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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)*
   - g) *official publication*
   - h) *non-official publications*
2. *Keywords of the systematic thesaurus*
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THE VENICE COMMISSION

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

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

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

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Albania
Constitutional Court

Summaries of important decisions of the reference period 1 May 1998 - 30 August 1998 will be published in the next edition, *Bulletin* 1998/3.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-1998-2-006

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 16.04.1998 / **e)** P.534.XXXI / **f)** Petric, Domagoj, Antonio c/ diario Página 12 / **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 - Categories - Case-law - Foreign case-law.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
General Principles - Weighing of interests.
Fundamental Rights - Civil and political rights - Freedom of opinion.
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 private life.

Keywords of the alphabetical index:

Right of rectification / Right of reply / American Convention on Human Rights / Human dignity.

Headnotes:

The right of rectification or reply does not conflict with the principle of freedom of the press as enshrined in Articles 14 and 32 of the Constitution.

Summary:

Following the publication in the press of certain news items concerning himself, the applicant had exercised his right of rectification or reply against the newspaper. The latter having refused to publish the reply, he brought an action which was allowed at first and second instance.

The newspaper lodged an extraordinary appeal with the Supreme Court. Among other grounds of defence, it claimed that the right of reply was unconstitutional insofar as it required the applicant to publish something which the applicant did not wish to publish, thus violating Articles 14 and 32 of the Constitution.

The Court dismissed this claim on the ground that:

a. the right of rectification or reply is provided for in Article 14 of the American Convention on Human Rights;

b. the Convention enjoys constitutional "status" under Article 75.22 of the Constitution.

The Court stated that under the Convention, this right applies only to:

a. "information", i.e. to facts the existence or non-existence of which can be proved and which do not include, therefore, ideas and beliefs, hypotheses, opinions, critical judgments and value judgments;

b. to "inaccurate or offensive information", it being understood that these characteristics must pertain to "facts" disseminated in the press and not to offensive value judgments, which would require a different statutory remedy;

c. to information which is "damaging" to the person concerned (this, together with the concept of inaccuracy, constitutes the difference between the American Convention system and the right of reply provided for in French law);

d. to cases where the information pertains directly to the individual in question or, at least alludes to him or her in such a way that he or she can be easily identified: the purpose of the right of rectification is not to create an instrument for anyone who feels that their values, institutions or convictions have been in some way injured.

The Court likewise dismissed the claim that the right of reply did not apply to the press owing to the lack of "legal regulation" (Article 14 of the Constitution) in Argentina, since firstly, paragraph 3 covers any "publication" and secondly, the right of rectification was conceived and developed in response to the existence, proliferation and growing importance of the press. In order for the latter to be excluded, therefore, there would have to be a clear, statutory provision to this effect.

The Court further added that when a case comes before a court, the evidence to be produced as to the inaccuracy and injury caused definitely counts for something, because it would be absurd if the law, having insisted that these conditions be met, were then to rely merely on the allegations made by the parties. In this particular case, since the requirements as to inaccuracy and injury had been verified by the lower court, the Court held that it was not necessary to decide whether either the fact of these conditions having been met or merely the possibility or probability of them being met ought to be established. Nor was there any need, in the Court's opinion, to ascertain the details relating to the burden of proof.

The Court found that in order to preserve the balance of the constitutional architecture, respect for freedom of the press and freedom of expression had to go hand in hand with the right to respect for a person's honour, identity and privacy, which are part of human dignity. The right of rectification guarantees not only protection of the rights and interests of the person seeking rectification, but also freedom of public opinion inasmuch as access to an alternative version of the published facts is conducive, rather than prejudicial, to the general interest as far as seeking and obtaining the truth is concerned.

During the deliberations, five judges submitted separate opinions and one judge submitted a dissenting opinion, holding that the right in question was unconstitutional.

Supplementary information:

The American Convention on Human Rights ranks alongside the Constitution in the hierarchy of legal rules (Article 75.22 of the Constitution).

Cross-references:

The majority of the judges cited two decisions of the Spanish Constitutional Court: decisions nos. 35/1983 of 11.05.1983 and 168/1986 of 22.12.1986.

Languages:

Spanish.

Identification: ARG-1998-2-007

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 07.05.1998 / **e)** D.224.XXXIII / **f)** Dotti, Miguel Angel y otro s/ contrabando / **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:

Constitutional Justice - The subject of review - International treaties.
Sources of Constitutional Law - Categories - Written rules - Vienna Convention on the Right of Treaties of 1969.
Institutions - Legislative bodies - Powers.

Keywords of the alphabetical index:

Treaties, simplified / Treaty, binding effect / Partial agreement / Treaty of Montevideo of 1980 / Treaty, ratification.

Headnotes:

An agreement concluded between States is, strictly speaking, an international treaty under Article 2.1.a of the Vienna Convention on the Law of Treaties of 1969, even though the consent of the Argentinian State was expressed via a simplified procedure, i.e. without the intervention of the legislature, insofar as this simplified procedure is permitted under the treaty concerned, and insofar as the legislature played a part in concluding this treaty.

Summary:

The applicant claimed that the Recife Agreement - concluded by Brazil, Paraguay, Uruguay and Argentina - was not an international treaty because it had not been adopted by the legislature.

The Court held that:

a. the Recife Agreement is one whose partial scope is intended to promote trade. The Agreement is governed by the Treaty of Montevideo of 1980 which was adopted by the legislature and which is the founding instrument of the Latin-American Integration Association (ALADI);

b. that this Treaty allows partial agreements to be concluded, which are not signed by all the Member States and which are designed to pave the way for further regional integration. Such agreements are concluded under a simplified procedure, without the intervention of the legislature. The fact that it is permitted by the Treaty is what gives the Recife Agreement its binding effect.

During the deliberations, three of the nine judges submitted separate opinions.

Languages:

Spanish.

Identification: ARG-1998-2-008

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 12.05.1998 / **e)** G.288.XXXIII / **f)** Gallardo García, Ramón Carlos y otro s/ robo de automotor / **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 - Categories - Written rules - International Covenant on Civil and Political Rights of 1966.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
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 to counsel.

Keywords of the alphabetical index:

In forma pauperis appeal / American Convention on Human Rights / Defence, effective.

Headnotes:

There must be no uncertainty as to the defence, so that the accused is able to benefit from the assistance of a lawyer, who is responsible for conducting an effective defence.

Summary:

An extraordinary appeal was lodged with the Supreme Court against an eleven-year prison sentence and a fine imposed on the applicant by an appeal court. The applicant had asked to be provided with a lawyer in order to substantiate the extraordinary appeal but the appeal court rejected the request.

The Court ruled that the proceedings based on the court of appeal judgment be set aside on the following grounds:

a. quite apart from procedural considerations, an application made by a remand prisoner must be regarded as the expression of a desire to file a statutory appeal;

b. the courts have a duty to provide this professional assistance in order to ensure the effective defence required by law, and thereby compensate for the lack of legal representation;

c. merely appointing the official defence counsel does not meet the requirements of proper professional assistance, as laid down in Article 18 of the Constitution: such defence counsel must have been able to conduct the defence by presenting well-founded claims;

d. the defence counsel are not obliged to substantiate any claims which they consider irrelevant; they are nevertheless bound to give serious consideration to any defence which may be raised by means of the established procedural measures, particularly as this is an obligation which is imposed on them by society;

e. failure to comply with the duty to provide the requisite legal assistance may result in the State concerned being found liable under international law (Articles 75.22 of the Constitution; Articles 1, 8.2.d and 8.2.e of the American Convention on Human Rights; Articles 2.1, 143.b and 143.e of the International Covenant on Civil and Political Rights of 1966).

Supplementary information:

The American Convention on Human Rights and the International Covenant on Civil and Political Rights of 1966 rank alongside the Constitution in the hierarchy of legal rules (Article 75.22 of the Constitution).

Languages:

Spanish.

Identification: ARG-1998-2-009

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 18.06.1998 / **e)** L.36.XXXIV / **f)** Lacroze de Fortabat, María Amalia Sara s/ recurso de casación / **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 - Categories - Written rules - Other international sources.
Institutions - Executive bodies - The civil service.

Keywords of the alphabetical index:

Immunity from jurisdiction / Ambassadors / Vienna Convention on Diplomatic Relations / Diplomatic immunity / Slander.

Headnotes:

Under international law, diplomatic agents do not enjoy immunity from jurisdiction in their country of origin.

Summary:

An Argentinian ambassador extraordinary and plenipotentiary had argued, in a criminal action brought against her for slander, that she enjoyed diplomatic immunity. Following the dismissal of these claims, an extraordinary appeal was lodged with the Supreme Court, which dismissed it.

The Court ruled:

a. that the applicant was governed by international law under the terms of the Vienna Convention on Diplomatic Relations (Articles 14.a and 1.e);

b. that Article 31 of the Convention was sufficiently clear when it stated that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of "the receiving State" (paragraph 1), something which is borne out by paragraph 4;

c. that this express regulation precludes the application of other sources of international law which, according to the Convention, govern any questions not expressly regulated by the provisions of the Convention (Preamble, paragraph 5);

d. that there was no doubt that the offence had been committed in Argentina.

At the same time, the Court found the application for immunity to be ill-founded under domestic law.

Languages:

Spanish.

Identification: ARG-1998-2-010

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 13.08.1998 / **e)** C.1292.XXVIII / **f)** Cauchi, Augusto s/ extradición / **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 - Categories - Written rules - International Covenant on Civil and Political Rights of 1966.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
Sources of Constitutional Law - Categories - Case-law - International case-law - Other international bodies.
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 to be informed about the charges.

Keywords of the alphabetical index:

Extradition / Criminal conviction *in absentia* / International public policy / American Convention on Human Rights.

Headnotes:

Argentinian international public policy, fortified by the principles set forth in the constitutional treaties on human rights, refuses to accept applications for the extradition of defendants who have been convicted *in absentia* in another State in cases where: a. the individuals prosecuted were not notified of the charges and had no opportunity to attend or to be publicly heard at the trial; b. the applicant State has given a final decision *in absentia* which, owing to the exceptional nature of the decision and the limited possibilities for review, fails to ensure the right to a fair retrial, at which the accused would be present and his or her rights protected.

Summary:

Italy had applied for the extradition of an individual convicted *in absentia*.

The Court held that the individual in question had left Italy before being notified of the charges and that there was no evidence that these charges had been communicated to him.

The Court further ruled that according to the usual practice accepted by Italy and Argentina, failure to appear for trial had been excluded from the extradition treaty dating from the late nineteenth century, and that the new treaty does not stipulate otherwise.

During the deliberations, the decision was adopted by a majority of five judges - one of whom submitted a separate opinion; three judges submitted dissenting opinions on the ground that, according to the evidence produced, the individual concerned was responsible for his failure to appear; one of the judges, whilst concurring with the opinion of the majority, held that the case ought to be adjourned in order that Italy might send all the documents required in order to render the extradition application compliant with the conditions specified in point b. of the headnotes above.

Supplementary information:

The American Convention on Human Rights and the International Covenant on Civil and Political Rights of 1966 rank alongside the Constitution in the hierarchy of legal rules (Article 75.22 of the Constitution).

Cross-references:

Previous decision: N.1.XXXI. *Nardelli, Pietro Antonio s/extradición*, of 05.11.1996, where it cited Article 14.3.d of the International Covenant on Civil and Political Rights of 1966; Article 8.1 of the American Convention on Human Rights; the judgment of the European Court of Human Rights, *Colozza v. Italy* of 12.02.1985, on Article 6 ECHR, *Special Bulletin ECHR* [ECH-1985-S-001] and Report No. 2/92, Case 10.289, of 04.02.1992 of the Inter-American Commission on Human Rights.

Languages:

Spanish.

Armenia
Constitutional Court

Information on the activities of the Court

On 1-3 May 1998, a full delegation of the Constitutional Court of the Georgian Republic visited Yerevan upon the invitation of the Constitutional Court of the Republic of Armenia to exchange experience, discuss issues of mutual interest and organise future co-operation. An agreement was reached during this visit that the meetings between the Constitutional Courts of the two countries would henceforth take place on a regular basis.

On 22-26 May a workshop was organised at the Constitutional Court on "Individual Complaint to the Constitutional Court: Issues, Approaches". The following persons participated in the workshop upon the invitation of the Constitutional Court: Mr Endzins, President of the Constitutional Court of Latvia; Mr Bartole, Professor of Law at the University of Trieste, both members of the Venice Commission; Mr Schwartz, Professor of Law at the Law School of the American University, Washington; and Mr Dürr, representing the Secretariat of the Venice Commission. The President and members of the Constitutional Court, representatives of the National Assembly of the Republic of Armenia, representatives of Yerevan State University and the Armenian Office of the Centre for Democracy and Human Rights attended from Armenia. During the discussions, issues concerning constitutional complaint and the possibilities of constitutional complaint within the framework of the current Constitution of the Republic of Armenia were considered. An exchange of opinions, with the participation of guests regarding the basic problems of constitutional reforms was organised in the Centre for Constitutional Law. The participants had meetings with Mr Kh. Harutiunian, Chairman of the National Assembly; Mr P. Hayrikian, adviser to the President of the Republic; Mr D. Harutiunian, the Minister of Justice; the members of the Board of the Association of Judges of the Republic of Armenia and professors at the Law Department of Yerevan State University.

Statistical data

1 May 1998 - 31 August 1998

- 26 referrals made, 25 cases heard and 25 decisions delivered, all cases concerned the compliance of international treaties with the Constitution.
- All referrals were initiated by the President of the Republic of Armenia.
- All international treaties were declared compatible with the Constitution.
- 6 cases heard by oral procedure, 19 cases heard by written procedure.

Important decisions

Identification: ARM-1998-2-002

a) Armenia / **b)** Constitutional court / **c)** / **d)** 27.02.1998 / **e)** DCC-92 / **f)** On the conformity of several provisions of the Law of the Republic of Armenia "On Real Estate" with the Constitution of the Republic of Armenia / **g)** *Téghékaguir* (Official Gazette), 3/1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Public interest.
Fundamental Rights - Civil and political rights - Right to property - Expropriation.

Keywords of the alphabetical index:

Expropriation, consent by owner / Real estate / Market value / Expropriation, compensation.

Headnotes:

Real estate can only be expropriated by way of a specific law which stipulates the social need for this expropriation, fixes the compensation based on market value and on written consent by the owner. This consent can be replaced only by a court decision.

Summary:

The case was initiated by the President of the Republic, who disputed several provisions of the Law on Real Estate regarding the expropriation of real estate in the interests of society and the State, in particular issues of preliminary determination of the value of equivalent compensation by the Government for the expropriated property and the resolution of the disputes connected with it in a judicial manner. The Constitutional Court confirmed the conformity with the Constitution of the

provision which fixes the powers of the Government in the preliminary determination of the value of equivalent compensation in the case of expropriation of real estate. However, the Court found the following provisions of the said Article contravening the Constitution:

- Paragraph 3, according to which, "If the owner of real estate disagrees with the value of compensation of the real estate, then the Government of the Republic of Armenia may conduct expropriation in a judicial manner only".

- Paragraph 4, according to which, "The owner of the real estate shall abstain from inflicting damage to real estate, subject to expropriation for society or State needs, until a court ruling comes into legal force".

- Paragraph 5, according to which, "The procedure of expropriation of real estate for society or State needs is established by the Government of the Republic of Armenia, pursuant to the provisions of this Article".

The Court held that, pursuant to Articles 8 and 28 of the Constitution, real estate may only be expropriated through the adoption of a Law on the expropriation of particular real estate, in which the extreme importance and significance of the expropriation of real estate shall be substantiated. Such a law has to state which needs of the society and the State will be satisfied through the expropriation of real estate. The law has to oblige the Government to fix the value of compensation for real estate based on a financial-economic assessment, taking market prices into account. It has to be based on the results of negotiations between the owner of the real estate and the Government, and it has to be based upon written consent of the owner, which is subject to court dispute by the latter. Furthermore, the Constitutional Court emphasised that the Government may not establish a procedure for expropriation of real estate which would grant it the power of forced expropriation of real estate.

Languages:

Armenian.

Identification: ARM-1998-2-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 16.06.1998 / **e)** DCC-114 / **f)** On the conformity with the Constitution of the obligations fixed in the Agreement between the Government of the Republic of Armenia and the World Health Organisation "On the Establishment of Relations in the Area of Technical Assistance" / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - International treaties.
Constitutional Justice - The subject of review - Failure to pass legislation.
Institutions - Executive bodies - Powers.
Fundamental Rights - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Government action, review of constitutionality / Government, failure to act / Health protection, State targeted programs.

Headnotes:

The Government has to undertake necessary and sufficient measures pursuant to Article 34 of the Constitution and the Law "On Medical Support and Medical Service of the Population".

Summary:

The Constitutional Court heard a case concerning the conformity with the Constitution of the obligations fixed in the Agreement between the Government and the World Health Organisation on the establishment of relations in the area of technical assistance. The Constitutional Court recognised that the obligations fixed in the Agreement signed on 17 September 1997 in Istanbul between the Government and the World Health Organisation were in conformity with the Constitution. The Court stipulated, however, that the Government had to undertake necessary and sufficient measures pursuant to Article 34 of the Constitution and the Law "On Medical Support and Medical Service of the Population", in particular, to ensure the approval and implementation of annual State programmes on health protection of the population which are prescribed by the law.

The Constitutional Court found that the Government had failed to undertake measures pursuant to the implementation of the requirements of Article 34 of the Constitution and the above-mentioned Law as well as

the requirements of the decision of Constitutional Court as of 18 February 1998, No. 90, because in practice the State health care programs had not been approved and published.

Languages:

Armenian.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court during June 1998

- Financial claims (Article 137 B-VG): 3
- Conflicts of jurisdiction (Article 138.1 B-VG): 0
- Review of regulations (Article 139 B-VG): 90
- Review of laws (Article 140 B-VG): 74
- Challenge of elections (Article 141 B-VG): 3
- Complaints against administrative decrees (Article 144 B-VG): 399

Composition of the Court:

Vice-President Dr Karl Piska, Member of the Court Dr Peter Fessler and Substitute-Member of the Court Dr Gustav Teicht retire at the end of 1998. The vacancies have been advertised by the Federal Cancellor and by the President of the *Nationalrat* (Parliament) as the successors are partly to be appointed on the recommendation of the Federal Government and partly on proposals submitted by the *Nationalrat*.

Important decisions

Identification: AUT-1998-2-005

a) Austria / **b)** Constitutional Court / **c)** / **d)** 24.06.1998 / **e)** G 31/98, G 79/98, G 82/98, G 108/98 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

General Principles - Rule of law.
Fundamental Rights - General questions - Entitlement to rights - Foreigners - Refugees and applicants for refugee status.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to have adequate time and facilities for the preparation of the case.
Fundamental Rights - Civil and political rights - Right of asylum.

Keywords of the alphabetical index:

Time limit for appeal, shortening / Remedy, effective.

Headnotes:

A statute which gave refugees whose requests for asylum were rejected on the grounds of their entering the country through a secure third country only two days to lodge an appeal does not meet the requirements of the rule of law.

Summary:

The Autonomous Federal Refugee Authority (*Unabhängiger Bundesasylsenat*) had filed several applications to overrule a specific part of Article 32.1 of the Asylum Act 1997 (*Asylgesetz* 1997) alleging that it was unconstitutional for two reasons:

1. Under Article 63.5 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz* 1991) an appellant is given two weeks to lodge an appeal. The federal legislator, who is empowered by Article 11.2 of the Constitution to vary the general rules of administrative procedure if required by the matter to be regulated, did not act in accordance with this authorisation when shortening the time for appealing in the Right to Asylum Act 1997.

2. The cutting down to two days of the period for filing an appeal in the complex matter of requests for asylum is contrary to the rule of law. According to the Court's case-law on the rule of law any means of legal redress must grant a minimum of effectiveness to the appellant. This guarantee was contradicted by the impugned statute.

Following essentially the reasoning of the applications, the Court annulled the relevant parts of the challenged law. Beyond that, the Court specified that the time for appealing may be shortened by the (federal) legislator as long as the appellant has enough time to contact professional consultants in order to be able to understand the substantive and procedural background of the rejecting decision and to be able to lodge a sufficiently founded appeal against it. The Court added that a period of a week for filing an appeal would meet the requirements of the rule of law granting a minimum of *de facto* efficiency to refugees.

Supplementary information:

The annulment and the Court's additional remark led to an immediate attempt of some members of parliament to amend the annulled provision by cutting the time-limit in question down to one week. However, this initiative did not pass Parliament. Due to the Court's judgment and the fact that the legislator has not enacted another Statute, refugees like almost any other appellants have two weeks to lodge an appeal.

Legal norms referred to:

Article 11.2 and 140 of the Constitution.

Languages:

German.

Identification: AUT-1998-2-006

a) Austria / **b)** Constitutional Court / **c)** / **d)** 25.06.1998 / **e)** V 98/97, V 125/97, V 128-130/97, V 149/97 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** *Europäische Grundrechte Zeitschrift* 1998, 383.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - International treaties.
Constitutional Justice - Procedure - Parties - Interest.
Sources of Constitutional Law - Techniques of interpretation - Literal interpretation.

Keywords of the alphabetical index:

Spelling, reform / Memorandum of intent / Treaty, elements.

Headnotes:

The "Joint Memorandum of Intent on a New Standard (a New Regulation) of German spelling of 1 July 1996", cannot be regarded as a treaty pursuant to Article 140a of the Constitution establishing rights and obligations between the contracting parties. On the contrary, its wording already proves clearly that the "Joint

Memorandum of Intent" is a non-binding promise of the signatories simply to give effect to the new German spelling in the respective states.

Summary:

Several individual applications, mostly filed by minors represented by their parents, were brought to the Court challenging the lawfulness of the so-called reform on German spelling. The applicants asked the Court to overrule the "Joint Memorandum of Intent on a New Standard (a New Regulation) of German spelling of 1 July 1996", Article 15.1 of the Regulation on Grading and Evaluation of Performance (*Leistungsbeurteilungsverordnung*) as well as two departmental orders issued by the Minister of Education and Cultural Affairs.

The Court rejected all applications on the ground that the Ministers of Education signing the relevant Joint Memorandum of Intent took notice of the experts' report on a new German spelling and stated their common intention to support the implementation of the reform. It is not to be qualified as a treaty as its wording does not constitute any mutual rights and obligations but contains only a non-binding promise.

Article 15.1 of the Regulation on Grading and Evaluation of Performance (*Leistungsbeurteilungsverordnung*) entering into force on 1 September 1998, stipulates that variations of the new spelling which are in conformity with the spelling used hitherto are to be corrected but not to be counted as mistakes. This provision was challenged by the application of a pupil who had attended her last year of grammar school during the past school year. Her application was inadmissible, as it was obvious that her rights could not have been directly encroached any more by the impugned provision.

As regards the two departmental orders issued by the Minister of Education and Cultural Affairs the Court found that those orders had no normative character at all but contained only more detailed information on the new German spelling and recommendations on how to give effect to it.

Supplementary information:

The question whether the new German spelling was a successful effort to simplify spelling and whether it should be implemented was widely discussed in the mass media not only in Austria but also in Germany. Consequently, the German Federal Constitutional Court also had to deal with a similar application (judgment of 14 July 1998, 1 BvR 1640/97), see *Bulletin* 1998/2 [GER-1998-2-008].

Legal norms referred to:

Articles 139 and 140a of the Constitution.

Languages:

German.

Belgium
Court of Arbitration

Statistical data
1 May 1998 - 31 August 1998

- 46 judgments
- 54 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 67 new cases
- Average length of proceedings: 9 months
- 14 judgments concerning applications to set aside
- 23 judgments concerning preliminary points of law
- 2 judgments concerning an application for suspension
- 6 cases settled by summary procedure (6 preliminary opinions)
- 1 preliminary decision (re-opening of the hearing)

Important decisions

Identification: BEL-1998-2-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 10.06.1998 / **e)** 67/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.09.1998 / **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 - Unwritten rules - General principles of law.
Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Public burdens.
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 - Independence.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Impartiality.
Fundamental Rights - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Taxation / Tax complaint, challenge / Challenging, procedure / Director of taxes, quasi-judicial role.

Headnotes:

If Article 366 of the Income Tax Code, whereby taxpayers may submit a written complaint about their tax bill to the Director of Taxes, is interpreted as granting the Director of Taxes a quasi-judicial role, the principles of equality and non-discrimination established in Articles 10 and 11 of the Constitution are breached insofar as it confers a quasi-judicial role on an authority offering no guarantee of independence or objective impartiality and does not provide any procedure for challenging the Director. The aforementioned constitutional provisions are not breached, however, if the said Article is interpreted as providing for an administrative appeal before an administrative authority.

Summary:

On the basis of Article 366 of the Belgian Income Tax Code, taxpayer N complained to the Director of Taxes about a tax bill substantially increasing the amount of tax he was required to pay as a result of a thorough tax inspection to which he had been subjected. In his capacity as a lawyer, N had in the past advised a client to lodge a complaint about a Director of Taxes. The latter had subsequently been imprisoned. Before the court, N requested that the file on his objections relating to the tax bill be handled by a different Director of Taxes. The Court decided to put a preliminary question to the Constitutional Court regarding the compatibility of Article 366, which was interpreted as providing the possibility of entering a quasi-judicial appeal before the Director of Taxes, with the constitutional principle of equality, possibly taken together with Article 6.1 ECHR and the general legal principle of a right to an independent and fair hearing. Under Article 366, citizens who lodged an income tax complaint were treated differently from those who, in respect of other political rights, entered a complaint before an ordinary court or an administrative court which, unlike in the case of tax complaints, was separate from the administration being challenged. The Court held that the Director of Taxes, as part of the hierarchical structure of the administration that was party to the proceedings, was unable, in the eyes of the taxpayer, to offer the guarantees of independence and impartiality that were essential for exercising judicial power and that consequently Articles 10 and 11 of the Constitution were breached, without there being any need to consider whether or not Article 6 ECHR was applicable in this case. According to the interpretation

by the court below, the contested provision also violated the constitutional principle of equality insofar as taxpayers did not, vis-à-vis the Director of Taxes, have the same right of challenge as other citizens, although it was possible for them to lodge an *a posteriori* appeal before the Court of Appeal.

However, the Court drew attention to the fact that Article 366 of the Income Tax Code could be interpreted as providing taxpayers with the possibility of bringing administrative appeals before the Director of Taxes, which, in an attempt to ensure efficient administration, was accompanied by guarantees similar to those offered in the case of appeals before a court. Providing that decisions made by the Director of Taxes could be challenged before the court of appeal, and given the specific nature of taxation, it was not discriminatory to require that appeals before a court be preceded by an administrative procedure.

Supplementary information:

See, also, on the question of the quasi-judicial status of tax appeal bodies, the *Corbiau* and *Peterbroeck* decisions of the Court of Justice of 30 March 1993 and 14 December 1995 respectively.

Languages:

French, Dutch, German.

Identification: BEL-1998-2-005

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 24.06.1998 / **e**) 74/98 / **f**) / **g**) *Moniteur belge* (Official Gazette), 25.09.1998 / **h**).

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Unwritten rules - General principles of law.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Adversarial hearings.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Presumption of innocence.

Keywords of the alphabetical index:

Criminal procedure / Expert opinion, criminal / Judicial inquiry / Judicial preliminary investigation.

Headnotes:

In criminal, as in civil, cases, expert opinions ordered by the trial court must in principle be drawn up after hearing both parties.

On the other hand, the principles of equality and non-discrimination and the principles governing the right to a fair trial are not violated when an expert ordered by the public prosecutor or judge to give an opinion during the preliminary investigation does so without hearing both parties. Nevertheless, the law may qualify this possibility and define when, and under what conditions, experts must hear both parties even at this stage in the proceedings.

Summary:

According to established precedents, the expert appointed by the public prosecutor or investigating judge in the course of the inquiry or investigation is not required to observe the principle that both parties be heard.

A number of (regional) criminal courts asked the Court of Arbitration to decide on the preliminary question of whether or not these provisions were compatible with the principles of equality and non-discrimination and the right to a fair trial.

The Court first of all drew attention to its previous case-law (Decision no. 24/97, *Bulletin* 1997/1 [BEL-1997-1-004]), according to which the expert ordered to give an opinion by the criminal court, as the trial court, was required to hear both parties insofar as that was compatible with the principles of criminal law.

The Court then pointed out that the difference between the rules governing expert opinions, in terms of the requirement to hear both parties, according to whether they were ordered by the trial court or during the preparatory stage of the criminal proceedings, was justified by the fact that during the inquiry and investigation the proceedings were still inquisitorial, in order, on the one hand, to preserve the presumption of innocence by not needlessly discrediting the persons concerned and, on the other hand, so that effective action could be taken without alerting the guilty parties.

However, the legislator could qualify this option and define when, and under what conditions, experts asked to give

their opinion were required to hear both parties even at the inquiry or investigation stage.

Regarding the right to a fair trial, the Court stated, first, that the law officer ordering the expert opinion could always ask that both parties be heard if it was felt that this would not in any way compromise the chances of attaining the aforementioned objectives, and, second, that the trial court was in no way bound by the expert's findings and would assess them freely, taking into account, in particular, whether or not both parties had been heard.

Languages:

French, Dutch, German.

Identification: BEL-1998-2-006

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 24.06.1998 / **e)** 77/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.08.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Reasonableness.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Gender.
Fundamental Rights - Economic, social and cultural rights - Right to social security.

Keywords of the alphabetical index:

Family allowances / Cohabitation / Household / Presumption of law, rebuttable / Orphan, allowance.

Headnotes:

The presumption in the law governing special orphans' allowances paid to families that two cohabiting persons of opposite sex constitute a household (unless they are relations by blood or by marriage up to and including the third degree), whereas there is no such presumption in the case of two cohabiting persons of the same sex, is not contrary to the principles of equality and non-discrimination established in Articles 10 and 11 of the Constitution.

Summary:

When one parent dies, in addition to ordinary family allowance the children are entitled to a special orphans' allowance paid to the surviving parent, providing he or she does not remarry or form a new household, in which cases the family situation usually reverts to one similar to that existing before the death of the other parent. There is a (rebuttable) presumption of law that cohabiting persons of opposite sex constitute a household unless they are related by blood or by marriage up to the third degree. A widow who appealed before the court against the decision that she had to repay the special orphans' allowance on the ground that in the interval since her husband's death she had been living with another man claimed that she was discriminated against insofar as the presumption of law that a new household had been formed applied exclusively to persons of opposite, rather than the same, sex. Faced with the preliminary question put by the court, as to whether or not such a presumption was contrary to the principles of equality and non-discrimination established in Articles 10 and 11 of the Constitution, the Court of Arbitration held that it was reasonable for the law to presume that a man and a woman living together constituted a household and not to presume it of two cohabiting persons of the same sex, given that in the vast majority of cases such a presumption corresponded to the reality. The Court also pointed out that the presumption was rebuttable and that in the event of a dispute the judge could decide, on a case by case basis and taking account of the specific facts of the case, whether or not the persons concerned constituted a household in the eyes of the law. On this basis, the Court considered that the distinction made in law could be objectively and reasonably justified.

Languages:

French, Dutch, German.

Identification: BEL-1998-2-007

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15.07.1998 / **e)** 91/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.08.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Decisions - Types - Suspension.
Sources of Constitutional Law - Categories - Written rules - Community law.
Sources of Constitutional Law - Categories - Case-law - International case-law - Court of Justice of the European Communities.
General Principles - Reasonableness.
Fundamental Rights - General questions - Entitlement to rights - Foreigners.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - National or ethnic origin.
Fundamental Rights - Economic, social and cultural rights - Right to be taught.

Keywords of the alphabetical index:

Enrolment fee / National of European Union member State / Art education / Foreign students.

Headnotes:

It is contrary to the principles of equality and non-discrimination established in Articles 10 and 11 of the Constitution to limit the number of foreign students considered for funding to a maximum 2% of the total number of students in a given higher art education establishment and to impose an additional enrolment fee on foreign students wishing to attend a category of special schools renowned notably for the possibility they present of mixing with Belgian and foreign artists. In the case of foreign students from other European Union Member States, this additional registration fee is moreover contrary to the aforementioned articles of the Constitution when taken together with Article 6 EC.

Summary:

In the case of higher art education establishments, the legislation of the French Community limits the number of foreign students who can be considered for funding to 2% of the total number of enrolments by Belgian students and requires that foreign students pay an additional enrolment fee which is not required of students from Belgium or Luxembourg or certain other categories of students. The establishments can refuse to allow students to enrol, unless they are from the European Union.

Some sixty, mostly foreign, students at the "La Cambre" Higher National School of Visual Arts applied to the Court to have these statutory provisions suspended and set aside. Teaching staff at this State-run education establishment also intervened in support of the students.

The Court held that the students at the "La Cambre" school of art could be directly and adversely affected by the measures appealed against insofar as such measures could undermine the specific quality of the education administered at the school, and that the students therefore had an interest.

In an initial phase, the Court suspended the measures by its Decision no. 62/98 of 4 June 1998. It then ruled on the application to have the suspended measures set aside (Decision no. 91/98 of 15 July 1998).

Concerning the additional enrolment fee, the Court first examined the case of foreign students who were nationals of another European Union Member State, given that Article 6 EC (ex Article 7) prohibits, within the field of application of the Treaty, any discrimination on the grounds of nationality. After finding, with reference to the *Gravier* Decision of the Court of Justice of the European Communities of 13 February 1985, that the requirement for foreign students to pay an additional enrolment fee in order to attend a school of art like "La Cambre" constituted a condition of admission to vocational education, the Court decided that such a requirement breached Articles 10 and 11 of the Constitution, taken together with Article 6 EC.

The Court then examined the case of foreign students from outside the European Union. Their situation was also found to be discriminatory. While recognising that a difference in treatment according to whether or not students were members of the European Union was based on an objective criterion, the Court held that the measure limiting the number of foreign students to 2% of the total number of students could not reasonably be justified given that it failed to take account of the specific features and quality of the education administered by the establishment in question.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-1998-2-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 05.06.1998 / **e)** 3/98, 4/98 / **f)** / **g)** Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of Bosnia and Herzegovina, the Official Gazette of Republika Srpska / **h)** CODICES.

Keywords of the systematic thesaurus:

Constitutional Justice - Constitutional jurisdiction - Relations with other institutions - Courts.
Constitutional Justice - Types of litigation - Litigation in respect of jurisdictional conflict.
Constitutional Justice - The subject of review - Court decisions.
Institutions - Jurisdictional bodies - Other courts.

Keywords of the alphabetical index:

Human Rights Chamber / Decisions, final and binding, appeal / *Nova producta.*

Headnotes:

Even if it were possible to appeal a decision of the Human Rights Chamber, parties to the proceeding cannot be allowed to present their comments and arguments for the first time in the appellate proceedings.

Summary:

Dr Haris Silajdžić, co-Chair of the Council of Ministers of Bosnia and Herzegovina, and Mr Plamenko Custovic, Public Attorney of Bosnia and Herzegovina, filed appeals with the Constitutional Court of Bosnia and Herzegovina against decisions of the Human Rights Chamber.

Article VI.3.b of the Constitution provides that the Constitutional Court has appellate jurisdiction over issues under this Constitution when they become subject to dispute arising out of a judgment of any court in Bosnia and Herzegovina. Therefore, a question arises whether the Human Rights Chamber should be considered a court in Bosnia and Herzegovina according to this provision of the Constitution. It is significant to note within this context that, according to Annex 6, Article XI.3 of the Agreement of Human Rights, which is the part of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), the decisions of the Human Rights Chamber are final and binding, subject to review by the Chamber itself in some cases.

The Constitutional Court did not decide the case on the merits and rejected the appeal. The fact that the State remained completely inactive throughout the proceedings before the Human Rights Chamber meant that it could not present arguments in the appellate proceedings.

Identification: BIH-1998-2-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 05.06.1998 / **e)** / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of claim - Claim by a public body - Executive bodies.
Constitutional Justice - Procedure - Parties - *Locus standi.*
Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Institutions - Executive bodies - Powers.

Keywords of the alphabetical index:

Co-Chair of the Council of Ministers, powers / Council of Minister, Rules of Procedure / Sub-constitutional norms, constitutionality / Effectiveness, principle.

Headnotes:

The Co-Chair of the Council of Ministers of Bosnia and Herzegovina is competent to refer a dispute to the Constitutional Court in accordance with Article VI.3.a of the Constitution.

Summary:

Dr Haris Silajdžić, "Co-Chair" of the Council of Ministers, seized the Constitutional Court to review the constitutionality of the "Law on Privatisation of Enterprises" of the Republika Srpska (Official Gazette of SR no. 15/96, 13/97 and 26/97 - re-promulgated text) and the "Law on privatisation of Enterprises" of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, no. 27/97).

Under Article VI.3.a of the Constitution of Bosnia and Herzegovina the Constitutional Court has exclusive jurisdiction to decide whether any provision of a constitution of an entity or law is consistent with this Constitution. Such a dispute may be referred to the Constitutional Court by, among others, the "Chair of the Council of Ministers".

Hence the preliminary question is raised whether Dr Haris Silajdžić, who is "Co-Chair" according to the Law on the Council of Ministers, is entitled to refer a dispute to the Constitutional Court of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina.

The office of a "Co-Chair" of the Council of Ministers is regulated by Article 3.1 and Article 5 of the "Law on the Council of Ministers of Bosnia and Herzegovina and Ministries of Bosnia and Herzegovina" (Official Gazette of Bosnia and Herzegovina, no. 4/77) which state that there are two "Co-Chairs" who "will take turns as Chair in accordance with the Rules of Procedure". According to Article 2.2 of the Rules of Procedure of the Council of Ministers of Bosnia and Herzegovina, the "Co-Chairs will take turns as Chair, rotating weekly". Moreover, a Co-Chair performing the duties of the Chair is, according to Article 24.a-e, responsible for more or less procedural tasks in connection with chairing meetings of the Council of Ministers, whereas the two Co-Chairs are, according to Article 25, "jointly responsible" for the co-ordination of the work of the Council of Ministers (lit. a) and the "representation" of the Council of Ministers (lit. d), i.e. in a more substantive way.

Although it was verified by the Constitutional Court that Dr Silajdžić was the Chair "in turn", it remained unclear under Articles 24 and 25 of the Law on the Council of Ministers of Bosnia and Herzegovina whether the two Co-Chairs have to act jointly when referring a dispute to the Constitutional Court according to Article VI.3.a of the Constitution.

The other Co-Chair in office, Mr Boro Bosić, did not react to a request made by the Constitutional Court to submit an opinion on the legal problems outlined.

The provisions of the Law on the Council of Ministers and the respective Rules of Procedure refer to the authority under Article VI.3.a of the Constitution insofar as all the statutory provisions quoted above deal with the responsibilities of the Co-Chairs acting on behalf of the Council of Ministers as a legal body in itself. However, the authority under Article VI.3.a of the Constitution is not assigned to the Council of Ministers, but to the "Chair" as the competent individual legal person.

Insofar as the Constitution does not contain any further definition of a "Chair" of the Council of Ministers, it could nevertheless be argued that one has to define this term in conjunction with the sub-constitutional provisions of the Law on the Council of Ministers and the respective Rules of Procedure. The substantive character of referring a dispute to the Constitutional Court could thus lead to the conclusion that the two Co-Chairs must act jointly when referring such dispute.

Interpreting the Constitution on the basis of sub-constitutional provisions can be seen as a variant of the principle of interpretation which requires that all sub-constitutional norms should be in conformity with the Constitution insofar as there is a legal hierarchy based on the supremacy clause of Article III.3.b of the Constitution. From that follows the general principle of interpretation that all statutes under review are supposed to be in conformity with the Constitution. In the examined case the problem raised concerns the interpretation of the Constitution in light of the sub-constitutional statute which would reverse the legal hierarchy that has to be derived from Article III.3.b of the Constitution.

From an interpretation that the two Co-Chairs must act jointly, it could follow that any access to the Constitutional Court by the Chair of the Council of Ministers may effectively be excluded if they block each other. Such an interpretation could thus have the effect that neither of the two Co-Chairs can exercise this responsibility. This would violate the principle of effectiveness which is to be derived from Article VI.3 of the Constitution.

The principle of interpretation of the conformity of sub-constitutional norms with the Constitution raises serious doubts about the conformity of the Law on the Council of Ministers with the Constitution of Bosnia and Herzegovina - the review of which was, however, not requested by the applicant. It can be derived thus as a principle of interpretation that the function of the Constitution must not be undermined by way of interpretation. In case of doubts, therefore, the Constitution must not be interpreted in such a way as to allow the "ordinary" legislation to reach its goals without amendment of the Constitution.

Based on the priority of the principle of functional conformity which has to be applied in this case due to the doubts on the constitutional compatibility of the Law on the Council of Ministers, Article VI.3.a of the Constitution must not be interpreted in light of the statutory provisions on the Co-Chairs. Thus, as already stated above, the preliminary question of whether Dr Silajdžić was acting as a Co-Chair according to the Law on the Council of Ministers and the respective Rules of procedure is constitutionally irrelevant. The problem of whether Dr Silajdžić was authorised under Article VI.3.a to refer the dispute must thus be resolved on the basis of the Constitution itself.

The rule concerning the authority to refer a dispute to the Constitutional Court refers to the "Chair" of the Council of Ministers as a legal person without any further specification. However, the "Chair" as a legal person cannot exercise this responsibility on its own. Insofar as there are no specific constitutional provisions that two or more persons in office have to act jointly, every person in office may exercise the responsibility of the "Chair" of the Council of Ministers under Article VI.3.a of the Constitution.

On the basis of the established facts, the Constitutional Court is of the opinion that Dr Haris Silajdžić is authorised to initiate a legal dispute before the Constitutional Court of Bosnia and Herzegovina in line with Article VI.3.a of the Constitution.

Taking into account the aforementioned, the Constitutional Court has decided, by the majority of votes 5:4, that the request of Dr Haris Silajdžić is admissible.

The Constitutional Court will decide subsequently on the substance of the request.

Supplementary information:

One judge submitted a separate opinion.

Bulgaria
Constitutional Court

Statistical data

1 May 1997 - 31 August 1998

Number of decisions: 12

Important decisions

Identification: BUL-1998-2-003

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 29.04.1998 / **e)** 10/98 / **f)** / **g)** *Darzhaven Vestnik* (Official Gazette), no. 52 of 08.05.1998 / **h).**

Keywords of the systematic thesaurus:

Institutions - Legislative bodies - Powers.
Institutions - Executive bodies - Powers.
Institutions - Executive bodies - Relations with the courts.
Institutions - Jurisdictional bodies - Organisation.
Institutions - Jurisdictional bodies - Military courts.

Keywords of the alphabetical index:

Cassation instance / Military jury.

Headnotes:

The Constitution of the Republic of Bulgaria neither provides for nor explicitly prohibits the existence of a military court with the Supreme Court of Cassation or of military prosecutors with the Chief Prosecutor's Office.

Summary:

The decision, which is based on Article 149.1.1 of the Constitution, is a response to the Council of Ministers' request for a binding interpretation of Article 119.1 of the Constitution on whether the Constitution requires a military court to exist within the Supreme Court of Cassation and, in view of Article 126.1 of the Constitution, military prosecutors within the Chief Prosecutor's Office.

The Constitutional Court ruled that in the sense of Article 119.1 of the Constitution the Supreme Court of Cassation shall act as a third instance of appeal for cases

of the military courts and that there shall be no separate special unit (jury, division) to hear such cases. However, there is no obstacle to establishing such a unit, which may be instituted by law under Article 133 of the Constitution.

The military prosecution section of the Chief Prosecutor's Office has been instituted by law in the absence of a constitutional provision. Under Article 126.1 of the Constitution, its existence is justified only if there is a military jury with the Supreme Court.

It lies within the legislator's exclusive competence to assess whether the judicial power and the Department of Public Prosecutions need such structural units.

Languages:

Bulgarian.

Identification: BUL-1998-2-004

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 04.06.1998 / **e)** 12/98 / **f)** / **g)** *Darzhaven Vestnik* (Official Gazette), no. 66 of 10.06.1998 / **h).**

Keywords of the systematic thesaurus:

General Principles - Vested rights.
Fundamental Rights - General questions - Basic principles - Equality and non-discrimination.
Fundamental Rights - Civil and political rights - Right to family life - Succession.
Fundamental Rights - Civil and political rights - Right to property - Expropriation.

Keywords of the alphabetical index:

Communist regime, legal consequences / Property / Inheritance, right / Tsars, property / Real estate.

Headnotes:

The Constitution of the Republic of Bulgaria does not allow privileges or curtailment of rights on the basis of origin or personal or social status. The same shall hold true for the heirs of the former Bulgarian Tsars Ferdinand and Boris with regard to their property.

Summary:

The decision in response to an appeal by the chief prosecutor found that the law on the nationalisation of the property of the families of the former Tsars Ferdinand and Boris and of their heirs was contrary to the Constitution.

The Constitutional Court ruled that the challenged law concerned acquired rights as it dealt with real estate and chattels which under the legislation existing in Bulgaria for acquisition and inheritance became property of the persons that are mentioned in the law. Nationalisation was the forcible taking away of private property for which no compensation was offered. By its nature and consequences such nationalisation was in no way different from confiscation as no compensation was offered in this case either. Therefore, the constitutionally protected right to property has been violated. The law contravened this principle which is contained in Article 17.1 of the Constitution and which requires the right to property to be guaranteed. It was also contrary to Articles 17.3 and 17.5 of the Constitution which state that private property shall be inviolable and subject to expropriation only under strictly defined conditions. Such conditions did not exist at the time of the nationalisation that was provided for by this law.

