the persons involved.

The *Riigikogu* passed the Act again, unamended, and the President requested the Supreme Court to declare the Act unconstitutional.

The Constitutional Review Chamber of the Supreme Court found that the preamble of the Constitution and several relevant articles state that one of the duties of the State is to preserve the Estonian nation and culture through the ages. Preservation of the Estonian nation and culture is not possible without the Estonian language. Thus, Articles 6, 52.1 and 51.1 of the Constitution, concerning Estonian as the official (State) language, the official language of State agencies and local governments, and everyone's right to address State agencies, local governments, and their officials in Estonian and to receive responses in Estonian, justify the enactment of requirements of knowledge of the Estonian language for the candidates to the *Riigikogu* and to the representative bodies of local governments as an electoral qualification.

However, decisions connected with electoral rights should be made by the legislature, which should also stipulate provisions concerning the elections. This is the competence of the *Riigikogu* and cannot be delegated to the executive. Moreover, since the election laws are constitutional laws under Article 104.2 of the Constitution, the election laws cannot make references to other laws in questions which fall into their sphere of regulation.

Article 5.2 of the Language Act, as amended, stated that the Government shall stipulate the requirements of knowledge of the Estonian language for the following: public servants; employees of institutions, commercial undertakings, non-profit associations or foundations and sole proprietors communicating with individuals in the course of business; foreign experts and specialists. The President of the Republic did not contest this article with regard to public servants, but noted concerning the other subjects that the requirements are too vague and allow the Government arbitrarily to establish restrictions and obligations upon individuals. In this regard the Supreme Court held that if the delegation is general, but is not directly contrary to the Constitution, then the mere allegation or possibility that the Government may exercise the delegation in an unconstitutional manner does not cause the delegation to be considered as unconstitutional. The Government, too, is under an obligation to comply with the Constitution and must interpret the delegation norm in compliance with the Constitution. The Supreme Court noted, however, that vagueness of competence harms general legal certainty and creates danger of harm to the constitutional principles of the state and to everyone's rights and freedoms. With reference to its decision of 20 December 1996, the Chamber stated that the delegation norm must clearly indicate the purpose, content and scope of the delegated legislation, so that everyone can understand which governmental regulations may be issued.

Cross-references:

Decision 3-4-1-3-96 of 20.12.1996, *Bulletin* 1996/3 [EST-1996-3-003].

Languages:

Estonian.

Identification: EST-1998-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 23.03.1998 / **e)** 3-4-1-2-98 / **f)** Review of constitutionality of the Customs Tariffs Act / **g)** *Riigi Teataja I* (State Gazette), 1998, no. 31/32, Article 432 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Certainty of the law.
General Principles – Legality.
Institutions – Legislative bodies – Relations with the executive bodies.

Institutions – Public finances – Budget.
Institutions – Public finances – Taxation.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax relation / Custom tariff / Tax rate / Custom rate / Legislative delegation.

Headnotes:

According to Article 113 of the Constitution, state taxes, duties, fees, fines and compulsory insurance payments shall be provided for by law. The constitutional requirement that the national State taxes shall be provided for by law includes tax rates, i.e. tax rates shall also be provided for by law.

Summary:

The Legal Chancellor made a proposal to the *Riigikogu* to bring Article 15.3 and 15.5 of the Customs Tariffs Act into conformity with Article 113 of the Constitution on 12 December 1997. The *Riigikogu* did not support the proposal of the Legal Chancellor and the latter proposed to the Supreme Court to declare the disputed articles of the Customs Tariffs Act invalid.

According to Article 15.3 of the Customs Tariffs Act, the applicable customs rates from zero to maximum, laid down in the appendix of the Customs Tariffs Act, were to be enacted and cancelled by the Government. Under Article 15.5 of the same act, special customs rates were also to be enacted and cancelled by the Government.

The Constitutional Review Chamber of the Supreme Court held that the term "provided for by law" in Article 113 of the Constitution includes both establishment and enactment of the tax by law. The legal relation of taxation can come into being only if the object of taxation, the tax (customs) rate, the taxpayer, the place and date or period of payment and the procedure of payment of the tax are determined.

The requirement of Article 113 of the Constitution that the state taxes shall be provided for by law means that also the tax rates must be provided for by law. This conclusion is supported by the State Budget Act which is a constitutional law (referred to in Article 104.2.11 of the Constitution) and with which the Customs Tariffs Act must be in compliance. Under Article 3.1.1 of the State Budget Act, the revenues of the State budget are incomes from state taxes according to the taxation laws.

The Supreme Court concluded that the delegation of enactment of the customs duties and the customs tariffs to the Government by the Customs Tariffs Act contradicts Article 113 of the Constitution. Such delegation also violates the principle of democracy and the rule of law, since it endangers everyone's fundamental rights, legal certainty and legality of the public administration.

Cross-references:

Decisions III-4/A-5/94 of 30.09.1994, *Bulletin* 1994/3, p. 228 [EST-1994-3-004], and 3-4-1-3-96 of 20.12.1996, *Bulletin* 1996/3 [EST-1996-3-003].

Languages:

Estonian.

Identification: EST-1998-1-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 14.04.1998 / **e)** 3-4-1-3-98 / **f)** Review of constitutionality of the Amnesty Procedure Act / **g)** *Riigi Teataja I* (State Gazette), 1998, no. 36/37, Article 558 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Head of State – Powers.
Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Relations with the Head of State.
Fundamental Rights – Civil and political rights – Right to administrative transparency.

Keywords of the alphabetical index:

Internal regulation / Legislative competence / Amnesty / Clemency / Administrative procedure.

Headnotes:

The legislature is empowered to regulate release from punishment, including clemency, despite the fact that the Constitution does not foresee the enactment of the Amnesty Procedure Act *expressis verbis*.

The branches of State power and constitutional institutions shall be autonomous when acting within the competence granted to them explicitly by the Constitution. The decisions of the commission working with the President in matters of release from punishment and commutation shall not be binding on the President. The President shall be free to choose his advisers himself.

Summary:

According to Article 78.19 of the Constitution, the President of the Republic shall, by way of clemency, release or reduce the sentence of convicted offenders at their request. In order to regulate such matters, the *Riigikogu* adopted the Amnesty Procedure Act on 22 January 1998 which the President refused to sign. According to the President, the Act neither arose from the Constitution nor did it comply with the Constitution. The President has the right to independently regulate matters concerning release and commutation, proceeding from Articles 78.19 and 4 of the Constitution, the latter of which declares the principle of separation of powers. Article 5 of the Amnesty Procedure Act provided for a commission working with the President in matters of release from punishment and commutation and determined the membership of the commission, despite the fact that the Constitution did not foresee the creation of such an advisory organ. According to Article 10.1 of the Amnesty Procedure Act, the President had to pass a positive or negative decision upon the request for release or commutation of a convicted offender only after receiving the proposal of the commission. Under Article 8.2 of the Act, the commission does not deal with the requests if a previous request of the same offender has been submitted less than one year ago and there are no new circumstances. The President found that Articles 10.1 and 8.2 taken together restrict his right in Article 78.19 of the Constitution, since in this case the commission does not pass the request for release or commutation to the President at all.

The *Riigikogu* passed the Act again, unamended, and the President regulated the Supreme Court to declare the Act unconstitutional. The Constitutional Review Chamber of the Supreme Court found that it could not be concluded that the *Riigikogu* would not have the power to regulate release from punishment, including clemency, from the fact that the Constitution does not provide *expressis verbis* for enactment of the Amnesty Procedure Act. Article 78.19 of the Constitution and Article 49 of the Criminal Code grant a convicted person the subjective right to submit to the President a request for release or commutation. Since Article 46 of the Constitution gives everyone the right to address State agencies, local governments and their officials with memoranda and petitions, and states that the procedure for responding shall be provided by law, it is reasonable to conclude that the procedure of release or granting commutation for convicted offenders should also be regulated by a law. Constitutionally, release or granting commutation is, firstly, an administrative decision, and secondly, a procedure composed of several steps. Both the court procedure, and the basic principles of administrative procedure shall be regulated by law.

The Supreme Court also found that the branches of State power and constitutional institutions shall be autonomous when acting within the competence granted to them explicitly by the Constitution. They are independent and competent to enact the procedures for their respective actions themselves, as far as this has not been explicitly granted to some other constitutional institution (to the *Riigikogu* in the present case) by the Constitution. The right to independent regulation of matters includes only the competence to enact internal rules or the internal procedures for the office or institution.

The decision of the commission shall not be binding on the President and the commission shall not prevent requests for release or commutation from reaching the President. Articles 10.1 and 8.2 of the Amnesty Procedure Act provide that some requests containing no new circumstances shall not reach the President, thus restricting, in violation of Article 78.19 of the Constitution, the President's power to release or grant commutation.

The President shall be free to choose his advisers himself, thus stipulation of the membership of the commission by the Amnesty Procedure Act violates Articles 78.19 and 65.16 of the Constitution by restricting the President's right to independent regulation of issues.

Justice Jüri Põld delivered a separate opinion. He agreed with the final conclusion of the decision that the Amnesty Procedure Act contradicted the Constitution, and also with most of the reasoning. He did not agree with the reasoning that it was merely the determination of the membership of the commission working with the President in matters of release from punishment and commutation by the law which was unconstitutional. According to Justice Põld, the very existence of a provision stating that there shall be such commission with the President is unconstitutional, regardless of who determines its membership, since a legal provision of this kind gives the President no choice whether to form the commission or not.

Cross-references:

Decision III-4/A-3/94 of 18.02.1994, *Bulletin* 1994/1, p. 19 [EST-1994-1-002].

Languages:

Estonian.

Finland

Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 1998 – 30 April 1998.

France
Constitutional Council

Statistical data

1 January 1998 – 30 April 1998

291 decisions including:

- 2 decisions on the review of laws submitted to the Constitutional Council pursuant to Article 61.1 of the Constitution for the purposes of ascertaining their constitutionality
- 1 decision on the review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution for the purpose of ascertaining their constitutionality
- 1 decision downgrading a law, taken pursuant to Article 37.2 of the Constitution
- 287 decisions on electoral matters taken pursuant to Article 59 of the Constitution, including 245 disqualifications for one year; 5 decisions to terminate proceedings; 1 rectification of a factual error; 35 dismissals; and 1 annulment and disqualification
- 3 decisions on the internal working of the Constitutional Council should be noted: triennial appointment of three new members of the Constitutional Council

Important decisions

Identification: FRA-1998-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 19/02/1998 / **e)** 98-396 DC / **f)** Organic Law on the emergency recruitment of judges and amending the conditions of recruitment of special duty Appeal Court judges / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette of the French Republic – Acts and Decrees), 26.02.1998, 2976 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Institutions – Jurisdictional bodies – Organisation – Members – Status.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Independence.
Fundamental Rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Judicial authority, independence / Judiciary, access.

Headnotes:

The conditions of entry to the judiciary, including the number and level of qualifications that judges require, must be such as to guarantee both the quality of those recruited and the independence of the judicial authority.

Certain principles in particular must be respected: not only the principle of the independence of the judiciary and the stipulation in Article 64 of the Constitution that magistrates may not be removed from office, but also the principle that public offices and employment are open on an equal basis to all "without any discrimination other than that based on merit or talent" (Article 6 of the Declaration of the Rights of Man and the Citizen of 26 August 1789).

Summary:

In order to lighten the workload of the courts and address the shortage of judges, the government passed an organic law providing for the emergency recruitment of judges and also extending recruitment arrangements for temporary judges, already provided for by an organic law of January 1995 which was the subject of Decision no. 94-355 DC, *Bulletin* 1995/1 [FRA-1995-1-001].

The status of the judiciary is determined by organic laws, which must be submitted to the Constitutional Council for scrutiny before their promulgation. Given that the question here concerned "lateral" avenues of recruitment to the judiciary, the Council broadly accepted the proposed arrangements, while noting that they must observe the constitutional requirements mentioned above.

In general, the organic law under scrutiny did observe those requirements but, in its decision, the Constitutional Council included three provisos on the interpretation of the organic law in subsequent implementing regulations, specifically with regard to: the competitive recruitment examinations designed to test applicants' legal knowledge; arrangements for monitoring temporary magistrates' decision-making ability; and the possibility that not all the posts advertised might be filled.

Languages:

French.

Georgia
Constitutional Court

Important decisions

Identification: GEO-1998-1-001

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.01.1998 / **e)** 2/59-8 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Jurisdictional bodies – Ordinary courts.
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:

Entrepreneurship / Limited liability companies / Share withdrawal.

Headnotes:

Contributions of the company partners in the common stock of a limited liability company are the property of the latter, once the company has obtained the status of a legal person. The company partners participate in the management of the property of the company and its activities in proportion to their share in the common stock. A company partner may withdraw his or her share and appeal to court against the partners in the company within the limits of law.

Summary:

Share holders of a limited liability company appealed to the Constitutional Court asserting the unconstitutionality of certain articles of the Entrepreneurship Law, considering that the disputed norms deprived them of the constitutional right to property since they could not withdraw their share from the common company stock. Moreover courts of ordinary jurisdiction rejected their civil law claims against the decisions of the company partners refusing their request on share withdrawal. The claimants contemplated that the courts had unreasonably invoked scientific-practical commentaries of legal scholars while deciding upon their cases.

The Constitutional Court held that contributions of company partners in the common stock of a limited liability company are the property of the company itself once it has obtained the status of a legal entity. A limited liability company is the sole owner of the company capital. The partners participate in the management of the company and receive benefits from it in proportion to their contribution.

The applicants complained that contributions might be withdrawn from the common stock of the company only with the consent of the meeting of partners. However, the Entrepreneurship Law does not allow the company partners to elaborate a statute which would empower the meeting of the company partners to decide upon share withdrawal. Meanwhile Article 15.2 of the Law entitles limited liability company partners to appeal against decisions of the company partners within two months from the date of the drafting of the minutes of the meeting.

As regards the application of scientific-practical commentaries on the Enterprenuership Law by courts of ordinary jurisdiction, the Constitutional Court held that legislation does not empower it to scrutinise this issue.

Languages:

Georgian.

Germany
Federal Constitutional Court

Statistical data

1 January 1998 – 30 April 1998

- 25 decisions by a panel *(Senat)*
  - all judgments concerning individual constitutional complaints
  - 2 cases dealt with (taking into consideration the joinder of cases)
- 1257 rejecting decisions of the chambers *(Kammern)*
  - 12 cases dealt with (taking into consideration the joinder of cases)
- 21 granting decisions of the chambers
  - 2 cases dealt with (taking into consideration the joinder of cases)
- 1701 new cases

Important decisions

Identification: GER-1998-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 14.10.1997 / **e)** 1 BvL 5/89 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
General Principles – Social State.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Economic, social and cultural rights – Right to be taught.
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:

Education accompanying gainful employment / Education, promotion / Exclusion provisions / Federal Law, promotion

of education / Loan / Housing subsidy, right / Public funds / Social services / Student.

Headnotes:

Treating gainfully employed persons differently in respect of housing subsidies according to whether or not they are studying cannot be justified and thus violates the principle of equality.

Summary:

The case concerned the question whether persons studying in addition to holding gainful employment, whose situation in life is determined by their professional activities, may be excluded from the receipt of housing subsidy.

In the early sixties, after relaxation of the controlled housing economy, so-called rent subsidies were introduced to counter increasing rents and to assure adequate housing especially for low-income families with children. Rent subsidies were later granted as housing subsidies. In the period to follow, housing subsidies were granted as a financial aid by the public authorities to tenants to finance their cost of accommodation. Besides this, a trainee could be granted financial aid during the times of his/her training and further education according to the Federal Law concerning the promotion of education. To avoid double subsidies of housing according to the Housing Subsidy Law on the one side, and the Law concerning the promotion of education on the other, the relation between the granting of housing subsidy and education promotion was legally redefined several times to the effect that the Housing Subsidy Law, after its last amendment in 1992, was not applicable to households exclusively comprising family members entitled to promotion of education benefits according to the Federal Law, no matter whether an application for the granting of educational assistance had been filed or not.

On this legal basis, the application for housing subsidy by a part-time nurse, who was studying as well as working but had not applied for benefits according to the Federal Promotion of Education Law although she was in principle eligible for such benefits, was refused. When this student filed an action against this decision, the competent administrative court asked the Federal Constitutional Court to review whether § 41.3.1 of the Housing Subsidy Law was compatible with Article 3.1 of the Basic Law (principle of equality), in so far as it excluded from the receipt of housing subsidies in particular fully trained, gainfully employed persons above 30 years of age, who are, alongside their job, undertaking further education which qualifies for educational promotion benefits.

According to the First Panel, the provisions of § 41.3.1 of the Housing Subsidy Law were, according to a constitutional interpretation, compatible with the Basic Law to the extent submitted for review, including its amendment in 1992.

The exclusion from the receipt of housing subsidies disadvantages those students who, besides gainful employment which is in fact the major factor determining their situation in life, are undertaking further education which qualifies for educational promotion benefits, as compared with gainfully employed persons entitled to housing subsidies who are not studying besides their job.

On the one hand, the test of need according to the Promotion of Education Law is stricter than according to the Residence Subsidy Law. On the other, accommodation benefits as part of the promotion of education are granted exclusively as a loan, whereas housing subsidies according to the Housing Subsidy Law are non-repayable.

This unequal treatment is not justified:

There is no sufficient reason to treat gainfully employed persons differently according to whether or not they are studying. Such discrimination cannot be justified by the demand for equal treatment of all students. As compared with other students, gainfully employed persons studying alongside their job have a special status. Their situation in life is determined by their professional activities. Their need for accommodation – in contrast to the usual situation of students – is not characterised by the limited duration of education and, therefore, not "temporary".

The reference of this group of persons to the system of the Federal Promotion of Education Law, which grants accommodation subsidies as a loan, also cannot be justified by the argument that these persons improved their professional prospects and chances of higher earnings by the completion of the State-promoted education and hence could be burdened by the cost of education and accommodation. It is true, though, that in the case of other students, this consideration is sufficient reason for burdening them with the disadvantages resulting from granting promotion benefits as a loan. For persons including the plaintiff of the initial procedure, however, the prospect of greater earnings is not so important a reason as to justify their reference to the Federal Promotion of Education Law according to which housing benefits are also granted on a loan basis only.

The unequal treatment is equally unjustifiable according to the argument that duplication in the granting of benefits

should be avoided. The provisions of the Housing Subsidy Law, which are the subject of the present review, exceed this intention, as they completely exclude persons such as the plaintiff of the initial proceedings from the law's scope of application and refer them to the system of the Promotion of Education Law, which grants them no or only small benefits to pay for accommodation.

The provisions which are the subject of the review may be interpreted in such a way, however, that they do not violate Article 3.1 of the Basic Law.

The provisions exclude from the receipt of housing subsidies those persons who are entitled to benefits according to the Promotion of Education Law. This allows the interpretation that the housing subsidy must be granted if at least one precondition for entitlement to benefits according to the Federal Promotion of Education Law is lacking. In the Court's view, a precondition could be lacking indeed when an application for the granting of educational promotion benefits had not been filed. If interpreted in this way, the provisions have not violated the principle of equality of Article 3.1 of the Basic Law at least for the group of persons concerned here, including the plaintiff of the initial proceedings. It was at the discretion of the persons concerned to avoid unequal treatment by refraining from filing an application for benefits according to the Federal Promotion of Educational Law. In the future, however, this interpretation is to be excluded, as the legislator has amended the provisions of § 41.3.1 of the Housing Subsidy Law as of 1 August 1992, with the effect that the mere lack of an application for educational promotion benefits does not lead to the applicability of the Housing Subsidy Law. This does not affect the possibility of a constitutional interpretation of the Act's previous version as valid until 31 July 1992.

Languages:

German.

Identification: GER-1998-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 16.12.1997 / **e)** 1 BvL 3/89 / **f)** / **g)** / **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 – Right to social security.

Keywords of the alphabetical index:

Welfare assistance, right / Pension / Social security pension insurance scheme / Post-war period / *Trümmerfrauen* / Raising / Child-raising, time / Social welfare benefits / Material grounds / Education, duration / Deadline / Waiting time / Deduction / Age limit / Old age, provision.

Headnotes:

The principle of equality according to Article 3.1 of the Basic Law is not violated by the fact that for mothers born in 1921 and later, but not for mothers born before 1921, pensions for periods where children were being raised are deducted from social welfare payments.

Summary:

As of 1 January 1986, the social security pension insurance scheme has been crediting those periods during which mothers, in order to raise their children, did not pay contributions to the social insurance fund. Beneficiaries of this regulation (*Hinterbliebenenrenten- und Erziehungszeiten-Gesetz = HEZG;* Widows' and Surviving Dependants' Pension and Periods of Child-Raising Act), however, were only those mothers (and also fathers) born after 31 December 1920. For mothers born before this date, also known as *Trümmerfrauen,* corresponding benefits were introduced by a law enacted on 12 July 1987 (*Kindererziehungsleistungs-Gesetz = KLG;* Child-Raising Benefits Act) which also regulated the relation of these specific child-raising benefits to other social security benefits.

It is because of this different legal development that for mothers (and fathers) born in 1921 and later, those parts of their pension acquired for periods in which children were being raised according to the *HEZG* have the effect of reducing social welfare benefits, while for mothers born before 1921 corresponding provisions of deduction do not exist.

The complainant of the initial proceedings – a woman born in 1922, mother of three children – has, since 1975, received supplementary payments for subsistence, according to the Federal State Welfare Assistance Act. In addition, she was paid disability benefit by the Federal

Insurance Office for Salaried Employees. The monthly total of social welfare benefit she received resulted from the fact that the amount to which she was entitled according to the Social Welfare Assistance Act was partly covered by her disability pension.

When in 1987 the disability pension was changed into an old age pension and an additional 31 calendar months for the raising of three children were credited, with pension-increasing effect, the amount of disability pension to be paid increased. With regard to this increase in her pension, the defendant reduced the amount of social welfare benefits she received by exactly the same amount, to the effect that the complainant's emoluments remained the same as before.

The court of first instance regarded this regulation as unconstitutional because it violated the principle of equality. It therefore suspended proceedings and submitted the rules to the Federal Constitutional Court for review.

According to the First Panel of the Federal Constitutional Court, the rules leading to unequal treatment of mothers born before and after 1921 are justified by material grounds and hence constitutional.

Mothers born before 1921 had already reached the age limit of 65 years when the *HEZG* came into force in January 1986. Their already completed pension biography could not have been reopened at reasonable expense. Furthermore, they had no chance any more of filling gaps in their pension biography by paying voluntary contributions, because in their cases, the final insurance contingency had already occurred.

From the constitutional point of view, moreover, the regulations concerning mothers born before 1921 (*KLG*) and those concerning mothers born in 1921 and later (*HEZG*) should be viewed together. On some points, the KLG is more favourable (advantaging persons exempt from compulsory insurance; no tax on child-raising benefits); on others, the *HEZG* is more favourable (adoptive mothers, stepmothers and foster mothers and fathers are also eligible for benefits; child-raising pensions are transferable to dependants).

If looked at in this way, the deduction from the social welfare benefits to which mothers born in 1921 and later are entitled of the part of the pension allocated for the raising of children is not of such importance as to justify an isolated constitutional evaluation in the light of Article 3.1 of the Basic Law.

At the same time, the extraordinary burden of the especially hard wartime and postwar period on those born before 1921 was to be recognised. For them, the need for social welfare assistance was, typically, more likely because the war and the after-war period had rendered it especially difficult for them to acquire pension rights. The age groups which came after them could be assumed by the legislator to profit increasingly from the propitious development of the Federal Republic of Germany.

Unequal treatment, however, is also justified by the legislative goal of simplifying the administrative proceedings for *KLG* benefits as far as possible. In the case of mothers born before 1921 no more than the inevitably necessary correspondence could and should be expected in view of their old age. A deduction of the child-raising pension from other social welfare benefits would have compromised this goal.

Languages:

German.

Identification: GER-1998-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 17.02.1998 / **e)** 1 BvF 1/91 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
General Principles – Public interest.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.
Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

General freedom of action / General personal right, limitation / Television reporting / Television broadcasting, right / Legislative power / Interest in information /

Information monopoly / Short communications, free transmission / Correction of rules / Right of exploitation / Freedom of economic action.

Headnotes:

The right to telecast short communications according to § 3.a *WDR-G/LRG NW* (Broadcasting Act of the North Rhine-Westphalia *Land*) is compatible with the Basic Law. However, the use of this right free of charge in professionally organised events violates Article 12.1 of the Basic Law. In regulating fees, the legislator has to make sure that the right to telecast short communications is in principle accessible to all television corporations.

Summary:

With regard to the acquisition of the exclusive rights to telecast important public events (especially sports events) by individual television stations, the *Länder* have agreed to allow free transmission of short communications on events which are of general interest but were telecast in full length by one station only. By this measure, the *Länder* sought to prevent gaps in supply for television viewers. In 1987, corresponding provisions were included into the Broadcasting Treaty (*Rundfunkstaatsvertrag*) and subsequently transferred to the statutes of the *Länder*. North Rhine-Westphalia included the provisions in its statutes governing broadcasting in 1991.

The provisions of North Rhine-Westphalia correspond to those on which the minister-presidents of the *Länder* had agreed in 1987; at present, they are part of the Broadcasting Treaty (*Rundfunkstaatsvertrag*). The right to the free transmission of short communications hence exists nationwide.

In June 1991, the Federal Government submitted a petition to the Federal Constitutional Court for review of the legal provisions. The Government sought a declaratory statement that the provisions contained in the Broadcasting Act of North Rhine-Westphalia were unconstitutional and void. In the Government's opinion, the provisions violate Article 14.1 of the Basic Law (guarantee of property), Article 12.1 of the Basic Law (freedom of profession) and Article 2.1 of the Basic Law (general freedom of action) as well as the legislative competence of the Federation (Articles 71 and 73.9 of the Basic Law).

The Federal Constitutional Court, however, considers the provisions concerning 'short television communications' to be essentially constitutional; according to the First Panel, it is only the free nature of the short communications on professionally organised events that affects the freedom of the profession. To this extent the legislator is obliged to provide for a constitutional regulation within 5 years. Pending its adoption, the provisions objected to shall remain applicable.

North Rhine Westphalia was authorised to adopt the regulation as it was not a matter of copyright but of broadcasting law and thus fell under the legislative competence of the *Länder*.

The regulation objected to interferes with the basic right to the freedom of profession. It is true that it applies to so many kinds of political, cultural, entertainment and sports events that the proportion of those which are professionally organised cannot be determined exactly. However, as today large sports events in particular are usually organised and exploited professionally, there is no denying that the regulation indeed has some tendency to regulate the profession.

However, this interference is justified – except in the case of the free transmission of professionally organised events.

The regulation objected to is founded on sensible considerations concerning the public interest. It is to assure sufficient, nationwide information on events of general interest. All television stations, furthermore, should be in a position to report about important events independently in their own programmes. This will also provide the preconditions for broadcast information to come not from one source only, but from different ones, and for different points of view, observations and interpretations to be shown.

This reference to the public interest is not irrelevant because the coverage provided by large private television stations has in the meantime become nearly as wide as that provided by the public broadcasting corporations. The danger that information may not be generally accessible, for one thing, may arise also when prominent events will in the future be broadcast only by the medium of pay television and so will be accessible to part of the television audience only. It is, in the second place, a legitimate interest of all television corporations to report on events of great informative value to the public. In doing so, they meet a legitimate expectation of television viewers that they will obtain information on events of special importance on their preferred or selected station.

This reference to the public interest is underlined by the significance of the constitutional guarantee of broadcasting freedom in Article 5.1.2 of the Basic Law. Information, in the sense of the classical duties of broadcasting, comprises information on all spheres of life including prominent sports events. The importance of such events

is not limited to their entertainment value. Sports provide possibilities of identification on the local or national level and starting points for a wide communication among people. Comprehensive reporting, therefore, will always have to include sports events.

A monopoly on reporting would compromise the aim of free forming of opinions, because it would encourage a certain uniformity of information. The freedom of broadcasting guaranteed by the Constitution aims at plurality in the transmission of information, because information transmitted by the media does not simply reflect reality, but is always the result of processes of selection, interpretation and presentation, the impact of which can be reduced only if there exist competing patterns of selection, interpretation and presentation. The potential for one opinion to predominate is, therefore, reduced not only by taking precautions against a concentration at the level of the organisers, but also by taking adequate measures against information monopolies. Complete commercialisation of information of general importance or general interest, which would allow the purchaser of the exploitation rights to use them at his discretion and to exclude or restrict third parties, would not comply with the goals of the freedom of broadcasting.

However, the regulation objected to restricts the freedom of profession inordinately in so far as it provides for free communication on professionally organised events.

Other legal provisions governing professions with obligations to perform or tolerate differ from the provisions on short communications in that the proceeds from the professional performance are not only to the public benefit, but also to the benefit of the competitors of the television corporation which was contractually granted the rights of first exploitation. The duty to provide the possibility of short communications free of charge is not in adequate proportion to the object of legal protection which the regulation is intended to secure. It imposes too strong a burden on the organisers of the event. Television corporations that benefit from the regulation can be expected to pay adequate fees. The amount of fees must not be placed at the organiser's discretion, however. The legislator must provide regulations ensuring that the right to short communications is not eroded by excessive fees, but remains, in principle, accessible to all television corporations. The constitution does not prescribe the manner in which the different concerns are to be balanced in compliance with the purpose of the regulation.

As far as the time of telecasting the short communications is concerned, the provisions of the North Rhine-Westphalian Broadcasting Act, if interpreted in conformity with the Constitution, are compatible with the freedom of profession.

The organisers and purchasers of exploitation rights which are not free of charge would be unreasonably disadvantaged, however, if those who are conceded the right to broadcast short communications could telecast their news during or immediately after the event, while the organisers and contractually authorised television corporations, in the interest of a large audience, have agreed to observe a waiting period between the conclusion of the event and its telecast.

Under these circumstances, a constitutional interpretation of the provisions seems admissible, even mandatory, according to which the right to short communications must not be exercised before the contractual right to telecast, if the holder of the contractual rights has to observe a waiting period.

In so far as the events that are the subjects of brief communications are not organised professionally, the regulation of § 3.a *WDR-G/LRG* is constitutional. It does not offend against the freedom of general, especially economic action guaranteed in Article 2.1 of the Basic Law.

In contrast to professional organisers, there are no grounds to suppose that non-professionals organising such events are burdened in an intolerable manner.

The partial incompatibility of the free transmission of short communications with the Basic Law does not void the challenged regulations. The provisions, on the contrary, may be further applied pending correction by the legislator. This follows from the fact that the legal situation if there were temporarily no right to the free broadcasting of short communications would correspond less to the constitutional intentions than would the continuing validity of the present, essentially constitutional regulation for a limited period of time.

For the correction of the provisions, the legislator is to be conceded a period of five years starting at the date of the judgement's promulgation. This period seems necessary in view of the lengthy legislative processes involved (amendment of the treaties of all 16 *Länder*). This period will also give the legislator the chance to take into account those changes which are occurring in the field of television, mainly because of the transition to digital techniques, and which may gain importance for the constitutional aspects of the right to short communications. If a new regulation does not come into force within the period of 5 years, the courts may in the meantime settle disputes on the amount of fees for the

telecasting of brief communications according to the arguments submitted.

Languages:

German.

Identification: GER-1998-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.03.1998 / **e)** 1 BvR 178/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles – Social State.
General Principles – Proportionality.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Social security.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Gender.
Fundamental Rights – Civil and political rights – Equality – Affirmative action.

Keywords of the alphabetical index:

Fees, amount / General freedom of action / Fees, graduated / Contributory fee / Family income, criteria for fees / Cost recovery, principle / Nursery school, fees, graduation.

Headnotes:

Fees charged to parents whose children are attending a nursery school may in principle be graduated according to the income of families.

Summary:

The city of Idstein, where the complainants live, charges fees to parents whose children are attending a nursery school; the fees, fixed in the relevant statutes of the city, are graduated according to family incomes and the number of children in the family. The complainants were thus charged the maximum nursery school fee, according to their income, for their son. Legal proceedings initiated by them against the city's statutes governing nursery schools were unsuccessful in all instances.

By their constitutional complaint, the parents challenged these court decisions, statutes regulating nursery school fees, and, indirectly, the relevant provisions of the nursery school statutes in Hesse, and individual provisions of the Social Security Code.

They alleged, in particular, that there had been a violation of Article 2.1 of the Basic Law (general freedom of action), Article 3.1 of the Basic Law (general principle of equality), Article 6.1 of the Basic Law (protection of marriage and family), and Article 14 of the Basic Law (guarantee of property). In their opinion, the contributory fee to be paid, by its legal nature, is neither a fee nor a contribution, but a local income tax, the imposition of which was not within the competence of the *Land* of Hesse, but within that of the Federation.

The statutes, they further alleged, also violated the principle of equality of Article 3.1 of the Basic Law as there were no material grounds justifying the unequal treatment.

The First Panel of the Federal Constitutional Court dismissed the complaint of unconstitutionality as unfounded. The graduation of fees to be paid by parents whose children are attending a nursery school did not interfere with the basic right of general freedom of action (Article 2.1 of the Basic Law) in an unconstitutional manner; it was also compatible with the general principle of equality (Article 3.1 of the Basic Law).

The statutes regulating nursery school fees, and the underlying statutory and Federal provisions (Social Security Code) were compatible with the Basic Law. The First Panel specified the following grounds among others:

The general freedom of action (Article 2.1 of the Basic Law) is not violated. This Basic Right protects citizens from financial disadvantages which are not provided for in the constitutional order and which were imposed upon them by public authorities. It is true that the challenged local scheme of nursery school fees burdens the complainants and thus interferes with their general freedom of action. This interference is justified, however. Its statutory basis complies with the constitutional order and does not violate the general principle of equality or other Basic Rights of the complainants.

The regulations of the legislative competence of the Basic Law are not violated by the provisions objected to. The Federal legislator had the competence to enact § 90 SGB VIII (Social Security Code). For the determination of the legislative competence, the focal points of the matter

to be regulated are decisive. Here, the care of children by nursery schools with the objective of promoting social modes of behaviour and thus of the prevention of later conflicts are the focus of interest. Pre-school education comes second after this duty to be covered by public welfare. Public welfare in the sense of Article 74.1.7 of the Basic Law, however, is a matter of concurrent legislation of the Federation.

The nursery school fee is not a local income tax and thus does not infringe upon the competence of the Federation to legislate on income taxes (Article 105.2 of the Basic Law). The fee, in contrast to a tax, is not due for payment without any precondition; it is rather linked to the individual use of an institution of the State infra-structure (a nursery school).

The provisions challenged are also in compliance also with the principle of equality (Article 3.1 of the Basic Law): there are material grounds for the graduation of fees for the use of nursery schools according to the number of children and family income, which justify different treatment of users with higher incomes.

Fees are pecuniary liabilities imposed upon the party liable by reason of individually used public services; they are intended to cover, fully or partly, the cost of the services. Fees differ from taxes by their special purpose of procuring the funds to cover fully or partly the cost of individually used public services. It follows from this purpose that fees for State services may not be fixed without regard to the actual cost of the services liable to a fee; the link between cost and the amount of fees paid must be adequate.

This, however, does not exclude a graduation of fees which is determined by social criteria.

The principle of cost recovery and similar principles pertaining to fees are not principles of constitutional rank. The regulation of fees may be a means of pursuing other intentions besides cost recovery; the value of a public service to its recipient may be reflected in the fees. Within its regulatory competences, the legislature has a wide scope of discretion to decide what individually used public services shall be liable to fees, what the fees will be, and what objectives beyond the aim of cost recovery – e.g. a limited control of behaviour in certain fields of activity – shall be pursued by the regulation.

The income-related graduation of nursery school fees does not offend against the justice of fees. Such a graduation is at any rate unobjectionable as long as even the maximum fee does not cover the actual cost of the institution and as long as it is in a reasonable relation to the administrative service paid for. Under this precondition, a pecuniary benefit is granted to any user. Furthermore, users paying the full fee are not called upon to finance general expenses or to relieve lower-income users.

According to the court findings, the fee schemes fixed in the statutes of the city of Idstein cover only about one third of the actual cost. Also those users of nursery schools who pay the full fee enjoy a public infrastructure service the value of which considerably exceeds the amount of fees paid.

The unequal treatment of parents with regard to nursery school fees is sufficiently justified by essential material grounds.

Nursery schools are indispensable for the provision of equal opportunities in life and education for all children. By the setting-up of nursery schools, essential constitutional duties of protection and promotion are fulfilled. The availability of a place at a nursery school may prevent women from interrupting an unintended pregnancy. Moreover, the equal treatment of women in professional life is promoted by the possibility of their children being cared for at a nursery school, as it allows women to practice a profession. In this respect, the state is also fulfilling a constitutional duty of protection; according to Article 3.2.2 of the Basic Law, the State must ensure that family and professional activities can be reconciled and that the performance of educational duties in the family does not lead to professional disadvantages.

Places at a nursery school must, therefore, be available also to the children of lower income families. This can be achieved by socially graduated fees. Extensive subsidies of nursery schools to the benefit of all parents, irrespective of their incomes, are not needed to secure their general accessibility, however.

Languages:

German.

Identification: GER-1998-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 04.05.1998 / **e)** 2 BvR 2555/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Jurisdictional bodies – Organisation – Members.
Institutions – Jurisdictional bodies – Organisation – Prosecutors / State counsel.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment – Public.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Judge, reappointment / German Democratic Republic / Civil service status / Re-unification / Judge, aptitude / Judge, probation.

Headnotes:

No fundamental rights are violated by the non-admission of a former judge of the German Democratic Republic (GDR) to the judicial service of one of the new Federal *Länder*.

Summary:

The complainant, a judge in the German Democratic Republic (GDR), born in 1938, held office from 1973 onwards at the regional court of Suhl (Thuringia) in criminal and family matters, and also temporarily as a military judge.

After the re-unification of the Federal Republic of Germany (FRG) and GDR, he applied for admission to the judicial service of the *Land* of Thuringia. In November 1991, the Minister of Justice of Thuringia informed the committee for the selection of judges of his intention not to appoint the applicant as a judge on probation, as the applicant seemed to be personally inapt for such office: during his term he had shown himself to be a judge strictly following the party line who had, particularly in criminal proceedings for illegal crossing of the border (§ 213 of the Criminal Code of the GDR), imposed excessive custodial sentences.

In December 1991, the committee for the selection of judges agreed to the applicant's appointment as judge on probation. The Minister of Justice nonetheless finally refused his application for admission to the judicial service of Thuringia in January 1992. A successful action of the complainant brought before the court of first instance was overruled by the court of second instance, which dismissed the case.

In his constitutional complaint, the complainant alleged a violation of his right to equal admission to every public office according to Article 33.2 of the Basic Law, of the principle of equality according to Article 3.1 of the Basic Law, and of the need for effective legal protection according to Article 19.4 of the Basic Law: he alleged that his age, as a negative selection criterion, was given too much weight, and that, regarding his professional activity, he had been treated more severely than a public prosecutor who – despite her active part in similar criminal proceedings – was admitted to the judicial service.

The First Chamber of the Second Panel refused to admit the constitutional complaint as, according to the Chamber, it was not of fundamental importance nor did it indicate a need for the enforcement of the complainant's allegedly violated rights.

A violation of the right to equal access to every public office (Article 33.2 of the Basic Law) did not obviously appear from the constitutional complaint. This Basic Right does not justify a claim for absorption into the public service.

What mattered in the present case was being absorbed into public service employment, and not a removal from a public office. The case- law of the Federal Constitutional Court had made it clear that appointments of former GDR judges as judges of the new Federal *Länder* were governed by the principle of discontinuity: although judges already in office remained temporarily authorised to act in order to avoid a standstill in the judicial process, a 'transfer' of existing positions was strictly avoided. Instead, a new appointment as judge on probation or for a certain period of time was required as for external applicants.

The Court further held that the complainant's rights were not violated by the alleged fact that in the aptitude test his age – because of which he had been integrated in the GDR system for decades – had counted against him. The decisions objected to were not based on the applicant's age nor on the duration of his integration in the specific judicial system of the former GDR, but on individual points resulting from his biography. Those who had the task of evaluating the complainant's aptitude for appointment as judge on probation saw an impediment to his lasting involvement in his application of the political criminal law of the former GDR, which people seeking justice now could not be expected to accept. In the applicant's case, at least eight sentences according to § 213 of the GDR Criminal Code which he had been involved in handing down were considered to speak against his aptitude. The use of this – to some extent objectified

and generalised – measure of personal aptitude, which is based on the necessary levels of confidence within the population and trustworthiness in the exercise of the office of judge in a democratic constitutional State, does not violate Article 33.2 of the Basic Law. An involvement in the application of political criminal law over several years, and not only in a few isolated cases, may, notwithstanding the degree of the penalties imposed, be reason enough to consider a candidate for the office of judge on probation to be inapt, even if there is no individual ground sufficient to justify such a decision.

The Court further held that the principle of equality (Article 3.3 of the Basic Law) was not violated either.

As for this part of his complaint, the complainant referred to the different evaluation made of a former GDR public prosecutor. Different evaluations of judges and public prosecutors may be justified by their different functions, however. Even if the aptitude of this public prosecutor was wrongly evaluated this would not justify a claim for a new, or even different decision on the complainant's appointment as judge on probation.

The fact that the Minister of Justice is not bound to obtain the consent of the committee for the selection of judges does not violate the complainant's right to effective legal protection (Article 19.4 of the Basic Law). The Court held that the complainant in fact objected to the procedural pattern of the administrative proceedings. He failed to show which of his rights was allegedly violated. He also left out of consideration the fact that the final responsibility for the appointment of a judge must lie with the Minister of Justice of the *Land*. The committee for the selection of judges is not responsible to parliament and government; it is indeed for this reason that exclusive power of decision of the committee would violate the principle of democracy.

Languages:

German.

Identification: GER-1998-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 04.05.1998 / **e)** 2 BvR 1314/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Right to physical integrity.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Surgical treatment ordered by police / Police order / Drug trafficking / Right to be heard / Danger to life / Procedure for enforcing a charge / Bodily injury / Clarification of circumstances / Public prosecutor / Prosecution, withdrawal / Fact, elucidation, insufficient.

Headnotes:

The right to be heard is violated when the preferment of a charge is refused on the basis of insufficient investigation of the facts.

Summary:

The complainant, an African living in Germany and seeking asylum, was temporarily arrested in June 1996 on suspicion of drug trafficking. As he had swallowed so-called cocaine bubbles (tightly sealed plastic spheres filled with cocaine), the presumed cocaine dealer was admitted to hospital, where the police officer who had arrested him ordered an operation for the preservation of evidence. After a doctor had gastroscopically ascertained the presence of bubbles in the man's stomach, the man was subjected to an open gastric operation; 14 cocaine bubbles were secured.

The complainant alleged that the doctors had performed the operation upon order by the police officer, and filed a complaint against the police officer of bodily injury inflicted in the execution of office. In the investigations instituted thereupon, a note by the incriminated police officer was requested, according to which the doctor had decided that an operation was necessary because obtaining the bubbles by gastroscopy would have been too dangerous to the complainant. Later, on consultation with a public prosecutor, the police officer added that the complainant had been admitted to hospital to avert the imminent danger to his life and to secure the drugs in his stomach for evidence. After the doctors had been informed accordingly, they decided to operate.

The public prosecutor then ordered the doctor who had done the gastroscopy to be questioned. The doctor was requested to explain "in detail" for what reasons an operation on the complainant had been necessary. The doctor thereupon declared he had not performed the

operation: the complainant had been sent to the surgical department.

The public prosecutor's office refrained from further questioning and dropped the case. A complaint filed against the public prosecutor's decision failed.

By another application to the upper regional court for enforcement of a charge the complainant denied a danger to his life and provided pertinent evidence; he further pointed out that the Ministry of Justice of the *Land* of North-Rhine Westphalia, in cases of "massive bodily trafficking", had ordered only that incriminated persons be hospitalised for observation; finally, the complainant alleged that the investigating authorities had not thoroughly investigated the circumstances. Neither the hospital personnel nor the operating doctors or assistants had been interrogated about the circumstances and events leading to the operation.

The upper regional court dismissed the application as unfounded, stating that there was no sufficient reason to lay a charge. Even if the incriminated police officer had ordered the open gastric operation without medical need, his behaviour was justified. The officer's statement that he had assumed the bubbles to represent an acute danger to the complainant's life could not be refuted. Even in the case of a wrong assumption of an acute danger to life, the police officer could, at the most, be reproached only for bodily injury caused by negligence (§ 230 of the Criminal Code); this was a private prosecution offence, however, for which a charge could not be enforced.

The complainant lodged a constitutional complaint against this decision, arguing that the courts had not taken notice of his description of the facts. If the upper regional court had taken his arguments into account, the statements of the police officer would have been exposed as a protective statement suppressing the actual facts. If, for the police officer, it had been a matter of averting a danger to life, he would have inquired about the complainant's condition. As long as the investigations had not shown that the police officer did so, he could not be conceded to have held an erroneous assumption of a danger to life.

The Third Chamber of the Second Panel considered the constitutional complaint of violation of the right to be heard (Article 103.1 of the Basic Law) to be evidently well-founded.

Article 103.1 of the Basic Law is violated when specific circumstances indicate that due notice was not taken of arguments or that arguments were not taken into consideration by the court.

In the present case, the judicial dismissal of the application to bring charges in spite of the obviously insufficient investigations by the prosecutor can be explained only by the court's failure either to take notice of the complainant's arguments or take the arguments into account. Otherwise it must at least have occurred to the court either to disapprove of the early discontinuance of the investigations or to make its own investigations about what the doctors had said about the alleged existence of a danger to life and how this danger could be overcome.