The range of persons to whom this law was applicable was defined on the basis of two criteria: a) these persons were members of the families of the former Tsars Ferdinand and Boris: and b) these persons were heirs. Both criteria refer to the origin and personal and social status of the persons in question. Consequently, the law violated Article 6.2 of the Constitution. It contravened the constitutional principle that all citizens shall be equal before the law. Along with that it contravened the non-admission of privileges and the prohibition of the curtailment of rights on grounds of origin and personal and social status.

Languages:

Bulgarian.

Canada
Supreme Court

Summaries of important decisions of the reference period 1 May 1998 - 30 August 1998 will be published in the next edition, *Bulletin* 1998/3.

Croatia
Constitutional Court

Summaries of important decisions of the reference period 1 May 1998 - 30 August 1998 will be published in the next edition, *Bulletin* 1998/3.

Cyprus
Supreme Court

Summaries of important decisions of the reference period 1 May 1998 - 30 August 1998 will be published in the next edition, *Bulletin* 1998/3.

Czech Republic
Constitutional Court

Statistical Data
1 May 1998 - 31 August 1998

- Judgments of the Plenary Session: 5
- Judgments of the chambers: 26
- Other decisions of the Plenary Session: 4
- Other decisions of the chambers: 411
- Other procedural decisions: 10
- Total: 456

Important decisions

Identification: CZE-1998-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 23.04.1998 / **e)** IV. US 463/97 / **f)** The Use of Criminal Punishment for General Crime Prevention / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of manifest error in assessing evidence or exercising discretion.
General Principles - Legality.
General Principles - Proportionality.
Fundamental Rights - General questions - Basic principles - Equality and non-discrimination.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Exemplary punishment, prohibition / Crime prevention, permissible means / Crime prevention, individual and general.

Headnotes:

In the broadest sense, the meaning and purpose of punishment is to protect society from criminality; it cannot be employed as a means for solving other societal problems. Punishment imposed on a criminal includes both elements of repression and prevention in relation to the criminal himself (individual repression and prevention) and an element of educational effect on the

other members of society (general prevention). In each particular case, § 23 of the Criminal Code provides that individual prevention and repression must be given more weight. Individual prevention may operate only secondarily as a means of effecting general prevention. This relation of individual to general prevention cannot be reversed. To elevate the element of general criminal repression would lead in reality to exemplary punishment, which would be in extreme conflict with § 23 of the Criminal Code and, thus, constitute a violation of Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms which guarantees legal protection in the manner prescribed by law.

Summary:

The complainant is a foreign national who was convicted for the criminal offences of falsifying or altering public documents, for travelling under a fake passport and thwarting the enforcement of official decisions by escaping twice from police custody. He was sentenced to four years imprisonment, to be followed by deportation. In its decision, the first instance court declared that if "persons such as the accused can so easily enter the Czech Republic, then in cases of their criminal activity, the court must, when passing sentence, lay the most emphatic stress upon the interests in protecting society and in general crime prevention." In addition, the appellate court also declared that, since the rise in illegal immigration and the criminal activity associated therewith are becoming increasingly serious, "in cases where the State succeeds in apprehending perpetrators, it is necessary to apply to the maximum degree considerations of the protection of society and general crime prevention".

The complainant brought a constitutional complaint against these decisions, and the Constitutional Court granted it. It reasoned that, in this case, the ordinary courts had taken an individual instance of criminal activity and placed it on the general level of the societal situation and the serious problems it is currently experiencing. For this reason, the decisions in this case were in extreme conflict with § 23 of the Criminal Code, which requires that more weight be given to considerations of individual repression. In addition, the stress laid by the ordinary courts on the fact that this case involved repeated offences committed by a foreign national can be seen as nothing else than an exemplary punishment and a disproportionate impairment of the pre-eminent role given to individual repression. In subverting the scheme laid down in the Criminal Code, the ordinary courts have violated Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms, which guarantees the protection of rights in the manner prescribed by law.

Languages:

Czech.

Identification: CZE-1998-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 13.05.1998 / **e)** Pl. US 25/97 / **f)** Prohibition of Residence of Aliens / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Public interest.
General Principles - Proportionality.
Fundamental Rights - General questions - Entitlement to rights - Foreigners.
Fundamental Rights - Civil and political rights - Freedom of movement.
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 - Equality of arms.

Keywords of the alphabetical index:

Residence, prohibition / Appeal, suspensive effect / Statute, necessary precision.

Headnotes:

A statutory provision is unconstitutional in violation of the principle of proportionality if it suffers from the basic defect that its terms are so general as to admit of an interpretation and application which can restrict a fundamental right or basic freedom beyond the limits permitted in the Constitution.

The denial of suspensive effect to an appeal against a decision forbidding residence by a foreign national is unconstitutional because it constitutes the denial of such rights, guaranteed to foreign nationals by Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms, to be present for the hearing of their case and to have the opportunity to express their views on the evidence.

Summary:

The petitioners, who were foreign nationals, were convicted of the offence of selling unmarked goods and impeding customs inspection. By virtue of § 14.1.f of Act no. 123/1992, on the Residence of Foreign Nationals, which provides that a foreign national may be forbidden to reside on the territory of the Czech Republic if he has violated any duties laid down by the same statute or by another generally binding legal enactment, their residence was forbidden for a period of three years by decision of the police. They appealed against this decision and further requested that its enforcement be suspended. However, since § 14.4 of Act no. 123/1992 Sb. provides that the filing of an appeal shall not have suspensive effect on the decision in question, the appellate court refused to order the decision prohibiting residence to be suspended and the petitioners were forced to leave the country.

In conjunction with a constitutional complaint, by which they contested these decisions, the petitioners submitted a petition requesting the annulment of four provisions of Act no. 123/1992 Sb. The Constitutional Court Plenum annulled two of them: § 14.1.f as incompatible with the principle of proportionality, and § 14.4 for violating the right guaranteed under Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms to a court hearing in one's presence and to comment on the evidence.

While the basic freedom of movement and residence (also guaranteed to foreign nationals, provided they hold a valid residence permit) may be limited by statute in the interest, among others, of public order, the limitation on that right prescribed in § 14.1.f of Act no. 123/1992 Sb. was disproportionate, in that its negative impact on the affected basic freedom outweighs the benefit to the public interest. While acknowledging that its terms are quite broad, the Parliament nonetheless maintained that administrative bodies applying this statutory provision could supply the necessary concretisation. The Constitutional Court rejected this argument in view of the principle that constitutionally authorised limitations upon basic rights must be laid down in a statute which is sufficiently precise and which makes the consequences of a person's conduct clearly foreseeable.

Since § 14.4 for all practical purposes entirely excludes the possibility of attending in person and commenting on the evidence and the right to propose evidence, all of which are guaranteed without exception by Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms, this provision puts affected persons at a distinct disadvantage vis-à-vis the State in such a proceeding - and this violates the principle of the equality of arms, one of the basic principles of fair process.

Supplementary information:

In a related case decided soon thereafter on 26 May 1998, the Constitutional Court annulled, upon the proposal of the Municipal Court in Prague, § 32.2 of Act no. 123/1992 Sb., which provided that decisions on the deportation of foreign nationals are not subject to review by a court.

Languages:

Czech.

Identification: CZE-1998-2-008

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 09.07.1998 / **e)** III. US 86/98 / **f)** The Right to Legal Protection Requires Two-Instance Decision-Making even for Procedural Rulings / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
General Principles - Legality.
General Principles - Prohibition of arbitrariness.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Independence.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Impartiality.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Double degree of jurisdiction.

Keywords of the alphabetical index:

Procedural rulings, right to appeal / Criminal procedure.

Headnotes:

Among the fundamental principles of fair process is included, in addition to the principles of independent and impartial decision-making and the exclusion of arbitrariness in judicial decision-making, the constitutional

right to review by a court of higher instance of decisions by a court of lower instance. Only by these means can the constitutionally-guaranteed fundamental right to judicial protection and the right to fair process derived therefrom be fully understood. Whenever a provision of the procedural codes allows for two different interpretations, preference must be given to that interpretation which is most in harmony with the constitutional order, in particular with the principles of fair process.

In relation to a provision of the procedural codes permitting a complaint against a court ruling only if the ruling court is "deciding in the matter at first instance", the principle that statutes must be interpreted in harmony with the constitutional guarantee of judicial protection, specifically of the requirement of a two-instance hearing, requires that the phrase be interpreted as referring to the first court to decide on the question at issue in a particular ruling, not to the court deciding in first instance on the merits of the underlying case.

Summary:

In a criminal matter the complainant moved to have the presiding judge of the regional court excluded from the proceeding due to bias during the course of an appeal before the regional court against the conviction of her *de facto* husband. Not satisfied with the regional court's decision on this motion, the complainant filed a complaint against it before the Superior Court. The Superior Court rejected the complaint as inadmissible in view of the general procedural principle that appeal is permitted only against the ruling of a first instance court but not against the ruling of a court deciding on appeal, such as the regional court in this case. The complainant then filed a constitutional complaint alleging that the Superior Court's refusal to hear her complaint against the decision by the regional court denied her the right, guaranteed by Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms, to judicial protection, in particular the right to a two-instance court proceeding.

The Constitutional Court reasoned that ordinary courts are entrusted with the protection of rights, and in this task are required by Article 90 of the Constitution to proceed in the manner prescribed by statute, in particular by the procedural codes. When interpreting any such procedural provision which allows for more than one construction, ordinary courts are required, pursuant to the principle of interpretation in conformity with the Constitution, to choose that interpretation which best harmonises with the constitutional order. While the frequently amended Criminal Procedure Code is still marked by traces of the totalitarian era, the decision-making of the ordinary courts may not strengthen them by giving the Code a restrictive interpretation that is contrary to the spirit of the present Constitution.

The particular provision at issue in this case, § 141.2 of the Criminal Procedure Code provides that complaints may be filed against court rulings, but only if the ruling was issued by a court "deciding in the matter at first instance". In order for it to be interpreted in harmony with the right to judicial protection, this provision must be construed not as referring solely to the court that has jurisdiction at first instance to decide the matter on the merits, but also to any courts which are authorised to make the first-instance ruling on any particular issue. The Criminal Procedure Code provides that the merits of the case shall be decided in a judgment and other matters relating to the merits shall be decided in a ruling. Since a ruling concerns a matter which, while related to the merits, can be separated therefrom, it thus possesses an independent meritorious foundation. Accordingly, such rulings are governed by a separate procedural regime and, therefore, where the law provides that they may be reviewed by a higher court, they have the nature of a decision by a court of first instance, regardless of the level of the ordinary court (with the exception, of course, of the Supreme Court) which took it.

In consequence, the guarantee of judicial protection requires that the complainant have the right to file with the Superior Court a complaint against the ruling of the regional court at issue in this case. Accordingly, the Constitutional Court granted her complaint and annulled the Superior Court ruling rejecting the complaint as inadmissible.

Cross-references:

In declaring the need to interpret the procedural codes in a manner that is in conformity with the Constitution, the Court referred to one of its earlier cases which had clearly declared it to be one of the duties of courts to follow this principle (judgment Pl. US 48/95, published as no. 121/1996 Sb. and in Volume 5, no. 21 of the Constitutional Court's reporter).

Languages:

Czech.

Identification: CZE-1998-2-009

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 09.07.1998 / **e)** III. US 206/98 / **f)** Respect for Constitutional Court Decisions in Factually Similar Cases as an Aspect of the Principle of Equality / **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 - Consequences for other cases.
Institutions - Jurisdictional bodies - Supreme court.
Institutions - Jurisdictional bodies - Ordinary courts.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Constitutional Court, decisions, binding nature / Supreme Court, decisions, binding nature / Property, restitution / *Stare decisis*.

Headnotes:

Independent decision-making by the ordinary courts is carried out within the framework of the constitutional and statutory provisions of procedural and substantive law.

The obligation of courts, arising from Article 1 of the Charter of Fundamental Rights and Basic Freedoms, to ensure that rights are enjoyed equally, is a part of the constitutional framework in which the independence of courts is exercised. The fundamental rights arising from the principle of equality correspond thereto. Consequently, in relation to ordinary courts, equality in rights establishes, among other things, the right to similar decision-making in similar cases and at the same time precludes arbitrariness in the application of law.

Cases where ordinary courts did not accord parties protection of their fundamental rights and basic freedoms, in spite of the fact that the Constitutional Court has already recognised such rights in factually analogous cases, must be viewed as a violation of the principle of equality in rights. From the perspective of constitutional law, such a manner of proceeding results in inequality in fundamental rights.

Summary:

In a case concerning the restitution of property confiscated by government order during the communist era, the complainant's claim to the return of property apparently qualified under either of two separate statutes governing restitution: one (Act no. 403/1990 Sb.) covering, among other things, confiscations under the government order in question and the other (Act no. 229/1991 Sb.) restitution of agricultural property generally. The first instance court, here the regional court, decided that the claimant was not entitled to recover his property. It reasoned that it would be a violation of legal certainty for a particular claim for restitution to be governed by more than one statute so that the legislative intent was for restitution claims of this type to be filed in accordance with Act no. 403/1990 Sb. Since the complainant here filed his claim under Act no. 229/1991 Sb. rather than Act no. 403/1990 Sb., he lost his claim.

The restitution claimant filed a constitutional complaint alleging that his basic rights to judicial protection had been violated. He argued, in particular, that the regional court's decision was in conflict with the position adopted on this issue by the Civil Law Collegium of the Supreme Court and with a judgment handed down by the Constitutional Court in a factually-similar case. Both declared that a person who had not succeeded in, or had not even asserted, his claim under Act no. 403/1990, was not, for that reason alone, precluded from filing his claim under Act no. 229/1991. When these arguments had been raised in proceedings before the regional court, it had responded that positions adopted by the Supreme Court or the Constitutional Court are not binding on ordinary courts deciding a separate matter.

The Constitutional Court acknowledged that, while not formally binding, the Supreme Court has been given authority to adopt positions on particular issues in order to unify ordinary court decision-making and to create unity in the legal order. Further, while Constitutional Court decisions on constitutional complaints are, at the very least, binding in further proceedings on the same matter, in addition, general respect for such decision in other factually similar matters is vital to the effective assertion of fundamental rights and basic freedoms. While the binding nature of these decisions is not specifically provided for in statutory law governing court procedures, and independent decision-making by ordinary courts has a constitutional dimension, such decision-making must respect all relevant constitutional principles, substantive and procedural. In particular, the right of equality is one such substantive constitutional principle, and it implies the need for consistent decision-making by courts in similar cases.

Languages:

Czech.

Identification: CZE-1998-2-010

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 17.07.1998 / **e)** IV. US 186/98 / **f)** Parties' Right to be Present for Evidentiary Hearings on Procedural Issues / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Scope.
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 - Public hearings.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Evidence hearings, right to be present.

Headnotes:

Even though an evidence hearing concerns the resolution of a purely procedural question, for example, whether a party actually received delivery of a court ruling, the general rules on evidence-taking apply, in particular, §§ 122 and 123 of the Civil Procedure Code, which implement the constitutional requirement of Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms, which states that a person has the right to have her matter considered in a public hearing at which she can be present and the right to give her views on the evidence.

Summary:

By a judgment of a municipal court, the complainant was ordered to vacate an apartment. The court then issued a ruling ordering execution, but the complainant later claimed not to have received delivery of notice of that ruling. To ascertain the truth of this claim, which was not raised until the proceedings on appeal against the decision to vacate, the municipal court questioned the postal carrier in a closed hearing, about which the parties to the case had not been informed and for which they were not present. On the basis of the evidence taken, the appellate court denied the claimant's appeal against the court's decision ordering her eviction, on the ground that it had not been filed in time.

The Constitutional Court granted the claimant's constitutional complaint, finding a violation of Articles 38.2 and 36.1 of the Charter of Fundamental Rights and Basic Freedoms (the latter guaranteeing the right to assert one's rights in a legally-prescribed manner), in that by holding such an evidence hearing the court deprived the complainant of her right to appear before it. This right applies whether the particular question being considered in a hearing directly concerns the merits of the case or is a purely procedural issue.

Cross-references:

In its judgment of 7 October 1996, IV. 198/96, the Constitutional Court decided, on essentially the same issue, that a party must be allowed to be present at an evidence hearing and comment on the evidence, even if the hearing concerns merely the purely procedural issue of whether a decision was duly delivered to the party.

Languages:

Czech.

Identification: CZE-1998-2-011

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 12.08.1998 / **e)** IV. US 305/97 / **f)** The Significance of Unauthorised Police Detention for Calculation of the Maximum Allowed Period of Detention / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.

Fundamental Rights - Civil and political rights - Individual liberty - Deprivation of liberty - Detention pending trial.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts - *Habeas corpus.*

Keywords of the alphabetical index:

Detention, actual / Detention, unlawful / Detention, maximum length.

Headnotes:

Not only the time during which a suspect is detained in accordance with the relevant provisions of the Criminal Procedure Code and the time during which he is secured in accordance with § 14.1.d and 14.1.e of Act no. 283/1991 Sb., as in force until 1 July 1998 (as the Constitutional Court so stated in its judgment published as no. 23/1997 Sb.), but also any period of time during which his personal freedom was in actual fact restricted in a manner contrary to law (*contra legem*), must be calculated as part of the maximum 24-hour period of time for which Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms permits a suspect to be detained before he is brought before a court.

Summary:

On 12 June 1997, in his criminal case, the complainant, in answer to a summons to give a statement, voluntarily reported to the police station. Once there, from 10:20 on he was forcibly kept in a waiting room that had a gate with bars and a person at the gate deciding who was permitted to go out. The whole time he was guarded by a policeman who informed him that he could not leave. As recorded in the written record, at 13:10 he was charged, and at 14:25 he was detained in accordance with the requirements of §§ 75 and 76 of the Criminal Procedure Code. He was brought before a court at 13:06 on 13 June 1997, thus within 24 hours of being detained pursuant to the Criminal Procedure Code (but more than 24 hours since his actual detention). The district court judge subsequently ordered him to be taken into custody. Both at that point and later during hearings before the regional court on his complaint against the decision ordering custody, he raised constitutional objections against that decision: he claimed that the decision ordering custody was invalid in view of the fact that, before being brought before a court, he had been detained by the police for more than 24 hours in violation of Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms, which requires suspects to be held no more than 24 hours before being brought before a court.

The regional court rejected his complaint, and he filed a constitutional complaint against the latter decision.

The regional court argued that placement of the complainant into custody had been in conformity with Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms. He was not detained pursuant to the Criminal Procedure Code until 14:25. Prior to that time he had not been secured (a second form of restriction on personal liberty) pursuant to § 14 of Act no. 283/1991 Sb., and the record did not indicate that he had been officially detained prior to 14:25. In any case, nothing in the record indicated that he expressly demanded to be allowed to leave the police building. The district court decided that the time prior to his detention pursuant to the Criminal Procedure Code could not be counted as a restriction on personal liberty pursuant to §§ 75 and 76 of the Criminal Procedure Code, and thus it did not count against the 24 hour maximum laid down in Article 8.3 of the Charter .

The Constitutional Court granted his complaint. Even though prior to 14:25 on 12 June 1997 the complainant had not been detained in accordance with §§ 75 and 76 of the Criminal Procedure Code, this did not mean his personal freedom was not limited. In fact, it was limited without statutory authorisation, in violation of the requirement in Article 8.2 of the Charter of Fundamental Rights and Basic Freedoms that detention be "on grounds and in the manner specified by law". Further, whether or not done in accordance with the Code, an actual limitation of someone's personal freedom implicates the guarantee in Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms that he be brought before a court within 24 hours. Since he was held in a waiting cell and his possibility to leave was clearly restricted, his personal freedom was in actual fact restricted as of 10:20 on 12 June 1997, so that, when he was brought before a court at 13:06 the next day, the maximum 24-hour period had already expired. Consequently, the complainant was held in custody in violation also of Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms. It makes no difference that the complainant merely asked to leave the cell without strenuously demanding it; this fact cannot justify limitation of his personal freedom. Although Article 8 of the Charter literally speaks of the deprivation of personal freedom, the limitation thereof is just a difference in degree, not one of such a kind that it would justify non-application of the 24 hour deadline in Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms.

Cross-references:

On 28 November 1996, the Constitutional Court issued its judgment IV. ÚS 246/96, reported in *Bulletin* 1996/3 [CZE-1996-3-012], in which it decided that Article 8.3 of the Charter of Fundamental Rights and Basic Freedoms had been violated in similar circumstances. The police had held a suspect more than 24 hours by making reference to § 14 of Act no. 283/1991 Sb., by which police were authorised to "secure" suspects. The Court held that a separate statutory authorisation to limit a suspect's personal freedom, whatever term was used for it, could not validly extend the maximum 24-hour period permitted in Article 8.3 of the Charter. In its judgment Pl. ÚS 2/97 of 2 July 1997, reported in *Bulletin* 1997/2 [CZE-1997-2-004], the Constitutional Court invalidated § 14 of Act no. 283/1991 Sb., as a violation of Article 8.3 of the Charter.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-1998-2-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 06.04.1998 / **e)** I 361/1997 / **f)** / **g)** *Ugeskrift for Retsvæsen*, 1998, 800 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national and non-national sources - Primary Community law and constitutions.
Sources of Constitutional Law - Techniques of interpretation - Intention of the author of the controlled enactment.
General Principles - Democracy.
Institutions - European Union - Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Intention, legislative body / Constitution, judicial review / Sovereignty, transfer, limits.

Headnotes:

Danish participation in the European Community does not infringe the Constitution.

Summary:

Ten citizens appealed to the Supreme Court in order to have the judgment of the Eastern Division of the High Court (*Østre Landsret*) of 27 June 1997 overruled. They reiterated their claim before the High Court that the Prime Minister should be ordered to recognise that the Act of Accession to the European Communities contravened the Constitution. The Prime Minister moved for dismissal of the claim.

The Supreme Court considered in this case whether the implementation in Denmark of the Treaty Establishing the European Community (EC) as framed in the Treaty Establishing the European Union was lawfully made in pursuance of § 20 of the Constitution or, alternatively, whether such implementation required an amendment of the Constitution pursuant to § 88 of the Constitution.

§ 20 of the Constitution is framed as follows:

"20.1 Powers vested in the authorities of the Realm under this Constitutional Act may, to an extent specified by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.

20.2 For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of an ordinary Bill is obtained, and if the Government maintains the Bill, it shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in Section 42."

Primarily, the appellants pleaded that Section 20.1 of the Constitution grants authority for the transfer of sovereignty only "to an extent specified by statute", and that this condition had not been met. In this connection they referred, in particular, to the powers vested in the Council under Article 235 EC, and to the law-making activities of the European Court of Justice. Secondly, the appellants pleaded that the delegation of sovereignty is on such a scale and of such a nature that it is inconsistent with the Constitution's premise of a democratic form of government.

In a unanimous judgment the Supreme Court found that the Danish participation in the European Community did not infringe the Constitution.

Cross-references:

On 12 August 1996 the Supreme Court delivered a judgment on the admissibility of this case. This decision has been reported in *Bulletin* 1996/2 [DEN-1996-2-002].

See also the Supreme Court decision of 26 May 1997 reported in *Bulletin* 1997/3 [DEN-1997-3-002].

Languages:

Danish.

Estonia
Supreme Court

Statistical data

1 May 1998 - 31 August 1998

Number of decisions: 2

Important decisions

Identification: EST-1998-2-004

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 27.05.1998 / **e)** 3-4-1-4-98 / **f)** Review of the constitutionality of the Rules for Issuing Estonian Seafarers' Certificates / **g)** *Riigi Teataja* (Official Bulletin), 1998, no. 49, Article 752 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Determination of effects by the court.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national and non-national sources - Treaties and other domestic legal instruments.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Citizenship.
Fundamental Rights - Economic, social and cultural rights - Freedom to choose one's profession.

Keywords of the alphabetical index:

Legislative delegation / Regulation / Foreigners / Seafarers / Identification documents / ILO Convention no. 108 / Place of work, right to choose / Seafarers, Certificate.

Headnotes:

A regulation of the Government issued without delegation of the regulatory power in a law contradicts Article 87.6 of the Constitution.

The unequal treatment of seafarers who are Estonian citizens vis-à-vis foreign citizens, based on the Identification and Proof of Citizenship of Estonian Citizens Act and Rules for Issuing Estonian Seafarers' Certificates, does not comply with the Foreigners Act and Convention no. 108 of the International Labour Organisation. The application of a governmental regulation conflicting with an international convention contradicts Article 123 of the Constitution. The subjective right to freely choose one's sphere of activity, profession and place of work, provided for in Article 29.1 of the Constitution, does not apply to an already existing labour relation.

Summary:

The Tallinn Administrative Court requested the Constitutional Review Chamber of the Supreme Court to invalidate a governmental regulation by which the Rules for Issuing Estonian Seafarers' Certificateswere enacted, because of its conflict with the Constitution.

The Constitutional Review Chamber found that since there was no provision in the law delegating to the Government the competence to issue the disputed regulation, the regulation was passed without a legal ground and, thus, was in conflict with Article 87.6 of the Constitution.

The Identification and Proof of Citizenship of Estonian Citizens Act stipulated that a seafarer's service record is an identity document of a professional seafarer in his or her official capacity. With the seafarer's service record the seafarer can leave Estonia for a ship located abroad and return to Estonia from such a ship as well as leave and return on a ship on which he or she is enrolled (muster roll). The regulation concerning citizens of foreign states and stateless persons was different. Under the disputed governmental regulation, they needed to obtain an Estonian seafarer's certificateif they worked, started working or started traineeship on a ship registered in Estonia. The Estonian seafarer's certificateenabled them to leave Estonia and return to Estonia if they had been enrolled on a ship registered in Estonia.

According to Article 5.1 of the Foreigners Act, foreigners shall be guaranteed the same rights and freedoms as Estonian citizens, unless the Constitution, the Foreigners Act or other laws or international treaties provide otherwise. The Constitutional Review Chamber ruled that unequal treatment of foreigners and Estonian citizens does not comply with Article 5 of the Foreigners Act and Article 5 of the ILO Convention no. 108. The latter stipulates that any seafarer who holds a valid seafarer's identity document issued by the competent authority of a territory for which this Convention is in force shall be readmitted to that territory. Under the Convention the re-admittance does not depend on whether the seafarer is enrolled on a ship registered in Estonia. The Convention does not deal with the question of leaving the country. This right, especially its exercise in order to go to the ship one is enrolled on, is self-evident and can be derived from the idea of the Convention. As far as the governmental regulation conflicts with Convention no. 108, the application of the regulation conflicts with Article 123 of the Constitution. Under Article 123.2 of the Constitution, if laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply. Under Article 1 of the Convention and Article 12 of the Constitution it is unfounded and contrary to the idea of the Convention to issue different documents to seafarers depending on their citizenship, granting them different rights to enter and leave the territory of Estonia.

The Constitutional Review Chamber stated (in contrast to the Tallinn Administrative Court) that Article 29 of the Constitution is irrelevant in this case, since the subjective right to freely choose one's sphere of activity, profession and place of work, provided for in Article 29 of the Constitution, does not apply to an already existing labour relation.

Since the Government invalidated the contested regulation before the decision of the Constitutional Review Chamber was promulgated, the Chamber simply declared the regulation to be unconstitutional and dismissed the petition of the Tallinn Administrative Court.

Chief Justice Rait Maruste delivered a separate opinion. He agreed with the main principles of the decision, but pointed out, as *obiter dictum*, that Estonia has made a political decision to become a member of the European Union. Under Article 68 of the Europe Agreement Estonia is obliged to bring existing and future legislation into line with that of the Community. According to Article 48.2 of the Treaty establishing the European Community, freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The principle of equal treatment is also one of the principles of European law.

Cross-references:

Decision 3-4-1-1-97 of 11.06.1997, *Bulletin* 1997/2 [EST-1997-2-001].

Languages:

Estonian.

Identification: EST-1998-2-005

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 17.08.1998 / **e)** 3-4-1-5-98 / **f)** Review of the constitutionality of the Rules of Timber Transactions / **g)** *Riigi Teataja* (Official Bulletin), 1998, no. 58, Article 939 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Temporal effect - Postponement of temporal effect.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources.
General Principles - Certainty of the law.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Fundamental Rights - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Legislative delegation / Regulation / *Vacatio legis* / Taxation.

Headnotes:

A provision in a law that delegates regulatory powers is directed to the future and cannot legalise a governmental regulation issued before the delegation provision came into effect. Such a regulation is in conflict with Article 87.6 of the Constitution. The delegation provision is, at the same time, an order to the executive to issue a regulation necessary for the implementation of the law, and the regulation has to be passed during the period of *vacatio legis*.

A governmental regulation which has not been issued on the basis of a tax law must not affect the tax burden of the tax-payers.

Summary:

The Tartu Circuit Court requested the Constitutional Review Chamber of the Supreme Court to invalidate Articles 3.5, 3.6 and 7 of the Rules of Timber Transactions, enacted by a governmental regulation, on account of the fact that it conflicted with the Constitution. The Constitutional Review Chamber allowed the petition.

The Constitutional Review Chamber ruled that Article 87.6 of the Constitution, which states that the Government shall issue regulations on the basis of and for the implementation of law, means, *inter alia*, that the Government can issue regulations only if there is a delegation norm enacted beforehand by the legislature. Neither the Forest Act nor any other law contained a delegation norm empowering the Government to enact the Rules of Timber Transactions at the time when the Rules were enacted by a regulation of the Government. Thus, the Government passed the regulation in conflict with Article 87.6 of the Constitution. The delegation norm was introduced by the *Riigikogu* into the Forest Act later, only after the regulation had been issued. In legal theory there is a difference between delegating the power to legislate and sanctioning already existing legislation. As the idea of delegation is aimed towards the future, a delegating provision cannot sanction administrative acts which have already been issued. The application of a governmental regulation enacted before the delegating provision violates the principle of legal certainty.

The delegation provision is also an order to the executive to issue a regulation necessary for the implementation of the law. The application of a law may prove to be impossible if a regulation deemed necessary by the legislature has not been enacted. It is unacceptable from the viewpoint of constitutional review if the Government hinders by its omission the application of a law. The regulation has to be passed during the period of *vacatio legis*, so that the law, when it becomes effective, can be applied immediately.

Article 7 of the Rules of Timber Transactions affected the obligations of tax-payers. The Constitutional Review Chamber ruled that, in regard of state taxes, a tax-payer must pay only the taxes imposed by law, according to the amount and procedure provided for in the tax laws. The obligations of a tax-payer may be specified only by regulations issued on the basis of a tax law. A regulation issued on the basis of the Forest Act must not affect the tax burden of the tax-payer.

Chief Justice Rait Maruste delivered a separate opinion. He agreed with most of the principal positions of the decision, but did not agree with the conclusions of the Chamber. Mr Maruste agreed that initially there was no provision delegating the competence to pass a governmental regulation, but according to him, after the delegation provision was introduced by the *Riigikogu* into the Forest Act, the violation was of formal character. Mr Maruste proposed the postponement of the effect

of the decision of the Supreme Court, in order to promote legal certainty and other constitutional values, so that the Government would have enough time to adopt a new regulation complying with the delegation.

Languages:

Estonian.

Finland

Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 May 1998 - 30 August 1998.

France
Constitutional Council

Statistical data
1 May 1998 - 31 August 1998

11 decisions including:

- 4 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
- 5 decisions on electoral matters taken pursuant to Article 59 of the Constitution, including 4 disqualifications for one year and 1 annulment

Note the publication of the Constitutional Council's observations on the legislative elections of 25 May and 1 June 1997.

Important decisions

Identification: FRA-1998-2-002

a) France / **b)** Constitutional Council / **c)** / **d)** 05.05.1998 / **e)** 98-399 DC / **f)** Act on the entry into and residence in France of aliens and on the right of asylum / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 12.05.1998, 7092 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Sovereignty.
General Principles - Legality.
General Principles - *Nullum crimen sine lege.*
General Principles - Prohibition of arbitrariness.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Age.
Fundamental Rights - Civil and political rights - Right to a nationality.
Fundamental Rights - Civil and political rights - Freedom of association.
Fundamental Rights - Civil and political rights - Right to family life.

Keywords of the alphabetical index:

Criminal immunity, association / Fundamental principles recognised by French law / Judge, foreign, judicial function.

Headnotes:

A difference in treatment based on age does not entail a breach of equality when the age in question is of relevance to the subject of the law. Thus, the provision requiring notification of a refusal to grant an entry visa to the foreign children of French nationals who are less than 21 years old or dependants of their parents is considered to be in conformity with the principle of equality. This age not only takes into account the situation of economic dependence of the persons concerned and their right to a normal family life, but is also consistent with other provisions of the legislation on the entry and residence of aliens which establish the age of 21.

The principle of the statutory definition of offences and penalties requires that the scope of a criminal statute itself be determined by legislation in order to exclude arbitrary conviction and sentencing. Consequently, the law cannot leave it to the administration to draw up the list of humanitarian associations which might be eligible for immunity.

Judicial functions are inseparable from the exercise of national sovereignty. Hence, they cannot be entrusted to persons of foreign nationality. However, this principle may be departed from "to the extent necessary for implementing an international commitment entered into by France and provided that it does not infringe the essential conditions for exercising national sovereignty".

Summary:

Referral by the parliamentary opposition of a text drafted by the political majority which emerged from the 1997 legislative elections, although the Constitutional Council had rendered a decision just one year earlier (*Bulletin* 1997/1 [FRA-1997-1-003]) on a text relating to the same subjects and drawn up by the previous majority.

Languages:

French.

Identification: FRA-1998-2-003

a) France / **b)** Constitutional Council / **c)** / **d)** 20.05.1998 / **e)** 98-400 DC / **f)** Organic Law determining the conditions of application of Section 88.3 C on the exercise by citizens of the EU residing in France,..., of the right to vote and of eligibility to stand in municipal elections. Implementation of Directive 94/80/EC of 19 December 1994 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.05.1998, 8003 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – International treaties.
Constitutional Justice – The subject of review – Community law – Subordinate law.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and other domestic legal instruments.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and constitutions.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and other domestic legal instruments.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – Citizenship.
Fundamental Rights – Civil and political rights – Electoral rights – Right to vote.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.

Keywords of the alphabetical index:

List of candidates / Electors of senators, nomination / Constitutional Council, review of the conformity of law with treaties.

Headnotes:

Conformity of an organic law with primary and secondary Community law. The reference to the nationality of the Community candidates on the lists of candidates and the ballot papers printed on their behalf was not found to be discriminatory.

Article 88.3 of the Constitution, adopted with a view to ratifying the Maastricht Treaty, prohibits non-French Community nationals from exercising the function of mayor or deputy mayor as well as from participating in the nomination of those who elect senatorsor, *a fortiori*, in the election of senators. Consequently, the Constitutional Council found that the reference to nationality should be understood as necessary for informing the electorate.

Summary:

Automatic referral by the Prime Minister of an organic law concerning implementation of Community Directive no. 94/80/EC of 19 December 1994. This text lays down conditions for the exercise of the right to vote and eligibility in municipal elections of citizens of the European Union residing in a member State of which they are not nationals, as specified in Article 8.B.1 EC (Treaty establishing the European Community).

The ratification of this provision by France made necessary the constitutional revision of 25 June 1992, and notably the introduction of a new Article 88.3 of the Constitution, which in turn refers to an organic law. However, in a decision of 2 September 1992 (92-312 DC), the Constitutional Council drew attention to the obligation to comply with Community provisions for the implementation of the right laid down in Article 8.B.1 EC.

The Council's review of a Community rule thus constitutes an exception. In keeping with established case-law since 1975, the Council does not review the conformity of legislation with treaties. In this case, and stating that it was responding in this manner to the "actual intention of the authors of the Constitution", the Council had to assess whether the organic law was in conformity with both Article 8.B.1 EC and the Directive issued for its implementation.

Languages:

French.

Identification: FRA-1998-2-004

a) France / **b)** Constitutional Council / **c)** / **d)** 20.06.1998 / **e)** 98-401 DC / **f)** Outline and incentive law relating to the reduction of the working week (so-called "Aubry Act on the 35-hour working week") / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 14.06.1998, 9033 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Employment.
Fundamental Rights - Economic, social and cultural rights - Right to just and decent working conditions.

Keywords of the alphabetical index:

Working time / Work, legal length / Freedom of enterprise / Working conditions, collective determination / Regulatory power / Social security, law on financing.

Headnotes:

The legislature is not failing to exercise its powers by leaving it to the regulatory authority or to collective negotiations to set conditions for granting aid to businesses which reduce the actual number of hours worked.

Such aid is not covered by any heading of the constitutional provisions setting the ambit of the law (Article 34 of the Constitution). However, the regulatory power must: 1) avoid any unjustified discrimination between businesses and/or branches in the definition of criteria establishing eligibility for increased aid; and 2) ensure respect for the rights of the defence in the application of sanctions suspending the aid.

Summary:

Law referred by the opposition, declared to be lawful by the Constitutional Council: example of the "interpretative comments" method employed by French constitutional judges.

Languages:

French.

Identification: FRA-1998-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 25.06.1998 / **e)** 98-402 DC / **f)** Legislation concerning various economic and financial provisions / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 03.07.1998, 10147 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Legislative bodies - Law-making procedure - Right of amendment.

Keywords of the alphabetical index:

Joint Committee, meeting.

Headnotes:

Amendments may only be adopted after a meeting of the Joint Committee if they fulfil at least one of the following conditions: they must be directly relevant to a provision of the text under discussion; they must be dictated by the need to ensure co-ordination with other texts being drawn up by the Parliament.

Languages:

French.

Identification: FRA-1998-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 29.07.1998 / **e)** 98-403 DC / **f)** Outline law on efforts to combat exclusion / **g)** *Journal officiel de la République française*

- *Lois et Décrets* (Official Gazette), 31.07.1998, 11710 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
General Principles - Separation of powers.
Institutions - Legislative bodies - Law-making procedure - Right of amendment.
Fundamental Rights - Civil and political rights - Inviolability of the home.
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:

Requisition of vacant dwellings / Eviction, procedure.

Headnotes:

In accordance with its recent case-law (98-402 DC, *Bulletin* 1998/2 [FRA-1998-2-005]), the Council found three articles unconstitutional because they stem from amendments adopted after a meeting of the Joint Committee and are not relevant to the text under discussion.

The reform of the seizure of real estate might have led to the sale of a building without the consent of the purchaser. By so seriously infringing the right freely to dispose of one's property, the legislature exceeded the limits which it could impose on the right to own property in the pursuit of the objective of constitutional value which constitutes the right of everyone to decent housing (see *Bulletin* 1995/1 [FRA-1995-1-007]).

By making participation by the executive authorities contingent on a prior administrative procedure when the judge has ordered the eviction of the tenant, the legislation infringes the principle of the separation of powers.

Lastly, the Constitutional Council strictly specifies the application of two articles by carefully defining "vacant dwellings" and regulations governing compensation for their requisition.

Languages:

French.

Georgia
Constitutional Court

Important decisions

Identification: GEO-1998-2-002

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.05.1998 / **e)** 2/59-8 / **f)** Lutseta Tapliashvili v. the President of Georgia / **g)** Official Gazette / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Constitutional jurisdiction - Relations with other institutions - Executive bodies.
Fundamental Rights - Civil and political rights - Right to family life - Succession.
Fundamental Rights - Civil and political rights - Right to property - Expropriation.
Fundamental Rights - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Housing, privatisation / Privatisation, special instructions / Constitutional Court, powers.

Headnotes:

A normative act by the executive regulating issues of privatisation in favour of tenants does not contradict the constitutional right to property enshrined in Article 21.1 of the Constitution. Privatisation of premises which were registered as public property at the time of privatisation does not constitute a ground for declaring the relevant normative act unconstitutional. The Constitutional Court is not empowered to instruct other State authority bodies to prohibit the privatisation of houses.

Summary:

The Cabinet of Ministers issued a decree which entitled tenants to obtain privatisation of premises owned by the State. An individual lodged a claim with the Constitutional Court and asserted a violation of her constitutional right to property ensured by Article 21.1 of the Constitution, stating that the disputed act empowered tenants to unlawfully obtain privatisation of premises which were previously owned by her grandfather and of which he had been deprived by the Soviet authorities in 1930. The plaintiff also requested the Court to provide the responsible body with special instructions in order to prohibit the privatisation of those premises which are subject to proceedings in courts of ordinary jurisdiction.

The Court held that the disputed normative act deals with only those apartments and premises which were registered as State property at the time of privatisation. Families that paid rent and enjoyed tenancy rights were entitled to have the premises and apartments privatised under the decree. Therefore, if a court of ordinary jurisdiction held that the premises were unlawfully privatised by tenants who were moved into the house in violation of the owners' property rights, the contract of privatisation must be annulled.

Pursuant to the Constitution and organic laws, the Constitutional Court is not competent to instruct any State authority to impose prohibitions.

Languages:

Georgian, English.

Germany
Federal Constitutional Court

Statistical data
1 May 1998 - 31 August 1998

- 5 decisions by a panel *(Senat)*
  - all judgments concerning individual constitutional complaints
  - 3 case dealt with (taking into consideration the joinder of cases)
- 1104 rejecting decisions of the chambers *(Kammern)*,
  - 12 cases dealt with (taking into consideration the joinder of cases)
- 9 granting decisions of the chambers,
  - 2 cases dealt with (taking into consideration the joinder of cases)
- 1807 new cases

Important decisions

Identification: GER-1998-2-007

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 01.07.1998 / **e)** 2 BvR 441/90 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Margin of appreciation.
Fundamental Rights - General questions - Entitlement to rights - Natural persons - Prisoners.
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 - Individual liberty - Prohibition of forced or compulsory labour.
Fundamental Rights - Economic, social and cultural rights - Right to just and decent working conditions.

Keywords of the alphabetical index:

Personality, general right / Pension, old age, insurance scheme / Remuneration / Wage / Work, assignment / Employment / Pay, continuance / Prisoner work / Prisoner pay / Prisoner / Human dignity / Resocialisation, principle / Pension, social security / Forced labour / Tandgible advantage.

Headnotes:

The Basic Law requires the legislator to develop an effective concept of resocialisation as the basis of executive practice. In doing so, the legislator is allowed a large scope of discretion.

Forced labour during imprisonment is an effective means of resocialisation only when the work carried out is adequately acknowledged. Adequate acknowledgement may be financial or of another kind. It must be suitable, however, to demonstrate to prisoners the importance of regular work for a future independent life outside prison in the form of a tangible advantage to him.

The legal concept of resocialisation by forced work which is compensated exclusively or mainly in a financial manner, can contribute to constitutionally required resocialisation only when the prisoner, by the level of payment he is entitled to, can to a minimum extent be made aware of the fact that gainful work is useful as a means of making one's living.

Article 12.3 of the Basic Law restricts permissible forced labour to institutions in which the executive authorities retain the public responsibility for the prisoners entrusted to them.

Summary:

I. According to § 41 of the law governing the execution of sentences (*Strafvollzugsgesetz StVollzG*), prisoners serving a sentence in Germany are in principle obliged to work according to their physical abilities.

By the reform of the executive procedures in 1976, the legislator redefined the external framework of conditions for work carried out by prisoners and re-assessed the work of prisoners. Work in prison was intended mainly to serve the 'treatment' of prisoners and thus promote their occupational integration on the one hand, and provide for a future economic basis on the other. In essence, work in prison should be paid in a way comparable to payment outside. Prisoners should also be fully included in the social security insurance scheme.

These essential aspects of the reform concept had not been implemented by the *Länder* responsible. More than twenty years after the reformed executive regulations had come into force, prisoners are still paid wages, the level of which, in the normal case, corresponds as before to a small 'reward' for the work performed. The increase

in the level of payment announced in § 200.2 *StVollzG* has not been implemented. Nor have working prisoners been integrated into the health insurance and social security insurance schemes (§ 198.3 *StVollzG*).

Within the framework of four constitutional complaints and a judicial motion for review of the executive regulations of work by prisoners, the Federal Constitutional Court had to examine whether the level of payment and the fact that working prisoners were not integrated in the social security pension insurance scheme are compatible with the Basic Law. At the same time, the Court had also to decide the basic issue whether the duty to work during imprisonment according to the *StVollzG* is compatible with the prohibition of forced labour.

II. 1. The Second Panel of the Federal Constitutional Court held that it was a constitutional requirement to orient executive practice towards the aim of resocialising prisoners. Each prisoner has the right to requirement that this aim be satisfied despite any measures imposed upon him. Resocialisation does not only imply providing a prisoner with the ability and willingness to live a responsible life; it serves at the same time to protect the community as a whole, as it is the community's immediate interest to prevent the prisoner from re-offending and harming his fellow citizens and the community once again. In accordance with these aims, the legislator has the duty to develop an effective concept of resocialisation as the basis of executive practice.

2. A legal concept of resocialisation by forced work which is compensated exclusively or mainly in a financial manner, can contribute to constitutionally required resocialisation only when the prisoner, by the level of payment, can to a minimum extent be made aware of the fact that gainful work is useful as a means of making one's living. However, the legislator may take the typical conditions of life in prison, especially its distance to markets, into account. The cost of prisoner work for entrepreneurs and other competing production facilities may also play a role. The legislator, therefore, has a large scope of discretion in this field.

III. 1. These criteria, if transposed to the present case, confirm that the resocialisation concept developed by the *StVollzG*, as far as it is in force and provides for forced labour and its remuneration, satisfies the constitutional requirements in principle.

If the resocialisation concept of the *StVollzG* had been fully put into force – i.e. including the intended increase of payment and the comprehensive inclusion of prisoners into the social security insurance systems – the legislator would have complied with the resocialisation requirement not only to the minimum extent required, but would have fulfilled it generously.

2. The duty to work according to § 41 *StVollzG* is also in accordance with Article 12.3 of the Basic Law since this duty exists only to the extent to which work is carried out under the public responsibility of the executive authorities. Any more far-reaching transfer of the overall responsibility, especially commitment of prisoners to the exclusive control of a private person, is legally not permitted.

These requirements may also be satisfied through employment of work release prisoners (forced labour with external enterprises). However, the executive practice of several *Länder* of restricting free employment (§§ 39.1 and 39.11 *StVollzG* – work release of prisoners) and of admitting such employment in exceptional cases contradicts the requirement of resocialisation. If a prisoner eligible for work release cannot be offered external employment – despite efforts made by the panel institution – it may not be excluded that a prisoner, with his consent, is assigned to an external private enterprise for a certain work. In this case, however, a minimum of organised public responsibility of the penal institution for the prisoner must be ensured.

The practice objected to only exceptionally of providing the chance of external employment for work release prisoners, must be stopped on 31 December 1998 at the latest. Until this date, the Senate has advised allowing the executive authorities time to win greater support by private companies for employment of eligible prisoners.

3. § 43 *StVollzG* which, in principle, allows prisoners performing forced labour the right to claim remuneration is constitutional. Providing for a 'basic pay', the legislator could without violating the principle of equality (Article 3.1 Of the Basic Law) pursue the aim of avoiding excessive differences of income among prisoners and the negative effects of these on life in prison. As far as § 43 paragraph 2 *StVollzG* provides for a graduation of payment, the law also allows for individual circumstances to be taken into account and for an adequate differentiation of payment to be made.

4. Furthermore, there are no constitutional objections to the fact that the inclusion of prisoners in the legal social security insurance scheme is reserved to regulation by a specific Federal law not yet adopted. The intended regulation which is not in force, however, provides for prisoners to be integrated in the social security systems on the basis of 90 % of the legal reference value. Such an extensive regulation is not required either by the constitutional requirement of resocialisation or the

principle of equality (Article 3.1 of the Basic Law). On the contrary: a legal regulation providing for the inclusion of prisoners in the social security insurance system would have to be defended against objections relating to the equality principle.

5. The regulation of payment in § 200.1 *StVollzG*, however, is incompatible with the constitutional requirement for resocialisation. The present level of payment cannot contribute to the prisoner's resocialisation because the amount the prisoner in fact receives does not convince him to the necessary minimum extent that gainful employment is reasonable as it provides the financial basis of life.

These considerations have prompted the Panel to declare § 200.2 *StVollzG* incompatible with the constitutional requirement of resocialisation.

Pending a new regulation, a legal basis must be available. The Panel, therefore, has decided that § 200.1 *StVollzG* continues to be in force for the time being, until 31 December 2000 at the latest. Notwithstanding the legislator's duty to take action immediately, the Court fixed this date on the assumption that revising the legal fundaments will take some time.

IV. The reporting judge, Judge of the Federal Constitutional Court Kruis, has added a dissenting vote. He agreed with the Court's judgment as far as forced labour is concerned. However, he is of the opinion that the question of adequate payment – in the light of the protection of human dignity (Article 1.1 of the Basic Law) – arises separately from the constitutional requirement of resocialisation and from the purpose of resocialisation through work.

Languages:

German.

Identification: GER-1998-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 14.07.1998 / **e)** 1 BvR 1640/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Procedure – General characteristics.
Constitutional Justice – Procedure – Originating document.
General Principles – Public interest.
General Principles – Legality.
General Principles – Reasonableness.
Fundamental Rights – Civil and political rights – Right to family life.
Fundamental Rights – Civil and political rights – Right to self fulfilment.
Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

General freedom of action / German spelling, uniformity / Right of education / Personality, free development / Conference of the Ministers of Culture / Personality, right / Authority to regulate / Authority to withdraw / Educational duty of the State / Constitutional complaint, withdrawal / Economic action, freedom.

Headnotes:

The State is not hindered by the Constitution when regulating the correct spelling of the German language for instruction at schools. Neither does the Basic Law contain a general prohibition on reforming spelling.

Regulations on the correct spelling for instruction at school are within the competence of the *Länder*.

To introduce a new regulation on German spelling into the schools of the *Land* Schleswig-Holstein, decided by the Conference of the German Ministers of Culture on 30 November / 1 December 1995, no specific legal basis beyond the general provisions on learning aims fixed in the school law of the *Land* is required.

The new regulation does not violate any basic rights of parents or pupils.

Summary:

I. 1. In 1987, the Federal Minister of the Interior and the Conference of the Ministers of Culture commissioned the Institute for German Language to work out proposals for a reform of German spelling. The proposals submitted in 1988 gave rise to vivid discussions. Following these discussions, the proposals were revised by the International Working Group for Orthography. After several changes, the reform proposals were finally

accepted by the Conference of the German Ministers of Culture on 1 December 1995.

2. The complainants are parents of two school-age children attending a primary school in Schleswig-Holstein. According to an ordinance by the Ministry of Culture of the *Land* Schleswig-Holstein dated 5 November 1996, the children are instructed according to the new spelling rules.

According to the ordinance, the new spelling is accepted as correct and is used in preference to the old one for any subject of instruction in any class of any school type of the *Land* Schleswig-Holstein. Outdated rules and spelling must not be introduced or used any more. In written examinations, only spelling which is not allowed by the new rules is considered to be wrong.

3. The complainants filed an action against teaching according to the new rules; the action is still pending. Their motion for an injunction was dismissed by both the Administrative Court and the court of second instance.

In their constitutional complaint, the complainants allege a violation of their children's general right of personality and of their own rights according to Article 2.1 of the Basic Law in combination with the principle of the rule of law, and Article 1.1 of the Basic Law as well as sentence 1 of Article 6.2 of the Basic Law.

In their opinion, the State is not allowed to make spelling a subject of State regulation when the regulation does not only trace, but change the usual spelling. For a spelling reform, a special legal provision is required. According to the principles of the rule of law and of democracy, any essential decision in this respect has to be made by the legislator himself.

In the complainants' opinion, the right of personality of their children is violated because teaching the new spelling is unconstitutional for lack of a legal basis, and because the spelling reform is unreasonable in its content. They themselves are affected as far as their right to linguistic integrity is concerned.

Moreover, the significance of the parental right of education in defining the educational duties of schools was not duly recognised.

4. After a hearing in the Federal Constitutional Court, the complainants have withdrawn their constitutional complaint on 6 July 1989.

II. The First Panel of the Federal Constitutional Court dismissed the constitutional complaint against the introduction of the new regulation on German spelling as unfounded.

1. The constitutional complaint had to be decided although it had been withdrawn by the complainants.

When a constitutional complaint has been accepted for decision because of its general importance (sentence 2 of § 90.2 BVerfGG), a withdrawal of the constitutional complaint has no effect when the constitutional dispute was the subject of a hearing and when the matter in dispute is of lasting importance.

2. The decisions attacked by the constitutional complaint do not violate the basic right of the complainants according to sentence 1 of Article 6.2 of the Basic Law:

The parental right of education and the educational claim of the State in the sphere of schools according to Article 7.1 of the Basic Law ("The entire educational system shall be under the supervision of the state") are of equal rank. However, the State must respect the parents' responsibility for the entire programme of education of their children and must be open to the variety of notions in educational questions to such extent as it is compatible with an ordered State school system.

The need for spelling reform, as well as its content, quality and benefits, cannot be evaluated by constitutional criteria. The Basic Law does not contain any rules governing linguistically correct spelling and the correct organisation of written texts by punctuation marks.

The Constitution, furthermore, does not contain a prohibition to make spelling the subject of state regulation. Neither can such a prohibition be derived from the assumption that the language "belonged" to people. The fact that something does not belong" to the State does not hinder the State to regulate its use.

The same applies to a general prohibition on reforming spelling. The State is not confined to only tracing what has in the course of time and without the State's influence become the generally acknowledged way of spelling.

Such regulations may also be issued by the *Länder*.

The decision by the Conference of the Ministers of Culture dated 1 December 1995, and the decree of the Ministry of Culture of the *Land* Schleswig-Holstein dated 5 November 1996, refer to the school system which, according to the Basic Law, is exclusively assigned to the competence of the *Länder*.

The regulating authority of the *Länder* does not conflict with the fact that spelling as a means of communication

implies great uniformity in the entire linguistic area, if the constitutionally guaranteed possibility of communication is ensured. The *Länder* may establish uniformity in compliance with the Constitution by way of self-coordination, by coordination with the Federation and by agreement with foreign states of the German speaking area. As far as the spelling reform is concerned, the *Länder* in fact proceeded in this way.

A specific legal regulation was not needed. It is true that the legality principle requires that State actions in certain fundamental fields must be legitimised by formal law. The legislator must make all essential decisions himself; he may not leave them to other rule makers. However, teaching pupils the reformed spelling rules is not of essential importance for the exercise of parental rights.

It must be taken into account that the extent of the intended changes in spelling is relatively small. According to the Conference of the Ministers of Culture, changes, in terms of quantity, concern only about 0.5 % of the vocabulary.

The basic rights of pupils do not enforce a parliamentary decision in the form of a specific act. It is true that, according to Articles 2.1 and 1.1 of the Basic Law (free development of personality and right of personality) pupils have the right to develop their personality as unhindered as possible including in schools; this implies the right to develop of their talents and abilities within the framework of school education. Pupils can also demand that the State, in setting the curriculum, respects their right of personality. If a violation of the relevant basic rights could be assumed, the implementation of the spelling reform still did not require any legal regulation beyond the provisions of the school law of the *Land*.

As to the parental right of education, according to the constitutionally unobjectionable assumptions of the administration of culture, the new spelling rules will facilitate the learning of literary language for pupils.

Finally, the implementation of the spelling reform is not substantial, in the sense of the legality principle, as far as the exercise of basic rights by third persons is concerned. The new regulation does not violate the freedom of profession according to Article 12.1 of the Basic Law nor the freedom of economic action according to Article 2.2 of the Basic Law.

3. The decisions objected to do not violate the basic rights of the complainants according to Article 2.1 of the Basic Law (general freedom of action) or Article 2.1 of the Basic Law in combination with Article 1.1 of the Basic Law (general right of personality).

It can remain open whether these rights grant individuals the right of being allowed to continue writing according to the traditional spelling. These rights are not interfered with by implementation of the spelling reform. Persons outside the school sphere are legally not bound to comply with the new rules; they are free to write as before. They are not hindered from doing this by the broad effect the reform will probably have.

Languages:

German.

Identification: GER-1998-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 29.07.1998 / **e)** 1 BvR 287/93 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Weighing of interests.
Fundamental Rights - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Disparagement, malicious / Leaflet / Interpretative alternative / Defamation / Criticism / Polemics / Malicious reviling / Protective range / Slander.

Headnotes:

Condemnation by a penal court because of the dissemination of a leaflet containing statements maliciously reviling the State may be a violation of the Basic Rights when, in the grounds of the judgment, the right to freely express one's opinion has not been adequately taken into account.

Summary:

I. In remembrance of the explosive attack at the Munich October festival in 1980, a commemorative event was organised by several groups in September 1991. On the occasion of this event a leaflet was disseminated vehemently and partly polemically attacking the German State; the Federal Republic and the Free State Bavaria

were compared with a fascist State obsessed by great power politics. As the complainant signed as responsible for the leaflet's content, he was subsequently fined for having maliciously reviled the State. His appeal from the judgment failed. Thereupon the complainant brought a constitutional complaint before the Federal Constitutional Court; he alleged, among other things, a violation of his Basic Right to freely express his opinion.

II. The First Chamber of the First Panel of the Federal Constitutional Court granted the constitutional complaint. Substantiating its decision, the First Senate declared in essence:

1. The leaflet predominantly contains opinions. These always fall under the range protected by sentence 5 of Article 5.1 of the Basic Law; a substantiation or the truth of the statements are irrelevant. They do not lose this protection even if they are expressed sharply and in an exaggerated way.

2. Regarding the Basic Right of the freedom of expression, penal courts passing sentence because of statement offences have to observe primarily two aspects:

a. On the one hand, the expression must not be attributed a meaning which, objectively, it does not have. In the case of ambiguity, the court is not allowed to assume the interpretation leading to conviction before other possibilities of interpretation have been excluded on convincing grounds.

b. On the other, it is exactly in matters of State security regulations that great care must be taken in differentiating between polemics which is exempt from punishment - however inappropriate it may be - and a (punishable) defamation or malicious disparagement. Article 5.1 of the Basic Law has emerged exactly from a specific need for protection of any criticism of State power; its significance in this respect has not changed.

3. The decision objected to by the constitutional complaint fails to meet these requirements.

a. In its grounds, the penal court interpreted the leaflet to the effect that the Federal Republic of Germany and the Free State Bavaria are identified with a fascist state. There are no constitutional objections to regarding this as disparagement in the sense of § 90.1.1 Penal Code. The text of the leaflet, however, does not necessarily suggest such identification without leaving any alternative. The structure of the leaflet in particular which contains three thematically different parts may also be interpreted in such a way that German State authorities are reproached with blindness or indulgence over neofascist activities. This, however, does not necessarily imply an assertion of approval of such actions and activities or even an identification with fascist States.

b. The same applies to the characterisation of German policy as aggressive great power politics. This statement, too, can be understood as a critical assessment of German political aims and not as an identification of the Federal Republic as a whole with a fascist State. It is not relevant for the interpretation of the statement whether such reproaches justified or not. It is only decisive whether in case preference is given to this interpretation, an offence according to § 90.1.1 Penal Code could be assumed. Such interpretative alternatives, however, have not been considered by the court.

c. However, even if the interpretation of the text of the leaflet by the penal court were correct, a constitutionally required weighing between the extent of impairment of the freedom of expression by the condemnation and the extent of impairment of the subject protected by § 90.1.1 Penal Code would have been necessary.

Such weighing was not carried out. It was not dispensable either from the point of view of libellous criticism, for example. It is true that an invective regularly makes the right of free expression stand back; in the present case, however, an invective was neither sufficiently substantiated by the court nor did its preconditions exist.

Even when the question of whether the principles of libellous criticism refer not only to persons but also to the State can be left open, exaggerated or even aggressive criticism is at any rate not enough. The statement must, in addition, centre not on a controversial issue, but on the defamation of a person.

To the complainant, it was primarily a matter of a political issue involving fundamental questions of essential interest to the public. In particular, the investigations following the explosive attack, the attitudes of the police and politicians towards acts of violence against foreigners, the return of expropriated works and the foreign attitude and behaviour of the Federal Republic of Germany after reunification were to be made the subject of discussion.

Libellous criticism prevails only if in these statements, in their context, defamation of the State had pushed the dispute of facts completely into the background. This must be doubted, however, precisely because the partly sharply and exaggeratedly formulated statements were evidently intended to support the conclusions drawn from the criticised political situation.

The First Chamber of the First Panel of the Federal Constitutional Court has therefore remitted the case to the penal court for a second decision to be made in consideration of the decision of the Constitutional Court. The penal court has to examine in particular whether the leaflet which was the reason for the condemnation, allowed according to its design and language other interpretations of its content, and whether these interpretations would be punishable as well.

Languages:

German.

Identification: GER-1998-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 05.08.1998 / **e)** 2 BvR 153/96 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - General questions - Entitlement to rights - Foreigners.
Fundamental Rights - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.
Fundamental Rights - Civil and political rights - Right of asylum.

Keywords of the alphabetical index:

Deportation, obstacle / Asylum seeker / Asylum, relevance for asylum / Prognosis of danger / Political persecution / Statement of facts / Political activities / Political malus / Elections, boycott, persecution / Leaflets, distribution, persecution.

Headnotes:

The case concerns the question of what constitutional requirements courts have to observe in ascertaining the political character of measures of persecution in compliance with the law governing asylum [official headnotes].

According to the jurisdiction of the Federal Constitutional Court, persecution is of a political nature when, following the criteria relevant for asylum, it deliberately causes harm to a person which, by its intensity, excludes the individual from the peace ensuring legal order of the state. Whether the aims of persecution are specific in this sense and persecution hence occurs "because of" a relevant criterion must be judged on the basis of its nature, contents and the recognisable intention of the measure itself. Any subjective reasons or motives guiding the persecutors are irrelevant.

Measures of State self-defence, may also be a reason to grant the right of asylum. As the protective range of the Basic Right of asylum comprises an active political conviction, State persecution of actions implementing a political conviction may in principle be political persecution.

The special courts are allowed some scope of assessment in checking these criteria. An assessment is unconstitutional, however, when the grounds furnished by the court do not allow for the assessment to be reproduced.

Summary:

The complainant, a Lebanese citizen, entered the Federal Republic of Germany in October 1992 and applied for recognition as an asylum seeker. He substantiated his application by alleging that he was arrested while he was distributing leaflets containing an appeal to boycott the elections. After arrest, he said he was severely tortured because of his affiliation with the group of General Aoun. He was released on bail only. Expecting penal proceedings in Lebanon leading to a presumable custodial sentence of three to five years, he decided to leave his country for Germany.

The Federal Office for the recognition of foreign refugees dismissed his application in 1994. The Office, furthermore, saw no obstacles to deportation according to the Foreigners Act. The complainant was at the same time given warning of his deportation to Lebanon. The Office substantiated its decision by declaring the allegation of the complainant incredible. In the Office's view, this is not a case of political persecution, but of prosecution of a criminal offence. There is no basis for assuming a political purpose of punishment. The complainant brought an action against this decision before the administrative court. In the court hearing, the man described the circumstances of his arrest, his detention and the reasons for the distribution of leaflets in greater detail. The Court, thereupon, revoked the warning of deportation and required the Federal Office to declare an obstacle to deportation to exist in accordance with § 53.4 Foreigners Act.

In its reasons the Court stated that there are no doubts about the man's credibility. But, the Court argued, he was not politically persecuted in Lebanon, as there is not sufficient reason to assume that the authorities wanted to punish him also because of his political conviction. The precondition for assuming political persecution is lacking. The Court was convinced that for the Lebanese authorities it was not a matter of punishing or suppressing a person's political conviction, but of ensuring law and order and securing the elections against a boycott. Torture, too, is not indicative of political persecution, as in Lebanon such infringements upon accused persons are current practice for both 'political' and 'usual' delinquents. This may be regarded only as an obstacle to deportation according to § 53.4 Foreigners Act.

The complainant objected to this decision by means of a constitutional complaint, alleging a violation of the Basic Right of political asylum in particular.

I. The First Chamber of the Second Panel partly reversed the decision of the administrative court because of a violation of Article 16.a.1 of the Basic Law "Basic Right of asylum" and remitted the case to this court for a second decision.

1. Measured against the principles set out in the headnotes, the reasoning of the administrative court on the political character of the persecution does not stand up to the constitutional review: in contrast to the view of the administrative court it is not essential whether the action against the distribution of leaflets was "politically motivated" or whether it should only safeguard the unhindered execution of the elections. Rather it is decisive how the measures taken against the complainant appear in the light of their recognisable intention. The judgment of the administrative court does not make it sufficiently clear that the actions could have served another purpose than the purpose of hindering the complainant from implementing his political conviction (boycott of the elections). Nor does the court's reasoning provide any information about what kind of criminal component, beyond an activation of the complainant's political conviction – e.g. endangering subjects of legal protection – may have been associated with the leaflet campaign.

2. In evaluating the danger of maltreatment of the complainant in Lebanon, furthermore, the court itself admitted that the prosecution authorities in Lebanon have been known to respond "with special toughness" when the regulations of State security are concerned. The court has thus ascertained a "*political malus*". Given these facts it is no longer understandable why the court only derived an obstacle to deportation and denied the menace of political persecution. The greater likelihood of maltreatment in violations of state security regulations, as assumed by the court, in fact suggests the political nature of the persecution.

Languages:

German.

Identification: GER-1998-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 05.08.1998 / **e)** 1 BvR 264/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – Courts.
Sources of Constitutional Law – Categories – Written rules – Community law.
Sources of Constitutional Law – Categories – Case-law – International case-law – Court of Justice of the European Communities.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Primary Community law and constitutions.
General Principles – Certainty of the law.
General Principles – Prohibition of arbitrariness.
Fundamental Rights – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Court of Justice of the European Communities, submission / Pension scheme, old age / Company pension / Part-time workers / Lawful judge / Reliability / Preliminary ruling, requirement / Maastricht treaty, protocol note.

Headnotes:

The case concerned whether the issue of whether the exclusion of part-time workers from a company pension scheme violates the principle of equality has to be submitted to the European Court of Justice [official headnotes].

The quasi-constitutional guarantee of sentence 2 of Article 101.1 of the Basic Law does not imply that the

Federal Constitutional Court has the function of a control body having to correct any procedural mistake a court has made regarding its competence. It therefore objects to the interpretation and application of rules of competence only, when the rules, on a true assessment of the ideas underlying the Basic Law, appear no longer understandable and are obviously untenable. From this point of view, the duty of submission to the Courts of Justice of the European Communities is obviously neglected by national courts only in those cases in which a deciding court of the last instance fails to recognise its duty of submission. The same applies to those cases in which a national court consciously deviates in its decision from the jurisdiction of the Court of Justice of the European Communities on questions of essential importance for this decision and still does not submit, or again submit, the case to the Court of Justice of the European Communities.

The competitive aim of Article 119 EC does not require that the prohibition of retroactivity be applied to national protective regulations. The aim and object of the Article is rather to promote and achieve the imposition and application of such prohibitions of discrimination on the national level. The fact that the validity of this article is limited in time for certain cases of discrimination cannot lead to an immediate restriction of those national prohibitions of discrimination for which a protection of confidence is either not, or not to the same extent, required.

Summary:

I. In its judgment dated 17 May 1990 (*Barber* case, C-262/88) the Court of Justice of the European Communities decided that the payment of part-time workers on the basis of a labour contract is in principle subject to Article 119 EC. Article 119 EC prohibits any discrimination of men and women relating to payment, regardless of the circumstances leading to the discrimination. Article 119 EC is directly applicable to any kind of discrimination which can be ascertained by means of the criteria of the same work and the same payment; community or national measures to determine these criteria are not needed for their application. Any national court in which a person quotes Article 119 EC has to ensure the protection of the rights which this Article concedes individuals. For reasons of legal certainty, however, the immediate effects of Article 119 EC do not extend to the period before promulgation of the judgment (17 May 1990).

In a protocol note (*Barber* protocol) to Article 119 EC, drafted in Maastricht following the *Barber* judgment, the Federal Republic of Germany and the remaining EC member States have agreed that benefits according to a company social security system shall not be regarded as remuneration in the sense of Article 119 EC, if and as far as they originate from times of employment before 17 May 1990.

II. The complainant of the proceedings before the Federal Constitutional Court – a successor company of the former state-owned *Deutsche Bundespost* (Telecom AG) – objected to a judgment of the Federal Labour Court. The Federal Labour Court decided that the exclusion of part-time workers from the benefits of a company old-age pension scheme relating to the period before 17 May 1990 had no legal force because it violated Article 3.1 of the Basic Law.

The company defeated in the action before the Federal Labour Court essentially alleged a violation of the right to jurisdiction of the lawful judge (sentence 2 of Article 101.1 of the Basic Law), because the national court failed to submit the case to the Court of Justice of the European Communities. Only this Court could, with regard to the *Barber* judgment, have answered the question in this labour conflict concerning whether the prohibition of wage discrimination resulting from Article 119 EC, because of the prohibition of retroactivity fixed in the judgment and agreed among the EC member States in the *Barber* protocol, applies also to German prohibitions of discrimination (Article 3 of the Basic Law).

The Federal Labour Court, however, considered a submission to the European Court of Justice unnecessary holding that Article 119 EC ensures only a social minimum standard on the European level. This does not exclude an extended protection by national law.

III. The Second Chamber of the First Panel of the Federal Constitutional Court did not accept the constitutional complaint for decision, as the judgment objected to does not violate the complainant's rights according to sentence 2 of Article 101.1 of the Basic Law.

It is true, the First Panel held, that a national court is in certain cases obliged to have recourse to the Court of Justice of the European Communities, for this Court has the duty of interpreting community law uniformly.

In the present case, the Federal Labour Court denied a duty of submission on grounds which are at least justifiable. This Court's view that the prohibition of retroactivity according to European law (jurisdiction of the Court of Justice of the European Communities in the Barber case, and Barber protocol) need not to be applied to the present case is especially plausible because:

1. The Court of Justice of the European Communities itself has already decided that the limitation of the effect of the *Barber* judgment to the time following 17 May 1990 does not refer to the exclusion of part-time workers from a company old-age pension system. Regarding the right of part-time workers to requirement integration in a company old-age pension system, the Court of Justice of the European Communities has in several decisions (the last is of 11 December 1997, C-246/96) not seen any basis for the assumption that the groups involved could be mistaken about the applicability of Article 119 EC. This is clear since promulgation of the judgment in the *Bilka* case (judgment of the Court of Justice of the European Communities of 13 May 1986, C-170/74). The effects of this judgment have not been limited to a certain period of time either.

2. A duty of submission cannot be derived from the *Barber* protocol itself. The protocol which was intended to specify and limit the range of the *Barber* judgment does not contain any more far-reaching regulations.

3. Finally, the complainant's view that the prohibition of retroactivity according to European law applies also to national prohibitions of discrimination is not clearly preferable to the opposite view taken by the Federal Labour Court:

An explicit ruling in this sense is not contained either in Article 119 EC or in the *Barber* protocol. Both the jurisdiction of the Court of the European Communities and the agreement fixed in the protocol are intended to limit the far-reaching consequences of the verbatim *Barber* judgment. This, too, speaks against the protocol as a source of advice on a limited-in-time validity of national law.

Languages:

German.

Identification: GER-1998-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the first Panel / **d)** 11.08.1998 / **e)** 1 BvR 1270/94 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Reasonableness.
General Principles - Prohibition of arbitrariness.
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 - Freedom to choose one's profession.

Keywords of the alphabetical index:

Airline passenger / Airport security, fee / Cost, coverage / Burdens, equality / Security fee / Security checks / Principle of benefit.

Headnotes:

This decision concerned the compatibility of the legal regulation governing the imposition of airport security fees with the principle of equality of burdens and the freedom to exercise profession [official headnotes].

A judicial decision is arbitrary only when it cannot be legally justified under any aspect conceivable and hence leads one to conclude that it is based on irrelevant considerations.

Summary:

I. A Federal directive issued in June 1990 on the basis of the Air Traffic Act of 1980 provides for a fee of DM 3.50 to DM 6.50 per passenger to be paid for air passenger and baggage checks. Airlines are also obliged to inform the civil aviation office about the number of air passengers checked.

For the complainant - a supra-regional German airline company - the Saarland Ministry of Economics had assessed the fees for security checks from July 1990 to February 1992 at DM 145 000 in total.

Both the complainant's action against this decision brought before the Administrative Court and its leap-frog appeal to the Federal Administrative Court were unsuccessful.

By its present appeal to the Federal Constitutional Court the defeated airline company alleged a violation of the prohibition of arbitrariness. The company denies being debtor of the cost resulting from the checks. In the complainant's view, the fee imposed also contravenes the principle of the equality of burdens fixed in Article 3.1

of the Basic Law, and unreasonably restricts its freedom of profession (Article 12.1 of the Basic Law).

II. The First Chamber of the First Panel of the Federal Constitutional Court did not accept the constitutional complaint for decision on the following grounds:

In the present case, the Administrative Courts did not ignore any rule relevant to the decision. For the Courts it was justifiable to start from the assumption that the specification of cost pertaining to airport security checks includes a specific provision regulating the debtor/creditor functions involved. The decisions objected to by the constitutional complaint can thus in no way be regarded as arbitrary.

The legal regulation of the airport security fee the First Panel continued, is not unconstitutional. It represents not an extra charge violating the principle of the equality of burdens, but a constitutionally admissible fee. Security checks are a public service which has to be attributed to the individual airline company. It is true, the Court held, that the checks focus on the passengers. As a precaution taken before the flight organised by the airline company, however, the checks aim at ensuring the security of the event. In this way, passenger checks concern the airline as organiser of the flight in a specific and individual manner. As security checks provide enhanced security to an airline company, the cost of the checks can, according to the benefit principle, also be attributed to each company.

The individual airline's responsibility for the cost, the First Panel finally held, is not ruled out because the security checks, as a means of averting danger, are carried out in the public interest. Nearly all actions liable to a fee are performed also, or predominantly, in the public interest. For calling upon individuals to pay fees it is sufficient that the individual takes a special real advantage of the public service rendered. This holds true in the present case, the Court held.

Nor do airport security fees unreasonably interfere with the airline's freedom to practise a profession. The fee in particular does not unreasonably restrict the free commercial activities of airlines. Compared to the remaining flight cost, the fees are of secondary economic importance as they may, through fares, be fully or partly passed on to the passengers. As the airport security fee equally concerns all airlines operating in Germany, it does, from a competitive point of view, ultimately neither advantage nor disadvantage any airline company.

Languages:

German.

Identification: GER-1998-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 11.08.1998 / **e)** 2 BvQ 28/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of litigation - Electoral disputes - Parliamentary elections.
Constitutional Justice - Decisions - Types - Interim measures.
Fundamental Rights - Civil and political rights - Right to participate in political activity.

Keywords of the alphabetical index:

Temporary injunction / Elections / Party, recognition / Admissibility, precondition / Candidates, list, joint / Urgent decision / Disadvantages, substantial.

Headnotes:

A temporary injunction cannot be issued when the underlying constitutional complaint is *a priori* inadmissible.

Summary:

I. In the run-up to the election to the *Bundestag*, the applicant founded several associations in 1998 and applied for their recognition as parties. However, the Federal Election Committee which is responsible for the recognition of political parties, refused their recognition. The appellant, thereupon, filed several urgent motions to the Federal Constitutional Court; they all aimed at the recognition of the associations as parties for the election, and at a statement by the Court confirming that the conditions of a joint list of candidates are met.

II. The Third Chamber of the Second Panel of the Federal Constitutional Court dismissed the motions for an injunction on the following grounds:

According to § 32.1 of the Rules of the Federal Constitutional Court, the Court may issue a provisional order if the preliminary adjudication of a controversy is necessary for the prevention of substantial disadvantages. According to the security function of the provisional order, however, there is no room for issuing such an order in a constitutional complaint procedure if the constitutional complaint filed or still to be filed is assumed to be *a priori* inadmissible.

It is a principle applying to electoral matters in particular that decisions and measures relating directly to the electoral procedure can be contested only by the remedies provided in the electoral rules, and by scrutiny. For the elections to the *Deutscher Bundestag*, the only admissible remedies and possibilities of contesting are provided in Article 41 of the Basic Law, § 49 of the Federal Election Act and in the Scrutiny Act. Recognition as party by the Federal Election Committee in accordance with § 18.4.2 of the Federal Election Act belongs to those individual decisions directly relating to the electoral procedures in the sense of § 49 of the Federal Election Act. The same applies to the recognition of a joint list of candidates which the appellant is striving for without a recognised legal basis.

Languages:

German.

Identification: GER-1998-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 11.08.1998 / **e)** 1 BvR 666/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Exhaustion of remedies.
Fundamental Rights - General questions - Basic principles.
Fundamental Rights - Civil and political rights - Right of asylum.

Keywords of the alphabetical index:

Party to an action / Grounds / Due process of law, guarantee / Subsidiarity / Constitutional complaint / Admissibility.

Headnotes:

The institution of proceedings before the Federal Constitutional Court is contrary to the principle of subsidiarity, if the complainant did not exhaust all other legal remedies provided for by law before appealing to the Court.

Summary:

I. In accordance with sentence 1 of § 92.2 of the Rules of Administrative Courts, an action is regarded as withdrawn when the plaintiff does not pursue his action within a period of three months although he was requested by the court to observe the deadline. In these cases, the court decides to discontinue proceedings and announces the legal consequences of the withdrawal. This decision of the court is without appeal.

The complainants are fugitives who, upon entering Germany, applied for recognition as persons seeking asylum. Subsequently, they claimed, through a lawyer, benefits according to the Act governing benefits to asylum seekers. After the action was brought before the court, the court requested the lawyer to present his case. It pointed out, furthermore, that the action was regarded as withdrawn when this request was not followed up within three months. The period expired on 2 March 1998 (Monday). By telefax transmitted on 2 March 1998, the lawyer applied for an extension of the period.

The court, thereupon, decided to discontinue proceedings on the grounds that the action was regarded as withdrawn. The decision was without appeal.

By their constitutional complaint the complainants subsequently alleged a violation of Article 19.4 and Article 103.1 of the Basic Law.

II. The Second Chamber of the First Panel of the Federal Constitutional Court rejected the constitutional complaint as inadmissible.

The admissibility of the constitutional complaint is contrary to the principle of subsidiarity expressed in sentence 1 of § 90.2 of the Rules of the Federal Constitutional Court. These rules requirement that a complainant makes use of all procedural possibilities according to the

circumstances beyond a mere exhaustion of remedies provided by the law, in order to achieve a correction of the alleged violations of the Basic Law.

The complainants have not fulfilled these duties. In their constitutional complaint they objected rather to the discontinuance of action, without applying to the administrative court for continuation of the proceedings, in order to achieve a review by the court as to whether the conditions specified in § 92.2 of the Rules of the Administrative Court had been met.

If a corresponding application were filed, the administrative court would have to decide whether the action is discontinued by withdrawal or must be continued. As a result, the complainants could have achieved the continuation of proceedings before their appeal to the Federal Constitutional Court.

Languages:

German.

Identification: GER-1998-2-015

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 11.09.1998 / **e)** 2 BvR 1929/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of litigation - Litigation in respect of fundamental rights and freedoms.
Constitutional Justice - The subject of review - Court decisions.
Constitutional Justice - Procedure - Parties - Interest.
Institutions - Jurisdictional bodies - Ordinary courts - Civil courts.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Acceptance, precondition / Existential significance / Fundamental importance / Proceedings, irregularity / Constitutional complaint / Dismissal / Hearing in accordance with the law.

Headnotes:

If an infringement of a right asserted by the complainant has no special importance, the appeal to the Federal Constitutional Court will not succeed in any case if the complainant is not existentially affected.

Summary:

I. In a civil action, the complainant was sued by the landlord of a horse stable for payment of a residual rent amounting to DM 610. Upon receipt of the action the competent judge resolved to decide the case in a simplified procedure without hearing according to § 495.a of the Code of Civil Proceedings.

He therefore granted the complainant 6 weeks to file a defence, beginning with the date of delivery of the court order. The Court office erroneously arranged for the order to be delivered to the lawyers of the plaintiff; delivery date was 1 April 1997. The lawyers returned the mail to the Local Court. The Court, thereupon, arranged for the order to be delivered to the complainant's lawyers. As the date of receipt (7 April 1997) is decisive for calculation of the time limit, the period for filing defence, for the complainant, expired on 20 May 1997.

In their pleadings dated 15 April, the complainant's lawyers substantially opposed the plaintiff's arguments and offered to produce evidence.

Already on 14 May 1998, the Local Court found against the defendant in a judgment on the grounds that the complainant had not denied the plaintiff's allegation.

The complainant's appeal from the judgment was unsuccessful.

By appeal to the Federal Constitutional Court, the complainant objected to the decisions of the civil courts. In particular, she alleged a violation of the right to be heard (Article 103.1 of the Basic Law).

II. The Third Chamber of the Second Panel of the Federal Constitutional Court did not accept the constitutional complaint for decision. The Chamber pointed out that admissible and justified complaints may ultimately be unsuccessful if the conditions of acceptance according to § 93.a of the Rules of the Federal Constitutional Court do not exist.

The constitutional complaint, the chamber declared, is of no fundamental constitutional significance. The scope and significance of the right to be heard have been sufficiently clarified by the jurisdiction of the Federal Constitutional Court.

Even though the judgment at first instance violates the constitutional guarantee to a hearing in accordance with the law, this is, however, of no special importance in this case. The Court held that the infringement of the Constitution was neither due to utter misappreciation of the constitutionally guaranteed protection nor were principles of the rule of law grossly violated. A careless neglect of constitutionally protected positions cannot be recognised either.

The judge, in working on the case, made a simple mistake, the Court held, from which a neglect - either especially careless or practised also in other cases - of the constitutionally protected positions cannot be concluded.

Under the conditions erroneously assumed by the judge (expiration of the time for filing a defence), the judgment now objected to by the constitutional complaint could be given.

Languages:

German.

Greece
Special Highest Court / Council of State

Important decisions

Identification: GRE-1998-2-001

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 20.10.1996 / **e)** 2512/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
Institutions - Jurisdictional bodies - Legal assistance - The Bar - Role of members of the Bar.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to counsel.
Fundamental Rights - Economic, social and cultural rights - Right to strike.

Keywords of the alphabetical index:

Lawyers, strike / Bar, disciplinary measures, power / Barristers, code of conduct.

Headnotes:

To safeguard their members' professional interests, the Bars have the power to order their members to refuse to discharge their duties. In principle, such orders do not conflict with the Constitution or other higher legal rules. However, Article 20 of the Constitution, which enshrines the right to judicial protection, Article 6 ECHR, which enshrines the right to a fair trial, and Article 5 of the Constitution, which enshrines professional freedom and everyone's right to unrestricted personal development, limit the Bars' power as regards the duration of such refusals and the nature of the decision issuing the order.

Barristers' refusal to discharge their duties does not constitute a strike in the true sense and consequently falls outside the scope of constitutional rules protecting workers' right to strike.

Summary:

In order to protest against taxation measures, in 1993 the Bars embarked on a long series of strikes which virtually paralysed the courts. In connection with an appeal against the decisions of the Athens Bar Council, a division of the Council of State and then the full assembly considered whether the decisions were constitutional.

Firstly, the Court ruled by a majority that the Bar's decision prohibiting its members from appearing in court was binding on the members, who had to comply with it or face disciplinary penalties. The dissenting opinion was that such a decision could only be viewed in the light of the general principle of individual freedom of action and could not be binding (and that since the Bar's decision did not constitute an enforceable measure having adverse effects, the appeal against it on the ground of abuse of authority was inadmissible).

The Court went on to analyse the special features of barristers' code of conduct and the nature of their refusal in order to ascertain whether the refusal constituted a strike within the meaning of Article 23 of the Constitution. The reply was unanimously negative. The majority view was that a Bar might order its members to refuse to discharge their duties for the purpose of safeguarding the members' professional interests. However, that power was not unconditional. The refusal must be of limited duration specified in the Bar's decision, which was subject to judicial review to see whether it exceeded the Bar's authority. Non-compliance with the decision was not punishable by disciplinary measures.

The decision appealed against was set aside because it had not stipulated the duration of the refusal; moreover, in the Court's view, the duration of the refusal had exceeded acceptable limits. Although belated, this judgment significantly restricts the powers of the Bars, which must have regard to its reasoning in any future action.

Languages:

Greek.

Identification: GRE-1998-2-002

a) Greece / **b)** Special Highest Court / **c)** / **d)** 25.06.1997 / **e)** 45/97 / **f)** / **g)** *Efimeritha tis Kyvernseos (tefhos tou AED)* (Official Gazette), 2/15.09.1997 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - Laws and other rules having the force of law.
Constitutional Justice - Effects.
Sources of Constitutional Law - Techniques of interpretation - Historical interpretation.
General Principles - Democracy.
Institutions - Jurisdictional bodies - Decisions.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.
Fundamental Rights - Civil and political rights - Right to property - Expropriation.

Keywords of the alphabetical index:

Royal family, deposed, disposal of royal assets / Law, retrospective repeal / King, former, surname / King, former, assets / Dictatorship, constitution.

Headnotes:

The Highest Court is competent to rule on a law's constitutionality even where that law is not of general scope but deals with an individual case.

When the supreme authority (Council of State, Court of Cassation or Court of Auditors) of one of the jurisdictions rules on the constitutionality or interpretation of a law, its decision is not binding on the other supreme authorities when, within their own jurisdiction, these are required to consider the constitutionality or interpretation of the same law. Only Highest Court judgments, handed down in the event of conflicting rulings, are binding on all courts and authorities.

Under the Constitution, everyone has the right to judicial protection and to state his or her views before the courts in cases affecting his or her rights or interests. The legislature consequently has the power to lay down rules on the right of appeal and the conduct of proceedings. Such rules are consistent with the Constitution provided that they are concerned with the functioning of the judicial system and observe certain limits, to exceed which would be directly or indirectly to abolish constitutional safeguards.

For the purposes of the right to judicial protection, the former king of Greece, who for historical reasons does

not have a surname, may apply to the courts using his first name provided that he specifies his identity in the documents in the file. In this case, the term "former King" is not a title, the use of which is strictly prohibited by the Constitution, but a statement of the applicant's identity. The "constitutional instrument" enacted by the dictatorship in 1968 is not a Constitution, being devoid of democratic legitimacy. After restoration of the parliamentary system it was repealed *ex nunc* but the constitutional draftsmen did not seek to eliminate all consequences of the dictatorship retrospectively.

Under the present republican system laid down in the Constitution in accordance with the outcome of the referendum that finally decided what was to happen with the former royal family's assets, a law giving the former king and royal family property rights over those assets is unconstitutional. However, a later law repealing the unconstitutional law is in no way incompatible with the Constitution.

Summary:

In 1992, an Act passed by the parliamentary majority of the time and vigorously resisted by the opposition (L 2086/92) conferred legislative force on a notarial deed signed by the former king and the Greek State. Under the provisions of the deed, the state acknowledged certain property rights of the former king and other members of the royal family. Following the change of government in 1993, the new majority repealed the provisions retrospectively (L 2215/94). In two cases, coming under different jurisdictions, the Court of Cassation and the Council of State ruled on the constitutionality of Act L 2215/94. The Court of Cassation held it to be unconstitutional, whereas the Council of State found that it complied with the Constitution. The matter was referred to the Special Highest Court, which is competent to determine the issue when two such judgments disagree. A majority of the Court found that Act L 2215/94 was constitutional.

The grounds for the judgment were as follows. In the political history of the Greek State, the assets of the king and the royal family were treated in legislation as special assets to which special rules applied. Abolition of the monarchy, which had occurred several times in the country's recent history, had been followed in each case by constitutional measures clarifying the status of those assets. The question of the royal family's assets was thus a political matter, the law on which was made at the constitutional level and according to the political situation.

During the dictatorship, the 1973 decree issued under the 1968 "constitutional instrument" expropriated the royal family and specified the compensation to be paid to them: royal assets thus became state property. Between then and the adoption of the 1973 Constitution no legislation was passed to return the assets to the royal family. When democracy was restored in 1974 the view was taken that the 1973 expropriation was not irrevocable. After the fall of the dictatorship, this issue was included in the referendum on the form of parliamentary system to be adopted: monarchic democracy or republican democracy. The outcome of the referendum was to determine what happened to the royal family's assets. In the referendum, the people voted for a republican system; subsequently, the 1975 Constitution, Article 1 of which defines Greece's political system as a "parliamentary Republic", definitively settled the question of the royal family's assets. The referendum and Constitution consequently made transfer of those assets to the Greek State irrevocable, and their return to the king is now prohibited by the Constitution. Act L 2086/92 is therefore unconstitutional and its retrospective repeal, by Act L 2215/94, contravenes neither the principle of separation of powers nor Article 17 of the Constitution on the protection of property.

Supplementary information:

This case is pending before the European Court of Human Rights.

Languages:

Greek.

Identification: GRE-1998-2-003

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 08.05.1998 / **e)** 1933/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Proportionality.
Institutions - Executive bodies - The civil service.
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:

Public service, service council, participation of women / Genuine equality.

Headnotes:

If it becomes apparent that, owing to social prejudices, a category of people is subject to discriminatory practices and that rigid application of the principle of equality consolidates and perpetuates the inequality, the legislature may, without infringing the Constitution, introduce positive measures in favour of that category of people. Such measures must be necessary and appropriate and their duration must be commensurate with the objective - in this case that of reducing inequalities so as to establish genuine equality.

Affirmative action on women's behalf is not contrary to the Constitution, provided that it is designed to restore genuine equality between men and women.

Summary:

In a case the question arose whether a law making it mandatory for there to be at least one woman in service councils (which deal with public-service career matters) was consistent with the principle of equality enshrined in the Constitution. The competent division of the Council of State referred the case to the full assembly, which ruled, by a large majority, that the measure was constitutional. This is a landmark judgment on affirmative action.

Languages:

Greek.

Hungary
Constitutional Court

Statistical data

1 May 1998 - 31 August 1998

Number of decisions

- Decisions by the plenary Court published in the Official Gazette:15
- Decisions by chambers published in the Official Gazette: 5
- Number of other decisions by the plenary Court: 16
- Number of other decisions by chambers: 10
- Number of other (procedural) orders: 22
- Total number of decisions: 68

Important decisions

Identification: HUN-1998-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 08.05.1998 / **e)** 16/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 38/1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Democracy.
General Principles - Social State.
General Principles - Rule of law.
Institutions - Executive bodies - Sectoral decentralisation.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Social security.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Elections.
Fundamental Rights - Civil and political rights - Electoral rights.