The circumstances leading to the ordering and carrying-out of the operation were insufficiently elucidated. After the doctor's written information had been vague, it must have occurred to the public prosecutor to ask the doctor precise questions about the circumstances leading to the order to operate, and about the existence of a danger to life. These questions were not asked. The persons involved in the operation were not interrogated, nor were those who had been present before the order to operate was given. Especially in view of the medical records present in the files, which do not provide any indication of an imminent danger to life, it cannot be excluded that further investigations would have provided a reasonable cause to bring charges.

Languages:

German.

Greece
Council of State

Summaries of important decisions of the reference period 1 January 1998 – 30 April 1998 will be published in the next edition, *Bulletin* 1998/2.

Hungary
Constitutional Court

Statistical data

1 January 1998 – 30 April 1998

Number of decisions

- Decisions by the plenary Court published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 3
- Number of other decisions by the plenary Court: 26
- Number of other decisions by chambers: 30
- Number of other (procedural) orders: 38
- Total number of decisions: 107

Important decisions

Identification: HUN-1998-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 09.02.1998 / **e)** 1260/B/1997 / **f)** / **g)** *Alkotmánybírósági Közlöny* (Official Digest), no. 2/1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Constitution.
General Principles – Sovereignty.
General Principles – Certainty of the law.

Keywords of the alphabetical index:

Constitution, amendment / Constitutional Court, powers / Elections / Act on amending the Constitution, quality.

Headnotes:

According to the constitutional provisions and laws concerning the jurisdiction of the Constitutional Court, the competence of the Court does not extend to the examination of the constitutionality of the Constitution itself and laws amending the Constitution. Nor does the Constitutional Court have jurisdiction to examine legal provisions giving effect to new constitutional provisions.

Summary:

On 14 October 1997, the Parliament approved the Act on the Amendment to the Constitution. As a result of this amendment, the constitutional provisions concerning elections for Parliament and for local governments were changed. Previously, under Article 20 of the Constitution, Parliament was elected for a term of four years. According to the recently enacted amendment, however, elections for Parliament shall be held in April or May of the fourth year as from the previous election. The Act on the Amendment to the Constitution contained a similar provision concerning local government elections. The members of the representative body and the mayor shall be elected in October of the fourth year as from the previous election. Under Article 6.1 of the Act, the above-mentioned changes entered into force on the day of its promulgation. According to Article 6.2, in 1998 the parliamentary elections shall be held in May, and the elections for local governments shall be held in October.

The petitioner contended that Article 6 of the Act is unconstitutional because the regulation concerning the election of 1998 violates the principles of sovereignty and certainty of the law as guaranteed by Articles 2.1 and 2.2 of the Constitution. In the petitioner's view, giving effect to the constitutional amendment on the day of its promulgation led to a reduction of the term of Parliament, the representatives of local governments and also the mayor, and changed the conditions of the elections of 1994 retrospectively.

The Constitutional Court in its current decision examined first whether it was competent to review the constitutionality of the Act on the Amendment to the Constitution. Under Articles 1.b and 1.c of Act XXXII of 1989 on the Constitutional Court, the Constitutional Court has jurisdiction to examine the constitutionality of legal rules and other legal means of State control as well as the conformity of legal rules and other legal means of State control with international treaties. Based on this, the Constitutional Court does not have competence to examine, amend or change constitutional provisions and therefore to review the constitutionality of legal regulations amending the Constitution. Since the challenged provisions are not a part of the text of the Constitution, the Court had to examine separately its competence concerning these regulations.

In the case of amendments to the Constitution, the legal provision which regulates the effect of the Act in question does not become part of the Constitution. However, it is precisely this kind of provision which is crucial to the amendment. Without this provision the amendment cannot be implemented, and thus the provision is inseparable from the normative part of the Act. As a result of this strong connection between the legal provision giving effect to the Act and the legal norms which became a part of the Constitution because of the amendment, the Court does not have jurisdiction to examine the constitutionality of these legal provisions. If the Court annuls these provisions, the normative part of the Act on the Amendment to the Constitution would also be null and void, and thus the Court would act as a legislative power. In theory, in some cases it is possible to review legal provisions that give effect to the Act on the Amendment, but only in the case where annulling these provisions does not result in changing the Constitution.

As concerns Article 6.2 of the Act, the Court stated that since this provision contains regulations concerning the elections to be held during 1998, the Court is competent to examine the unconstitutionality of this legal rule. Since this provision regulates the dates of the parliamentary elections and the elections for local governments and the mayor in accordance with the new constitutional provisions which already entered into force in October 1997, the Court held that the petition contending that this provision was unconstitutional was unfounded.

Supplementary information:

One of the judges wrote a dissenting opinion, stating that the Court should have examined the constitutionality of Article 6.1 of the Act because the legal rule which gives effect to the Act does not become a part of the Constitution. There is no constitutional reason for handling the legal rules giving effect to the Act on the Amendment to the Constitution differently from other legal regulations, since under Article 1 of the Act on the Constitutional Court, the Court should examine the constitutionality of every kind of legal rule and other legal means of State control. According to this judge, the reduction of the term of MPs is not unconstitutional, since under Article 28.2 of the Constitution, Parliament may proclaim its dissolution even before the expiry of its mandate. However, reducing the term of representatives of the local governments and the mayor violates the Constitution. Since Article 6.1 of the Act deprives the representatives of the local governments elected in 1994 of their mandate before the expiry of their mandate, it is against the Constitution.

One judge attached a concurring opinion, according to which the Court does not have competence to examine legal provisions giving effect to the Act independently of the question whether this provision puts this Act into force *ex nunc* or *pro futuro*.

Languages:

Hungarian.

Identification: HUN-1998-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.02.1998 / **e)** 793/B/1997 / **f)** / **g)** *Alkotmánybírósági Közlöny* (Official Digest), no. 2/1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Case-law – International case-law – European Court of Human Rights.
General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate one-self.

Keywords of the alphabetical index:

Criminal procedure / Testimony, pre-trial, use in trial.

Headnotes:

To read aloud the testimony of an accused person at a court hearing despite the fact that the accused has refused to testify during the trial does not mean a disproportionate restriction of the rights of the defence if this limitation complies with the following constitutional requirements:

- reading aloud and using the testimony made during the investigation can be constitutional if it is done in the interest of making clear the facts of the case or in the interest of another accused or the victim;

- the judge should examine whether during the investigation the accused was familiarised with the possibility of refusing to testify and its consequences, and whether the testimony was given under duress;

- the judge should obtain evidence from other sources even if the accused made a full confession.

Summary:

Upon the petition of a judge, the Constitutional Court examined the constitutionality of Article 83 of Act I of 1973 on the Code of Criminal Procedure (hereinafter: the Code) according to which the document containing the testimony could be used if the person who testified cannot be heard, the person refuses to testify or the document is contrary to the testimony. In the petitioner's opinion, that part of the challenged provision under which the testimony can be used in spite of the fact that the accused person later refuses to testify violates the rights of the defence ensured by Article 57.3 of the Constitution.

According to Article 57.3 of the Constitution, a person charged with a criminal offence is entitled to the rights of the defence in every phase of the criminal procedure. The Constitutional Court in this decision examined whether the contested provision of the Code infringes the fundamental rights of the defence.

Under Article 83 of the Code, the document containing the testimony is a piece of evidence, which, as a general rule, can be used only according to the provisions of this Code as direct evidence. According to Article 83.3, however, three cases are exceptions to the above-mentioned rule, one of which is the case where the accused refuses to testify.

The right not to incriminate oneself emerging from the fundamental right to human dignity guaranteed by Article 54 of the Constitution ensures for the accused the right to remain silent. In order for this right to be realised, under the Code the investigator is obliged to draw the accused's attention to the possibility of refusing to make a statement. But if the accused decides to make a statement despite the notice of the investigator, later on he/she does not have the right to decide whether this statement can be used at trial. Under the Code, however, both the defence counsel and the accused have the possibility of making a remark if the court decides on using the statement made during the investigation as evidence.

According to Article 50 of the Constitution, the courts punish the perpetrators of criminal offences. The restriction of the rights of the defence therefore can be justified by this obligation of the State if this restriction is necessary and proportionate to the purpose of the limitation. In answering the question whether in the instant case the restriction is necessary and proportionate, the Constitutional Court took into consideration the case-law of the European Court of Human Rights, especially the

John Murray v. the United Kingdom judgment of 8 February 1996, Reports of Judgments and Decisions 1996, p. 30, *Bulletin* 1996/1 [ECH-1996-1-001]. In this case the European Court of Human Rights stated that the right to remain silent is a generally recognised international standard which lies at the heart of a fair trial. However, the European Court of Human Rights also held that the right to silence is not an absolute right, but rather a safeguard which might, in certain circumstances, be removed provided other appropriate safeguards for accused persons are introduced to compensate for the potential risk of unjust convictions. The court has a discretionary power to draw inferences from the silence of an accused, but this does not, in itself, violate the right to silence. Accordingly, the Court held that there had been no violation of Article 6.1 and 6.2 ECHR.

On the basis of the aforesaid considerations, the Constitutional Court held the contested provision restricting the rights of the defence to be constitutional, since according to the reasoning of the Court, this limitation is justified by the interest of another accused or the victim and the rights of the defence can be also restricted in the interest of making clear the facts of the case.

Languages:

Hungarian.

Identification: HUN-1998-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 11.03.1998 / **e)** 6/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 18/1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights of 1966.
General Principles – Proportionality.
General Principles – Weighing of interests.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

State secret / Criminal procedure / National security / Defence, restrictions / Guarantees, absolute character.

Headnotes:

The challenged provisions of the Code of Criminal Procedure and the Ministerial Decree on obtaining copies of criminal case files which preclude defence counsel and the accused from obtaining access to the case-file if it contains State or official secrets violate the rights of the defence and the right of an accused person to a fair trial.

Summary:

A judge initiated the procedure of the Constitutional Court, since in the course of a pending case in which the prosecutor accused some contributors to the State security service of disclosing a State secret, the judge considered unconstitutional one of the provisions of the Code of Criminal Procedure and a provision of the Ministerial Decree on obtaining copies of criminal case files which the accused needed.

Under Article 114.4 of the Act on the Code of Criminal Procedure (hereinafter: the Code), defence counsel or the accused cannot have access to those files which contain State or official secrets.

According to Articles 4.a and 4.c of the Joint Decree no. 4/1991 (III. 14.) of the Minister of Justice and the Minister of Internal Affairs on obtaining copies of criminal case files, the accused and his/her counsel cannot even obtain copies of case-files which contain State or official secrets or copies of the record prepared during a closed trial in the criminal procedure.

The rights of the defence ensured by Article 57.3 of the Constitution require the effective realisation of the defence and this means that the accused and counsel should

have the possibility of preparing for the trial. In its previous decision, the Constitutional Court already emphasised the importance of the rights of the defence, but it mentioned that protecting State and official secrets during criminal proceedings may also be needed. This statement of the Court is in harmony with Article 14.3.b of the International Covenant on Civil and Political Rights and Article 6.3.c ECHR under which everyone charged with a criminal offence has the minimum right to have adequate time and facilities for the preparation of his defence. These possibilities include the right of access to the case-file, and also the right to possess the case-file. Therefore it is required that the person charged with a criminal offence and his/her counsel be able to obtain the documentation prior to the trial, and they should have access to copies thereof.

The question of whether there has been a fair trial as guaranteed by Article 57.1 of the Constitution can be judged only by taking into consideration the circumstances of the trial as a whole. Despite the lack of an important element, the procedure as a whole can be fair. But the contrary can be also true: the trial can be unfair even if the judge observes all the procedural safeguards. One of the most important parts of a fair trial is to ensure equal opportunities for both the prosecutor and the defence counsel to form an opinion on questions of facts and rights. The other requirement is that the accused and counsel should have the same access to the relevant information of the case as the prosecutor. Restricting this right of the defence is unconstitutional if the prosecutor may have access to the same documents without any limitation.

The constitutional limits of restricting fundamental rights were established by Article 8.2 of the Constitution and the jurisprudence of the Constitutional Court. Article 8.2 of the Constitution, however, provides only an abstract general rule; the way in which each fundamental right is applied may change case by case. Based upon these, the Constitutional Court in its current decision ruled as follows: The rights of the defence are not absolute; however, it is not easy to preserve the constitutional balance between these rights and the requirement of protecting State secrets. The legislator with the challenged regulations intended to act in the interest of national security, i.e. the aim of the legislator was to prevent State or official secrets coming to the knowledge or into the possession of an inappropriate person. The provisions under review, however, restricted the rights of the defence in an unnecessary and disproportionate way. Therefore, these provisions are unconstitutional. The legislator is entitled to introduce measures for safeguarding State secrets during criminal proceedings, but the legislator should define these measures in a way that will not infringe upon the rights of the defence in an unconstitutional manner.

The Constitutional Court has already dealt with the absolute ban on restricting the criminal law guarantees, such as the presumption of innocence and the *nullum crimen sine lege* principle. Concerning the guarantees of a fair trial ensured by Article 57.1 of the Constitution, the Court stated that these conditions are not absolute, unlike the presumption of innocence, but the weighing of interests in accordance with Article 8.2 has absolute limits. There is not any kind of need in the interest of which the fairness of the trial can be restricted even in a proportionate way. Rather, the question whether the restrictions were necessary and proportionate to their purpose shall be examined solely within the notion of a fair trial.

Languages:

Hungarian.

Identification: HUN-1998-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 08.04.1998 / **e)** 10/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 30/1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Taxation law.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Taxation, public purposes Taxes, dedication by taxpayer / Church property, favourable tax treatment.

Headnotes:

The Constitutional Court held to be constitutional Act CXXVI of 1996 on the use of a specified amount of

personal income tax for public purposes in accordance with the taxpayer's instruction (hereinafter: the Act), which regulates the procedure enabling private individuals to utilise the right to instruct in a statement that a portion of the tax paid be transferred to a designated beneficiary to be used for public purposes.

Summary:

The petitioners in their submissions initiated an *ex post facto* review of some provisions of the Act and of the Act as a whole. According to them, Article 1 of the Act, under which not every citizen, but only private individuals who pay tax, can give instructions for the transfer of a portion of the tax, violates the principle of the rule of law as guaranteed by Article 2.1 of the Constitution. The petitioners also contend that numerous provisions of the Act include unconstitutional distinctions (discrimination, as termed by Article 70/A of the Constitution) and that some provisions are against Article 70/I of the Constitution, according to which every citizen of Hungary bears the obligation to contribute to rates and taxes in accordance with their income and wealth.

The petitioners assert an infringement on the principle of non-retrospective effect of law, in that the beneficiary can only be a social organisation which – among other requirements – has been registered by the courts at least three years prior to the first day of the year in which the individual's statement of instruction takes place. According to one petition, the Act unconstitutionally applies different regulations concerning churches.

Finally the petitioners contend that the fact that an incorrect or illegible tax identification number on the statement of instruction shall render the statement of the taxpayer invalid and that there is no possibility for the individuals to follow the path of their contributions to the beneficiaries is unconstitutional.

In the instant case, the Constitutional Court held that the right of the taxpayer to use a specified amount of personal income tax for public purposes differs from the deductions which reduce the amount of tax base when the individual contributes to financing a public aim in such a way that in the former case the law imposes further conditions concerning the beneficiaries. The contributions given for the beneficiaries by the individuals reduce the amount of the tax base prior to paying the tax. Therefore the Court did not hold the challenged provision unconstitutional.

According to the Court, the petitioners' assertion that the Act differentiates unconstitutionally between social organisations, since it stipulates that individuals can offer 1 per cent of the amount of the tax they should pay for only those organisations which have been registered by the courts for at least three years prior to the first day of the year in which the individual's statement of instruction takes place, is unfounded. The aim of this legal regulation is to exclude those organisations from being beneficiaries which were established obviously only because of this tax allowance. As concerns the legal provisions on churches, the Court did not hold to be unconstitutional the fact that the Act deals with churches separately from other social organisations. The Court recalled one of its previous decisions no. 4/1993 (II. 12.) (*Bulletin* 1993/1, page 16 [HUN-1993-1-002]), in which the Court rejected the petitioners' contention of unconstitutionality of the natural restitution of church property, which leads to discrimination in favour of churches and other civic organisations, ruling that churches cannot be comparable with other social organisations.

As concerns the petitioners' latest request, the Court stated that since the tax authority shall proceed according to the provisions of the Act on the Rules of Taxation and, if this Act does not stipulate otherwise, according to the Act on the General Rules of State Administrative Procedure, the taxpayer has the possibility of a legal remedy against the decision of the tax authority. The Court declared it to be a constitutional requirement when applying Article 7.1 of the Act that the tax authority proceed according to the relevant provisions of the Act on the General Rules of State Administrative Procedure.

Supplementary information:

One of the judges attached a dissenting opinion in which the judge pointed out that the Constitutional Court should have declared null and void the challenged Act as a whole, since the State in this case gives the possibility of deciding upon using public monies for an arbitrarily chosen part of the constituents, i.e. the taxpayers. The judge referred to the practice of Italy, where the taxpayer can decide not on the use of 8 pro mille of his/her personal income tax, but on the use of 8 pro mille of the total amount of the personal income tax collected. The Hungarian solution, however, does not contain even this minimum democratic requirement.

Languages:

Hungarian.

Ireland
Supreme Court

Summaries of important decisions of the reference period 1 January 1998 – 30 April 1998 will be published in the next edition, *Bulletin* 1998/2.

Italy
Constitutional Court

Important decisions

Identification: ITA-1998-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 10.04.1998 / **e)** 110/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 15 of 15.04.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Reasonableness.
Institutions – Executive bodies – Relations with the courts.
Institutions – Jurisdictional bodies – Organisation – Prosecutors / State counsel.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Investigations / Criminal proceedings / Application for committal for trial / State secret / Secret service.

Headnotes:

The Constitutional Court upholds previous judgments on the basis and limits of State secrecy imposed on the judiciary, for reasons of State security, by the executive authorities. With regard to the subsequent restriction on the exercise of judicial powers – as the Constitutional Court has already ruled – "State security is an essential interest of the community and may not be abolished; it is a concern which clearly prevails over all others, since it affects the very existence of the State." In any case – again, as previously stated by the Court – the powers of the executive in this area are not unlimited, since the need to ensure a reasonable relationship between the means and the end pursued must be taken into consideration. Nevertheless, it is not admissible to invoke State secrecy with the intention of preventing action to subvert the constitutional system from being proved; furthermore, it is essential for the executive to give its fundamental reasons for invoking State secrecy, while bearing in mind that political supervision of the objection of State secrecy must be carried out at parliamentary level.

In referring to the limits and the scope of the obstacles created by the objection of State secrecy in criminal proceedings, it must be pointed out that the Constitutional Court cannot assume the legislator's role when it thoroughly weighs up, in each criminal case, the constitutional rights underlying the need to defend the values that are protected. Consequently, the objection of State secrecy by the President of the Council of Ministers does not prevent the prosecuting authorities from investigating the offences cited in the criminal report in its possession and instituting criminal proceedings, if there are grounds for doing so. The only consequence of the objection of State secrecy is that the judiciary does not have the right to obtain and use the facts and evidence covered by State secrecy.

Summary:

In the decision referred to, the Court first of all declared admissible the question raised following the proceedings brought by the President of the Council of Ministers against the prosecuting authorities, in the person of the State prosecutor at the Bologna Court, concerning an investigation carried out into secret police officials by means of a subsequent application for committal for trial, with the aim of obtaining evidence covered by State secrecy under the existing regulations.

The Court admitted the said application, albeit only in part, considering that it was not for the prosecuting authorities either to obtain or to use papers and documents legally classified as State secrets by the President of the Council, or to use them as a basis for investigations with a view to initiating criminal proceedings. Consequently, having regard to the regulations on disputes as to jurisdiction, the Court declared void the investigations carried out using sources of evidence covered by State secrecy, as well as the application for committal which had been made in the meantime.

Cross-references:

In addition to various rulings – among many that have been given – on the admissibility, from a subjective standpoint, of the proceedings brought by the President of the Council against the prosecuting authorities at the Bologna Court, the Court alludes with reference to the merits of these proceedings to judgments nos. 82/1976 and 86/1977 as specific precedents for the justification and limits of the objection of State secrecy raised by the executive authorities against the judiciary (see headnotes); following the latter judgment, Parliament adopted the legislation currently in force (Act no. 801/1977).

Languages:

Italian.

Identification: ITA-1998-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 23.04.1998 / **e)** 140/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 18 of 29.04.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Prohibition of arbitrariness.
Institutions – Executive bodies – The civil service.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Arbitrary acts / Slander / Wrongful act of another, anger / Provocation, justification / Insult / Insulting behaviour towards a public official / Civil servant, necessary politeness.

Headnotes:

The judge's interpretation in this particular case – according to which, in spite of the "extreme animosity" and "patent impropriety" shown by the public official, it was not necessary to examine whether the conditions justifying the reaction to arbitrary acts on the part of a public official were met – cannot be endorsed by the Constitutional Court.

Even under existing legislation on the behaviour of public employees and relations between citizens and the civil service – based on historical and political reasons which prompted the ground of justified reaction to arbitrary acts to be reintroduced into the criminal law in 1944, and based on previous judgments of the Constitutional Court itself aimed at making the provisions of the Criminal Code on offences committed by private individuals against the civil service compatible with the regulations governing relations between the authorities and citizens in a democratic society – the line principally pursued hitherto by the Court of Cassation, that the behaviour of public

officials, even if it seems improper or impolite, cannot be classified as arbitrary acts, may be deemed to have been superseded by the opposite approach taken in several different judgments of the Court of Cassation itself and in the vast majority of decisions handed down in trial and appeal courts. According to this new approach, public officials must be regarded as having a duty to behave properly and politely; consequently, impropriety and rudeness in performing the acts of a public official – even if those acts themselves are not strictly speaking contrary to the law – are sufficient to constitute conduct exceeding the official's powers; hence such acts are also to be regarded as arbitrary.

A fundamental similarity can be perceived between unlawful and arbitrary behaviour on the part of a public official who provokes an individual to an abusive reaction, and a wrongful act on the part of another person; in cases of insulting behaviour towards a public official where provocation is considered to be justified, the ground of justified reaction to arbitrary acts on the part of a public official is applicable with the same consequences.

Summary:

In this judgment "which interprets and rejects", the Court declared unfounded, "for the reasons given", the question of the constitutionality of Article 599.2 of the Criminal Code, referring to Article 3 of the Constitution, in so far as the Constitution does not provide that the ground of justification of a fit of anger provoked by a wrongful act on the part of another person and occurring immediately after such act also applies to the offence of insulting behaviour towards a public official.

Cross-references:

Reference is made to the present Constitutional Court's judgment no. 341/1994, which ruled that the minimum statutory sentence of six months' imprisonment laid down by Article 341 of the Criminal Code for insulting behaviour towards a public official was constitutionally unlawful; on that occasion, the Court also found that this provision was the result of an authoritarian conception of relations between persons exercising public authority and citizens.

Languages:

Italian.

Latvia
Constitutional Court

Statistical data

1 January 1998 – 31 March 1998

Number of judgements: 2

All cases – *ex post facto* review

Important decisions

Identification: LAT-1998-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23.02.1998 / **e)** 04-04(97) / **f)** On conformity of the Regulation of the Cabinet of Ministers no. 322 of 16 September 1997 on the Payment of Part of Property Tax Income into the Municipal Finance Equalisation Fund in 1997 with the Law On Budget and Financial Management / **g)** *Latvijas Vestnesis* (Official Gazette), 25.02.1998, no. 50 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
General Principles – Certainty of the law.
General Principles – Maintaining confidence.
General Principles – Legality.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Institutions – Executive bodies – Territorial administrative decentralisation.
Institutions – Public finances – Budget.
Institutions – Public finances – Taxation.

Keywords of the alphabetical index:

Municipal finance, equalisation / Budget / Taxation / Municipal Finance Equalisation Fund / Justice, principle.

Headnotes:

The failure by the Cabinet of Ministers to promulgate in time regulations which stipulate the procedure for transfer of parts of the property tax they perceive into the Municipal Finance Equalisation Fund, does not give the municipalities the right to dispose of these funds.

Summary:

Article 41.1 of the law "On Budget and Financial Management" establishes that "municipalities have the right to independently draw up and confirm their budget", but Article 42.1 determines that "municipalities have the right to budget income, based on laws, to provide for regular and safe income, meeting the demands of macro-economic stability".

The amount of the budget income which the municipalities have the right to receive from the property tax is established by the laws "On Property Tax" and "On Equalisation of Municipal Finance in 1997".

The law "Amendments to the law On Property Tax" establishes that the procedure of transferring the property tax income into the city or *pagasts* municipality budget and into the Municipal Finance Equalisation Fund shall be determined by Regulation of the Cabinet of Ministers.

The case was initiated by Aizkraukle city Dome (Council) and a *pagast* Council petitioning to abrogate Regulation no. 322 "On the Payment of Part of Property Tax Income into the Municipal Finance Equalisation Fund in 1997", considering that the Regulations do not comply with Article 41.1 and Article 42.1 of the law "On Budget and Financial Management".

The applicants pointed out that by implementing the requirements of Regulation no. 322, which was passed on 16 September 1997 (three months before the end of the year), large sums of money were deducted from the budgets of the respective municipalities and transferred into the Municipal Finance Equalisation Fund, thus creating unforeseen financial difficulties for the above municipalities. They also pointed out that Regulation no. 322 gives the Minister of Finance the right to determine the part of property tax to be transferred into the Municipal Finance Equalisation Fund in the last quarter of the year.

The Constitutional Court concluded that Article 2.1.3 of the law "On Equalisation of Municipal Finances in 1997", passed on 19 December 1996, determined that the income of the Municipal Finance Equalisation Fund was to be constituted in part by payment of 31.85% of the property tax income.

Thus, the municipalities, when drawing up their budget for 1997, were not authorised to plan to include the whole income from the property tax into their budget. They had to foresee payment of 31.85% of property tax income into the Municipal Finance Equalisation Fund.

The fact that the Cabinet of Ministers delayed promulgation of the Regulation until 16 September 1997 did not give municipalities the right to consider that they would not have to transfer part of property tax income into the Municipal Finance Equalisation Fund.

According to the law "Amendments to the law On Property Tax" the Cabinet of Ministers had both the right and the obligation to establish the procedure, but it had no right to authorise any other institution to determine the procedure of payment, as the law did not envisage it.

The Constitutional Court decided that the Regulation of the Cabinet of Ministers no. 322 was in compliance with Article 41.1 and Article 42.1 and only paragraph 6 of Regulation no. 322 of the Cabinet of Ministers was at variance with Articles 14 (part 2) and 15 of the law "The Structure of the Cabinet of Ministers" and Article 5 (part 2) of the law "On Property Tax" and was declared null and void from the moment of its adoption.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-1998-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 11.03.1998 / **e)** 04-05(97) / **f)** On Conformity of the Joint Interpretation by the Ministry of Finance (no. 047/475 certified on 30 April 1993) and by the Ministry of Economic Reforms (no. 34-1.1-187, certified on 4 May 1993) On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy and Interpretation by the Ministry of Economy no. 3-31.1-231 of 28 December 1993 On the Procedure of Application of the Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy with the law On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipal Property as well as other laws / **g)** *Latvijas Vestnesis* (Official Gazette), 12.03.1998, no. 66 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Temporal effect.

Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.
Sources of Constitutional Law – Techniques of interpretation – Systematic interpretation.
General Principles – Separation of powers.
General Principles – Certainty of the law.
General Principles – Legality.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Privatisation, procedure / Loans, interest free.

Headnotes:

The procedure for privatisation of State assets, and particularly provisions granting interest free loans in this process, have to be regulated by law.

Summary:

A Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms and an Interpretation by the Ministry of Economy establish that the difference between the preceding value of fixed assets and the value established by the Privatisation Commission can be drawn up as an interest free loan and, if the privatisation project of an undertaking, the purchase and sale agreement or the agreement on lease buy-out of an undertaking envisages investment, that covers the above difference and if all the conditions have been observed on the term the lease buy-out envisages or – in case of purchase and sale agreement – in a year after the agreement has become effective, the institution which has signed the agreements adopts a decision to write the difference off.

Article 1 of the Constitution *(Satversme)*, establishing that Latvia is an independent democratic Republic, was effective at the time when the Joint Interpretation was passed. On 6 July 1993 the complete Satversme became effective. In compliance with Article 64 of the Satversme, legislative rights in the Republic of Latvia belong to the Saeima and to the people in accordance with the procedure envisaged by the Constitution.

The case was initiated by the Council of State Control which petitioned to declare the part of the Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms referring to inclusion of investments into the buy-out payment during the process of privatisation and the Interpretation by the Ministry of Economy as null and void from the moment of their enactment.

The petitioner considered that they are not in compliance with:

1. Article 9 of the law "On the Procedure of Privatisation of State-owned enterprises and Municipal Property";
2. Article 6 of the law "On Privatisation of the Objects of the State and Municipal Property";
3. Articles 8 and 20 of the law "On Lease and Lease Buy-out Payment of the State and Municipal Enterprises".

The applicant pointed out that the above laws provided no method of privatisation to make use of investments with an aim to reduce the buy-out payment of the object, and so these Interpretations had established a completely new dealing with State property during the process of privatisation concluding a loan agreement without interest and reduction of the purchase price because of investments or preservation of posts.

Evaluating the rights of the ministries to pass such normative acts, as well as their contents, the Constitutional Court considered that the principle of separation of powers should be taken into consideration.

In a democratic State, the legislative power belongs to the people and the legislator. Other State institutions only have the right to pass generally binding legally based normative acts in cases delegated by the law. Consequently, the principle of legality of management envisages that the government institution shall carry out its activities on the basis of existing laws.

To establish whose competence it is to regulate the process of privatisation, it is necessary to bear in mind that the issue is of utmost importance and therefore it is necessary to settle it through legislation. The Constitutional Court is of the opinion that the above issue falls within the competence of the legislator and that the Ministry of Finance, the Ministry of Economic Reform and the Ministry of Economy, when passing the normative acts in question, interfered in the area of legislation without any proper basis. Therefore, the above normative acts are *ultra vires* and unlawful.

While discussing the date from which the normative acts in question should be declared null and void, the Constitutional Court considered the following principles of law: the principle of justice, the principle of legality, the principle of the separation of powers and the principle of confidence in the law. When comparing the significance of the above principles, the elements which are essential to the principle of confidence in the law include: retrospective effect of the verdict on public and private interests; longevity of legal relations, established on the basis of the Joint Interpretation; possible changes in the

legal status of the subjects to be privatised who trusted in legality of the normative acts in question.

The Constitutional Court declared the part of the Joint Interpretation referring to inclusion of investments into the buy-out payment during the process of privatisation as well as the Interpretation by the Ministry of Economy as not being in compliance with Article 64 of the Constitution and null and void from the moment of the pronouncement of the judgment.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

There was no relevant constitutional case-law during the reference period 1 January 1998 – 30 April 1998.

Lithuania
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

Number of decisions: 5 final decisions including:

- 3 rulings concerning the compliance of laws with the Constitution;
- 1 ruling concerning the compliance of governmental resolutions with the laws;
- 3 rulings concerning the compliance of a Parliamentary resolution with the Constitution.

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

The main content of the cases was the following:

- civil service: 1
- distribution of powers: 2
- financial questions: 1
- local self-government: 1

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

Important decisions

Identification: LTU-1998-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.01.1998 / **e)** 19/97 / **f)** On the Programme of the Government / **g)** *Valstybės Žinios* (Official Gazette), 5-99 of 14.01.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between State authorities.
Institutions – Head of State – Powers.
Institutions – Legislative bodies – Relations with the executive bodies.
Institutions – Executive bodies – Relations with the legislative bodies.

Keywords of the alphabetical index:

Government, resignation / Government, returning powers / Government, programme / Government, confidence / Governance, parliamentary model.

Headnotes:

Under the parliamentary model of government formation the Head of State appoints as head of government the person whose candidature is approved by the parliament, thereby taking into account the results of parliamentary elections. The activity of the government is based on the confidence of the parliament and the government is responsible to the parliament for the policies it implements.

According to the Lithuanian Constitution, parliamentary approval conferring on the government the power to act is given by the *Seimas*' vote approving the government's programme. By expressing its confidence in the government's programme, the *Seimas* takes on an obligation to supervise the government's implementation of that programme, which serves as the basis for the government's responsibility to the *Seimas* for their common activities. The *Seimas* may remove the powers conferred on the government by a vote of no confidence in the government or in the prime minister, the consequence of which is the resignation of the government.

The programme of the government can thus be assessed as a legal document setting forth the main landmarks of State activities for a certain period. It is equally important in determining the actions of the institutions forming the government and ensuring reciprocity between the government and these institutions.

The programme of the government is binding on it for the whole period of its powers. New governments submit their programmes to the *Seimas* in order to obtain the powers to act. The *Seimas*' approval of the government's programme expresses its confidence in the government in principle for the period until the *Seimas*' powers expire. Following the resignation of the government, the same programme will not necessarily be approved.

Summary:

On 10 December 1996 the *Seimas* approved the programme of the government presented by the Prime Minister covering the activities of the government for the period from 1997 to 2000, i.e. the whole period of power of the present *Seimas*. During this period presidential elections occurred. Under the Constitution, the government was then obliged to return its powers. The

government (the petitioner in the case) therefore requested a decision as to whether the disputed resolution of the *Seimas* on the approval of the programme is in compliance with the Constitution.

The Constitutional Court underlined that the governance model of the State of Lithuania as established by the Constitution of the Republic of Lithuania is a parliamentary model in which particular emphasis is placed on the government's responsibility to the *Seimas*. The government, composed of the Prime Minister and ministers, is a joint institution of the executive power having general competence. It is formed by the President and the *Seimas*; however, their role and tasks are different. The President participates in the process of government as the Head of State accomplishing the function provided for in the Constitution, while the *Seimas*, to which the government is responsible, acts as representatives of the people.

After examining the notions contained in Articles 101 and 92.4 of the Constitution (resignation of the government and the returning of its powers respectively), the petitioner raised doubts as to whether, upon the election of the President of the Republic, the President is empowered to submit to the *Seimas* for consideration a new candidate to be Prime Minister and a new government for approval.

The Court held that the grounds for the resignation of the government are exhaustively listed in Article 101 of the Constitution. The essence of these grounds is the *Seimas*' loss of or failure to acquire confidence in the government. As regards the returning of government powers, this is provided for in two cases: first, after *Seimas* elections, and second, upon the election of the President of the Republic.

Thus it can be concluded that the expiration of the powers of one of the subjects who has participated in forming the government entails the necessity of the government returning its powers. Constitutional norms, however, attribute different meanings to the expiration of the powers of the President and the *Seimas*. In the first case, the government must simply return its powers. In the second, it must not only return its powers but also resign. This is because after *Seimas* elections, the subject from which the government had received confidence and powers to act has been replaced, whereas in the first case, after a change in the Head of State, the confidence of the *Seimas* in the government remains intact. Therefore, in the case of the returning of powers after the election of a new President, the same government must be charged by the new Head of State to continue exercising its powers. Should the government resign, the President may then charge another member of the government to exercise the functions of the Prime Minister.

The Court stressed that there are no grounds for treating the notions of the government's resignation and the returning of its powers as identical. They relate to different legal situations and determine different legal consequences. The Court further held that the *Seimas*' Resolution of 10 December 1996 on the Programme of the Government of the Republic of Lithuania is in conformity with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-1998-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 18.02.1998 / **e)** 2/97 / **f)** The Law on the Government Representative / **g)** *Valstybės Žinios* (Official Gazette), 18-435 of 20.02.1998 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.
Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Supervision.
Institutions – Executive bodies – Territorial administrative decentralisation – Structure.
Institutions – Federalism and regionalism – Institutional aspects – Executive.

Keywords of the alphabetical index:

County, governance / Government representative / Localities, administrative supervision.

Headnotes:

The Constitution defines local self-government as a public administration system operating on the basis of direct action principles, and not directly subordinate to State authorities. Analysis of the constitutional norms permits a distinction to be drawn between the following principles of local self-government: representative democracy, accountability of executive institutions to the representa-

tives, free and independent actions of local governments within the limits prescribed by the law, co-ordination of interests of local governments and those of the State.

Self-government presupposes a certain freedom and autonomy of activities, as well as independence from institutions of State authority. Such freedom, however, is not limitless, while autonomy does not mean that one may ignore State interests. Therefore coordination of local government and State interests is of the utmost importance. This may be realised through State support or supervision of local government activities or through joint actions when significant social objectives are sought.

Local administration fulfils State administrative (i.e. executive) functions in particular localities, i.e. particular administrative units. The functions of the local administrations are, as a rule, performed by officials appointed by the central authority or institutions formed by such officials acting in the name or on the instructions (authorisation) of the central authority. Thus local administration is an organic part of the State administration: it is an extension of State executive power into particular locales. This is often defined as decentralisation of power, i.e. a partial transfer of central authorities' powers into particular locales or administrative units.

The institution of administrative supervision of local government activities is defined in individual parts of Article 123 of the Constitution, which also clearly indicates that this institution must be defined by law. This must be construed as emphasising the autonomy of the institution supervising local government activities (and not merely a matter of formality) as well as the requirement that this institution be regulated by a special law. The Constitution lays down the form of the law and autonomous regulation of this institution, as well as a comprehensive definition of the powers to exercise supervision and the procedure for their implementation. The option for and consolidation of an appropriate organisational legal form for a particular institution is another matter and is the prerogative of the legislator.

The amalgamation of an independent constitutional institution for the administrative supervision of local government activities with another institution, and in this case its direct incorporation into the local administration, contradicts the Constitution.

Summary:

Two systems of administration have been formed in administrative units of Lithuania: a system of self-government which is organised in the lower level administrative units (which are referred to by the law as territories of local governments), and a system of local administration which is organised by the Government in the higher level administrative units (counties).

In implementing constitutional provisions concerning the administrative supervision of self-government institutions, on 1 July 1993 the Law on the Government Representative was adopted, and it remained in force until 12 December 1996. Article 1 of this law reiterated constitutional provisions that the representative appointed by the Government had to supervise how local governments observe the Constitution and the laws or fulfil Government resolutions.

The Government representative had to check whether decisions adopted by joint or separate self-government institutions respect the rights of citizens and organisations, and whether officials of local governments fulfil Government resolutions.

On 12 December 1996, the *Seimas* passed the Law on the Amendment and Supplementation of the Law on the Governing of the County, as well as the Recognition of the Law on the Government Representative as null and void. The petitioner maintains that by this law the institution of the Government representative which is provided for by Article 123 of the Constitution, was abolished, which contradicts the provisions of Article 123 of the Constitution.

The Constitutional Court held that the common notion "representative" as used by Article 123 of the Constitution has an important legal meaning. First, Part 2 of the said article employs this notion to define an institution of the administrative supervision of local government activities. Second, the notion "representative" indicates a legal link with a certain legal subject, and reveals what interests are being represented and in whose name action is being taken. This question is answered by the notion "Government representative" used in Article 123.3 of the Constitution. It means that the subject exercising local government supervision acts in the name of the Government and is subordinate to it.

The Constitutional Court ruled that the Law on the Amendment and Supplementation of the Law on the Governing of the County is not in conformity with the Constitution. The Recognition of the Law on the Government Representative as Null and Void, in the part whereby the independent constitutional institution of the administrative supervision of local government activities is amalgamated with another institution, which found expression in the direct incorporation of local government supervision into the local administration, also conflicts with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-1998-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.03.1998 / **e)** 14/97/ **f)** The Law on Officials / **g)** *Valstybės Žinios* (Official Gazette), 25-650 of 13.03.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
General Principles – Proportionality.
Institutions – Executive bodies – The civil service.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Officials, dismissal / Civil service / Officials, freedom of expression / Information, right freely to seek, obtain and disseminate.

Headnotes:

The human right to freedom of convictions and of information is one of the fundamental requirements of a democratic order, as well as a pre-condition for the implementation of other human rights and freedoms. The freedom to form and discuss one's opinions, particularly on issues of public interest, is essential to the functioning of a representative democracy.

The fact that the Constitution consolidates the freedom of convictions and information means that the State is commissioned to guarantee and protect the people's right to have convictions and freely express them, as well as the right to seek, obtain and disseminate information unhindered. At the same time, the guarantees for an open society and pluralistic democracy are consolidated.

In the practice of the European Court and Commission of Human Rights as regards the application of Article 10 ECHR, the human right to express one's ideas and convictions freely is emphasised as being of exceptional importance for democracy. At the same time, attention is drawn to the fact that the attachment of duties and responsibilities to the exercise of these rights and the resultant dependence of their exercise on a variety of forms of State control mean this article provides States with more freedom to act than do other articles of the Convention. The State is entitled to restrict the right (consolidated by Article 10 ECHR) of State officials to express their ideas and opinions freely, in so far as this is done in connection with their official duties and functions.

The official is a participant in the implementation of the powers of State or local government institutions. Taking account of the peculiarities of the legal status of officials, certain restrictions of their civil rights are possible. From the legal standpoint it is significant that a person, after he becomes an official, commits himself to performing his duties properly, and agrees to the restriction of certain of his rights and freedoms as provided for by law. It is also important here that, as a rule, the requirements to be satisfied by officials as well as the restrictions applied to them are counterbalanced by rights guaranteed to them, as well as a system of incentives and rewards, together with remuneration and other social guarantees.

Summary:

Article 20 of the Law on Officials provides: "Officials of 'B' level who disagree with the policy implemented by the *Seimas*, the President of the Republic or the Government or with their decisions or actions may resign if their criticism of the above actions, passed through all stages in accordance with the regular course of business, produces no positive results. In the event that the above officials declare their disagreement in the mass media, at political or other public events (except when such declarations are made during the election campaign to the *Seimas*, the office of the President of the Republic or the local government councils), as well as in the cases of non-approval of officials as provided for by Article 17 of this law, they shall tender their resignation no later than within 14 days. Should they refuse to resign, they shall be dismissed from office in accordance with the procedure established by the labour legislation and shall be considered dismissed from the civil service". The petitioner questions whether this norm is in compliance with the Constitution.

The freedom to express convictions as well as the freedom of information are not unrestricted. In particular, Article 25 of the Constitution provides that freedom to express convictions, as well as to obtain and disseminate information, may not be restricted in any way other than

as 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.

Thus, it is established in this constitutional norm that any restriction expression of convictions or on the freedom of information must always be conceived as a measure of exceptional nature. The exclusiveness of the restriction means that one may not interpret the constitutionally established bases of the restriction so as to expand them. The criterion of necessity as laid down in the Constitution pre-supposes the fact that in every instance the nature and scope of the restriction must be proportionate to the aim sought.

The requirement for officials to refrain from public criticism of the higher state institutions is usually derived from principles of hierarchical subordination. In democratic states relations of such nature are commonly defined and assessed in accordance with the norms of professional ethics. The requirement to observe professional ethics along with other duties of officials is established by Article 14.4 of the Law on Officials. In Lithuania the regulations for professional ethics, however, have not been laid down systematically, nor has the content of the said legal norm been specified. Due to this, the Law on Officials is not sufficiently clear.

By establishing the restrictions on the civil right of officials of 'B' level to criticise the work of State institutions or officials, the legislator neither took account of the differences between the notions of disagreement and criticism employed therein, nor did he define 'disagreement', while for all cases he established the same legal effects. This contradicts the requirement of proportionality concerning restrictions on people's and citizens' constitutional rights, which is the essential deficiency of the contested legal norm.

Due to the vagueness of the legal regulation, as well as the disproportion between the aim of the provision and the sanction in the civil service, legal vagueness and uncertainty arise, while the protection of the rights of officials is not guaranteed. Such a deficient regulation is not in line with the objectives sought in this case, i.e. those of the lawfulness of State administration, stability, confidence and effectiveness. It also contradicts the constitutional principles of protection of human rights, and one of such principles is that restrictions may be established only by law, respecting the balance between the objective sought and the restriction of the right.

Taking account of the motives set forth, it must be concluded that the contested norm of Article 20.3 of the Law on Officials conflicts with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-1998-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 25.03.1998 / **e)** 12/97 / **f)** On Regulation of Pricing / **g)** *Valstybės Žinios* (Official Gazette), 29-784 of 27.03.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources.
General Principles – Certainty of the law.
Institutions – Executive bodies – Powers.
Institutions – Economic duties of the State.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Energy, pricing, regulation / Laws, promulgation.

Headnotes:

Legal theory states clearly that in the sphere of legal regulation the rule that a legal act shall not be retroactively valid is in operation. Thus, in general, legal acts are not applied to legal facts and legal effects which have already occurred.

The non-retrospectivity of laws is an important and necessary factor in ensuring the stability and firmness of the law, laws and legal order, and the rights of the subjects of legal relations, as well as in maintaining confidence in the legal acts adopted in the State. Legal subjects must be sure that conduct which is in conformity with the legal acts in force at the time will also be held lawful and not cause any legal effects to them later.

An exception is made in cases when, in either criminal or administrative law, liability is abolished or responsibility is mitigated for a deed. Such laws have the power of retroactive validity. This is in line with the rule of the legal doctrine *lex benignior retro agit.*

It is to be presumed that the adoption of a legal act having retroactive validity would be possible if this were indicated by the law itself and if such a legal act did not deteriorate the legal position of legal subjects. However, in all cases one has to take account of the fact that, in private law, after the legal position of one party of legal relations has been improved, the position of another party is likely to deteriorate.