Keywords of the alphabetical index:

Democratic legitimacy / Public body / Social security boards.

Headnotes:

The constitutional requirement of exercising public power is that the power should be based on democratic legitimacy. The legitimacy of the Social Security Self-

governing bodies depends on whether the representatives of these Self-governing bodies are elected or delegated, and it also depends on the circle of persons who have the right to vote for the representatives of these bodies.

Summary:

In its decision, the Constitutional Court examined whether Social Security Self-governing bodies are public bodies, and if so, whether they are based on democratic legitimacy as required by Article 2.1 and 2.2 of the Constitution, according to which Hungary is an independent and democratic constitutional State, where all power belongs to the people, and where the people exercise their sovereignty through elected representatives or directly. In its previous decision, the Court stated that public bodies are those which undertake public tasks, which otherwise should be carried out by the State or by local governments (Decision no. 38/1997, *Bulletin* 1997/2 [HUN-1997-2-007]). In the case of Social Security Self-governing bodies, public tasks are the following: the Self-governing bodies have the right to express their opinion on the draft of the law concerning social security, they can discuss with the Finance Minister the social security budget of the next year and the budget and the final accounts of the Social Security Funds, the Self-governing bodies have the right to decide *inter alia* on the use of the income of the Social Security Funds and, finally, the head of their central organ manages the offices of the Self-governing bodies. The Social Security Self-governing bodies are therefore public bodies. But are they established based on democratic legitimacy? The Social Security Self-governing body is a body made up of delegates from unions and employer associations. The subjects of the Self-governing bodies are therefore employers and workers paying into the funds. Under Article 7 of the Act LXXXIV of 1991 on the management of the Social Security Self-governing bodies however, the representatives of these Self-governing bodies should be delegated by the national trade unions of the employees and employers. Since only 54% of the employees are members of these national trade unions, the Self-governing bodies established according to this provision of the Act lack the democratic legitimacy the Constitution requires. Excluding a considerable part of the insured from electing the representatives of the Social Security Self-government results in the lack of democratic legitimacy of this body.

If the representatives of the Social Security Self-governing bodies are elected, it is a constitutional requirement that all the persons who have the right to vote should be entitled to participate in electing the representatives. If the representatives are delegated according to the law, the majority of the subjects should decide on who will be the representative. Where trade unions or social groups are entitled to delegate the members of the Social Security Self-governing bodies, it is important that the overwhelming majority of the subjects of the Self-governing body should be members of these organisations. In its current decision, the Court held that 54% cannot be considered as an overwhelming majority, therefore the Court annulled the provisions regulating the method of delegating the representatives of the Social Securities Self-governing bodies.

Supplementary Information:

In the middle of July 1998 the Parliament passed a law that permitted the newly formed government to exercise full supervision and administration over the Social Securities Funds and broke up the two governing boards of the social security funds.

Cross-references:

Decision no. 38/1997, *Bulletin* 1997/2 [HUN-1997-2-007].

Languages:

Hungarian.

Identification: HUN-1998-2-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 16.06.1998 / **e)** 27/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 52/1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - Parliamentary rules.
Constitutional Justice - The subject of review - Failure to pass legislation.
General Principles - Equality.
Institutions - Legislative bodies - Political parties.
Institutions - Legislative bodies - Status of members of legislative bodies.

Keywords of the alphabetical index:

Elections, parliamentary / Party fractions, minimum ceiling / Mandate, free.

Headnotes:

A provision of the Standing Order of the Parliament, according to which 15 Members of the Parliament can form a party fraction, is unconstitutional. While the current electoral laws are in force, MPs who are members of a party which received at least 5% of the votes cast nationally have the right to form a party fraction regardless of the fact that the Parliament determines a higher ceiling to form a fraction. Forming a parliamentary fraction of such a party requires that number of MPs which the party in question has at the time of the Parliaments' formative session.

Summary:

According to the Constitutional Court, Parliament created an unconstitutional situation by failing to guarantee that MPs who are not members of any party fraction can be members either of a permanent or an ad hoc committee. The Court therefore called upon Parliament to meet its legislative obligation by 1 September 1998.

The Court emphasised that the basis of the operation of the Parliament is the free mandate of the representatives and the organised activities of the political parties within the Parliament. The parties of the Parliament can perform their duty, i.e. mediating the will of the people, with the help of the party fractions. The Standing Order of the Parliament should handle the political parties of the Parliament equally. Therefore the parties which received at least 5% of the votes cast nationally, on party lists, should have the right to form a party fraction.

The decision of the Constitutional Court also declared that a group of MPs which belongs to one of the parliamentary parties in a broader sense, despite the fact that the members of this group of MPs were elected from an individual constituency, also has the right to form a party fraction if the number of these MPs is equal to the number required by the Parliament to form a fraction. The Court emphasised that the contested provision of the Standing Order of the Parliament, under which 15 representatives can form a fraction, is unconstitutional not because of the number of representatives the Standing Order requires, but because the Standing Order did not take into account the minimum ceiling fixed by the Electoral Law. Where candidates were elected from a party list, the constituents voted for the candidates of a party. The Standing Order should therefore take into consideration that the party promoted by the constituents has a special legal status. The current decision pointed out that Parliament can determine the number of representatives which is required to form a parliamentary fraction in many ways. Parliament for example can determine the minimum ceiling according to the number of the smallest party which has received at least 5% of the votes. Parliament can also bestow the right to form a parliamentary fraction for a party which does not have the number of parliamentary representatives required by the Standing Order.

Languages:

Hungarian.

Identification: HUN-1998-2-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 25.06.1998 / **e)** 30/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 55/1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Determination of effects by the court.
Sources of Constitutional Law - Categories - Written rules - Community law.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national and non-national sources - Subordinate Community law and other domestic legal instruments.
General Principles - Sovereignty.

Keywords of the alphabetical index:

Community law, competition / Treaty, direct applicability / European Union, Association agreement.

Headnotes:

When implementing competition and other economic provisions of Law I of 1994 on the Promulgation of the Europe Agreement with Hungary, it is a constitutional requirement that Hungarian authorities which apply the law must not apply directly the criteria required by Article 62 of this Agreement. On the basis of this, the Governmental Decree promulgating a decision of the Association Council, according to which the Hungarian Competition Council shall apply Community law concerning competition, is unconstitutional. However the Court did not annul these provisions but suspended a decision on the annulment until 30 December 1999.

Summary:

In the instant case, the Court had to examine in what way the criteria and principles established by the Community concerning the prohibition of restraint of trade can be realised in the Hungarian legal system. In particular, it had to consider whether the Hungarian Competition Council could directly apply the internal norms of another international legal entity or another independent legal system, like community law, without incorporating these international legal norms into the Hungarian legal system. The Court emphasised that the challenged criteria of the Europe Agreement are prevailing for the domestic Competitive Council and should be taken into consideration when the Council decides concrete cases according to the Governmental Decree in question. The Court also held that direct applicability is a special characteristic of the connection between the Community and its member States, and Hungary is not yet a member State.

According to the reasoning of the Court, the affected legal relations are linked with State sovereignty: legal regulations on restraint of trade fall within the exclusive sovereignty of the State. Without an explicit constitutional authorisation, the Parliament does not have the constitutional right to go beyond the principle of territorial right in an international treaty concerning a branch of law which falls exclusively within State sovereignty. From the point of view of constitutionality, it does not matter that in this case Parliament only went beyond the principle of the territorial right in a narrow field, the field of competition law. The decision pointed out that international treaties shall be promulgated by law in order for them to be binding on everyone in Hungary. The relevant statute however just refers to the criteria determined by the Community law without these appearing even in an international treaty or in the law promulgating the treaty. The challenged provisions of the Governmental Decree promulgating the decision of the Association Council in question are unconstitutional, since they were not made by the legitimate public authority determined by the Hungarian Constitution as the source of those criteria which the Hungarian Competition Council is bound to take into account. These provisions are unconstitutional also because according to these, it is the obligation of the Hungarian Competition Council to apply directly the future norms of public law.

The Constitutional Court suspended decision on the annulment of the unconstitutional provisions until 30 December 1999 so that the legislator would have enough time to harmonise the legal provisions as required by the Constitution.

Cross-references:

Decision no. 4 of 1997 (I. 22.), *Bulletin* 1997/1 [HUN-1997-0-001].

Languages:

Hungarian.

Ireland
Supreme Court

Important Decisions

Identification: IRL-1998-2-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 19.02.1997 / **e)** 35/96 / **f)** B. v. The Director of Public Prosecutions / **g)** / **h)** *Irish Law Reports Monthly*, volume 2, 1998.

Keywords of the systematic thesaurus:

Fundamental Rights - General questions - Entitlement to rights - Natural persons - Minors.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Trial within reasonable time.

Keywords of the alphabetical index:

Sexual offences / Criminal trial / Delay / Sexual abuse of minors / Presumption of prejudice.

Headnotes:

The right to reasonable expedition must be assessed in the light of the circumstances of each particular case. If the accused's defence has been expressly prejudiced by unreasonable delay on the part of the State, he is entitled to an order prohibiting the trial. It is necessary to balance the right of the accused to reasonable expedition with the community's right to have criminal offences prosecuted. In balancing these rights, the right of the accused to a fair trial supersedes society's right to prosecute. The test therefore is whether there is a real risk that the accused would not obtain a fair trial as a result of the delay.

Summary:

The criminal prosecution of a man for the sexual abuse of three of his daughters was not commenced until 1992, the offences in question having allegedly occurred between 1963 and 1973. There was no delay on the part of the State authorities. The delay was due to the fact that the victims did not approach the authorities until 1992. The accused sought judicial review of the decision to prosecute, on the basis of the time which had lapsed since the alleged child sexual abuse.

It was claimed that the failure to prosecute prior to 1992 deprived the accused of his constitutional right to a fair trial in due course of law. In particular, he claimed that there was a presumption of prejudice and that the lapse of time prevented him from being able to locate either witnesses or documentary evidence as to his activities during the time in question.

The Supreme Court stated that there was no statutory basis for the right to a speedy trial. The Constitution does not expressly state that there is such a right. Article 38.1 of the Constitution provides that no person shall be tried on any criminal charges save in due course of law. Article 40.3 imposes duties on the State, including the duty to protect the right to fair procedures.

Delay in cases of sexual abuse of children fall into a special category. The Supreme Court considered the relationship between the accused and the victims and the dominion which existed between them. It was held that the accused had controlled and dominated the victims and prevented them from taking steps to prosecute before 1992.

In considering the facts of the case, the Supreme Court emphasised the unique nature of sexual abuse in the home and the dominance exercised by the accused. The Court concluded that the accused had not discharged the onus of establishing that he would not receive a fair trial as a result of the delay. The delay made the trial more difficult but not unconstitutional.

Languages:

English.

Identification: IRL-1998-2-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 04.03.1997 / **e)** 53/97 / **f)** The People (at the Suit of the Director of Public Prosecutions) v. Peter Pringle / **g)** / **h)**.

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 - Presumption of innocence.

Keywords of the alphabetical index:

Murder of a member of the police force / Miscarriage of justice, definition / Presumption of innocence / Evidence, newly discovered / Compensation / Proof, onus / *Nova reperta*.

Headnotes:

A person claiming that his conviction for capital murder and robbery was a miscarriage of justice, and claiming compensation for this miscarriage, must bear the onus of proving on the balance of probabilities that a newly discovered fact shows there has been a miscarriage of justice.

Summary:

The applicant and two others were convicted of the murder of a member of the Irish police force (capital murder), the *Gardaí Síochána*, and of armed robbery in 1980. They subsequently sought leave to appeal against the convictions. This leave was refused. The applicant then sought to take civil proceedings against the State for alleged violations of his constitutional rights. There was a claim that newly discovered evidence rendered his conviction unsafe. In particular, there was evidence that one of the *Garda'* involved in the prosecution lacked credibility. This was accepted by the Court of Criminal Appeal, which is a court composed of judges of the High and Supreme Court and exercising appellate jurisdiction in criminal matters.

The conviction of the applicant having been quashed, he then claimed compensation pursuant to the Criminal Procedure Act, 1993. This statute provides for compensation where the applicant has suffered a miscarriage of justice and specifically mentions miscarriages of justice arising from newly discovered evidence. The Court of Criminal Appeal refused to make an award of compensation. The applicant appealed to the Supreme Court from this decision.

The applicant submitted that the presumption of innocence should be relevant. However the Supreme Court stated that the issue of an award of compensation is a civil matter which arises when all relevant criminal proceedings are at an end. The onus is therefore upon the applicant to establish his entitlement to compensation. The presumption of innocence has no role in such an enquiry.

The Supreme Court refused to define the term "miscarriage of justice". However it did state that the primary meaning of that term is that the applicant is proven on the balance of probabilities to have been innocent of the offence. The mere fact that the conviction was quashed because of new evidence having been discovered, did not necessarily mean that there was a miscarriage of justice and it did not automatically entitle the applicant to compensation.

The applicant sought to argue that there had been a violation of his constitutional rights, as the prosecution had failed to make a full disclosure to the defence of all relevant material. This submission was rejected on the facts, as there was no evidence that the material in question was known to the prosecution before the trial.

A further issue which arose was the failure of the Court of Criminal Appeal to order a re-trial. The applicant claimed that the Court should have made such an order unless there had been a miscarriage of justice. The Supreme Court however held that the Court has a discretion in this regard. A conviction can be quashed even though no miscarriage of justice has occurred.

The Supreme Court concluded that the Court of Criminal Appeal had been correct in refusing to award compensation. However the matter was referred back to that Court in order for the applicant to produce further evidence in favour of his application, if he so wished.

Languages:

English.

Identification: IRL-1998-2-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 15.05.1997 / **e)** 118/97 / **f)** In the Matter of Article 26 of the Constitution of Ireland and In the Matter of the Employment Equality Bill, 1996 / **g)** / **h).**

Keywords of the systematic thesaurus:

Constitutional Justice - Types of claim - Type of review - Preliminary review.
General Principles - Social State.
General Principles - Proportionality.

General Principles - Weighing of interests.
Fundamental Rights - General questions - Entitlement to rights - Natural persons - Minors.
Fundamental Rights - General questions - Entitlement to rights - Natural persons - Incapacitated.
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 - Age.
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.
Fundamental Rights - Civil and political rights - Inviolability of the home.
Fundamental Rights - Civil and political rights - Right to property - Other limitations.
Fundamental Rights - Economic, social and cultural rights - Freedom to work for remuneration.

Keywords of the alphabetical index:

Age discrimination / Property rights / Disabled persons, employment / Vicarious liability of employers / Social policy.

Headnotes:

Provisions of the Employment Equality Bill, 1996, which made employers vicariously liable for the acts of employees, sections requiring employers to adapt the conditions of employment for people with disabilities and a section of the Bill which provided that a certificate could be sufficient evidence to ground a particular conviction, among other provisions, were held to be contrary to the Constitution.

Summary:

Article 26 of the Constitution empowers the President of Ireland to refer a bill to the Supreme Court before the bill is signed into law, in order for the Court to determine whether the bill, or particular provisions thereof, is or are repugnant to the Constitution. The Employment Equality Bill, 1996 was referred to the Supreme Court in this manner.

The Bill was designed to prevent discrimination and harassment in employment. However there were a number of exceptions to the general prohibition in the Bill, the constitutional validity of which was questioned. In particular, provisions relating to people aged below 18 years and people above 65 years of age excluded those age groups from the scope of the Bill. In addition, the defence forces were excluded from its remit, as were the operations of certain institutions under the direction of religious bodies.

The Court held that the Government had the responsibility of balancing the competing constitutional rights, a responsibility which was exclusively within its province. The constitutional rights to equality, the right to earn a livelihood and other property rights had to be balanced in this instance. The Court stated that these constitutional rights were not absolute and the Government could restrict their exercise, provided the means by which it did so were not contrary to reason or fairness and were necessitated by the common good. On this basis, the relevant sections of the Employment Equality Bill were held not be unjustifiable and these exceptions were therefore not unconstitutional.

The Court considered provisions of the Bill dealing with people with disabilities. It was submitted to the Court that the provisions in this regard infringed the employer's constitutional right to earn a livelihood, as employers were required to bear the financial burden of adapting the place of employment to the needs of disabled employees, with no possibility of compensation. The Court considered the requirements of social justice and the competing constitutional right to earn a livelihood of employers. The Court concluded that these provisions of the Bill did represent an unjust attack on the rights of the employer and were contrary to the Constitution.

It was submitted that the provisions of the Bill which imposed vicarious liability on employers for the criminal acts of employees, were repugnant to the Constitution. The Court noted that an employer with no guilty intent could be found guilty of offences and sentenced to a term in prison. The Court held that such a change to the criminal law could not be justified on the grounds of social policy, as it was disproportionate to the aim intended. The imposition of a criminal sanction on employers in these circumstances was unjust, irrational and inappropriate. These provisions of the Bill were therefore contrary to the Constitution.

The Bill provided that an employer would not be obliged to employ a person with a propensity for unlawful sexual behaviour. This was challenged as a violation of the constitutional right to equality. The Court was of the view that this provision was justifiable on the grounds of prudence and safety.

The Bill contained a section which enabled the Director of Equality Investigation to issue a certificate which would then be accepted as *prima facie* evidence of the fact

that the implementation of the Bill had been obstructed or that there had been a failure to comply with its terms, and that this conduct should be subject to a criminal sanction. It was submitted to the Court that this provision violated the constitutional right to a trial in due course of law, as it had the effect that a person could be prosecuted on the basis of a certificate alone. The Court stated that this section concerned the essence of a constitutional criminal trial. The certificate was to be issued by a person who would have no personal knowledge or involvement in the events in issue and in circumstances where there was likely to be conflicts of evidence. The provision clearly was an interference with the right to a trial in due course of law. The Court then considered whether this interference was constitutional. In this regard the Court stated that there was a legitimate social policy underlying the section. However, the certification procedure which was proposed was neither rational nor necessary. The Court concluded that there was no proportionality between the process of trial by certification and the objective of the Bill and the right to trial in due course of law. This provision was accordingly a failure to protect the constitutional rights of the citizen and was repugnant to the Constitution.

Further provisions of the Bill were challenged as being repugnant to the Constitution. A provision which enabled entry onto premises for the purposes of investigations, was claimed to contravene the constitutional right to inviolability of the dwelling. The Supreme Court held that the powers of entry conferred were reasonably necessary and were not repugnant to the Constitution. It was also claimed that a provision which imposed a duty to answer questions or sign declarations, was contrary to Article 40.3 of the Constitution, as it failed to protect the privilege against self-incrimination. The Court held that the section at issue was reasonably necessary to the discharge of the functions under the Bill and did not infringe the constitutional rights of the citizen.

Languages:

English.

Identification: IRL-1998-2-004

a) Ireland / **b)** Supreme Court / **c)** / **d)** 19.11.1997 / **e)** 16/96 / **f)** Rock v. Ireland / **g)** / **h).**

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
General Principles - Proportionality.
Fundamental Rights - General questions - Limits and restrictions.
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.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right not to incriminate one-self.

Keywords of the alphabetical index:

Silence, right / Presumption of constitutionality / Inferences / Proof, modes of / Banknotes, forgery.

Headnotes:

Legislation which provided for inferences to be drawn from certain facts and circumstances, unless the accused offered an explanation, did not infringe the constitutional right to silence or the presumption of innocence, as the legislation in question was a proportionate and appropriate means of weighing the rights of the accused and the requirements of public order.

Summary:

A man accused of possession of forged banknotes, knowing them to be forged, brought an action claiming that the legislation in question was unconstitutional. In particular, he claimed that Sections 18 and 19 of the Criminal Justice Act, 1984, infringed his right to silence and the presumption of innocence. These sections permitted the court to draw inferences in relation to the guilt of the accused, from the failure of the accused to account for the presence of an incriminating object, substance or mark on or around his person, or for his failure to account for his presence at a particular place at a given time. Such a failure or refusal to account could also amount to corroboration of other evidence, according to the legislation.

The Chief Justice of the Supreme Court, delivering the unanimous judgment of the Court, stated that the legislation benefited from a presumption of constitutionality and the onus was therefore on the applicant to prove his constitutional rights had been infringed. The Court

stated that the right to silence and the presumption of innocence are protected under the Constitution.

The Court first considered the presumption of innocence and the effects of the provisions on this presumption. The Court determined that, while inferences may be drawn from the failure of the accused to account for the presence of the object, substance or mark in the circumstances provided, the Court is not obliged to draw any such inferences. It is purely a matter for the Court to decide whether any inferences should be drawn or what inferences may be properly drawn. In this regard, the Court is obliged to act in accordance with the rules of constitutional justice and the Court is moreover under a constitutional obligation to ensure that no improper or unfair inferences are drawn.

The Court concluded that there was no interference with the presumption of innocence. The legislation merely provides a factor which may be adduced as evidence. If the inferences are drawn, they are corroborative evidence only and a person may not be convicted solely on the basis of such inferences. There was therefore no infringement of the constitutional right to the presumption of innocence.

The accused also challenged the legislation on the basis of an infringement of his right to silence. The Court stated that the right to silence was not absolute and could be qualified by the requirements of public order and morality. The legislation in question was attempting to balance the individual's right to avoid self-incrimination and the right and duty of the State to defend and protect its citizens. The Court considered the principle of proportionality, which is a well-established tenet of Irish constitutional law. The issue was whether the restrictions which the legislation placed on the right to silence, was greater than was necessary to enable the State to fulfil its constitutional obligations. The Supreme Court decided that the restriction on the individual constitutional rights was permissible. The sections which the accused sought to challenge did not unjustly attack his constitutional rights and the validity of the legislation was accordingly upheld.

Languages:

English.

Identification: IRL-1998-2-005

a) Ireland / **b)** Supreme Court / **c)** / **d)** 22.01.1998 / **e)** 11/97 / **f)** Donnelly v. Ireland / **g)** / **h)** *Irish Law Reports Monthly*, volume 1, 1998.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Case-law - Foreign case-law.
Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
General Principles - Weighing of interests.
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:

Sexual assault / Evidence, live television link / Cross-examination of witnesses / Confrontation of the accuser / Presumption of constitutionality / Witnesses, examination via television link.

Headnotes:

The constitutional right of a person to have a fair trial in due course of law does not include the right to confront witnesses appearing on behalf of the prosecution and there is therefore no violation of the right to a fair trial where such witnesses give evidence by means of a live television link, rather than in the physical presence of the accused person.

Summary:

The Criminal Evidence Act 1992 provided for the reception of evidence through a live television link in respect of certain offences. The situations in which such a procedure could be adopted included cases of sexual offences in which a witness was less than 17 years of age, unless the court sees good reason to the contrary. This Act had the effect that the witness in question would not be physically present in the court and would not be required to give evidence in the presence of the accused person. However, the witness was still required to give evidence on oath and was subject to cross-examination in the normal fashion. The witness was also clearly visible to the judge and the jury by means of monitors.

A man was charged with sexually assaulting a 14 year old girl. The trial judge ordered that the girl could give

evidence by means of a live television link. The accused sought to challenge the constitutionality of this procedure. The accused claimed that this procedure infringed his constitutional right to a fair trial in due course of law. In particular, he claimed that the right to cross-examine witnesses appearing on behalf of the prosecution, included a right to confront such witnesses. It was therefore claimed that the witness should be required to give evidence in the physical presence of the accused.

The Chief Justice of the Supreme Court delivered the unanimous judgment of the Court. The Court recognised that the right of the accused to a fair trial is one of the most fundamental rights accorded to a person and, in a hierarchy of constitutional rights, it was a superior right. The right to a fair trial includes the right of the accused to have every opportunity to defend himself and to hear and test the evidence of the prosecution.

The Court proceeded to address the contention that the concept of fair procedures includes a requirement that the witness should give evidence in the physical presence of the accused and that the accused has the right to confront the witness in open court. This was the first time the Supreme Court had the opportunity to consider this issue. The Court pointed out that there appeared to be no previous Irish or other common law authority establishing such a requirement. The utility of American case-law in favour of such a requirement was reduced because of the different constitutional and statutory provisions in that jurisdiction.

The Court held that the right of fair procedures and due process do involve the rigorous testing by cross-examination of the evidence against the accused. However, the procedure at issue here did not restrict in any way the rights of the accused person. The procedure was designed to avoid subjecting witnesses below the age of 17 to the trauma of giving evidence in court. The requirements of fair procedures were adequately fulfilled by obliging the evidence to be given on oath and subject to cross-examination, with the judge and jury being able to observe the witness. The right to a fair trial was protected and vindicated. Moreover, it is open to the court not to permit evidence to be given by live television link where the accused can show that there is good reason to the contrary.

The Court concluded that the right of the accused to a fair trial does not include the right to have the witness give evidence in his presence or the right to confront his accuser. The procedure for giving evidence by live television link did not infringe the right of the accused to a fair trial. The legislation and the procedures which it created were not repugnant to the Constitution.

Languages:

English.

Identification: IRL-1998-2-006

a) Ireland / **b)** Supreme Court / **c)** / **d)** 20.03.1998 / **e)** 51/98 / **f)** National Irish Bank Limited v. Radio Telefís Éireann / **g)** / **h).**

Keywords of the systematic thesaurus:

General Principles - Maintaining confidence.
General Principles - Public interest.
General Principles - Weighing of interests.
Fundamental Rights - Civil and political rights - Rights in respect of the audiovisual media and other means of mass communication.
Fundamental Rights - Civil and political rights - Right to information.

Keywords of the alphabetical index:

Confidential information / Disclosure / Publication / Tax evasion / Banking secret.

Headnotes:

The public interest in maintaining the confidentiality of the relationship between the banker and the customer may be outweighed by the public interest in disclosing certain confidential information arising from this relationship, particularly where the disclosure of the information may assist in defeating wrong-doing.

Summary:

The National Irish Bank Limited (NIB) is a banking business operating in Ireland and overseas, which was suspected of being involved in a scheme for tax evasion. Radio Telefís Éireann (RTE), which is the State broadcasting authority and operates a national television service, obtained information regarding this scheme. In particular, RTE had specific information about the bank accounts of certain customers of NIB. RTE intended to broadcast details of the documentation and the bank accounts. NIB brought this action seeking to prevent any

publication of, what it claimed to be, confidential information.

The Supreme Court accepted that there was a right and a duty of confidentiality between a bank and its customers, which extended to third parties who came into possession of confidential information. The Court emphasised that the existence of an efficient banking system based on a confidential relationship between the banks and their customers is a central feature of a modern economy. The Court moreover stated that there was a public interest in the maintenance of such confidentiality.

RTE submitted to the Court that there was a public interest in the disclosure of the information where, as here, there were allegations of serious wrong-doing. The Court agreed with this submission and stated that the public interest in the disclosure of information to defeat wrong-doing, may outweigh the public interest in maintaining confidentiality. In the circumstances of this case, the Court agreed that there was a matter of genuine interest and importance to the general public and that it was in the public interest that the general public should be given this information.

The Supreme Court did not grant an unqualified right to publish the information which was in RTE's possession. The Court held that RTE had not shown any justification for publishing the names and account details of individual customers. Such a disclosure of the private financial affairs of individuals, without proof of any illegality, could not, in the decision of the Court, be justified by either principle or authority. The Court ruled that RTE must therefore take all necessary steps to ensure that they did not publish the names of innocent investors.

Languages:

English.

Identification: IRL-1998-2-007

a) Ireland / **b)** Supreme Court / **c)** / **d)** 02.04.1998 / **e)** 69 & 77/97, 92 & 197/97, 93 & 195/97, 91 & 196/97 / **f)** Irish Times Limited and others v. Judge Murphy / **g)** / **h).**

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution - Hierarchy attributed to rights and freedoms.
General Principles - Public interest.
General Principles - Weighing of interests.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Public hearings.
Fundamental Rights - Civil and political rights - Freedom of the written press.

Keywords of the alphabetical index:

Proceedings, publication / Unfair trial, risk / Contemporaneous reporting.

Headnotes:

The constitutional requirement that justice must be administered in public can only be departed from where there is a real and unavoidable risk that the constitutional right of the accused to a fair trial would not be respected.

Summary:

A judge of the Circuit Court of Ireland made an order that the trial of five non-nationals accused of possession of cocaine for sale or supply and unlawful importation of cocaine, should not be the subject of contemporaneous media reporting. The doors of the Court were to remain open to the public and certain specified details of the trial could be published. However no contemporaneous media coverage was permitted.

Representatives of various media groups appealed to the High Court, where the Order was upheld. An appeal was then brought to the Supreme Court. The Supreme Court considered whether the Order which was made did prevent the trial being heard in public. The constitutional requirement that justice must be administered in public was considered. This was then weighed against the constitutional right of the accused to a fair trial. The Supreme Court finally considered whether the Circuit Court Judge had properly balanced the requirement that justice be administered in public and the right to a fair trial.

The Supreme Court decided that the order which was made did constitute a denial of the right to a hearing in public. The Court described the right of members of the public to know about the proceedings and the right

of the accused to have their cases reported in the press. The constitutionally guaranteed freedom of the press and the right of the press to report and comment on proceedings were also considered. The Court stated that any curtailment of the press is a curtailment of the access of the people to the administration of justice. The press are entitled to report and the public are entitled to know that justice is being administered fairly and properly.

However the Supreme Court held that the right to a hearing in public is not an unlimited or absolute right. It must be weighed against competing constitutional rights. In the hierarchy of constitutional rights, the right of the accused to a fair trial is superior to the requirement that a trial is held in public. The test which must be applied is whether there is a real risk that the accused will not receive a fair trial and it must also be determined whether this risk could be avoided by appropriate directions being given to the jury.

The Supreme Court held that the Circuit Court Judge was not entitled on the evidence before him to assume that media reporting of the trial would be other than fair and accurate. There was no evidence to suggest that there was a real and unavoidable risk of an unfair trial if contemporaneous reporting was permitted. The Order prohibiting contemporaneous media reporting was therefore excessive and unjustified.

Languages:

English.

Identification: IRL-1998-2-008

a) Ireland / **b)** Supreme Court / **c)** / **d)** 03.04.1998 / **e)** 260/95 / **f)** I.O'T. v. B. / **g)** / **h).**

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Unwritten rules.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution.
General Principles - Public interest.
General Principles - Weighing of interests.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Right of access to administrative documents.
Fundamental Rights - Civil and political rights - Right to private life.

Keywords of the alphabetical index:

Family law / Natural parents / Confidentiality / Parentage.

Headnotes:

The right to know the identity of one's natural parents is a unenumerated personal right guaranteed under the Constitution, but it must be balanced against the constitutional right of the parents to privilege and privacy, and this weighing of the competing interests must be done according to the circumstances of each individual case.

Summary:

The applicants sought to ascertain the identity of their natural mothers. Both of the applicants brought proceedings in the Circuit Court under the Status of Children Act, 1989. The Circuit Court Judge referred the question of law to the Supreme Court. The issues to be resolved were whether the Circuit Court had jurisdiction to declare the right of the child to be a constitutional right, whether there was such a constitutional right, whether the mother had constitutional rights not to have her identity disclosed, and if so, how these competing rights should be balanced.

Since 1965, the Irish courts have created a category of so-called unenumerated personal rights under Article 40.3 of the Constitution. The question which arose in this case was whether an inferior court, such as the Circuit Court, whose jurisdiction is based upon and defined by legislation, had the power to determine which rights were within this category. The Supreme Court described the jurisdiction of the Superior Courts and that of the Inferior Courts. The Court stated that every court is obliged to uphold the Constitution. However the Circuit Court has not been vested with jurisdiction to interpret the Constitution. The duty of ascertaining and declaring the personal rights of the citizen, other than those specified in the Constitution, rests solely upon the High Court and the Supreme Court.

The statute pursuant to which the applications were made was the Status of Children Act, 1989. This Act conferred a clear and explicit right to apply for a declaration that a named person is the father or mother of the applicant.

In this case, neither applicant could name their natural parents. One of the applications was therefore struck out, while the action for discovery which was brought by the second applicant, was permitted to proceed.

The Supreme Court addressed the question of unenumerated personal rights. The Court stated that when it is declaring rights other than those specified in the Constitution, it must do so in clear and explicit terms. There must be a clear declaration by the Superior Courts before a right can be considered to be protected under the Constitution.

A majority of the Supreme Court stated that the right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child. It was not however an absolute or unqualified right and its exercise could be restricted by the constitutional rights of others and by reference to the common good. In particular, the constitutional right to know the identity of the natural parents, may be restricted by the constitutional right to privacy and confidentiality of the natural mothers. The Court therefore had to decide whether the constitutional rights of the child outweigh the constitutional and legal rights of their natural mothers.

The Court considered the right to privilege and privacy claimed by the natural mothers. A majority of the Court held that it was not permissible to disclose to the applicants the identity of their natural mothers at this stage of the proceedings. However, there should be a procedure whereby the names and addresses of the natural mothers are disclosed to the Court and their claims are heard, without their identities being disclosed to the applicants. In this regard, the Court held that the rights of the natural mothers to privilege and to privacy are not absolute constitutional rights.

The majority of the Supreme Court held that it was not possible to lay down all the criteria to be applied when the constitutional right of the child to know the identity of the natural mother was being balanced with the constitutional right to privacy of the mother. The Court did describe some of the matters which the Circuit Court should take into account. These included: the circumstances giving rise to the surrender of custody by the mother, the present circumstances of the mother and the child, the ages of both, the attitude of the mother and the child to the disclosure of the identity of the mother, the reasons for these attitudes, the views of the foster parents.

Languages:

English.

Italy
Constitutional Court

Important decisions

Identification: ITA-1998-2-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 20.05.1998 / **e)** 185/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 22 of 03.06.1998 / **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 health.

Keywords of the alphabetical index:

Multitherapy, tumour pathology / Medication, free / Medical experimentation / Illness, terminal phase / Treatment, evaluation by the Court / Right to health, minimum content / Recovery, expectation.

Headnotes:

The lack of provision for the distribution, at National Health Service expense, under criteria to be set down by the legislature itself, of the drugs prescribed in a treatment for certain types of cancer, to those living in poverty, is unconstitutional. Only those drugs forming part of the treatment for patients suffering from forms of cancer that are the subject of clinical trials are to be distributed free of charge until the effectiveness of this therapy has been confirmed following these trials.

Summary:

The Council of State, in a case referred to it, raised before the Court the question of the constitutional legitimacy of Act no. 94/1998, which only granted free treatment to patients in the terminal phase of cancer who had been selected for clinical trials of the "*Di Bella* multitherapy" in a hospital environment. For other patients in the terminal phase who were not selected for clinical trials, the law authorised doctors to prescribe drugs belonging to the "*Di Bella* therapy" but stipulated that these drugs were to be supplied entirely at the patient's expense. The Council of State found that the law in question was in violation both of the principle of equality (Article 3 of the Constitution) on account of the disparity in treatment between patients undergoing clinical trials, who received the drugs free of charge, and other cancer sufferers who had to pay for treatment, and of the right to protection of health enshrined in Article 32 of the Constitution.

The Constitutional Court points out above all that it is not within its jurisdiction to pass judgment on the therapeutic effectiveness of the "*Di Bella* multitherapy" in treating cancer; this is currently being investigated through clinical trials conducted by competent technical and scientific bodies, with the aim of assessing its effectiveness in the field of oncology.

The Court finds, however, that the start of clinical trials of the "*Di Bella* multi-drug treatment" on cancer sufferers in specialist medical establishments, and the authorisation of the use of the multi-drug treatment on other patients not undergoing clinical trials but also suffering from cancer, have aroused expectations of a cure among these patients, for whom existing forms of therapy have proved inappropriate; such expectations are to be understood as a minimum component of the right to health. It is unacceptable, under the principle of equality, that effective enjoyment of this fundamental right should depend, for patients who do not undergo clinical trials, on their respective financial circumstances.

The provision, in the law challenged before the Court, for a reduction in the sale price of the drugs belonging to the "*Di Bella* multi-drug treatment", as agreed between the Ministry of Health and pharmaceutical companies, is insufficient to be regarded as a guarantee of the right to protection of health enshrined in Article 32 of the Constitution; the same is true of the provision allocating a fixed sum to local authorities for 1998, to fund contributions towards particularly heavy medical costs for poor people.

Supplementary information:

The government has adopted a decree increasing contributions to the funding of the National Health Service from those receiving health care, precisely in order to cover the increase in expenditure caused by the reimbursement of costs incurred by the less well-off in paying for the "*Di Bella* multitherapy". The results of trials conducted up to September 1998 on this method of therapy have not demonstrated its effectiveness.

Cross-references:

The matter at issue in this judgment has considerable similarities with that at issue in the *Bundesverfassungs-*

gerichts decision reported in *Bulletin* 1997/1 [GER-1997-1-004].

Languages:

Italian.

Identification: ITA-1998-2-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 01.06.1998 / **e)** 212/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 25 of 24.06.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Case-law - Domestic case-law.
General Principles - Margin of appreciation.
General Principles - Reasonableness.
Institutions - Armed forces and police forces - Police forces.
Fundamental Rights - Economic, social and cultural rights - Right to work.
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.
Fundamental Rights - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Police, auxiliary, access to posts / Course leading to appointment, illness, impediment / Course leading to appointment, repetition, impossibility / Police, administration, discretion, absence.

Headnotes:

The rule whereby the state police authorities are not permitted to admit auxiliary police officers to another subsequent course preparing for access to posts in the state police force if they have been absent for more than forty days because of an illness contracted during the course, even though they have since regained their psychological and physical capacity to work, is contrary to the principle of equality and the right to work and health as well as contrary to the principle of the proper functioning of the administration.

Summary:

An auxiliary police officer who had been accepted on the course leading to a permanent post had fallen ill with leukaemia and, following a bone-marrow transplant, had subsequently recovered. The Medical Committee had reckoned that he needed 160 days' convalescence; he had therefore been unable to attend the course and, by order of the Chief of Police, he had been expelled from the course, which meant the end of his service in the police force. The police officer appealed against this order before the Regional Administrative Court, which asked the Constitutional Court to rule on the constitutional legitimacy of the rule stipulating that all ties with the police authorities must be severed for auxiliary members of the state police force who, owing to illness, were absent for more than thirty days from the four-month course leading to appointment to a permanent post as a member of the police force.

The judge referring this rule to the Court considered it to be at variance with:

- Article 3 of the Constitution, on two counts:
  a. the disparity in treatment in relation to the situation of auxiliary officers not taking part in a course and therefore not subject to a provision for the severance of ties;
  b. the manifest unreasonableness reflected in the severity of the consequences of exceeding the maximum permissible period of absence, even by one day;
- Article 4 of the Constitution (the right to work) and Article 32 of the Constitution (the right to protection of health), because it imposes a draconian choice between loss of employment for those who decide to undergo treatment and loss of the right to protection of health for those who neglect their illness in order to attend the course;
- Article 97 of the Constitution (proper conduct of the administrative authorities), because it necessitates the immediate severance of ties and does not allow the authorities to assess whether it is in the public interest to keep in employment a person who, once recovered, could continue to put the professional experience which he or she has acquired to the service of the state.

The constitutionality of the contested rule in respect of Article 3 of the Constitution (the principle of equality)

has already been considered in previous judgments. However, on those occasions the Court had judged the complaints to be unfounded (judgment no. 297/1994 and order no. 140/1995) on the grounds that the following situations had been used as points of comparison:

1. auxiliary police officers authorised to be absent for more than thirty days in the event of injury contracted as a result of a practical exercise organised as part of the course;

2. participants in the course who were absent on maternity leave.

The Court had found that the situations given as points of comparison fell under the jurisdiction of the discretionary and not unreasonable option provided by the law of according more favourable treatment to people absent for reasons of service or maternity. It had also considered this choice to be justified because of the avowedly transitional nature of the recruitment system set down by the law.

On the present occasion, the judge cited as a point of comparison the situation of an auxiliary police officer not yet admitted to the course, whose absence owing to illness, even if it exceeds the terms specified in the contested rule, does not lead to the automatic severance of all ties with the administration. The unreasonableness of the rule, for which the argument concerning the "transitional nature" of the recruitment system is no longer valid, since it has been extended until the end of 1999, is confirmed by the absence of any discretionary powers on the part of the administrative authorities. They are unable to assess the causes and consequences of the illness resulting in the participant's absence, and are merely authorised to expel him or her from the course and from the police force without being able to judge whether the professional experience acquired during the service of an officer who has regained the psychological and physical capacity to work could still be of use to the authorities.

Supplementary information:

In the present decision, the Court applied the reasoning followed in judgment no. 195/1998, in which it found that a provision similar to the rule declared unconstitutional here was manifestly unreasonable; the provision concerned trainee police superintendents, who were barred from taking part in a subsequent course if they were absent, for over thirty days (for any reason) or for over ninety days (as a result of illness contracted during the course) from the theoretical and practical course leading to a promotion to police superintendent.

Languages:

Italian.

Identification: ITA-1998-2-005

a) Italy / **b)** Constitutional Court / **c)** / **d)** 17.07.1998 / **e)** 267/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 29 of 22.07.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Proportionality.
General Principles - Weighing of interests.
General Principles - Reasonableness.
Fundamental Rights - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Secondary health care / Urgent treatment, reimbursement / Prior authorisation / Health, effective protection / Emergency, non-public medical treatment.

Headnotes:

The Constitutional Court, in its previous case-law, has repeatedly maintained that the right to health entails the right to the medical treatment needed to protect it and is "guaranteed to every person as a right that is constitutionally dependent on its implementation by law, through the balancing of the interests protected by this right with the other interests protected by the Constitution". Eligibility for secondary health care is therefore proportional to the other interests protected by the Constitution, taking into account the limits set down by the law with regard to the organisational and financial resources available.

The essence of the right to health is safeguarded by these legislative provisions, which legitimise recourse to secondary health care in the event of the public health service being unable to guarantee rapid treatment that cannot be postponed because of the state of health of the person needing the treatment.

Regional legislative provisions, criticised because they blindly and unconditionally rule out the possibility of

reimbursing the costs if a patient has not requested prior authorisation for treatment in institutions other than public ones, even in serious or urgent cases where this is absolutely necessary, do not guarantee effective health protection and are in violation of Article 32 of the Constitution, as well as being at variance with the principle of reasonableness. The fact that prior authorisation is an absolute prerequisite constitutes a failure to accord protection in precisely those cases where the seriousness of the patient's condition makes it impossible for him or her to submit an application for prior authorisation; moreover, the interpretation of the law does not appear to be based on plausible grounds. Consequently, the correct interpretation from a constitutional viewpoint would appear to be to delay checking the documents supporting recourse to secondary health care until after the service has been provided. This would guarantee an appropriate balance between the relevant constitutional values, on the one hand by avoiding the failure to guarantee the fundamental right to health protection in the event of a serious risk to health, and on the other hand by not altering the criteria underpinning the distinction between primary and secondary health care.

Summary:

The Constitutional Court found that a legal rule passed in 1990 in the Piedmont region was unlawful, in that it made no provision for financial contributions to secondary health care in cases of "proven gravity and urgency", when it had not been possible to obtain the necessary prior authorisation from the public health service, although all the other conditions specified regarding eligibility for reimbursement were fulfilled.

Cross-references:

With regard to the need to strike a balance between safeguarding the right to health and other important constitutional values, the Court refers to judgment no. 304/1994, as well as judgments nos. 218/1994, 247/1992 and 455/1990.

Languages:

Italian.

Identification: ITA-1998-2-006

a) Italy / **b)** Constitutional Court / **c)** / **d)** 17.07.1998 / **e)** 268/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 29 of 22.07.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Reasonableness.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Race.
Fundamental Rights - Civil and political rights - Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Persecution, victims, allocation of funds / Jewish minority / Persecution, political, anti-fascist, victims / Persecution, racial, victims.

Headnotes:

The failure to provide for a representative of the Jewish community in the Government Committee for the allocation of funds to anti-fascist victims of political persecution and to victims of racial persecution and their surviving family members is not reasonable and is consequently unconstitutional.

Summary:

The Court found that part of Article 8, in the subsequently amended text, of Act no. 96/1995 on "funds to support anti-fascist victims of political persecution or victims of racial persecution and their surviving family members", was unconstitutional in that it did not stipulate that a representative of the Union of Italian Jewish Communities should also be a member of the committee in order to secure the funds specified by this law.

With regard to the organisation of public activities, the legislative authorities have discretionary powers to set up *ad hoc* committees to carry out specific administrative activities; these committees are not only consultative but also deliberative. In reviewing the principles of reasonableness, smooth functioning and impartiality, these committees are responsible, amongst other things, for regulating the composition of the committees themselves; members may also include people who, even if they are not part of the administration, are deemed able to make an appropriate contribution to administrative activities because of their specific knowledge of areas in which the committee is called to intervene, or of particular areas

of interest which merit consideration in the assessment of more general questions.

In setting up a government committee for the allocation of funds to anti-fascist victims of political persecution, victims of racial persecution and their surviving family members, the legislative authorities on the one hand stipulated that the committee would include representatives of anti-fascist victims of political persecution, while irrationally neglecting to stipulate that it should also include victims of racial persecution, and more specifically persons belonging to the Jewish community.

Racial discrimination against Jews from 1938 onwards was characterised by specific features, concerning not only the general, systematic nature of the persecution carried out against an entire minority, but also the identification of the target of persecution as persons belonging to the Jewish race on the basis of criteria established by law, and the pursuit of different aims from those of political persecution: anti-Jewish regulations were directed at a minority which suffered "persecution of rights", and, subsequently, "persecution of lives".

The distinction made by the law between the categories of anti-fascist victims of political persecution and victims of racial persecution, in particular Jews, in specifying that representatives of the first group, with no mention of the second group, should be members of the committee set up in order to obtain funds by way of compensation, cannot be reasonably justified in view of the particular contexts and vicissitudes that have characterised the persecution of members of the Jewish community; the specific nature of the situations of the two categories and their separate representation have already been asserted in the legislation, in the provisions governing requests for the allocation of a life annuity to survivors of Nazi concentration camps; to this end, a government committee has been set up including representatives of concentration camp survivors' associations, anti-fascist victims of political persecution and a representative of the Union of Jewish Communities. Consequently, the violation of the principle of equality may be redressed by the adoption of similar criteria to those laid down in respect of this particular committee.

The Court recalls the manner in which the Union of Italian Israelite Communities, now known as the Union of Italian Jewish Communities, has become recognised by the law as the representative organisation defending the interests of Italian Jews; this is acknowledged by a legal provision governing relations between the state and the Union itself.

Languages:

Italian.

Latvia
Constitutional Court

Important decisions

Identification: LAT-1998-2-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30.04.1998 / **e)** 09-02(98) / **f)** On Conformity of Paragraph 2 of the Resolution of the Supreme Council of 15 September 1992 on the Procedure by which the Law on Eminent Domain Takes Effect with Article 1 First Protocol of the Law of the Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** *Latvijas Vestnesis* (Official Gazette), 05.05.1998, no. 122 / **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.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national and non-national sources - European Convention on Human Rights and other domestic legal instruments.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.
General Principles - Public interest.
General Principles - Proportionality.
General Principles - Weighing of interests.
Fundamental Rights - General questions - Basic principles - Equality and non-discrimination.
Fundamental Rights - Civil and political rights - Right to property - Expropriation.
Fundamental Rights - Civil and political rights - Right to property - Nationalisation.
Fundamental Rights - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Real estate / Land ownership / Compensation, determination / State Land Service.

Headnotes:

The general principle of peaceful enjoyment of possessions is always to be considered in connection with the right of the State to limit the use of property in accordance with conditions envisaged by Article 1 Protocol 1 ECHR.

Summary:

On 19 December 1996, the Parliament (*Saeima*) passed the law "Amendment to the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect", supplementing paragraph 2 with the second, third and fourth parts in the following wording:

"When expropriating real estate necessary for the State or public - needs for maintaining and operating specially protected natural objects, educational, cultural and scientific objects of State significance, State training farms, national sport centres, as well as objects of engineering and technical, energy and transportation infrastructure - according to which the ownership rights are renewed or shall be renewed in accordance with the law to former owners (or their heirs), the extent of compensation shall be determined in money by a procedure established by law, but shall be not more than the evaluation of the real estate in the Land Books or cadastral documents drawn up before 22 July 1940 in which the value of real estate is indicated. Coefficients for the recalculation of value of property according to prices in 1938-1940 (in pre-war lats) and present prices (in lats) shall be determined by the State Land Service.

The fourth part stresses that the procedure for expropriation of real estate established by this paragraph shall also be applied to owners who have acquired the real estate from the former land owner (or his/her heir) on the basis of an endowment contract."

Taking into consideration that Article 64 ECHR (henceforth "the Convention") envisages the possibility of making reservations to any particular provision of the Convention where any law then in force in its territory is not in conformity with the provision, the *Saeima* included the following reservation in Article 2 of the Law on the Convention:

> "Claims under Article 1 Protocol 1 ECHR shall not relate to the property reform that regulates restitution of property or paying compensation to former owners (or their heirs) whose property has been nationalised, confiscated, collectivised or otherwise unlawfully expropriated during the period of the annexation by the USSR or to the process of privatisation of agricultural enterprises, fishermen's collective bodies and State or municipal property."

The case was initiated by twenty deputies of the *Saeima* who asked that parts 2 and 4 of paragraph 2 of the

Resolution be declared null and void from the day the Convention took effect in Latvia, i.e. from 27 June 1997.

The applicants pointed out that the procedure established by the second and fourth parts of paragraph 2 of the Resolution, when applied to persons mentioned there, makes them less equal before court than those whose property is expropriated in the public or State interest under general procedure, since the persons mentioned in paragraph 2 of the Resolution have no right or reason to protect their interests at the court as regards the amount of compensation for the expropriated property. Courts - in cases like this and according to the law - can only quite formally approve of the price, determined by the State Land Service.

They also pointed out that the second and fourth parts of paragraph 2 of the Resolution express the notion that evaluation of the property depends only on what basis or how the property has been obtained and on whether the property status of its owner has improved or become worse. The applicants are of the opinion that compensation for expropriated property should be reasonable and should not be determined merely on the basis of the manner of obtaining it. If for one and the same property two people are paid different sums of money just because the properties have been obtained differently, then that constitutes discrimination on the ground of property status.

The Constitutional Court concluded that the procedure for the evaluation and determination of compensation for immovable property, which is envisaged by the second part of paragraph 2 of the Resolution, has been determined taking into consideration State or public interests. The terms of the second part of paragraph 2 of the Resolution refer only to immovable properties that are necessary for State or public needs for the maintenance and operation of specially protected natural objects, educational, cultural and scientific objects of state significance, State training farms, national sport centres as well as objects of engineering and technical, energy and transportation infrastructure. Such a procedure is in conformity with the fundamental principle of denationalisation of property in the Republic of Latvia - "to denationalise the property or to compensate its value to the extent that has been indicated during nationalisation" and it has the objective - in the context of consequences of the policy of annexation by the USSR to re-establish social justice and to fairly balance interests of the individual and the society after completion of the property reform (conversion).

Although the amount of compensation is to be reasonably related to the value of the property to be expropriated, Article 1 Protocol 1 ECHR - as has repeatedly been shown in the practice of the European Court of Human Rights - does not envisage full compensation for the expropriated property, especially in cases when expropriation of property takes place for important public interests. The European Court of Human Rights has come to the conclusion that legitimate objectives of public interest, such as those pursued by measures of economic reform or measures designed to achieve greater social justice, may call for reimbursement of less than the full market value. Thus, the principle of fair balance not only establishes a certain boundary between an admissible and inadmissible expropriation of property but also invests the government with extensive rights when evaluating the property to be expropriated and determining the amount of compensation.

The second and fourth parts of paragraph 2 of the Resolution do not prevent the owner whose property is being expropriated in the public or State interest from appealing to a court to review the extent of compensation. The second part of paragraph 2 of the Resolution only establishes the maximum extent of compensation. Therefore the viewpoint of the applicants, that the above persons have been denied the right to protection by a court and equality before the court, is unfounded.

The Constitutional Court decided to declare the second and fourth part of Paragraph 2 of the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect as being in compliance with Article 1 Protocol 1 ECHR.

Cross-references:

On the question of reimbursement for less than full market value, see:

- Judgment *James and Others v. the United Kingdom*,of 21.02.1986, paragraph 54;
- Judgment *Lithgow and Others v. the United Kingdom*, of 08.07.1986, paragraph 121; précis in *Special Bulletin ECHR* [ECH-1986-S-002];
- D.J.Harris, M.O'Boyle, C.Warbrick: *Law of the European Convention on Human Rights*; London, Dublin, Edinburgh, 1995, pages 532-534.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-1998-2-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 10.06.1998 / **e)** 04-03(98) / **f)** On Conformity of the Cabinet of Ministers 1996 Resolution no. 148 and the Cabinet of Ministers 1997 Resolution no. 367 with the Law on the Determination of the Status of Politically Repressed Persons Suffered during the Communist and Nazi Regimes / **g)** *Latvijas Vestnesis* (Official Gazette), 11.06.1998, no. 172 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Unwritten rules - **General principles** of law.
General Principles - Democracy.
General Principles - Separation of powers.
General Principles - Rule of law.
General Principles - Certainty of the law.
General Principles - Maintaining confidence.
General Principles - Vested rights.
Fundamental Rights - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Compensation, politically repressed persons / Deportation, compensation / Time-limit for application, reduction / Compensation, amount, limitation.

Headnotes:

Any State governed by the rule of law acknowledges the principle of trust in law. The principle requires that State institutions shall be consistent in their activities as regards normative acts passed by them and that they shall take into account trust in law, which could arise on the basis of a specific normative act.

Summary:

The Latvian SSR Council of Ministers adopted on 29 August 1989 Resolution no. 190, certifying the procedure by which property was to be restituted or its value compensated to citizens whose administrative deportation from Latvian SSR had been recognised as unfounded. The first paragraph of the Resolution provided that an application for restitution of property or compensation of its value must be made not later than 3 years from the date on which the Resolution about unfounded deportation had been passed. On 12 April 1995 the *Saeima* passed a new law on the determination of the status of politically repressed persons who suffered during the Communist and Nazi Regimes. The very first sentence of Article 9 established that "the State shall ensure restoration of politically repressed persons' rights in the area of civil, economic and social rights according to law".

On 15 February 1996 the law on the State Budget for 1996 was passed.

The third paragraph of the Transitional Provisions of the Law states that from 1 March 1996, applications for compensation from persons residing in the territory of the Republic of Latvia shall no longer be accepted.

On 23 April 1996, the Cabinet of Ministers passed Resolution no. 148 on the procedure by which property is to be restituted or its value compensated to persons whose administrative deportation from the Latvian SSR is recognised as unfounded (henceforth Resolution no. 148).

The second paragraph of the Resolution establishes that persons whose administrative deportation from the Latvian SSR is recognised as unfounded and who reside in the territory of the Republic of Latvia (or their heirs) shall have the issue of restitution of or compensation for property reviewed if they submit an application to the Council *(Dome)* of the Municipality of the territory where the persons lived before deportation. In accordance with the third paragraph of Transitional Provisions of the law on the State budget for 1996, such a claim had to be made within three years of the date of passing the Resolution concerning unfounded deportation but not later than 1 March 1996.

On 4 November 1997, the Cabinet of Ministers introduced amendments to Resolution no. 148 by means of Resolution no. 367, which provided that persons whose administrative deportation from the Latvian SSR had been recognised as unfounded and who reside in the territory of the Republic of Latvia (or their heirs) shall have the issue of restitution of or compensation for property reviewed if they have received documents certifying the fact that their administrative deportation was unfounded only after 1 March 1996.

The application was submitted by 22 deputies of the *Saeima*, who challenged Resolutions no. 148 and no. 367, considering that they were not in compliance with the law of 1995 on the determination of the status of politically repressed persons who suffered during the communist and Nazi Regimes. Article 10.1 of the law establishes that the State and local government institutions and their officials shall, upon receiving applications from politically repressed persons as well as from other interested persons, eliminate the consequences resulting from restrictions of civil, economic and social rights caused by the totalitarian regimes, and compensate material

losses, physical and material damage, caused by these regimes.

The applicants also point out that in paragraph 10 of Resolution no. 148, the Cabinet of Ministers has groundlessly reduced the amount of compensation that the State had undertaken to pay to politically repressed persons in cases where there was no possibility of restituting the property, establishing the maximum amount of compensation as 2,000 lats for buildings and 500 lats for other property. In addition, Resolutions no. 148 and no. 367 created a situation whereby politically repressed persons who had received the certificate of rehabilitation before 1 March 1996 but who had not been able to submit an application to receive compensation before that date, had been denied the possibility of receiving compensation at all.

The Constitutional Court concluded that Article 1 of the Constitution (*Satversme)* establishes that Latvia shall be an independent democratic Republic. In a democratic state the legislative power belongs to the nation and the legislator - the *Saeima*. The executive power - the Cabinet of Ministers - has the right to pass resolutions only in cases foreseen by the law. Such resolutions shall not be at variance with the Constitution (*Satversme*) and other laws. The above follows from the principles of the rule of law and the separation of powers, which are considered to be the basis of the existence of a State governed by the rule of law.

Politically repressed persons trusted the procedure established in 1988 by which property was restituted or its value compensated. These persons planned their future on the basis of the rights endowed by certain normative acts. Due to Resolutions no. 148 and 367, passed by the Cabinet of Ministers, a number of politically repressed persons were denied the right of retrieving illegally confiscated property or receiving compensation for it as provided by law. Thus, the principles of justice and trust in law were violated.

By establishing the date upon which applications would no longer be accepted, Resolutions no. 148 and 367 are at variance with the law on the determination of the status of politically repressed persons who suffered during the Communist and Nazi Regimes which does not establish time limits for granting the status of a politically repressed person and restoring of the rights of such persons.

Paragraph 3 of the Transitional Provisions of the law on the State budget for 1996 only held up the acceptance of applications mentioned in the Resolution for a while and even then only on issues of compensation, not establishing restrictions on accepting those applications when there was a possibility of returning the property.

Evaluating the principles of justice, the rule of law, separation of powers and trust in law and taking into consideration the fact that the normative acts in question worsened the situation of politically repressed persons and unlawfully denied them their rights, the Constitutional Court decided that the above Resolutions are to be declared null and void from the moment of their adoption.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-1998-2-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 13.07.1998 / **e)** 03-04(98) / **f)** On Conformity of the Resolution of the *Saeima* of 30 April, 1998 on the Vote of Confidence for the Cabinet of Ministers with the Law "The Structure of the Cabinet of Ministers" and Rules of Procedure of the *Saeima* / **g)** *Latvijas Vestnesis* (Official Gazette), 14.07.1998, no. 208 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
Institutions - Legislative bodies - Powers.
Institutions - Legislative bodies - Relations with the executive bodies.
Institutions - Executive bodies - Composition.
Institutions - Executive bodies - Liability - Political.

Keywords of the alphabetical index:

Cabinet of Ministers / Procedure, Parliament / Procedural fault, importance / Vote of confidence.

Headnotes:

Not every violation of parliamentary procedure means that an act should be considered as having no legal force. To declare an act null and void due to a violation of parliamentary procedure, one should have a well-founded

doubt that if the procedure had been observed, the *Saeima* would have adopted a different resolution.

Summary:

Only one issue was on the agenda of the 30 April 1998 extraordinary sitting of the *Saeima*: the draft Resolution on a vote of confidence in the Cabinet of Ministers.

The draft Resolution envisaged simultaneously giving a vote of confidence on the acting members of the Cabinet of Ministers and on the persons invited to take up office in the Cabinet of Ministers (henceforth - "the disputed act").

The case was initiated by 21 deputies of the *Saeima* who challenged the conformity of the disputed act with Articles 6 and 11 of the Law on "The Structure of the Cabinet of Ministers" and Articles 27 and 28 of the Rules of Procedure, petitioning the Court to declare the Resolution null and void from the moment of its adoption.

The application declared that in conformity with Article 6 of the Law on "The Structure of the Cabinet of Ministers", ministers who are subsequently appointed by the Prime Minister need a special *Saeima* resolution on the vote of confidence and not a resolution on a vote of confidence for the whole body of the Cabinet of Ministers.

The applicants stressed that, when adopting the disputed act, the deputies of the *Saeima* were restricted to expressing their attitude to the newly appointed members of the Cabinet of Ministers. Deputies who supported the continuation of the activities of the existing Cabinet of Ministers were denied the possibility of giving a no-confidence vote regarding the subsequently appointed ministers. In addition, the application pointed out that the Rules of Procedure do not provide the possibility for the Prime Minister to request the *Saeima* to give a vote of confidence in the acting government and Rules of Procedure determine all cases in which the *Saeima* is authorised to reach decisions on a vote of confidence or no-confidence in the Cabinet of Ministers or a separate member of it in detail.

The Constitutional Court held that Article 59 of the Constitution (*Satversme*) establishes, that "the Prime Minister and Ministers shall by necessity enjoy the confidence of the *Saeima* and shall be responsible to the *Saeima* for their actions. Should the *Saeima* express a vote of no-confidence in the Prime Minister, the whole Cabinet shall resign. Should the *Saeima* express a vote of no-confidence in any particular minister, that minister shall resign and the Prime Minister shall invite another person to take his place". Thus, the Article authorises the *Saeima* to reach decisions on issues connected with expressing confidence or no-confidence in the Cabinet of Ministers.

The Rules of Procedure do not prohibit reviewing cases not envisaged by the Rules of Procedure. In the same way, the Rules of Procedure do not prevent reviewing cases in compliance with parliamentary traditions, if they are not at variance with the Rules of Procedure.

However, one of the basic principles of parliamentary action requires that the essence of the procedure of reviewing cases be clearly understood. If there are no established traditions, then the *Saeima*, before it starts reviewing the particular case, shall establish the procedure of the review.

In compliance with Article 59 of the Constitution (*Satversme*), the *Saeima* is authorised to make a decision on giving a repeated vote of confidence in the Cabinet of Ministers, although, before it begins considering the issue, it must determine the review procedure. As the verbatim report of 30 April 1998 extraordinary *Saeima* sitting proves, the *Saeima* did not take this fundamental principle into consideration.

The procedure for submitting a draft resolution on a vote of confidence in the Deputy Prime Minister, a Minister or a Minister of State subsequently invited or appointed by the Prime Minister is established by Article 28 of the Rules of Procedure.

This Article shall be interpreted taking into consideration the second sentence of Article 6 of the Law on "The Structure of the Cabinet of Ministers". Both these provisions refer to cases when a person is nominated subsequently to the office of a Minister, i.e., the *Saeima* has not given a vote of confidence in that person as envisaged by Article 27 of the Rules of Procedure, whereby a candidate to the office of Prime Minister invited by the President of the State, asks the *Saeima* to give a vote of confidence in the formed Cabinet of Ministers.

Article 6 of the Law on "The Structure of the Cabinet of Ministers" establishes that a person who is subsequently invited to become a Minister shall need "a special resolution on the vote of confidence". The term "a special resolution on a vote of confidence" has been used to separate the form and the point of the resolution from the "specific resolution" on a vote of confidence for the whole Cabinet of Ministers by the *Saeima*, envisaged in the first sentence of the Article.

The contents and the form of the above "special resolution" are clearly defined in Article 28 of the Rules of Procedure. In particular, where a person is

subsequently invited to become a Minister, a draft resolution of the *Saeima* on a vote of confidence in that person is required. Such a resolution - as has been with good reason pointed out by the applicant - is one which has been adopted separately from any other resolution, including a resolution giving a repeated vote of confidence in the Cabinet of Ministers.

In compliance with Article 11 of the Law on "The Structure of the Cabinet of Ministers", persons nominated to the office of minister who have resigned shall begin to fulfil their obligations as ministers only after they have received a vote of confidence from the *Saeima*.

The disputed act should have been discussed by the *Saeima* and reviewed as two separate cases - first as a vote of confidence in persons who have not yet been submitted to a vote of confidence and then as a vote of confidence for the whole government.

By discussing and reviewing the disputed act as one case, the *Saeima* has taken into consideration neither Article 6 of the Law on "The Structure of the Cabinet of Ministers" nor Article 28 of the Rules of Procedure.

Even though the draft disputed act was not in compliance with Article 6 of the Law on "The Structure of the Cabinet of Ministers" and the requirements of Article 28 of the Rules of Procedure, the deputies had a possibility to eliminate the shortcomings of the draft.

Before voting the deputies already knew that they were going to give a vote of confidence not only in the whole body of the government but also in the persons nominated to take up office in the Cabinet of Ministers. Every deputy who wanted to oppose one or several persons invited to take up office in the Cabinet, had the right, under Article 133 set by the Rules of Procedure, to demand a separation of the motion, i.e. a separate vote for the particular person or persons. However, during the process of adoption of the disputed act, such a motion was not expressed.

The Constitutional Court decided to declare that the 30 April 1998 Resolution of the *Saeima* on a vote of confidence in the Cabinet of Ministers had been adopted not taking into consideration several procedural norms, included in Article 6 of the law "The Structure of the Cabinet of Ministers" and Article 28 of the Rules of Procedure. However, on its merits it is in compliance with Article 59 of the Constitution (*Satversme*).

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Statistical data
1 May 1998 - 31 August 1998

Number of decisions: 13

Important decisions

Identification: LIE-1998-2-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 18.06.1998 / **e)** StGH 1998/6 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
General Principles - Public interest.
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.

Keywords of the alphabetical index:

Co-defendants, consultation of the case-file, restriction / Co-defendants, collusion / Extortion, serious.

Headnotes:

The right to consult case-files may be restricted within the limits of the law and in keeping with the principles of proportionality and the public interest *(Übermaßverbot)*. When there is more than one accused, consultation of the case-file during investigation proceedings may be refused until all the accused have been questioned.

Summary:

During an investigation opened against the applicant and two other defendants for serious extortion, the investigating judge rejected a request from the applicant to consult the case-file on the grounds that he was still due to be questioned. The investigating judge accepted a second request to consult the file once this questioning had taken place.

In response to an appeal by the Public Prosecutor's Department, the Appeal Court set aside the investigating judge's decision to allow the applicant's second request on the grounds, *inter alia*, that his co-defendants were still due to be questioned. The applicant appealed to the Supreme Court to overrule this decision. The Supreme Court rejected this application, also relying primarily on the grounds that there was a need to prevent collusion between the defendants. If the public interest inherent in the quest for truth during a criminal hearing is weighed against the interest of the applicant in consulting the case-file, a brief restriction on the right to consult the case-file until all the defendants have been questioned is fully justified.

The applicant lodged a constitutional appeal against this decision, which was rejected by the State Council. In its judgment the State Council found that the fundamental right to consult the case-file can be restricted within the limits of the law and in keeping with the principles of proportionality and the public interest *(Übermaßverbot)*. Article 6.3.d ECHR does not offer broader legal protection than the basic domestic law, as the fundamental law of the European Convention on Human Rights is only applicable after indictment, and then only subject to certain restrictions. In the instant case, the refusal to allow the applicant to consult the entire criminal case-file until all the defendants had been questioned seems proportionate. For in the event that there is more than one accused, there is often an obvious risk of collusion between them to prevent the investigation from continuing. However, even in this event, any automatic refusal to allow consultation of the criminal case-file is contrary to the application of the fundamental right to consult the case-file required by the Constitution. Both the decision to restrict the right to consult the case-file in itself and the extent and duration of this restriction must be furnished with detailed reasons.

Languages:

German.

Lithuania
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 May 1998 - 30 August 1998.

Malta
Constitutional Court

Statistical data
1 May 1998 - 31 August 1998

- Number of decisions: 5
- New Cases: 4

Important decisions

Identification: MLT-1998-2-001

a) Malta / **b)** Constitutional Court / **c)** / **d)** 06.07.1998 / **e)** 625/97 / **f)** John Saliba v. Attorney General et al / **g)** / **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 - Procedural safeguards and fair trial - Trial within reasonable time.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Independence.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rules of evidence.

Keywords of the alphabetical index:

Experts, members of police force, independence / Evidence, fingerprint report / Experts, appointment, objection / Objection, belated.

Headnotes:

A person should not be prevented from benefiting from recent case-law establishing a principle in respect of the fundamental right to a fair hearing merely because at the time in question he had not realised this right had been breached by the appointment, in criminal proceedings, of court experts employed in the Police Corps. As the Criminal Code permitted this practice and it was only through judgments delivered by the Constitutional Court that its unconstitutionality was later established, it cannot be argued that the applicant could easily have raised objections at the time on the basis of the Criminal Code.

Summary:

The applicant instituted a constitutional application wherein he alleged a breach of his fundamental human right to a fair hearing as guaranteed by Article 39 of the Constitution and Article 6 ECHR. His grievances were based on the fact that:

1. Ten years had elapsed since criminal proceedings had been instituted against him and a final judgment was delivered by the Court of Criminal Appeal on 12 December 1997. For the previous five years the proceedings had been repeatedly adjourned for the delivery of the judgment.

2. During the criminal proceedings the Court had appointed experts who were members of the Police Force, and the applicant contended that such experts could not be deemed as independent.

The First Hall of the Civil Court sitting in its constitutional jurisdiction declared that the applicant's right to a fair hearing had been breached in that the criminal proceedings had been pending for ten years before a final judgment was delivered. However, the Court rejected the applicant's second grievance on the basis that at the time of the appointment of the experts, the applicant did not object. He only filed an objection in this sense when the proceedings were pending before the Court of Criminal Appeal. Furthermore, the Court condemned the respondents to pay the applicant the sum of Lm 500 by way of compensation. However, it denied the applicant's request for the revocation of the judgment delivered on 12 December 1997 by the Court of Criminal Appeal whereby the applicant had been condemned to imprisonment.

The applicant filed an appeal requesting the revocation of the judgment delivered on 24 April 1998 by the First Hall of the Civil Court insofar as it dismissed his grievance that his right to a fair trial had been breached when members of the Police Corps had been appointed as court experts to take the fingerprints of the applicant and file a report after comparing the same with another fingerprint which was in the possession of the Prosecution and had been exhibited in the acts of the proceedings.

The Constitutional Court observed that it was true that during the criminal proceedings the applicant had not objected to the appointment of such experts when he had the opportunity to do so. However, the Court of Magistrates (Malta) as a Court of Criminal Judicature had rightly discarded the reports and opinions drafted by such experts on the basis of recent judgments which had declared the inadmissibility of similar reports.

The Constitutional Court referred to a judgment delivered on 8 May 1998 by the Court of Criminal Appeal in the Case *The Republic of Malta v. Joseph Attard et al.* The case concerned an appeal from a judgment delivered by the Criminal Court, wherein the appellant claimed that the fingerprint report exhibited in the proceedings was null as it was drawn up by a member of the Police Corps. The objection was not raised when the expert was appointed by the Court. The Court of Criminal Appeal, while referring to previous judgments, declared that the member of the Police Corps appointed to examine the fingerprints was not independent and as such did not qualify to be appointed as court expert. Thus, the Court ordered the removal of the report from the acts of the criminal proceedings.

The Constitutional Court observed that from the records of the proceedings it transpired that:

1. By means of a judgment delivered on 28 October 1991 by the Court of Magistrates (Malta) as a Court of Criminal Judicature, the applicant was freed from the accusations filed against him.

2. The fingerprint expert had been appointed in 1987.

3. The case depended on a fingerprint which had been taken by a police constable, allegedly from the scene of the crime, under dubious circumstances.

4. The Court of Magistrates (Malta) as a Court of Criminal Judicature, of its own initiative, declared the fingerprint report to be inadmissible in the light of recent judgments which had declared that reports drawn up by court-appointed experts who were members of the Police Corps had no probative value.

The Constitutional Court expressed its full agreement with the initiative taken by the Court of Magistrates (Malta) as a Court of Criminal Judicature especially when one considered that when the experts were originally appointed in 1987 the issue concerning the legality of appointing members of the Police Force had never been tested in the local courts. At that point in time no one had ever thought of contesting such appointments.

The Constitutional Court was of the opinion that when the Court of Magistrates (Malta) as a Court of Criminal Judicature decided to discard the report drawn up by the court-appointed expert, it recognised that the applicant did not have the opportunity to raise the issue concerning the appointment of experts. Thus it was not prepared to prohibit the applicant from the benefits resulting from recent case-law which established a principle in respect of this issue.

The Constitutional Court also declared unfounded the argument of the Court of Criminal Appeal that the applicant could have easily objected to the appointment of members of the Police Corps as court experts at an earlier stage, in terms of the Criminal Code (Chapter 9 of the Laws of Malta). The Criminal Code provided for the possibility that such experts be appointed from amongst the Police Corps. It was only through judgments delivered by the Constitutional Court that the anti-constitutionality of this principle and practice was established.

Thus, the Constitutional Court upheld the applicant's appeal and revoked the judgment delivered by the Court of Criminal Appeal on 12 December 1997. The Court reached this decision on the strength of the premise that applicant's guilt was based on the report drawn up by the court-appointed expert.

Languages:

Maltese.

Identification: MLT-1998-2-002

a) Malta / **b)** Constitutional Court / **c)** / **d)** 18.08.1998 / **e)** 466/94 / **f)** Dr Lawrence Pullicino v. The Hon. Prime Minister et al / **g)** / **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 - Weighing of interests.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Impartiality.
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 - Right to have adequate time and facilities for the preparation of the case.
Fundamental Rights - Civil and political rights - Freedom of the written press.

Keywords of the alphabetical index:

Judge, pre-trial decisions / Publicity of proceedings / Notes, confiscation / Media, newspaper articles, prejudicial / Press campaign, virulent / Judge, challenging / Text-books, legal, confiscation.

Headnotes:

Although publicity is a means of guaranteeing the fairness of a trial, a balance must be struck between the right to a fair trial and the freedom of expression enjoyed by the media in terms of Article 10 ECHR.

The taking of certain pre-trial decisions by a judge presiding over a trial by jury does not in itself justify fears as to his impartiality.

The confiscation of notes written by an accused during a trial by jury constitutes a breach of his fundamental right to a fair hearing. However, account could be taken of the proceedings in their entirety when deciding whether to grant a remedy.

Summary:

The applicant had been condemned to a term of fifteen years imprisonment, having been found guilty of complicity in the crime of grievous bodily harm followed by death of a person while in police custody. The crime was committed at the time when the applicant occupied the office of Police Commissioner.

The applicant filed a constitutional application alleging that during the criminal proceedings his right to a fair trial had been breached, particularly that during the criminal proceedings the presiding judge:

1. had been negatively influenced against the accused as a result of the various press reports which were published in the local newspapers;

2. was prejudiced against the applicant since prior to the commencement of the trial by jury he had already expressed himself in the sense that the applicant was not a credible person;

3. had ordered that prior to the applicant giving evidence in the trial by jury, all his personal papers and law text-books which were in his possession be removed from his cell.

1. Virulent press campaign

The Constitutional Court expressed the view that publicity is to be considered as a guarantee of the fairness of a trial. Furthermore, the right to a fair trial was to be counter-balanced with the right of the freedom of the press as laid down in Article 10 ECHR. There is general recognition of the fact that the Courts cannot operate in a vacuum. Whilst they are the forum for settlement of disputes, this does not mean that there can be no proper discussion of disputes elsewhere, be it in specialised journals, in the general press, or amongst the public at large. The media also has an obligation to impart information on matters which come before the Courts.

It is true that certain articles published in the local newspapers were not written in an objective manner and were prejudicial to the applicant. However these were the exception and not the rule and they were published after the jury had reached its final verdict, although the appeal was still pending. Thus, one could not conclude that a virulent press campaign was directed against the applicant, and which if present would have prejudiced the applicant's fundamental right to a fair hearing.

Although in trials by jury the risk that the jury is influenced by public opinion is more pronounced, such an influence is difficult to prove as no written statement of reasons is provided by the members of the jury. No proof was produced that the articles in question produced a negative effect on the members of the jury or the presiding judges. In this respect the Constitutional Court concluded that it did not find any appearance of a violation of the rights and freedoms of the applicant as set out in the Constitution and the European Convention on Human Rights.

2. Impartiality of the presiding Judge

The applicant contended that in the early stages of the trial, the judge delivered certain decisions which instilled the appearance that he was prejudiced against the applicant. This could be seen, argued the applicant, when the judge revoked the applicant's bail and ordered his immediate arrest.

The Constitutional Court held that in applying the objective test, what is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. Justice must not only be done; it must also be seen to be done. It further held that according to the jurisprudence of the European Convention of Human Rights, the mere fact that a judge has made pre-trial decisions cannot be taken as in itself justifying fears as to his impartiality. What matters is the extent and the nature of those decisions.

Respondents contended that prior to the commencement of the trial, the applicant could have raised a plea requesting the presiding judge to abstain from sitting in the proceedings. The Constitutional Court held that a judge who had not expressed himself on the merits of the case could not be challenged. The preliminary decision delivered by the judge concerning the issue whether the applicant should be remanded in detention had no connection with the merits of the case.

Another remedy was to request the Criminal Court to refer the issue to the First Hall of the Civil Court sitting in its constitutional jurisdiction, in terms of Article 46 of the Constitution.

Furthermore, the Constitutional Court held that notwithstanding this preliminary decision, at no point in time did the judge express an opinion on the character of the applicant. No proof was produced that the presiding judge had influenced the members of the jury in an adverse manner. The manner in which the judge addressed the jury is added proof that no such bias was present. In particular, throughout his address the judge warned the members of the jury that they had to deliver the verdict on the facts as produced to them.

3. Sequestration of personal notes and legal text-books during the trial by jury

The Constitutional Court opined that the criminal proceedings were lengthy and it was evident that the final decision depended much on the credibility of the evidence heard throughout the trial. It was thus essential for the applicant to be placed in the best possible position to rebut evidence given by witnesses produced by the prosecution. The Constitutional Court contended that for this to be achieved the applicant had a right to refer to the various notes he had compiled throughout the trial. Although the Court of Criminal Appeal had made specific reference to this incident, it concluded that notwithstanding such an irregularity, no miscarriage of justice had occurred during the trial.

On this issue the First Hall of the Civil Court concluded that the fact that the notes were in the possession of the accused during the whole criminal proceedings, except while he was giving evidence, and the fact that they were at the disposal of his defence counsel, were determinate in permitting the applicant to prepare his defence.

The Court argued that according to Article 463 of the Criminal Code (Chapter 9 of the Laws of Malta), in

criminal proceedings the accused has a right to be furnished with a copy of the transcript of the evidence submitted, and of all the documents which form part of the acts of proceedings (Article 519 of the Criminal Code - Chapter 9 of the Laws of Malta).

Thus, as the accused enjoys the right to such documents he must also have the right to take notes of the evidence produced during the trial. In terms of Article 583 (Chapter 12 of the Laws of Malta) he has the right to refresh his memory by referring to these notes.

The scope of this Article is to ensure that evidence produced in court is genuine and not contaminated. This provides a further guarantee that during the proceedings the truth is established. The applicant's evidence during the trial was one of the means whereby he could defend himself from the accusations. Furthermore, reference to legal text-books would have assisted the applicant in the preparation of his defence.

The order for the immediate removal of all applicants' notes and legal textbooks from his cell had a negative effect on the evidence given by the applicant both from the factual and psychological point of view. Furthermore, according to the principle of equality of arms each party was to be afforded a reasonable opportunity to present its case in conditions which do not place him at a disadvantage in respect to his adversary. In this respect the Constitutional Court declared that the applicant's right to a fair hearing was breached.

However, the Constitutional Court expressed the view that while proceedings were still pending before the Court of Criminal Appeal, the applicant should have requested that he give evidence with the assistance of the notes seized from his possession. Although the applicant had this remedy, for some reason he failed to make use of it. Consequently, the Constitutional Court was entitled to refuse the granting of a remedy to applicant.

The Court concluded that when the criminal proceedings instituted against the applicant are examined as a whole, one could safely declare that they were fair.

Cross-references:

In its reasoning the Constitutional Court referred to judgments delivered by the European Commission and European Court of Human Rights amongst which were:

De Cubber v. Belgium (1984); *Hauschildt v. Denmark* (24.05.1989), *Special Bulletin ECHR* [ECH-1989-S-001]; *Stanford v. the United Kingdom* (23.02.1994); *Fey v. Austria* (24.02.1993); *Padovani v. Italy* (26.02.1993).

The Sunday Times v. the United Kingdom (26.04.1979), *Special Bulletin ECHR* [ECH-1979-S-001]; *The Sutter Case, X v. the United Kingdom*, a decision of the Commission (16.05.1969), *X v. Austria*, a decision of the Commission (23.07.1963).

Jespers v. Belgium, a decision of the Commission (14.12.1981); *Can v. Austria,* a decision of the Commission (14.12.1983); *F. v. the United Kingdom*, a decision of the Commission (13.05.1986); *Windisch Case* (27.09.1990); *Delta Case* (19.12.1990); *Vidal v. Belgium* (22.04.1992).

Languages:

Maltese.

Moldova
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 May 1998 - 30 August 1998.

The Netherlands
Supreme Court

Summaries of important decisions of the reference period 1 May 1998 - 30 August 1998 will be published in the next edition, *Bulletin* 1998/3.

Norway
Supreme Court

Important decisions

Identification: NOR-1998-2-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 02.07.1998 / **e)** Inr 53 B/1998 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1998, 1190 / **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 - Margin of appreciation.
Fundamental Rights - General questions - Entitlement to rights - Natural persons - Prisoners.
Fundamental Rights - Civil and political rights - Right to private life.
Fundamental Rights - Civil and political rights - Right to family life.
Fundamental Rights - Civil and political rights - Rights of the child.

Keywords of the alphabetical index:

Imprisonment, separation of mother and child / Prisoner, mother's access to newborn child / Child, separation from imprisoned mother / Council of Europe member States, practice, comparison / Imprisonment, high level of security / Handcuffs / Body searches.

Headnotes:

The separation of a mother from her newborn child during the mother's imprisonment for serious drug crimes did not constitute a violation of Article 8 ECHR.

Summary:

The Dutch citizen A. was taken into custody on her arrival in Norway on 1 March 1990. 4.9 kilograms of amphetamines were found in her car. A few months later, an attempt to escape from prison was unveiled.

A. was pregnant at the time of the arrest. She gave birth to a son on 11 November 1990. After the birth, A. was brought back to prison, while her son stayed in a nursery centre. A. was allowed to visit her son 5 times a week until mid-December 1990. The child was then brought to visit A. in the prison, and after some time, for longer periods.

In February 1991, A. was sentenced to 6 years of imprisonment. A few days later, according to A.s' wish, her son was placed in the care of A.s' mother and taken to the Netherlands. Until July 1992, when A. was granted pardon, the child visited her several times in prison.

A. filed a case against the Norwegian State and demanded compensation on the grounds that the treatment of her during custody and imprisonment constituted a violation of her rights under the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The judgments in the City Court and the Court of Appeal were both in favour of the State.

The appeal to the Supreme Court mainly concerned the issue whether the separation of mother and child during A.s' imprisonment was a violation of Article 8 ECHR.

The Supreme Court found it of importance that A was imprisoned in institutions with a high level of security, especially regarding the possibility of escape. The Court emphasised the extensive contact arrangements that had been established for A. and her child. From the documentation that was presented to the Court on the conditions in other countries within the Council of Europe, no certain conclusion could be drawn on the right for a mother with a newborn child to have the child with her during imprisonment which demanded such a high level of security. The practice in Norwegian prisons was a result of thorough consideration by Norwegian authorities, which also took into account the physical and mental health of the child. Article 8 ECHR gives each country a certain margin of appreciation. This margin, which will be used by the convention organs, must also be used by the national courts. The Supreme Court concluded that the separation did not constitute a violation of Article 8 ECHR.

A. claimed that she had also been exposed to several other violations of Article 8 ECHR and Article 3 ECHR during her imprisonment. These alleged violations included, among others, the use of uniformed police and handcuffs when A. was brought to medical consultations during the pregnancy, the strict police surveillance during the birth and on later occasions when she visited her child in the nursery centre, and the extensive body searches she was subjected to each time she returned from the nursery centre to the prison. The Supreme Court concluded that Norwegian authorities did not violate the

Convention on any of these points, or on the points taken together.

The Supreme Court thus upheld the judgment of the Court of Appeal.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 May 1998 - 31 August 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): 7
- Courts' referrals ("legal questions", Article 25 of the Constitutional Tribunal Act): 0

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

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

Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 7
- Motions requesting such interpretations rejected: 0

Important decisions

Identification: POL-1998-2-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.05.1998 / **e)** K 35/97 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 1998, no. 59, item 381; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 3, item 32 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Relations between the State and bodies of a religious or ideological nature.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Religion.
Fundamental Rights - Civil and political rights - Freedom of conscience.

Keywords of the alphabetical index:

Churches, equality of rights / Public school certificates.

Summary:

The President of the Republic of Poland lodged a motion to conduct a preliminary review of the Act amending the Act on Guarantees of Freedom of Conscience and Confessions. The General Prosecutor supported the motion (in the most part). In the President's opinion, differentiation of the legal situation of citizens due to their confession, introduced by the Act, infringes the principle of equality.

Pursuant to the Act in question, the provision granting a number of churches the right to place on public school certificates the marks of religion classes was deleted. The Tribunal, in plenary session, held that the change was necessary since it was introduced to unify the regulation in this respect and not to eliminate the marks for religion classes on school certificates.

After the Act became effective, the churches were not deprived of the aforementioned right. Now, all churches must fulfil the same conditions, specified in a Regulation issued pursuant to an authorisation contained in the Act on Education. Therefore, the amendment mentioned above does not infringe the principle of equality.

Supplementary information:

One judge (A. Mączyński) delivered a dissenting opinion.

Languages:

Polish.

Identification: POL-1998-2-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.05.1998 / **e)** K 37/97 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 3, item 33 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Armed forces and police forces - Army.
Fundamental Rights - General questions - Basic principles - Equality and non-discrimination.
Fundamental Rights - Civil and political rights - Equality.

Keywords of the alphabetical index:

Soldiers, private accommodation, payment of dues / Social justice.

Headnotes:

The lack of a provision in the Act on Common Duty to Guard Polish Borders, pursuant to which soldiers would get refund of payments for their private accommodation, is contrary to the principle of equality.

Summary:

The principle of equality requires that an individual's rights be expressed unambiguously in an Act. Only then is the risk of unfavourable interpretation for an individual minimised. A provision of law must enable an individual to ascertain his or her rights.

The Act on Common Duty to Guard Polish Borders specifies a number of legal titles to various types of accommodation, of which the possession entitles its owners to refund of payments. The Act does not specify, however, private accommodation. Therefore, a legal title to an accommodation becomes the criterion of differentiation. In the Tribunal's opinion, there is no rational link between this criterion and the purpose of the legal regulation. The fact that persons having private accommodation were not specified in the Act is not justified on the grounds of the hierarchy of values defined in the Constitution and as such it infringes not only the principle of equality but also the principle of social justice.

Cross-references:

Resolution of 5 November 1997 (K 22/97, OTK 1997, no. 3-4, item 41), *Bulletin* 1997/3 [POL-1997-3-023], Resolution of 22 December 1997 (K 2/97, OTK ZU 1997, no. 5-6, item 72), *Bulletin* 1998/1 [POL-1998-1-002].

Languages:

Polish.

Identification: POL-1998-2-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.05.1998 / **e)** U 5/97 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 46 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Fundamental Rights - Civil and political rights - Right to private life - Protection of personal data.

Keywords of the alphabetical index:

Medical certificate.

Headnotes:

An obligation to indicate the statistical number of an illness in a medical certificate, as introduced by a Regulation of the Minister of Health and Social Welfare, limits citizens' constitutional rights and freedoms and as such must be introduced by an Act.

Summary:

The right to private life does not have an absolute character and may be limited. Such limitations must be introduced according to constitutional requirements.

Each provision limiting citizens' rights and freedoms must be assessed from two aspects: procedural, i.e. that such regulation must be introduced by an Act, and material, i.e. that the constitutional requirements of such limitations must be fulfilled. If a limitation was not introduced according to the aforementioned requirements it shall be deemed to be null and void.

Information about a person's health condition is a part of the private life of each individual. The introduction of an obligation to indicate the statistical number of an illness in a medical certificate causes a potential danger that the privacy of an individual may be infringed, regardless of the fact that direct infringement may happen only if third persons infringe the secrecy of this matter.

Languages:

Polish.

Identification: POL-1998-2-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.05.1998 / **e)** U 19/97 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 47 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Executive bodies - Powers.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.

Keywords of the alphabetical index:

Regulations, permissible scope / Act, technical defect.

Headnotes:

Determination of income (for purposes of determining private accommodation allowances) in an appendix to a Regulation of the Council of Ministers goes beyond the permissible scope of regulation.

Summary:

The Act on Lease of Private Accommodation, pursuant to which the regulation in question was issued, does not contain the basis for the method of determination of income. This fact constitutes a material loophole and a technical defect of the Act. It does not mean, however, that the Council of Ministers is entitled to include such definition in an appendix to a regulation. All regulations may only be issued pursuant to an authorisation contained in an act and only with in the scope of such authorisation. A provision of law setting forth such authorisation is subject to strict interpretation and may not lead to matters not specified therein being regulated by the regulation.

Cross-references:

Resolution of 28 May 1986 (U 1/86, OTK 1986, item 2), Resolution of 17 June 1997 (U 5/96, OTK ZU 1997, no. 2, item 21), *Bulletin* 1997/2 [POL-1997-2-014].

Languages:

Polish.

Identification: POL-1998-2-012

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.05.1998 / **e)** K 17/98 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 48 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of litigation - Distribution of powers between State authorities.
General Principles - Rule of law.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.

Keywords of the alphabetical index:

Term of office, extension.

Headnotes:

The extension of the period between the terms of office of local self-government bodies by the legislator is consistent with the principle of rule of law.

Summary:

The principle of proper duration of the terms of office of State bodies is not stated *expressis verbis* in the Constitution, but may be deduced from the principle of the rule of law. It is created by:

i. the obligation to grant the powers for each body for a defined period;

ii. the fact that this period should not exceed a reasonable time;

iii. the obligation to introduce legal regulations which would enable each body to commence its activity without unreasonable delays, after the termination of the previous term of office.

Both the extension and the shortening of the term of office of local self-government bodies during its duration must be assessed on the basis of the principle of proportionality. That requires deciding whether the results of such regulation remain in adequate proportion to the scope of infringement of the constitutional values. One should take into account that conducting such an assessment requires consideration of the circumstances of each matter. The extension of the period between the terms of office of local self-government bodies is acceptable if the Act introducing such amendment does not extend this period beyond a reasonable time.