Summary:

Article 7.2 of the Constitution provides: "Only laws which are promulgated shall be valid", while Articles 70 and 72 of the Constitution establish the procedure of promulgation and enforcement of laws. Therefore, pursuant to these constitutional provisions, the Law on the Procedure of Promulgation and Enforcement of the Laws and Other Legal Acts of the Republic of Lithuania was passed. Article 4 of this Law stipulates: "The laws of the Republic of Lithuania shall come into force after they have been signed and officially promulgated in the Official Gazette (*Valstybės Žinios*) by the President of the Republic unless a later day for their entry into force is established in the laws, while Article 8 prescribes that resolutions of the Government of the Republic of Lithuania by which legal norms are established, amended or recognised as null and void shall go into effect on the day after they have been signed by the Prime Minister and promulgated by the appropriate minister in the Official Gazette (*Valstybės Žinios*)".

The Constitutional Court, analysing the problems of retrospective validity of legal acts, noted with respect to Government resolutions that "the Government resolution which has been adopted applying the norms of law and establishing their retroactive power is in all cases inconsistent with the law, since it interferes in the scope of validity of laws, and their supremacy over executive acts is violated".

The disputed Government resolution was adopted on 18 July 1997 and came into effect on 24 July 1997. But it provides that after the new pricing procedure for energy resources goes into effect, the suppliers of electric energy, central heating, hot water and natural gas must establish the new prices for energy resources from 1 July, 1997. The Constitutional Court held that it is evident that in the departmental legal acts Item 2.3 of the disputed Government resolution was being followed and it was assessed as one among several legal grounds for establishing the retroactive application of the new prices for energy resources. This was the ground for recognising that the disputed Government resolution contradicts the Laws.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-1998-1-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.04.1998 / **e)** 13/97 / **f)** On the powers of the President / **g)** *Valstybės Žinios* (Official Gazette), 39-1044 of 24.04.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Head of State – Powers.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Legislative bodies – Relations with the Head of State.
Institutions – Jurisdictional bodies – Organisation – Prosecutors / State counsel.

Keywords of the alphabetical index:

Legislative initiative / State institution, definition / Radio and television, council, member, dismissal / Prosecutor General, appointment.

Headnotes:

The principle of the separation of State powers means that the legislative, executive and judicial powers must be separated and sufficiently independent; however, they must be balanced. Every institution of power is granted competence corresponding to its purpose, the particular content whereof depends on the form of State governance.

The status of the supreme institutions of State power is, first of all, grounded on the authorisations directly consolidated in the Constitution. In defining the functions and authorisations of the supreme institutions of State power, the Constitution also provides for their reciprocal control and balance, as well as their partnership. The direct establishment of authorisations in the Constitution means also that one institution of State power may not take over any authorisations from another institution, nor may it pass or refuse them. Such authorisations may

not be altered or restricted by the law by establishing additional conditions for their implementation. If there is a wish to alter or restrict them, an amendment to the Constitution must be adopted.

The right of legislative initiative is equal in scope for every subject who is entitled to exercise it and it is implemented by submitting a concrete draft law to the parliament, or by formulating in writing a new fundamental idea concerning law-making. After an appropriate subject has submitted a draft law, the process of law-making begins. The *Seimas* then has a duty to begin considering the presented draft law or the project for a draft law. After this, further stages of the legislative process ensue, as provided for in the Statute of the *Seimas*.

The autonomy of the *Seimas* within its sphere of competence is established by the Constitution and is limited by the *Seimas*' duty to act in compliance with the Constitution and valid laws. It is the constitutional duty of the *Seimas* and of every *Seimas* member to observe the requirements laid down in these texts as well as those of the statute of the *Seimas*, which has the force of law.

Summary:

On 12 December 1996, the *Seimas* passed the Law on Amending and Supplementing of Article 8 of the Law on the National Radio and Television of Lithuania. This law provided for a new legal basis for recalling members of the Council from office. Article 8.4.5 stipulates that the members of the RTL Council may not be recalled from office until their term of office has expired unless the legal basis for the appointment of a Council member is changed. On the same day, by the disputed law, the *Seimas* established that after the Law On Amending Article 29 of the Law on the Provision of Information to the Public of 5 December 1996 had come into force, the powers of the members of the Council of the National Radio and Television of Lithuania who were appointed by the President of the Republic and the *Seimas* would cease. The petitioner, a group of *Seimas* members, maintains that by discontinuing the authorisations of the Council members who had been appointed by the President, the *Seimas* violated the powers of the President.

Upon adoption of the Law on the Provision of Information to the Public, as well as the Law on the National Radio and Television of Lithuania, the RTL lost the status of a State institution. Thus, the RTL Council is not a constituent part of State power. Nor is it a State institution under Article 67.5 of the Constitution. Therefore the status of its directing body, the Council, is not equivalent to that of a State institution, while the legal situation of a Council member is not equivalent to that of a State official or State officer. Thus the norms as to the termination of service relations do not apply the members of the RTL Council, nor do RTL Council members benefit from the guarantees established for State officers.

Taking account of the reasons given above, the Constitutional Court ruled that the *Seimas* did not violate the constitutional principle of separation of powers; therefore, the Law on Implementation of the Law on Amending Article 29 of the Law on the Provision of Information to the Public is in compliance with the Constitution.

The President of Lithuania, by his decree of 17 February 1997, recommended that the *Seimas* dismiss V. Nikitinas from the post of Procurator General and commission the Deputy Procurator General, A. Paulauskas, to act temporarily as the Procurator General of the Republic of Lithuania until a new Procurator General was appointed.

By its Resolution of 25 February 1997, the *Seimas* dismissed V. Nikitinas from the post of Procurator General (Article 1), and commissioned him to act temporarily as the Procurator General until a new Procurator General was appointed (Article 2). The petitioner contends that this part (Article 2) of the legal act violated the prerogative of the President of the Republic to recommend a person to act as the Procurator General.

Under the then valid Law on Courts and Law on the Procurator's Office, the President of the Republic was entitled to submit candidatures for the position of Procurator General to the *Seimas*. Thus, the *Seimas* could appoint a person to act as the Procurator General only if there existed a recommendation of the President of the Republic. By his decree the President proposed that a particular person should act as the Procurator General. The *Seimas* had to deliberate upon the said candidature and was entitled either to approve or to reject it. However, the *Seimas*, on the grounds of a motion of a *Seimas* member, appointed another person to act as the Procurator General, thereby violating the powers of the President of the Republic that had been established by the aforesaid laws.

Languages:

Lithuanian, English (translation by the Court).

Malta
Constitutional Court

Summaries of important decisions of the reference period 1 January 1998 – 30 April 1998 will be published in the next edition, *Bulletin* 1998/2.

Moldova
Constitutional Court

Introduction

1. Date and context of establishment

On 29 July 1994 the Parliament of the Republic of Moldova – an independent State from 27 August 1991 – adopted the new Constitution. Thus, the foundation of the Constitutional Court of the Republic of Moldova, its structure and functions as well as its place amongst the public authorities were provided.

On 23 February 1995 the Constitutional Court started its activity.

On 16 June 1995 the Parliament adopted the Code of Constitutional Jurisdiction. The Court delivers its judgments, decisions and opinions in conformity with this Code.

2. Position in the hierarchy of the legal institutions

The Constitutional Court does not represent a branch in the hierarchy of the legal institutions of the State. It is a unique constitutional judicial body, autonomous and independent from the executive, the legislature and the judiciary. The goal of the Constitutional Court is to guarantee the supremacy of the Constitution, to ensure the principle of separation of State powers into the legislative, executive and judicial branches, to guarantee the observance of the State's responsibility towards the citizen and the citizen's responsibility towards the State. Upon request the Constitutional Court interprets the Constitution and undertakes the review of constitutionality of the Parliament's laws and decisions, of the decrees of the President of the Republic of Moldova and of the acts of the Government.

I. Statutory foundations

- Articles 134-140, 141.2, Chapter VII "The Final and Transitory Provisions" of the Constitution;
- Law on the Constitutional Court no. 317-XIII of 13 December 1994, modified through Law no. 917-XIII of 11 July 1996, and Law no. 1221-XIII of 26 June 1997;
- Code of Constitutional Jurisdiction no. 502-XIII of 16 June 1995.

II. Composition and organisation

1. Composition

The Constitutional Court of the Republic of Moldova is composed of 6 judges, appointed for a 6-year term. Two of them are appointed by the Parliament, two by the President of the Republic of Moldova, while the two remaining members are appointed by the Judicial Service Commission. When the Constitutional Court was first established, the legal system was in the process of being reorganised, and in fact the Judicial Service Commission, provided for by the Constitution had not yet been established. That is why, in the initial composition of the Constitutional Court, the judges who had to be appointed by the Judicial Service Commission were elected through a secret ballot at the general meeting of the judges of the Republic of Moldova which took place on 7 February 1995.

According to the Constitution, any person who possesses outstanding legal knowledge, high professional competence and at least 15 years' experience as a judge or in legal education or research may be appointed to the function of judge of the Constitutional Court.

The Law on the Constitutional Court stipulates an age limit for appointment as a judge of the Constitutional Court, which is 65.

According to the Constitution, for the duration of their term the judges of the Constitutional Court are irremovable and independent and obey only the Constitution.

The expiration of the judge's term and the vacation of their functions is declared only in the case of:

- death
- expiration of the term
- the judge's dismissal
- annulment of the appointment, which is possible when the judge has:

  a. been unable to fulfil his duties because of ill health;
  b. not observed his oath or failed to fulfil his duties;
  c. been convicted by a court of an offence;
  d. allowed incompatibilities with his functions to arise.

The expiration of the 6-year term and the vacation of a judge's functions are declared exclusively by the Constitutional Court.

Membership is incompatible with any other public office or remunerated activity, except of a teaching or scientific nature. The legal provisions stipulate that the judges of the Constitutional Court must give up any activity in political parties or any other public organisation.

After taking the oath in front of the authorities that appointed them, the judges of the Constitutional Court elect its President by secret ballot.

2. Procedure

The procedure of the Court is governed by the Constitution, the Law on the Constitutional Court and the Code of Constitutional Jurisdiction.

Under the Constitution and the Law on the Constitutional Court, the following parties may petition the Constitutional Court:

- the President of the Republic of Moldova;
- the Government;
- the Ministry of Justice;
- the Supreme Court of Justice;
- the Economic Court;
- the Prosecutor-General;
- a member of Parliament;
- a parliamentary group;
- the National Assembly of Gagauzia (Gagauzia-Yeri is an autonomous territorial unit of the Republic of Moldova).

The Constitutional Court exercises constitutional jurisdiction only upon appeal by the subjects provided for by the Law on the Constitutional Court.

Individual citizens have no right to petition the Constitutional Court. The Constitutional Court has no right to examine a case of its own motion either. Appeals are made to the Constitutional Court in written form, in the official State language, and submitted to its President with no charge for the procedure.

The examination of the appeal consists of 2 stages: the preliminary examination and the examination of the substance of the case.

If the subject-matter referred to the Constitutional Court is within the Court's jurisdiction, in order to make a preliminary examination, the President of the Court arranges for the material to be transmitted to one or more judges of the Court, to a Secretary's subdivision or to an assistant judge.

The report regarding the preliminary examination must be presented not later than 60 days after registration of the application. In cases where a large amount of investigation is necessary, the time limit can be extended by 30 days.

After the preliminary examination of the appeal the rapporteur judges present the report to the Court. The members of the Court decide on the admissibility for examination of the substance of the case and its inclusion in the agenda in order to be examined at the public session. If the appeal is deemed admissible, the President of the Court designates a rapporteur judge and fixes the time-limit for examination and presentation of the report.

The rapporteur judge (or judges) prepares the file for the examination, transmits a copy of the appeal and of the annexed documents to the other party, studies the other party's written objections to the referral, solicits the materials regarding the case from the relevant institutions, orders expert opinions and requests the opinion of the Scientific-Consultative Council concerning the examined question where appropriate and takes any other measures necessary.

When the file is made up, the rapporteur judge informs the members of the Court and the participants in the case of the place, date and time of the session not later than 10 days before the session itself.

The parties may appear before the Constitutional Court either in person or through their legal representatives. The representatives of a party can be lawyers, specialists in the relevant field and other persons.

The representatives' scope of authorisation is indicated in the letter of attorney.

Throughout proceedings the parties have equal procedural rights and access to all documents of the case file.

The Court can request and obtain additional information and documents necessary for the examination of the case. The Constitutional Court's requests and summonses are binding on all public authorities, officials, institutions and organisations. Non-fulfilment of the Court's requests is punishable by law.

In plenary and public sessions the constitutional jurisdiction operates under the adversarial principle. The number of judges necessary to constitute a quorum is two-thirds of the judges. Each application is dealt with at a single hearing. The Court cannot examine another appeal until judgment concerning the current application has been pronounced or the case is suspended.

Where publicity could threaten the interests of the State and the public order, the Constitutional Court declares that the hearing will be held *in camera*.

After the examination of the case, the Court deliberates in private in the consultation room. Judges have no right to divulge the content of deliberations.

The Constitutional Court delivers judgments, decisions and opinions. Where the application is examined, judgment is handed down or an opinion is issued. If the problem is not resolved, a decision is adopted.

The goals of the issued opinions are:

- to review the Constitution;
- to review the circumstances which may justify the dissolution of Parliament, the suspension from office of the President of the Republic of Moldova or the interim office of the President of the Republic of Moldova;
- to decide over matters dealing with the constitutionality of parties etc.

Court rulings are adopted by a majority of the judges' votes. The President of the session votes last. Where there are equal numbers of opposing votes, the President has the casting vote.

Judgments and opinions are adopted on behalf of the Republic of Moldova. The judgments of the Constitutional Court cannot have retrospective effect, are final and cannot be appealed against.

Laws and other legal acts or some of their provisions become null and void from the moment that the Constitutional Court passes the appropriate decisions to that effect.

Reconsideration of a judgment or opinion is possible only on the Court's initiative through a decision adopted with the majority of votes of judges.

A judge whose opinion differs from the pronounced judgment or issued opinion can set out his point of view in written form. The judgments and opinion of the Constitutional Court, together with separate dissenting judgments if there are any, are published in "*Monitorul Oficial*" of the Republic of Moldova not later than 10 days after the date of their announcement.

3. Organisation

The Secretariat of the Constitutional Court is responsible for providing assistance in all informational, organisational, scientific and other such matters for the preliminary appeal examination and for preparation of the file.

The Secretariat's regulations rules for the appointment of staff and management of human resources are adopted by the Constitutional Court itself.

The management of the Secretariat is entrusted to the chief, who is responsible for all the administrative work.

The personnel of the Secretariat consists of 20 people. (The Chancellery – 5 persons, the International Relations Section – 3 persons, the Legislative Section – 4 persons, the Editorial Section – 3 persons, the law clerk, the Financial-Administrative Section – 4 persons).

The President of the Constitutional Court is in charge of the general supervision of the Secretariat, the appointment and dismissal of Secretariat staff as well as the co-ordination of budget resources.

The Constitutional Court has its own budget. This is established each year by the Parliament within the State budget.

The Scientific-Consultative Committee also functions within the Constitutional Court.

III. Functions

In pursuance of Articles 135 and 141.2 of the Constitution and according to the procedures established by the Code of Constitutional Jurisdiction, the Constitutional Court:

undertakes, upon application, constitutional review of laws, regulations and orders of Parliament, Presidential decrees, decisions and orders of Government, as well as international treaties endorsed by the Republic of Moldova. This is *ex post facto* review. Any normative act as well as any international treaty to which the Republic of Moldova is a party is considered to be constitutional until the moment when its unconstitutionality is proved during the exercising of constitutional jurisdiction.

Only normative acts adopted after the adoption of the new Constitution, 27 August 1994, are subject to the constitutional review.

The Constitutional Court considers only the problems falling within its jurisdiction. If in the examination process questions arise over which other organs have competence, the Court sends the materials to them. The Constitutional Court ascertains the limits of competence itself. While undertaking the review of the contested normative act, the Court can deliver judgments concerning other normative acts whose constitutionality completely or partially depends on the constitutionality of the contested act.

During 1995-1997 about 128 normative acts of Parliament, the President of the Republic of Moldova and the Government were subjected to constitutional review.

Constitutional review of international treaties was not undertaken.

The Constitutional Court also:

- explains and clarifies the Constitution. In the period of 1995-1997, articles of the Constitution were interpreted by the Court 11 times. The majority of interpretations concern the competence of public authorities and the principle of separation and collaboration of State powers;

- formulates its position on initiatives aiming at revising the Constitution. In accordance with the Constitution the subjects empowered to initiate the constitutional review can present drafts of constitutional laws only if they are accompanied by the Constitutional Court's opinion. This shall be adopted through a vote by no less than 4 judges. In spite of the fact that the Court's opinions concerning the draft do not have binding force, the Parliament is guided by them. To date the Court has expressed its opinion on 3 initiatives concerning the modification of the Constitution. One of the drafts, dealing with the new conditions for appointment to the function of judge in the judicial system, was adopted by Parliament;

- confirms the results of republican referenda. Before the establishment of the Constitutional Court of the Republic of Moldova there were no such referenda;

- confirms the results of parliamentary and presidential elections in the Republic of Moldova. In December 1996 the Court confirmed the results of the election of the President of the Republic of Moldova, elected in conformity with the Constitution's provisions. On 9 April 1998 the Court confirmed the results of the election of the Parliament of the Republic of Moldova;

- ascertains the circumstances justifying the dissolution of Parliament, the suspension from office of the President of the Republic of Moldova or the interim office of the President of the Republic of Moldova;

- resolves exceptional cases on the unconstitutionality of judicial acts, as signalled by the Supreme Court of Justice;

- decides on matters relating to the constitutionality of political parties. To date there have been no such cases in the practice of constitutional review.

In order to guarantee the judges' irremovability, the Court is the only authority empowered to revoke the judge's immunity and release them from office.

The Constitution expressly determines the functions of the Constitutional Court, which can be neither increased nor limited through a law. Its functions can be modified only if the Constitution is changed accordingly.

IV. The practice of the Constitutional Court

In the period of activity from 23 February 1997 to 1 January 1998, the Constitutional Court considered 128 appeals:

- 95 referrals regarding the constitutionality of the Parliament's laws and decisions, Presidential decrees and acts of Government;
- 11 applications concerning the interpretation of the Constitution;
- 3 appeals regarding laws on the modification of the Constitution and other such matters.

The Constitutional Court confirmed the results of the presidential election of 1 December 1996. It validated the mandates of deputies of the Republic of Moldova.

Analysis of the appeals lodged with the Constitutional Court demonstrates that at present the Republic of Moldova faces problems with the principle of separation and collaboration of powers in the State and with the observance of fundamental human rights and freedom.

On 6 November 1995, the Constitutional Court undertook the constitutional review of the Law on Local Elections and the Law on Local Public Administration.

The acts subjected to constitutional review stipulated that in cases where the majority of voters included in the electoral rolls do not vote during the re-running of local elections for public authorities, on the Government's suggestion, the leaders of the local public authorities are appointed by the President of the Republic of Moldova. The Constitutional Court ruled that the local public authorities' autonomy protects the rights of the administrative-territorial units to satisfy their private interests without any interference from central authorities. Autonomy is a right and decentralisation a system which implies autonomy. Local public authorities should be elected and removed by the citizens of the administrative-territorial units and not appointed by central authorities.

The Constitutional Court delivered judgments on very important matters concerning the State guarantee of the right to private ownership of land. Thus, on 25 January 1996 some articles of the Land Code and parliamentary orders were subjected to constitutional review. The Parliament limited property rights regarding the incorporation of near-by land into the private property of newly created agricultural enterprises, the rights of the equivalent land shareholders as well as the forms of ownership of land.

Analysing the stipulations of the Constitution, which state directly the fundamental principle concerning property, the right to private property and its protection, as well as the provisions regarding the restriction of some rights and freedoms, the Constitutional Court considered that the right to private ownership of land is a prerogative characteristic to the human being. It is an affirmation of human values. The articles of the Land Code that limited owners' rights on the land in their possession and its usage, and prohibitions regarding the land's sale and purchase, donation, exchange etc. till 2001 were declared unconstitutional.

The Court considered these questions in its judgment of 2 October 1996 concerning "the constitutionality of some provisions of Law no. 369-XIII of 10 February 1995, Law no. 745-XIII of 23 February 1996 and of Judgment no. 460-XII of 23 January 1991 dealing with right on the land disposition", and in its judgment of 27 October 1997 concerning "the constitutional review of Article 4, paragraph 4 and Article 12, paragraph 4 of the Land Code of the Republic of Moldova".

The judgment of the Constitutional Court of 4 March 1997 had a notable effect as well. By this judgment, some of the provisions of the Law "On the Supreme Council of the Magistracy" were deemed unconstitutional.

According to the acts subjected to constitutional review, the President of the Judicial Service Commission performed a function equivalent to that of the Minister of Justice. In this case the Minister of Justice exercised the powers dealing with the promotion, transfer, suspension and dismissal of judges and the solution of different kinds of problems such as financial ones, which consequently impinged on the real independence of the judicial board towards the executive power.

Appreciating the principle of the separation of State powers as a mechanism for guaranteeing the existence of reciprocal checks and balances amongst them, the Constitutional Court held that the direct subordination of the activities of the Judicial Service Commission to the Minister of Justice, one of the representatives of the executive power, contradicts the constitutional principle of separation of powers. The norms in question were declared unconstitutional.

The Constitutional Court pays particular attention to the question of fundamental human rights and freedoms. Many times this has been reflected in its judgments.

Thus, under the judgment of 16 June 1997, the Court examined Article 97, paragraph 4 of the Code of Criminal Procedure, which stipulates that any complaint against the refusal to start a criminal case has to be addressed to the public prosecutor.

The legally consolidated right of the plaintiff to contest the order refusing to instigate a criminal case by means of a complaint addressed to the public prosecutor, who is responsible for the legality of the institution of criminal proceedings, does not contradict the Constitution of the Republic of Moldova. The Constitution guarantees human rights and freedoms and permits violations committed during the issue of the order refusing to institute the criminal proceedings to be effectively cancelled out.

It is important to mention that judicial instances and other legal organs interpreted the provisions of Article 97, paragraph 4 of the Code of Criminal Procedure, which allow the interested persons, enterprises, institutions and public organisations as well as victims to appeal against the public prosecutor's refusal to institute criminal proceedings. But these provisions in themselves limit the possibility of addressing a similar application to a judicial instance.

The lack of indications concerning the possibility of attacking the refusal to instigate a criminal case, as well as the methods of examination of such complaints, caused a limitation of the interested persons' constitutional right to effective satisfaction from the courts. Taking into consideration these facts, the Constitutional Court declared the dispositions of Article 97, paragraph 4 of the Code of Criminal Procedure to be unconstitutional. In practice, they limit the possibility of appealing to a judicial instance against a refusal to institute criminal proceedings.

With the purpose of ensuring the respect of the fundamental human rights and freedoms, under its judgment of 21 July 1997, the Constitutional Court held the Presidential Decree "On the Department for Struggle Against Organised Criminality and Corruption" of 7 April 1997 to be unconstitutional. Through the judgment of 27 October 1997, Article 5 of the Law "On Privatisation of the Housing Fund", some of the Governmental decisions dealing with discriminatory conditions in work payment, combined jobs, the means of employment on the basis of agreement etc. were declared unconstitutional.

v. Bibliography

- The Constitution of the Republic of Moldova
- The Law on the Constitutional Court
- The Code of Constitutional Jurisdiction
- The Collection of judgments and decisions (Official Digest) 1995 – 1996.

Statistical data

1 January 1995 – 31 December 1997

Synoptic table of the cases registered and examined by the Constitutional Court in 1995-1997

Article concerned	Cases registered		
	1995	1996	1997
135a	28	16	50
135b	1	6	9
135c, 141(2)	2		1
135d			
135e, 69(1)	3	3	5
135f			
135g	1		
135h			
Total:	35	25	65

Article concerned	Judgments and opinions handed down		
	1995	1996	1997
135a	6	11	22
135b	1	6	4
135c, 141(2)	2		1
135d			
135e, 69(1)	3	4	5
135f			
135g			1
135h			
Total:	12	21	33
Decisions interpreting the judgments of the Constitutional Court		1	1
Dismissals	6	1	7
Decisions concerning a stay in proceedings	3	2	10
Decisions concerning the organisation of the rules of procedure			5

Important decisions

Identification: MDA-1998-1-001

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 01.01.1998 / **e)** 2/1998 / **f)** / **g)** *Monitorul Oficial of the Republic of Moldova* (Official Gazette), 02.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between State authorities.
General Principles – Separation of powers.
Institutions – Legislative bodies – Powers.
Institutions – Jurisdictional bodies – Jurisdiction.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Service abuse / Privatisation / Criminal code.

Headnotes:

No public authority other than the judiciary can declare anyone guilty or impose a sanction for a presumed offence under the Criminal Code.

Summary:

On 19 January 1998, at the appeal, the Constitutional Court examined the Parliament's orders concerning the illegal privatisation of the sanatorium-preventorium "Legkovik" and the establishment of the committee for the examination of cases, referring to the unlawful privatisation of some other concerns.

In both of these orders, without having a decision of a judicial organ at its disposal, the Parliament found the activity of the two Governmental members to be an abuse of power, insisting that one of them should undergo a disciplinary punishment. According to the internal legislation the notion of an abuse of power is deemed an offence under the Criminal Code and the punishment measures are stipulated. Taking into consideration that according to the constitutional provisions a person can be accused of a criminal offence only during a public judicial process, the author of the appeal states that in finding the activity of the Governmental members to be an abuse of power, the Parliament, in effect, had administered justice, violating the constitutional principle of separation of powers as well as that of presumption of innocence.

Examining the case materials in comparison with the constitutional norms, listening to the arguments of the parties, the Constitutional Court noted that the constitutional characteristics of a State governed by the rule of law consolidated the respect of human rights and fundamental freedoms by the state and, with that end in view established some legal procedures necessary for the assurance of the person's rights and fundamental freedoms. At the same time, one of the constitutional characteristics of a state governed by the rule of law is the obligation of the State, its public authorities and officials to act within their functional limits as defined by the Constitution and laws.

The Constitutional Court noted that the regulation of offences and punishments and the regime of execution of the latter, according to Article 72 of the Constitution falls within the scope of organic laws. With this in mind, the Parliament adopted the Code of Criminal Procedure.

The notion "of abuse of power" is treated as an offence under the Criminal Code. Criminal sanctions are envisaged against its commitment. As for all criminal cases, according to the Code of Criminal Procedure, in the name of law, they fall within the scope of the system of justice.

The Constitutional Court states that the Parliament, using the notion "abuse of power" in its normative acts directed towards individual persons, without basing its actions on any judgments of the court declared during some public judicial proceedings, was in effect administering justice, assuming the function of the judicial authorities.

Consequently, the Constitutional Court declared the notion "of abuse of power" contained in the legislative acts subjected to a review of constitutionality to be unconstitutional.

Languages:

Moldovan.

Identification: MDA-1998-1-002

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 03.02.1998 / **e)** 1/1998 / **f)** / **g)** *Monitorul Oficial of the Republic of Moldova* (Official Gazette), 02.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Equality.
Institutions – Legislative bodies – Powers.
Institutions – Legislative bodies – Organisation.
Institutions – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, internal regulation / Parliamentary groups / Parliament, free mandate / parliament, regulatory, autonomy.

Headnotes:

The Parliament has the right to establish its own method of internal organisation. This includes the power to fix a deadline for the composition of the parliamentary groups.

The right to become or not to become a member of a parliamentary group is a personal decision of each member of the Parliament.

Summary:

Upon the appeal of a member of Parliament, the Constitutional Court examined the constitutionality of Articles 4.3 and 4.4 of the Parliament's Regulations, according to which parliamentary groups are formed within 10 days after the new parliament has been elected. The establishment of other groups for the duration of the Parliament's mandate is not admissible. The applicant considers that the parliamentary groups benefit from the additional technical means necessary for the groups' activity and that the groups determine the composition of the permanent Bureau, the parliamentary committees and the agenda. As for the deputy who does not belong to a parliamentary group, he has no such possibility. In fact, he has no possibility of executing freely his deputy's mandate. This contradicts Article 68 of the Constitution, according to which during his term of office, the deputy is at the people's service. Any mandate under which the deputy is compelled to obey his electors' instructions is considered void.

Studying the parties' arguments, the norms of the Constitution and international practice, the Constitutional Court came to the conclusion that the method of the establishment and operation of the parliamentary groups is based on the principle of the regulatory autonomy of Parliament. The initial Parliamentary election of any parliamentary group has an optional character and not an imperative one. Where a deputy does not participate in at least at one group, this does not mean that he is obliged to adopt any decision against his own will.

Taking into consideration the above reasons, the Constitutional Court decided to dismiss the case, stating that the establishment of the method of organisation and development of the Parliament's activities is undertaken at its own discretion through the execution of its main competences.

Languages:

Moldovan.

Identification: MDA-1998-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 26.02.1998 / **e)** 9/1998 / **f)** / **g)** *Monitorul Oficial of the Republic of Moldova* (Official Gazette), 03.1998 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Law-making procedure.
Institutions – Legislative bodies – Relations with the Head of State.

Keywords of the alphabetical index:

Law, promulgation / Presidential decree / Promulgation, refusal by Head of State.

Headnotes:

The Constitution enables the President to send back to the Parliament a law with his objections for its re-examination.

Such objections shall be submitted to Parliament in writing. They do not, however, have to be in the form of a decree.

Summary:

On 26 February 1998, at an open plenary session, the Constitutional Court examined the appeal of the Parliamentary deputy Victor Cecan, who solicited the interpretation of some provisions of Article 93.2 of the Constitution. The interpretation of this article, which allows the president to send a law back to the parliament for its further examination if he has any objections to it, was necessary because the kind of law concerned (decrees, intercession, letter etc.) is not expressly stated in Article 93.2 of the Constitution.

Upon examination of the appeal, the constitutional Court held that the return of the adopted law to the parliament for re-examination taking into account the President's objections meant in effect that the Head of State had refused to promulgate the law. This refusal to promulgate the law was completed by the President providing written reasons for the refusal.

The Constitutional Court delivered this Judgment based on the following considerations.

According to Article 74.3 of the Constitution the laws adopted by Parliament, in order to be promulgated, are transmitted to the President of the Republic of Moldova. The law's promulgation is the final act of the legislative process and falls exclusively within the competence of the Head of State. This competence is directly defined by Article 93.1 of the Constitution.

Clearly the Head of State must have the possibility of examining the law, in order to exercise his responsibilities in this quality, to ensure the public authorities' function is quite obvious. That is why under Article 93.2, the Constitution permits the President of the Republic of Moldova, in case of any objections to a law, to send it to the Parliament not later than 2 weeks for its reexamination. Only in case when the Parliament maintains its anterior adopted judgment, the President promulgates the law.

Actually, the text of Article 93 of the Constitution does not provide the way, through which the Head of State sends the law to the Parliament for its reexamination. At the same time the Constitutional Court does not support the thesis of the appeal, according to which, the transfer of the law to the Parliament for its reexamination should be done through the Presidential decree. According to Article 94.1 of the Constitution, the decrees, issued by the President of the Republic of Moldova, are obligatory to be executed on the whole territory of State and as a rule have a normative character. The Head of State' objections to a law, indifferently of their nature, are not obligatory for Parliament. This results from the text of Article 93.2 of the Constitution. It stipulates the Parliament's right to maintain the previous decision during the process of the law's reexamination. The Constitutional Court considers that the law's transfer of the President of the Republic of Moldova with his objections to the Parliament for the reexamination, actually, means the rejection by the Head of State to promulgate the law.

Thus, in order to be reexamined, through a written application, the President of the Republic of Moldova has the right to send the laws with his objections to the Parliament.

Languages:

Moldovan.

The Netherlands
Supreme Court

Important decisions

Identification: NED-1998-1-001

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 12.09.1997 / **e)** 16.309 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 168.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Case-law – International case-law – European Court of Human Rights.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Adversarial hearings.

Keywords of the alphabetical index:

Right to hear and be heard / Public Prosecution, advisory opinion, response.

Headnotes:

Pursuant to Article 6 ECHR of the European Convention on Human Rights (ECHR), parties had the right to respond to the advisory opinion of the Public Prosecution Service as they saw fit, unless this would prejudice due process, taking into account the interests of the other party.

Summary:

Insofar as Article 328 of the Code of Civil Procedure prevented parties from responding to the advisory opinion of the Public Prosecutions Department as they saw fit, it should be deemed inapplicable, because it was incompatible in this context with the relevant provision of Article 6 ECHR, which was to be interpreted according to the case law of the European Court of Human Rights ruling of 20 February 1996, European Court Reports 1996-I, pp. 224 ff.). In this regard, no constraints were applicable other than those relating to due process, e.g. in relation to the other party's interests.

Languages:

Dutch.

Identification: NED-1998-1-002

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 14.10.1997 / **e)** 105.128 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 187.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights of 1966.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Independence.

Keywords of the alphabetical index:

Judges, participation in previous process / Statement of accused, previous evaluation as statement of a witness.

Headnotes:

When an accused is faced in his criminal case with a number of judges who have already assessed his reliability as a witness in a different criminal case against a fellow suspect, the fear of the accused that the Court is biased against him is objectively justified.

Summary:

In a different criminal case against a fellow suspect, the Court of Appeal had used statements made by a witness in that case (now the accused), having first expressed its opinion, furnished with reasons, as to the reliability of the testimony of the witness. In the case at hand, two of the three justices were also on the bench in the case against the fellow suspect. The accused contended that his case was therefore not being heard by independent judges.

The Supreme Court considered that the mere circumstance that the accused's case was dealt with on appeal by a division of the Court of Appeal, two members

of which also belonged to the division that had previously found that a fellow suspect, together with *inter alia* the accused, had contravened Article 140 of the Criminal Code in another case, did not in itself constitute a serious indication that the Court was biased against the accused, or that the accused's fear in that regard was objectively justified.

However, the Supreme Court went on to consider that the following special circumstances applied in the case at hand. In the case against the fellow suspect, the accused, acting as a witness, had testified that the statement he had previously made to the police was incorrect, as it had been obtained through intimidation and the promise of a reduced sentence. In his own case he reiterated this position. However, he found himself facing a division of the Court of Appeal two members of which had formed an opinion on this position before, giving their reasons and having first investigated it, and who had therefore already given their opinion on the reliability of the accused in the case at hand. In the view of the Supreme Court, under these special circumstances it must be concluded that the fear of the accused as to the Court's partiality was objectively justified, and that on these grounds there had been a violation of Article 6.1 ECHR and Article 14.1 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

Identification: NED-1998-1-003

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 21.10.1997 / **e)** 105.652 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998, 173.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Case-law – International case-law – European Court of Human Rights.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate one-self.

Keywords of the alphabetical index:

Evidence, obligation to give, exemption / Statutory obligation to supply information.

Headnotes:

The witness's right not to be forced to incriminate himself, as enshrined in the right to a fair trial in accordance with Article 6.1 ECHR, is not an absolute right that takes precedence over a statutory obligation to supply information.

Summary:

In the case at hand, the suspect refused to permit officials monitoring the observance of the Driving Hours Decree to inspect written documents when instructed to do so pursuant to Section 19 of the Economic Offences Act.

In this connection the Supreme Court considered that the right of the accused not to be forced to incriminate himself, as enshrined in the right to a fair trial in accordance with Article 6.1 ECHR, was not an absolute right that prevailed over a statutory obligation to supply information even if the accused would incriminate himself by supplying that information. In the opinion of the Supreme Court, it followed from the Saunders judgment (European Court of Human Rights, 17.12.1996) that Article 6.1 ECHR was not incompatible with the use as evidence of material obtained from an accused under coercion where this material existed independently of the will of the accused. The demand made in this case under Section 19 of the Economic Offences Act to permit the inspection of certain documents was therefore not incompatible with Article 6.1 ECHR, even if the person concerned was suspected at that point of having committed a criminal offence.

Languages:

Dutch.

Identification: NED-1998-1-004

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 24.10.1997 / **e)** 16.429 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 211.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Case-law – International case-law – European Court of Human Rights.
Institutions – Legislative bodies – Law-making procedure.
Fundamental Rights – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Parentage / Paternity, repudiation / Law-making task of the Court / Assumption, legal / Reality, social and biological / Father, biological.

Headnotes:

The period set by law for proceedings for the repudiation of paternity led in the present case to impermissible interference with the right to family life as protected by Article 8 ECHR. In the case at hand, it was within the Court's law-making task to find a solution to this problem.

Summary:

Under current Dutch law, if a child is born while its mother is married, the mother's husband is its father (Article 1:197 of the Civil Code). Repudiation of paternity is only possible within the bounds set by Article 1:199-204 of the Civil Code.

The Supreme Court determined that if applying these provisions meant that the mother's husband could not repudiate paternity even if he was not the child's biological father, which the result that no relationship under family law could develop between the child and its biological father because the latter could not acknowledge paternity, this could be said to constitute impermissible interference with family life as protected by Article 8 ECHR. In this regard, the Supreme Court considered that pursuant to the judgment of the European Court of Human Rights of 27.10.1994 (series A, number 297, *Nederlandse Jurisprudentie* 1995, 248 (Kroon), paragraph 40) the basic principle to be applied in assessing this question should be that the right to respect for family life, within the meaning of this Article, required that biological and social reality should take precedence over statutory assumptions, such as the assumption of the husband's paternity that follows from Dutch legislation, when such an assumption obviously conflicted with both the established facts and the wishes of those concerned and was not to anyone's benefit. In the case at hand, the Supreme Court believed that there had been interference within the meaning of the Article, and that no justification for it within the meaning of Article 8.2 ECHR could be found.

The Supreme Court also held that it could be said in this case that finding a solution to the consequences of the unjustified interference at issue was within the Court's law-making task. For it could plausibly be argued that the time limit in Article 1:203 of the Civil Code did not commence, in circumstances such as those at issue here, until the husband concerned had been informed that he was probably not the biological father of the child born during the marriage.

Languages:

Dutch.

Identification: NED-1998-1-005

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 01.11.1997 / **e)** 105.463 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 303.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Undue delay / Appeal Court, procedure to follow.

Headnotes:

A period of 19 months violates the requirement that an accused person must be tried within a reasonable time.

When there are no special circumstances to justify this time lag.

Summary:

A period of over 19 months elapsed between the lodging of the appeal in cassation and the Supreme Court's receipt of the case file, without there being any special circumstances that might have justified this time lag. In this case this led to the quashing of the sentence (6 weeks' imprisonment, 2 weeks of which was suspended) and referral back to the Appeal Court that had heard the case.

The Supreme Court took the view that when the Appeal Court heard the case again, it would first have to ascertain whether the prosecution's case was inadmissible or whether the sentence should be reduced.

Languages:

Dutch.

Identification: NED-1998-1-006

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 05.11.1997 / **e)** 32.632 / **f)** / **g)** / **h)** *Beslissingen in belastingzaken*, 1997, 406.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
General Principles – Reasonableness.
Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Undue delay / Reasonable time.

Headnotes:

A time lapse of seven months between the hearing of a case on appeal and the pronouncement of the judgment did not constitute a violation of the right to be tried within a reasonable time within the meaning of Article 6 ECHR.

Summary:

In the cassation proceedings it was contended that a reasonable time within the meaning of Article 6 ECHR had been exceeded in the present case, because the Appeal Court had not given judgment until seven months after hearing the case. The Supreme Court rejected this contention, holding that although the time lapse was indeed long, it was not so long that the trial had not taken place within a reasonable time as referred to in Article 6 ECHR.

Languages:

Dutch.

Identification: NED-1998-1-007

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 07.11.1997 / **e)** 16.424 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 220.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights of 1966.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Married persons and single / Cohabiting persons / Jobs pool / Goal, legitimate / Discrimination based on a civil status.

Headnotes:

Granting an extra allowance added to the salaries of married and cohabiting persons in the pursuit of a legitimate goal (promoting job opportunities for unemployed persons who are very difficult to place), does not amount to unlawful discrimination.

Summary:

Zaanwerk is a non-profit-making foundation set up by the municipality of *Zaanstad* to implement the Jobs Pools Government Grants Scheme. *Zaanwerk*'s objective is to implement this Grants Scheme by offering people who were difficult to place employment contracts for an indefinite period. On 5 November 1991 the municipal executive of *Zaanstad* decided to give an additional NLG 100 to married/cohabiting persons employed by *Zaanwerk* under the jobs pool scheme on top of the wages that had been, or were yet to be, agreed ("the extra allowance"). On the basis of this decision, *Zaanwerk* paid the extra allowance to employees who qualified from 1 April 1991 onwards. In the present case, a single employee contended that by only giving the extra allowance to married and cohabiting persons, *Zaanwerk* had violated the ban on discrimination enshrined in Article 26 of the International Covenant on Civil and Political Rights (ICCPR).

In cassation proceedings, the Supreme Court held that on appeal the district Court had rightly adopted the position (which was not being disputed in cassation proceedings) that in order to decide whether the distinction that *Zaanwerk* had made was compatible with Article 1 of the Constitution and Article 26 ICCPR, it had to be determined whether this distinction was made in pursuit of a legitimate goal and whether the distinction could be regarded as an appropriate means of achieving that goal.

The Supreme Court then held that what *Zaanwerk* had done was basically to create a financial incentive to accept work for married and cohabiting unemployed people who were difficult to place and for whom the existing financial incentive – the salary – was objectively insufficient, and to do so as part of its total package of manpower services provision. This was entirely in keeping with the objective of the jobs pool as regulated by the Jobs Pools Government Grants Scheme. The Supreme Court held that the district Court had therefore been right to rule that in making this distinction, *Zaanwerk* was pursuing a legitimate goal.

Languages:

Dutch.

Identification: NED-1998-1-008

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 12.11.1997 / **e)** 30.981 / **f)** / **g)** / **h)** *Beslissingen in belastingzaken*, 1998, 22.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights of 1966.
General Principles – Margin of appreciation.
General Principles – Reasonableness.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Grounds for justification / Goal, legitimate / Expenditure, exceptional / Tax deduction.

Headnotes:

When assessing whether a regulation leading to the unequal treatment of equal cases met this criterion has a legitimate goal one must look also at the degree to which equal cases were treated differently. For this reason, quantitative issues – relative as well as absolute – must be taken into account.

Summary:

In this case the unequal treatment of working and unemployed persons in relation to tax deductions for

travel expenses for study purposes was justified on objective and reasonable grounds.

The person concerned incurred study costs under the heading of exceptional expenditure, including travel expenses in relation to which she was entitled to a deduction based on NLG 0.28 per kilometre. In cassation proceedings she argued that this constituted a violation of Article 26 ICCPR because employees whose study costs were reimbursed by their employers were allowed to receive a tax-free refund of up to NLG 0.49 per kilometre.

The Supreme Court held that the statutory regulation that laid down the aforementioned deduction did indeed create an inequality. It added, however, that Article 14 ECHR and Article 26 ICCPR prohibited the unequal treatment of equal cases if there was no objective and reasonable justification for it, in other words, if it was not introduced in pursuit of a legitimate goal, or if there was no reasonable correlation between the unequal treatment and the objective pursued. The legislature was allowed a certain margin of discretion in this regard.

According to the Supreme Court, the regulation at issue ensured that employers who wished to award their employees a slightly higher kilometre allowance than the maximum tax-deductible sum (which was NLG 0.28 per kilometre in 1992) were not immediately confronted with an obligation to deduct income tax over this sum. This promoted efficiency, which was in itself a legitimate goal. In answering the question of whether a regulation leading to the unequal treatment of equal cases met this criterion, however, the Supreme Court was of the opinion that one must look not only at efficiency but also at the degree to which equal cases were treated differently. For this reason, quantitative issues – relative as well as absolute – must be taken into account. In this connection it was important that the exceptional expenditure provisions were not confined to employees, but applied equally to all taxpayers precisely for study costs incurred in a private capacity. In assessing the quantitative aspects of the regulation at issue, the "ordinary" cases should be taken as the point of departure, which meant leaving out of consideration exceptional cases such as the one at hand that involved great distances. Following this approach, there was no reason to assume that the unequal treatment would involve significant sums of money, whether in absolute or relative terms.

Taking all factors into account, the Supreme Court concluded that there was an objective and reasonable justification for the unequal treatment at issue in this case.

Languages:

Dutch.

Identification: NED-1998-1-009

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 16.12.1997 / **e)** 105.895 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 352.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Case-law – International case-law – European Court of Human Rights.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Languages.

Keywords of the alphabetical index:

Translation / Interpretation of documents in the action.

Headnotes:

The right to translation of all the written evidence cannot be derived from Article 6.3.e ECHR. In general, it is sufficient for the summarised content of certain documents in the case to be interpreted. In certain exceptional cases, Article 6.3 ECHR could mean that interpreting is not sufficient, but that the translation of a certain document or a brief written rendering of it in a language intelligible to the accused could be necessary. Any request to this effect, the assessment of which must take into account the interests of due process, must be decided by the examining magistrate during the preliminary judicial investigation, during the preparatory examination by the public prosecutor, after the service of the summons by the president of the court, and during the trial before the district court or court of appeal. Should a decision be taken that failed to take this into account, this would not mean that the case brought by the public prosecutor was inadmissible and that he hence could not prosecute, since an omission of this kind could be remedied. Given the burden that the written translation of the documents in a case would place upon the proceedings, the legal counsel of an accused should indicate precisely which

documents he or she wanted to be translated. The costs of translation cannot be charged to the accused, so that the granting of a request for a translation cannot be made dependent on payment of these costs by the accused.

Summary:

An accused person who had an inadequate command of the Dutch language did not have an unlimited entitlement to written translations of the documents in his action. Only in an exceptional case was interpretation insufficient and the translation of a specific document in the action deemed necessary. That not a single document in Chinese had been handed over, and the fact that the request for a translation was rejected, did not constitute a violation of Article 6 ECHR in this case.

The question at issue here was whether an accused person with an inadequate command of Dutch was entitled to written translations of the documents in the case. The Supreme Court held that in accordance with Article 6.3.e ECHR, an accused person was entitled to the assistance of an interpreter free of charge if he did not understand or speak the language used in court. In its judgment of 19 December 1989 (European Court of Human Rights, Series A, vol. 168, *Nederlandse Jurisprudentie* 94/26 (Kamasinski)), the European Court determined that the scope of this provision was not limited to the trial itself, but included the documents in the case and the preliminary investigation.

Languages:

Dutch.

Identification: NED-1998-1-010

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19.12.1997 / **e)** 8974 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 3.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Case-law – International case-law – European Court of Human Rights.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Languages.

Keywords of the alphabetical index:

Interpreter, right, civil proceedings / Language of civil proceedings, interpreter.

Headnotes:

Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms.

Summary:

The Supreme Court held that it was right that in the cassation proceedings of this civil case it was not being contested that the right to the free assistance of an interpreter in the verbal hearing of these divorce proceedings could be derived from Article 6.3.e ECHR. Where civil proceedings were concerned, Dutch law did not provide for any such right, so that the question arose of whether it could be directly derived from the provisions of Article 6.1 ECHR.

In the opinion of the Supreme Court, this question should be answered as follows. The mere fact that the ECHR provided for such a right in the treatment of criminal cases but not in that of civil cases did not justify the conclusion that such a right could never be held to exist in relation to civil cases (cf. European Commission of Human Rights 9 December 1981, application no. 9099/80, D&R 27, p. 210). Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms. Hence in principle, the same applied to the right to the free assistance of an interpreter as to the right to free legal assistance. The member States had an obligation to provide free legal assistance under Article 6.3.c ECHR, but the ECHR included no such express provision in regard to civil cases. Even so, the obligation to provide free legal assistance sometimes existed in civil cases, namely if such legal assistance was necessary to ensure that the fair trial requirement of Article 6.1 ECHR was met (cf. European Court, 23 November 1983 in the case of Van der Mussele vs. Belgium, series A, no. 70, § 29, p. 14); whether this applied depended entirely on the circumstances of the case at hand, in particular the question of whether free legal assistance was indispensable to a fair hearing of the case (cf. European

Court, 9 October 1979, case of Airey vs. Ireland, series A, no. 32, §26, p. 16; *Nederlandse Jurisprudentie*, 1980, 376).

In the present case, the Supreme Court held that it could not be said in the present case that the failure to provide the woman with the free assistance of an interpreter at hearings by the two courts that dealt with the facts of her case was in breach of the requirements embraced by the concept of a fair hearing.

Languages:

Dutch.

Identification: NED-1998-1-011

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 09.01.1998 / **e)** 8915 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 10.

Keywords of the systematic thesaurus:

General Principles – Legality.
General Principles – *Nullum crimen sine lege.*
Fundamental Rights – General questions – Basic principles.

Keywords of the alphabetical index:

Criminal law / Enforcement, international request / Legal assistance / Coercive measures / Treaty mutual assistance in criminal matters.

Headnotes:

There was no sufficient basis in the law applicable in Aruba until 30 September 1997 for searching premises in order to seize and deliver documents in relation to a request for legal assistance from the United States.

Summary:

In the present case, the plaintiffs contended that, insofar as it was still relevant in cassation proceedings, there was no sufficient basis for searching premises as ordered by the examining magistrate and subsequently performed, for the seizure of documents found during these searches, or for the delivery of certain of these documents to the judicial authorities of the United States.

The Supreme Court held that it should be stated first and foremost that given the principle of *nullum crimen sine lege* to be observed for the application of coercive measures such as the one at issue here – which constituted a violation of fundamental rights – in connection with international legal assistance, a statutory basis, or a basis in international law, was indispensable.

The Supreme Court went on to consider that it must be inferred from the wording of Article 1.1 and 1.2 *chapeau* and 1.2.f of the Treaty between the Kingdom of the Netherlands and the United States of America on Mutual Assistance in Criminal Matters that these provisions were intended solely to impose obligations on the States Parties themselves. Considering that the Treaty did not include any directly applicable regulations on search and seizure, it should not be interpreted as being universally binding, in the sense of constituting a basis in international law for the violations of the fundamental rights of the individuals concerned that were brought about by the search and seizure. Nor did the national legislation of Aruba that was applicable at the time provide the necessary basis. This applied in particular to the regulations on searches of premises contained in Articles 99 ff. of the Code of Criminal Procedure that applied in Aruba in 1992. For it was clear, according to the Supreme Court, partly in view of the fact that these regulations were included in the Third Title of the Code of Criminal Procedure, entitled, "On commencement of proceedings and other matters relating to the preliminary judicial investigation", that they concerned the application of this coercive measure only as part of a preliminary judicial investigation, and not in compliance with a request for legal assistance submitted by the authorities of a foreign State. Nor could the necessary basis be found in the provisions of Article 35.2 of the 1985 Uniform National Ordinance on the Organisation of the Judiciary, pursuant to which the Joint Court of Justice, the courts at first instance and the public prosecution service were obliged to comply with requests for legal assistance received from officials or official bodies of another country. Partly in view of the connection with the first paragraph of this Article, which related to mutual legal assistance within the Kingdom, the Supreme Court held that a reasonable interpretation of the second paragraph would be that it was not intended to call into being, independently, the competence to violate fundamental rights in the context of international legal assistance, but that it was solely intended to determine, in the event of such competence existing on some other basis, which authorities should exercise it.

Languages:

Dutch.

Identification: NED-1998-1-012

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 13.01.1998 / **e)** 106.288 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 390.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

Keywords of the alphabetical index:

Telephone tapping.

Headnotes:

An examining magistrate who had signed a number of orders for telephone taps on behalf of a fellow judge after having first conducted an investigation to determine whether his colleague's decision to extend the telephone taps should be upheld, and who subsequently sat on the bench when the case was tried was not an impartial judge within the meaning of Article 6 ECHR.

Summary:

In cassation proceedings, the Supreme Court considered that if a judge had conducted any form of investigation in a case as an examining magistrate, the same judge could not participate in the trial, as it would be reasonable for the accused to fear that the judge would lack the necessary impartiality. As a judge signed a number of orders for telephone taps on a colleague's behalf in this case, after first having scrutinised his colleague's decision to determine whether it should be upheld, it must be assumed that he had performed a certain amount of investigative work. This disqualified the judge from sitting in the division of the district court that conducted the trial. As the said judge did take part in the trial, this case was not heard by an impartial tribunal within the meaning of Article 6.1 ECHR.

Languages:

Dutch.

Identification: NED-1998-1-013

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 23.01.1998 / **e)** 16.490 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 27.

Keywords of the systematic thesaurus:

Institutions – Jurisdictional bodies – Administrative courts.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Independence.

Keywords of the alphabetical index:

Administrative Court, independence / Relationship between the civil and administrative courts / Administrative decision, unlawful / Appeals procedure.

Headnotes:

Before applying to a civil court to obtain compensation for damage allegedly arising from an unlawful administrative decision, the case should first have been brought before an administrative court, even though this legal remedy did not meet all the requirements of Article 6 ECHR.

Summary:

In these proceedings, the plaintiff was claiming compensation for damage allegedly suffered as a result of an unlawful administrative decision. The key issue was whether it could be objected that he should first have submitted the decision for review by the Trade and Industry Appeals Tribunal (CBB), an administrative court, before bringing his case before the civil court with a view to obtaining compensation.

In assessing the dispute, the Supreme Court noted first and foremost that the European Court of Human Rights had ruled in its judgment of 19 April 1994, *Nederlandse Jurisprudentie* 1995, 462, that the CBB did not meet the requirements of Article 6 ECHR. In reaching this judgment, the European Court of Human Rights deemed it a decisive

factor that Section 74 of the Administrative Justice (Trade and Industrial Bodies) Act gave the Crown the power to intervene, and although the State had already argued that this power could no longer be exercised in law, because such exercise would be deemed unlawful by the civil court, this was insufficiently certain because there was no case law in support of this argument. The Supreme Court took the view that what the European Court of Human Rights held to have been a flaw in the judicial independence of the CBB prior to 1 January 1994, could not, by its very nature, be redressed retroactively by a Dutch court ruling that it was unlawful; furthermore, any such ruling would be incompatible with the obligation on the civil court under Article 53 ECHR to be bound by the European Court's decision on this flaw and the consequences the Court attached to it where the period prior to 1 January 1994 was concerned.

The Supreme Court went on to state that if an interested party had lodged an appeal before the CBB in accordance with the provisions of the Administrative Justice (Trade and Industrial Bodies) Act and the CBB had ruled against him, he could then submit his dispute to a civil court without the CBB's decision being used against him. However, in the Supreme Court's opinion, the right of the party to have his dispute heard by a court that met the requirements of Article 6.1 ECHR did not in principle imply that the entire appeals procedure prescribed by the Administrative Justice (Trade and Industrial Bodies) Act should be set aside, contrary to the legislature's intentions, given that the aforementioned procedure did in principle make sufficient provision. In the period prior to the European Court's judgment of 19 April 1994, some doubt did exist as to whether the CBB had met the requirements prescribed for tribunals under Article 6 ECHR in the period prior to 1 January 1994, but no certainty existed on this point. It was therefore incumbent on parties affected by decisions from which appeal lay to the CBB under the Act to take serious account of the possibility that if they did not lodge an appeal against the decision before the CBB within the set time, that decision would formally acquire the force of law, as a result of which the civil court would be obliged to proceed on the basis that the decision was lawful. Taking all these considerations into account, the Supreme Court concluded that the interested party could not apply to the civil courts in cases such as the one at issue without first having obtained the CBB's decision.

Languages:

Dutch.

Identification: NED-1998-1-014

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 27.01.1998 / **e)** 106.809 / **f)** / **g)** / **h)** *Delict en Delinquent*, 1998, 160.

Keywords of the systematic thesaurus:

Institutions – Jurisdictional bodies – Ordinary courts.
Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Undue delay / DNA analysis.

Headnotes:

There was no undue delay in this case at first instance, in view of the special circumstances of the case, the extreme seriousness of the offences, the particular importance to society of discovering the truth about these offences and the provisional release of the accused from pre-trial detention. This view did not testify to an incorrect interpretation of the law and was not unreasonable, partly in view of the accused's denial of guilt and the great weight attached to the results of sound DNA analysis, pending which the proceedings were stayed.

Summary:

In this case the period relevant for assessing a "reasonable time" within the meaning of Article 6.1 ECHR commenced, in the opinion of the Supreme Court, with the arrest of the accused on 3 August 1993. The crucial period was that between 9 November 1993 and 29 February 1996, during which proceedings were stayed by the district court pending the outcome of DNA analysis. The appeal court established that sperm had been found in the victim's mouth, that the Forensic Laboratory had sent this material to an institute in Münster, and that because the sample was so small, this institute had proposed waiting until a new DNA extraction method being developed there was ready for use. The new method had been expected to be operational at the end of 1993, but this proved not to be the case; then, on 23 February 1995, the statements made by the experts at the trial in relation to technical developments again suggested that there was a realistic prospect that the method would be available for use within the foreseeable future.

The Supreme Court ruled that under these unusual circumstances, having regard to the seriousness of the offences with which the accused was charged and the particular importance to society of discovering the truth about them, and considering that the accused had been provisionally released from pre-trial detention on 9 November 1993, the proceedings at first instance had not exceeded the reasonable time referred to in Article 6.1 ECHR, taking into account the fact that the accused denied his guilt and that great weight was generally attached to the results of a sound DNA examination, whether for incriminating or exculpatory purposes.

Languages:

Dutch.

Identification: NED-1998-1-015

a) The Netherlands / **b)** Supreme Court / **c)** Third division / **d)** 28.01.1998 / **e)** 32.732 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1998, 147.

Keywords of the systematic thesaurus:

General Principles – Proportionality.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
Fundamental Rights – Civil and political rights – Right to private life – Protection of personal data.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Identification, compulsory / Criminal prosecution / Criminal charge, disproportionate.

Headnotes:

The fact that an employee was required to allow his employer to verify his identity for income tax and national insurance salary deductions by handing over proof of identity to his employer for inspection could not be regarded as a violation of the employee's right to privacy.

The application of the higher "anonymous" rate on the grounds that an employee had failed to comply with the aforementioned compulsory identification was not a sanction of such a nature or weight as to merit in itself the appellation "criminal". Furthermore, consideration of the nature of the offence together with the nature and severity of the sanction did not lead to the conclusion that these had any criminal connotation.

Summary:

At dispute in these proceedings was whether it was right to deduct income tax and national insurance contributions from an employee's salary at what is called the anonymous rate (60%) on the grounds that she had failed to comply with the obligation laid down in Section 29.1 of the Wages and Salaries Tax Act to hand over proof of identity to the employer responsible for making deductions at source from her salary. In appeal proceedings, the court of appeal held that the obligation imposed on the employee to provide proof of identity for the employer's inspection constituted à violation of Article 8.1 for which there was no justification as there were no other grounds in this case for doubting her identity.

In cassation proceedings, the Supreme Court considered that it could not be regarded as an infringement of an employee's privacy that the employee was obliged to have his or her identity verified by his employer by allowing the latter to inspect an identity document. Insofar as the employer's obligation to pass on to the tax authorities the information thus supplied by the employee did amount to such an infringement, the Supreme Court held that this was fully justified, because the information was needed to process the salaries tax deducted at source prior to the determination of income tax, whereby the tax authorities had to be able to assess whether the right amount of salaries tax had been deducted at source, and whether an income tax demand had to be imposed as well. The desirability of combating fraud, and in particular tax and social insurance fraud, made it reasonable, and – insofar as it might result in a more serious violation – justifiable both that the employer had imposed on the employee the obligation to confirm his or her identity by handing over proof of identity for his inspection (which meant at least that he or she was obliged to show this document to the employer, to give him the opportunity to include the information on the employee's identity in his files and to retain a copy of the document) and that the legislature had imposed on the employer the obligation to include this information in his files and to retain a copy of the proof of identity submitted for his inspection. In such matters, the legislature had a certain margin of discretion that should be taken into account. Finally, the Supreme Court

considered that the legislature was entitled, again taking into account its margin of discretion, with a view to the practical application of the regulations, to decide that only certain types of identity papers would be deemed adequate, and that no exceptions would be made for cases such as the one at issue here, in which there was no reason to doubt the employee's identity.

In cassation proceedings the question was also raised of whether the application of the "anonymous rate" was incompatible with Article 6 ECHR, as such application would amount to a criminal charge that was disproportionate and in relation to which the employee was not guaranteed the right of access to the courts.

In this connection the Supreme Court ruled as follows. As it was clear that the "anonymous rate" was not applied in pursuance of Dutch criminal law, the point was to consider the nature of the offence and the nature and severity of the penalty, viewed in the light of this provision of international law. The obligation at issue applied to all members of the public in their capacity of taxpayers, not only to a limited group, and the legislature had attached a penalty, namely a fine (under Section 69 of the State Taxes Act), as well as the application of the "anonymous rate" at issue here, to failure to comply with this obligation. These facts supported the argument that the general nature of the contravention of the norm should be regarded as criminal in the sense referred to. In assessing the nature of the offence in this regard, however, it was also important to determine if the object of the penalty was preventive and/or punitive (European Court ruling, *Nederlandse Jurisprudentie* 1988, 937 (Öztürk) and *Nederlandse Jurisprudentie* 1988, 938 (Lutz)). The application of the same rate to employees whose identity was indeed unknown to the tax authorities did not constitute a punitive or deterrent measure. If tax was levied in accordance with a differentiated system of tax rates and the taxpayer's identity was unknown, it was reasonable, partly in order to prevent any loss being incurred by imposing too low a rate, to set the tax deducted at source at the highest sum that the taxpayer could possibly pay from his salary, given the possibility of other unknown income. This was not a punishment, but a logical consequence of the differentiated rates of taxation. This was not altered by the fact that the tax rate system for "anonymous" employees led to a tax rate equal to the highest rate of salaries tax and income tax, whereas in general persons working without paying tax etc. and/or illegally would not come into the highest tax bracket if their particulars were known. In that regard, the regulation had a preventive and deterrent effect that did not, therefore, bring the application of the highest tax rate to employees whose identity particulars were unknown within the definition of a criminal charge within the meaning of Article 6 ECHR.

The Supreme Court went on to consider that the primary point of the regulation was to help ensure that the tax rate differentiation was applied to all employees correctly. That in cases such as that of the employee at issue here (cases that it was fair to assume would be largely confined to the initial period after the introduction of compulsory identification) the regulation made it essential to check and record identity particulars that had already been made known by other means, but that the taxpayer did not want to have checked in the way prescribed by law, did not imply that the application thereby acquired a punitive or deterrent character that made the offence "criminal". Another important point in this connection was the possibility of a refund, a corrective mechanism that punitive penalties did not generally have. Partly on the basis of this possibility, it could not be said that the application of the "anonymous" rate was a penalty of such a nature and of such severity that it should be regarded in itself as a "criminal charge". Nor did a consideration of the nature of the offence and the nature and severity of the penalty taken together lead to the conclusion that they had a criminal connotation (cf. European Court of Human Rights *Beslissingen in Belastingzaken* 1994/175 (Bendenoun) and European Court 24 September 1997 (Garyfallou AEBE)).

Languages:

Dutch.

Identification: NED-1998-1-016

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 30.01.1998 / **e)** 16.387 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 33.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

Keywords of the alphabetical index:

Discovery of documents / Contract of sale / Cassation proceedings.

Headnotes:

In civil cases, appeal courts are not obliged to examine evidence concerning fact which have been the object of the proceeding in the lower instance when both parties had the opportunity to present their case, to adduce evidence and to rebut the other side's evidence.

The key issue in this case was whether the seller was obliged to produce in evidence a contract of sale that he had entered into with a third party in proceedings instituted by the buyer with a view to dissolving their contract of sale. On appeal, the appeal court had passed over this question, concluding that the evidence in dispute had already been supplied by the witnesses produced by the seller.

In cassation proceedings, the Supreme Court held that the choice and evaluation of evidence was the prerogative of the appeal court, as the court hearing the facts of the case. As the appeal court had evidently not doubted the credibility of the witnesses brought forward by the seller, the principles of due process did not require that the appeal court should grant the original buyer's request, made in a pleading after the examination of the witnesses, that the seller be ordered to produce the contract of sale or a copy thereof. Nor did Article 6.1 ECHR require the appeal court to make such a order, since with the means at their disposal, concerning the contract concluded between the seller and the third party. It could therefore not be said that there had not been a fair hearing within the meaning of that article.

Languages:

Dutch.

Identification: NED-1998-1-017

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 06.02.1998 / **e)** 16.512 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 43.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Adversarial hearings.

Keywords of the alphabetical index:

Copyright / Evidence, use / Law, interpretation.

Headnotes:

The fact that someone who was alleged to have infringed an author's copyright did not have certain items of evidence at his disposal because of a protective order given in American discovery proceedings did not constitute a violation of either the principle of equality of arms or the right to adversarial hearings.

Summary:

The Supreme Court considered that the essential criterion in answering the question of whether there had been a fair trial was whether the proceedings as a whole could be deemed to have been fair. In this connection, the decisive issue relevant in the case at hand was whether one of the parties had an improper advantage over the other in respect of the use of evidence. In the Supreme Court's opinion, the appeal court's ruling that this was not the case in these proceedings did not display an incorrect interpretation of the law and was not unreasonable. The Supreme Court considered that the appeal court evidently assumed, and not unreasonably so, that the protective order did not make it impossible for the person alleged to have infringed copyright to have material belonging to him examined by experts, and that if he had wished to have at his disposal material that did not originate from him with a view to having it examined, he had made too little use of the scope afforded him in this respect by Dutch procedural law.

Languages:

Dutch.

Identification: NED-1998-1-018

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 20.02.1998 / **e)** 9041 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 54.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights of 1966.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate one-self.

Keywords of the alphabetical index:

Right to remain silent / Criminal charge / Benefits, application, obligation to produce evidence.

Headnotes:

A person who is under an obligation to produce information and particulars concerning all matters relating to the granting or continuation of benefit, in connection with an application for benefit, does not have the right to remain silent concerning the question of whether or not he has committed a crime.

Summary:

In cassation proceedings it was complained that the district court, ruling on appeal, had not addressed the question of whether a person who had committed a crime was required by law to report this fact to the benefit-awarding body, and that the district court had therefore violated that person's statutory right to remain silent.

In this connection the Supreme Court considered that this complaint must be dismissed insofar as "the right to remain silent" referred to the definition in Article 29.1 of the Code of Criminal Procedure of the right of someone being interviewed as a suspect to refrain from making a statement. This right of silence was not enjoyed by someone who was not being heard as a suspect, but who was required, in relation to an application for benefit, to produce information and particulars concerning all matters relevant to the granting or continuation of benefit.

Insofar as the "right to remain silent" cited in the complaint referred to the right laid down in Article 14.3.g of the International Covenant on Civil and Political Rights or – according to established case law of the European Court of Human Rights (see most recently European Court judgment of 20 October 1997 in the case of Serves v. France) – the "right to remain silent and the right not to incriminate oneself" that may be inferred from Article 6 ECHR, the complaint must likewise be rejected. For in the opinion of the Supreme Court, these rights presupposed the existence of a criminal charge, which was no more at issue than the circumstance of being heard as a suspect within the meaning of Article 29 of the Code of Criminal Procedure.

Languages:

Dutch.

Identification: NED-1998-1-019

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 11.03.1998 / **e)** 33.086 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1998, 121.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Discrimination, married / Cohabiting / Marital status.

Headnotes:

Insofar as the regulation of the basic tax allowance for married persons differed from that for cohabiting persons, it did so with an objective and reasonable justification.

Summary:

In 1993 the complainant was living with his partner. He and his partner submitted a joint request for the transfer to him of his partner's basic tax allowance for 1993, on the basis of Section 56.1 in conjunction with Section 55.2 of the Income Tax Act. The couple were first registered in the population register as living together on 17 November 1994, at the complainant's address. In cassation proceedings the complainant argued that the

statutory regulation on the transfer of the basic tax allowance, contrary to the prohibition of unequal treatment in equal cases enshrined in Article 26 of the ICCPR, made an unwarranted distinction between married persons who are not permanently separated and unmarried cohabitees by *inter alia* setting a longer reference period (viz. 18 instead of 6 months).

The Supreme Court rejected this argument. It held first and foremost that the situation of married persons and couples living together on a permanent basis differed to the extent that it was harder for the tax authorities to determine the permanency of the arrangement in the case of unmarried cohabitees, so that the legislature was permitted to impose conditions with a view to verifiability. The Supreme Court further held that the extra requirement in the case of unmarried cohabitees, namely that the persons concerned should have lived together throughout the entire year prior to the reference period of 6 months, was intended to establish the permanence of the cohabitation. This requirement, like the requirement that the two persons must be registered at the same address in the population register, was included, as appears from the parliamentary debate on Section 56, to prevent the improper use or abuse of the provision, whereby the legislature considered it to be of great importance that it would enable checks to be performed without any need to infringe privacy. In the opinion of the Supreme Court, it was reasonable for the legislature to have imposed these requirements in this case, given the margin of discretion it enjoyed in these matters. Hence insofar as one may speak of equivalent cases, there was an objective and reasonable justification for the difference in treatment.

Languages:

Dutch.

Identification: NED-1998-1-020

a) The Netherlands / **b)** Supreme Court / **c)** Second division / **d)** 14.04.1998 / **e)** 106.758 / **f)** / **g)** / **h)** *Delict en Delinquent*, 1998, 258.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.

Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.

Keywords of the alphabetical index:

Witnesses, right of defence to examine.

Headnotes:

It was permissible for a statement made to the police by a witness who was not heard by the defence to be used in evidence if the involvement of the accused in the offences on the charge sheet was confirmed by other evidence.

Summary:

In this case, the court of appeal used as evidence a statement that a co-accused had made to the police, even though the defence had not been given an opportunity to examine this witness in court.

The Supreme Court observed that it had determined in relation to a previous case that if the defence had not had an opportunity to examine, or have examined, a person who had made a statement to the police, Article 6 ECHR did not impede the use of such a statement as evidence, provided that the statement concerned was corroborated to a substantial extent by other items of evidence. The Supreme Court continued that having regard to the European Court of Human Rights of 26 March 1996, no. 54/1994/501/583, judgment of the *Nederlandse Jurisprudentie* 1996/74, the phrase "to a substantial extent" should be understood to mean that it was sufficient for the involvement of the accused to have been confirmed by other evidence. Thus if this involvement derived sufficient support from other items of evidence, Article 6 ECHR did not present an obstacle to its admission as evidence.

Languages:

Dutch.

Norway
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 1998 – 30 April 1998.

Poland
Constitutional Tribunal

Statistical data
1 January 1998 – 30 April 1998

Constitutional review

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

Types of review:
- Ex post facto review: 7
- Preliminary review: 0
- Abstract review (Article 22 of the Constitutional Tribunal Act): 6
- Courts' referrals ("legal questions", Article 25 of the Constitutional Tribunal Act): 1

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 6
- Cases on the legality of other normative acts under the Constitution and statutes: 2

Holdings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 3
- Upholding the constitutionality of the provision in question: 4

Universally binding interpretation of laws:

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 6
- Motions requesting such interpretations rejected: 0

Supplementary information:

Between 17 and 21 May 1999 the XI Conference of the European Constitutional Courts will be held in Warsaw on "Constitutional jurisprudence in the area of freedom of religion and beliefs".

Important decisions

Identification: POL-1998-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.12.1997 / **e)** K 22/96 / **f)** / **g)** *Orzecznictwo Trybunłau Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 5-6, item 71 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
General Principles – Certainty of the law.
General Principles – Maintaining confidence.
Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Taxation law.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Budget, balance, taxation.

Headnotes:

If a provision of law has retroactive effect and the appropriate period of *vacatio legis* is not respected, the following principles, based on the principle of the democratic state governed by the rule of law, are infringed: the principle of certainty of the law, the principle of maintaining confidence and the principle of non-retroactive effect of the law.

Summary:

In certain special circumstances the legislator shall be allowed to amend a law in force, despite the fact that such amendments may result in a deterioration in the legal situation of persons concerned by the new provisions of the law.

The fact that the legislator is responsible for the State's income is a material element of the democratic state governed by the rule of law. Therefore, if special circumstances arise in which the necessities of preserving the budget balance and the State's ability to fulfil its obligations become particularly urgent, the legislator may introduce new provisions of law affecting the conditions of the agreements previously concluded.

Due to the reasons stated above, it is extremely important to introduce amendments to the law that are unfavourable to some groups of the citizens in a manner which will enable those citizens to prepare for their new legal situation. The legislator's freedom in this area is limited both by constitutional regulations and the obligation to respect the values protected by these principles and regulations.

Languages:

Polish.

Identification: POL-1998-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 22.12.1997 / **e)** K 2/97 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 1997, no. 159, item 1077; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 1, item 72 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
General Principles – Maintaining confidence.
General Principles – Vested rights.
Fundamental Rights – Economic, social and cultural rights.

Keywords of the alphabetical index:

Labour law.

Headnotes:

Vested rights shall be protected under the constitutional principle of the rule of law and particularly under the principle of maintaining citizens' confidence in the law, which results from that of the rule of law.

Summary:

The constitutional principle of protection of vested rights extends to rights vested under the labour law, which should be implemented with strict observation of the constitutional rights and rules. The Constitution does not prohibit the legislator from introducing any amendments to the provisions of the law in force, including introducing amendments making the situation of certain groups of citizens worse. In the Tribunal's opinion, the legislator has the prerogative to choose more accurate

solutions, which, obviously, does not exclude the constitutional review thereof.

Cross-references:

Resolutions: K 19/95, P 2/87, U 7/93, U 4/95.

Languages:

Polish.

Identification: POL-1998-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.01.1998 / **e)** P 2/97 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 1998, no. 6, item 24; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 1, item 1 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Value added tax.

Headnotes:

An ordinance which has not been issued in order to carry out a provision of an act and/or pursuant to an authorisation contained therein is contradictory to the provisions of the Constitution. Non-fulfilment of these requirements is a failure important enough for the ordinance to be found discordant with the Constitution, irrespective of the fulfilment or non-fulfilment of other requirements for its legality.

Cross-references:

Resolution of 6 January 1998 (U15/97), [POL-1998-1-004].

Languages:

Polish.

Identification: POL-1998-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.01.1998 / **e)** U 15/97 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 1998, no. 1, item 30; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 1, item 2 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
General Principles – Legality.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Living allowances, teachers / Teachers, allowances.

Headnotes:

The Minister of National Education may modify, by virtue of an Ordinance, the principles of living allowances for teachers, generally regulated by the Teachers' Profession Act.

Executive acts shall fulfil three basic principles: they must be issued pursuant to an explicit, detailed authorisation included in an act; they must be issued within the scope of authorisation and for its realisation and their content must not be contrary to the provisions of the law in force. Former judgements remain current on the basis of the new Constitution.

Cross-references:

Resolution of 15 July 1996 (U 3/96, OTK ZU 1996, p. 264), Resolution of 28 October 1996 (P 1/96, OTK ZU 1996, p. 337).

Languages:

Polish.

Identification: POL-1998-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.03.1998 / **e)** U 23/97 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 2, item 11 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.
Institutions – Executive bodies – Application of laws – Delegated rule-making powers.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Remuneration, teachers / Trade union, negotiation, obligatory / Negotiations / Consultation.

Headnotes:

Departure from the principles of determination of teachers' remuneration does not infringe the provision of the Teachers' Profession Act stating that all ordinances issued pursuant to the Act must be negotiated with the teachers trade unions.

Summary:

The expression "to be negotiated" (with the trade unions), used by the legislator, may be subject to different interpretations due to its ambiguity. It should be stressed, however, that the expression used does not impose on the Minister of National Education the duty to reach consent with the trade unions. The aforementioned expression imposes only the duty to make an effort to reach consent among all parties participating in the process of creation of the normative act.

The Constitutional Tribunal has determined that the ordinance was issued after negotiations with the trade unions had taken place; however, the scope of the discussions was not taken into account in the contents of the ordinance. The Tribunal's purpose was to determine whether the negotiations with the trade unions did take place.

Cross-references:

Resolution of 6 May 1997 (U 2/96).

Languages:

Polish.

Identification: POL-1998-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.03.1998 / **e)** K 40/97 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 2, item 12 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.
Institutions – Public finances – Principles.

Keywords of the alphabetical index:

Communes, income / Municipalities, financial independence.

Headnotes:

Regulating the principles of determination of a commune's income by a provision of law different from an Act infringes the principle of the financial independence of a commune.

Summary:

The purpose of the principle of financial independence of communes, arising from the Constitution, is to grant communes wide authority to issue decisions in local matters, in order to meet the expectation of the inhabitants of their territory. However, the principle of independence is not absolute in character and is subject to various restrictions, especially restrictions set forth

by the legislator. All restrictions specifying the manner of determination of the amount of the communes' income may only be introduced by an Act.

Cross-references:

Resolution of 24 January 1995 (K 5/94), Resolution of 23 October 1996 (K 1/96).

Languages:

Polish.

Identification: POL-1998-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 31.03.1998 / **e)** K 24/97 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 2, item 13 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Intention of the author of the controlled enactment.
General Principles – Certainty of the law.
General Principles – Public interest.
General Principles – Equality.
Institutions – Executive bodies – Territorial administrative decentralisation – Principles.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Incompatibilities, local government.

Headnotes:

The prohibition against the combining of membership of a local government body with a position as a member of the governing body or as a proxy of commercial law companies in which the commune (as a legal person) participates is in conformity with the principles of equality and of certainty of the law.

Summary:

The prohibition against the holding of a position as a member of the governing body or a proxy of commercial law companies by deputies of communes is to be viewed in the light of the purpose of the adopted regulation, i.e. the priority of the public interest and the authority of the State. From this point of view, adoption of the new regulation may not be surprising, especially as the legislator has introduced a three month period during which the deputies may adapt to the new restrictions.

The prohibition does not concern deputies appointed to the governing bodies of companies with the participation of the communal legal persons after the date of their appointment as deputies but before the date when the provision in question became effective. Also, the amendments to the Act were introduced during the last year of the term of the office of the communes. Thus the consequences of the new regulation are held to be in conformity with the Constitution.

In the Tribunal's opinion, bearing the above in mind, the claim of infringement of the principles of equality, certainty of the law and public interest due to the introduction of the above prohibition should be rejected.

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

Total: 317 judgments, of which:

- Preliminary review: 1 judgment
- Abstract *ex post facto* review: 4 judgments
- Appeals: 246 judgments
- Complaints: 35 judgments
- Returns of assets and income: 1 judgment
- Political parties accounts: 1 judgement
- Electoral disputes: 28 judgments
- Referenda: 1 judgment

Important decisions

Identification: POR-1998-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.04.1998 / **e)** 288/98 / **f)** / **g)** *Diário da República* (Official Gazette), no. 91 (Serie I-A), 18.04.1998, 1714 (2) – 1714 (35) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Admissibility of referendums and other consultations.
General Principles – Weighing of interests.
Fundamental Rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Abortion / Termination of pregnancy / Referendum.

Headnotes:

Inasmuch as the Constitutional Court is responsible for reviewing the constitutionality and legality of national referenda before they take place, it must also ensure that the subject of a referendum is, in substance, constitutional: deciding whether the question posed in a referendum is lawful is thus part of the process of reviewing the constitutionality of the referendum. Ultimately, the majority principle must be reconciled with the principle of constitutionality.

Under Article 24.1 of the Constitution, human life is inviolable. The judgment resolves the question in three stages.

The issue of whether to decriminalise abortion may be regarded purely as a matter of criminal policy: the legislative authority may choose whether or not to make abortion a criminal offence because, while life *in utero* may constitute legal property (thus entailing potential conflict with other rights of the woman in question), it is not protected by the right to life enshrined in Article 24.1 of the Constitution.

At the same time there is the secondary consideration that, as well as guaranteeing every individual a basic (subjective) right to life, Article 24.1 also extends to the (objective) protection of life developing in a mother's womb (life *in utero*); there is thus a constitutional obligation to protect that life. However, the protection of the human embryo cannot be as substantial (nor can it be ensured by the same methods) as the protection of the subjective right to life inherent in every individual person from birth onwards.

The ordinary legislative process must provide ways of protecting human life in the womb while at the same considering the various interests at stake and balancing the constitutional protection of legal property against other rights and values, according to the principle of the weighing of interests.

In other words, the need to strike a balance between the protection of the human embryo and a woman's other rights, including her right to develop freely as a person (in terms of autonomy and personal self-determination and the freedom to plan her own destiny), particularly in association with the right to motherhood as a conscious choice, may justify the legislative option of decriminalising the termination of pregnancy in the first 10 weeks. Any conflicts of constitutionally protected legal property can be resolved by the legislature and, if need be, there is legislative scope, in conformity with the Constitution, for deciding whether or not to make the deliberate termination of pregnancy a criminal offence.

Third – even if abortion is deemed illegal – it does not necessarily imply that a positive response to the question asked in the referendum would be unconstitutional because, in terms of constitutional law, criminal law controls must be a last resort for the application of cultural, economic, social and health measures, not a substitute for such measures. Therefore, given that the constitution does not require abortion to be deemed an

offence, there is a constitutional legislative option to attach or not to attach criminal sanctions to the deliberate termination of a pregnancy, by the woman's choice, within the first ten weeks, as envisaged in the draft referendum under consideration. It is also the case that reasonably well-off women who wish to have abortions can do so with impunity in clinics elsewhere in Europe, whereas poorer women who find themselves obliged to have an abortion not only run the risks associated with illegal medical treatment but also face the threat of criminal sanctions.

Notwithstanding, the Court stipulated a number of legislative measures and formal conditions to be observed if the response to the referendum were positive: for example, a requirement that the woman seeking an abortion shall have a consultation, including a personal interview, with a specialised counselling service; and a guarantee that she be given time to consider her decision.

Summary:

According to Article 115.8 of the Constitution (as revised in 1997), the President of the Republic must submit referendum proposals referred to him by the Assembly of the Republic, or by the Government, to the Constitutional Court for preliminary review to ensure that they are constitutional and lawful. The resolution referred by the Assembly of the Republic to the President in this case frames the question to be asked in the national referendum as follows: "Do you agree that the deliberate termination of pregnancy should cease to be a criminal offence if it is carried out, by the woman's choice, within the first ten weeks of pregnancy, at a legally recognised medical establishment?"

Since its 1989 revision, the Portuguese Constitution has included a provision for national referenda. Under Article 115, the President of the Republic may ask the electorate to express its will directly in a referendum, the outcome of which shall have the force of law.

The constitutional revision of 1997 gave the Constitutional Court the task of examining in advance the constitutionality and legality of national, regional and local referenda, including the electoral conditions under which they are held.

In this case, the Constitutional Court ruled on whether the subject of the question to be asked in the referendum was unconstitutional – i.e. whether either of the two possible responses might require legislation that infringed constitutional principles or provisions.

In its final decision, the Court declared the referendum both constitutional and lawful, on the following grounds:

a. the proposal to hold a referendum had been approved by the competent body;
b. the subject of the referendum was an important question of national interest which had to be decided by the Assembly of the Republic through the adoption of legislation;
c. the subject of the referendum in this case did not fall outside the general scope of referenda;
d. the fact that the question at issue in the referendum had to be the subject of legislation which was still under consideration (and that the relevant bill had already been submitted for a vote in a general debate in the Assembly), did not prevent it from being the subject of a referendum;
e. the referendum addressed a single issue, by means of a single question, without any qualification, introduction or explanatory comment, and could thus be answered with yes or no;
f. the question asked met the criteria of objectivity, clarity and exactitude;
g. the referendum proposal was in accordance with the formal requirements of the Organic Law on referenda in force at the time;
h. the fact that only registered electors within the national territory could vote in the referendum was in accordance with electoral requirements;
i. the Constitutional Court has jurisdiction to decide whether the referendum question presented the electorate with a dilemma of which one outcome might suggest an unconstitutional legal solution;
j. neither an affirmative nor a negative response to the question necessarily committed the government to an unconstitutional legal solution.

Supplementary information:

The problem of abortion has twice been referred to the Constitutional Court, in both cases on points concerning the law approved by the Assembly of the Republic in 1984, amending certain articles of the Criminal Code and allowing abortion to be carried out in certain circumstances.

In Judgment no. 25/84, on proposed legislation referred to it by the President of the Republic for preliminary review, the Court did not declare the provisions in question unconstitutional. In Judgment no. 85/85, in a review of legislation already enacted, it upheld its previous interpretation and did not declare the new Criminal Code provisions on the deliberate termination of pregnancy to be unconstitutional.

The Court delivered a majority judgment, with six judges dissenting.

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data

1 January 1998 – 30 April 1998

The Constitutional Court has handed down 73 decisions, as follows:

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

Important decisions

Identification: ROM-1998-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 10.03.1998 / **e)** 45/1998 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 504, paragraph 1, of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), no. 182/18.05.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
Constitutional Justice – Effects.
Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
Institutions – Jurisdictional bodies – Liability.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Prisoners.

Keywords of the alphabetical index:

Miscarriage of justice / Damages / Pecuniary liability of the State / Victim of a miscarriage of justice / Constitutional Court, jurisdiction.

Headnotes:

The principle of the State's liability vis-à-vis persons who have suffered as a result of a miscarriage of justice in criminal proceedings against them must be applied to all such persons. The phrase "in accordance with the law" does not signify that the legislature has the power to restrict the State's liability to certain miscarriages of justice, but refers to the laying down of the requirements as to form and substance in accordance with which that liability is to be assumed so that the damages due can be paid. Thus, under the constitutional rule in question, the legislature may not decide that the consequences of certain miscarriages of justice for which the victim cannot be held responsible must nevertheless be borne by the victim.

Summary:

The objection alleging the unconstitutionality of the provisions of Article 504 of the Code of Criminal Procedure was referred to the Constitutional Court by the judicial authority.

In support of the objection it was argued that the provisions of Article 504 of the Code of Criminal Procedure contravened the provisions of Article 48.3 of the Constitution insofar as they restricted the possibility of paying damages to the victims of miscarriages of justice to two situations: where the convicted person did not commit the offence of which he or she was found guilty, and where the offence itself did not take place. Article 48.3 of the Constitution, in accordance with the provisions of Article 3 Protocol 7 ECHR, established the State's pecuniary liability for damage caused by any miscarriage of justice in criminal proceedings. It was also argued that the phrase "in accordance with the law" in Article 48 of the Constitution refers to the scope of the State's pecuniary liability and not to the possibility of ruling out State liability in certain cases where there has been found to be a miscarriage of justice.

Under the terms of Article 48.3 of the Constitution, "the State bears pecuniary liability, in accordance with the law, for damages caused by judicial errors in criminal cases".

The provisions of Article 504 of the Code of Criminal Procedure, which was alleged to be unconstitutional, established two reasons for the State being rendered liable for miscarriages of justice in criminal cases: where the convicted person did not commit the offence, and where the offence of which he or she was found guilty did not take place. This legal provision therefore ruled out State liability for any other miscarriage of justice for which the victim was not responsible. However, such a restriction was unconstitutional, as Article 48.3 of the Constitution conferred on the legislature the power to regulate the payment of damages, not to choose the miscarriages of justice for which the State was to be rendered liable.

Consequently, it was noted that the legislature had not harmonised the provisions of Article 504 of the Code of Criminal Procedure with those of Article 48.3 of the Constitution. If it had done so, it would have been possible, by implementing the constitutional provision, to regulate the conditions governing the payment of damages as well as those relating to the definition of a miscarriage of justice.

The Constitutional Court could not take the place of the legislature in establishing these aspects, as this lay outside its constitutional status and to do so would have undermined the legislative role of the Parliament of Romania, which, according to Article 58.1 of the Constitution, was the country's sole legislative authority. For these reasons, given the role and powers of the Constitutional Court under Article 144 of the Constitution and the provisions of Article 1.3 of Law no. 47/1992, the Court could only rule on the constitutionality of the provisions to which the objection had been raised.

The Constitutional Court allowed the objection and noted that the provisions of Article 504.1 of the Code of Criminal Procedure were constitutional only insofar as they did not restrict, in the circumstances referred to in the text, the cases in which the State bore pecuniary liability for damage caused by miscarriages of justice in criminal proceedings, in accordance with Article 48.3 of the Constitution.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

Total number of decisions: 13

Types of decisions:
- Rulings: 13
- Opinions: 0

Categories of cases:
- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of State bodies: 12
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 1
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:
- Claims by State bodies: 4
- Individual complaints: 6
- Referral by a Court: 4
  (Some claims were joined.)

Important decisions

Identification: RUS-1998-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 09.01.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 22.01.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
General Principles – Federal State.
Institutions – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.
Institutions – Federalism and regionalism – Distribution of powers – Co-operation.

Keywords of the alphabetical index:

Federation, subjects, right to ownership / Forest land / Natural resources, exploitation / Joint jurisdiction.

Headnotes:

The powers of the Russian Federation and its subjects regarding exercise of ownership of forestland are delimited on the basis of joint jurisdiction. Regulations on the ownership of forestland are not incompatible with the Constitution.

Summary:

The proceedings were initiated at the requests of the Administration of Khabarovsk Territory and of the Government of the Republic of Karelia to verify the constitutionality of several provisions relating to forestland.

The Forestry Code of the Russian Federation came into force on 4 February 1997. Under the Code, forestland is federal property. The subjects of the Russian Federation may share in the right to possess, use and dispose of forestland. According to the applicants, this contravenes the Constitution of the Russian Federation and the Treaty on the delimitation of areas of jurisdiction and powers between the federal organs of State power and the organs of State power of the sovereign republics within the Russian Federation.

Citing the Treaty, the applicants claim that the status of the Federation's natural resources can only be determined on the basis of a reciprocal agreement between the federal organs of State power and the organs of State power of the subjects of the Russian Federation. In the applicants' view, the Constitution does not determine the procedure for delimiting State property between the Federation and its subjects with regard to the exploitation of forestland and, consequently, in the absence of a federal law laying down the procedure for delimiting the ownership of natural resources, reference must be made to the Treaty.

The Constitutional Court of the Russian Federation found that forestland is public property belonging to the multinational people of Russia, and that it constitutes federal property. For this reason, the Forestry Code does not permit sales, mortgages or any other transactions involving forestland. However, the Forestry Code permits the transfer of some forestland to the ownership of the subjects of the Russian Federation, thereby forming the

legal basis for subsequent delimitation of ownership of forestland.

Under a whole series of articles of the Forestry Code, the powers of the Federation and its subjects to exercise the right to possess, use, etc. forestland are assigned on the basis of areas of joint jurisdiction. It is impossible to enact decisions relating to such measures as leasing forestland, exploiting it free of charge, storing timber, pruning forests, and determining the rates for leases and the amounts to be paid for converting wooded forests into non-wooded forests, without the co-operation of the constituent subjects of the Russian Federation. The Code has laid down special rules governing the ownership of forestland and was therefore not inconsistent with the Constitution of the Russian Federation.

The Federal Treaty on the delimitation of areas of jurisdiction settles the problem of delimiting areas of jurisdiction for the exploitation of natural resources differently. However, this treaty was adopted before the Constitution of the Russian Federation, and its provisions therefore only apply if they do not conflict with the Constitution of the Russian Federation, which has supreme legal force and applies to the whole territory of the Russian Federation.

The Constitutional Court held that the contested articles of the Forestry Code cannot be regarded as conflicting with the Constitution, because the powers which they recognise the organs of State power of the Russian Federation and the organs of State power of its subjects as having are defined on the basis of the provisions of Articles 72 and 76 of the Constitution of the Russian Federation.