Languages:

Polish.

Identification: POL-1998-2-013

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.06.1998 / **e)** K 28/97 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 50 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Armed forces and police forces - Army.
Fundamental Rights - General questions - Basic principles - Equality and non-discrimination.
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 - Public judgments.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to be informed about the decision.

Keywords of the alphabetical index:

Soldiers, professional, access to courts.

Headnotes:

Depriving professional soldiers and trainee professional soldiers of the right of access to courts in respect of reprimands and dismissals from professional service in the army is contrary to the constitutional principle of the right of access to courts.

Summary:

The right of access to courts is one of the most important rights of each individual and as such is an essential guarantee of a State governed by the rule of law. This right is composed of:

i. the right of access to courts;

ii. the right of a properly constructed court procedure, in accordance with the requirements of justice and publicity; as well as

iii. the right to the court's decision.

Each individual has the right of access to courts. Moreover, the legislator's intention is to extend this right to as many matters as possible.

A new provision of the Law on Professional Soldiers' Service excluded a number of matters connected with the official relations of professional soldiers and those of professional soldiers with the administrative bodies from the Supreme Administrative Court's control and supervision. The right of access to courts requires the legislator, however, to introduce legal regulations which would guarantee the courts' supervision of each decision, at the applicant's request. Therefore, since the legislator did not authorise another court to control the decisions issued in the aforementioned matters, the professional soldiers' right of access to courts has been infringed.

Languages:

Polish.

Identification: POL-1998-2-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.06.1998 / **e)** K 3/98 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 52 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Separation of powers.
General Principles - Equality.
Institutions - Jurisdictional bodies - Organisation - Members - Status.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Independence.

Keywords of the alphabetical index:

Retirement age, judges / Retirement rights, judges, grounds for deprivation.

Headnotes:

Allowing judges to remain in their positions after the age of 65 years (but before reaching the age of 70 years) subject to the consent of the National Council of Judges does not infringe the principle of independence of the judges, constituting the constitutional principle of the independence of the courts.

The provision of the Act, under which judges who infringed the principle of independence (before 1989) could be deprived of the right of retirement was unconstitutional due to the lack of consultations with the National Council of Judges.

Judges who worked for the machinery of repression before 1956 can be deprived of the right of retirement.

Summary:

The principle of irremovability of judges must be considered in the light of all general principles regarding the court's authority, because it constitutes one of a number of factors the purpose of which is to secure the independence of the court's authority and its capability to judge independently. The principle of irremovability of judges excludes the possibility of granting the executive authority the right to issue decisions on any aspects of a judge's legal situation. Therefore, the Constitution requires the legislator to determine the age at which the judges should retire. It does not mean, however, that the legislator is not allowed to introduce additional limits that could result in a judge's retirement, irrespective of the lack of his consent to such a decision.

Nevertheless the introduction of an additional age limit (65 years), which requires judges to obtain the acceptance of the National Council of Judges in order

to remain in their positions, makes the regulation more flexible. In the Tribunal's opinion, there are no grounds for suggesting that granting such competence to the National Council of Judges could cause an infringement or a risk of infringement to the principle of the independence of courts. Such interpretation is additionally strengthened by the fact that the Tribunal's decision is issued in the course of a preliminary review.

The Act in question revoked the statute of limitations for bringing disciplinary proceedings against judges who departed from the duty to judge independently and fairly in the political trials before 1989. In the Tribunal's opinion, due to drastic abuses of the principle of an independent trial in this period, the introduction of special procedures regarding the responsibility of such judges is permissible. Obviously, the legislator's duty is to pay special attention in order not to exceed the limits and open up the possibility of interference in the independent sphere of the judicial activity. Moreover, that provision of law was recognised to be unconstitutional since there had been no consultations with the National Council of Judges.

Pursuant to the provisions of the Act in question, judges who worked for the machinery of repression (both Polish and Soviet) between 1945 and 1956 may be deprived of the right of retirement. Such a regulation infringes, in the applicant's opinion, the principle of equality. However, in the Tribunal's opinion, the special rules of retirement for judges shall be treated as a special privilege. Therefore, one may require that use of such privilege must be limited to judges deserving special treatment. Judges acting within bodies constituting the terror machine which was responsible for many crimes should not be treated in a special way.

Cross-references:

Resolution of 9 November 1993 (K 11/93), Resolution of 20 November 1995 (K 23/95), Resolution of 17 July 1996 (K 8/96).

Supplementary information:

Two judges (F. Rymarz and M. Zdyb) delivered dissenting opinions.

Languages:

Polish.

Portugal
Constitutional Court

Statistical data

1 May 1998 - 31 August 1998

Total: 289 judgments, of which:

- Abstract *ex post facto* review: 1 judgment
- Appeals: 169 judgments
- Complaints: 50 judgments
- "Simplified decisions": 61 judgments
- Political parties accounts: 3 judgments
- Electoral disputes: 1 judgment
- Referenda: 4 judgments

Important decisions

Identification: POR-1998-2-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 29.07.1998 / **e)** 531/98 / **f)** / **g)** *Diário da República* (Official Gazette), no. 174, (Serie I-A), 30.07.1998, 3660-(2)-3660(13) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of litigation - Admissibility of referendums and other consultations.
Constitutional Justice - The subject of review - International treaties.
Constitutional Justice - The subject of review - Community law - Primary law.
Institutions - European Union - Legislative procedure.

Keywords of the alphabetical index:

Amsterdam Treaty / Referendum / European Union, construction process.

Headnotes:

Following the 4th constitutional reform (1997), the Constitution now makes provision for referenda on questions on which treaties are proposed which relate to Portugal's participation in international organisations. Such treaties have to be approved by the Assembly of the Republic (except peace treaties and treaties rectifying borders). The treaty (or convention) on the question put

to a referendum will of course already have been signed by the government but not yet formally approved by the Assembly prior to ratification by the President of the Republic.

However, no referendum on the "European question" should be allowed to call into question Portugal's past participation in or future membership of the European Union.

Summary:

With a view to the preliminary review of its constitutionality and legality (review which is in fact compulsory under the Constitution and the organic law on referenda), a proposal for a referendum submitted to the President of the Republic by the Assembly of the Republic was referred by the President to the Constitutional Court. The question proposed for the referendum was: "Do you agree that Portugal should continue to participate in the process of construction of the European Union through the Treaty of Amsterdam?" The proposal also stipulated that citizens registered as voters within the national territory and Portuguese citizens resident in the member States of the European Union would be entitled to take part in the referendum.

The Constitutional Court found that the question asked did not meet the requirements of clarity and exactitude because it was open to more than one interpretation and the wording made it impossible to determine the significance of the reference to the Treaty of Amsterdam. Nor did it fulfil the objectivity requirement because the question was worded in such a way as to force voters who were in favour of Portugal's continued participation in the process of construction of the European Union to vote yes and the key issue of the referendum, namely the changes brought about by the adoption of the Treaty of Amsterdam, was played down.

The court therefore declared the proposed referendum unconstitutional and unlawful and as a result the President of the Republic rejected the proposal.

Supplementary information:

The decision of the court was taken by a majority. Six judges delivered dissenting opinions.

Cross-references:

For the status of referenda after the 4th constitutional reform, see decision 288/98, *Bulletin* 1998/1 [POR-1998-1-001].

Languages:

Portuguese.

Identification: POR-1998-2-003

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 29.07.1998 / **e)** 532/98 / **f)** / **g)** *Diário da República* (Official Gazette), no. 174, (Serie I-A), 30.07.1998, 3660-(13)-3660(23) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of litigation - Admissibility of referendums and other consultations.
Institutions - Executive bodies - Territorial administrative decentralisation - Structure.
Institutions - Federalism and regionalism - Basic principles.

Keywords of the alphabetical index:

Local autonomy, implementation / Local authority / Referendum, general conditions / Referendum, specific conditions / Administrative region / Regions, establishment.

Headnotes:

The President of the Republic can put the question of establishing administrative regions to a referendum in the manner laid down in the law on referenda (Law 15-A/98 of 3 April 1998). The subject of the referendum is the organisational model (including the map of the administrative regions) and the essential points of the system provided for in the law instituting administrative regions, as approved by the Assembly of the Republic: it is a yes vote in the referendum that will authorise the legislator to institute administrative regions.

Direct consultation of citizens with the right to vote will take place at national level and within each region. However, if a majority of citizens taking part in the referendum do not vote in favour at the national level of establishing administrative regions, the replies to the questions on each region to be established by the law will have no effect.

Administrative regions are local authorities which can only be set up within metropolitan Portugal (the Azores and Madeira are autonomous regions with political and administrative status and executive bodies of their own). They are regional legal entities with representative bodies responsible for looking after their populations' interests. The administrative regions will each have an elected body with decision-making powers (the "regional assembly") and a collegial body answerable to it (the "regional council").

Summary:

Under Article 256.1 of the Constitution (amended in the constitutional revision of 1997), the detailed establishment of administrative regions, and adoption of the law setting up each region, is subject to a favourable vote by a majority of the electorate in a direct consultation at national and regional level.

The Assembly of the Republic therefore proposed that the President of the Republic should call a referendum on the following two questions:

a. the first question, to all electors registered on national territory, would be: "Do you agree to the establishment of administrative regions?";

b. the second question, to registered voters in each of the eight administrative regions provided for in Law 19/98 of 28 April 1998, would be: "Do you agree to the establishment of the administrative region corresponding to the constituency in which you are registered as a voter?".

These two questions (the first at national level and the second at regional level) are more or less predetermined by the Constitution itself because a referendum for the purpose of establishing administrative regions is compulsory and is governed by the Constitution and by a number of specific provisions of the law on referenda.

In the present case, the Constitutional Court declared the referendum lawful and constitutional. It found that the proposal fulfilled the general requirements for referenda (concerning their initiation and subject-matter and the electorate as well as the content and number of questions) and the specific requirements for a referendum on establishing administrative regions as laid down in the Constitution and the law on referenda.

Supplementary information:

The decision of the Court was taken by a majority. Five judges delivered dissenting opinions.

Cross-references:

On the constitutionality of the law instituting administrative regions, see decision 709/97, *Bulletin* 1997/3 [POR-1997-3-007].

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data
1 September 1997 - 31 December 1997

The Constitutional Court has handed down 380 decisions, as follows:

- 4 decisions on the constitutionality of legislation prior to its enactment;
- 376 decisions on objections alleging unconstitutionality.

Statistical data
1 May 1998 - 31 August 1998

The Constitutional Court has handed down 43 decisions, as follows:

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

Important decisions

Identification: ROM-1998-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.10.1997 / **e)** 394/1997 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Law no. 3/1974 on the press / **g)** *Monitorul Oficial al României* (Official Gazette), no. 46/02.02.1998 / **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 - Freedom of the written press.
Fundamental Rights - Civil and political rights - Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Human dignity, violation / Press law violations, definition / Offences, classification / Insult / Defamation / Constitutional Court, powers.

Headnotes:

The rule-making, social and political content of Law no. 3/1974 (Press Act) was contrary to the provisions of the December 1991 Constitution and the law was therefore repealed under Article 150.1 of the Constitution. Human dignity is violated by insult and defamation. Human dignity, being enshrined as a supreme value in Romania, a State governed by the rule of law, is protected by the provisions of Article 30.6 of the Constitution and by the provisions of Articles 205 and 206 of the Criminal Code, whose guarantees cover insult and defamation through the press.

Summary:

An objection alleging the unconstitutionality of Law no. 3/1974 (the Press Act) was referred to the Constitutional Court by a lower court.

The referral stated that in the preliminary complaint the injured parties had requested that criminal proceedings be instigated against the defendants, under Articles 205 and 206 of the Criminal Code for insult and defamation and under Law no. 3/1974 for publishing insulting and defamatory material about them in the newspaper "*Evenimentul de Iaşzi*".

In their memorial the defendants contended that the provisions of Law no. 3/1974 were unconstitutional as there was currently no law establishing press offences as envisaged in Article 30.8 of the Constitution.

In its opinion on the unconstitutionality objection the lower court submitted that while Law no. 3/1974 had not been expressly repealed, it had been implicitly repealed by the provisions of Article 150.1 of the Constitution. Under Article 30.6 of the Constitution freedom of expression was not to be prejudicial to the dignity, honour and privacy of the person, nor to the right to one's own image: nevertheless, paragraph 8 of the same article stated that press offences would be established by law. As no law on press offences had been promulgated, the penalties for insult and defamation which the Criminal Code prescribed were contrary to constitutional law, which classified press offences as offences of lesser seriousness.

In the Government's view, the matters with which the criminal proceedings were concerned came under Articles 205 and 206 of the Criminal Code rather than Law no. 3/1974, and the objection alleging unconstitutionality was therefore irrelevant.

In support of this opinion it pointed to the provisions of Article 279.3 of the Code of Criminal Procedure: these referred to offences provided for by "Article 205 and Article 206 of the Criminal Code, committed in the press" or in any other of the mass media.

In addition, the Government claimed that the lower court's argument that the Criminal Code penalties for insult and defamation in the press were unconstitutional because the Constitution classified such press offences as lesser offences, could not be accepted. Bearing in mind that current legislation did not recognise the threefold classification of offences as serious crimes, lesser offences and petty offences, Article 30.8 of the Constitution could not be taken to classify offences committed in the press as a particular category of offence. On the contrary, since Article 30.8 dealt with "civil liability for any information or creation made public", it followed from the argument that press offences were "established by law" that the passage referred to civil offences, which consequently entailed civil liability of the publisher, director, author, producer or the owner of the radio or television station or other mass medium.

After examining the documents in the file, the Constitutional Court ruled as follows:

Although Law no. 3/1974 predated the 1991 Constitution, the Constitutional Court was competent to rule on the unconstitutionality objection.

The referral to the Constitutional Court had been made on the ground of non-observance of Article 23.2 of Law no. 3/1974. This stated: "If, during trial of a case, the appointed court or one of the parties argues that a law or an order on which the case depends is unconstitutional, the constitutionality issue shall be referred to the Constitutional Court for a ruling". An objection of unconstitutionality could therefore only be raised, and the court could only refer it to the Constitutional Court, if the objection was to a provision of a law or an order on which the outcome of the case depended.

The present case was a criminal one. The fact of using the press as a vehicle for insult and defamation was irrelevant to the offence and the legal context. That was merely the manner of commission, and in law the offence was not conditional on using a particular procedure or method. This also followed from the provisions of Article 279.3 of the Code of Criminal Procedure, which stipulated that the preliminary complaint was also to be lodged directly with the judicial authority "in the case of offences provided for in Article 193 and Article 206 of the Criminal Code which are committed through the press or another of the mass media".

Law no. 3/1974 was scrutinised even though it had no bearing on the offences with which the proceedings were concerned. The defence counsel, who based the unconstitutionality objection on the fact that the material which had given rise to the charges of insult and defamation had been committed in the press, had submitted: "Obviously the injured parties invoke the provisions of Law no. 3/1974, and plainly they have not invoked, and had no reason to invoke, any other text than the Criminal Code. The judicial authority regards offences committed by means of the press as a particular category of offence rather than what they are in reality, namely, as in the present case, offences against the person in criminal law, which should be applied and not evaded on the pretext that insult and defamation are not punishable when committed by the press."

Although the appeal to Law no. 3/1974 and its alleged unconstitutionality was misplaced, it should be noted that the Constitutional Court had ruled on the constitutionality of certain provisions of that law in Decision no. 8 of 31 January 1996, made final by Decision no. 55 of 14 May 1996, and had found them to be constitutional. In Decision no. 8, the Constitutional Court had rejected an objection alleging the unconstitutionality of provisions regarding the right of reply (Article 74.2 of Law no. 3/1974) in connection with a document published by a newspaper. On that occasion the Constitutional Court had ruled: "The right of reply has the force of a constitutional right corresponding to the freedom to express opinions, regardless of the form in which it is exercised. It can be considered to be closely connected to the provisions of Article 30.8 of the Constitution, which regulates civil liability for information made public". The constitutional right concerned came under the law on the press, and it was for that reason that "in principle, even at the current stage of legislation, the regulations on the right of reply contained in Law no. 3/1974 satisfy the constitutional requirements contained in the Constitution".

In the light of the foregoing, the conclusion must be that, while the great majority of its provisions, by virtue of their social and political content, were contrary to the 1991 Constitution and had been repealed by Article 150.1 of the Constitution, Law no. 3/1974 could not be regarded as unconstitutional in its entirety.

The Constitutional Court rejected the objection alleging the unconstitutionality of Law no. 3/1974.

Languages:

Romanian.

Identification: ROM-1998-2-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 02.12.1997 / **e)** 483/1997 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 346.2 of the Code of Criminal Procedure / **g)** / *Monitorul Oficial al României* (Official Gazette), no. 125/25.03.1998 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Civil liability / Compensation.

Headnotes:

The perpetrator's civil liability for injury to the victim does not infringe on the individual's rights and freedoms with regard to private property. On the contrary, the obligation to pay damages which the law places on the person causing injury is a legal guarantee of the right to property, and without it a person's assets, to which that right applies, would be at the mercy of all and sundry, which would be nothing less than a negation of the right.

Summary:

An objection alleging that the provisions of Article 346.2 of the Code of Criminal Procedure were unconstitutional had been submitted to the Constitutional Court by the Oradea Court of Appeal.

In the grounds of objection it was submitted that Article 346.2 was unconstitutional because it contravened the Constitution's provisions regarding the individual's rights and freedoms of physical persons with regard to private property, which was inviolable and not to be interfered with by arbitrary measures.

In the statement of its opinion, the Oradea Court of Appeal judged that the objection was groundless and the provision constitutional.

The Committee for Legal Affairs, Appointments, Disciplinary Matters, Immunities and Accreditations of the Romanian Senate judged Article 346.2 of the Code of Criminal Procedure to be constitutional.

In its arguments, the Government sought to show that the objection alleging unconstitutionality was unfounded as the disputed provision complied with the Constitution. No provision of the Constitution had been cited in support of the objection, and there was in fact none with which the provisions of Article 346.2 of the Code of Criminal Procedure were at variance as the approach with regard to the civil law aspect was based not on criminal liability but on the tortuous civil liability incurred through the defendant's action.

The Constitutional Court delivered the following findings:

Under Article 144.c of the Constitution and Article 23 of Law no. 47/1992, the Court was competent to determine the unconstitutionality objection, which had been legally referred to it.

The constitutionality of Article 346.2 of the Code of Criminal Procedure had already been reviewed: in Decision no. 207 of 5 June 1997, made final by Decision no.18 of 3 February 1998, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 77 of 18 February 1998, the Court had ruled that the provisions of Article 346.2 of the Code of Criminal Procedure were constitutional.

These provisions, which dealt with civil actions within criminal proceedings, did not introduce new requirements governing tortious civil liability, but referred to civil law and in particular to the provisions of Article 998ff. of the Civil Code. The courts were empowered to order an acquitted defendant to pay civil damages. A finding that there was no criminal intent did not necessarily imply that there had not been negligence and thus civil liability.

The Constitutional Court rejected the objection alleging the unconstitutionality of the provisions of Article 346.2 of the Code of Civil Procedure.

Languages:

Romanian.

Identification: ROM-1998-2-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 19.05.1998 / **e)** 81/1998 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 6.1 of Law no. 1/1991 on social protection for unemployed persons and returning them to employment / **g)** *Monitorul Oficial al României* (Official Gazette), no. 220/16.06.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
Fundamental Rights - General questions - Basic principles.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Economic, social and cultural rights - Right to work.
Fundamental Rights - Economic, social and cultural rights - Right to social security.

Keywords of the alphabetical index:

Social protection / Vocational reintegration of unemployed persons / Unemployment benefit, right.

Headnotes:

By its nature, the principle of equality before the law and the public authorities applies to all rights and all freedoms enshrined in the Constitution or the law. This principle is also established in Article 14 ECHR and in the case law of the European Court of Human Rights. In *Marckx v. Belgium, Special Bulletin ECHR* [ECH-1979-S-002],for instance, the European Court based its judgment on Article 14, ruling that any difference in the way the State dealt with individuals in similar situations must have an objective and reasonable basis.

Summary:

An objection alleging that Article 6.1.e of Law no. 1/1991 on the social protection of unemployed persons and returning them to employment was unconstitutional was referred to the Constitutional Court.

In the grounds of objection, it was argued that Article 6.1.e of Law no. 1/1991, under which secondary school diploma holders did not receive unemployment benefit or assistance in finding employment, discriminated against persons studying at a higher education institution who, having been in employment, then became unemployed. Depriving them of unemployment benefit under the above-mentioned provision was contrary to Articles 16.1, 16.2, 26.2, 32.1, 38.1, 38.2, 43.1, 43.2, 45.1, 45.2 and 134.2.e of the Constitution.

The Court of Appeal took the view that the objection was unfounded in that Article 6 was concerned with exceptions dealt with by legal provisions on measures to guarantee the possibility of obtaining earned income and other social protection measures, including, in the applicant's case, a grant.

In its memorial the Government took the view that Article 6.1.e of Law no. 1/1991 did not contravene the Constitution since throughout the period of university studies students received a grant and the other forms of assistance provided for in the Education Act.

The Constitutional Court ruled as follows:

Under Article 144.c of the Constitution and Article 23 of Law no. 47/1992, the Constitutional Court was competent to examine the objection alleging unconstitutionality.

Article 6.1.e of Law no. 1/1991 specified that those who had completed secondary education and were taking vocational training were not eligible for unemployment benefit or assistance with finding employment. In the present case, the plaintiff had been employed while at university, but had lost his job. Under Article 6.1.e, unemployment benefit was no longer paid to him.

In Decision no. 95 of 18 September 1996, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 350 of 27 December 1996, the Constitutional Court had ruled that the provisions of Article 6.1.e of Law no. 1/1991 were constitutional. However, this decision only referred to the provisions of Article 3.1.a of this law, under which, on certain conditions, holders of a secondary school diploma who had not obtained employment were treated as unemployed. However, the situation in the present case was different: on the one hand were unemployed persons who had had their employment contracts terminated through no fault of their own and who received unemployment benefit under Law no. 1/1991 while on the other were those who, although unemployed, were not paid unemployment benefit because they were studying at a higher-education institution.

The right to unemployment benefit was not only a legal right, established by Law no. 1/1991, it was also a constitutional right under Article 43.2 of the Basic Law. Withholding unemployment benefit from unemployed persons studying at a higher-education institution was discrimination within the meaning of Article 16.1 of the Constitution, under which citizens were equal before the

law and public authorities and had the right to be treated without privilege or discrimination.

That an unemployed person was studying at a higher-education institution was not objective and reasonable justification for not paying unemployment benefit, which was a constitutional right.

As a matter of principle, the exercise of one constitutional right, such as the right to education, could not be used as a ground for withholding another constitutional right such as unemployment benefit and was not one of the grounds set out in Article 49.1 of the Constitution for restricting the exercise of certain rights.

From the grounds of Constitutional Court Decision no. 95 it was clear that withholding unemployment benefit from certain unemployed persons because they were exercising their right to study was discriminatory because it treated them less advantageously than other unemployed persons who did receive unemployment benefit under Article 43.2 of the Constitution and Article 2 of Law no. 1/1991.

Since Law no. 1/1991 predated the Constitution, under Article 150.2 of the Basic Law it needed to be included in the legislation on which the Legislative Council must propose measures to bring it into line with the standards and principles of the Constitution. That review must therefore also remove the discrimination objected to so that suitable regulations could be adopted.

The Constitutional Court allowed the objection and noted that the provisions of Article 6.1.e of Law no. 1/1991 on the social protection of unemployed persons and returning them to employment were unconstitutional when they were applied to a person who, following cancellation of an employment contract through no fault of his or her own, was unemployed and therefore legally entitled to unemployment benefit.

Languages:

Romania.

Identification: ROM-1998-2-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 19.05.1998 / **e)** 83/1998 / **f)** Decision on objection alleging the unconstitutionality of Government Emergency Order no. 22 of 26 May 1997 amending and extending the Local Public Administration Act (no. 69/1991), republic / **g)** *Monitorul Oficial al României* (Official Gazette), no. 211/08.06.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Separation of powers.
General Principles - Public interest.
Institutions - Legislative bodies - Powers.
Institutions - Executive bodies - Powers.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.

Keywords of the alphabetical index:

Exceptional circumstances / Public interest, serious violation / Government, emergency order.

Headnotes:

In accordance with Decision no. 65/1995 of the Constitutional Court, in order to establish the exceptional nature, and thus the constitutionality, of an emergency order, it has to be shown that, "because of exceptional circumstances, there is an urgent need to regulate a situation through the adoption of immediate measures in order to avoid serious harm to the public interest". In this case, no reference was made to any circumstances to justify the exceptional nature or the urgency of the measure, whether in the explanatory memorandum to the initial bill, in the introduction to Government Emergency Order no. 22/1997, in the explanation offered by the government representative in the debate at the Senate sitting of 17 March 1997 or in the other contributions to this sitting, as shown in the shorthand record of the debate. Exceptional cases have an objective character, in the sense that they are independent of the will of the government when such circumstances require it to react promptly to defend the public interest by issuing an emergency order. Thus, the government's decision to change the form of legal instrument used does not, in any circumstances, constitute an exceptional case. Emergency orders do not constitute an alternative, at the government's discretion, to enable it to dispense with its constitutional obligation to implement its programme through the laws.

Summary:

The Constitutional Court had been asked to rule on an objection alleging the unconstitutionality of Government Emergency Order no. 22 of 26 May 1997 amending and extending the Local Public Administration Act (no. 69/1991).

In support of the objection, it was claimed that the relevant provisions contravened Articles 72.3.o, 114.1 and 114.4 of the Constitution.

The judicial authority argued that the emergency order was unconstitutional, on the grounds that under Article 72 of the Constitution the regulations it instituted came within the scope of organic laws whereas in accordance with Article 144.1 of the Constitution the government could only issue orders in areas falling outside the scope of organic laws.

The government argued that the objection alleging the unconstitutionality of Government Emergency Order no. 22/1997 was ill-founded, since emergency laws constituted an exception to the rule laid down in Article 114.1 of the Constitution and could therefore be issued in any area, with the result that the restrictions concerning the areas reserved for organic laws did not apply.

At the hearing, having regard to the Constitutional Court's Decisions nos. 65/1995 and 34/1998 and after concluding that the relevant provisions were in breach of Article 114.4 of the Constitution, the State Prosecutor's representative supported the objection.

The Constitutional Court found that:

The objection alleging the unconstitutionality of the relevant provision concerned a failure to comply with Article 114.4 of the Constitution, under which emergency orders could only be issued in exceptional cases. It also concerned Article 114.1 of the Constitution, which prohibited the government from issuing orders in fields falling within the scope of organic laws, and which the government did not consider to be applicable to emergency orders. The specific purpose of the objection was to have sub-paragraph 4 of Order no. 22/1997, amending Section 67 of Act no. 69/1991, ruled unconstitutional. However, the alleged grounds for unconstitutionality concerned the order in its entirety and therefore had to be considered as a whole.

The first ground for alleging unconstitutionality, the failure to observe the condition in Article 114.4 of the Constitution that emergency orders could only be issued in exceptional cases, was well founded. The Court could not accept either the existence of an exceptional situation or the need for the measures provided for in the order to be instituted as a matter of urgency.

The reports submitted by the Legislative Council showed that the government had initially drawn up draft legislation to regulate the matters covered by the order. The explanatory memorandum to the bill had merely referred to the need to improve the legislative framework governing local self-government, in accordance with the government's current programme, and to eliminate certain imperfections and confusions and rectify certain inadequacies, but had made no mention in this context of the existence of circumstances necessitating the urgent implementation of these regulations. This was why there had been no request for the bill to be debated under the emergency procedure. The bill had been initialled by the Legislative Council on 10 May 1997. Nine days later, the bill had been changed into a draft emergency order and submitted for initialling, after which it was adopted by the government. Apart from certain details, the content of the order was the same as that of the previous bill and the explanatory note was the same as the previous explanatory memorandum, with no attempt to establish the existence of exceptional circumstances to justify the issuing of the regulations as a matter of urgency by means of an emergency order.

It followed that the government's intention had been to institute a new set of directly applicable regulations but that the procedure had infringed parliament's constitutional powers, laid down in Article 58 of the Constitution, as the country's sole legislative authority.

It had been shown in Decision no. 34/1998 of the Constitutional Court that the amendment or consolidation of legislation in whatever field did not, in itself, justify the issuing of an emergency order.

It was clear from the explanatory memorandum to the initial bill, the explanatory note to the order and the debates in the Senate that the government's purpose in adopting Emergency Order no. 22/1997 was to improve the legislation.

The shorthand record of the Senate sitting of 17 March 1998 showed that Emergency Order no. 22/1997 had been rejected in the final vote on the regulations in their entirety, after the provisions in the articles had been partially approved. This vote therefore questioned the need for the order as a whole, thus automatically denying the existence of an exceptional situation necessitating its adoption. Moreover, the period of one year that elapsed before the order was discussed in parliament proved that the regulations introduced by the order were

not urgent and the government made no reference to this aspect in its memorial.

Thus, the government's initial intention had been to enact draft legislation since the necessary conditions for an exceptional case, on which the constitutional legitimacy of the government's emergency order depended, had not in fact been met; the issuing of such an order could not be justified in terms of amendments to the legislation.

The subsequent change of policy involving the issuing of new regulations in the form of an emergency order was therefore unconstitutional.

With regard to the second ground for alleging unconstitutionality, the use of Emergency Order no. 22/1997 to issue regulations in an area reserved for organic laws, it was clear that because Act no. 69/1991 was concerned with local public administration it constituted an organic law, in accordance with Article 72.3.a of the Constitution. In its aforementioned Decision no. 34/1998, the Constitutional Court had ruled that the prohibition on issuing regulations through orders, in areas reserved for organic laws, did not apply to government emergency orders. By a majority, the Court found that there had been no new factors to justify changing this practice.

The Constitutional Court allowed the objection and ruled that the provisions of Government Emergency Order no. 22/1997 amending and extending the Local Public Administration Act (no. 69/1991) were unconstitutional.

Languages:

Romanian.

Identification: ROM-1998-2-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 30.06.1998 / **e)** 45/1998 / **f)** Decision on objection alleging the unconstitutionality of Article 87 of the Standing Orders governing joint sittings of the Chamber of Deputies and the Senate / **g)** *Monitorul Oficial al României* (Official Gazette), no. 260/13.07.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Parliamentary rules.
Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Legal quorum / Chamber of Deputies, Senate, joint sittings.

Headnotes:

Under Article 64 of the Constitution, the Chamber of Deputies and the Senate shall pass laws and carry resolutions and motions in the presence of the majority of their members. This must be interpreted as referring to the physical presence of members of parliament at the sitting in which the texts listed in the Constitution have to be passed or carried. Article 87 of the rules of procedure, under which the constitutional requirement for a legal quorum is deemed to be respected if some members of parliament are absent for justified reasons, is not compatible with Article 64 of the Constitution. Article 39 of the rules of procedure, which is compatible with the Constitution, lays down that the presence of at least half plus one of the total of deputies and senators constitutes a legal quorum for the purposes of passing laws and carrying resolutions and motions.

Summary:

Twenty-seven senators asked to the Constitutional Court to rule that Article 87 of the Standing Orders governing joint sittings of the Chamber of Deputies and the Senate and the vote taken when the Granting of Meal Tickets Act was passed were unconstitutional, for the following reasons:

- the provisions of Article 87 of the Standing Orders governing joint sittings of the Chamber of Deputies and the Senate constituted inadmissible additions to Article 64 of the Constitution, under the terms of which "the Chamber of Deputies and the Senate shall pass laws and carry resolutions and motions in the presence of the majority of their members". Under the Constitution, a legal quorum for passing laws and carrying resolutions and motions required the actual presence of a majority of members of parliament, which meant 244 in the case of the two chambers combined. This quorum could not be reduced by the Standing Orders governing joint sittings, no matter how justified or well-argued the absences.

- the application of the unconstitutional provision in Article 87 of the Standing Orders governing joint sittings of the two chambers of parliament had made it possible to vote on the Granting of Meal Tickets Bill in the absence of the constitutionally required quorum. In the event, only 230 members of parliament were present at the vote, 14 less than the constitutional quorum.

Having regard to Article 144.b of the Constitution and Sections 2, 3, 12 and 21 of Act no. 47/1992, the Constitutional Court had jurisdiction to rule on the constitutionality of Article 87 of the Standing Orders governing joint sittings of the Chamber of Deputies and the Senate but only in so far as the dispute about the legal quorum was concerned. In its Decisions nos. 68 of 23 November 1993 and 392 of 15 October 1997, the Constitutional Court had found that decisions taken in accordance with parliamentary Standing Orders could not be the subject of constitutional review. Therefore, the Constitutional Court did not have jurisdiction concerning the enactment of the granting of Meal Tickets Bill.

The Constitutional Court ruled as follows:

The Court noted that Article 87 of the Standing Orders governing joint sittings of the Chamber of Deputies and the Senate specified that:

> "When determining the legal quorum for joint sittings of the chambers of parliament, the statutory number required shall not take account of deputies or senators who do not participate in proceedings because they have been given a temporary mandate by parliament which prevents them from being present at the sitting.
>
> The provisions of sub-paragraph 1 shall also apply to deputies and senators who are members of the government in cases where they are absent in the exercise of their duties."

In its Decision no. 4 of 11 January 1994, published in the *Monitotul Oficial al României* (Official Gazette), Part 1, no. 7 of 13 January 1994, the Constitutional Court had ruled on the problem of the legal quorum, within the context of Article 64 of the Constitution, under which "the Chamber of Deputies and the Senate shall pass laws and carry resolutions and motions in the presence of the majority of their members". This decision established the principle that a quorum was a precondition, which must be satisfied immediately before a vote, to ensure a significant presence of members of parliament when legislation was passed. Article 64 of the Constitution specified that laws should be passed in the presence of a majority of members. The quorum thus represented the condition for the chambers of parliament to meet legally or, to put it another way, for a chamber to be able to carry out its work. Failure to achieve a quorum therefore resulted in the adjournment of the sitting. Thus, the quorum and the vote must not be confused, with the former preceding the latter. This meant that the constitutionality of the quorum condition and of the result of the vote had to be assessed at different moments in the parliamentary legislative process: the quorum before the vote and the vote, for reasons such as disputes concerning corrections to the count, failure to achieve a majority and so on, after it had taken place, as the distinct moment when the legislation was passed.

Similarly, in its Decision no. 46 of 17 May 1994, published in the *Monitotul Oficial al României* (Official Gazette), Part 1, no. 131 of 27 May 1994, the Constitutional Court, ruling on the constitutionality of the Senate Standing Orders, had stated that the quorum and the majority required for legislation to be passed should not be confused, since they were dealt with separately in the Constitution (respectively Articles 64 and 74) and served naturally different purposes, that of the quorum being to ensure a minimum presence while the majority was concerned with establishing the commitment on which the adoption of measures or other decisions depended.

Although these decisions did not examine the constitutionality of Article 87 of the Standing Orders governing joint sittings of the Chamber of Deputies and the Senate, on the basis of legal consistency the court's decisions concerning the legal quorum were also applicable to the current application.

Under Article 39 of the Standing Orders, there was a legal quorum for passing laws and carrying resolutions and motions if at least half plus one of the total of deputies and senators was present, which was consistent with Article 64 of the Constitution. Articles 39 and 87 of the Standing Orders were therefore clearly incompatible with each other, with the general character of the latter making it in breach of Article 64 of the Constitution.

It was clear that in so far as other problems falling outside the scope of Article 64 of the Constitution were debated in joint sittings of the Chamber of Deputies and the Senate, the provisions of Article 87 of the Standing Orders were applicable.

The Constitutional Court found that the provisions of Article 87 of the Standing Orders governing joint sittings of the Chamber of Deputies and the Senate were unconstitutional, in so far as they were applied to cases

in which the two chambers of parliament sitting in joint session passed laws or carried resolutions or motions.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data

1 May 1998 - 31 August 1998

Total number of decisions: 10

Types of decisions:
- Rulings: 10
- Opinions: 0

Categories of cases:
- Interpretation of the Constitution: 1
- Conformity with the Constitution of acts of State bodies: 9
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:
- Claims by State bodies: 4
- Individual complaints: 5
- Referral by a Court: 3

(Some claims were joined)

Important decisions

Identification: RUS-1998-2-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 15.06.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 23.06.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - International Covenant on Economic, Social and Cultural Rights of 1966.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
General Principles - Social State.
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 - Freedom of movement.
Fundamental Rights - Economic, social and cultural rights - Right to social security.

Keywords of the alphabetical index:

Pensions, exportability / Pensions, payment procedure / Pension, eligibility / Permanent residence / Emigration, eligibility for a pension.

Headnotes:

The right of a citizen permanently resident abroad to receive a pension previously granted and his/her exercise of this right cannot depend exclusively on circumstances such as the date of that person's departure abroad or his/her place of residence immediately prior to departure.

Summary:

In connection with complaints from a number of citizens, the Constitutional Court considered a case relating to verification of the constitutionality of several articles of the Law of 2 July 1993 "on the payment of pensions to citizens who move to another country from outside the territory of the Russian Federation in order to establish permanent residence".

In their complaints, these citizens challenged the provisions of the said law, pursuant to which retired citizens who left from outside the territory of the Russian Federation prior to 1 July 1993 in order to establish permanent residence in a third state, and retired citizens who left after that date from within the territory of the Russian Federation, are deprived of the right to receive the pensions which had been granted and paid to them prior to their departure.

The Constitutional Court noted that the contested law entered into force on 1 July 1993, but that it did not explicitly state whether these provisions applied to citizens who departed prior to that date.

By law, the procedure for payment of pensions according to these provisions is decided by the government. This arrangement presupposes that the normative act must not contain any attributive rules on conditions relating to the actual right to receive pensions granted, because the legislator only requires that the procedure for payment be laid down. The government has used the power vested in it to adopt the procedural rules for payment of pensions to citizens who move to another country from outside the Russian Federation in order to establish permanent residence. The rules provide in particular that they are applicable to citizens to whom pensions were granted in such cases after 1 July 1993. Thus, the government defined the temporal application of the law and the category of persons concerned, interpreting its provisions restrictively. Consequently, citizens who went to live abroad prior to 1 July 1993 are not eligible to be granted or to receive pension payments during their residence outside the Russian Federation.

Another consequence of the lack of clarity over the content of the relevant provisions of this law has been that the bodies responsible for enforcing the law interpret it as not including persons who resided outside the Russian Federation prior to their departure and who, in leaving for the purpose of establishing permanent residence in another country had therefore departed from a foreign country. It follows that citizens of the Russian Federation residing especially in Latvia, Lithuania and Estonia after the break-up of the USSR and who received pensions from the Russian Federation are deprived of the pensions granted them if they leave any of these states to establish permanent residence in another country.

The Constitutional Court found that the Constitution protects everyone's entitlement to social security in old age, in case of illness, disability and loss of the family breadwinner, for the bringing up of children and in other cases specified by law (Article 39.1 of the Constitution). The constitutional right to social security also includes the right to receive a pension in the cases and in the amount established by law.

The discontinuation, for the period of their residence abroad, of the granting and payment of pensions based on employment to citizens who have departed from outside the Russian Federation to establish permanent residence in another country is a restriction of the constitutional right to social security. Pursuant to Article 55.3 of the Constitution, no limitation may be imposed by federal law on human and civil rights and freedoms except where it is necessary to protect the foundations of the constitutional system, morals, health and the rights and lawful interests of others or to ensure the defence of the country and the security of the state. The restriction introduced by the law in question is incompatible with the objectives referred to and is therefore unconstitutional.

The denial of a citizen's right to receive a pension based on employment for the period of his/her permanent residence outside the Russian Federation is also inconsistent with Article 4 of the International Covenant on Economic, Social and Cultural Rights.

Uncertainty over the content of the contested provisions with regard to the category of persons to which the law is applied, and hence the possibility that it might be interpreted and enforced in an arbitrary manner, is tantamount to a violation of the equality before the law and the courts guaranteed by Article 19.1 of the Constitution, because unjustified and unfair distinctions are in fact made between retired persons living in the Russian Federation and those residing permanently abroad, as well as between retired persons who left Russia at different periods to live abroad. These distinctions are based solely on the permanent place of residence of the retired persons and the date of their departure abroad; this is not in conformity with Article 19.2 of the Constitution, according to which the state must guarantee equality of human and civil rights and freedoms.

It follows from Article 2 of the Constitution that recognition of, respect for and protection of human and civil rights and freedoms are a state obligation. Consequently, the manner in which citizens exercise the right to receive pensions based on work and determined legislation must not prevent them from exercising the other rights and freedoms guaranteed by the Constitution, notably the right of everyone to choose his/her place of residence and the right freely to leave the Russian Federation (Articles 27.1 and 27.2 of the Constitution). The exercise by citizens of these constitutional rights must not serve as a justification for limiting their constitutional right to receive a pension.

The contradiction between the constitutional right freely to leave the Russian Federation and the constitutional right to receive a pension is a violation of the principle proclaimed in Resolution 41/117 of the UN General Assembly of 4 December 1986, namely the indivisibility and interdependence of economic, social, cultural, civil and political rights.

The Constitutional Court found the contested articles of the law to be unconstitutional, since under these provisions, retired persons may be deprived of the right to receive the pensions granted them on the basis of their work if they went to another country in order to establish permanent residence prior to or after 1 July 1993, but did not reside in the Russian Federation immediately preceding their departure.

Languages:

Russian.

Identification: RUS-1998-2-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 16.06.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.06.1998 / **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 - Other international sources.
Sources of Constitutional Law - Categories - Unwritten rules - General principles of law.
Institutions - Legislative bodies - Relations with the courts.
Institutions - Executive bodies - Relations with the courts.
Institutions - Jurisdictional bodies.
Institutions - Public finances - Budget.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Judicial system, financing / Courts, independence / Budget, courts, reduction.

Headnotes:

The government cannot have the right to reduce budget allocations for the operation of the federal judicial system in accordance with actual receipts from the federal budget.

Summary:

At the request of the Supreme Court, the Constitutional Court considered a case relating to verification of the constitutionality of Article 102.1 of the federal Law "on the 1998 federal budget".

The Constitutional Court found that, according to the contested rule, in the event of rejection of the accumulated receipts of the federal budget on the basis of the amounts provided for in the present law, the expenditure of the federal budget is financed by the government in a manner strictly proportional to the annual appropriation, taking into account the actual budget receipts. This means accepting a discrepancy with regard to proportional financing by items of a maximum of five per cent for each quarter (with the exception of seasonal or lump-sum payments), provided that federal law does not contain a provision to the contrary. In the opinion of the applicant, this rule permits the government to

reduce on its own initiative the size of federal budget allocations earmarked for the judicial system as a function of the situation of budget receipts, and is therefore in conflict with Articles 10, 76.3 and 124 of the Constitution.

The Constitutional Court noted that, pursuant to Article 124 of the Constitution, the courts are financed solely from the federal budget, and their financing must ensure the possibility of administering justice fully and independently in conformity with federal law. Such financing must be in keeping with the provisions and resources required to ensure that the economic conditions for the exercise of judicial authority exist.

Specifying the constitutional guarantees, the federal constitutional law "on the judicial system of the Russian Federation" provides that financing for the federal courts is based on the rules approved by federal law and is broken down by separate headings in the federal budget. The amount of budgetary resources earmarked for the courts in the current budget year or planned for the coming budget year cannot be reduced without the approval of the Congress of Judges of All Russia or the Council of Judges of the Russian Federation. The absence of rules approved by federal law on the financing of the courts cannot in itself justify allowing such financing to be left to the discretion of the legislature or the executive, because the federal budget allocations needed for the courts are directly protected by the Constitution itself and cannot be cut below the level required to ensure that the requirements of Article 124 of the Constitution are met.

Thus, the provisions of the Constitution, together with the implementing rules in Article 33 of the federal constitutional Law "on the judicial system of the Russian Federation", create the means of protecting the financing of the judicial system that is mandatory for both the Federal Assembly, which approves the budget for the corresponding year, and the government, which is responsible for implementing it.

So in adopting Article 102 of the contested Law, the Federal Assembly gave the government the right to reduce allocations for operating the federal judicial system and regarded this as coming under an expenditure heading not protected in the same way as the other headings. The proposals of the Russian Federation's Supreme Court, the Supreme Court of Arbitration and the Council of Judges on maintaining allocations for the judiciary for 1998 as a protected heading were not approved by the State Duma.

It emerges from the case-file that in applying the contested rule, in April 1998 the government and the Ministry of Finance reduced by 26.2% the allocations in the federal budget earmarked for operating the federal judicial system. The reduction was carried out under the provisions of the contested rule.

By reducing federal budget expenditure for the judicial system, the Government and the Ministry of Finance fail to guarantee the complete and independent administration of justice and the smooth functioning of the judiciary, thereby diminishing the confidence of the Russian people in the state and ultimately jeopardising the human and civil right to judicial protection guaranteed by the Constitution, because the realisation of the constitutional provisions on ensuring the judicial protection of human and civil rights and freedoms is inseparably linked to the creation by the state of the necessary conditions for the functioning of the courts.

The contested rule, which permits the reduction in allocations for the judicial system in violation of Article 124 of the Constitution, is also at variance with the federal constitutional Law "on the judicial system of the Russian Federation" and thus infringes Article 76.3 of the Constitution, which states that federal laws may not be contrary to federal constitutional laws.