Languages:

Russian.

Identification: RUS-1998-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 15.01.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 29.01.1998 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction.
Fundamental Rights – Civil and political rights – Freedom of movement.
Fundamental Rights – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Passport, issuing, powers / Residence, registered place / Permanent residence.

Headnotes:

The constitutional right to leave the country is violated if a citizen, for whatever reason, is unable to apply for a passport at his or her registered place of residence and no other possibilities are provided for by law.

Summary:

The proceedings were initiated by the complaint of a Russian citizen to whom the internal affairs bodies had refused to issue a passport to travel abroad on the ground that he had not been registered and had no place of permanent residence in Moscow, but was registered in Tbilisi (Georgia); in accordance with the Law on the Procedure for Leaving and Entering the Russian Federation, passports are issued to Russian citizens, on written application, by the internal affairs body at their place of residence, by the Ministry of Foreign Affairs on the territory of the Russian Federation in specific cases, or by a consular institution of the Federation outside the borders of Russian territory.

According to the applicant, the procedure whereby the issuing of passports is wholly conditional on registration at the place of residence is restrictive, because it leads to discrimination between citizens and, for no reason, prevents citizens from enjoying their right to freedom of movement. In the applicant's view, passports should be issued at the place where the application is made and not at the place of residence, since citizenship is not defined by and does not depend on the individual's having or not having a place of residence.

The Constitutional Court noted that the Law on the Procedure for Leaving and for Entering the Russian Federation does not define the concept of place of residence. Other normative legal enactments of the Russian Federation define this as the address where

the citizen lives permanently or most of the time. The existence of an abode at this address is confirmed by the registration effected by the internal affairs bodies. The place of residence, as a legally relevant fact, is in practice determined not by the citizens themselves but by the appropriate internal affairs body.

The issuing of a passport solely at the place of residence confirmed by registration establishes a rigid link between citizens' enjoyment of their constitutional right to leave the country freely and the requirement to apply only to a specific territorial executive organ. For this reason, if this procedure cannot be followed for whatever reason, the constitutional right to leave the Russian Federation is violated. It is practically impossible for citizens permanently resident outside the country's borders, forced migrants and persons with no officially registered address to obtain a passport in Russia.

Constitutional rights and freedoms are guaranteed to all citizens regardless of their place of residence, particularly as the State is under no obligation to guarantee housing to all its citizens. The issuing of passports solely at the place of residence is a discriminatory measure in contravention of Article 19 of the Constitution, which guarantees the individual and the citizen equality of rights and freedoms regardless of place of residence.

Section 15 of the above-mentioned law contains an exhaustive list of cases in which the right of citizens of the Russian Federation to leave the country may be restricted.

Restrictions may be placed on those who have access to information constituting a State secret, have been called up for military service, have been convicted, are seeking to avoid carrying out the obligations imposed on them by a court, or have supplied false personal information in support of their applications. The list does not include those who do not have a permanent place of residence. Therefore, the Constitutional Court held that the contested provision of the law did not comply with the Constitution.

Languages:

Russian.

Identification: RUS-1998-1-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 15.01.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 31.01.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Regional measures.
Constitutional Justice – Effects – Determination of effects by the court.
Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.
Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.

Keywords of the alphabetical index:

Territorial administrative subjects / Local self-government, citizens' right.

Headnotes:

Local self-government is independent within the limits of its powers and its organs do not belong to the system of State power. Organs of State power may not be established in territories which do not have the status of territorial administrative subjects.

Summary:

The proceedings were initiated at the request of a judge of the Supreme Court of the Republic of Komi, who considered that Articles 80, 92 and 94 of the Constitution of the Republic of Komi and the Law of the Republic of Komi on the Organs of Executive Power in the Republic of Komi violate the right of citizens to local self-government.

In accordance with the Constitution of the Russian Federation, administrative powers in territorial and municipal administrative subjects should be exercised either by the representative organs of local power or by the organs of local self-government; however, the Republic of Komi classifies local administrations and their heads as belonging to the system of organs of State power of the Republic by granting them the powers of representative organs. In this way, a precedent has been set for the creation of parallel administrative organs in cities, districts, villages and market towns, with identical functions and an equal right to have the use of the local budget and municipal property. According to the applicant, classifying heads of local administrations as belonging to the system of organs of State power of the Republic

also contravenes the Constitution of the Russian Federation.

The Constitutional Court observed that the Constitution of the Republic of Komi guarantees self-government with the aim of allowing the people to decide for themselves on matters of local importance. The municipal nature of the representative organs mentioned in Articles 92 and 93 of the Constitution of Komi is confirmed by the fact that their powers, as listed in Article 93 of the Constitution of Komi, include approving the local budget, setting their own taxes and charges, determining how municipal property is managed, and fixing the conditions on which land and the other natural resources that constitute municipal property may be used; in other words, all the powers falling within the exclusive municipal jurisdiction of self-government.

The Constitution of the Republic of Komi itself makes the executive organs answerable to the representative organs of local self-government. This is inadmissible, because only the statute of the municipal subject can impose an obligation of this kind.

The Constitution of Komi provides that the Republic has not only local representative organs but also administrations (organs of executive power). These organs are responsible for all matters of local importance, i.e. matters falling within the competence of local self-government, which is contrary to the Constitution of the Russian Federation. The constituent subjects of the Russian Federation may not establish organs of representative or executive State power in territories which do not have the status of territorial administrative subjects of importance at the level of the Republic. Under the Constitution, local self-government is independent within the limits of its powers, and organs of local self-government do not belong to the system of organs of State power. Consequently, the provisions of Articles 80 and 94 of the Constitution of Komi, whereby local administrations responsible for matters of local self-government are classified as belonging to the system of executive power of the Republic, contravene the Constitution of the Russian Federation. For the same reason, the Constitutional Court found Section 31 of the Law on the Organs of Executive Power in the Republic of Komi to be incompatible with the Constitution of the Russian Federation; this section provides that local administrations may be formed by the Head of the Republic of Komi, which implies that heads of local administrations are appointed by the Head of the Republic of Komi or by heads of superior administrations.

The statute of a municipal subject should set out the structure of the organs of local self-government. Given that no statutes of this kind have been adopted in the Republic of Komi, the Constitutional Court held that the existing local representative organs of power currently performing the duties of local self-government may be given the possibility of adopting a statute. In all municipal subjects, a representative organ of local self-government must be formed. If the population does nothing, fails to determine the structure of organs of local self-government and thereby prevents the effective exercise of local self-government, the federal organs of power must take measures to safeguard the rights and freedoms of the citizens, including the right to local self-government.

The Constitutional Court of the Russian Federation has established the following procedure for implementing its decision:

Local representative organs elected before this decision came into force are to retain their powers until the expiry of their term of office, unless the statute of the municipal subject sets a shorter time limit. In municipal subjects where there is no representative organ of local self-government and the powers of organs of local self-government are exercised by civil servants, elections for representative organs of local self-government must be arranged.

Local representative organs are required to draw up, adopt and register the statutes of municipal subjects.

Appointed leaders of local administrations are to exercise only those duties relating to matters of local importance, and only until the statute of the relevant municipal subject abolishes the post of head of the local administration and creates a new post to replace it.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 3
- Decisions on the merits by panels of the Court: 14
- Number of other decisions by the plenum: 9
- Number of other decisions by panels: 46
- Total number of cases brought to the Court: 229

Important decisions

Identification: SVK-1998-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 07.01.1998 / **e)** II.ÚS 48/97 / **f)** Petition from a natural person / **g)** to be published in *Zbierka nálezov a úznesení Ústavného súdu Slovenakej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Courts.
Institutions – Legislative bodies – Composition.
Institutions – Legislative bodies – Political parties.
Fundamental Rights – Civil and political rights – Electoral rights.
Fundamental Rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Constitutional Court, powers / Electoral candidature / Equal access, elected offices, rights / Parliament, member, alternate / Vote, preferential / Party lists.

Headnotes:

The right of equal access to elected offices which is guaranteed under Article 30.4 of the Constitution is a right which belongs to all citizens of the country and does not depend on their membership of any political party or movement. A citizen who is not a member of a political party can be also elected to a seat in parliament.

Summary:

The petitioner, an individual person, claimed to have had his right of equal access to elected offices as guaranteed under Article 30.4 of the Constitution violated. In parliamentary elections in 1994, the petitioner was a candidate for the Slovak National Party (SNS). He did not win the seat in Parliament; however, with 2,809 preferential votes which were equal to 12,76 % of all polls within the polling district, he obtained the status of first substitute. Thus he was entitled to substitute for any member of the Parliament elected to the National Council of the Slovak Republic within the same district for the Slovak National Party. In 1996 one such SNP member died. As the petitioner in the meantime had left the SNP, he was not appointed to Parliament. Instead, someone who had not reached the limit of preferential polls but who was a member of the SNP was appointed to the Parliament. The petitioner claimed there had been a violation of the constitutional right guaranteed by Article 30.4 of the Constitution due to the fact that he had reached the status of substitute and he had not lost it as a result of leaving the SNP.

The National Council of the Slovak Republic contested the competence of the Constitutional Court to decide the merits of the case, arguing that the case fell within the competence of the ordinary judiciary. This argument was based on Article 127 of the Constitution according to which: "The Constitutional Court shall review the challenges to final decisions made by central government authorities, local government authorities and local self-governing bodies in cases concerning violations of fundamental rights and freedoms of citizens, unless the protection of such rights falls under the jurisdiction of another court".

The Constitutional Court explained that: Article 127 establishes the subsidiary power of the constitutional judiciary within the field of reviewing legality. If a violation of a constitutional right or freedom by an administrative authority may not be reviewed by an ordinary court because no such competence is vested in this body, a citizen may ask the Constitutional Court to undertake this review. In such circumstances, the possibility of lodging a constitutional complaint based on Article 127 of the Constitution guarantees the last sentence of Article 46.2 of the Constitution. "The review of decisions taken by a public authority concerning fundamental rights and freedoms shall not be excluded from the jurisdiction of courts of law". As the ordinary courts may review administrative authorities only inasmuch as the legality of their decisions is concerned, the subsidiary competence

of the Constitutional Court to review the legality of those decisions made by executive authorities and local self-governing bodies which are not under the control of ordinary courts is based on Article 127 of the Constitution. Its principal task of protecting constitutionality in relation to the constitutional rights and freedoms guaranteed to individuals is performed through petitions based upon Article 130.3 of the Constitution. As the case was submitted to the Court through a petition based upon Article 130.3 of the Constitution, the argument given by the National Council of the Slovak Republic was dismissed as irrelevant. The petitioner was entitled to submit his case, and the Constitutional Court was held to be the competent State authority to decide on the merit of his petition.

Regarding the merits of the case, the Constitutional Court ruled that the citizens participating in elections decide on their own future in the district where they are entitled to vote. Ideas concerning future development in that district differ not only on the basis of political affiliation or sympathy for a political party. Individual politicians hold different opinions on development within the sphere of public interest too. Thus the citizen's right to be represented by the person sharing the closest views on matters of public interest represents a very significant component of the constitutional right to participate in the administration of public affairs directly or by freely elected representatives. The legislator is obliged to adopt laws in such a way as to enable any citizen to exercise this right. The right to deliver a preferential vote under statute no. 80/1990 on election to the National Council of the Slovak Republic is relevant if more than 10% of all electors within one polling district express their will to be represented by the same candidate. If this happens, a political party or political movement has no right to change the candidate. What is more, there is no legal difference between a preferred person elected to a seat in parliament, and a person who reached the status of substitute. If a person with preferential votes resigned from his or her membership in a political party, this does not change his/her status as a substitute. He or she is a representative of the citizens, not of political parties or political movements. Thus, the petitioner's right to become a member of the Parliament on account of his status as substitute has been violated in the circumstances of the case.

Languages:

Slovak.

Identification: SVK-1998-1-002

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 22.01.1998 / **e)** I.ÚS 60/97 / **f)** petition from a natural person / **g)** to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Referendums and other consultations.
Institutions – Executive bodies – Powers.
Fundamental Rights – Civil and political rights – Right to participate in political activity.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Referendum, participation of State authorities / Referendum, participation in administration of public affairs / Referendum, ballot paper.

Headnotes:

The constitutional right to participate directly in the administration of public affairs is fulfilled if any citizen has had the opportunity to express his/her opinion on the questions announced for referendum.

Summary:

The National Council of the Slovak Republic adopted on 14 February 1997 resolution no. 564 on the holding of a referendum on the following three questions:

1. Do you agree that the Slovak Republic will join NATO?

2. Do you agree that nuclear weapons shall be located within the territory of the Slovak Republic?

3. Do you agree that foreign military bases shall be established within the territory of the Slovak Republic?

On 4 March 1997, a petition by 495,241 citizens of the country called for a referendum on the question: "Do you agree that the President of the Slovak Republic shall be elected directly due to the constitutional amendment drafted as attached to this petition?"

A referendum on all four questions was announced by a decision of the President of the Slovak Republic

published in the Official Gazette of the Slovak Republic no. 76/1997. This decision was published on 13 March 1997. The referendum was announced for 23 and 24 May. The announcement of the referendum initiated a series of disputes between the President of the Slovak Republic on the one side, and the Parliament and government on the other. It was also reviewed by the Constitutional Court of the country (see *Bulletin* 1997/2 [SVK-1997-2-004] and [SVK-1997-2-005]). The Constitutional Court ruled that any referendum which has been announced must be held in the manner in which it has been announced. No State authority has the power to revoke or abolish a referendum once announced. Nonetheless, the Minister of Interior following an internal instruction passed by the Government ordered ballots to be printed including only those three questions emanating from the Parliament. In consequence, only 9,53% out of the 3,967,067 entitled citizens took part in the referendum. A day later the referendum officially was declared void by the Central Commission for Referenda. As a result, citizens claiming various constitutional rights went to the Constitutional Court. The rights claimed, the arguments put forward and the State authorities and public figures against whom complaints were lodged were very different. One of the petitioners claimed there had been a violation of his constitutional right to participate directly in the administration of public affairs (Article 30.1 of the Constitution) due to the fact that the Ministry of Interior delivered to the constituencies the ballots including three questions instead of four.

The Ministry of the Interior asked the Court to dismiss the petition as evidently ill-founded because the petitioner had the opportunity to exercise his constitutional right but had refused to exercise it. The Ministry of the Interior also argued that it had carried out the judgement of the Constitutional Court of 21 May 1997, as well as the resolution of the Slovakian Government of 22 April 1997.

The Constitutional Court ruled that the decision of the President to announce a referendum is final and irrevocable. No extraordinary remedies exist against it. Nobody, including any State authority, is entitled to change the formulation, amount or sequence of the questions announced for referendum by the decision of the President of the Republic. The Constitutional Court within its judgement of 21 May explicitly underlined that the legal reasoning of the Court was of no direct impact on the preparation and accomplishment of the referendum announced by the presidential decision no. 76/1997. Thus, the judgement of the Constitutional Court could not be considered as the ground for legalising the activities of the Minister of the Interior and the Ministry of the Interior. Neither the judgement of the Constitutional Court nor the resolution of the Government entitled the Ministry to abstain from its mandatory obligation "to take measures for the ballots to be printed and handed to the municipalities" as provided by the statute on referendum. The power of the Government "to guide, unify and control the activities of the ministries" which is vested in the Government through the general provision of statute no. 347/1990 may not be interpreted as the legal basis allowing a minister to overreach his competence. Thus, the Minister as well as the Ministry were obliged to follow the decision of the President of the country proclaimed in the Official Gazette no. 76/1997. Contrary to that obligation, the Ministry of Interior took no measures in favour of printing the ballots on all four questions. It also did not deliver such ballots to the municipalities. Thus no constituency had the opportunity to provide the voters with the ballots printed in conformity with the decision of the President. The individual's right to participate in the administration of public affairs through referenda cannot be exercised to its full extent at the moment when a citizen enters the polling-station. This right is exercised solely when its purpose has been achieved, and that happens at the moment when the citizen expresses his or her opinion on the questions upon which a referendum has been called. The Ministry of the Interior showed no respect for the constitutional act carried out by the President of the Slovak Republic. Moreover, through the activity of the Ministry, the referendum was thwarted. This was the reason why the petitioner lost his opportunity to participate in deciding on four questions significant for the administration of public affairs. Thus, the Constitutional Court ruled that the right claimed by the petitioner had been violated by the Ministry of the Interior of the Slovak Republic.

Supplementary information:

The Constitutional Court re-affirmed the above reasoning through an other judgement of 6 February 1998 when the right of another citizen "to participate in the administration of public affairs directly" was found to have been violated by the Ministry of the Interior (re I.ÚS 76/97).

Languages:

Slovak.

Identification: SVK-1998-1-003

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 05.02.1998 / **e)** I.ÚS 3/98 / **f)** Case of interpretation of Constitutional provision in conflicting situation / **g)** *Zbierka zákonov* (Official Gazette), no. 49/1998, 334 in brief; to be published *in Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Rule of law.
General Principles – Legality.
Institutions – Legislative bodies – Powers.
Institutions – Executive bodies – Powers.

Keywords of the alphabetical index:

State authorities, conflict / State authorities, respect of treaties / State authorities respect of domestic legislation.

Headnotes:

Any public authority in a State governed by the rule of law is obliged to follow the Constitution, laws and subordinate legislation without exceeding the limits laid down by the law.

Summary:

The President of the Slovak Republic requested an interpretation of Article 2.2 of the Constitution, according to which "State bodies may act solely in conformity with the Constitution. Their actions shall be subject to its limits, within its scope and governed by procedures determined by law".

The Court ruled that Article 2.2 of the Constitution is respected only if the State authority acts within the limits laid down by the law and that there can be no exception to the requirement for such conduct. At the same time, the State authority must behave in the manner prescribed by law. This constitutional requirement is valid even if the State authority shares the opinion that some other State authority did not act in conformity with the Constitution. Presumed unconstitutional conduct by one State authority is never a reason for allowing another State authority to overstep the limits laid down by law. All this is based on the principle of the rule of law. The essence of a State governed by the rule of law is the subordination of any State authority to the Constitution and law. This, however, does not mean that the State authorities are subordinated exclusively to the Constitution. If, as is the case here, the Constitution so provides, the State authorities are also obliged to follow international treaties (Articles 11 and 144.2 of the Constitution), governmental decrees (Article 120.1 of the Constitution) and all other domestic legislation.

Languages:

Slovak.

Identification: SVK-1998-1-004

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 24.02.1998 / **e)** PL.ÚS 17/96 / **f)** Case of constitutional conflict between the Constitution and the statute / **g)** *Zbierka zákonov* (Official Gazette), no. 78/1998, 543 in brief; to be published in *Zbierka nálezov a úzneseni Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Certainty of the law.
General Principles – Publication of laws.
Institutions – Legislative bodies – Law-making procedure.
Institutions – Jurisdictional bodies – Organisation – Prosecutors / State counsel.
Fundamental Rights – Civil and political rights.
Fundamental Rights – Economic, social and cultural rights.

Keywords of the alphabetical index:

Laws, entry into force / State prosecution, territorial organisation.

Headnotes:

In the Slovak Republic, laws must be promulgated in the Official Gazette prior to their entry into force. Otherwise the law has not been adopted in conformity with the Constitution.

Summary:

The President of the Slovak Republic submitted a motion on the non-conformity of law no. 314/1996 on the State prosecution with Articles 1 and 2.2 of the Constitution

in conjunction with Article 132.1 of the Constitution. The petitioner did not only claim that the whole statute was unconstitutional, but also that many individual provisions of the law were not in conformity with constitutional articles on the right to privacy, personal liberty, freedom of movement and residence, freedom of thought, conscience, religion and faith, the right to run a business, the right of free association, the right to refuse to give evidence, as well as with the constitutional provisions on the competence to make laws, etc.

The Constitutional Court decided that the whole law no. 314/1996 was unconstitutional. This opinion was based upon Article 87.5 of the Constitution, according to which: "Any law shall enter into force after promulgation. Details shall be defined by law". The law within the meaning of Article 87.5 of the Constitution is law no. 1/1993 on the Official Gazette of the Slovak Republic. Under this law any sort of legislation is valid on the day of its promulgation in the Official Gazette. As a rule, valid legislation enters into force on the fifteenth day after its promulgation, if its entry into force is not postponed. The day of entry into force may be fixed before the fifteenth day after promulgation in very exceptional circumstances, if there is an imminent threat to public interest. In such a case, however, the day of entry into force of the law may not be fixed sooner than on the day of promulgation of the law in the Official Gazette. Law no. 314/1996 was promulgated on 12 November 1996. According to Article 56 of this law it entered into force on 1 November 1996. The Constitutional Court ruled that the National Council of the Slovak Republic adopted this law contrary to the principle of legal certainty which is implicitly included in the principles of a State governed by the rule of law guaranteed by Article 1 of the Constitution. The National Council also overstepped the competence given to it by Article 2.2 of the Constitution because it did not act within the limits of the Constitution, and in the manner determined by law.

In addition to this, the Constitutional Court in five other points ruled on the unconstitutionality of a series of individual provisions of law no. 314/1996. Those provisions were held to be unconstitutional because of their non-conformity with constitutional rights and freedoms of individuals and legal entities. Non-conformity with the Constitution was also found in general provisions on the organisation of State authorities, their constitutional competence and law-making powers. This unconstitutionality was found in respect of the right of the Attorney-General to change the territorial organisation of the State prosecution laid down by law through his circular promulgated in the Official Gazette. The Constitutional Court ruled that this competence in fact constituted a law-making power for the Attorney-General. Law-making power, however, may be derived solely from the Constitution. Under the Constitution it is vested in the National Council of the Slovak Republic (Article 86.a of the Constitution), the Government of the Slovak Republic (Article 120 of the Constitution), authorities of the executive power (Article 123 of the Constitution) and the authorities of local self-government (Articles 68 and 71.2 of the Constitution). As the Attorney-General is not authorised to exercise a law-making activity under the Constitution, the law-making power vested in him by law no. 314/1996 was not in conformity with Articles 2.2, 68, 71.2, 86.a, 120 and 123 of the Constitution.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

Number of decisions

The Constitutional Court had 29 sessions (17 plenary and 12 in chambers) during this period, in which it dealt with 227 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 107 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 in sessions closed to the public). There were 439 U- and 374 Up- unresolved cases from the previous year at the start of the period (1 January 1998). The Constitutional Court accepted 184 U- and 121 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

- 175 cases (U-) in the field of protection of constitutionality and legality, of which there were (taken by the Plenary Court)
  - 35 decisions and
  - 140 resolutions

- 68 cases (U-) that were joined to the above-mentioned cases because of common treatment and decision; accordingly the total number of resolved cases (U-) is 243.

- 89 cases (Up-) in the field of protection of human rights and basic freedoms (12 decisions taken by the Plenary Court, 77 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 handed over to the participants in the proceedings.

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

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

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

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

- since June 1998 on CD-ROM (complete Slovene full text version from 1990 through 1996, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act and the European Convention for the Protection of Human Rights and Fundamental Freedoms translated into Slovene language);

- since August 1995 on Internet (Slovene constitutional case law of 1994 and 1995, as well as some important cases prepared for the *Bulletin on Constitutional Case-Law* of the Venice Commission from 1992 through 1997, in full text in Slovene as well as in English "http://www.sigov.si/us/eus-ds.html"); since 1 January 1997 also on the mirror site in U.S.A.: "http://www.law.vill.edu/us/eus-ds.html";

- since 1995 some important cases in English full-text version in the *East European Case Reporter of Constitutional Law*, published by the BookWorld Publications, The Netherlands. The *East European Case Reporter* is available also on Internet (http://www.bwp-mediagroup.com/bookworld/eecrcl.htm).

Important decisions

Identification: SLO-1998-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.01.1998 / **e)** U-I-349/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 24/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts. **Fundamental Rights** – Economic, social and cultural rights – Right to be taught.

Keywords of the alphabetical index:

Education, secondary schools / Education, assessment, students' right to appeal / Right to judicial protection of rights.

Headnotes:

The provision of the High Schools Act, which states that the headmaster of a school must, where a pupil lodges an appropriate objection, appoint a commission within three days, which must within three days reassess the knowledge of a pupil, and he must appoint onto this commission at least one member who is not employed in the school, is not in conflict with the Constitution. The cited statutory provision does not violate constitutional rights and basic freedoms in relation to equality before the law, equal protection of rights or judicial protection of rights and is not in conflict with the constitutional obligation of the State to provide the opportunity for all citizens to obtain a proper education.

Summary:

The High Schools Act (hereinafter: "ZGim") as an organic law regulates in entirety all the more important questions of education in general and professional high schools, which enable pupils after completing matriculation to continue education in tertiary education (Article 1). Article 40 regulates the question of the right of pupils to appeal in a case in which they are dissatisfied with an assessment in an individual subject. A pupil may within three days of receipt of the annual report submit an objection to the assessment in an individual subject, to the headmaster of the school (Article 40.1). The disputed second paragraph of this Article governs the right and duty of the headmaster to establish a commission for reexamining the pupil's knowledge. The assessment of the commission is final (Article 40.3).

Article 14.2 of the Constitution guarantees the equality of all persons before the law, and Article 22 of the Constitution guarantees the principle of equal protection of rights, which is guaranteed to all, among other things before holders of public authority. Article 23 of the Constitution guarantees the right of any person to judicial review.

The disputed provision, Article 40.2 ZGim, is not in conflict with the cited constitutional principles. ZGim establishes with this provision the mechanism of retesting the knowledge of a pupil, because of a disputed assessment, on the basis of an objection submitted. This scheme applies in all secondary schools. Under Article 40.3, the assessment of the commission is final, but judicial review of the decision is guaranteed, although this is not explicitly stated in this law. For example, in relation to obtaining or losing the status of pupil it is explicitly stated that it is possible to initiate an administrative dispute against a final decision of the competent organ.

A pupil dissatisfied with a final decision (assessment) of the cited commission may, in compliance with Article 1.2 of the Administrative Disputes Act (ZUS), initiate judicial protection of his rights. According to this provision, judicial protection of rights and legal interests of individuals is guaranteed in administrative disputes against a decision of holders of public authority. In compliance with ZGim and with the Organisation and Financing of Childcare and Education Act (ZOFVI) a high school is a holder of public authority. If a school carries out a publicly recognised education programme, a report on the assessment of a pupil's knowledge represents an individual administrative act. Against such an individual act, therefore, which also includes an assessment of the special assessment commission which ZGim regulates, it is possible to initiate an administrative dispute and thus ensure judicial protection of rights and legal interests.

The headmaster of a school, who appoints the special assessment commission in accordance with Article 533 ZOFVI, is appointed and dismissed by the school council, for which it must obtain the consent of the competent minister. However, the competencies of the headmaster of a school are explicitly determined in Article 49 of the cited law, in relation both to guaranteeing the unfolding of the educational process defined by the school program and to realising the rights and obligations of pupils in this and other tasks in conformity with the law and other regulations. The possibility of partiality in assessing the knowledge of a pupil who, on the basis of an objection, has initiated the procedure of reassessing his knowledge in an individual subject, is already restricted by the composition of the assessment commission, since under ZGim the headmaster must appoint to this commission at least one member who is not employed in the school. The appointment of the assessment commission is also regulated by the Regulations on checking and assessing knowledge in high schools, issued on the basis of Article 41 ZGim, according to which more detailed provisions on checking and assessing knowledge are prescribed by the minister. Under Article 12 of the Regulations, a headmaster must appoint a commission of at least three persons within three days of receiving an objection to an annual report. The commission must

include at least one member who is not employed in the school, and the teacher who has assessed the pupil may not be appointed to it; and at least one of the members of the commission must be a teacher of that subject. With these more detailed requirements for the composition of the commission and with the possibility of judicial review, the rights of pupils in connection with assessment of their knowledge are protected and the possible influence of a headmaster on the work of the commission in checking the appropriateness of an assessment is restricted.

The disputed provision ZGim is not in conflict with Article 57.3 of the Constitution. A citizen's right to obtain a proper education does not depend solely on the realisation of those opportunities to which the State is bound by the cited constitutional provision. The possibility of obtaining a proper education depends equally on the activity and contribution of each citizen himself. In conformity with the cited constitutional provision and statutory and other regulations, the State is bound to provide adequate organisation and functioning of a specific educational system. In the framework of general high school education, the opportunity of obtaining a proper education, to which the State is bound, is guaranteed by both ZGim and ZOFVI. The latter law specifies even in its title that it governs the organisation and financing of childcare and education. This includes education programmes and their syllabus, organisations, types of school, conditions for performing these activities and similar. This serves to create the opportunity to obtain a proper education as one of the constitutionally determined freedoms. The disputed ZGim provision also contributes to guaranteeing the possibilities under consideration.

Supplementary information:

Legal norms referred to:

- Articles 14, 22, 23, 57 of the Constitution;
- Article 1 of the Administrative Disputes Act (ZUS);
- Articles 49, 53 of the Organisation and Financing of Childcare and Education (ZOFVI);
- Articles 21, 26 of the Constitutional Court Act (ZUstS).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1998-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.03.1998 / **e)** U-I-314/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 24/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Institutions – Public finances – Taxation – Principles.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Public burdens.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.
Fundamental Rights – Economic, social and cultural rights – Right to culture.

Keywords of the alphabetical index:

Sales tax, exemptions / Natural and cultural heritage, protection / Public institutes, cultural / Legal person, differential treatment as a tax payer.

Headnotes:

Under the statutory scheme in question, only those public institutions for cultural activities whose activity is the protection of the natural and cultural heritage and which are considered museums under the Natural and Cultural Heritage Act are entitled to exemption of payment of sales tax in the purchase of objects of all kinds and forms which they purchase as being of value to museums. This scheme was held to be in conflict with the constitutional principle of equality before the law.

Summary:

From the standpoint of Article 14.2 of the Constitution (principle of equality), the question is raised whether, in relation to the purchase of objects of historical or cultural value, sound reason is to be found deriving from the nature of the matter or whether there exist material grounds for the legislator's differentiation between public institutes in the field of culture, some of which are considered museums under the Natural and Cultural Heritage Act (ZNKD), and others of which, whose activity is the protection of the natural and cultural heritage, are not considered museums, or whether the legislator's behaviour is arbitrary. Under Realising the Public Interest in the Field of Culture Act (ZUJIPK), a museum is defined as a public institute in the field of culture. On the basis of Article 74.4 ZUJIPK, those provisions of the ZNKD which refer to the founding and administration of public institutes ceased to have effect, and similarly, the identical

provisions in the Libraries Act (ZKnj) ceased to have effect, such that libraries are also public institutes in the field of culture.

The activity of a museum as defined under Article 70 ZNKD is the protection of the natural and cultural heritage, i.e. of that part of nature and objects of human work that is of high cultural value, such that the natural and cultural heritage (among other things) is preserved. The work of museums also includes but is not limited to heritage studies, professional cooperation with owners, the proposal to competent bodies of the declaration of certain objects as being of cultural value, recording and documenting monuments, collecting, arranging and preserving museum items, preparing exhibitions, publications and other forms of presentation of national and foreign heritage items at home and abroad and the development amongst citizens of an awareness of the importance of heritage and of its protection (Articles 71 and 87 ZNKD). Because of the multitude of aspects which influence the value of objects of the movable cultural heritage, many of which depend on society's perceptions or the object's links with particular persons or events, the majority of the movable heritage is outside museums, in the possession of individual or legal persons. It thus depends on the owner whether the item is recognised as part of the cultural or natural heritage and is treated as such and whether it is made accessible to the public, or at least to professionals.

The concept of the natural and cultural heritage is constantly enriched, which means that society wishes to preserve as heritage ever more natural attributes, achievements and documents of the past. The dilemma of what shall count, be declared and protected as heritage also exists. In this, not only a professional point of view matters, since society also has its own more or less expressed interest and also its own measure of willingness and capacity for physical protection, preservation and attainability.

Concern for preserving the natural richness and cultural heritage is also dictated by Article 5 of the Constitution and it thus also creates the possibility for the harmonious civilisational and cultural development of Slovenia. In relation to Article 73 of the Constitution, everyone is bound in compliance with the law to protect natural features and rarities and cultural monuments, to preserve the natural and cultural heritage, and such matters are also the concern of the State and local government.

In view of all that has been said about the statutory arrangement, according to which, among public institutions for cultural activities whose activity is the protection of the natural and cultural heritage, tax exemption is awarded only to museums and galleries which are considered museums under ZNKD (a gallery which preserves the movable cultural heritage is a museum – Article 88.2 ZNKD), it is not possible to find material reasons deriving from the nature of the arrangement of the matter. The disputed statutory arrangement is thus arbitrary and conflicts with Article 14.2 of the Constitution. The legislator, in order to rectify the established unconstitutionality of the disputed provision, will therefore have to bind tax exemption under Article 18.18 of the Sales Tax Act (ZPD) to other regulations as well, or embrace as purchasers to whom the tax exemption refers, all public institutions in the field of culture whose activity is the protection of the natural and cultural heritage.

Supplementary information:

Legal norms referred to:

- Articles 5.3, 14, 73 of the Constitution;
- Article 74 of the Realising the Public Interest in the Field of Culture Act (ZUJIPK);
- Article 48.2 of the Constitutional Court Act (ZUstS).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1998-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.03.1998 / **e)** U-I-123/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 27/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles – Social State.
General Principles – Rule of law.
General Principles – Public interest.
Institutions – Jurisdictional bodies – Organisation – Prosecutors / State counsel.
Fundamental Rights – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Contractual relations, freedom of arranging / Public order, cogent / Contract, nullity / Morals / Denationalisation, rectifying injustice / Legal norms, cogent / Nationalised assets, prohibition on disposal.

Headnotes:

According to the Code of Obligations, only such defects in concluding contractual relations as gravely infringe the existing legal order and its operation shall be considered reasons for annulling a contract. The constitutionally determined function of the State prosecutor, according to which he is bound to operate so as to prevent behaviour by legal subjects which would threaten the social order and its operation, therefore includes reasons which have as a result the annulment of contractual relations. The right of the State prosecutor to find the nullity of a contract (contained in the Code of Obligations) is therefore not in conflict with the Constitution.

Summary:

Based on the principle that contracts should be given effect where possible, Article 103 of the Code of Obligations (ZOR) states that contracts shall be found null and void where they are in conflict with constitutional principles of social order, with legislation in force or with moral principles, and where no other sanction is prescribed by law. Annulling a contract is the heaviest civil sanction available under the ZOR and is only to be used where this is absolutely necessary in the public interest. The legislator thus envisaged imposing this sanction only exceptionally within the framework of Article 103 ZOR, when a particular contract is in clear conflict with the public good or interest. In certain cases this sanction is imposed automatically by law; in others, it is left to the courts to decide whether annulment of the contract at issue is appropriate.

The Denationalisation Act (ZDen) was adopted with the intention of rectifying injustices caused to private property owners during and after the Second World War. It is compulsory in nature and is carried out even against the will of those bound. ZDen regulates ownership regulations anew and with retrospective effect. Under the ZDen, claimants may demand that nationalised property be returned to them in natural form, that ownership or co-ownership relations be established over the nationalised property or that they receive compensation for the property. In order to prevent mass disposal of the assets in question to legal subjects not bound by ZDen, thereby avoiding the obligation to denationalise, the legislator considered it essential to prohibit the disposal of such assets (Article 88 ZDen). This was done by removing from legal trade, for a specified period, property which had been forcibly nationalised (Article 88.3 ZDen in conjunction with Article 64 ZDen). This system does not violate the principle of freedom of contract. Parties are still free to arrange their respective obligations in legal transactions provided this is done in compliance with constitutional principles, legislation in force and moral principles, and thus also in conformity with the prohibition implemented in Article 88 ZDen.

Article 109 ZOR imposes a duty on the court to examine *ex officio* the question of nullity of a contract. Any interested persons may also raise the question of nullity. The disputed Article 109.2 further extended the circle of those entitled to raise the annulment of a contract to include the public prosecutor.

The public prosecutor's office is, in accordance with the Constitution, a special State organ intended for the protection of legal order. The responsibilities of this office include not merely questions of criminal prosecution but questions in all fields of public life which are important for the protection and strengthening of legal order. Article 135 of the Constitution requires the prosecutor to prefer and prosecute criminal charges, and empowers the legislator to determine by statute his jurisdiction in other spheres of public life. Under the Civil Procedure Act (ZPP), in accordance with Article 9 of the State Prosecutor Act, the State prosecutor is authorised amongst other things to challenge in specified circumstances a final court judgment issued in disputes relating to property contracts (Article 401a ZPP). This provision is in conformity with the prosecutor's constitutionally defined function of protecting legal order. Thus Article 109.2 ZOR, giving the prosecutor the right to raise the issue of the nullity of such contracts as seriously infringe the existing social order or its operation, does not conflict with the Constitution.

It follows from the above statements that the disputed provision is not in conflict with Articles 1, 2 and 8 of the Constitution, as it does not violate the principles of freedom of contract or of consent. Further, since a null contract has no legal effect between the parties (being null *ab initio*), the right to request a finding of nullity has no effect on the property relations of the contracting parties and does not infringe their right to ownership. A finding of nullity is made by declaratory judgment, which neither changes nor establishes new property relations, but rather declares what the position has always been.

The appellant did not give an argument as to why the disputed provision is in conflict with Article 15 of the Constitution, and the Court itself did not ascertain the

asserted discordance. On the basis of the disputed provision, the State prosecutor requested that the contract that the appellant concluded to be contrary to Article 88 ZDen be found null and void. Article 88 ZDen, which admittedly had an indirect effect on the right of beneficiaries of denationalisation to validate their claims, was implemented in the public interest in order to ensure denationalisation proceeded fairly. The appellant's claim that the prohibition was implemented solely in the interest of contracting parties and that the State prosecutor was thus not entitled to request a finding of nullity must thus be dismissed.

The disputed provision became law in the Republic of Slovenia at the time of the declaration of its sovereignty and independence, on the basis of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia and the provisions on continuity implemented in Article 4 of the Enabling Statute for Implementing the Basic Constitutional Charter. The Court thus rejected the appellant's claim that the provision has been in conflict with the Constitution from the very start.

Supplementary information:

Legal norms referred to:

- Articles 1, 2, 8, 15, 135 of the Constitution;
- Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL);
- Article 401 of the Civil Procedure Act (ZPP);
- Articles 64, 88 of the Denationalisation Act (ZDen);
- Articles 21, 26 of the Constitutional Court Act (ZUstS).

Concurring separate opinion of a constitutional judge. Dissenting separate opinion of a constitutional judge.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1998-1-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.03.1998 / **e)** U-I-249/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 27/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.
Constitutional Justice – The subject of review – Administrative acts.
General Principles – *Nullum crimen sine lege.*
Institutions – Jurisdictional bodies – Military courts.
Institutions – Jurisdictional bodies – Special courts.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
Fundamental Rights – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Constitutional Court, judgement of pre-Constitution regulation / Seizure of assets / General legal principles of civilised nations / Law of attainder / Right to rehabilitation and compensation.

Headnotes:

The Constitutional Court does not in general have jurisdiction to decide on the constitutionality of laws, other regulations and general acts which, at the time of the independence of Slovenia, did not become a composite part of its legal order. The Court may, however, exceptionally pass judgment in such matters if it is a penal regulation which may be used under the provisions of Article 28 of the Constitution in deciding on the rights or obligations of an individual, or for other regulations which may be used in their full extent for any other specially founded reasons for deciding on rights or obligations.

The provision of Article 28 of the Confiscation Act (ZKIK), in all cases in which a declaration of a district people's council (that a specific person is a war criminal or national enemy and has specific assets) was not based on a court sentence, was a provision of a material criminal law nature that determined by decision of an administrative organ which persons could be proclaimed war criminals and the penalty thus imposed of seizure of assets. A declaration of a district people's council was in these cases, in terms of its content, a sentence. The Constitutional Court thus has jurisdiction to review it.

The concepts "war criminal" and "national enemy", at the time of creation of the ZKIK, were determined from Articles 13 and 14 of the Military Courts Decree, which contained the definitions of the most serious criminal

offences. So the then Article 28 ZKIK was already in conflict with the basic principles which were recognised by civilised nations because it determined that, outside a criminal proceeding, that is outside a procedure in which at least the basic guarantee of a fair trial was guaranteed, individual persons could be declared war criminals or national enemies by decision of an administrative organ. The use of such a provision would not be permissible in contemporary proceedings, since it signified a serious violation of Article 23 of the Constitution.

A person entitled may, according to the provisions of the now valid Code of Criminal Procedure, demand a renewal of the procedure in which the decision was issued, which is by its legal nature a court sentence.

Summary:

The concepts "war criminal" and "national enemy" in the text of Article 28.1 ZKIK are derived from the Decree on Military Courts (UVS), Articles 13 and 14, the constitutionality of which the Court has already examined in case no. U-I-6/93, *Bulletin* 1994/2 [SLO-1994-2-008]. In that case the Court held that all elements of the provisions of the Order which were used as bare incrimination of status and did not refer to specifically defined acts of the accused were opposed to general legal principles and to the current Constitution. The lack of specificity of these provisions also served as a basis for arbitrary decisions by the courts of the time. It is clearly possible that the post-war legislator had in mind, with the use in the ZKIK of the concepts of "war criminal" and "national enemy" and the provisions disputed in the instant case, precisely the terminology of Articles 13 and 14 UVS. Under this law, military courts pronounced judgment in criminal proceedings; seizure of property was envisaged as a secondary penalty and was pronounced together with the main punishment in the criminal proceedings in which a decision was reached on the accused's guilt.

Examination of the implementation of the ZKIK shows that a declaration according to Article 28 that the person in question was a war criminal could be based on a court sentence, and that criminal proceedings may have taken place in individual cases, although court records were not preserved; and it is equally clear that in other cases property was confiscated based on a declaration, made without court proceedings having taken place, that the accused was a war criminal. This was permitted under Article 28.1 ZKIK, which allowed district councils to proclaim persons who, during the war, were "shot, killed, died or fled" to be "war criminals" and "national enemies" – which, in the criminal terminology of the time, meant persons who had been convicted of war crimes – and to seize their property. The legislator thus gave district councils authority, in cases where no criminal proceedings or judgment occurred, to determine that a specific person was guilty of a criminal act under Article 13 or 14 UVS. Thus administrative bodies could and did find persons guilty of serious crimes, and this without even the most minimal guarantees of a fair trial.

An essential part of Article 28.1 ZKIK was the legal nature of the finding that a specific person was a war criminal or national enemy who during the time of war had been shot or killed or had died or fled. At the time of passing sentence of confiscation, the court was forbidden to enter into the question of whether an individual person had really been shot, killed, died or fled, since establishing this, under the authentic interpretation of Article 28.2 ZKIK, was within the exclusive jurisdiction of the district councils. Similarly, the courts could not enter into the question of whether an individual person had really committed any kind of criminal offence which represented a war crime under the then valid legislation, and whether this person had been convicted in a criminal proceeding in which the basic guarantees of a fair trial were assured, as already then recognised by civilised nations. The courts therefore passed sentence and carried out confiscation of property even if a criminal judgement had not been passed, solely on the basis of the declaration of the district council.

This declaration was from a formal legal standpoint undoubtedly an administrative decision and was such also from a material law standpoint in all those cases in which and in so far as the finding that an individual had committed a criminal offence (was a war criminal) was the basis of the sentence. In all other cases it was possible, by this administrative decision, to declare a person a war criminal. Undoubtedly, the terms "war criminal" and "national enemy" implied persons held to have committed some criminal offence; seizure of property was considered a secondary punishment. The court sometimes executed seizure itself, and sometimes only passed this sentence. But in order to pass a sentence of seizure under Article 28.1 ZKIK, it was necessary to consider that it was passed on persons against whom there existed an enforceable criminal judgment, which the court did not have to hand owing to the exceptional wartime conditions. Seizure itself thus represented, under Article 28.1 ZKIK, an institution of criminal law. As the applicant claimed, the administrative decision – the declaration of the district council in all cases where it was not based on a criminal law judgment – replaced, in terms of its content, such a criminal law judgment. The district councils had explicit statutory authority for this. The statutory regime thus allowed for criminal convictions to be pronounced without the necessity of first carrying out criminal proceedings which would guarantee to the individual at least the basic principles

of a fair trial, already then recognised in civilised nations. The use today of such a provision – which allows for the conviction of an individual as a war criminal or national enemy without a fair trial and even without criminal charge – would be in conflict at the very least with Article 23 of the Constitution, according to which everyone has the right to have any criminal charges laid against him decided by an independent, impartial court established according to the law.

Since the declaration was of such a nature that in terms of its content it represented a sentence, then the same legal regime must apply for it as applies for a sentence. On the basis of the appeal which the Constitutional Court explicitly addressed to the legislator in the already cited decision on UVS, by the provision of Article 559 Code of Criminal Procedure (hereinafter: ZKP) special appeal was introduced for disputing already final decisions. The time limit for exercising such appeals has already expired. Article 416 ZKP allows for renewing regulations annulled by constitutional judgment on the basis of which a final condemnatory judgement was passed. This legal remedy is also undoubtedly a reflection of Article 28 of the Constitution, and as such is directed above all at cases of annulled criminal provisions under which criminal offences are defined. The Constitutional Court could not, however, annul the disputed provision, as it was already invalid, and so in the same way and for the same reasons as with UVS, it decided that the provision, as anti-constitutional, may not be used in procedures before State organs in the Republic of Slovenia. The effect under Article 416 ZKP of such a decision in terms of its content is the same as that of the annulment of a still valid regulation which determined punishable behaviour. Thus, in compliance with Article 416 ZKP, persons who were proclaimed war criminals and national enemies by declaration without sentence, or their legal heirs who are legally entitled to this, must be allowed to request in a retrial a change to the final decision (that is the declaration of a district people's council which was not based on a sentence) on the basis of this decision of the Constitutional Court.

Persons who were in this way unjustly convicted have the right to moral rehabilitation, which they can achieve in a retrial under Article 416 ZKP. Similarly they also have the right for property seized to be returned to them or their legal heirs. Property in these cases, on the basis of Article 28 ZKIK, was formally (in the legal sense) seized by decision of the district court of jurisdiction, which meant in essence enforcement of the declaration. From this point of view, this decision, against which no legal remedy is any longer available, would represent in the above-mentioned cases, despite possible annulment of the declaration, a hindrance to the restitution of property to persons unjustly convicted. However, given that both in these cases and in cases in which a sentence represented the basis for seizure the decision of the district court only represented a continuation of the sentence, it actually signified rendition of a penal sanction against the individual. So in a case in which the individual achieves annulment of the sentence which was the basis for seizure of property by decision of a district court under Article 28 ZKIK, the legal basis is also created for restitution of that property under the provisions of the Punishment Enforcement Act.

Supplementary information:

Legal norms referred to:

- Articles 23, 28, 30 of the Constitution;
- Articles 367, 411, 416, 421, 559 of the Code of Criminal Procedure (ZKP);
- Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL);
- Articles 23, 26, 40.1 of the Constitutional Court Act (ZUstS).

Concurring separate opinion of a constitutional judge. Dissenting separate opinion of a constitutional judge.

Cross-references:

In the reasoning of its decision, the Constitutional Court refers to its cases no. U-I-6/93 of 13.01.1994 (Dolus III, 33; *Bulletin* 1994/2, 159, [SLO-1994-2-008]) and no. U-I-67/94 of 21.03.1996 (Dolus V, 31; *Bulletin* 1996/2 [SLO-1996-2-006]).

By resolution of the Constitutional Court of 22.01.1998, cases no. U-I-68/97 and no. U-I-1/97 were joined to the case being tried because of common treatment and decision.

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-1998-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 17.02.1998 / **e)** CCT 8/97 / **f)** The City Council of Pretoria v Walker / **g)** / **h)** 1998 (3) *Butterworths Constitutional Law Reports* 257 (CC).

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Race.

Keywords of the alphabetical index:

Discrimination, indirect / Local authority, powers / Service charges, uniform structure / Unfair discrimination, elements / Cross-subsidies.

Headnotes:

The differential levying of service charges for water and electricity which results in the cross-subsidisation of an historically disadvantaged area by a previously privileged area does not constitute unfair, indirect discrimination on the grounds of race. However, it does amount to unfair discrimination if service-charge debts are recovered selectively.

Summary:

The City Council of Pretoria was established by the amalgamation of a number of municipalities including those of former so-called black townships and the former white municipality. The issue before the Court arose from the levying by the Council of charges for water and electricity on a differential basis. Charges were levied against Mr Walker and other residents of the traditionally white area on the basis of a consumption-based tariff measured by means of meters installed on each property. However, due to the shortage of meters on township properties, the residents of the former black townships were levied on the basis of a flat rate per household. Furthermore, outstanding municipal service debts were only judicially recovered in the former white area. Mr Walker contended that this differential treatment constituted an infringement of his right not to be unfairly discriminated against.

Deputy President Langa, who wrote the majority judgment, held that levying charges on a differential basis amounted to indirect discrimination on the basis of race. In determining whether this discrimination was unfair, the impact thereof on Walker had to be examined. The Court concluded that the discrimination was not unfair because there was no evidence that the respondent has been adversely affected by the policy in any material way. The high standard of services in the former white area had not deteriorated, and the flat-rate was a transitional measure implemented for practical reasons. In relation to selective recovery of debts, however, the majority held that as the impact of the policy affected Walker in a manner comparably serious to an invasion of his dignity the discrimination was unfair.

Justice Sachs agreed with the majority's judgment regarding differential levying of service charges, but dissented from the view that selective enforcement of debt recovery by the council amounted to unfair discrimination. Residents of the white area were not called upon to do any more than to pay what they owed for services they had always received, and were not being singled out or targeted in any way.

Cross-references:

Other relevant cases in which the right to equality has been analysed include:

Brink v Kitshoff (CCT 15/95) 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); *Bulletin* 1996/1 [RSA-1996-1-009];
President of the Republic of South Africa and Another v Hugo (CCT 11/96) 1997 (4) SA 1 (CC); 1997 (6) BCLR 692 (CC); *Bulletin* 1997/1 [RSA-1997-1-004];
Prinsloo v van der Linde and Another (CCT 4/96) 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); *Bulletin* 1997/1 [RSA-1997-1-003];
Harksen v Lane NO and Others (CCT 9/97) 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC); *Bulletin* 1997/3 [RSA-1997-3-011];
Larbi-Odam and Others v The MEC (Member of the Executive Council) for Education (North-West Province) and Another (CCT 2/97) 1997 (12) BCLR 1655 (CC).

Languages:

English.

Identification: RSA-1998-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 24.03.1998 / **e)** CCT 19/97 / **f)** African National Congress and Another v Member of the Executive Council for Local Government and Housing, KwaZulu-Natal, and Others / **g)** / **h)** 1998 (4) *Butterworths Constitutional Law Reports* 399 (CC).

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Teleological interpretation.
Institutions – Executive bodies – Composition.
Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

Keywords of the alphabetical index:

Constitutional provision, local government / Local government body, right of membership / Provincial enactment, constitutionality / Traditional leaders, unelected.

Headnotes:

The interim Constitution of the Republic of South Africa (Act 200 of 1993) makes provision for the membership of traditional leaders on elected local government by virtue of their being traditional leaders, provided certain prescribed identification procedures are followed (Section 182). Regional councils, established by a provincial enactment which permits membership of certain nominated representatives of interest groups on such councils, are still *elected* local government. The provincial enactment, which governs the representation of traditional leaders on the regional councils, is consonant with Section 182 of the Constitution.

Summary:

The Constitutional Court had to consider the meaning of Section 182 of the interim Constitution which entitled traditional leaders of communities residing within the area of an elected local government to membership thereof by virtue of their being traditional leaders, as long as certain prescribed identification procedures had been followed.

The African National Congress challenged the constitutional validity of a provincial enactment which established several regional councils for KwaZulu-Natal and provided for membership of traditional leaders on those councils. The ANC's challenge was based on two grounds.

It was first argued that local government as established by the provincial enactment was not *elected* government as referred to in Chapter 10 of the interim Constitution, because the Local Government Transition Act provides for membership on those local government bodies of certain nominated representatives of specified interest groups. Justice O'Regan, speaking for a unanimous Court, held that the mere fact that a limited number of nominated members were represented on local government bodies established by municipal elections, did not mean that those bodies did not constitute *elected* local government.

Second, it was argued that the councils were not local government contemplated by the interim Constitution but rather were transitional local government structures established in accordance with the provisions of the Local Government Transition Act. They therefore did not comply with the requirements of Section 182 which provided for membership of traditional leaders on elected local government as contemplated by Chapter 10 of the Constitution. The Court held that the fact that the Local Government Transition Act had governed the municipal elections, did not mean that the local government established thereby was not contemplated by the interim Constitution. The purpose of the constitutional provision in respect of traditional leader membership on local government was to ensure continuity and avoid dislocation during the period of transition from old local government structures, which had been mainly urban and divided along racial lines, to new democratic bodies which covered the entire area of South Africa.

The Court thus upheld the provincial enactment.

Languages:

English.

Spain
Constitutional Court

Statistical data
1 January 1998 – 30 April 1998

Type and number of decisions:

- Judgments: 92
- Decisions: 100
- Procedural decisions: 1547

Cases submitted: 1960

Important decisions

Identification: ESP-1998-1-001

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 13.01.1998 / **e)** 11/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 37 of 12.02.1998, 48-53 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality – Scope of application.
Fundamental Rights – Civil and political rights – Right to private life – Protection of personal data.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Data processing, right of control / Strike, deduction from wages / Trade union, membership, discrimination.

Headnotes:

Although the wording of Article 28.1 of the Constitution might appear very detailed and precise with regard to the substance of trade union freedom, it can in no way be considered exhaustive or comprehensive but merely as indicative. Consequently, the explicit enumeration of specific rights contained within the generic right of trade union freedom in no way represents the full substance of that freedom.

In imposing a legal restriction upon the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights, Article 18.4 of the Constitution establishes an institution intended to guarantee other fundamental rights in response to a new form of specific threat to human dignity and rights. This institution is itself a full fundamental right, namely: the right to freedom in the face of any possible infringement of a person's dignity or freedom following unlawful use of the automatic processing of information of all kinds.

Summary:

This judgment concerns a worker's application for constitutional protection against the decision of his company to make certain deductions from his wages in respect of his participation in a strike which he had not actually supported, on the grounds that he was a member of one of the trade unions which had called the strike. In this connection, it should be noted that the company was given this information – the fact that the worker belonged to the trade union in question – to enable it to deduct the worker's trade union dues from his wages and pay them to the trade union. Since processing of this kind of data computerised, the company had used the same computer code to deduct an amount corresponding to the number of strike days from the worker's wages.

The Constitutional Court stressed first that the company had used the information on the worker's trade union membership for a completely different purpose from that for which it had been given the information and that it had deducted an amount from the worker's wages corresponding to the number of strike days, without even trying to find out whether he had actually taken part in the strike, purely on the basis of his membership of one of the trade unions which had organised the strike. The company manager's unilateral decision therefore constituted unfavourable treatment of the worker based merely on his membership of a trade union.

With regard to the right to trade union freedom (Article 28 of the Constitution) and the right to protection of data held on computer (Article 18.4 of the Constitution), the Constitutional Court stated that, in cases such as this, the guarantee provided by Article 18.4 of the Constitution constituted an instrumental right designed to ensure the protection of other fundamental rights, including, of course, trade union freedom. It was indeed this right which had been infringed by the company's decision to deduct wages on the basis of the worker's membership of a specific trade union. Moreover, Article 18.4 of the Constitution established an independent fundamental right which consisted in controlling the flow of personal

information, whether or not it concerned strictly private matters, so as to ensure that the person concerned was able to exercise his or her rights fully. In this case, the company had used sensitive information which it had been given for an entirely different purpose, thereby infringing the legitimate exercise of the worker's right to trade union freedom. The Constitutional Court therefore considered that there had been a violation of the right to trade union freedom (Article 28 of the Constitution) through the right to protection of data held on computer (Article 18.4 of the Constitution).

Languages:

Spanish.

Identification: ESP-1998-1-002

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 22.01.1998 / **e)** 13/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 47 of 24.02.1998, 3-21 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.
Institutions – Federalism and regionalism – Distribution of powers – Co-operation.

Keywords of the alphabetical index:

Environmental impact assessment / Collaboration / Co-operation / Jurisdiction, positive conflict / Autonomous community.

Headnotes:

The division of powers in respect of the environment is the decisive criterion only with regard to administrative measures to protect the environment, i.e. where the purpose and effect of an administrative act are to preserve or restore the environment affected by the activity in question.

From the jurisdictional point of view, environmental impact assessment can in no way be considered as an exclusive power of execution or management in the environmental field since a great many works, installations and activities requiring such assessment are matters subject to specific rules on jurisdiction (established by the Constitution and the Statutes of Autonomous Communities) which, in view of their very nature and their purpose, extend to the environmental field.

Summary:

This judgment rules on a positive conflict of jurisdiction arising between the executive of an Autonomous Community and State provisions concerning environmental impact assessment. Under these provisions, environmental impact can only be assessed by the authorities which carry out or authorise projects relating to works, installations or activities falling within their jurisdiction. Thus, in the case of projects relating to works, installations or activities carried out by the State or by private bodies subject to administrative supervision by the State, it is for the State administration alone to assess environmental impact.

The executive of the Autonomous Community concerned argued that by virtue of the legislative and executive powers which it had assumed in respect of the environment, projects relating to works, installations or activities located on its territory were subject to environmental impact assessment by the administration of the Autonomous Community, even if the power to approve and authorise such projects lay with the State administration.

The Constitutional Court pointed out first that it could only give a ruling on this jurisdictional dispute on the basis of the division of powers in respect of the environment, a criterion which was decisive only in the case of administrative measures to protect the environment and over which sectoral powers to approve or authorise works, installations or activities requiring environmental impact assessment took precedence. The Constitutional Court considered therefore that it was entirely in keeping with the constitutional system of powers to entrust environmental impact assessment to the authorities which carried out or authorised projects relating to works, installations or activities falling within their sphere of competence.

In reaching this conclusion, the Constitutional Court stressed that it was essential not to lose sight of the fact that when the State administration exercised its powers on the territory of an Autonomous Community, it must always take into account the latter's point of view and observe the duty of collaboration inherent in the very structure of the autonomy-based State, under which the State administration could not approve or authorise any project relating to works or installations located wholly

or partially on the territory of an Autonomous Community without weighing up the interests involved and co-ordinating its own action with that taken by the Administration of the Autonomous Community in the exercise of its powers.

The Constitutional Court considered that the regulations at issue offered sufficient ways and means of fulfilling this duty of collaboration, and observed in this connection that before drawing up an environmental impact study, the administration which had authorised the works or installations in question was required to consult, during the initial phase of the environmental impact assessment, the various authorities involved. In addition, the reports which the State administration must have at its disposal before issuing the environmental impact statement included those produced by the administration of the Autonomous Community in which the works, installations or activities were located.

Supplementary information:

There were two dissenting opinions on this ruling, supported by six judges.

Languages:

Spanish.

Identification: ESP-1998-1-003

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 17.02.1998 / **e)** 37/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 65 of 17.03.1998, 31-39 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Proportionality.
Institutions – Armed forces and police forces – Police forces – Functions.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Economic, social and cultural rights – Right to strike.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Strike, filming a picket line / Strike, identification of the participants.

Headnotes:

The right to strike recognised in Article 28.2 of the Constitution includes the right to disseminate information on the strike. In essence, therefore, it also comprises the right to publicise the strike, provided that it is publicised in a peaceful way, without any coercion, intimidation, threats or acts of violence of any kind, and respects the right of workers to choose not to exercise their right to strike.

Any measure which restricts a fundamental right has to be assessed from the angle of proportionality. For this purpose, it is first necessary to determine whether the measure is capable of achieving the desired result (assessment as to appropriateness); second, it has to be established whether the measure is necessary, i.e. whether there is any more moderate alternative measure which could achieve the aim pursued just as effectively (assessment as to necessity); last, it has be to determined whether the measure is a balanced one, i.e. whether it is more beneficial to the general interest than it is prejudicial to other interests or values involved (assessment as to proportionality in the strict sense).

Summary:

This judgment concerns a trade union's application for constitutional protection in connection with a case of violation of the right to trade union freedom (Article 28.1 of the Constitution) and of the right to strike (Article 28.2 of the Constitution), following an intervention by the police of an Autonomous Community during which a picket line was photographed and filmed with a video camera.

With reference to the facts declared proven in the judicial decisions handed down in the course of the preliminary judicial proceedings, the Constitutional Court observed that the members of the picket line in question performed their task without causing any disruption to public order and that their picketing proceeded quite normally, without any act that could in any way be construed as an offence. Moreover, it had been proved, under the terms of the judicial decisions referred to above, that the police of the Autonomous Community concerned, despite requests from several members of the picket line, had not agreed to stop filming and taking photos and had refused to identify the strikers.

The Constitutional Court pointed out first of all that the right to strike included the right to call for solidarity from third parties. With regard to the filming of the picket line by the police, the Court confined its analysis to three key aspects of the question: whether this act restricted or limited, if only superficially, the exercise of the right to strike; whether there was any constitutionally important right, or legal interest justifying such a restriction; and last, whether the restrictive measure was justified or proportionate in this specific case, regard being had, chiefly, to whether or not equally effective alternative measures existed and to the proportionality of the sacrifice of the fundamental right in question.

The Constitutional Court stated first that in filming the picket line, the police had sought to discourage or obstruct the free exercise of the right to strike. It could therefore be argued that the police had impaired the effectiveness of this right to the extent that it was impossible to overlook either the possible dissuasive effects on those participating peacefully in a picket line of being filmed continuously without any explanation and without knowing how the film would be used, or the effects which such a measure might have on the people at whom the information disseminated by the picket line was aimed.

However, the Constitutional Court could not rule out the possibility that, under some circumstances and subject to observance of the required guarantees, monitoring measures such as those challenged in this application could be used to prevent disruptions of public order and to protect the free exercise of rights and freedoms. In this specific case, despite the possible existence of a constitutionally legitimate interest, namely the protection of citizens' rights and freedoms and the maintenance of public order – an interest which might therefore justify the adoption of a preventive monitoring measure – the Constitutional Court considered, having regard to the circumstances of this case, that the police measure had been disproportionate. In this connection, it pointed out that the activity of disseminating information and publicising the strike had been conducted in a positive and lawful manner at all times, without any act that could be construed as an offence. Furthermore, it emphasised that the police officers had refused to explain to the strikers the reasons for such a measure, even though the members of the picket line had specifically requested them to do so. In addition, the police had not agreed, as a possible alternative measure, to personally identify the members of the picket line.

Finally, it must also be pointed out that at the time of the facts there was a gap in the law with regard to the circumstances of such filming and the procedures to be observed, particularly as regards the keeping of recordings made in such circumstances, their availability for inspection by the courts, rights of access to them, and their destruction.

Languages:

Spanish.

Identification: ESP-1998-1-004

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 02.03.1998 / **e)** 46/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 77 of 31.03.1998, 42-47 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Case-law – International case-law – European Court of Human Rights.
General Principles – Public interest.
General Principles – Weighing of interests.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Judicial bodies, criticism of their actions / Judicial decisions, criticism / Defamation.

Headnotes:

The scope of the protection of the right to honour is proportional to the external scope of freedom of expression and information where the holders of this right are public figures, persons holding public office or persons involved in matters having an impact on public life. In such cases, these persons are forced to accept that their individual rights might be affected by opinions and information of general interest. Similarly, it is legitimate to criticise judicial decisions provided that this does not involve the use of words which are positively abusive or devoid of public interest, and which are therefore unnecessary for conveying the essence of the thought, the idea or opinion expressed.

Summary:

This judgment rules on an application for constitutional protection in connection with several judicial decisions under which the applicant had been convicted for insulting a judge on the grounds that during an interview, in his capacity as a lawyer, he had expressed opinions strongly critical of the judge who had ruled on a civil case.

The Constitutional Court emphasised that, in this case, the criticism had been directed against a specific judge and that, consequently, in weighing freedom of expression against the right to honour, it had to be determined whether the views expressed by the applicant had been confined to criticism of the judicial decision in question or whether, on the contrary, they had crossed that boundary and expressed concepts and ideas which were directly critical of the judge who had given the decision, whether on a personal level or with regard to his professional conduct, and, if so, whether they could be described as criticism or, on the contrary, given the form that they had taken, as comments or information designed to cast discredit on the person concerned.

The Constitutional Court first stressed that it was lawful to criticise judicial decisions and the actions of judges, and referred to the very specific position of judges in relation to the limits of freedom of expression, under the case-law of the European Court of Human Rights (Judgments of the European Court of Human Rights of 23 September 1994 – *Jersild* case – and of 24 February 1997 – case of *Hars and Gisels* v. Belgium). The Constitutional Court considered that in this case, although some of the expressions used during the interview could be regarded, separately, as normal criticism – albeit harsh and clumsily expressed – of the judicial decision concerned, overall there was no doubt that they constituted a series of insults which did nothing to explain the reasons why the judicial decision warranted such criticism. In fact, taken together, these views amounted to a personal attack by a lawyer, to the exclusion of any other kind of personal reaction, on a person holding judicial office. The lawyer had therefore used the interview to cast discredit on the judge in connection with a decision whose substance he did not even describe and which he used to make a categorical statement as to the judge's complete lack of competence and knowledge of the legislation concerned, of the law and of professional practice, and even to accuse him of having an attitude that was contrary to ethical principles.

Supplementary information:

One judge issued a dissenting opinion on this judgment.

Languages:

Spanish.

Identification: ESP-1998-1-005

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 02.03.1998 / **e)** 48/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 77 of 31.03.1998, 53-60 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Legality.
General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment – Public.
Fundamental Rights – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Entrance examinations, entry to public service / Public service, entry, conditions.

Headnotes:

Under the Spanish Constitution it is for the law to lay down the provisions governing the fundamental right of entry to the public service on equal terms (Article 23.2 of the Constitution). This is therefore a right which is prescribed by the law. Accordingly, the only way of protecting the exercise of this right is to set *ex ante* recruitment criteria, whether absolute or relative, so that appointment to each particular post is based on equality, merit and ability. Notwithstanding this, the law may make use of a regulation or the means necessary to implement the regulation because the constitutional principle under which it is for the law to regulate the exercise of the aforementioned fundamental right is not absolute.

Summary:

The judgment dealt with an appeal, based on a breach of the Constitution, against an administrative decision, upheld by the courts, to fill a vacancy within the public service by competitive examination from which certain professional categories – health staff, research workers

and teachers – were expressly excluded. The applicant alleged that not allowing teachers to sit the examination contravened the right of entry to the public service on equal terms (Article 23.1 of the Constitution) and was discriminatory.

The Constitutional Court held that the criteria which governed entry to the public service on equal terms as well as on the basis of merit and ability could in no way be preserved and still less established by positive legislative action. Indeed,the requirement was still more obvious and stringent in cases of entry to public service than in matters of career development and promotion within the public service. The constitutional principle that the law alone set the criteria governing entry to public service and the principle of compliance with the law both included a substantive safeguard reflected in the absolute necessity that the requirements for entry to the public service be specified in advance in accordance with the constitutional principles of equality, merit and ability. This prior specification, which ensured that the administrative body responsible for assessing the candidates did not act arbitrarily and took the careful and reasonable approach required by Article 23.2 of the Constitution, also allowed judicial review of administrative decisions. However, it was appropriate to underline the fact that in this area the constitutional principle was not absolute and it was perfectly lawful and possible to set conditions of entry to the public service by means of regulations. It was therefore constitutionally acceptable that, in the administrative field, the law did not deal with every detail and used technical instruments such as lists of vacancies to organise staffing in keeping with the needs of the service and the requirements of each post. In this extreme case, therefore, the Constitutional Court rejected the applicant's claim.

With regard to the allegation that excluding certain candidates was discriminatory, the Constitutional Court first pointed out that there could only be a breach of the principle of equality of entry to the public service if different treatment of different candidates lacked any objective and reasonable justification in the light of the merit and ability requirements. Furthermore, for such differentiation to be constitutional, the legal consequences must be appropriate and proportionate to the aim pursued. In assessing whether there were reasonable and objective grounds for the differentiation complained of the Constitutional Court stressed that the requirements for entry to the public service could be specified in positive or negative terms, two radically different approaches. If they were negative, then greater and stricter objective, rational justification was needed to fulfil the requirements of Article 23.2 of the Constitution. In this case, barring certain categories of people from certain functions, not by legal prescription but by a list of vacancies, was difficult to justify and lacking in any rational basis from the standpoint of Article 23.2 of the Constitution, and was therefore contrary to the right of entry to the public service on equal terms.

Languages:

Spanish.

Identification: ESP-1998-1-006

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 16.03.1998 / **e)** 58/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 96 of 22.04.1998, 19-24 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.
Fundamental Rights – Civil and political rights – Inviolability of communications – Correspondence.

Keywords of the alphabetical index:

Prison administration / Prisoners, interception of communications with their lawyers / Terrorism, interception of prisoner's communications.

Headnotes:

Whenever any of a convicted prisoner's fundamental rights is restricted and the right is not one of those expressly or implicitly limited by the court sentence, the Constitution requires that the body empowered to impose the restriction abide by the relevant legal rules and ensure that the aim pursued by the restriction of the right is compatible with the aims of the prison.

Summary:

The issue in the case was whether the guarantee that communications between prisoners and their lawyers would not be intercepted except by prior court order and

in cases of terrorism referred only to oral or private communications or also extended to written communication and correspondence.

The Constitutional Court first pointed out that, under the Prisons Act, which alone allowed restrictions of prisoners' fundamental rights other than those expressly or implicitly limited by the court sentence they were serving (Article 28.2 of the Constitution), communications between prisoners and their lawyers or the lawyers appointed to defend them in criminal proceedings, could only be suspended or intercepted by judicial order and in cases of terrorism. As the Constitutional Court had pointed out in its judgment 183/1994 of 20.06.1994, *Bulletin* 1994/2 [ESP-1994-2-020], these two requirements must be interpreted as cumulative and not as alternatives in view of their serious effect on the right to defence. Problems concerning proof of lawyers' identity and the necessary prior judicial step could not be allowed to undermine in any way the guarantees laid down in the Prisons Act. The reinforced safeguards against interception of communications between prisoners and their lawyers therefore related not only to oral communications but also to written communication of all types.

Languages:

Spanish.

Identification: ESP-1998-1-007

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 17.03.1998 / **e)** 61/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 96 of 22.04.1998, 31-34 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Legality.
General Principles – *Nullum crimen sine lege.*
General Principles – Proportionality.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty.

Keywords of the alphabetical index:

Minor, detention.

Headnotes:

In the light of the child's personal and social circumstances, a Juvenile Court exceeds that court's discretionary powers when it fails to make any correlation – necessary whenever in deciding to restrict a fundamental right – between the penalty and the principle of proportionality.

Summary:

The applicant minor's legal representative contested the Juvenile Court's decision, upheld by the appeal court, to sentence the minor, who was convicted for attempted theft, to four months' detention in a semi-open detention centre. The applicant argued that this penalty was disproportionate to the penalty imposed according to the Criminal Code for an equivalent criminal offence, namely between one and thirty days' imprisonment. The applicant further contended that the decision had been reached in the light of his personal circumstances, which were entirely unrelated to the seriousness of the offence committed, and considered that this constituted a violation of the *nullum crimen lege* principle established by Article 25.1 of the Constitution.

The Juvenile Court's decision was based on the discretionary powers granted by Article 16.1 of the Juvenile Courts Act, but Parliament had in fact been forced to change the wording of the clause following judgment 16/1991 of the Constitutional Court on the constitutionality of Article 16 (previous version). In that judgment the Constitutional Court had ruled, in an interpretative decision, that "quite apart from the necessary flexibility that the courts must show when evaluating the facts and their seriousness, they must also base themselves on certain principles which limit their discretionary powers, such as that of proportionality between the seriousness of the offence and the penalty imposed". In spite of the revised wording of the provision (in its decisions the Juvenile Court must "assess the circumstances of the offence as well as the minor's character, circumstances, needs and family and social background"), a substantial part of the aforementioned Constitutional Court interpretation was still necessary in order to preserve the provision's constitutionality.

At first sight, therefore, the provision applied by the Juvenile Court appeared to provide the necessary legal cover for the sentence imposed in that the decision complied with the words of the provision and the length-

of-sentence rules which the Act set. However, the provision must be applied in accordance with the Constitutional Court interpretation which had given rise to the amendment to the provision. From this angle, though the impugned decision complied with the revised Article 16.1 of the Juvenile Courts Act, it still did not fulfil the requirements of the *nullum crimen sine lege* principle. Though it was not for the Constitutional Court to assess minors' social and educational needs and override the Juvenile Court's evaluation of the matter, the Court was competent to decide, as guarantor of the aforementioned principle, whether a sentence of four months' detention for what the Criminal Code classed as attempted theft was proportionate to the offence. Accordingly the Constitutional Court found that there was reason to grant the applicant the protection afforded by the Constitution and to set aside the Juvenile Court's decision.

Languages:

Spanish.

Identification: ESP-1998-1-008

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 30.03.1998 / **e)** 68/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 108 of 06.05.1998, 3-12 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Weighing of interests.
General Principles – Reasonableness.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Evidence, circumstantial / Authority, abuse / Collegiate body, decisions.

Headnotes:

From the point of view of the external review conducted by the Constitutional Court, the evidence from which the trial court had inferred the applicants' guilt did not have the logic or coherence to be used as circumstantial evidence and therefore was not enough in itself to override the right to presumption of innocence as secured by Article 24.2 of the Constitution.

Summary:

The Constitutional Court was here called on to rule on two successive decisions of the Supreme Court. In the first decision, the court had declared admissible an appeal on points of law against a judgment acquitting the appellants in the present proceedings of a charge of abuse of official authority brought following a complaint against them by the other party in the constitutional proceedings. In the second decision, the appellants had been found guilty of intentional abuse of authority and prohibited from occupying any position of responsibility to which they might have been elected in connection with their work as sales representatives and ordered to pay various sums of compensation.

The Constitutional Court rejected the appellants' allegations that they had been denied access to court and the right to a defence.

As concerns the infringement of the right to a presumption of innocence, arising in the applicants' view out of the problem of circumstantial evidence, the Constitutional Court referred above all to its case-law on these two matters. It had stated on several occasions that the presumption of innocence was based on two essential notions: the principle of the courts' freedom to assess evidence in criminal proceedings, under Article 117.3 of the Constitution, and the rule that all convictions must be founded on genuine proof and therefore on evidence sufficient to overturn the presumption of innocence. This was why it was absolutely essential, in view of the result of such a measure, for there to be irrefutable proof not only than an offence had been committed but also that the accused had taken part in it. In this connection, it was important to note that when Article 24 of the Constitution referred to the presumption of innocence, it referred to unchallengeable innocence, absence of bias, and unbiased treatment of the defendant.

On the subject of circumstantial evidence the Constitutional Court had itself explained in judgment 24/1997: "the criteria for differentiating between mere suspicions and circumstantial evidence capable of outweighing the presumption of innocence are as follows:

a. circumstantial evidence must be based on facts which have been entirely proved;

b. the facts constituting the offence must be deduced from that evidence by a process of reasoning which is in keeping with the rules of human judgment and is described in the decision convicting the accused".

The Constitutional Court had to confine itself to a strictly external judgment in order to determine whether, on the basis of entirely proven facts, there was an adequate logical connection between the evidence and the court's finding, and if the connection resulted from a process of reasoning in keeping with the rules of human judgment and not arrived at by defective argument or on arbitrary grounds. The Constitutional Court had examined from this standpoint the various pieces of evidence to which the Supreme Court had referred in its contested decision as showing that the decision rejecting the applicant's request for appointment of a replacement – the key issue on which the two parties disagreed – had been delivered in bad faith, a matter which the Criminal Code classed as abuse of authority. Reviewing the individual items of evidence in the contested decision, the Constitutional Court found as follows:

a. The body which had made the decision in question was a collegiate one and each of its members had extensive legal training. All of this appeared to guarantee a well-founded decision;

b. There was tension and conflict between the applicant and the trade-union committee. All in all it was possible that had some effect and that the aforementioned administrative decision had been a calculated one, however unfair;

c. Procedural irregularities resulted in serious administrative penalties whereas the offences had been described as harmless by the supervisory bodies.

The Constitutional Court held that the conclusions which had drawn from the evidence in the contested decisions were unjustified: the evidence which the court dealing with the case had used as rules allowing the applicants' guilt to be inferred was not logically and reasonably consistent enough, in this particular case, to be used as circumstantial evidence and therefore did not outweigh the right to presumption of innocence.

Supplementary information:

One judge submitted a dissenting opinion.

Languages:

Spanish.

Identification: ESP-1998-1-009

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 21.04.1998 / **e)** 87/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official State Bulletin), no. 120 of 20.05.1998, 19-26 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Proof, burden / Promotion, refusal / Company, organisational powers.

Headnotes:

In order to ensure that the fundamental right to freedom of trade unions is effectively secured, attention has to be paid to the importance of the rules apportioning the burden of proof. It is for the company management to prove that its actions were prompted by reasonable considerations and not intended to undermine a fundamental right, although in order for this burden of proof to be imposed, employees must provide reasonable evidence that the actions of the company infringed their fundamental rights.

Summary:

The case concerned an industrial dispute between a bank's management and the applicant, an employee of the bank, who alleged, on the basis of the facts as established in the proceedings complained of and by the investigation carried out by the industrial tribunal's two levels of jurisdiction, that his career with the bank had been interrupted because he belonged to a trade union. The applicant alleged that as soon as the bank found out that he was a member of the trade union, it stopped his promotion and demoted him. In response

to this the applicant instituted proceedings to protect his fundamental rights. His complaint was rejected by the industrial tribunal on the ground that there was no evidence of the infringement. The applicant appealed to the tribunal's appeals section, which rejected the appeal on the ground that the company's actions were entirely justified by the discretionary powers it had in matters of internal organisation.

The applicant complained to the Constitutional Court that these two decisions violated the fundamental right to freedom of trade unions established in Article 28.1 of the Constitution and the basis that he had not received judicial reparation for the damage caused to him by the bank's halting his promotion because of his membership of a trade union and his union activities.

The Constitutional Court had repeatedly found that the immunity secured to workers by Article 28.1 of the Constitution applied not only to management's power to dismiss employees but also to its organisational powers. It could therefore be said that employers' organisational powers ended where their employees' fundamental rights began.

In addition, the Constitutional Court's own doctrine attached great importance to the rules apportioning the burden of proof, particularly where effective protection of freedom of trade unions was concerned. The case-law of the Constitutional Court states that, for the burden of proof to be shifted to the company, the employee first had to produce reasonable evidence that the employer's actions infringed his or her fundamental right. That meant that as soon as the employee was able to provide the aforementioned evidence, it fell to the defendant – in this case the bank – to prove that its motives had been reasonable and there had been no intention of violating the fundamental right in question.

In view of the proven facts and in accordance with its case law, the Constitutional Court found that the applicant's evidence was sufficiently tangible and precise to indicate that there had indeed been a violation of his right to freedom of trade unions and hence to suggest, or create a suspicion, that there had been deliberate interference with that fundamental right.

The Constitutional Court rejected the company's contention that there was no connection between its decision and the applicant's complaint. The company was unable to prove that the decisions to transfer the employee had been taken on proper, serious and sufficient grounds that removed all suggestion of discrimination.

Languages:

Spanish.

Sweden
Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 1998 – 30 April 1998.

Switzerland
Federal Court

Important decisions

Identification: SUI-1998-1-001

a) Switzerland / **b)** Federal Court / **c)** Second civil law Chamber / **d)** 22.12.1997 / **e)** 5P.421/1997 / **f)** L.X. v. M.F. / **g)** *Arrêts du Tribunal fédéral* (Decisions of the federal Court), 124 III 90 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – Grounds.
Sources of Constitutional Law – Categories – Written rules – Convention on the rights of the Child of 1989.
Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Right to a hearing / Family law, right of access / International treaty, direct applicability / Child, personal hearing / Child, right of access.

Headnotes:

Article 12 of the United Nations Convention on the Rights of the Child. Direct applicability of this provision; opportunity for the child to be heard personally.

Article 12 of the UN Convention on the Rights of the Child is a directly applicable provision of treaty law, breaches of which may be challenged in the Federal Court (recital 3a).

It stipulates that children must be given a hearing, in proceedings affecting them, only if they are capable of forming their own views (recital 3b). Must a six-year-old child, who does not know her father, have an opportunity to be heard on the question of a right of access (recital 3c)?

Summary:

Julia was born in 1991. She is the daughter of Ms X., who has parental authority over her, and Mr F. The

paternity relationship was established by the District Court in 1993.

Mr F. then tried unsuccessfully to reach agreement with the mother about a right of access to his daughter. Finally, in 1994, he applied to the guardianship authority for authorisation to have personal contact with his daughter and for a right of access. Following a suspension of the proceedings, the authority granted him a right of access under strict conditions (access for six hours on one Sunday per month, under supervision). Ms X. contested the decision but her various appeals were rejected at cantonal level.

She then made a public-law appeal to the Federal Court to have Mr F.'s right of access to Julia withdrawn. She argued that the visits could be detrimental to the child's psychological wellbeing. At a procedural level, she pleaded the UN Convention on the Rights of the Child (hereinafter "the Convention"), Article 12 of which guarantees children the right to be heard, since in this case Julia had not had an opportunity to express her views on her father's right of access.

The Federal Court rejected the appeal. It began by examining the question of the direct applicability of Article 12 of the Convention. This Article stipulates that the States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, and the opportunity to be heard in any judicial or administrative proceedings, either directly or through a representative or an appropriate body.

This provision is directed not only at those who make the law but also – with sufficient precision and clarity – at the authorities responsible for applying it (ie. it is self-executing). Any breach may therefore be challenged through a public-law appeal.

With regard to the substance of the appeal, the Federal Court acknowledged that Article 12 of the Convention did not require that children be heard in every case. The deciding factor was the degree of maturity of the child concerned. This approach was also in line with current practice in Switzerland. In this case, Julia was only five years old and did not know her father at all; she was not, therefore, in a position to express a view on his right of access. The claim that the Convention on the Rights of the Child had been breached was therefore unfounded.

Languages:

German.

Identification: SUI-1998-1-002

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 27.02.1998 / **e)** 1P.629/1997 / **f)** X. v. guardianship authority of the municipality of Derendingen and Solothurn Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Decisions of the federal Court), 124 I 40 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Unwritten rules.
General Principles – Legality.
General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Psychiatric report, obligation / Incapacity proceedings.

Headnotes:

Obligation to undergo psychiatric examination; personal freedom; principle of proportionality.

Guarantee of personal freedom (recital 3a). Necessity of a legal basis for restrictions on personal freedom (recital 3b). Requirements arising from federal and cantonal regulations and Federal Court case law, in connection with psychiatric reports in incapacity proceedings (recitals 3c and d). Constitutional principle of proportionality (recital 3e).

Circumstances in which it would seem disproportionate to have an elderly, frail person, in need of care, taken forcibly to a psychiatric hospital by the police in order to undergo a medical examination (recitals 4a – e). Proportionality and legality of a psychiatric report based on an examination at the place where the person concerned lives and is cared for (recital 5).

Summary:

In 1996, the guardianship authority of a municipality in the Canton of Solothurn applied for a court order declaring Ms X. incapable on account of her age (87)

and mental frailty. The president of the district court therefore ordered that a psychiatric report be prepared by the cantonal psychiatric clinic. As Ms X. did not reply to a request to attend the clinic, the president of the district court issued an order requiring her to undergo the examination and warning that if she refused she would be taken to the clinic forcibly by the police.

Ms X. did not respond. The president of the district court then ruled that she had failed to comply with the order, fixed a date for the psychiatric examination and ordered that she be taken to the clinic by the police.

When the cantonal court rejected her appeal against the decision, Ms X. lodged a public-law appeal with the Federal Court. She applied to have the order that she undergo a psychiatric examination set aside and the threat of being taken to the clinic by the police lifted. The Federal Court allowed the appeal and set aside the cantonal court's decision.

Personal freedom was an unwritten constitutional right. Requiring a person to undergo a psychiatric examination constituted interference with that right. Such a requirement must therefore have a sufficiently clear and precise legal basis and must be compatible with the principle of proportionality. Under the Civil Code, a person may not be declared incapable on grounds of mental illness or mental frailty except on the basis of an expert report. With regard to the proportionality of the means used to implement this provision, the Federal Court pointed out that elderly people deserved to be treated with respect. The cantonal authorities' argument that Ms X. could undergo the psychiatric examination only at the cantonal clinic was not relevant in this case. Moreover, in the course of the proceedings, the appellant had taken up permanent residence in a home for elderly people. The cantonal authorities had not demonstrated that it would be impossible to conduct a psychiatric examination on the premises of the home. On those grounds, the contested decision to have Ms X. taken to the cantonal clinic by the police breached the principle of proportionality and was therefore unconstitutional.

Languages:

German.

Identification: SUI-1998-1-003

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 23.04.1998 / **e)** 1P.87/1997 / **f)** Basle City Police Officers' Association v. the Canton of Basle City / **g)** *Arrêts du Tribunal fédéral* (Decisions of the federal Court), 124 I 85 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Categories – Unwritten rules.
General Principles – Public interest.
General Principles – Legality.
General Principles – Proportionality.
Institutions – Armed forces and police forces – Police forces.
Fundamental Rights – General questions – Entitlement to rights.
Fundamental Rights – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Police personnel, identity badge.

Headnotes:

Personal freedom, requirement that police personnel wear an identity badge.

The requirement, under policing legislation, that police personnel should wear identity badges on their uniforms constitutes an infringement of personal freedom (recital 2). The requirement is compatible with the Constitution (recital 3).

Summary:

In November 1996, the cantonal parliament of Basle City passed a new law on the cantonal police. Under the heading "Legitimisation", paragraph 33 of the law requires cantonal police personnel, when in uniform, to wear an identity badge bearing their name. There are certain exceptions to this requirement: the Basle City Council of State (the cantonal executive authority) is to decide when alternative means of identification may be worn and under what exceptional circumstances no identification is needed.

The Basle City Police Officers' Association appealed under public law to the Federal Court, asking it to annul paragraph 33 of the new cantonal law. It claimed that

the measure infringed personal freedom and breached Article 8 ECHR. The Federal Court dismissed the appeal.

Personal freedom – an unwritten constitutional guarantee – encompassed all those basic liberties that a human being needed in order to develop. It included a guarantee of respect for individual privacy. This freedom also applied in relation to a person's name and the way it was used. Requiring people to wear badges bearing their names and enabling them to be identified constituted an infringement of personal freedom – a ground on which the police officers might challenge the measure.

However, it was not a serious infringement and it was justified by the circumstances. The law was based on the idea that the image of the police in a democratic society had changed. The wearing of identity badges could contribute to a degree of openness and thus to easier contact, and more courteous relationships, between the public and the police. There was no need to fear an upsurge in the threats and abuse occasionally directed at police officers' families. The experience in other cantons had been positive. In short, the Federal Court took the view – supported by an abstract assessment of the law – that the legislative effort to improve and facilitate contact, and reduce tension, between the police and the public could be held to justify the disputed requirement.

Languages:

German.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-1998-1-001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 18.03.1998 / **e)** U.br. 220/97 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
General Principles – Rule of law.
General Principles – Certainty of the law.
General Principles – Equality.
Institutions – Executive bodies – Relations with the courts.
Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Property, social, equal treatment / Property, protection, procedure / Property, social, ownership.

Headnotes:

There is no constitutional basis for granting special protection of property relations based upon illicit withdrawal or appropriation of socially owned i.e. state-owned land by prescribing a special administrative procedure outside current principles of civil law.

Summary:

Upon the petition lodged by a natural person from Skopje, the Constitutional Court initiated proceedings for reviewing the constitutionality of the Law regulating the property relations set up by the unlawful seizure of socially owned land, published in the Official Gazette of the Socialist Republic of Macedonia no. 31/72 and 44/91.

Pursuant to the aforementioned law, the possessor of the illicitly seized land obtains ownership rights over the socially owned land which up to 6 April 1941 fulfilled all

necessary conditions for acquisitive prescription. Legal proceedings in this kind of property relations are initiated 1) *ex officio*, 2) by the beneficiary of the illicitly seized land or 3) by the possessor, and the municipal administrative body competent for property relationships is authorised to enforce the decision.

The Law enacted in 1959 prescribed parallel regulation in the legal proceedings regarding property relations based upon appropriation of socially owned land: the relationships established up to 1959 are disputed under administrative procedure, and those established after 3 May 1959 are treated before municipal courts pursuant to the Law on Civil Procedure.

The disputed Act, passed in 1972, and its Amendments from 1991 prescribed that all appropriations of this kind will be treated by the Republic's administrative body for property relationships under administrative procedure.

The protection envisaged, prescribing the specific procedure for socially owned land, has a constitutional basis in the Constitution of the National Republic of Macedonia dated 1946 and the Constitution of the Socialist Republic of Macedonia dated 1963 and 1974, which, in comparison with other kinds of ownership, gave social ownership special, privileged treatment.

The current constitutional and legal system, however, removes the special status of social ownership and guarantees this ownership right in a generic way. Taking into consideration the conclusion that socially owned land belongs to the Republic, which is its rightful claimant during the process of privatisation and transformation, which can be drawn from the essence of the legal texts, it seems that there is no constitutional basis for granting a special protection of this land by prescribing a special administrative procedure outside current principles of civil law.

The disputed Law is thus inconsistent with the equal treatment of all kinds of ownership legal relationships stipulated by the Constitution of 1991, as well as with the respect of the basic values of certainty of law and separation of powers. The Constitutional Court, decided to abolish the disputed Law.

Languages:

Macedonian.

Identification: MKD-1998-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 08.04.1998 / **e)** U.br. 215/97 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Restrictive proceedings – Banning of political parties.
General Principles – Legality.
Institutions – Legislative bodies – Political parties.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Political parties, freedom / Racial hatred / Intolerance / Party programmes.

Headnotes:

Everybody has a right to express his own political belief, as well as to associate freely and found a political party, provided that its activities are not focused toward violent destruction of the constitutional system of the Republic of Macedonia, or toward supporting or calling for war or aggression or inflaming national, racial or religious hatred or intolerance.

Summary:

Several natural persons lodged petitions with the Constitutional Court challenging the constitutionality and legality of the programs and statutes of the Albanian minority's political parties – "The Party for Democratic Prosperity of Albanians" (PDPA) and "National Democratic Party" (NDP), as well as their functioning.

According to the applicants, the necessity of reviewing the constitutionality and legality of the Albanian minority's political parties arises from their establishment on an ethnic basis with programmes and statutes focused toward inflaming national hatred and religious intolerance.

In light of the previously determined actual situation and the analysis of the programs' and statutes' content, the Court considered that there is no constitutional basis for interpreting these acts as unconstitutional and illegal.

The aforementioned texts define the political parties in question as open ones for all citizens no matter what their national, religious or social affinities, and as parties which advocate total citizen and national equality, democratic prosperity of the Republic and the growth of general principles of market economy and political democracy and pluralism, respect of basic human rights and freedoms, decentralisation and demilitarisation of the country etc.