Moreover, given the principle universally recognised in international law of the independence of the courts, it should be borne in mind that the Vienna Declaration and Action Programme adopted at the Second World Conference on Human Rights (June 1993) consolidates this principle of the need for proper financing of institutions responsible for the administration of justice. Article 2 of the federal Law of 30 March 1998 "on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto" stipulates that as from 1998, the federal budget must provide for the necessary increase in allocations for the operation of the federal judicial system for the purpose of applying legal rules fully in keeping with the Russian Federation's commitments arising from its accession to the Convention and its Protocols.

The Constitutional Court annulled the contested provision, finding it unconstitutional. It required the Government to ensure the financing of the courts and ruled that it was the Federal Assembly's responsibility to adopt appropriate rules to that effect.

Languages:

Russian, French (translation by the Court).

Identification: RUS-1998-2-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.07.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.07.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Constitutional jurisdiction - Relations with other institutions - Courts.
Constitutional Justice - Types of claim - Referral by a court.
Constitutional Justice - The subject of review - Laws and other rules having the force of law.
Constitutional Justice - Effects - Effect *erga omnes*.
Institutions - Jurisdictional bodies - Procedure.
Institutions - Jurisdictional bodies - Organisation.

Keywords of the alphabetical index:

Courts, verification of the constitutionality of laws / Courts, delimitation of powers / Constitutional court, exclusive jurisdiction.

Headnotes:

Ordinary courts do not have a right, but rather an obligation, to request the Constitutional Court to verify the constitutionality of a law applied or to be applied in a specific case if they find that law to be unconstitutional. Only in such cases will an unconstitutional provision be denied the force of law in accordance with the constitutionally established procedure, thereby ruling out its future application. This also ensures compliance with the constitutional principle that laws must be applied in a uniform manner throughout the territory of the Russian Federation, as well as the primacy of the Constitution, which cannot be guaranteed if different courts are allowed to interpret constitutional provisions in divergent ways.

Summary:

In this case, the Constitutional Court interpreted several articles of the Constitution at the request of the legislative assembly of the Republic of Karelia and the State Council of the Republic of Komi.

The subject of the interpretation in this case are the provisions of Article 125 of the Russian Constitution, pursuant to which the Constitutional Court is required to verify the constitutionality of the normative legal acts enumerated in this article and which, if they are found unconstitutional, cease to have force of law in respect of the provisions of Articles 126 and 127 of the Constitution; the latter provisions set out the powers of the Supreme Court as the supreme judicial authority in civil, criminal, administrative and other matters, and the Supreme Court of Arbitration as the supreme judicial authority ruling on economic disputes and other matters, and thus determine in general the relevant powers of the ordinary courts and the arbitration courts. The Constitutional Court was required to consider whether the powers of the ordinary courts and arbitration courts to verify the constitutionality of normative legal acts and to declare them null and void, i.e. as being no longer in force, flow from the above-mentioned provisions.

Of fundamental importance for this interpretation are the provisions of the Constitution laying down the superior legal force of constitutional provisions and the direct force of the Constitution (Article 15 of the Constitution), inter alia in the area of the rights and freedoms guaranteed by law (Article 18 of the Constitution), in which their legal protection is guaranteed (Article 46 of the Constitution). It follows that the requirement of the direct application of the Constitution applies to all courts.

At the same time, Article 125 of the Constitution contains special provisions giving a special judicial body, the Constitutional Court, power to verify the constitutionality of normative legal acts with the result that such acts may lose the force of law. The Constitution does not attribute such powers to the other courts.

In defining the powers of the Constitutional Court, the Constitution takes as a basis the obligation to exercise this power in a particular way, namely via constitutional judicial procedure. For this reason, it determines the main aspects of this procedure, i.e. what decisions may be challenged and who may appeal, as well as the types of procedures applicable and the legal effects of decisions rendered. For the other courts, there are no such regulations at constitutional level. Consequently, the Constitution does not contemplate verification by these courts of the constitutionality of normative acts.

This is also in conformity with the general legal principle that a court which was established and functions on a lawful basis (Article 6 ECHR) is considered to be competent to hear the case, which presupposes that the powers of the various courts are set forth in the Constitution and in the law adopted in keeping with the Constitution. This principle is expressed in Articles 47, 118, 120 and 128 of the Constitution of the Russian Federation and is at the basis of the definition of absolute territorial power and of the jurisdiction of the court hearing the case as well as the categorising of types of court jurisdiction. With regard to the exercise of the power to verify the constitutionality of acts, provision is made for the relevant court only in the Constitution; such provision may not be made by another law.

Articles 125, 126 and 127 of the Constitution develop the logic of Article 118, according to which judicial authority is exercised through constitutional, civil, administrative and criminal proceedings. It is precisely because the constitutional proceedings are the responsibility of the Constitutional Court, in accordance with Article 125, that Articles 126 and 127 give other courts jurisdiction in civil, criminal, administrative matters and economic disputes.

The decisions of the Constitutional Court pursuant to which unconstitutional normative legal acts lose the force of law produce the same general effects in respect of time, of territory and of the number of persons concerned as do normative legal acts which are decisions of the body creating the rules. Consequently, they also have the same general effects as these acts. Those effects are not unique to the decisions of ordinary courts and arbitration courts, which by nature are acts in application of the law designed to apply legal rules. The Constitutional Court alone takes official decisions of general application. Hence, its decisions are final and cannot be reviewed by other bodies or overruled by the adoption for a second time of an act which has been found unconstitutional, and require all those who apply the law, including other courts, to act in conformity with the legal positions of the Constitutional Court.

The decisions of the ordinary courts and the arbitration courts do not have such force of law. They are not binding on other courts in other cases, because the courts interpret independently the normative provisions which must be applied. The decisions of the ordinary courts and the arbitration courts may be challenged in accordance with established procedures. Moreover, no provision is made for the mandatory official publication of these decisions, which, by virtue of Article 15.3 of the Constitution stipulating that only officially published laws are applicable, also excludes other bodies applying the law from the obligation to follow suit when settling other cases. In view of the above, the decisions of courts of ordinary law and arbitration courts are not recognised as an appropriate way of depriving of the force of law normative legal acts which have been found unconstitutional.

The fact that courts of ordinary law and arbitration courts do not have the power to find the above-mentioned normative legal acts unconstitutional and thus without direct effect also flows from Article 125.2 of the Constitution, pursuant to which the Supreme Court and the Supreme Court of Arbitration are both bodies which may request the Constitutional Court to verify the constitutionality of normative legal acts (unrelated to the consideration of a specific case, i.e. verification of rules *in abstracto*). Upon the request of courts, the Constitutional Court also verifies the constitutionality of the law applied or applicable in a specific case.

Hence, it has been established at constitutional level that rulings of other courts on the unconstitutionality of a law cannot in themselves serve as a basis for officially finding that law unconstitutional and depriving it of legal effect. From the point of view of the interaction of courts with different types of jurisdiction and the definition of their power to find laws unconstitutional, the exclusion of such laws from a number of acts in force is the joint result of the obligation on the ordinary courts to question the constitutionality of the law before the Constitutional Court and the obligation of the latter to render a final ruling on the question.

Appeals by other courts, provided for in Article 125 of the Constitution relating to verification of the constitutionality of the law applied or applicable in a specific case if the court finds the law to be unconstitutional, cannot be regarded as a right only: the court must lodge an appeal requesting that the unconstitutional act lose its force of law according to the constitutionally established procedure, which may rule out its future application.

Refusal to apply in a specific case a law found unconstitutional by the court, without an appeal having been lodged on this occasion before the Constitutional Court, would be at variance with the constitutional provisions according to which laws apply uniformly throughout the entire territory of the Russian Federation (Articles 4, 15 and 76), and would probably also cast doubt on the primacy of the Constitution, because it cannot be applied if conflicting interpretations of constitutional rules by different courts are allowed. This is precisely why an appeal to the Constitutional Court is also obligatory in cases in which the court, when examining a specific case, finds unconstitutional a law which was adopted prior to the entry into force of the Constitution and whose application must be ruled out in conformity with paragraph 2 of its Concluding and Interim Provisions.

In cases in which they find a law to be unconstitutional, the obligation on the courts to apply to the Constitutional Court for official confirmation of unconstitutionality does not restrict their direct application of the Constitution, whose purpose is to ensure the application of constitutional rules above all when they have not been given specific legislative form. If, in the view of the court, the law which should be applied in a specific case is unconstitutional and its provisions therefore cannot be applied, that law may cease to have statutory force in accordance with constitutional procedure, so that the

Constitution has direct effect in all cases in which the court rules on the basis of a specific constitutional rule.

Article 125 of the Constitution does not limit the powers of other courts to decide which law is applicable in a given case, where laws contradict each other or gaps are revealed in the legal regulations, or rules which have actually lost their effect have not been abrogated in accordance with the established procedure. However, the court may refrain from applying the federal law or the law of a constituent entity of the Russian Federation; but it does not have the power to find them null and void.

Nor does the power of the federal courts to declare the normative legal acts of the constituent entities of the Russian Federation to be inconsistent with their constitutions (statutes) follow from Article 76 of the Constitution, which lays down the principles for settling conflicts between normative legal acts at various levels. Only the bodies of the constitutional court system, if such is provided for by the constitutions (statutes) of the constituent entities of the Russian Federation, may perform the above-mentioned function, which leads to the loss of force of law of those entities' normative legal acts.

The Constitutional Court has decided that it alone shall rule on the constitutionality of the laws of the Federation and its constituent entities. The ordinary courts of law are bound to appeal to the Constitutional Court if they believe such a rule to be unconstitutional. A federal constitutional law may require the ordinary courts to rule on the legality of normative legal acts below the level of statute law.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data

1 May 1998 - 31 August 1998

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 4
- Decisions on the merits by panels of the Court: 9
- Number of other decisions by the plenum: 4
- Number of other decisions by panels: 43
- Total number of cases brought to the Court: 174

Important decisions

Identification: SVK-1998-2-005

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 28.05.1998 / **e)** PL. ÚS 18/97 / **f)** Petition from members of Parliament / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), no. 209/1998 in brief; complete version to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - General questions - Basic principles.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Rights of domicile and establishment.
Fundamental Rights - Civil and political rights - National service.

Keywords of the alphabetical index:

Conscientious objection, legal effects / Weapon, right to carry / Conscientious objection, prohibition on carrying weapon.

Headnotes:

"Injury on rights" (Article 12.4 of the Constitution) means any situation when the only reason for excluding a person from a right is the previous exercise of some other fundamental right or freedom.

Summary:

The petitioner, a group of 32 members of the Parliament, claimed a constitutional conflict between the provisions of Articles 6.1.i and 10.1 of the Law on Weapons and Ammunition, and Article 25.2 of the Constitution taken in conjunction with Articles 12.1 and 12.4 of the Constitution.

Law no. 246/1993 on Weapons and Ammunition has been amended by Law no. 284/1995 so that a person applying for a licence to carry a gun is obliged to give evidence that he has not refused to perform military service or military exercise. If a licence holder later refuses to perform his military service or military exercise, this constitutes grounds for withdrawing the licence from him. The legal grounds are Articles 6.1.i and 10.1 of the amendment no. 284/1995. The petitioner claimed a constitutional conflict between those provisions and Article 25.2 of the Constitution: "No person may be forced to perform military duties if it is contrary to his or her conscience or religious faith or conviction. Further details shall be specified by law" if read in conjunction with two other constitutional provisions according to which: "All human beings are free and equal in dignity and rights. Their fundamental rights and freedoms are inalienable, irrevocable and absolutely perpetual" (Article 12.1 of the Constitution), and "No person shall suffer injury on his or her rights just because of exercising his or her fundamental right or freedom" (Article 12.4 of the Constitution).

The Constitutional Court reasoned first of all that the words "injury on rights" might not be identified with the right previously obtained. The Court held that those words mean any restriction imposed on the opportunity to obtain some right if such restriction resulted exclusively from a previous exercise of another fundamental right or freedom. The Court thus ruled that "injury on rights" means any situation when the only reason why a person was excluded from obtaining some right was a previous exercise of some other fundamental right or freedom by the same person.

According to Law no. 246/1993 as amended by Law no. 284/1995 a person was entitled to receive a licence to carry a gun on the condition that this person had refused to exercise his constitutional right not to perform military duties. If the same person had exercised the constitutional right not to perform his military service, the licence to carry a gun would not have been given to him or would have been withdrawn from him. Exercise of the constitutional right guaranteed under Article 25.2 of the Constitution due to that regulation resulted in loss of the right set up by Law no. 246/1993. The Court found it contrary to the Constitution.

Languages:

Slovak.

Identification: SVK-1998-2-006

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 24.06.1998 / **e)** PL. ÚS 8/97 / **f)** Petition from the Attorney General of the Slovak Republic / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), no. 222/1998 in brief; complete version to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Institutions - Head of State - Powers.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.

Keywords of the alphabetical index:

Amnesty, transfer of power to grant or refuse / Pardon, transfer of power to grant or refuse / Pardon, legal nature / Amnesty, legal nature / President, powers, delegation.

Headnotes:

The right to grant pardons and amnesty is vested exclusively in the President of the Slovak Republic. This right may not be transferred to any other State authority of the country.

Summary:

The Attorney General of the Slovak Republic petitioned the Court claiming a constitutional conflict between the provisions of Articles 366.2 and 367 of the Penal Procedure Code and Article 102.i of the Constitution. According to this provision "The President shall grant pardons and amnesty, mitigate sentences imposed by criminal courts, decrees to terminate or not to commence proceedings and to erase criminal records." Under Article 366.2 of the Penal Procedure Code "the President shall authorise the Attorney-General or the Minister of Justice to act in matters concerning pardon and shall authorise them to dismiss ill-founded petitions for pardon."

The Constitutional Court found that through the Penal Procedure Code the exclusive power of the President has been transferred to other State authorities, the Minister of Justice and the Attorney General. According to the Constitution, however, the presidential powers under Article 102.i of the Constitution are not transferable. The right to grant pardon as well as other rights under that article represent an interference by the executive power in the power of the judiciary or the authorities for criminal investigation. A decision on pardon is an extraordinary means, not the rule or a duty which must be performed in favour of the applicant for pardon. The right to pardon is not explicitly or implicitly part of the fundamental rights and freedoms, and this right may not be claimed by any citizen of the Slovak Republic. The decision concerning pardon is vested exclusively in the President who is free to decide whether to grant or to deny pardon, amnesty, etc. For these reasons, the Court held that the Penal Procedure Code in provisions 366.2 and 367 was not in conformity with Article 102.i of the Constitution.

Languages:

Slovak.

Identification: SVK-1998-2-007

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 24.06.1998 / **e)** PL. ÚS 13/97 / **f)** Petition from members of the Parliament / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), no. 221/1998 in brief; complete version to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Competition, economic, protection / Privatisation, payments in bonds / Market economy, principles.

Headnotes:

The Constitutional principle "to protect and encourage economic competition" expressed in Article 55.2 of the Constitution is mandatory for all State authorities of the Slovak Republic when exercising the powers vested in them by the Constitution.

Summary:

The petitioner, a group of 30 members of the Parliament, submitted a motion claiming a constitutional conflict between Articles 24.9.a and 24.9.e of Law no. 190/1995 amending Law no. 92/1991 on Privatisation and a series of Constitutional provisions.

The privatisation of formerly socialist (State) property in Czechoslovakia began with the voucher method in 1991. After the split of the Czechoslovak Federation, the voucher method was replaced with the bond method in the Slovak Republic in the autumn of 1994. Under Law no. 190/1995 the "bond privatisation" was amended so that individuals and legal entities who were obliged to pay the National Property Fund (NPF) or the Slovak Land Fund for their privatised property were entitled to pay those obligations in the bonds issued by the National Property Fund. The same right was given to landlords for transferring apartments in ex-socialist ownership to the ownership of apartment tenants. Legal entities performing supplementary social or health insurance were also entitled to such use of the NPF bonds, as were banks determined by the Government for restructuralisation. All other individuals and legal entities are entitled to pay for their obligations until just after 31 December 2000 when the NPF bonds are to fall due under Law no. 92/1991 as amended in 1994. The group of members of Parliament found this regulation unconstitutional. They claimed a violation of Article 35.1 of the Constitution on the right to run a business and a violation of Article 55.2 of the Constitution: "The Slovak Republic shall protect and encourage competition. Details shall be provided by law". The Constitutional Court dismissed the motion in the part claiming unconstitutionality in the field of apartment transfers. In the opinion of the Court there was a lack of causality between those transfers and the purpose of constitutional protection provided for in Articles 35.1 and 55.2 of the Constitution. The right of individuals to pay in NPF bonds for their privatised property was found unconstitutional on the grounds that

it violated equal opportunities among persons exercising the constitutional right to run a business.

Other provisions of Article 24.9 of Law no. 190/1995 were reviewed for their conformity with the constitutional protection of economic competition. In this part of the case, the Court developed its doctrine on constitutional guarantees given to economic competition introduced in case PL.ÚS 7/96 (see *Bulletin* 1997/1 [SVK-1997-1-001]).

The Court noted that Article 55.2 of the Constitution is included in Part Three, Chapter 1 of the Constitution entitled *Economy of the Slovak Republic*. This means that neither the right to economic competition nor the right to participate in economic competition is guaranteed in Article 55.2 of the Constitution. Part Three, Chapter 1 of the Constitution states the principles of the State's role in the national economy (macroeconomy). One of these principles is the principle to protect and encourage a competitive economic environment. Article 55.2 of the Constitution is of a general character. This means that any authority of the Slovak Republic must exercise its powers in order to protect and encourage economic competition in relevant relations. This constitutional principle is prescribed for the Parliament too. Through Law no. 188/1994 on the Protection of Economic Competition as well as through many other laws on taxes, prices, etc., economic competition can be protected. The National Council of the Slovak Republic is authorised to adopt an unlimited number of laws regulating economic competition.

The very basis for economic competition is free entry to the market and equal rules which must be followed by all those who participate in economic competition while they remain in the market. Not all competitive conduct is relevant for economic competition. Moreover, there are economic activities which are sometimes excluded from competition on the basis that some other public interest is more important. One example is that of social insurance and health insurance where priority is given to the obligation of the Government to keep its duty and constitutional guarantees. Supplementary social and health insurance, however, is of a different nature. There are no governmental duties and no constitutional guarantees involved. Thus, neither supplementary social and health insurance, nor other activities covered by Law no. 190/1995, could reasonably be excluded from economic competition and its constitutional protection given by Article 55.2 of the Constitution.

On the basis of that constitutional provision, the Slovak Republic has undertaken to adopt such rules of law as will contribute to forming a natural market environment where the success of running a business rests with the business activities and abilities of persons who participate in the economic competition. This constitutional guarantee was not respected by the National Council of the Slovak Republic when it adopted the provisions on the right to pay for privatised property etc. in NPF bonds. For this reason, the Court decided that the provisions of Article 24.9.a, c and d of Law no. 190/1995 were unconstitutional.

Languages:

Slovak.

Identification: SVK-1998-2-008

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 01.07.1998 / **e)** I. ÚS 45/98 / **f)** Petition from person claiming violation of constitutional right / **g)** to be published in *Zbierka nálezaov a uznesení súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Parties - Interest.
Fundamental Rights - General questions - Entitlement to rights.
Fundamental Rights - Civil and political rights - Electoral rights.

Keywords of the alphabetical index:

Referendum, right / Necessary condition / Referendum, announcement / Referendum, re-run / Public affairs, administration, right to participate.

Headnotes:

The right to participate in the administration of public affairs through a referendum cannot be violated if a referendum has been announced in a manner which was not in conformity with the constitutional regime and for that reason the referendum was not held.

Summary:

The petitioner, an individual, claimed that his right to participate directly in the administration of public affairs through a referendum had been violated. The petitioner

claimed this on account of the reasoning of the President of the Slovak Republic, who, following the finding of the Constitutional Court according to which the Ministry of the Interior violated the rights of citizens in the national referendum (see *Bulletin* 1997/2 [SVK-1997-2-005] and *Bulletin* 1998/1 [SVK-1998-1-002]) announced the same referendum once again. The petitioner claimed a violation of his constitutional right on the ground that the repeated referendum was announced on questions concerning direct election of the Head of State by citizens as well as on membership of the country in NATO. The national referendum on direct election of the President resulted from a petition of citizens while the referendum on NATO membership had been approved by the Parliament. The petitioner explained that he had desired to participate solely in voting on direct election of the President. Thus, he argued that his constitutional right had been violated when he had been asked to give his opinion also on NATO membership.

The decision of the President to organise a re-run of the referendum had been published on 20 February 1998 in the mass media. A re-run of the referendum, however, was never announced in the Official Gazette. The announcement of any referendum in the Official Gazette is a necessary condition for holding a referendum. The President's decision was abrogated through Resolution of the Government no. 158 of 3 March 1998 when, in conformity with Article 105.1 of the Constitution, the Government started to exercise the powers of the President due to vacancy of the office of the President (see *Bulletin* 1997/3 [SVK-1997-3-009]). On the basis of all these facts, the Court ruled that any referendum can be held only if it has been announced in conformity with the Constitution. As the re-referendum for 19 April 1998 had not been announced in conformity with the Constitution, there was no referendum at all. No referendum-related rights could be violated. The petition was dismissed.

Languages:

Slovak.

Identification: SVK-1998-2-009

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 26.08.1998 / **e)** II. ÚS 44/98 / **f)** Petition from person claiming violation of constitutional right / **g)** to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Parties - Interest.
Fundamental Rights - General questions - Entitlement to rights.

Keywords of the alphabetical index:

Referendum, right / Public affairs, administration, right to participate.

Headnotes:

The right to participate directly in the administration of public affairs through a referendum never can be exercised individually. This right may be exercised solely with the participation of other entitled persons.

Summary:

The Constitutional Court in February 1998 decided that the petitioner's right to participate in the administration of public affairs directly had been violated by the Ministry of Interior (see *Bulletin* 1998/1 [SVK-1998-1-002]) in May 1997 when a national referendum had been thwarted. Due to this finding of the Court, the petitioner submitted a new petition claiming that his right continues to be violated because the re-run of the referendum proclaimed by the President for 19 April 1998 was cancelled by a resolution of the Government on 3 March 1998.

The Court ruled that the right to participate in the administration of public affairs through referendum may not be exercised individually. All citizens together, on the same day or days, may claim the right to vote on affairs of public interest announced for referendum. The prerequisite of such voting is the announcement of questions submitted to voting. The re-run of the referendum initially announced for 23 and 24 May 1997 was never announced. Thus, the referendum to be held on 19 April 1998 could not be thwarted through a governmental resolution of 3 March 1998.

The right to participation in the administration of public affairs through a referendum is not a permanent right which can be exercised whenever an individual so desires. This right may be exercised solely on the days announced for referendum. The right to participate in a referendum announced for 23 and 24 May 1997 expired on 24 May 1997. This right may not be claimed on the ground of the petitioner's reasoning according to which

the violation of his right lasts until the referendum is held. The petition was dismissed.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data

1 May 1998 - 31 August 1998

Number of decisions

The Constitutional Court had 19 sessions (9 plenary and 10 sessions) during this period. There were 481 U- (cases in the field of protection of constitutionality and legality which are denoted U- in the Constitutional Court Register) and 452 Up- (cases in the field of protection of human rights and basic freedoms which are denoted Up- in the Constitutional Court Register) unresolved cases from the previous year at the start of the period (1 May 1998). The Constitutional Court accepted 112 U- and 132 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

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

- 6 cases (U-) were joined to above mentioned cases because of common treatment and decision; accordingly the total number of resolved cases (U-) is 63.

In the same period, the Constitutional Court resolved 91 cases (Up-) in the field of protection of human rights and basic freedoms (12 decisions taken by the Plenary Court, 79 decisions taken by the Chamber of Three Judges). 4 cases (Up-) were joined to above mentioned cases because of common treatment and decision.

The decisions have been published in the Official Gazette of the Republic of Slovenia, while the resolutions of the Constitutional Court are not as a rule published in an official bulletin but are rather handed over to the participants in the proceedings.

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

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

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

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

- since June 1998 on the 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 from 1992 through 1997, prepared for the *Bulletin on Constitutional Case-Law* of the Venice Commission and its database CODICES (CD-ROM Internet: http//www.coe.fr/codices) and 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).

New Rules of Procedure of the Constitutional Court were adopted on 26 May 1998 (published in the Official Gazette of the Republic of Slovenia, no. 49/98).

Important decisions

Identification: SLO-1998-2-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.05.1998 **/e)** U-I-297/97 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 43/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles - Legality.
Institutions - Executive bodies - Territorial administrative decentralisation - Structure - Municipalities.
Institutions - Public finances - Taxation - Principles.

Keywords of the alphabetical index:

Public utility taxes, petrol sales / Municipality, jurisdiction for prescribing public utility taxes / Regulation, municipal, exceeding statutory criteria.

Headnotes:

A municipal decree which prescribes public utility taxes on retail outlets for petrol exceeds conditions determined by a statute for municipally prescribed public utility taxes. This law enumerates objects and services for which taxes may be prescribed and taxes on pumps are not among them.

Summary:

Article 147 of the Constitution determines that local communities shall prescribe taxes and other levies under conditions determined by the Constitution and Law. The possibility of a municipality prescribing public utility taxes is provided for by the Public Utility Tax Act. In prescribing public utility taxes, therefore, a municipality may not overstep the conditions which the Public Utility Tax Act sets for their prescription. This regulation determines in Article 2 that public utility taxes shall be paid for the use of objects and services which a municipal council shall prescribe in a tariff of public utility taxes. Thus the Public Utility Tax Act restricts a municipality prescribing public utility taxes in two directions: first, it determines in general that public utility taxes may not be prescribed by the value of the object, by actual trade or by actual income (Article 3), and in Article 4, it states the objects or services for which a municipality may prescribe public utility taxes. These are jukeboxes in public premises (indent 1), the use of public pavements in front of business premises (indent 2), gambling means in public premises (indent 3), advertising inscriptions, notices and announcements attached in public places (indent 5), messages, notices and announcements through local public address systems (indent 6), window displays for the display of goods outside business premises (indent 7), use of space for parking automobiles which the municipality determines and organises for the guarding of vehicles (indent 8), use of public areas for parking and other temporary purposes (indent 9) and the use of squares and other areas for displaying objects, arranging exhibitions etc. (indent 10 of Article 4 Public Utility Tax Act).

Nowhere does Article 4 of the Public Utility Tax Act state that municipalities may prescribe public utility taxes for retail outlets for the sale of petrol. The disputed regulation in this part therefore taxes completely different objects from those determined by the Public Utility Tax Act and

thus greatly exceeds the framework and conditions which this sets for the prescribing of public utility taxes (see on a very similar case the decision of the Constitutional Court no. U-I-269/97, Official Gazette RS, no. 33/98). Some of the cited objects or services which are enumerated by the Public Utility Tax Act could probably be found at individual petrol stations, but a municipality in this case would have to prescribe taxes precisely for these subjects or services and also calculate them on these objects (window displays, advertising inscriptions, etc.). It is thus not important what kind of motive guided the municipality in prescribing taxes on retail outlets. A public utility tax under the Public Utility Tax Act is not a finance instrument for limiting environmental pollution or for paying the costs of environmental pollution. The Constitutional Court therefore annulled the disputed provisions.

Supplementary information:

Legal norms referred to:

Article 147 of the Constitution;
Articles 2, 3, 4 of the Public Utility Tax Act (ZKT);
Articles 26, 45.3 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court refers to its case no. U-I-269/97 of 09.04.1998.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1998-2-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.05.1998 / **e)** U-I-307/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 42/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Parties - Interest.
General Principles - Separation of powers.
General Principles - Rule of law.
General Principles - Legality.
Institutions - Executive bodies - Organisation.
Institutions - Jurisdictional bodies - Organisation - Prosecutors / State counsel.
Institutions - Jurisdictional bodies - Legal assistance - The Bar - Role of members of the Bar.

Keywords of the alphabetical index:

Public prosecution service, constitutionality, assessment / State organs, relations / Penal code, permission to prosecute perpetrator / Insult to foreign government or international organisation / Public prosecutor's office, position in constitutional and legal system / Attorney / Notary.

Headnotes:

The provisions of the Public Prosecutors Act which regulate the appointment of candidates to the post of public prosecutor, their dismissal, disciplinary proceedings in connection with the discharge of the public prosecution service and organs with jurisdiction for deciding on such disputes are not used in proceedings conducted by the public prosecutor as a representative of the state in criminal or other proceedings in which the public prosecutor's office acts officially as a State organ. The public prosecutors office may thus not dispute them by a demand for the assessment of constitutionality.

The provisions of the Public Prosecutors Act which regulate the appointment, dismissal, and the suspension of public prosecutors as well as disciplinary proceedings relating to them do not encroach directly on the legal position of the office of public prosecutor as a State organ, so the circuit public prosecutor's office failed to demonstrate a legal interest in disputing them.

The provisions of the Public Prosecutors Act according to which the public prosecutor's office must send to the Ministry of Justice in connection with the discharge of their responsibilities a report on cases with which it is dealing, an annual report on the work of the public prosecutors' office and a report on supervisory reviews are not in conflict with constitutional provisions whereby public prosecutors discharge their function of criminal prosecution, and their organisation and jurisdiction are determined by law. The function of prosecution of perpetrators of criminal offences is by its nature a specific State function. It ensures the implementation of regulations by which criminal offences are determined. The importance of mutual co-operation both of State organs of the same branch of government and of State organs of different branches of government and State organs which, because of their special nature, cannot simply be classified in one or another branch of

government for the sake of the effective working of the State as a whole demands that State organs communicate among themselves, in conformity with statutory frameworks, specific data which are important for the discharge of individual state functions.

For the sake of the effective discharge of the function of criminal prosecution, bodies for investigating criminal offences must be subordinated to public prosecutors from a functional point of view. The provision of the Criminal Procedures Act, which requires a public prosecutor to communicate periodic reports on what he has decided on the basis of charges laid, is not an expression of subordination of the public prosecutor's office to bodies of internal affairs but an expression of crucial co-operation between investigatory bodies and prosecution bodies.

The provision of the Penal Code according to which the prosecution of a perpetrator of the criminal offence of insulting a foreign State or international organisation requires the permission of the Minister of Justice is not in conflict with the principle of a State ruled by law and is not in conflict with the constitutional provision which regulates the function of public prosecutor. Such an arrangement is justified by the public interest of the State in the context of its relations with other States or international organisations whenever this criminal offence is committed against them. For this reason, it is not an impermissible deviation from the otherwise specific principle of legality which binds a prosecutor in concrete cases to lay a criminal charge against anyone of whom there is given well-founded suspicion that he is the perpetrator of a criminal offence. On the grounds of public interest, it is also allowable that special permission for a charge in this case be given by the Minister of Justice. This cannot be considered to be an impermissible encroachment by the Minister of Justice into resolving concrete cases, since such an encroachment is prescribed in advance in the public interest. It is therefore not in conflict with the principle of a State ruled by law.

Supplementary information:

Legal norms referred to:

Articles 2, 3.2,114, 120, 135, 137 of the Constitution; Articles 21, 23, 24, 25 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court refers to its case no. U-I-224/96 of 22.05.1997 (OdlUS VI, 65).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1998-2-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 28.05.1998 / **e)** U-I-71/98 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 45/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights - General questions - Basic principles - Equality and non-discrimination.
Fundamental Rights - Economic, social and cultural rights - Right to housing.

Keywords of the alphabetical index:

Statutory acts / Principle of mutual accordance / Housing, leasing, criteria, young family / Family, young / Family, complete.

Headnotes:

The provision of the Housing Act does not provide a basis for different treatment of families on the basis of their different forms and thus is not in relation to whether they are "composed" of both parents or only one. Priority is only given to any form of family which is: "young", has more than one child, has a smaller number of employed persons or has an invalid member. The intention of the Housing Act is also to give priority in awarding non-profit and social housing to young families, irrespective of their actual form, thus to all forms of family which the law recognises as such, and not only "complete" young families.

The disputed provision of the Amending and supplementing rules to the Rules on leasing non-profit housing is not in conflict with the Constitution if it is interpreted such that a young family is considered to be not only a living community of both parents and

children, but also all other legally recognised forms of family. The basis for such an interpretation of the disputed provision of the Rules can be found in the corresponding provision of the Housing Act and ensures respect for the constitutional principle of equality.

When a disputed norm can be understood in practice and can be used in a number of ways, some of which are constitutionally permissible and others are not, annulling or annulling *ab initio* the norm would not be sensible since cases in which the norm had been used in compliance with the Constitution would also be affected. In so far as there is a violation of human rights and freedoms in individual cases because of unconstitutional use of the disputed provision, the Constitutional Court may intervene in a proceeding of possible constitutional appeal – in so far as on the basis of this decision, violations are not rectified in proceedings of legal remedy before organs or courts of jurisdiction.

Summary:

The Constitutional Court has already in a number of decisions – including the cited decision OdlUS IV, 76 – decided that the principle of equality does not prevent law makers from determining, within the bounds of their competence, criteria whereby similar material circumstances will be mutually distinguished and different legal effects will follow. The question here is whether the rules may define the concept of a "young family" such that only so-called complete families (both parents and children) shall be considered as a young family.

In conformity with the principle of legality, the statutory acts issued by the executive branch of power with the authority to issue administrative acts must in content, intent and extent be sufficiently specified and delineated to ensure that the behaviour of the administration or holders of public authority is to a certain extent foreseeable by citizens. This principle does not prevent the legislator from the use of general clausal and undefined legal concepts. Statutory regulations must in that case define the content of the undefined legal concept such that the aim of the statutory norm is thus achieved. An administrative regulation or general act for the exercise of public authority may supplement a statutory norm only to the extent that the supplementing does not restrict the statutorily regulated rights and obligations. It must only go so far as to ensure that the statutory norm is supplemented such that its aim will be achieved.

The second paragraph of Article 91 of the Housing Act does not provide a basis for a different treatment of families on the basis of their different forms and thus not in relation to whether they are "composed" of both parents or only one. It gives priority only to any form of family which is "young", which has more than one child, which has fewer employed members or which has an invalid member. One-parent families cannot be equated with so-called self-support, which refers to the survival of a child which is the responsibility of both parents even in the event of divorce. The Rules on measures for leasing social housing also respect self-support as an additional social criterion on the basis of Article 102.1 of the Housing Act. The intention of the Housing Act, as derived from Article 91.2 and from Article 102.1, is to give priority in the awarding of non-profit and social housing also to young families, irrespective of their actual form, thus to all forms of family which the law recognises as such, and not only "complete" young families.

The disputed provision of the Rules is not therefore in conflict with Articles 120 and 153 of the Constitution if it is interpreted such that it respects as young families not only living communities of both parents and children but also all other legally recognised family forms. A basis in the second paragraph of Article 91 of the Housing Act can only be found for such an interpretation of the disputed provision of the Rules, and ensures respect for the constitutional principle of equality (Article 14 of the Constitution).

When a disputed norm can in practice be understood and used in a number of ways, some of which are constitutionally permissible and others are not, annulling or annulling *ab initio* the norm would not be sensible since cases in which the norm had been used in compliance with the Constitution would also be affected. The Constitutional Court therefore retained the disputed provision of the Rules in its undisputed or constitutionally acceptable extent or meaning, and at the same time, excluded from legal use the constitutionally unacceptable use of the disputed norm.

Supplementary information:

Legal norms referred to:

Articles 14, 120, 153 of the Constitution;
Articles 5, 6, 91, 93, 102 of the Housing Act (SZ);
Articles 114, 115 of the Marital Bonds and Family Relations Act (ZZZDR);
Articles 26, 40 of the Constitutional Court Act (ZUstS).

One judge delivered a separate concurring opinion.

Cross-references:

In the reasoning of its decision, the Constitutional Court refers to its case no. U-I-77/95 (OdlUS IV, 76).

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-1998-2-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.05.1998 / **e)** CCT 28/97 / **f)** Wild and Another v. AP Hoffert NO and Others / **g)** / **h)** 1998 (6) *Butterworths Constitutional Law Reports* 656 (CC).

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Trial within reasonable time.

Keywords of the alphabetical index:

Permanent stay of prosecution as a remedy / Trial within reasonable time, meaning / Trial within reasonable time, remedies.

Headnotes:

Where an accused person's right to be tried within a reasonable time after having been charged is violated, a permanent stay of prosecution will seldom be the appropriate remedy in the absence of trial-related prejudice. Instead, there are alternative remedies depending on the facts of each case.

Summary:

In this case the Constitutional Court considered whether a permanent stay of prosecution was an appropriate remedy in terms of Section 7.4.a of the interim Constitution where an accused's constitutional right to be tried "within a reasonable time after having been charged" (Section 25.3.a of the interim Constitution) had been violated.

The appellants were arrested in June 1993 on charges of dealing in or possessing cocaine. They appeared in court several times for postponements. After the interim Constitution came into force in April 1994 the trial was postponed to enable the appellants to apply to the High Court for access to the police docket and to refer the constitutional validity of certain Sections of the Drugs and Drug Trafficking Act 140 of 1992 to the Constitutional

Court for determination. That application dragged on and in March 1995 the criminal case was struck off the roll by the district magistrate. As a result, the appellants withdrew the High Court application as there was no longer any criminal charge pending against them. However, later that yearthe appellants were charged again on similar charges. They unsuccessfully applied to the Natal High Court for a stay of the prosecution claiming, among other things, that their right to be tried within a reasonable time had been infringed. The appellants then appealed to the Constitutional Court.

The Court reaffirmed that ordinarily, unless there was trial-related prejudice, a stay of prosecution was not appropriate relief for a breach of the right to be tried within a reasonable time of having been charged. The Court assumed for purposes of argument that there had been such a breach but, as there was no suggestion that the appellants' defence to the charges had been prejudiced, the appeal was dismissed.

Applying the principles laid down in the recent Constitutional Court judgment of *Sanderson v. Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC), Kriegler J, with whom the other justices concurred, repeated that a permanent stay of prosecution will not ordinarily be granted in cases where no prejudice related to the trial has occurred. He emphasised however, that the appellants' right to be tried within a reasonable time continued to operate throughout the trial. Although a permanent stay may be inappropriate in such cases, the right to a speedy trial was important and needed to be protected and enforced by prosecutors and judicial officers in a variety of ways. If at any stage the right is shown to have been infringed or endangered, appropriate remedies should be considered.

Cross-references:

The scope and purpose of the right to be tried within a reasonable time after having been charged was set out by the Constitutional Court in *Sanderson v. Attorney-General, Eastern Cape* (CCT 10/97) 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC).

Languages:

English.

Identification: RSA-1998-2-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.05.1998 / **e)** CCT 26/97 / **f)** De Lange v. Smuts and Others / **g)** / **h)** 1998 (7) *Butterworths Constitutional Law Reports* 779 (CC).

Keywords of the systematic thesaurus:

General Principles - Separation of powers.
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.

Keywords of the alphabetical index:

Detention without trial, meaning / Incarceration by non-judicial authority / Officers non-judicial, powers.

Headnotes:

A provision of the Insolvency Act, Act 24 of 1936, providing that the presiding officer at a meeting of creditors can order imprisonment of a person appearing before such a meeting if such a person should fail to produce required books or documents, or refuse to answer a question lawfully asked, is found unconstitutional to the extent that it authorises a presiding officer who is not a magistrate to issue a warrant committing a person to prison.

Summary:

A subsection of the Insolvency Act provides that if a person summoned to appear before a meeting of creditors should refuse to be sworn by the presiding officer at the meeting, fail to produce any book or document which he or she was required to produce, or refuse to answer a question lawfully asked, the presiding officer may commit that person to prison. According to another section of the Act such a meeting of creditors can be presided over by a magistrate, a Master or an officer in the public service designated by the Master of the High Court or a magistrate. It was argued that this state of affairs violates the constitutional right not to be detained without trial.

Judgment for the majority was given by Ackermann J and concurred in by Chaskalson P, Langa DP and Madala J. It ordered that the subsection concerned is unconstitutional only to the extent that it authorises a presiding officer who is not a magistrate to issue a

warrant committing an examinee at a creditors' meeting to prison.

The right to freedom and security of the person has a substantive as well as a procedural aspect. With respect to the substantive aspect the only issue was whether there was just cause for the power to commit to prison under the subsection. The power to commit recalcitrant witnesses at insolvency hearings served an important public objective, namely to ensure that insolvents and other persons who are in a position to give important information relating to an insolvency do not evade supplying it. This important objective constitutes just cause for the deprivation of freedom under these circumstances.

With respect to the attack based on the fair procedure aspect of the right to freedom, the majority concluded that non-judicial officers cannot commit an uncooperative witness to prison, because they lack the independence of the judiciary. Magistrates who commit uncooperative witnesses in aid of an insolvency inquiry do so in a judicial and not an administrative capacity.

Sachs J concurred in the order proposed but for separate reasons. He evaluated the constitutionality of the subsection within the context of separation of powers rather than that of freedom rights. Didcott J (in whose judgment Kriegler J concurred) rejected the idea that officers other than magistrates will be less independent or impartial in upholding the rule of law. There is always the opportunity for an aggrieved party to approach the High Court and thus involve the judiciary. The words "detention without trial" had to be interpreted in its specific historical context and that it bears no resemblance to committal to prison under the circumstances of this case.

Mokgoro J wrote a separate judgment, finding the subsection in question unconstitutional as a whole on grounds of infringing the right not to be deprived of freedom arbitrarily or without just cause. She acknowledged the legitimate purpose of the committal procedure but objected to the absence of adequate safeguards to protect personal liberty. O'Regan J also found the subsection unconstitutional as a whole in a separate judgment, asserting that a magistrate presiding at a creditors' meeting is not acting in his or her judicial capacity but rather fulfils an administrative or quasi-judicial function. The right to freedom and security of the person is accordingly infringed even when imprisonment of a recalcitrant witness at a creditors meeting is ordered by a magistrate. Powers of coercive imprisonment are seldom conferred on administrative or quasi-judicial bodies, even where those bodies are exercising functions similar to those of courts of law.

Cross-references:

Coetzee v. Government of the Republic of South Africa and Others; Bulletin 1995/3 [RSA-1995-3-005]; *Matiso v. The Commanding Officer; Port Elizabeth Prison and Others* (CCT 27/95) 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC); *Ferreira v. Levin and Others: Vryenhoek and Others v. Powell NO and Others* (CCT 5/95) 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC); *Bulletin* 1995/3 [RSA-1995-3-010]; *Bernstein and Others v. Bester NO and Others* (CCT 23/95) 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC); *Bulletin* 1996/1 [RSA-1996-1-002]; *Nel v. Le Roux and Others* (CCT 30/95) 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC); *Bulletin* 1996/1 [RSA-1996-1-004].

Languages:

English.

Identification: RSA-1998-2-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.05.1998 / **e)** CCT 5/98 / **f)** Mello and Another v. The State / **g)** / **h)** 1998 (7) *Butterworths Constitutional Law Reports* 908 (CC).

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 - Presumption of innocence.

Keywords of the alphabetical index:

Fair trial, meaning / Presumption of innocence, meaning / Reverse onus, meaning / Proof, burden.

Headnotes:

Section 20 of the Drugs and Drug Trafficking Act 140 of 1992 provides that if drugs are found in the immediate vicinity of a person, such person shall be rebuttably presumed to be in possession of such drugs. This provision was challenged and found unconstitutional on the basis that it places a reverse onus on the accused

to prove his or her innocence and thereby violates the right to be presumed innocent until proven guilty.

Summary:

The matter came to the Constitutional Court arising from a conviction in the lower court. The appellants were driving a truck in which illegal drugs were hidden. As a result, the appellants were presumed under Section 20 of the Drugs and Drug Trafficking Act to be in possession of such drugs. The appellants challenged their conviction in the High Court on the basis that Section 20 of the Act places a "reverse onus" on an accused person to disprove such possession of drugs in a criminal charge.

The appellants argued that it is an established rule of South African law that the prosecution carries the burden of proving the guilt of an accused beyond reasonable doubt, and that the presumption embodied in Section 20 places the burden instead on the accused person to prove his or her innocence.

The Court found Section 20 of the Drugs and Drug Trafficking Act to be wide, invalid and inconsistent with Section 25.3.c of the interim Constitution. The matter was referred to the High Court to deal with in accordance with the judgment of the Constitutional Court.

Cross-references:

S v. Mbatha 1996 (2) SA 464 (CC); *S v. Prinsloo* 1996 (3) BCLR 293 (CC); *Bulletin* 1996/1 [RSA-1996-1-001]; *S v. Bhulwana* 1995 (1) SA 509 (CC); 1995 (5) BCLR 566 (CC); *Bulletin* 1995/3 [RSA-1995-3-008]; *S v. Gwadiso* 1995 (2) SACR 748 (CC); 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); *Bulletin* 1995/3 [RSA-1995-3-008]; *S v. Julies* 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC); *Bulletin* 1996/2 [RSA-1996-2-011] *and S v. Ntsele* 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC); *Bulletin* 1997/3 [RSA-1997-3-012]; *S v. Van Nell* 1998 (8) BCLR 943 (CC).

Languages:

English.

Identification: RSA-1998-2-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.05.1998 / **e)** CCT 13/97 / **f)** Mistry v. The Interim National Medical and Dental Council of South African and Others / **g)** / **h)** 1998 (7) *Butterworths Constitutional Law Reports* 779 (CC).