Among other things, PDPA advocates setting up a basis in the system for free use of the mother tongue; the promotion of the Albanian language as an official one in the Republic of Macedonia; the continuation of the persistent efforts of the Albanians in this region for political identity, systematic equality and dignity; lawful regulation of free use of the national symbols and celebration of historical events characteristic to each national, cultural or religious community etc.

Regarding the above, the Court ruled that there is no objective reason for starting a procedure for reviewing the constitutionality and legality of the programs and statutes of the PDPA and NDP.

The Court rejected the petitions for judging the conformity of these programmes and statutes with the provisions stipulated in the Law for political parties, as well as the functioning of PDPA and NDP, specifying that these issues are beyond its scope and competence.

Languages:

Macedonian.

Identification: MKD-1998-1-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 08.04.1998 / **e)** U.br. 50/98 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Influence on State organs.
Sources of Constitutional Law – Categories – Written rules.
General Principles – Territorial principles – Indivisibility of the territory.
General Principles – Weighing of interests.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of conscience.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Linguistic freedom.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Civil rights and obligations / State symbols / Mayor, obligation.

Headnotes:

Freedom of thought and public expression of thought are subjective rights inalienably connected with human personality. The guarantee of these freedoms means that everyone can develop their own opinions in all spheres of life and publicly express them free from external or State intervention. Since the Constitution contains neither specific nor general legal reservations restricting the exercise of the freedom of thought and public expression of thought, these limitations are to be found in the Constitution and its provisions as a whole, taking into consideration as well the international instruments ratified in conformity with the Constitution.

Despite the high level of guarantees provided, the freedom of thought and public expression of thought provided for in the Constitution of the Republic of Macedonia are not absolute and cannot exist unrestrictedly. The legal framework has to limit the exercise of individual freedoms to some extent for the protection of others and for the security of society as a whole.

Summary:

Rufi Osmani, Major of the Municipality of Gostivar, lodged a petition with the Constitutional Court for the protection of his personal convictions, conscience, thought and public expression of thought, the freedom of which is guaranteed in Article 16 of the Constitution. As an act by which this freedom had been violated, he indicated a final judgment of the Municipal Court of Gostivar from 17 September 1997, which found him guilty of certain criminal offences, notably "Inciting national, racial and religious hatred, discord and intolerance", "Organising

resistance" and "Non-enforcement of a court's decision", and sentenced him to a single penalty of imprisonment for 13 years and 8 months, a sentence which the Court of Appeal reduced to 7 years.

By the aforementioned decision, the applicant was convicted for having organised and agreed to a protest meeting "To protect the official use of the national flag" on 24 May 1997 at 1.00 pm in Gostivar's main square, at which the flag of the Republic was not hoisted, and the national anthem of Albania was played. The applicant publicly expressed his thoughts using, amongst others, the following formulations: "we give our life, but not the flag", "we do not recognise decisions of the Constitutional Court of the Republic of Macedonia", "our territories in Macedonia are ours, that should be known once and for good", "our flag will always fly on each of our territories", "their black hand bloodied the university in Tetovo yesterday; this same black hand wishes to bloody the national flag today... I sent them a clear message: as long as I'm in the Municipality of Gostivar, no one can touch the Albanian flag", "in the election campaign I promised that we shall make Gostivar an Albanian city, and we will", "we will use the Albanian flag, there will be official use of the Albanian language and many other institutions, as there will be very soon in the other Albanian municipalities set up within the framework of the project for regionalism".

It is of the utmost importance that this protest meeting was organised after the passing and as a consequence of the Decision of the Constitutional Court of the Republic of Macedonia U.br.52/97 of 21 May 1997 by which the constitutionality and legality of Article 140 of the Municipality of Gostivar's Statute was reviewed and specific acts and gestures undertaken based on the disputed article of the Statute were disallowed until the taking of a final decision by the Court.

The Constitutional Court held that the Municipal Court of Gostivar by its judgment had found the applicant guilty because, abusing his office as Mayor of Gostivar and by continuous activity, he had incited and inflamed national hatred, discord and intolerance among the citizens of the Municipality of Gostivar and more widely among citizens of other neighbouring municipalities and organised resistance and disobedience toward legal decisions and government measures by the following acts:

- first, when enacting the statutory decision of the Municipal Council of Gostivar for the use of flags in the municipality, he did not point out the unconstitutionality and illegality of passing such a decision, and after its announcement and publication he did not notify the Government of the Republic of Macedonia of its unconstitutionality and illegality, which a mayor is obliged to do under the Law on Local Government;

- then, although he knew the decision to be unconstitutional and illegal, immediately after its enactment he undertook the following activities;

- by his permission, the flags of the Republic and the flags of Albania and Turkey were hoisted on the masts in front of the building of the Municipal Council of Gostivar;

- before Labor Day holidays, he gave written notification to all public institutions, informing them that they were obliged, during the Labor Day holidays, to hoist these flags in conformity with the statute;

- he organised armed guards to be stationed in front of the building of the Council of Municipality of Gostivar to prevent the removal of the flags from the masts;

- he created a central crisis headquarters, and made written operation plans for constituting central and regional organising structures, managing bodies within the central crisis headquarters and regional crisis headquarters;

- he created a managing body for establishing a strategic and operating plan in case of police intervention, which precisely determined the structure and names of people who would be in charge of questions such as information and propaganda, security, transport and connections, finances, medical aid etc.;

- he suspended the municipality's management and Council, specifying the primary tasks as temporary ones; and

as a result of such activity, on 26 May 1997, following the desecration of the flag of Albania by a group of citizens of Macedonian ethnic origin, a disturbance of the public order and peace began in front of the building of the Municipal Council of Gostivar by a fight among a large group of citizens of Macedonian and Albanian nationality. Further, on the morning of 9 July 1997 the police forces took action to enforce the Constitutional Court's Decision U.no. 52/97 dated 21 May 1997 and U.no. 52/97 dated 11 June 1997 according to which the flags of the Republics of Albania and Turkey should have been taken down from the masts. As a result of organised resistance and disobedience in the face of this lawful decision, its enforcement was hard to achieve, and direct armed conflict ensued between the forces of the Ministry of Internal Affairs and the assembled people, causing three deaths as well as bodily injuries to a large group of citizens and police officers.

The applicant argued that freedom of thought and public expression of thought are absolute rights guaranteed by the Constitution and that each restriction or additional regulation means the negation of these rights. Therefore his conviction and sentencing generated direct violation of rights guaranteed by the Constitution.

The Court held, however, that, given all the circumstances in which it was undertaken, the applicant's gesture had completely lost the content of public expression of thought in the sense in which the Constitution guarantees and protects this freedom. In light of the circumstances of the event, the applicant's public expression of thought did not expose his intellectual or political attitude, nor did it represent in some manner the intellectual and political convictions of the participants of the meeting, but represented a direct call and initiative for the present people of Albanian ethnic origin not to obey i.e. to destroy the legal system by force, inciting national intolerance, discord and hatred among the population in Gostivar, in a situation of already perceptible tension amongst people of different ethnic origin.

Languages:

Macedonian, English (translation by the Court).

Ukraine
Constitutional Court

Important decisions

Identification: UKR-1998-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.01.1997 / **e)** 01/34-97 / **f)** / **g)** Official Digest, no. 1(3)98 / **h)**.

Keywords of the systematic thesaurus:

General Principles – Separation of powers.
Institutions – Legislative bodies – Finances.
Institutions – Public finances – Accounts.
Institutions – Public finances – Auditing bodies.

Keywords of the alphabetical index:

Budget, State / Immunity, officials / Financial policy.

Headnotes:

Ukraine's Constitution creates a State body known as the Accounting Chamber which reviews State expenditures on behalf of Parliament. However, Parliament passed a law extending this power to the power to supervise expenditures other than State expenditures and the power to supervise certain income-generating ventures of the State. These are both unconstitutional extensions of power beyond that contemplated by the Constitution and violate the balance of power established by the Constitution. The law also violates the Constitution when it grants immunity to the officials working in the Accounting Chamber. In Ukraine immunity is an extraordinary protection under the Constitution granted only to the President, deputies of Parliament and judges. Only the Constitution has the power to grant immunity, not Parliament. The law violates the Constitution when it allows the Chamber, acting on behalf of the Parliament, to perform executive and judicial functions. Finally, although the Accounting Chamber may review expenditures in local governments, it may only do so to the extent that it concerns funds from the national government. Likewise, the Chamber may review expenditures concerning private business, but only concerning funds from the national government.

Summary:

The case came before the Constitutional Court upon a petition by the President of Ukraine asking the Court to determine the constitutionality of the Parliament's law on the Accounting Chamber. Article 98 of the Constitution is the only reference to the powers and duties of the Accounting Chamber. It reads in full as follows: "the Accounting Chamber exercises control over the use of finances of the State Budget of Ukraine on behalf of the Parliament of Ukraine".

Under Article 8.2 of the Constitution, the Constitution is the highest law in Ukraine. All laws must comply with it, and the Ukrainian Parliament may not pass a law conflicting with the Constitution. However, the Parliament has passed a law creating the Accounting Chamber as an organ of the Parliament, and not as an organ of the Constitution as is set forth in the Constitution.

First, Articles 85 and 92 of the Constitution of Ukraine establish the Parliament's power over financial and economical activity. However, Article 98 of the Constitution establishes the Accounting Chamber as a separate organ under the Constitution. The Accounting Chamber has limited powers derived from the Parliament's powers and, under Article 19 of the Constitution, it may not exceed those powers. [Article 19.2 of the Constitution reads as follows: "Bodies of State power ... are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine."] So, the Accounting Chamber is a constitutional body and the Parliament has no power to take away, restrict or transfer those powers.

Second, Parliament's law on the Accounting Chamber conflicts with the Constitution because it gives the Accounting Chamber wider purposes than those provided under the Constitution. The Constitution states that the Chamber shall "exercise control over the use of finances of the State budget" while the law on the Chamber grants it the power to exercise "State financial and economic control". However, its constitutional power is limited to overseeing how finances are used; it may not itself exercise control over the finances as is stated in the law which Parliament passed.

The law on the Accounting Chamber also improperly extends parliamentary immunity to officials in the Accounting Chamber. Although citizens' rights and freedoms are guaranteed by laws which Parliament passes, immunities are guarantees of a higher level and, logically, should be determined by the Constitution. Because the Constitution does not establish immunity for officials in the Accounting Chamber, Parliament can create no such immunity.

The law also granted to the Accounting Chamber the power both to review costs in the budget and to supervise the government's income. However, under Article 98 of the Constitution, the Chamber may only review costs; it may not oversee income. Thus, the provisions of the law concerning the power to provide profit are unconstitutional. However, the Chamber may conduct business in such matters if this is necessary to supervise how funds are being spent.

Several bodies in Ukraine have control over various financial matters: Parliament, the Cabinet of Ministers, the Fund of State Property, the Head Auditing Board, the Head Board of the State Treasury, and others. These powers are divided into legislative, executive and judicial branches, each with its own powers and limits. In this context, granting executive powers to the Accounting Chamber violates the principle of separation of powers. The law, as it now stands, gives to the Parliament the power to perform executive acts through the Accounting Chamber, which is directly responsible to the Parliament. Thus, the legislative branch may now execute its own laws. This is unconstitutional. The law also grants to the Accounting Chamber the power to act as an investigating agency, that is, to act as the judicial branch; however, it may do so under this law without following procedures such as obtaining a warrant to make a search. It has the power to demand compulsory inspection of companies that have business activities with the State. It also has a power, normally reserved for the executive, of stopping payments and seizing bank accounts. These executive powers are all unconstitutional when used by the legislative branch.

Under the current laws of Ukraine, the term "budget" does not mean property or monetary policy; rather, it means the accumulated financial resources which the State then uses. The means of accumulating the budget is known as "income" or "profits" and the ways in which the budget is used are known as "costs". The power of the Accounting Chamber, under Article 98 of the Constitution, is limited to the control of how the "costs" are used. Supervising the lawful expenditure of funds is charged to Parliament, the Accounting Chamber and the Office of the Prosecutor. Parliament has the highest level of control over financial activity followed by the Cabinet of Ministers, which is charged with carrying out financial policy. The prosecutor reviews the lawfulness of these activities. The power of the Accounting Chamber is limited by the Constitution to ensuring that the funds are lawfully used according to the purposes established by Parliament.

The law grants to the Accounting Chamber control over 1) objects which are not subject to privatisation, 2) use of gold reserves and precious metals, 3) use of State

property, 4) property that is at the disposal of the National Bank, and 5) the land fund of Ukraine – matters which are reserved either for the Cabinet of Ministers or for the Parliament. Therefore, transfer of these powers to the Chamber is unconstitutional. Likewise, the law is unconstitutional in so far as it grants the Chamber the power to oversee foreign loans and assistance.

The Accounting Chamber's sphere of power is limited to control over those matters which are in the State budget. The law on the Accounting Chamber allows it to supervise a number of monetary items which are not a part of the State budget and, therefore, are not within the Chamber's power of control: the pension fund; the financial resources of economic, social, scientific, and cultural development; finances for the protection of the environment; economic assistance from foreign States or international organisations or foreign credits obtained without the guarantees of the Cabinet of Ministers. Likewise, the law on the Accounting Chamber improperly gives it control over non-State funds of public organisations, over funds of local government bodies (except over those funds transferred from the State budget to the local government under Article 143.3 of the Constitution), and over the budget of the Autonomous Republic of Crimea.

The law also provides that the Chamber may exercise control over various private businesses that use funds from the State budget. Under Article 13.4 of the Constitution, the State protects the rights of ownership and business activity. Therefore, under this general principle, the control of the Accounting Chamber is limited to control over only those funds which come from the State budget. The same general principle applies to the Chamber's supervision of citizens' groups, who, in addition, have a guarantee under Article 41 of the Constitution of being able to dispose of property; therefore, the Accounting Chamber may control the funds of citizens' groups only in so far as those funds come from the State budget.

Supplementary information:

This is the second part of the question first considered in Case no. 1/1509-97, 11.07.1997, (*Bulletin* 1997/2 [UKR-1997-2-003]). That case determined that the Parliament exceeded its power in interpreting the provision of the Constitution which establishes the Accounting Chamber as a constitutional organ. The present case determines which part of that law is constitutional and which part is unconstitutional.

Languages:

Ukrainian.

Identification: UKR-1998-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.12.1997 / **e)** 3/690-97 / **f)** / **g)** Official Digest, no. 1(3)98 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Temporal effect.
Sources of Constitutional Law – Techniques of interpretation – Historical interpretation.
Institutions – Head of State – Powers.
Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.

Keywords of the alphabetical index:

Local administration, heads.

Headnotes:

Under the Constitution, the President of Ukraine has the power to appoint heads of local government administrations, but does not have the power to appoint the deputy heads or other subordinate officials of local government. That power belongs to the head of the local government.

Summary:

The deputies of Ukraine's Parliament brought this case before the Constitutional Court to interpret the power of the President to appoint not only the heads of local administration, but also the deputy heads of local administration. The Court finds that the Constitution only allows the President to appoint the heads of local administration, not the deputy heads.

The deputies submit that the President's orders issued in July-December 1996, appointing first deputies and deputy heads of local administrations, do not comply with Article 106 of the Constitution, the pertinent part of which reads: "The President of Ukraine appoints, on the submission of the Prime Minister of Ukraine, ... the heads of local State administrations". They submit that under Article 118.3 of the Constitution, which states: "The composition of local state administrations is formed by heads of local state administrations", the head of the local state administration should make these appoint-

ments, not the President. Article 106 does not state who will appoint the subordinate local administrators. The deputies submit that the President's appointments of officials to these subordinate positions constitutes an unconstitutional extension of his powers.

The President argues that under the law in existence before the Constitution was adopted on 28 June 1996 the local heads would submit to the President those people the local head wanted to be appointed to the subordinate positions, and the President would make those appointments. The President submits that this practice should continue because it complies with the Constitution.

The President correctly sets forth the law and practice prior to the adoption of Ukraine's Constitution. However, nowhere in the Constitution does the Constitution refer to powers of the President to appoint first deputies or deputy heads of local state administrations. Rather, Article 118.3 of the Constitution specifically states that local state administrations "are formed" by the heads of those administrations. In Article 107 of the Constitution, the term "are formed" includes the act of appointing personnel; in addition, the verbatim account of the Parliament's debate of Article 118.3 of the Constitution, also demonstrates that the term "are formed" includes the power to appoint the employees of the local state administration. Because the power to appoint the subordinate local officials is not set forth in the Constitution, the President exceeded his constitutional powers in this regard.

Article 152.2 of the Constitution sets forth the principle that when a provision is ruled unconstitutional, it is invalid from the day of the Constitutional Court's decision. According to this principle, other legal acts are valid until the Court rules them unconstitutional. The Court's ruling in this case may not affect prior legal relations, that is, the appointments that the President made before the date of the Court's decision in this case. Therefore, the present appointments of subordinate local officials remain valid, but in the future the President may not use the law that the Court today invalidated to appoint these subordinate local officials.

Languages:

Ukrainian.

Identification: UKR-1998-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.01.1998 / **e)** 03/3600-97, 03/3808-97, 1-13/98 / **f)** / **g)** Official Digest, no. 2(4)98 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights – General questions – Entitlement to rights – Natural persons – Prisoners.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections, direct representation / Elections, proportional representation / Elections, status of candidates / Immunity, electoral candidates / Constitutional Court, power.

Headnotes:

Ukraine's election law was found to be unconstitutional, primarily because the law violates principles of equality in voting rights. Therefore, it is unconstitutional to preclude prisoners from voting, to preclude dissatisfied candidates from judicial challenges of certain election disputes, and to require candidates to resign from government employment while they are campaigning. Ukraine has a dual-mandate system in which half of the Parliament is elected as individual candidates and half is appointed by the parties in proportion to the percentage of votes that the party receives. Certain parts of this dual-mandate system are unconstitutional where there are advantages to one form of election over the other; for instance, it is unconstitutional for a candidate to run as an individual and to be listed on the party's list as one of the people who the party will send to Parliament if the party receives enough votes. This unfairly allows one person two opportunities to become a deputy. However, the requirement that a party must receive at least 4% of the vote before it has a right to send any of its members to Parliament concerns a political question not open to review by the Court. Finally, it is unconstitutional for the law to grant immunity to candidates; immunity is an extraordinary protection which may only be granted by the Constitution.

Summary:

This case was brought to the Constitutional Court by deputies of Parliament to challenge the constitutionality of Ukraine's new election law dated 24 September 1997.

Under Article 71 of the Constitution, elections to state and local positions are "held on the basis of universal, equal and direct suffrage, by secret ballot". Citizens over the age of eighteen may vote but citizens which a court finds to be incompetent may not vote. Any citizen having voting rights and who is over the age of 21 and who has lived in Ukraine for five years may be elected as a deputy of the Parliament.

The deputies challenge as unconstitutional the section of the law which states that political parties which obtain fewer than 4% of the national vote do not share in the distribution of half of the seats in the Parliament; this half is divided proportionally among all the political parties that receive at least 4 % of the vote. The other half of the seats are determined by individual elections. This question as to whether the 4% threshold violates the Constitution is a political question to be resolved only by the Parliament, and not by the Constitutional Court.

In accordance with constitutional principles of suffrage, the section of the law which states that "electors who did not participate in voting are considered as having supported the will of electors who participated in the elections" is unconstitutional. This section conflicts with Article 69 of the Constitution which states that "the expression of the will of the people is exercised through elections, referendum and other forms of direct democracy". Thus, the will of the people must be expressed directly.

The section of the election law which deprives people incarcerated in prison of the right to vote is unconstitutional. Suffrage is a constitutional right both to elect deputies to the Parliament and to be elected to the Parliament. Under Article 70 of the Constitution, only people that a court has found to be incompetent may not vote. The section of the law which deprives these rights to people in prison is unconstitutional. Under Article 76.3 of the Constitution, a citizen may not run for Parliament if he has been convicted of an intentional crime which has not been cancelled from his record. In so far as the election law contradicts this constitutional provision it is unconstitutional.

The election law requires that deputies running for re-election, as well as servicemen, certain employees of internal affairs bodies, judges, public prosecutors and state employees may not register as candidates unless they submit a personal statement that they will terminate such employment while they campaign. This violates Ukraine's principle of universal and equal suffrage.

The election law restricts in some instances a person's right to challenge an election matter in court. This violates Article 55.2 of the Constitution which "guarantees the right to challenge in court the decisions, actions or omissions of bodies of State power". No exceptions to this right are acceptable and the restrictions in the law which limit access to judicial review are unconstitutional.

There are provisions in the law that do not follow the principle of equal suffrage. As referenced above, Ukraine has a dual mandate system: deputies may be elected individually or as representatives of a political party. Obviously, candidates who run individually must register as a candidate. In addition, a political party must register the members it will select as deputies in the event that it receives more than 4% of the vote and is entitled to its proportion of deputies. It is unconstitutional for a candidate to be listed on both lists because this person has a greater chance of being elected a deputy than a person who is listed on only one list. Likewise the law is unconstitutional in precluding parties from registering candidates in individual mandate districts if they did not also register candidates in multi-mandate districts.

As stated above, Ukraine has a dual mandate system in which half the deputies are elected individually and half are elected as party representatives. The law does not provide for equal possibilities of election in this system. There are differences in nominating and setting the registration lists. Different terms are necessary to nominate candidates from parties depending upon whether the district is a multi-mandate or single-mandate district, and there are also different requirements for making election posters depending on whether the candidate is running individually or for the party. All of these are unconstitutional distinctions.

The election law also grants to candidates the same immunity from prosecution as that enjoyed by elected deputies, the President and judges. The purpose of immunity is to create the proper conditions so that the deputies may fulfil their duties without interference from the State. This is a higher protection than the right to be free from unlawful arrests set forth in Article 29 of the Constitution. If rights and freedoms, as well as guarantees thereof, are determined exclusively by the laws of Ukraine (Article 92.1 of the Constitution), then the exceptional protection of immunity may only be granted by the Constitution itself, because only the Constitution may provide for such exceptions to the general principle of equality recognised in Ukraine. Because the Constitution does not provide candidates with such immunity, the law providing it is unconstitutional in this regard.

Finally, a section of the election law states that if a candidate runs both as a representative of a party and as an individual candidate, and wins as an individual candidate, then he is automatically removed from the

list of candidates put forward by the party because he won a seat as an individual. (This means that the party, which overall received, for example, 20% of the vote, will now have 20% of the deputies, plus one. Thus a vote for this deputy was in essence counted twice. The remedy is to allow candidates to run individually or on a party list, but not both ways.) This provision is unconstitutional because it violates the principle of equal suffrage.

Languages:

Ukrainian.

United States of America
Supreme Court

Summaries of important decisions of the reference period 1 January 1998 – 30 April 1998 will be published in the next edition, *Bulletin* 1998/2.

Court of Justice of the European Communities

Summaries of important decisions of the reference period 1 January 1998 – 30 April 1998 will be published in the next edition, *Bulletin* 1998/2.

Note: The following is the English version of the contribution for the reference period: 1 September 1997 – 31 December 1997.

Statistical data

1 September 1997 – 31 December 1997

Cases dealt with : 249
Court of Justice of the European Communities (CJEC): 163, 94 judgments, 13 orders and 56 orders to strike out Court of First Instance (CFI): 86, 42 judgments, 30 orders, 14 orders to strike out

Several decisions of the Court of Justice and the Court of First Instance which are not analyzed in this review contain nevertheless interesting developments concerning general principles of community law and fundamental rights:

On the principle of due care and good administration, see:

CFI, 21 October 1997, *Deutsche Bahn v Commission*, Case T-229/94, E.C.R II-1689, paragraphs 113-117

On the principle of non-retroactivity, see:

CJEC, 2 October 1997, *Parliament v Council*, Case C-259/95, *E.C.R.* I-5303, paragraph 21
CJEC, 20 November 1997, *Moscow*, Case C-244/95, *E.C.R.* I-6441, paragraphs 77-82

On the principle of protection of legitimate expectations, see equally in addition to the judgment of the CFI of the 22 October 1997, *SCK and FNK v Commission*, Cases T-213/95 and T-18/95, *E.C.R.* II-1739 (paragraphs 80-84):

CJEC, 2 October 1997, *Parliament v Council*, Case C-259/95, *E.C.R.* I-5303, paragraphs 21-22
CFI, 15 October 1997, *IPK-München v Commission*, Case T-331/94, *E.C.R.* II-1665, paragraph 46
CJEC, 16 October 1997, *Lay e.a.*, Case C-165/95, *E.C.R.* I-5543, paragraphs 37, 46 and 50
CFI, 24 October 1997, *British Steel v Commission*, Case T-243/94, *E.C.R.* II-1887, paragraphs 74-79
CFI, 24 October 1997, *Wirtschaftsvereinigung Stahl e.a. v Commission*, Case T-244/94, *E.C.R.* II-1963, paragraphs 56-61
CJEC, 20 November 1997, *Moscow*, Case C-244/95, *E.C.R.* I-6441, paragraphs 60, 68-73, 77 and 81
CFI, 27 November 1997, *Pascall v Commission*, Case T-20/96, not yet published, paragraphs 72-83
CFI, 9 December 1997, *Quiller and Heusmann v Council and Commission*, Cases T-195/94 and T-202/94, not yet published, paragraphs 53-85
Ord. CFI, 10 December 1997, *Smets v Commission*, Case T-134/96, not yet published, paragraphs 28-31
CJEC, 16 December 1997, *Fábrica de Queijo Eru Portuguesa*, Case C-325/96, *E.C.R.* I-7249, paragraphs 21-22

On the principle of legal certainty, see in addition to the judgement of the CFI of 22 October 1997, *SCK and FNK v Commission*, Cases T-213/95 and T-18/95, *E.C.R.* II-1739, paragraphs 55, 73-76:

CFI, 16 September 1997, *Gimenez v Comité des régions*, Case T-220/95, E.C.R S.C II-775, paragraphs 77-85
CJEC, 2 October 1997, *Parliament v Council*, Case C-259/95, *E.C.R.* I-5303, paragraphs 21-22
CJEC, 16 October 1997, *Lay e.a.*, Case C-165/95, *E.C.R.* I-5543, paragraphs 49-50
CJEC, 16 October 1997, *Banque Indosuez e.a.*, Case C-177/96, *E.C.R.* p. I-5659, paragraphs 27-31
CFI, 21 October 1997, *Deutsche Bahn v Commission*, Case T-229/94, *E.C.R.* p. II-1689, paragraphs 113-117
CJEC, 20 November 1997, *Moscow*, Case C-244/95, *E.C.R.* I-6441, paragraphs 77-82
CJEC, 20 November 1997, *Wiener SI*, Case C-338/95, *E.C.R.* I-6495, paragraphs 19-20
CJEC, 4 December 1997, *Commission v Italy*, Case C-207/96, *E.C.R.* I-6869, paragraph 26
CJEC, 16 December 1997, *Fábrica de Queijo Eru Portuguesa*, Case C-325/96, *E.C.R.* I-7249, paragraphs 21-22

On the principle of proportionality, see in addition to the judgment of the CFI of 22 October 1997, *SCK and FNK v Commission*, Cases T-213/95 and T-18/95, *E.C.R.* II-1739 (paragraphs 246-255):

CFI, 15 October 1997, *IPK-München v Commission*, Case T-331/94, *E.C.R.* II-1665, paragraph 43
CFI, 24 October 1997, *EISA v Commission*, Case T-239/94, *E.C.R.* II-1839, paragraphs 77-99

CFI, 24 October 1997, *British Steel v Commission*, Case T-243/94, *E.C.R.* II-1887, paragraphs 98-123, 131-140
CFI, 24 October 1997, *Wirtschaftsvereinigung Stahl e.a. v Commission*, Case T-244/94, *E.C.R.* II-1963, paragraphs 72-95 and 106-119
CJEC, 27 November 1997, *Somalfruit and Camar*, Case C-369/95, *E.C.R.* I-6619, paragraphs 49-53
CFI, 17 December 1997, *Petrides v Commission*, Case T-152/95, not yet published, paragraphs 48-53, 63-67, 87-95, 102-106
CJEC, 18 December 1997, *Molenheide e.a.*, Cases C-286/94, C-340/95, C-401/95 and C-47/96, *E.C.R.* I-7281, paragraphs 46-64

On the principle *patere legem quam ipse fecisti* see:

CFI, 15 October 1997, *IPK-München v Commission*, Case T-331/94, *E.C.R.* II-1665, paragraph 45

On the respect of the rights of the defense, see in addition to the judgement of the CFI of the 22 October 1997, *SCK and FNK v Commission*, Cases T-213/95 and T-18/95, *E.C.R.* II-1739 (paragraphs 65, 87-91, 218-223):

CFI, 25 September 1997, *Shanghai Bicycle v Council*, Case T-170/94, *E.C.R.* II-1383, paragraph 120
Ord. CFI, 30 September 1997, *Federolio v Commission*, Case T-122/96, *E.C.R.* II-1559, paragraph 75
CFI, 21 October 1997, *Deutsche Bahn v Commission*, Case T-229/94, *E.C.R.* II-1689, paragraphs 102-106
CFI, 24 October 1997, *British Steel v Commission*, Case T-243/94, *E.C.R.* II-1887, paragraphs 174-179
CFI, 24 October 1997, *Wirtschaftsvereinigung Stahl e.a. v Commission*, Case T-244/94, *E.C.R.* II-1963, paragraphs 170-174
CFI, 5 November 1997, *de Compte v Parliament*, Case T-26/89 (125), not yet published, paragraph 39
CFI, 6 November 1997, *Berlingieri Vinzek v Commission*, Case T-71/96, not yet published, paragraphs 22-24
CFI, 7 November 1997, *Azienda Agricola "Le Canne" v Commission*, Case T-218/95, not yet published, paragraphs 48-51
CFI, 7 November 1997, *Cipeke v Commission*, Case T-84/96, not yet published, paragraph 31
CFI, 17 December 1997, *EFMA v Council*, Case T-121/95, not yet published, paragraphs 84-88, 111-113

On the respect of fundamental rights in the Community legal order, see in addition to the judgement of the CFI of the 22 October 1997, *SCK and FNK v Commission*, Cases T-213/95 and T-18/95, *E.C.R.* II-1739 (paragraphs 65, 87-91, 218-223):

CJEC, 18 December 1997, *Annibaldi*, Case C-309/96, *E.C.R.* I-7493, paragraphs 12-24

On the right to property, see:

CJEC, 9 October 1997, *Macon*, Case C-152/95, *E.C.R.* I-5429, paragraph 26
CJEC, 18 December 1997, *Annibaldi*, Case C-309/96, *E.C.R.* I-7493, paragraphs 17, 23

On the right to protection of medical secret, see:

CFI, 18 December 1997, *Gill v Commission*, Case Case T-90/95, E.C.R S.C II-1231, paragraphs 38-40

Judgments analysed

1. CJEC, 1 October 1997, *France v Parliament*, Case C-345/95, *E.C.R.* I-5215; Fixing of the seat of the institutions, Decision of the representatives of the Governments of the member States, Annulment of a vote of the European Parliament.
2. CJEC, 1 October 1997, *Regione Toscana v Commission*, Case C-180/97, *E.C.R.* I-5245; Distribution of competences between the Court of Justice and the Court of First Instance, Claim by a sub-state authority.
3. CJEC, 16 October 1997, *Garofalo e.a. v Ministero della Sanità et USL no. 58 di Palermo*, Cases C-69/96 to C-79/96, *E.C.R.* I-5603; Preliminary rulings – Competence of the Court of Justice, Definition of courts and tribunals, Consiglio di Stato (Italy).
4. CFI, 22 October 1997, *SCK et FNK v Commission*, Cases T-213/95 and T-18/96, *E.C.R.* II-1739; Competition law administrative procedure, European Convention on Human Rights Article 6.1.
5. CJEC, 4 November 1997, *Parfums Christian Dior v Evora*, Case C-337/95, *E.C.R.* I-6013; Preliminary rulings, Obligations of the national jurisdictions, Limits, *Hoge Raad der Nederlanden* and Benelux Court.
6. CJEC, 11 November 1997, *Eurotunnel e.a. v SeaFrance*, Case C-408/95, *E.C.R.* I-6315; Preliminary rulings – Competence of the Court of Justice, Consultation and reconsultation of the European Parliament, Democratic principle, Power of amendment of the Council.
7. CJEC, 2 December 1997, *Fantask e.a. v Industriministeriet*, Case C-188/95, *E.C.R.* I-6783; Repayment of monies unduly paid, National procedural autonomy, Limits.
8. CJEC, 9 December 1997, *Commission v France*, Case C-265/95, *E.C.R.* I-6959; Free movement of goods, Obligations of the member States, Obstacles not caused by the state, Failure to fulfil the obligations.

Important decisions

Identification: ECJ-1997-3-014

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 01.10.1997 / **e)** C-345/95 / **f)** France v. Parliament / **g)** *E.C.R.* I-5215 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Distribution of powers between Community and member States.
Sources of Constitutional Law – Categories – Written rules – Community law.
Sources of Constitutional Law – Categories – Written rules – Other international sources.
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Acts of the representatives of the Governments of the member States meeting in the Council / European Parliament, power of internal organization / European Parliament, seat / European Parliament, yearly sessions.

Headnotes:

The decision of the representatives of the Governments of the member States on the location of the seats of the institutions and of certain bodies and departments of the European Communities, which definitively locates the seat of the Parliament in Strasbourg, whilst maintaining several places of work for that institution, must be interpreted as defining the seat of the Parliament as the place where 12 ordinary plenary part-sessions must take place on a regular basis, including those during which the Parliament is to exercise the budgetary powers conferred upon it by the Treaty. Additional plenary part-sessions cannot therefore be scheduled for any other place of work unless the Parliament holds the 12 ordinary plenary part-sessions in Strasbourg, where it has its seat. To the extent that it provides for 11, not 12 ordinary plenary part-sessions in Strasbourg in 1996, the vote of the European Parliament adopting the calendar of part-sessions of the institution for that year must be annulled. (see paragraphs 23, 29, 34-35)

Summary:

The French Republic brought an action before the Court under Article 173 EC, seeking annulment of the vote of the European Parliament of 20 September 1995, adopting the calendar of the institution for 1996. According to this vote, only eleven plenary sessions of the Parliament were to be held in Strasbourg during this year, although Article 1.a of the decision taken by the representatives of Governments of the member States on 12 December 1992 ("Edinburgh Decision") states that, "the Parliament shall have its seat in Strasbourg, where the twelve periods of monthly plenary sessions, including the budget session, shall be held". (...) The applicant submits that the vote violates the Edinburgh Decision, substantial formal requirements and the obligation of motivation under Article 190 EC.

The Court, after recalling its case-law according to which the Governments of the member States have the right but also the obligation to complete the system of institutional provisions established by the treaties, underlines that the Edinburgh Decision, adopted after a judgment in which the Court had held that Governments had failed to comply with their obligation to fix the final seat of the institutions (Judgment of 28 November 1991 *Luxembourg v. Parliament*, Cases C-213/88 and C-39/89, *E.C.R.* I-5643), fills in the gap, whilst maintaining the multiplicity of places of work for the Parliament. The decision must thus be interpreted as defining the seat of the Parliament, Strasbourg, as the place where twelve periods of plenary sessions must be held. The Court therefore annuls the litigious vote.

Cross-references:

On the litigation relating to the determination of the seat of the European Parliament, see

CJEC, 10 February 1983, *Luxembourg v Parliament*, 230/81, *E.C.R.* 255
CJEC, 10 April 1984, *Luxembourg v Parliament*, 108/83, *E.C.R.* 1945
CJEC, 29 September 1988, *France v Parliament*, 358/85 and 51/86, *E.C.R.* 4821
CJEC, 28 November 1991, *Luxembourg v Parliament*, C-213/88 and C-39/89, *E.C.R.* I-5643

Languages:

French (language of the case), English, German, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-1997-3-015

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 01.10.1997 / **e)** C-180/97 / **f)** Regione Toscana v. Commission / **g)** *E.C.R.* I-5245 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a public body – Organs of regional authorities.
Constitutional Justice – Procedure – Parties – *Locus standi.*
Institutions – European Union – Distribution of powers between institutions of the Community.

Keywords of the alphabetical index:

Sub-State authority / CJEC and CFI, distribution of powers / Institutional balance / Member State, Notion / Region, applicant *locus standi* at CJEC.

Headnotes:

Since the entry into force of Decision 94/149, the jurisdiction of the Court of Justice is limited to actions brought by a member State or by a Community institution. In that respect, it is clear from the general scheme of the Treaties that the term member State, for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the member States of the European Communities and cannot include the governments of regions or of autonomous communities, irrespective of the powers they may have. If the contrary were true, it would undermine the institutional balance provided for by the Treaties, which determine, *inter alia*, the conditions under which the member States, that is to say the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of member States than the number of States between which they were established. Accordingly, when an action for annulment is brought before it on the basis of Article 173.4 EC by a regional authority, which must be considered to be a legal person for the purposes of that provision, the Court of Justice clearly has no jurisdiction to take cognizance of it and must refer it to the Court of First Instance pursuant to Article 47.2 EC Statute of the Court of Justice (see paragraphs 5-6, 8-12).

Summary:

The *Regione Toscana* brought an action before the Court under Article 173.4 EC asking for the annulment of several acts of the Commission regarding the allowance of Community financial aids for a project to supply drinking water in Tuscany, in the framework of the Integrated Mediterranean Program. The Court recalls that according to Article 168a EC and Article 3 of Council Decision 88/591/ECSC, EEC, Erratum of 24 October 1988 establishing a Court of First Instance of the European Communities, many times modified, its competence, since entry into force of Decision 94/149, is limited to referrals originating from member States or a Community institution. Since the *Regione Toscana* must be seen as a legal person according to Article 173.4 EC, the Court refers the case to the Court of First Instance.

Cross-references:

CJEC, 21 mars 1997, *Région walonne v Commission*, C-95/97, *E.C.R.* I-1787

Languages:

Italian (language of the case), English, German, Danish, Spanish, Finnish, French, Greek, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-1997-3-016

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth chamber / **d)** 16.10.1997 / **e)** C-69/96 to C-79/96 / **f)** Garofalo e.a. c. Ministero della Sanità and USL no. 58 di Palermo / **g)** *E.C.R.* p. I-5603 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Referral by a court.
Constitutional Justice – Types of claim – Type of review – Preliminary review.
Constitutional Justice – Procedure – Parties – *Locus standi.*

Keywords of the alphabetical index:

Consiglio di Stato / Courts and tribunals, definition.

Headnotes:

In order to determine whether a body making a reference to the Court of Justice is a court or tribunal within the meaning of Article 177 EC, account must be taken of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether procedure before it is *inter partes*, whether it applies rules of law and whether it is independent. When it issues an opinion in the context of an extraordinary petition, the *Consiglio di Stato* constitutes a court or tribunal within the meaning of Article 177 EC. (see paragraphs 19, 27)

Summary:

The *Consiglio di Stato* referred to the Court for a preliminary ruling under Article 177 EC several questions on the interpretation of that same article and of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice, this question having been raised in a number of extraordinary petitions to the President of the Italian Republic by eleven doctors. The first question aims more specifically at determining whether the *Consiglio di Stato* is to be seen as a court or tribunal under Article 177 EC when it expresses an opinion in the framework of an extraordinary petition. The Court responds in the affirmative after recalling the criteria already outlined for the purpose of defining a court or tribunal under this article and after examining the nature of the referral in question.

Supplementary information:

On the definition of jurisdiction for the purpose of Article 177 EC, see also:

CJEC, 17 September 1997, *Dorsch Consult*, C-54/96, *E.C.R.* p. I-4961 (Federal Public Procurement Awards Supervisory Board).

Languages:

Italian (language of the case), English, German, Danish, Spanish, Finnish, French, Greek, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-1997-3-017

a) European Union / **b)** Court of First Instance / **c)** Fourth enlarged chamber / **d)** 22.10.1997 / **e)** T-213/95, T-18/96 / **f)** SCK et FNK v. Commission / **g)** *E.C.R.* II-1739 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
General Principles – Maintaining confidence.
General Principles – Reasonableness.
Fundamental Rights – General questions – Basic principles – Nature of the list of fundamental rights.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment – Private.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Legitimate expectation / Effective judicial protection, right / Legal certainty.

Headnotes:

When a party applies to the Commission for negative clearance under Article 2 of Regulation no. 17 or gives it notification under Article 4.1 thereof for the purpose of obtaining an exemption, the Commission may not defer defining its position indefinitely. In the interests of legal certainty and of ensuring adequate judicial protection, it is required to adopt a decision or, if such a letter has been requested, to send a formal letter within a reasonable time. Similarly, when the Commission receives an application under Article 3.1 of Regulation no. 17 alleging infringement of Article 85 and/or Article 86 EC, it is required to adopt a definitive position on the complaint within a reasonable time. It is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy. The question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved. (see paragraphs 55-57, 218)

Article 19.1 of Regulation no. 17 and Articles 2 and 4 of Regulation no. 99/63, which apply the *audi alteram partem* principle, require that undertakings concerned

by a proceeding for the establishment of infringements of the rules on competition are afforded the opportunity, in the course of the administrative procedure, of effectively making known their views on all the objections dealt with in the decision. In accordance with that requirement, when the Commission proposes to deal in its decision with objections not covered by the first statement of objections, it is required to send a second such statement to the undertakings concerned. (see paragraphs 65, 218)

The Commission is entitled to apply different degrees of priority to the cases submitted to it. If, following notification of an arrangement, it takes the view that the practices notified to it cannot be exempted under Article 85.3 EC, it may, when assessing the degree of priority to be given to the notification, take into account the fact that a national court has already caused the infringements in question to cease. (see paragraphs 67, 218)

The statement of the reasons for an act is indispensable for determining the exact meaning of what is stated in the operative part. (see paragraph 104)

A body governed by private law which sets up a certification system for crane-hire firms to which affiliation is optional, establishes independently the criteria which certified firms must satisfy and issues a certificate only on payment of a subscription must be classified as an undertaking within the meaning of Article 85.1 EC since, in the context of competition law, that classification applies to every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

The amount of a fine imposed for breach of the Treaty's competition rules must be fixed at a level which takes account of the circumstances and the gravity of the infringement and the latter is to be appraised taking into account in particular the nature of the restrictions on competition.(see paragraph 246)

Summary:

By application under Article 173 EC, the Court of First Instance is asked to annul Commission Decision 95/551/EC of 29 November 1995 relating to an application procedure of Article 85 EC, while under Articles 178 EC and 215 EC it is asked to grant repair for the damages allegedly incurred by the applicants resulting from the unlawful conduct of the Commission. In its decision 95/551/EC the Commission stated that the two applicants, the *Federatie van Nederlandse Kraanverhuurbedrijven* (FNK), a sector-based organization regrouping Dutch crane-hire companies and the *Stiching Certificatie Kraanverhuurbedrijven* (SCK), a foundation created by representatives of crane-hire companies, had violated Article 85.1 EC by, for the FNK, using a system of suggested tariffs and compensations enabling the members to anticipate their respective price policy, and for the SCK, forbidding its affiliated members from hiring cranes from non-affiliated companies. The Commission therefore ordered them to immediately put an end to these violations and fined them respectively 11 500 000 and 300 000 Ecus.

The Court of First Instance, even if it rejects the applications in their entirety, whilst reducing the fine imposed on SCK, also brings important precessions regarding procedural aspects. In their application for damages, the applicants reproached the Commission, amongst other arguments, with violating Article 6 ECHR and more specifically with violating the obligation of acting within a reasonable time of Article 6.1 ECHR, the administrative proceedings leading to the contested decision having lasted 45 months. Even if it rejects all the grounds for complaint put forward by the applicants, the Court nonetheless states that the necessity for the Commission to act within a reasonable time when it adopts a decision at the end of administrative proceedings in the framework of its competition policy, constitutes a basic principle of Community law.

Languages:

Dutch (language of the case), English, German, Danish, Spanish, Finnish, French, Greek, Italian, Portuguese, Swedish (translations by the Court).

Identification: ECJ-1997-3-018

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 04.11.1997 / **e)** C-337/95 / **f)** Parfums Christian Dior v. Evora / **g)** *E.C.R.* I-6013 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Referral by a court.

Keywords of the alphabetical index:

Benelux Court / Community law, uniform interpretation / Courts and tribunals, definition / National jurisdictions, obligations.

Headnotes:

As a court common to more than one member State which has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and reference to which is a step in the proceedings before the national courts leading to definitive interpretations of the common Benelux rules, the Benelux Court of Justice must be regarded as entitled to refer questions to the Court of Justice for a preliminary ruling. To allow such a court, faced with the task of interpreting Community rules in the performance of its function, to follow the procedure provided for by Article 177 EC serves the purpose of that provision, which is to ensure the uniform interpretation of Community law. (see paragraphs 19-23)

Where a question relating to the interpretation of Directive 89/104, approximating the laws of the member States relating to trade marks, is raised in proceedings in one of the Benelux member States concerning the interpretation of the Uniform Benelux Law on Trade Marks, a court against whose decisions there is no remedy under national law, as is the case with both the Benelux Court of Justice and the *Hoge Raad der Nederlanden*, must make a reference to the Court of Justice under Article 177.3 EC. However, that obligation loses its purpose and is thus emptied of its substance when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings. (see paragraph 31)

Summary:

The *Hoge Raad der Nederlanden* referred to the Court for a preliminary ruling under Article 177 EC several questions raised in proceedings between the French Christian Dior and the Dutch Evora. The latter had advertised Christian Dior products she was selling. The Court is more specifically asked whether it is the *Hoge Raad* or the Benelux court which is obliged under Article 177.3 EC to make a reference to the Court, in a case where a question relating to the interpretation of a Community directive is raised in proceedings in one of the Benelux member States concerning the interpretation of the Uniform Benelux Law on trademarks. The Court, whilst underlining that both jurisdictions, which are supreme courts against whose decisions there is no judicial remedy under national law, are obliged to refer to the Court of Justice for preliminary ruling when faced with a question relating to the interpretation of Community law, recalls none the less its case-law according to which this obligation can under certain circumstances lose its purpose and thus be emptied of its substance. This will be the case when the question raised is substantially the same as a question which has already been answered in a preliminary ruling for a similar case.

Languages:

Dutch (language of the case), English, German, Danish, Spanish, Finnish, French, Greek, Italian, Portuguese, Swedish (translations by the Court).

Identification: ECJ-1997-3-019

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 11.11.1997 / **e)** C-408/95 / **f)** Eurotunnel e.a. v. SeaFrance / **g)** *E.C.R.* p. I-6315 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Referral by a court.
Constitutional Justice – Types of claim – Type of review – Preliminary review.
Constitutional Justice – Types of litigation – Litigation in respect of the formal validity of enactments.
General Principles – Democracy.
Institutions – European Union – Institutional structure – European Parliament.
Institutions – European Union – Institutional structure – Council.
Institutions – European Union – Institutional structure – Commission.
Institutions – European Union – Distribution of powers between Community and member States.
Institutions – European Union – Legislative procedure.

Keywords of the alphabetical index:

Validity, assessment / Commission, power of proposal / Council, power of amendment / European Parliament, consultation / Directive / Institutional balance / National jurisdictions, competencies / Legislative procedure /

Preliminary rulings, competence of the Court / Preliminary rulings, admissibility.

Headnotes:

A natural or legal person may challenge before a national court the validity of provisions in directives, such as Article 1.22 of Directive 91/680 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers and Article 28 of Directive 92/12 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, even though that person has not brought an action for annulment of those provisions pursuant to Article 173 EC and even though a court of another member State has already given judgment in separate proceedings. With respect to the validity of provisions in Community directives which are addressed in general terms to member States and not to natural or legal persons, and which are not directly applicable to the operators concerned, it is not clear whether an action challenging those provisions under Article 173 EC would have been admissible. As regards the decision of a court of another member State, it is not for the Court of Justice, in the procedure provided for in Article 177 EC, to assess the need for a preliminary ruling by reference to the judgment on a similar question given in separate proceedings by a court of another member State (see paragraphs 26-32).

The requirement to consult the Parliament in the legislative procedure, in the cases provided for by the Treaty, means that it must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself. With respect to the proposals for Directives 91/680 and 92/12, the purpose of which was to adjust the systems of value added tax and excise duty to the existence of an internal market, it was not necessary for the Parliament to be consulted again on Articles 1.22 of Directive 91/680 and 28 of Directive 92/12. The object of those provisions, which authorize member States to exempt supplies of tax-free shops within certain limits for a period ending on 30 June 1999, is to permit a pre-existing system to be maintained if the member States so wish, and the provisions must be interpreted as optional exceptions of limited scope to Directives 91/680 and 92/12, and thus cannot be classed as changes in the essence of the measures. Moreover, by deciding to maintain the option for member States to exempt tax-free sales for a transitional period, the Council responded in substance to the wishes of the Parliament, which not only had an opportunity to express its opinion on the question of tax-free sales but recommended that they should be maintained. In its opinion on Directive 91/680 it had proposed amendments which were entirely compatible with the tenor of the final text of the directive and in its opinion on Directive 92/12 it proposed that the derogating arrangements in force for sales free of excise duty should temporarily be maintained until 31 December 1995 (see paragraphs 5, 46, 56-64).

Summary:

The *Tribunal de Commerce de Paris* referred to the Court for a preliminary ruling under Article 177 EC, several questions on the validity of the transitional regime for "duty-free shops". Those questions were raised in proceedings between English and French companies jointly operating the Channel Tunnel railway link (hereinafter "Eurotunnel") and a cross-Channel maritime transport company. The latter is accused of practising unfair competition by selling goods free of tax and excise duty on board its ships, enabling it to compensate for transport charges at below cost prices. This practice proceeded from the authorization in both Article 28k of Council Directive 77/388/EEC of 14 May 1977 on the harmonization of the laws of the member States relating to the turnover taxes (Common system of value added taxes: uniform basis of assessment as inserted by Article 1.22 of Council Directive 91/680/EEC of 16 December 1991, supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers) and Article 28 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangement for products subject to excise duty and on the holding, movement and monitoring of such products, Eurotunnel challenged the validity of those provisions before the referring court.

The referring court therefore asks whether Eurotunnel may apply under Article 177 EC for the annulment of the aforementioned dispositions although it has not brought an action for annulment pursuant to Article 173 EC and although a court of another member State has already given judgement in separate proceedings. If such an application is admissible, the Court is invited to rule on the validity of the litigious dispositions and the consequences of a declaration of invalidity.

The Court, recalling that it is solely for the national court to decide whether a preliminary ruling on the validity of an act of a Community institution is necessary to enable it to give a judgment, observes that there is in fact a genuine dispute between the parties to the main proceedings. Emphasising that the national court has not provided enough information to enable the Court to see how the declaration of invalidity of the litigious dispositions could affect the outcome of the action alleging

unfair competition, the Court holds that the declaration of the alleged invalidity would at least enable the national court to order the defendant to refrain from selling tax-free goods. The questions are therefore declared admissible.

The Court then observes that the admissibility of Eurotunnel's application for annulment of the litigious provisions under Article 173.4 EC is not clear since these provisions are not applicable to passenger carriers and passengers and do not concern directly Eurotunnel. However, the Court holds that an individual may challenge the validity of a provision in a directive even though he has not brought an action for annulment pursuant to Article 173.4 EC.

The Court further examines the validity of the litigious articles in the light of the grounds of invalidity put forward by the referring court and relating to the irregularity of the adoption procedure: lack of proposal of the Commission on the one hand and of reconsultation of the Parliament on the other. The Court finally states that the Council did not exceed its power of amendment under Article 149 EC and that in these circumstances a reconsultation of the Parliament was not necessary.

Languages:

French (language of the case), English, German, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translation by the Court).

Identification: ECJ-1997-3-020

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 02.12.1997 / **e)** C-188/95 / **f)** Fantask e.a. v. Industriministeriet / **g)** *E.C.R.* I-6783 / **h)**.

Keywords of the systematic thesaurus:

Institutions – Public finances – Taxation – Principles.
Institutions – European Union – Distribution of powers between Community and member States.
Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

National procedure, independence / Direct effect / Repayment of monies unduly payed.

Headnotes:

Community law precludes actions for the recovery of charges levied in breach of Directive 69/335 from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the member State inasmuch as they were levied over a long period without either those authorities or the persons liable to pay the charges having been aware that they were unlawful. While the recovery of sums levied in breach of Community law may, in the absence of Community rules governing the matter, be sought only under the substantive and procedural conditions laid down by the national law of the member States, those conditions must nevertheless be no less favourable than those governing similar domestic claims nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law. The application of a general principle of national law under which the courts of a member State should dismiss claims for the recovery of charges levied over a long period in breach of Community law without either the authorities of that State or the persons liable to pay the charges having been aware that they were unlawful, would make it excessively difficult to obtain recovery of charges which are contrary to Community law and, moreover, would have the effect of encouraging infringements of Community law which have been committed over a long period (see paragraphs 39-41).

Community law, as it now stands, does not prevent a member State which has not properly transposed Directive 69/335 from refusing actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see paragraph 52).

Article 10 of Directive 69/335 in conjunction with Article 12.1.e thereof gives rise to rights on which individuals may rely before national courts. The prohibition laid down in Article 10 and the derogation from that prohibition in Article 12.1.e are expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringes the directive (see paragraph 55).

Summary:

The Østre Landsret (Denmark) referred to the Court for a preliminary ruling under Article 177 EC several questions which were raised in an action brought by Fantask A/S, amongst others, against the *Industriministeriet* (Danish Ministry of Industry) relating to charges levied on the registration of newly created limited companies and on the capital of such companies being increased. These companies argue that the national legislation imposing the new charges is contrary to Article 10 and 12 of Council Directive 69/335/EEC of 17 July 1969, modified, relating to the indirect taxation of capital raising. The referring court asks more specifically whether Community law precludes actions for the recovery of charges levied in breach of a directive from being dismissed on the ground that the charges were imposed as a result of an excusable error of the authorities of the member State inasmuch as they were levied over a long period of time without anybody ever being aware that they were unlawful. It asks further whether Community law prevents a member State from refusing actions for the repayment of charges levied in breach of a directive by relying on a limitation period under national law, as long as this State has not correctly transposed the directive. Finally, it enquires whether Articles 10 and 12.1 of the directive give rise to rights on which individuals may rely before national courts.

Cross-references:

On the question of independence of national procedure and its limits, see also:

CJEC, 16 December 1976, *Rewe Zentralfinanz*, 33/76, *E.C.R.* 1989
CJEC, 16 December 1976, *Comet*, 45-76, *E.C.R.* 2043
CJEC, 27 February 1980, *Hans Just*, 68/79, *E.C.R.* 501
CJEC, 5 March 1980, *Ferwerda*, 265/78, *E.C.R.* 617
CJEC, 27 March 1980, *Denkavit italiana*, 61/79, *E.C.R.* 1205
CJEC, 27 March 1980, *Salumi*, joint 66, 127 and 128/79, *E.C.R.* 1237
CJEC, 12 June 1980, *Express Dairy Foods*, 130/79, *E.C.R.* 1887
CJEC, 10 July 1980, *Ariete*, 811/79, *E.C.R.* 2545
CJEC, 10 July 1980, *MIRECO*, 826/79, *E.C.R.* 2559
CJEC, 6 Mai 1982, *Fromme*, 54/81, *E.C.R.* 1449
CJEC, 9 November 1983, *San Giorgio*, 199/82, *E.C.R.* 3595
CJEC, 21 September 1983, *Deutsche Milchkontor*, 205 to 215/82, *E.C.R.* 2633
CJEC, 2 February 1988, *Barra*, 309/85, *E.C.R.* 355
CJEC, 25 February 1988, *Bianco*, 331/85, 376/85 et 378/85, *E.C.R.* 1099
CJEC, 24 March 1988, *Commission v Italie*, 104/86, *E.C.R.* 1799
CJEC, 29 June 1988, *Deville*, 240/87, *E.C.R.* 3513
CJEC, 14 July 1988, *Jeunehomme*, 123 and 330/87, *E.C.R.* 4517
CJEC, 2 February 1989, *Commission v Germany*, 94/87, *E.C.R.* 175
CJEC, 9 November 1989, *Bessin and Salson*, 386/87, *E.C.R.* 3551
CJEC, 21 March 1990, *Belgium v Commission*, C-142/87, *E.C.R.* I-959
CJEC, 20 September 1990, *Commission v Germany*, C-5/89, *E.C.R.* I-3437
CJEC, 11 July 1991, *Verholen*, C-87/90, C-88/90 and C-89/90, *E.C.R.* I-3757
CJEC, 25 July 1991, *Emott*, C-208/90, *E.C.R.* I-4269
CJEC, 19 November 1991, *Francovich*, C-6/90 and C-9/90, *E.C.R.* I-5357
CJEC, 9 June 1992, *Commission v Spain*, C-96/91, *E.C.R.* I-3789
CJEC, 1 April 1993, *Lageder*, C-31/91 à C-44/91, *E.C.R.* I-1761
CJEC, 27 May 1993, *Peter*, C-290/91, *E.C.R.* I-2981
CJEC, 27 October 1993, *Steenhorst-Neerings*, 338/91, *E.C.R.* I-5475
CJEC, 6 December 1994, *Johnson*, C-410/92, *E.C.R.* I-5483
CFI, 8 June 1995, *Siemens*, T-459/93, *E.C.R.* II-1675
CJEC, 6 July 1995, *Soupergaz*, C-62/93, *E.C.R.* I-1883
CJEC, 11 August 1995, *Roders*, C-367/93 to C-377/93, *E.C.R.* I-2229
CFI, 13 September 1995, *TWD Textilwerke Deggendorf*, T-244/93 and T-486/93, *E.C.R.* II-2265
CJEC, 14 December 1995, *Peterbroeck*, C-312/93, *E.C.R.* I-4599
CJEC, 14 December 1995, *Van Schijndel*, C-430/93 and C-431/93, *E.C.R.* I-4705
CJEC, 8 February 1996, *FMC*, C-212/94, *E.C.R.* I-389
CJEC, 5 March 1996, *Brasserie du Pêcheur and Factortame*, C-46/93 and C-48/93, *E.C.R.* I-1029
CJEC, 14 May 1996, *Faroe Seafood*, C-153/94 and C-204/94, *E.C.R.* I-2465
CJEC, 23 May 1996, *Hedley Lomas*, C-5/94, *E.C.R.* I-2553
CJEC, 24 October 1996, *Dietz*, C-435/93, *E.C.R.* I-5223
CJEC, 22 April 1997, *Sutton*, C-66/95, *E.C.R.* I-2163
CJEC, 10 July 1997, *Palmisani*, C-261/95, *E.C.R.* I-4025
CJEC, 17 July 1997, *GT-Link*, C-242/95, *E.C.R.* I-4449

Languages:

Danish (language of the case), English, German, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

Identification: ECJ-1997-3-021

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 09.12.1997 / **e)** C-265/95 / **f)** Commission v. France / **g)** *E.C.R.* I-6959 / **h)**.

Keywords of the systematic thesaurus:

Constitutional justice – Referral – Claim by a public body – Community institutions.
3.23 **General principles** – Fundamental principles of the Common Market.

Keywords of the alphabetical index:

Free movement of goods, Obstacle not caused by the State / Goods, free movement, obligations of the member States / Failure to fulfil the obligations under Community law.

Headnotes:

As an indispensable instrument for the realization of a market without internal frontiers, Article 30 EC does not merely prohibit measures emanating from a State which, in themselves, create restrictions on trade between member States, but may also apply where a member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State. The fact that a member State abstains from taking action or fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other member States, is just as likely to obstruct intra-Community trade as a positive act. Article 30 EC therefore requires the member States not merely to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 EC, to take all necessary and appropriate measures to ensure that the free movement of goods, a fundamental freedom, is complied with on their territory. Although the member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of goods in a given situation and it is therefore not for the Community institutions to act in place of the member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard the free movement of goods on their territories, it nevertheless falls to the Court to verify, in cases brought before it, whether the member State concerned has adopted appropriate measures for ensuring the free movement of goods. (see paragraphs 30-35)

A member States fails to fulfil its obligations under Article 30 EC, in conjunction with Article 5 EC, and under the regulations on the common organization of markets in agricultural products, where the measures which it adopted in order to deal with actions by private individuals creating obstacles to the free movement of certain agricultural products were, having regard to the frequency and seriousness of the incidents in question, manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them. That failure cannot be justified either by apprehension of internal difficulties, unless the member State can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, or by the assumption of responsibility for the losses caused to the victims, or on economic grounds, or by the claim that another member State may have infringed rules of Community law. (see paragraphs 39, 52, 54-64 and disp.)

Summary:

The Commission of the European Communities brought before the Court an action under Article 169 EC for a declaration that France, by failing to take all the necessary and proportionate measures in order to prevent obstruction of the free movement of fruit and vegetables by actions by individuals, failed to fulfil its obligations under the common organization of markets of agricultural products and Article 30 EC in conjunction with Article 5 EC. These actions were characterized by acts of violence committed by certain groups of French farmers against agricultural products originating in other member States, consisting *inter alia* of intercepting lorries and destroying their loads as well as acts of violence against lorry drivers, threats against wholesalers and retailers as well as damaging of goods displayed in shops.

The Court, recalling that the free movement of goods belongs to the fundamental principles of the EC Treaty whose implementation relies on Article 30 EC, underlines that this provision does not only prohibit measures emanating from the State which in themselves restrict

trade between member States, but also applies, in conjunction with Article 5 EC, when a member States abstains from adopting the measures necessary to eliminate obstacles to the free movement of goods which are not caused by the State.

Declaring that the member States must determine which measures are most appropriate since they are exclusively responsible for maintaining public order and safeguarding internal security on their territory, the Court examines if in the particular case, the member State had taken the necessary and appropriate steps to ensure the free movement of goods. After a careful examination of the circumstances, the Court concludes that this was not the case, and rejecting the arguments of the member State, condemns the French Republic for failing to fulfil its obligations.

Languages:

French (language of the case), English, German, Danish, Spanish, Finnish, Greek, Italian, Dutch, Portuguese, Swedish (translations by the Court).

European Court of Human Rights

Important decisions

Identification: ECH-1998-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 30.01.1998 / **e)** 133/1996/752/951 / **f)** United Communist Party of Turkey and Others v. Turkey / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
General Principles – Democracy.
General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Political party, dissolution / National security, protection / Party, name / Terrorism, fight.

Headnotes:

The dissolution of a political party by the Turkish Constitutional Court violated the right to freedom of association.

Summary:

The United Communist Party of Turkey ("the TBKP"), the first applicant, was a political party that was founded on 4 June 1990 by 36 people, including Mr Nihat Sargin and Mr Nabi Yagci, the second and third applicants. They are Turkish nationals and live in Istanbul; at the material time, they were respectively Chairman and General Secretary of the TBKP.

On 14 June 1990 the Attorney General brought proceedings in the Constitutional Court for the dissolution of the TBKP, which he accused of attempting to establish the domination of one social class over the others, declaring itself to be the successor to a political party that had previously been dissolved, illegally including in its name the word "communist" and having activities

which would tend to undermine the territorial integrity of the State. In support of his application, the Attorney General relied, inter alia, on certain passages from the party's programme. On 16 July 1991 the Constitutional Court ordered the dissolution of the TBKP, which entailed its liquidation and the transfer of its assets to the Treasury. As a further consequence Mr Sargin and Mr Yagci, as founders and managers of the party, were banned from holding similar office in any other political body.

The Court pointed out that political parties were a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system, there could be no doubt that political parties came within the scope of Article 11 ECHR.

The Court noted that an association, including a political party, was not excluded from the protection afforded by the Convention simply because its activities were regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions. It was in principle open to the national authorities to take such action as they considered necessary to respect the rule of law or to give effect to constitutional rights; however, they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions.

The Court noted that the protection afforded by Article 11 ECHR lasted for an association's entire life and that the dissolution of an association by a country's authorities had accordingly to satisfy the requirements of Article 11.2 ECHR.

The Court concluded that there had been an interference with the right of all three applicants to freedom of association. Such an interference would constitute a breach of Article 11 ECHR unless it had been "prescribed by law", had pursued one or more legitimate aims under Article 11.2 ECHR and had been "necessary in a democratic society" for the achievement of those aims. It was common ground that the interference had been "prescribed by law" and the Court considered that the dissolution of the TBKP had pursued at least one of the "legitimate aims" set out in Article 11 ECHR: the protection of "national security".

As to the necessity of the measure in a democratic society, the Court noted from the outset that the TBKP had been dissolved even before it had been able to start its activities and that the dissolution had therefore been ordered solely on the basis of the TBKP's constitution and programme. A political party's choice of name could not in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances. Accordingly, in the absence of any concrete evidence to show that in choosing to call itself "communist", the TBKP had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court could not accept the submission based on the argument that the party's name might, by itself, be sufficient to entail the party's dissolution.

The Court considered one of the principal characteristics of democracy to be the possibility it offered of resolving a country's problems through dialogue, without recourse to violence, even when these problems were disturbing. From that point of view, there could be no justification for hindering a political group solely because it sought to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.

The Court was prepared to take into account the background to a case, in particular the difficulties associated with the fight against terrorism. In the case before it, however, it found no evidence to enable it to conclude, in the absence of any activity by the TBKP, that the party bore any responsibility for the problems which terrorism posed in Turkey.

A measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, was disproportionate to the aim pursued and consequently unnecessary in a democratic society. It followed that the measure had infringed Article 11 ECHR.

Cross-references:

14.11.1960, *Lawless v. Ireland*; 01.07.1961, *Lawless v. Ireland*; 07.12.1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*; 07.12.1976, *Handyside v. the United Kingdom*; 18.01.1978, *Ireland v. the United Kingdom*; 06.09.1978, *Klass and Others v. Germany*; 26.04.1979, *Sunday Times v. the United Kingdom* (no. 1); 13.05.1980, *Artico v. Italy*; 13.08.1981, *Young, James and Webster v. the United Kingdom*; 08.07.1986, *Lingens v. Austria*; 02.03.1987, *Mathieu-Mohin and Clerfayt v. Belgium*; 07.07.1989, *Soering v. the United Kingdom*; 23.04.1992, *Castells v. Spain*; 29.10.1992, *Open Door and Dublin Well Woman v. Ireland*; 16.12.1992, *Hadjianastassiou v. Greece*; 24.11.1993, *Informationsverein Lentia and Others v. Austria*; 23.09.1994, *Jersild v. Denmark*; 23.03.1995, *Loizidou v. Turkey*; 26.09.1995, *Vogt v. Germany*; 16.09.1996, *Akdivar and Others v. Turkey*; 25.11.1996, *Wingrove v. the United*

Kingdom; 18.12.1996, *Aksoy v. Turkey*; 01.07.1997, *Gitonas and Others v. Greece.*

Languages:

English, French.

Identification: ECH-1998-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 19.02.1998 / **e)** 116/1996/735/932 / **f)** Guerra and others v. Italy / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of expression.
Fundamental Rights – Civil and political rights – Right to information.
Fundamental Rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Industrial accident, risk, information / Environment, risks, information / Information, obligation to provide / Failure to act.

Headnotes:

The failure to provide the local population with information about the risk factor and how to proceed in the event of an accident at a nearby chemical factory breached the right to respect for private and family life.

Summary:

The forty applicants, who are all Italian nationals, live in the town of Manfredonia (province of Foggia) in Italy, approximately one kilometre from the Enichem agricoltura company's chemical factory, which lies within the municipality of Monte Sant'Angelo.

In 1988, the factory was classified as "high risk" according to the criteria set out in Presidential Decree no. 175 of 18 May 1988, which transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the "Seveso" directive) on the risk of major accidents associated with certain industrial activities dangerous to the environment and the well-being of the local population.

The applicants stated that in the course of its production cycle the factory released large quantities of dangerous substances into the atmosphere. Indeed, accidents due to malfunctioning have already occurred in the past, the most serious one on 26 September 1976, when 150 people were admitted to hospital with acute arsenic poisoning.

In a report of 8 December 1988 a committee of technical experts appointed by Manfredonia District Council established that because of the factory's geographical position, emissions from the factory into the atmosphere were often channelled towards Manfredonia. It was noted in the report that the factory had refused to allow the committee to carry out an inspection and that the results of a study by the factory itself showed that the emission treatment equipment was inadequate and the environmental-impact assessment incomplete. In 1989 the factory restricted its activity to the production of fertilisers, and was accordingly still classified as a dangerous factory. In 1993 the Ministry for the Environment and the Ministry of Health jointly adopted conclusions prescribing a number of improvements to be made to the factory installations, and provided the Prefect with instructions as to the emergency plan for which he was responsible and the measures required for informing the local population. However, the district council concerned did not receive any document concerning those conclusions, and the applicants did not receive the relevant information. In 1994, the factory permanently stopped producing fertilisers.

The Court reiterated that freedom to receive information, referred to in Article 10.2 ECHR, basically prohibited a Government from preventing a person from receiving information that others wished or might have been willing to impart to him. That freedom could not be construed as imposing on a State, in circumstances such as those of the case before the Court, positive obligations to collect and disseminate information of its own motion. The Court considered, therefore, that Article 10 ECHR was not applicable.

In the Court's view, the potential direct effect of the toxic emissions on the applicants' right to respect for their private and family life meant that Article 8 ECHR was applicable.

Italy could not be said to have "interfered" with the applicants' private or family life; they had complained not of an act by the State but of its failure to act. However, although the object of Article 8 ECHR was essentially that of protecting the individual against arbitrary interference by the public authorities, it did not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there might be positive obligations inherent in an effective respect for private or family life. In the case before the Court, all that needed to be ascertained was whether the national authorities had taken the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8 ECHR.

The Court noted that severe environmental pollution could affect individuals' well-being and prevent them from enjoying their homes, in such a way as to affect their private and family life adversely. In the present case the applicants had been left, right up until the production of fertilisers had ceased in 1994, without essential information that would have enabled them to assess the risks they and their families might run if they continued to live in Manfredonia, a town particularly exposed to danger in the event of an accident at the factory. The Court held, therefore, that the respondent State had not fulfilled its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 ECHR.

Cross-references:

09.10.1979, *Airey v. Ireland*; 26.03.1987, *Leander v. Sweden*; 21.02.1990, *Powell and Rayner v. the United Kingdom*; 19.02.1991, *Zanghi v. Italy*; 27.09.1991, *Demicoli v. Malta*; 27.09.1991, *Philis v. Greece* (no. 1); 26.11.1991, *Observer and Guardian v. the United Kingdom*; 25.06.1992, *Thorgeir Thorgeirson v. Iceland*; 09.12.1994, *Lopéz Ostra v. Spain*; 08.06.1995, *Yagci and Sargin v. Turkey*.

Languages:

English, French.

Identification: ECH-1998-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 19.02.1998 / **e)** 141/1996/760/961 / **f)** Bowman v. the United Kingdom / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
General Principles – Proportionality.
Fundamental Rights – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Anti-abortion campaigner, rights / Electoral campaign, expenses / Elections, campaign, restrictions.

Headnotes:

The prosecution of an anti-abortion campaigner for the distribution of leaflets prior to a general election amounted to a violation of the right to freedom of expression.

Summary:

The applicant, as executive director of the Society for the Protection of the Unborn Child, distributed 25,000 leaflets shortly before the 1992 general election, outlining the views on abortion of the three main candidates.

She was charged under Section 75 of the Representation of the People Act 1983 ('the 1983 Act'), which makes it a criminal offence for an unauthorised person to incur expenses in excess of five pounds sterling (GBP) in issuing publications with a view to promoting or procuring the election of a candidate. On 28 September 1993, at Southwark Crown Court, she was acquitted because the summons had been issued out of time.

The Court noted that Section 75 of the 1983 Act did not directly restrain freedom of expression, but instead limited to GBP 5 the amount of money which unauthorised persons were permitted to spend on publications and other means of communication during the election period. Moreover, it did not restrict expenditure on the transmission of information or opinions in general, but only that incurred during the relevant period 'with a view to promoting or procuring the election of a candidate'. Nonetheless, there could be no doubt that the prohibition contained in Section 75 amounted to a restriction on

freedom of expression, which directly affected the applicant.

The Court considered that the restriction on expenditure was 'prescribed by law' and that its application pursued the legitimate aim of protecting the rights of others, namely the candidates for the election and the electorate.

The Court had to determine whether, in all the circumstances, the restriction on the applicant's freedom of expression was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities in justification of it were relevant and sufficient.

It was significant that the limitation on expenditure contained in Section 75 of the 1983 Act was set as low as GBP 5. This restriction applied only during the four to six weeks preceding the general election, so the applicant could have campaigned freely at any other time. However, this would not, in the Court's view have served her purpose in publishing the leaflets which was, at the very least, to inform the electorate about the three candidates' voting histories and attitudes on abortion, during the critical period when electors' minds were focused on their choice of representative. The Court was, moreover, not convinced that, in practice, the applicant had access to any other effective channels of communication, for example, by ensuring that the material contained in the leaflets was published in a newspaper or broadcast on radio or television.

The Court found that Section 75 of the 1983 Act operated, for all practical purposes, as a total barrier to the applicant's ability to publish information with a view to influencing voters in favour of an anti-abortion candidate. The Court was not satisfied that it was necessary thus to limit her expenditure to GBP 5 in order to achieve the legitimate aim of securing equality between candidates, particularly in view of the fact that there were no restrictions placed upon political parties to advertise at national or regional level, provided that such advertisements were not intended to promote or prejudice the electoral prospects of any particular candidate in any particular constituency, or upon the freedom of the press to support or oppose the election of any particular candidate. The Court accordingly concluded that the restriction was disproportionate to the aim pursued and that there had been a violation of Article 10 ECHR.

Cross-references:

06.11.1980, *Sunday Times v. United Kingdom* (no. 1); 08.07.1986, *Lingens v. Austria*; 02.03.1987, *Mathieu-Mohin and Clerfayt v. Belgium*; 26.11.1988, *Norris v. Ireland.*

Languages:

English, French.

Identification: ECH-1998-1-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 19.02.1998 / **e)** 158/1996/777/978 / **f)** Kaya v. Turkey / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Fundamental Rights – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Security forces, unlawful killing / Investigation, effective, requirement / Remedy, effective, right.

Headnotes:

The failure of the Turkish authorities to carry out an effective investigation into an alleged unlawful killing by its security forces violated the right to life and the right to an effective remedy.

Summary:

The applicant, Mr Mehmet Kaya, a Turkish national, was born in 1949. His brother, Mr Abdülmenaf Kaya, was killed on 25 March 1993 in the vicinity of Dounay village in the district of Lice, south-east Turkey. The applicant and the Turkish Government provide different accounts of the circumstances surrounding Mr Abdülmenaf Kaya's death. The applicant claims that Mr Abdülmenaf Kaya, while unarmed, was shot dead by soldiers of the Turkish security forces after which the soldiers planted a Kalashnikov assault rifle on his body. The Government claims that on the day in question the soldiers came under fire from members of the PKK. They returned fire and following the gun battle a body was found with a rifle beside it.

The same day a District Government Doctor and the Public Prosecutor for Lice were flown to the scene of the incident by helicopter. After conducting an external examination of the body at the place of the incident the doctor drew up an on-the-spot report concluding that the cause of death was cardiovascular insufficiency as a result of the wounds caused by firearms. It was in his view neither necessary nor practical to carry out a full autopsy. It appears that the Public Prosecutor of Lice initiated a preliminary investigation. However, on 20 July 1993 he issued a decision of non-jurisdiction and transferred the case file to the Public Prosecutor of the Security Court of Diyabakir State. The case is apparently pending before that court as well as before the Lice Administrative Board.

The Court recalled its settled case-law to the effect that the establishment and verification of the facts are primarily a matter for the Commission. In the instant case there were deeply conflicting accounts of the circumstances in which the victim was killed. The Court noted that the Commission's fact-finding had been seriously hindered by the failure of the applicant and of an alleged key eyewitness to testify before the Commission's Delegates at the hearing of witnesses in Diyabakir. While the Court expressed a number of doubts about the credibility of the Government's account of the killing, it considered nevertheless that there was an insufficient factual and evidentiary basis on which to conclude that Abdülmenaf Kaya was, beyond reasonable doubt, intentionally killed by the security forces in the circumstances alleged by the applicant.

The Court recalled that Article 2 ECHR requires by implication that there should be some form of effective official investigation launched when individuals have been killed as a result of the use of force by agents of the State.

It noted in the instant case that the death of the applicant's brother could not be considered a clear-cut case of lawful killing by the security forces having regard to the fundamentally divergent accounts of what happened on the day in question. It rejected the Government's contention that it had only been necessary to comply with minimum formalities in order to dispose of the case. The Court considered that the investigation undertaken by the authorities was seriously deficient in regard to the forensic examination, the autopsy and the attempt to take any concrete steps thereafter to investigate the circumstances surrounding the killing. The Court was struck in particular by the fact that the Public Prosecutor appeared to take it for granted that Abdülmenaf Kaya was a terrorist who had been killed while taking part in an attack on the soldiers.

The Court concluded that neither the presence of armed clashes in the region nor the high incidence of fatalities can displace the obligation under Article 2 ECHR to ensure effective investigations into deaths arising out of armed clashes with security forces. The authorities had failed to comply with this obligation in the present case. The Court accordingly concluded that there had been a violation of Article 2 ECHR.

As regards Article 13 ECHR, in the view of the Court the nature of the right which the authorities are alleged to have violated, one of the most fundamental in the Convention, must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. The Court noted in particular that where those relatives have a tenable claim that the victim was unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 ECHR entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the killing. Seen in these terms the requirements of Article 13 ECHR are broader than a Contracting State's procedural obligation under Article 2 ECHR to conduct an effective investigation.

Against that background the Court considered that the relatives of the deceased had tenable grounds for claiming that he had been unlawfully killed. An effective official investigation should therefore have been conducted for their benefit. However, as noted under the Article 2 ECHR head of complaint, the authorities failed in their obligation to conduct an effective investigation. The Court found that the applicant and the next-of-kin on that account were denied an effective remedy against the authorities and thereby access to other available remedies including a claim for compensation. It concluded that there had been a violation of Article 13 ECHR.

Cross-references:

27.04.1988, *Boyle and Rice v. the United Kingdom*; 27.09.1995, *McCann and Others v. the United Kingdom*; 18.12.1996, *Aksoy v. Turkey*; 25.09.1997, *Aydin v. Turkey*; 28.11.1997, *Mentes v. Turkey*.

Languages:

English, French.

Identification: ECH-1998-1-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25.03.1998 / **e)** 13/1997/797/1000 / **f)** Kopp v. Switzerland / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Fundamental Rights – Civil and political rights – Right to private life.
Fundamental Rights – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Telephone tapping, necessary safeguards / Lawyer, telephone tapping.

Headnotes:

The monitoring of a law firm's telephone lines on the orders of the Public Prosecutor breached the right to respect for private life.

Summary:

The applicant, Mr Hans W. Kopp, a Swiss national and former lawyer, was born in 1931 and lives in Zürich. His wife was formerly a member of the Swiss Government – the Federal Council – on which she served as Head of the Federal Department of Justice and Police. Suspicions arose that she had passed secret information to the applicant for the benefit of one of his firm's clients. As a result, she resigned from the Federal Council but an inquiry later revealed that these allegations were unfounded.

In the course of these investigations, the President of the Indictment Division of the Federal Court, on an application by the Federal Attorney-General, issued an order on 23 November 1989 for the applicant's telephone lines to be tapped. The order stated that conversations in which the applicant participated in his capacity as a lawyer should be "disregarded". The telephone tapping was discontinued on 11 December 1989, when it appeared that the suspicions against the applicant and his wife were groundless. The applicant was informed by a letter of 9 March 1990 that his telephone lines had been tapped, but that all recordings had since been destroyed.

The applicant filed a complaint about the tapping of his telephone lines with the Federal Department of Justice and Police. The complaint was dismissed on 2 November 1992. He then filed an administrative appeal with the Federal Council. He also lodged an administrative-law appeal with the Federal Court. In both appeals he relied on provisions of the Federal Criminal Procedure Act (the FCPA) which prohibit the tapping of lawyers' telephone lines. The administrative appeal was dismissed on 30 June 1993, as was the administrative-law appeal on 8 March 1994.

In the Court's view, it was clear from its case-law that telephone calls made from or to business premises, such as those of a law firm, may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8.1 ECHR.

The interception of telephone calls constitutes an "interference by a public authority" within the meaning of Article 8.2 ECHR. Such interference breaches Article 8 ECHR unless it is "in accordance with the law", pursued one or more of the legitimate aims referred to in Article 8.2 and is "necessary in a democratic society" to achieve those aims.

However, the expression "in accordance with the law" requires first that the impugned measure should have some basis in domestic law. In principle, it was not for the Court to express an opinion contrary to that of the Federal Department of Justice and Police and the Federal Council on the compatibility of the judicially ordered tapping of Mr Kopp's telephone with Sections 66 (1 bis) and 77 of the FCPA. Moreover, the Court could not ignore the opinions of academic writers and the Federal Court's case-law on the question. In short, the interference complained of had a legal basis in Swiss law.

However, the expression "in accordance with the law" also refers to the quality of the law in question requiring that it should be accessible to the person concerned, who moreover had to be able to foresee its consequences for him. The accessibility of the law did not raise any problem in the instant case. The same was not true of the law's "foreseeability" as to the meaning and nature of the applicable measures. The Court therefore had to examine the "quality"of the legal rules applicable to Mr Kopp in the instant case.

It noted that the safeguards afforded by Swiss law were not without value. However, the Court discerned a contradiction between the clear text of the legislation which protected legal professional privilege when a lawyer was being monitored as a third party and the practice followed in the present case. The law did not clearly state how, under what conditions and by whom the distinction

was to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel. Above all, the Court found it astonishing that in practice this task was assigned to an official of the Post Office's legal department without supervision by an independent judge. Accordingly, it found that the applicant, as a lawyer, had not enjoyed the minimum degree of protection required by the rule of law in a democratic society. There had therefore been a breach of Article 8 ECHR.

Having found a breach of one of the requirements of Article 8.2 ECHR, the Court was not required to verify compliance with the other two requirements.

Cross-references:

02.08.1984, *Malone v. the United Kingdom*; 24.04.1990, *Kruslin v. France and Huvig v. France*; 16.12.1992, *Niemietz v. Germany*; 23.10.1996, *Ankerl v. Switzerland*; 25.06.1997, *Halford v. the United Kingdom*; 27.11.1997, *K.-F. v. Germany.*

Languages:

English, French.

Identification: ECH-1998-1-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 27.03.1998 / **e)** 156/1996/775/976 / **f)** Petrovic v.. Austria / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
General Principles – Margin of appreciation.
Fundamental Rights – General questions – Basic principles – Equality and non-discrimination.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Parental leave allowance, father.

Headnotes:

The refusal of the Austrian authorities to grant parental leave allowance to a father did not constitute discriminatory treatment and therefore did not violate his right to respect for private and family life.

Summary:

On 25 April 1989 the applicant, an Austrian national, applied for a parental leave allowance so that he could look after his child, who was born on 27 February 1989, while his wife continued to work. His application was turned down by the employment office on 26 May 1989, on the ground that, under the Unemployment Benefit Act 1977, only mothers could claim such an allowance. The applicant's appeal to the Regional Employment Office, in which he contended that the relevant provisions were discriminatory and therefore unconstitutional, was dismissed on 4 July 1989. On 18 August 1989 the applicant lodged a complaint with the Constitutional Court arguing that the terms of the Act restricting the right to parental leave allowance to mothers were discriminatory and were therefore in breach of the Federal Constitution. He also relied on Article 8 ECHR guaranteeing the right to respect for family life.

On 12 December 1991 the Constitutional Court declined to accept the complaint for adjudication. It referred to its previous case-law and took the view that the amendments to the Federal Unemployment Act that had been introduced in the meantime made no difference to the applicant's case. With effect from 1 January 1990 an amendment to that Act made it possible for fathers to claim parental leave allowance, but only in respect of children born after 31 December 1989. It did not therefore apply to the applicant.

The Court had to determine whether the facts of the case before it came within the scope of Article 8 ECHR and consequently, of Article 14 ECHR. It considered that the refusal to grant the applicant a parental leave allowance could not amount to a failure to respect family life, since Article 8 ECHR did not impose any positive obligation on States to provide the financial assistance in question. Nonetheless, the allowance paid by the State was intended to promote family life and necessarily affected the way in which the latter was organised as, in conjunction with parental leave, it enabled one of the parents to stay at home to look after the children. By granting parental leave allowance States were able to

demonstrate their respect for family life and the allowance therefore came within the scope of Article 8 ECHR. It followed that Article 14 ECHR taken together with Article 8 ECHR was applicable.

The Court noted that at the material time parental leave allowances were paid only to mothers, not fathers, once a period of eight weeks had elapsed after the birth and the right to a maternity allowance had been exhausted. It had not been disputed that this amounted to a difference in treatment on grounds of sex.

The Court recalled that the Contracting States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified a different treatment in law. The scope of the margin of appreciation varied according to the circumstances, the subject-matter and its background; in that respect, one of the relevant factors might be the existence or non-existence of common ground between the laws of the Contracting States. It was clear that at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the Contracting States had not provided for parental leave allowances to be paid to fathers. Only gradually, as society had moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, had the Contracting States extended entitlements, such as parental leave, to fathers. Austrian law had evolved in this manner with the enacting of legislation in 1989 to provide for parental leave for fathers. Furthermore, eligibility for the parental leave allowance had been extended to fathers in 1990. It therefore appeared difficult to criticise the Austrian legislature for having introduced legislation in a gradual manner which reflected the evolution of society in that sphere and which was, all things considered, very progressive in Europe.

There still remains a very great disparity between the legal systems of the Contracting States in this field. Whereas measures to give fathers an entitlement to parental leave had now been taken by a large number of States, the same was not true of the parental leave allowance, which only a very few States granted to fathers. The Austrian authorities' refusal to grant the applicant a parental leave allowance had not, therefore, exceeded the margin of appreciation allowed to them. Consequently, the difference in treatment complained of had not been discriminatory within the meaning of Article 14 ECHR.

Cross-references:

12.04.1975, *National Union of Belgian Police v. Belgium*; 06.02.1976, *Schmidt and Dahlström v. Sweden*; 28.11.1984, *Rasmussen v. Denmark*; 24.06.1993, *Schuler-Zgraggen v. Switzerland*; 18.07.1994, *Karlheinz Schmidt v. Germany; Van Raalte v. the Netherlands.*

Languages:

English, French.

Other Courts

Republic of Korea
Constitutional Court

The following decisions of the Constitutional Court of the Republic of Korea are available in English at the Centre on Constitutional Justice of the Venice Commission summaries.

1. **Trade Union Act**
   (96 KCCR 20, 26.03.1998)

General Principles – Legality.
General Principles – *Nullum crimen sine lege.*
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

2. **Publishing Company and Printing House Register Act**
   (95 KCCR 15, 30.04.1998)

Fundamental Rights – Civil and political rights – Freedom of the written press.

Systematic thesaurus *

* Page numbers of the systematic thesaurus 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 (municipalities, 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

1.5.8 Preparation of the case for trial
- 1.5.8.1 Receipt by the court
- 1.5.8.2 Notifications and publication
- 1.5.8.3 Time-limits
- 1.5.8.4 Preliminary proceedings
- 1.5.8.5 Opinions
- 1.5.8.6 Reports
- 1.5.8.7 Inquiries into the facts

1.5.9 Parties
- 1.5.9.1 *Locus standi* 13
- 1.5.9.2 Interest
- 1.5.9.3 Representation
  - 1.5.9.3.1 The Bar
  - 1.5.9.3.2 Legal representation other than the Bar
  - 1.5.9.3.3 Representation by persons other than lawyers or jurists

1.5.10 Interlocutory proceedings
- 1.5.10.1 Intervention
- 1.5.10.2 Plea of forgery
- 1.5.10.3 Resumption of proceedings after interruption
- 1.5.10.4 Discontinuance of proceedings
- 1.5.10.5 Joinder of similar cases
- 1.5.10.6 Challenging of a judge
  - 1.5.10.6.1 Automatic disqualification
  - 1.5.10.6.2 Challenge at the instance of a party

1.5.11 Hearing
- 1.5.11.1 Composition of the court
- 1.5.11.2 Procedure
- 1.5.11.3 In public
- 1.5.11.4 In camera
- 1.5.11.5 Report
- 1.5.11.6 Opinion
- 1.5.11.7 Address by the parties

1.5.12 Special procedures

1.5.13 Re-opening of hearing

1.5.14 Costs
- 1.5.14.1 Waiver of court fees
- 1.5.14.2 Legal aid or assistance
- 1.5.14.3 Party costs

1.6 **Decisions**

1.6.1 Deliberation
- 1.6.1.1 Composition
- 1.6.1.2 Chair
- 1.6.1.3 Procedure
  - 1.6.1.3.1 Quorum
  - 1.6.1.3.2 Vote

1.6.2 Reasoning

1.6.3 Form

1.6.4 Types
- 1.6.4.1 Procedural decisions
- 1.6.4.2 Opinion
- 1.6.4.3 Annulment
- 1.6.4.4 Suspension
- 1.6.4.5 Modification
- 1.6.4.6 Finding of constitutionality or unconstitutionality
- 1.6.4.7 Interim measures

1.6.5 Individual opinions of members
- 1.6.5.1 Concurring opinions

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 Prohibition of punishment without proper legal base.

24 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.

25 Bicameral, monocameral, special competence of each assembly, etc.

26 Including specialised powers of each legislative body.

27 Presidency, bureau, sections, committees, etc.

28 State budgetary contribution, other sources, etc.

29 For procedural aspects see the key-word "Electoral disputes" under "Constitutional justice - Types of litigation".

pages

30 For example incompatibilities, parliamentary immunity, exemption from jurisdiction and others.

31 Derived directly from the constitution.

32 Local authorities.

33 The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.

34 Civil servants, administrators, etc.

pages

[35] Comprises the Court of auditors in so far as it exercises jurisdictional power.

[36] E.g. Court of Auditors.

pages

37 Ombudsman, etc.
38 E.g. Court of Auditors.
39 Open-ended or finite.
40 If applied in combination with another fundamental right.

pages

41 The question of "Drittwirkung".

42 Used independently from other rights.

43 Here, the term "national" is used to designate ethnic origin.

44 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".

45 Including the right of access to a tribunal established by law.

pages

46 This keyword covers the right to a jurisdictional appeal.

47 *Audiatur et altera pars* - adversarial principle

48 Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

49 This keyword also includes the right to freely communicate information.

50 Militia, conscientious objection, etc.

51 Aspects of the use of names are included either here or under "Right to private life".

pages

[52] This keyword also covers "Freedom of work".

Keywords of the alphabetical index

* Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

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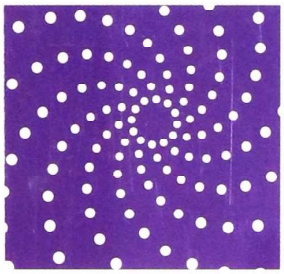

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