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Temporal effect.
Fundamental Rights - Civil and political rights - Right to private life.

Keywords of the alphabetical index:

Regulatory searches / Informational privacy, right / Search and seizure / State regulation of public and private activity.

Headnotes:

The constitutionally protected right to privacy (Section 13 of the Interim Constitution), prohibits State regulatory inspectors from conducting unrestricted searches of any premises where such inspectors reasonably believe there are medicines or other substances regulated by the Medicines and Related Substances Control Act 101 of 1965 (the "Medicines Act").

Periodic regulatory inspections are necessary to maintain professional standards and to protect the general public. Yet when the enacting legislation grants excessive authority to regulatory inspectors and fails to provide them with the necessary guidelines for conducting inspections, it must be struck down as an impermissible infringement on the right to privacy.

Information sharing amongst authorised officials charged with the duty of maintaining the public health is not tantamount to a breach of the right to privacy when such information is not of a personal nature and is communicated to another official who shares the responsibility of maintaining the confidentiality of such information.

Summary:

The case involved a challenge to the exercise by regulatory inspectors of their powers of entry, examination, search and seizure given to them by Section 28 of the Medicines Act. This section of the Act grants to inspectors the authority to enter into and inspect *any* premises, place, vehicle, vessel or aircraft where such inspectors reasonably believe there are medicines

or other substances regulated by the Act. The Act was challenged on the basis that the powers granted to inspectors therein are too broad and therefore violate Section 13 of the interim Constitution which guarantees the right to personal privacy.

The claim arose as a result of a search which was initiated by a letter of complaint from a medical patient to the Interim National Medical and Dental Council of South Africa. It alleged that the complainant in this matter, a medical doctor, was fraudulently claiming reimbursement from the patient's medical aid fund for services which he had not delivered. In response, the Council ordered an inspection of the doctor's surgery by two of its investigating officers. Prior to conducting the search, one of the investigating officers notified a health inspector of the Department of Health of the impending inspection. During the course of the search numerous items were seized by the health inspector and the doctor argued that these items should be returned on the basis that the search was unlawfully conducted.

The Court found that a history of gross violations of fundamental rights sanctioned by the State warranted a repudiation of past practices repugnant to the new Constitution. It found that while periodic regulatory inspections are necessary to maintain professional standards and to protect the citizenry at large, the section of the Act authorising such inspections in the present case went too far. The section is so wide and unrestricted as to authorise any inspector to enter any person's private home simply on the basis that there may be common household medicines there.

The complainant also challenged the constitutionality of the search itself on the grounds that an investigating officer of the Medical Council told the health inspector of the complaint in breach of the confidentiality requirements of governing statutes. He claimed that such an illegal search violated his constitutional right to privacy. The Court accepted for purposes of the present case that there exists a right to informational privacy. It found however, that the complainant had failed to establish a breach of such right in the present case for the following reasons: the information was volunteered by a member of the public; the substance of the information communicated was not personal in nature but related to the doctor's professional practice; and the information was not communicated to the press or to the public, but was given to another inspector charged with protecting public health.

The Court declared Section 28.1 invalid. Its order was not retrospective. The Court denied the complainant's request for the return of the items seized on the grounds that the search was conducted according to a law that had not been invalidated at that time and that the complainant had failed to establish alternative grounds for invalidating the search.

Cross-references:

Previous decisions of the Constitutional Court concerning the right to privacy are as follows: *Bernstein and Others v. Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (5) BCLR 609 (CC); *Bulletin* 1996/1 [RSA-1996-1-002]; and *Case and Another v. Minister of Safety and Security and Others; Bulletin* 1996/1 [RSA-1996-1-006]; *Curtis v. Minister of Safety and Security and Others* 1996 (3) SA 617 (CC); 1996 (4) BCLR 441 (CC). In the former decision, the Court developed the doctrine that privacy rights exist on a continuum which ranges from the protection of the intimate sphere of the person and home to the less protected rights associated with the public realm. In the latter decisions, the Court established that the right to privacy is broad but may be limited, depending on the circumstances of a particular case.

Languages:

English.

Identification: RSA-1998-2-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.05.1998 / **e)** CCT 33/97 / **f)** MEC for Development Planning and Local Government in the Provincial Government of Gauteng v. The Democratic Party and Others / **g)** / **h)** 1998 (7) *Butterworths Constitutional Law Reports* 855.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of litigation - Powers of local authorities.
Constitutional Justice - The subject of review - Constitution.
Institutions - Federalism and regionalism - Budgetary and financial aspects - Budget.
Institutions - Federalism and regionalism - Distribution of powers.

Keywords of the alphabetical index:

Local government budget, passing / Government, transitional, statutory interpretation during.

Headnotes:

A constitutionally protected statutory provision made applicable for a specified time appears to be inconsistent with another constitutional provision. The statutory provision applies unchanged for this period where the Constitutional Principles do not require the immediate application of the constitutional provision. There is no inconsistency because the constitutional provision would not apply until the expiry of that period.

Summary:

The High Court held that a simple majority was insufficient and thus improper for the passing of a budget of the Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council. Two different provisions seemed to govern the passing of local government budgets: Section 160.3 of the Constitution requires a simple majority and Section 16.5 of the Local Government Transition Act 206 of 1993 requires a two-thirds majority. Other provisions were also relevant to the issue: item 26.2 of Schedule 6 of the Constitution providing that Section 16.5 may not be repealed before 30 April 1999 and Section 241 in the body of the Constitution which provides that Schedule 6 applies during transition to the new constitutional order.

The appellants argued that Section 16.5 was inconsistent with a provision of the Constitution and therefore invalid and that item 26.2 of Schedule 6 could not preserve it as it is not possible to shield statutory provisions from constitutional review. They argued further that item 26.2 did not put Section 16.5 beyond any provision of the Constitution, its effect was to protect Section 16.5 from repeal by Parliament until 30 April 1999.

The Court found that when read together with Section 241 and item 26.2 of Schedule 6 of the Constitution, Sections 16.5 of the Local Government Transition Act and 160.3.b of the Constitution are not inconsistent with each other. Section 241 makes Schedule 6 (therefore item 26.2) applicable during the transitional period. Thus Section 16.5 will apply during the transitional period and may not be repealed until 30 April 1999 as provided in item 26.2 of Schedule 6. Section 160.3.b of the Constitution shall apply thereafter. The Court held therefore that Section 16.5 of the Local Government Transition Act was not inconsistent with the Constitution by virtue of its textual difference from Section 160.3.b.

Section 16.5 of the Local Government Transition Act also provided a mechanism whereby the MEC for local government in a province may unilaterally pass the budget if the requisite two-thirds majority was not obtained in time. The appellants argued that this mechanism was unconstitutional because it violated the principles of democratic local government, autonomous local government, transparency in local government and the separation of powers in provincial government. The appellants claimed such principles were enjoined by the Constitution.

The Court found that the fact that Section 16.5 may violate certain constitutional principles as argued by the appellants did not mean it was unconstitutional, as a deadlock breaking mechanism was necessary to ensure that a budget was passed in time. Local government would not function properly, if at all, where a budget was not passed in time because the necessary majority was not obtained.

The appeal was accordingly dismissed.

Cross-references:

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC); *Bulletin* 1996/3 [RSA-1996-3-016].
Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended text of the Constitution of the RSA, 1996 1997 (2) SA 97 (CC); 1997 (1) BCLR (CC); *Bulletin* 1996/3 [RSA-1996-3-020].

Languages:

English.

Spain
Constitutional Court

Statistical data
1 May 1998 - 31 August 1998

Type and number of decisions:

- Judgments: 83
- Decisions: 80
- Procedural decisions: 1376

Cases submitted: 1931

Important decisions

Identification: ESP-1998-2-010

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 04.05.1998 / **e)** 93/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 137 of 09.06.1998, 3-7 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Proportionality.
General Principles - Prohibition of arbitrariness.
Institutions - Legislative bodies - Organisation.

Keywords of the alphabetical index:

Assembly, Bureau / Parliamentary committees, proportional representation.

Headnotes:

Proportional representation is very difficult to apply fully or in an ideal fashion, particularly in the case of internal elections in parliamentary assemblies. "Adequate representation will, by definition, be less than perfect and the principle has to be applied in a discretionary or flexible fashion, though its essence must be preserved".

Summary:

In this application for constitutional protection, the applicants, members of parliament of the Balearic Islands Autonomous Community, challenged two decisions of their assembly's Bureau which ruled that the various parliamentary committees should each have fifteen members and that the apportionment of places between the different parliamentary groups should be the same as before. The applicants claimed that these decisions violated the right enshrined in Article 23.2 of the Constitution, arguing that after one of the parliamentary groups had lost its overall majority, the seats in the various parliamentary committees should have been reapportioned in accordance with the proportionality principle.

The Constitutional Court stated that, since political pluralism was one of the country's fundamental legal values and the role of political parties as the expression of this pluralism was enshrined in the Constitution, representatives' political affiliations had legal significance. Such affiliations could not therefore be ignored, either by the non-constitutional rules governing the internal organisation of the body of which these representatives were members or by the body itself, when taking decisions in accordance with the powers inherent in its autonomous status to organise its own activities. The Constitution itself therefore required the application of proportionality to the composition of committees.

Nevertheless, this did not necessitate absolutely strict proportionality applied with mathematical precision. In this case, in order to determine whether proportionality was applied in a discriminatory fashion, the Constitutional Court did not need to resort to mathematical analysis but had to establish whether the apportionment of seats was based on a system that was patently unfair and devoid of any rational criteria or reasonable justification. The bureau's decisions could not therefore be held to have been taken in the absence of any objective criteria or to have involved a deliberately arbitrary interpretation of the relevant regulations.

Languages:

Spanish.

Identification: ESP-1998-2-011

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 02.06.1998 / **e)** 117/1998 / **f)** / **g)** *Boletín Oficial del*

Estado (Official Gazette), no. 158 of 03.07.1998, 26-33 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Public interest.
Fundamental Rights - General questions - Entitlement to rights - Legal persons.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Legal aid, free / Legal persons / Commercial profit-making companies / Associations / Foundations.

Headnotes:

It cannot be inferred from the general granting of the right to effective judicial protection (Article 24 of the Constitution), that legal persons are entitled, in every case, to free legal aid if they lack the means to enter into litigation.

Summary:

The legal regulations governing the right of legal persons to free legal aid make such entitlement dependent on the functions which such legal persons fulfil and restrict its application to legal persons operating in the "public interest". For the purposes of these regulations, "legal persons operating in the public interest" are taken to comprise associations (*universitas personarum*) of declared "public interest" and foundations (*universitas bonorum*) recorded on the relevant administrative register. The regulations therefore exclude other associations, and more particularly companies, being associations with specified objectives, from the scope of application of the legislation.

This application for constitutional protection, lodged by a commercial company, challenged a court decision to reject the company's request for free legal aid to enable it to initiate insolvency proceedings. The refusal, on the grounds that the body was a "commercial profit-making company", was challenged as being a violation of the right to effective judicial protection (Article 24.1 of the Constitution) and of the principle of equality before the law (Article 14 of the Constitution). The applicants also submitted that these two violations contravened Article 119 of the Constitution, according to which "justice shall be free, when thus provided by law, and shall in any case be so in respect of those who have insufficient means to litigate".

While the claims in this application concerned a judicial decision, in practice the real issue raised by the applicant was whether Section 2.c of the Free Legal Aid Act (1/1996) was unconstitutional, an issue which could only be raised in an action for constitutional protection if the alleged infringement of fundamental rights was the result of the application of the legislation in question and if constitutional protection was inextricably bound up with the unconstitutional nature of this provision. The court considered that in order to assess the circumstances it had to interpret this provision, which was not in itself liable to be the subject of an application for constitutional protection. Article 2.c of the Free Legal Aid Act conferred a right to litigate at no cost to legal persons taking the form of "associations operating in the public interest" and "foundations", if they could establish that they had insufficient means to enter into legal proceedings.

Article 119 of the Constitution appeared to place two constraints on law makers. First, the right in question was not absolute or unrestricted but one that was legally based and whose boundaries had to be laid down in legislation. Second, the right had a constitutional force that could not be ignored in the legislation, even though the article did not specify whether "insufficient means to enter into legal proceedings" only concerned individuals, or natural persons, or extended also to corporate bodies, or legal persons. This lack of precision required the Constitutional Court, as the supreme interpreter of the Constitution, to rule on this matter. In a previous judgment, the Constitutional Court had ruled that, in accordance with the binding elements of Article 119 of the Constitution, which could not be ignored in the legislation, free legal aid had to be granted to those who could not meet the expenses arising from proceedings, without neglecting their basic needs and those of their family. In doing so, the Court had ruled implicitly that this aspect of the Article only concerned natural persons, on the grounds that only individuals could be granted the right to a minimum level of personal or family subsistence. In other words, while the Constitution did not exclude the possibility of some, or even all, legal persons' benefiting from free legal aid, the fact remained that such state subsidies were based not on the second clause of Article 119 of the Constitution, which only applied to natural persons, but on the first, which made parliament responsible for determining when, and to what extent, a legal person could benefit from free legal aid.

The principle of equality (Article 14 of the Constitution) had not been infringed, when the law treated natural and legal persons differently with regard to entitlement to free legal aid, since the legislation in fact took account of the widely differing nature and functions of these two types of person, which operated in equally different

environments, thus permitting and fully justifying unequal legal treatment.

Supplementary information:

One judge issued a dissenting opinion on this judgment.

Languages:

Spanish.

Identification: ESP-1998-2-012

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 15.06.1998 / **e)** 121/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 170 of 17.07.1998, 10-14 / **h)**.

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 - Inviolability of communications - Telephonic communications.

Keywords of the alphabetical index:

Presumption of innocence, collection of evidence / Evidence of prosecution / Telephone tapping.

Headnotes:

There is no direct violation of the fundamental right to confidentiality of communications when the irregularities complained of occur after the decision to limit that right has been implemented, that is after the results of the investigations have been recorded in the case file. Thus, information secured by the judge through telephone taps, to take an example, may be presented at the trial as evidence for the prosecution through the means of other evidence revealing the information obtained by the telephone tapping, so long as this information can be subsequently investigated and substantiated by other evidence admissible at the trial.

Summary:

The applicant had been sentenced to a long term of imprisonment and a heavy fine for public health offences, drug trafficking and smuggling. He claimed that this conviction violated his right to the presumption of innocence, on the grounds that the district court had based its findings on evidence secured in breach of constitutional safeguards. He also argued that the telephone taps to which he had been subjected by judicial order infringed his right to confidentiality of communications (Article 18.3 of the Constitution), that judicial supervision of the storage of the tapes, their typed transcription and their verification, and of the choice of conversations recorded, was defective, and that these deficiencies rendered not only the recordings but also the other evidence submitted at the hearing, all of which was based on information obtained from the telephone taps, invalid.

It should be noted from the outset that the applicant did not challenge the judicial authorisation to administer telephone taps; his complaint therefore only concerned the way in which the results of these taps had been recorded in the case file. It should also be noted that the decision of the Court of Cassation terminating the preliminary judicial proceedings had declared that the recording of the results of the telephone tap in the case file had been procedurally invalid, on account of formal errors in the way it had been carried out.

Having regard to the previous decisions, the Constitutional Court found that the applicant's case was only admissible if, for the sole purpose of establishing the offence in question, a fundamental right had been infringed and there had been an unlawful link between the action constituting the infringement and the evidence on which the conviction leading to the sentence had been based. In this case, the Court found that the contested irregularities had not infringed the applicant's fundamental right to confidentiality of communications, since they related solely to the way in which the results of the telephone taps had been recorded in the case file. With regard to the evidence on which the conviction was based, the Court again found that confidentiality of communications had not been breached, since the evidence was in no way linked to these irregularities. It was clear, in fact, that they had occurred after the securing of the information which had finally made it possible to establish the evidence on which the conviction was based: the evidence of the police officers taking part in the telephone taps and of the persons carrying out the examination of the posted packages containing the cocaine, as well as the statement of the applicant himself in which he acknowledged that he had resided

at the hotel to which the package sent to him had been addressed.

Languages:

Spanish.

Identification: ESP-1998-2-013

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.06.1998 / **e)** 141/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 181 of 30.07.1998, 24-30 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - Other international sources.
General Principles - Legality.
General Principles - Publication of laws.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Treaties, publication of reservations / Extradition, safeguards / Right to a trial with full safeguards / European Convention on Extradition / Reservation, withdrawal, publication / Treaty, effect in domestic law / *Nulla traditio sine lege.*

Headnotes:

Violations of fundamental rights by foreign authorities in the course of the original criminal proceedings may be imputed to the Spanish courts if the latter authorise extradition in full knowledge of the facts. By acting in this way, the courts may contribute either to the failure to re-establish the fundamental right that has been violated or to encouraging further violations of the extradited person's fundamental rights.

The extradition procedure, to which all the safeguards of criminal procedure apply, must respect the rights conferred in Article 24 of the Constitution, in particular the right to a trial with full safeguards.

Summary:

This judgment concerned an application for constitutional protection against a judicial decision authorising the extradition of an Argentine citizen to Italy and ordering his arrest in order that the sentence passed on him in Italy could be carried out. The Spanish courts had ordered the extradition under the terms of Chapter III of the Second Additional Protocol to the European Convention on Extradition, signed in Strasbourg on 17 March 1978. At the signing ceremony, Italy had entered a reservation concerning this chapter, which it had subsequently withdrawn in a letter to the Secretary General of the Council of Europe. Despite this letter, the withdrawal of the reservation was never officially published in Spain.

The Constitutional Court noted first that one of the restrictions on the powers of the Spanish authorities to extradite persons subject to criminal prosecutions in other States was the need for prior and express legal authorisation, in accordance with the guarantee referred to in the adage *nulla traditio sine lege.* In accordance with this legal principle, the first and most basic safeguard in the extradition procedure was the requirement that the extradition be authorised by treaty or by law. This safeguard served a number of purposes. First, it was intended to ensure that extradition was essentially subject to legal rules, and not simply to the will of governments, which could not arbitrarily extradite persons staying or residing in their territory. Second, it required the judicial bodies responsible for responding favourably or unfavourably to extradition applications to comply with the rules laid down by the country's lawful representatives. Finally, it offered those concerned greater legal certainty by enabling them to anticipate correctly the consequences of a measure such as extradition, which inevitably had adverse effects for them.

In the light of these considerations, the Constitutional Court found that the withdrawal of a reservation modifying the application of a provision of a treaty was an integral part of the latter and, from a constitutional standpoint, had to be published officially in Spain. Article 96.1 of the Constitution provided that validly concluded treaties, once officially published in Spain, formed part of the internal legal order. As a result, a treaty's provisions, including the withdrawal of a reservation, were not part of the Spanish legal system until they had been officially published. The Spanish courts could not apply a convention provision that had not been incorporated into Spanish law, particularly if the provision was the basis for a restriction on one of citizens' fundamental rights, such as the right to freedom.

Languages:

Spanish.

Identification: ESP-1998-2-014

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.06.1998 / **e)** 144/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 181 of 30.07.1998, 38-43 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Democracy.
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 information.
Fundamental Rights - Civil and political rights - Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Information, accurate, requirement / Media, accurate information / Pluralism, political / Libel.

Headnotes:

In the event of conflict between the right of freedom of information (Article 20.1.d of the Constitution) and the right to honour (Article 18.1 of the Constitution), the former only takes precedence if the information concerned is accurate and concerns public matters of general interest, having regard to the subjects under consideration and the persons involved.

Summary:

This judgment concerned an application for constitutional protection against a judicial decision to convict a weekly journal of unlawfully impugning the honour of a member of the Spanish diplomatic service in the Netherlands following the publication of a report criticising the involvement of certain members of the Spanish delegation in the Netherlands in arms, motor vehicle and drugs trafficking, and in a number of attacks on Spanish diplomatic staff and official buildings claimed by ETA.

The Constitutional Court stated that freedom of information and freedom of expression had a special place in the Spanish legal system, both because of their status as individual liberties and because of the safeguards they offered for free public opinion, which was indissolubly linked to political pluralism. However, the exercise of freedom of information was only justified if the information concerned related to matters of public interest, that is facts that should be brought to public attention, and was accurate. If the two criteria were satisfied, the exercise of this right took precedence over the honour of the persons concerned by the information, since freedom of information was the very foundation of a democratic society.

In this case the Constitutional Court found that the information published concerned important matters for the community, which therefore had to be considered matters of public interest, from the standpoint both of the person concerned, whose public duties implied a special responsibility, and of the very nature of the facts set forth. However, in this case the constitutional criterion of accuracy had not been satisfied. This criterion placed on the publisher of the information a special duty of care when determining the accuracy of the information and checking the information published. Moreover, the strictness with which the duty of care had to be applied was directly related to the nature of the information presented. A neutral form of communication, that is one based on information from another medium, or a source of information that was simply being passed on, was different from information which the medium and its author acknowledged as their own, in which case the duty of care in checking the accuracy of the published material could not be lessened or relaxed in any way but had to be strictly enforced.

The information published in this case could not be described as neutral reporting but rather information of foreign origin for which the authors had taken responsibility and developed as their own, without fulfilling the duty of professional care that was incumbent on them. The authors of the report had undertaken no checking and made no effort to ensure that the facts reported were correct, despite being aware that the duty to check information must be strictly respected when the information published was likely, on account of its content, to cast discredit on the individual concerned.

Languages:

Spanish.

Identification: ESP-1998-2-015

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 15.07.1998 / **e)** 166/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 197 of 18.08.1998, 63-74 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Systematic interpretation.
General Principles - Legality.
General Principles - Reasonableness.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.
Institutions - Public finances - Principles.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Judicial decisions, implementation, right / Property of local institutions, exemption from attachment / Local institutions, principle of protection from enforcement / Budget, appropriation extraordinary / Attachment, exemption / Payment obligations / Judicial protection, effective.

Headnotes:

The right to effective judicial protection (Article 24.1 of the Constitution) includes the personal right to the implementation of final judicial decisions in so far as the fair and effective implementation of these decisions is the only way of ensuring that the proceedings are effective in practice. This right is respected when the judges and courts responsible for implementing final decisions take appropriate steps to ensure that the judgment is strictly applied, even if the decision to be implemented concerns a public body.

Summary:

This case concerned a question raised by a judicial body concerning the constitutionality of two legal provisions, concerning respectively the principle that local institutions' property was exempt from attachment and those institutions' privilege of protection from enforcement of judicial decisions, on account of their presumed conflict with the exclusive power of the courts to exercise judicial authority (Article 117.3 of the Constitution), the obligation to implement final court judgments (Article 118 of the Constitution) and the right to effective judicial protection (Article 24.1 of the Constitution).

Following a systematic analysis of the relevant provisions, the Constitutional Court concluded that the principle of legality with regard to public expenditure required local institutions or their autonomous bodies to be exclusively responsible for implementing judicial decisions imposing on them payment obligations. On the same principle, a general payments scheme had been laid down in legislation which stipulated that administrative authorities responsible for implementing this type of decision were obliged to make payments according to the conditions and limits set out in the corresponding budget. This requirement was not, however, as strict as it might appear, since the aforementioned scheme allowed the relevant authorities to request the full assembly of the local institution, should this be necessary to make the payments concerned and within three months of notification of the judicial decision, to authorise an extraordinary or supplementary appropriation, and at the same time allowed individuals to contest the budget, if the latter did not make the necessary provision for the local institution to meet the relevant obligations. To match this, the legislation had also laid down that local institutions' property should be exempt from attachment on the basis of the principle, deemed to be incontrovertible, that the general payments scheme guaranteed that judicial decisions would be properly applied.

The Constitutional Court considered that the principle of local institutions' protection from enforcement of judicial decisions was an inevitable consequence of the legality principle with regard to public expenditure. Since the payments concerned were made by public bodies, they had to be effected using an administrative procedure for authorising expenditure for which the authority liable for the payment was itself responsible. This privilege should not be interpreted as embodying the granting of a power, nor was that its purpose; it simply gave effect to the duty to implement final decisions and to collaborate in implementing such decisions with courts which so requested in their final judgments. In the final analysis, the protection principle involved nothing more than a

local authority taking action to implement judicial orders. It could not therefore be claimed that of itself it excluded or restricted the exercise of the judicial power to implement final judgments, which was exclusively the jurisdiction of the courts, or the duty which Article 118 of the Constitution imposed on public bodies to execute judgments and other final judicial decisions and collaborate with the judges and courts during proceedings and in the execution of judgments.

Turning to the principle that local institutions' property was exempt from attachment, which was an exception to the general rules governing the implementation of judgments, the Constitutional Court found that, as laid down in the legal provision under consideration, it was not compatible with the right to effective judicial protection, as reflected in the right to the implementation of final judicial decisions, on the grounds that it was not justified by the principle of budgetary legality or by the inviolability of public assets on account of their purpose, which was to satisfy public interests and objectives. Whereas local debtor bodies were subject to the legality principle regarding public expenditure, they were nonetheless required to implement judgments according to the terms laid down. Yet the general payments system provided for in the legislation did not prevent debtor bodies from failing to apply court judgments and sentences or from postponing or deferring payments to individuals, even if the latter and the courts had taken all appropriate steps and used all the legal remedies available to overcome the obstacles impeding the implementation of final court decisions. Moreover, the fact that exemption from attachment extended not just to State and common assets but also to municipal assets that were not earmarked for public use or services could not be considered reasonable from the standpoint of the right to the implementation of final judicial decisions. The Constitutional Court therefore declared unconstitutional the legal provision enshrining the principle that local institutions' assets were exempt from attachment, on the grounds that this principle could not in any circumstances apply to all these institutions' assets.

Languages:

Spanish.

Sweden

Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 May 1998 - 30 August 1998.

Switzerland
Federal Court

Important decisions

Identification: SUI-1998-2-004

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 29.04.1998 / **e)** 1P.711/1997 / **f)** Jura Socialist Party and others v. Constitutional Court of the Republic and Canton of Jura / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 107 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of litigation - Admissibility of referendums and other consultations.
Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
General Principles - Federal State.
General Principles - Public interest.
General Principles - Legality.
General Principles - Proportionality.
Institutions - Federalism and regionalism - Distribution of powers.
Fundamental Rights - Civil and political rights - Freedom of association.
Fundamental Rights - Civil and political rights - Electoral rights.
Fundamental Rights - Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Collective labour agreement / Political rights / Federal law, overriding effect / Popular initiative.

Headnotes:

Partial invalidation of a popular initiative; overriding effect of federal law on cantonal law; freedom of association.

The proposal to make State aid to companies conditional on their concluding collective labour agreements is contrary to federal law. It is disproportionate and, in particular, breaches the federal law providing for the scope of collective labour agreements to be extended, the federal law on the internal market and principle of freedom of association (recitals 2-4).

Even in the sense of an aspiration, the proposal cannot be interpreted or implemented in conformity with federal law (recital 5).

Summary:

The Jura Socialist Party put forward a popular initiative designed to complement cantonal legislation. Entitled "For a dynamic and effective full-employment policy", it consisted of a seven-point programme, the third point of which stipulated:

"Public aid to companies shall depend on their concluding collective labour agreements and respecting the principle of equality between men and women with regard to conditions of employment, particularly pay."

On a proposal by the Government of the Canton of Jura, the cantonal parliament approved the initiative with the exception of the wording concerning the conclusion of collective labour agreements, which was deleted. The Socialist Party and a number of individuals appealed to the Constitutional Court of the Canton of Jura, which upheld the parliament's decision. It found that the requirement to conclude a collective labour agreement was in breach of federal law and ruled that the applicants could not amend the text of the popular initiative.

Citing violation of their political rights, the Socialist Party and two individuals made a public-law appeal to the Federal Court to set aside the Constitutional Court's ruling and the parliament's decision on the grounds that they invalidated aspects of the initiative "For a dynamic and effective full-employment policy".

The Federal Court rejected the appeal.

Under the principle that federal law overrides cantonal law, the cantons may not legislate in areas exclusively regulated by federal law; in other spheres they may enact legislation provided that it does not breach the letter or spirit of federal law nor compromise its implementation. Employee protection, employer-employee relations, the conclusion and effects of collective labour agreements and the extension of their scope are regulated by Article 34ter.1 of the Federal Constitution, Article 356 and following articles of the Code of Obligations and the federal law providing for the scope of collective labour agreements to be extended. The proposal in the disputed initiative would extend the scope of collective labour agreements automatically, in a manner contrary to federal law, and must therefore be rejected.

It is also incompatible with the federal law on the internal market because the requirement that companies conclude collective labour agreements constitutes an unacceptable restriction on the freedom of companies based outside the canton to tender for public contracts.

With regard to freedom of trade and industry, cantons may, under Article 31.2 of the Federal Constitution, impose administrative restrictions on the right to engage in trade and industry freely. The initiative in question has a social-policy aim that is, in itself, acceptable provided that it observes the principles of public interest and proportionality. These conditions must be considered in relation to the freedom of association guaranteed by Article 56 of the Federal Constitution and Article 11 ECHR. Under the principle of freedom of association, individuals may form and become members of associations and cannot be required to join or to leave an association. The requirement that companies "conclude" collective labour agreements constitutes a significant interference with their freedom to form coalitions and make contracts. Specifically, companies in financial difficulty could find themselves forced to give up these freedoms in order to get the assistance necessary to keep them in business. It would seem that the aim of the initiative could have been realised through other measures. The Constitutional Court of the canton was therefore right to rule that the initiative as framed was in breach of federal law.

The applicants also complained that the Jura Constitutional Court had insisted on a literal reading of the initiative, failing to take into account the fact that it was not an exhaustively drafted popular initiative, but a general one that simply expressed an aspiration. In fact, the key characteristic of the general popular initiative as an instrument is that it is very flexible and thus presents a number of advantages: on the one hand, it helps to maintain legislative consistency while, on the other, it constitutes a general demand, rather than a tightly drafted, binding text, thus giving parliament ample scope in implementing it. Nonetheless, the legislative authority must act within certain limits; in particular, it is bound by the intention of the mandate given to it by the signatories to an initiative. Point 3 of the initiative in question has the character of a formal proposal that would not seem to lend itself to interpretation or implementation in a way that complies with federal law. It was the clear intention of the authors of the initiative to tie the distribution of State aid to the conclusion of collective labour agreements. The ruling that the initiative is partly invalid does not, therefore, breach the applicants' political rights.

Languages:

French.

Identification: SUI-1998-2-005

a) Switzerland / **b)** Federal Court / **c)** Second public law Chamber / **d)** 15.05.1998 / **e)** 2P.259/1997 / **f)** Ludwig A. Minelli v. Maur Municipal Tax Office and the Finance Department and Council of State (Supreme Administrative Court) of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 176 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
General Principles - Public interest.
General Principles - Legality.
General Principles - Weighing of interests.
Fundamental Rights - Civil and political rights - Individual liberty.
Fundamental Rights - Civil and political rights - Right to information.
Fundamental Rights - Civil and political rights - Right to administrative transparency.
Fundamental Rights - Civil and political rights - Right of access to administrative documents.
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:

Tax certificate / Personal rights, protection / Tax register, consultation.

Headnotes:

Section 83 of the Zurich Public Taxes Act of 8 July 1951 is a sufficient legal basis for the issue of a tax certificate to a third party; existence of a preponderant public interest (recital 5).

A taxpayer is not entitled to be consulted before a certificate showing his tax liability is issued (recital 6).

Summary:

Under Section 83 of the Zurich Cantonal Public Taxes Act, a municipal tax office can issue tax certificates, in respect of taxpayers within the municipality, at the request of individuals; the certificates contain information on the income and assets of natural persons or the profits and capital of legal entities, based on their most recent tax assessment or return.

Ludwig A. Minelli asked that his municipal tax office should not divulge any further information about him or issue certificates in relation to his tax liability.

On the basis of Section 83 (cited above), the municipality refused his request.

Appeals against this decision, first to the Finance Department and then to the Council of State of the Canton of Zurich, were also unsuccessful. In his submission to the latter, the applicant further asked that he should be consulted before a tax certificate was issued. He based his appeal primarily on the principles of the protection of personal information and personal freedom and Article 8 ECHR.

The Federal Court rejected the appeal for the Council of State's decision to be set aside.

The Federal Court left open the question of whether generalised access to the type of tax information included in tax certificates was covered by the constitutional guarantee of personal freedom or by Article 8 ECHR. Any constitutional right may be limited if the restriction placed on it has an adequate legal basis, reflects the public interest and is proportionate to its purpose.

Section 83 of the Public Taxes Act clearly constitutes an adequate legal basis. The applicant is wrong to cite the cantonal law on data protection, which explicitly excludes the processing of personal and sensitive data if such processing is provided for by law. In fact, data on taxable income and assets cannot be regarded as particularly sensitive information, knowledge of which might impinge on the personal rights of the individual concerned.

Moreover, the Public Taxes Act must be interpreted not only from the angles of personal freedom and data protection, but also with regard to the principle of freedom of information, as guaranteed in the constitution.

Access to the tax information included in the disputed certificate is also a matter of public interest. Existing and potential creditors have an interest in obtaining information on taxpayers' financial resources and that interest is worthy of protection. A democratic society must apply a certain degree of transparency in the area of public finances. Finally, individuals in their capacity as taxpayers help to finance the community and it is in the public interest to be able to identify the level at which each individual contributes. Divulging tax information is not prejudicial to the individuals concerned; any debts that a taxpayer may have do not appear as such on the certificate, since declared or assessed income and assets cannot be less than nil. The fact that the disputed tax information does not exactly tally with actual income and assets is ultimately unimportant as regards acknowledging the public interest. It is common knowledge that tax law provides for deductions from actual income and assets. Therefore, it is not unconstitutional for municipalities to issue tax certificates.

The legislative authority has decided that this information should be made public. The person concerned is not entitled to be informed of an application to consult the tax register nor to express a view on such an application. The public-law appeal is ill founded on this point too.

Languages:

German.

Identification: SUI-1998-2-006

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 05.06.1998 / **e)** 1P.132/1998 / **f)** E. v. Head of the Department of Justice, the Police and Military Affairs of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 231 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Parties - Interest.
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.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
Fundamental Rights - General questions - Entitlement to rights - Natural persons - Prisoners.

Fundamental Rights - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.
Fundamental Rights - Civil and political rights - Individual liberty - Deprivation of liberty.

Keywords of the alphabetical index:

Sentences, serving, prison regime / Sentences, serving, punishment / Medical treatment.

Headnotes:

Minimum rules applicable to prisoners undergoing punishment. The applicant in this case received adequate medical supervision; the defective ventilation of his cell and the sanitary conditions imposed on him could not be considered to constitute inhuman or degrading treatment.

Summary:

While serving a sentence in the Orbe Plain prisons (Canton of Vaud), E. was ordered by the prison governor to undergo a five-day punishment, without work, for having smoked cannabis. He did not contest the imposition of the punishment.

Several days later E. complained to the Head of the Department of Justice, the Police and Military Affairs of the Canton of Vaud about the conditions in his punishment cell: there had been only one, sealed opaque-glass window and the ventilation had been inadequate. He also reported that he had had to wash his dishes in water running into a seatless lavatory.

When the Head of the Department rejected his complaint, E. made a public-law appeal to the Federal Court to have that decision overturned.

The Federal Court rejected the appeal. In terms of procedure, it acknowledged that E. had a real, practical interest in having his appeal accepted even though his punishment had already been carried out.

In terms of the substance of the case, the Federal Court referred to Article 3 ECHR, Article 7 of the International Covenant on Civil and Political Rights, the 1984 UN Convention against Torture and the 1987 European Convention for the Prevention of Torture. It also took account of the European Prison Rules adopted by the Committee of Ministers of the Council of Europe in 1987. The main purpose of these Rules is to lay down conditions for normal places of detention. However, it is accepted that conditions under punishment regimes imposed on prisoners for limited periods of time may be somewhat harsher. Nonetheless, in such cases, the prison authority may not overstep the line beyond which the treatment must be regarded as inhuman or degrading. In assessing a particular case, all the circumstances must be taken into account.

E. did not claim that there was insufficient light in the cell, although it had only one opaque-glass window. He did, however, complain of inadequate ventilation and said he had suffered feelings of asphyxiation and anxiety, headaches, breathing difficulties, dizziness and giddiness. The prison management pointed out to the Federal Court that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had visited the prison in 1996 and had noted the progress made since its previous visit. However, this general observation did not amount to grounds for rejecting the appeal.

When a prisoner occupies a room virtually continuously over several days, as happened in this case, the room must be properly ventilated. Although the ventilation system in the applicant's cell had been partially defective, it had not endangered his health. The ailments he complained of appeared to have been caused more by his being confined and by the cigarettes he had smoked than by a lack of air.

Moreover, and of crucial importance, E. had received proper medical supervision. The prison medical service had been notified that he was to be placed on a punishment regime. A doctor had seen him and confirmed that he was physically and psychologically capable of withstanding the punishment. In fact, the applicant had never requested medical attention for his ailments. In these circumstances, the treatment could not be held to have endangered his health.

With regard to sanitation in the cell, it should be noted that prisoners on punishment regime can take a shower once a day in an area separate from the cell and can wash their plastic dishes in a room with a sink and hot water. The applicant was not, therefore, subjected to inhuman or degrading treatment.

Languages:

French.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-1998-2-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 20.05.1998 / **e)** U.br. 49/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - International Covenant on Civil and Political Rights of 1966.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
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 - Linguistic freedom.
Fundamental Rights - Civil and political rights - Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Language, official / Media, radio broadcasting / Minority language, use in official communications.

Headnotes:

Radio broadcasting by a State enterprise in the language of minorities does not bring into question the official use of the Macedonian language. It is entirely in line with the constitutional guarantees of the rights of persons belonging to minorities freely to express, enjoy and develop their identity and national characteristics. It reflects the State's obligation to create normative conditions in order to accomplish this goal in the cultural sphere.

Summary:

The VMRO-Democratic Party for Macedonian National Union lodged a petition with the Constitutional Court challenging the Law on radio broadcasting and claiming that it enables minority languages to become official ones, in addition to the Macedonian language.

The Law itself stipulates that radio broadcasting organisations perform their activity through programmes and specifies the general content of these programmes. Programmes which are broadcast with the aim of destroying the constitutional order through violence, calling for military aggression or inciting national, racial or religious hatred and intolerance are not allowed.

Basic human freedoms and rights recognised in international law and set down in the Constitution constitute one of the fundamental values of the constitutional order. In order to guarantee such rights and national equality, the State has to protect the ethnic, cultural, linguistic and religious identity of persons belonging to minorities. This cannot be made dependent on the national minority being the majority in a certain area (local level). Radio broadcasting using the language of minorities does not amount to the creation and association of a multi-language situation in the Republic. The right of a public radio enterprise to broadcast its programmes in the language of minorities in addition to the Macedonian language cannot be applied in the context of the official use of language, only in connection with the rights of minorities and the obligation of the State to guarantee their protection.

Therefore, this legal provision is not incompatible with the constitution.

Cross-references:

In its decision, the Court referred to the international documents dealing with cultural rights, such as: Article 27.1 of the Universal Declaration of human rights; Article 27 of the International Pact on civil and political rights); OSCE Documents; Article 4.2 of the Framework Convention for the Protection of national minorities.

Languages:

Macedonian.

Identification: MKD-1998-2-005

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 01.06.1998 / **e)** U.br. 62/98 / **f)** / **g)** *Sluzben Vesnik na Republika Makedonija* (Official Gazette), no. 34/98 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Determination of effects by the court.
General Principles - Legality.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Supervision.
Institutions - Executive bodies - Territorial administrative decentralisation - Structure - Municipalities.
Institutions - Public finances - Budget.

Keywords of the alphabetical index:

Decision, notification / Financial control / Local self-government, law-making power / Budget, adoption, control / Mayor, remuneration.

Headnotes:

Although a municipality is authorised to pass its budget independently, it is obliged to consider proposals and comments given by the Ministry of Finance. It cannot stipulate either a wage provision for the Chairman of the Council, or a fixed monthly remuneration for the Mayor.

Summary:

The Government lodged a petition with the Constitutional Court challenging the legality of the procedure followed by a municipality in passing its budget and a decision on wages and other remuneration for elected and appointed persons in the local bodies.

Although local self-government units pass their budgets and balance sheets independently (Article 17.1.2 of the Law on local self-government), the draft-budget has to be given to the Ministry of Finance for preliminary review and additional consent (Article 20 of the Law on Budgets). Furthermore, the municipality is obliged to take into consideration its comments and proposals. Despite all this, the municipality passed the budget without the necessary remarks and compulsory consent given by the Ministry of Finance.

The Council also passed a decision determining that its Chairman was entitled to receive a wage and that the Mayor could enjoy remuneration at a fixed monthly rate. According to Article 37 of the Law on local self-government "Council members are entitled to receive remuneration covering travel and daily expenses in lawfully determined frames, as well as for the costs caused by enforcing the tasks delegated by the Council itself". There is no legal possibility for the municipality either to prescribe a wage for the Chairman of the Council or to determine its size. Since the Mayor performs a professional function, he/she receives a wage in lawfully determined frames, but the law does not prescribe the possibility of enjoying remuneration at a fixed monthly rate.

Since the municipality did not follow legal provisions regarding the procedure for passing its budget and passed a decision that violates a specific law, the Constitutional Court annulled these acts.

Supplementary Information:

As this practice existed within several municipalities, this decision was used as a warning aimed at forcing them to adjust their acts (budgets) in line with the Governmental proposals. A fixed term has been given to them to accomplish this objective. If they do not comply, their budgets will be suspended.

Languages:

Macedonian.

Identification: MKD-1998-2-006

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 08.07.1998 / **e)** U.br. 53/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Weighing of interests.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Economic, social and cultural rights - Right to strike.

Keywords of the alphabetical index:

Strike, injunction proceedings / Strike, restrictions / Public utilities, limitation to strikes.

Headnotes:

The right to strike is guaranteed. The legislator is allowed to prescribe certain restrictions for its exercise if this is necessary for economic and other activities in the country, as well as for enforcing international commitments.

Summary:

The Constitution guarantees the right to strike and envisages the possibility of its restriction in the armed forces, the police and administrative bodies. The applicant, the Independent Union of railway traffic staff, considered that public undertakings, including the "Macedonian Railways", cannot be included in the aforementioned sectors.

The law on public undertakings stipulates the right to strike in compliance with the Constitution, provided that the strike board and participating workers are obliged to organise and conduct it in a way that ensures physical safety for employees and the protection of equipment sustains a necessary operating level and enforces international agreements. Non-fulfilment of these obligations represents a serious violation of working obligations.

Although the right to strike is guaranteed, it cannot exist absolutely, without restrictions necessary for the protection of the state interest and human freedoms and rights. Therefore, general conditions for its exercise have to be circumscribed in order to prevent possible abuse to the extent that can cause negative, damaging consequences for the entire community and particular entities.

Taking into account the character and significance of public utility activities, restrictions stated in the challenged acts are in line with the need to create a legal framework for the conditions under which the workers in these undertakings can enjoy the constitutionally guaranteed right to strike.

Languages:

Macedonian.

Turkey
Constitutional Court

Summaries of important decisions of the reference period 1 May 1998 - 30 August 1998 will be published in the next edition, *Bulletin* 1998/3.

Ukraine
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 May 1998 - 30 August 1998.

United States of America
Supreme Court

Important decisions

Identification: USA-1998-2-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 27.05.1997 / **e)** 95-1853 / **f)** Clinton v. Jones / **g)** 117 *Supreme Court Reporter* 1636 (1997) / **h)**.

Keywords of the systematic thesaurus:

General Principles - Separation of powers.
Institutions - Head of State - Responsibilities.
Institutions - Jurisdictional bodies - Jurisdiction.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Trial within reasonable time.

Keywords of the alphabetical index:

Immunity, presidential / Suspension of judicial proceedings.

Headnotes:

The Constitution does not provide the President of the United States temporary immunity, except in the most exceptional circumstances, from civil damages litigation arising out of events that occurred before the President took office.

The rationale that certain public officials must be insulated from lawsuits in order to perform their duties without fear of personal liability does not apply to lawsuits which are grounded in alleged unofficial acts.

The doctrine of separation of powers does not always bar the courts from exercising jurisdiction over the President of the United States.

The doctrine of separation of powers does not require the federal courts to suspend all private lawsuits against the President of the United States until the conclusion of the President's term in office.

Summary:

A former employee of the State of Arkansas filed a civil lawsuit against the sitting President of the United States,

alleging that the President, while serving as Governor of Arkansas, had made sexual advances on her and that her supervisors subsequently imposed punishments upon her because of her rejection of those advances. The President filed a motion to dismiss the lawsuit on grounds of presidential immunity. The Federal District Court denied the motion to dismiss and ruled that pre-trial discovery of evidence could proceed, but suspended the trial until the end of the President's term in office. The court of appeals affirmed the denial of the motion to dismiss, but reversed the order which suspended the beginning of the trial.

The Supreme Court affirmed the decisions of the court of appeals. In doing so, the Court rejected the grounds upon which the President's claim of immunity was based: that judicial precedent established the principle of immunity; that judicial action which burdens the activity of the Executive branch would constitute a constitutionally impermissible impairment of the Executive's ability to perform its constitutionally mandated functions; and that historical and functional reasons dictated that a sitting President should be immune from the distractions resulting from defence against a private lawsuit.

The Supreme Court rejected the first argument by distinguishing the case at hand and examining the principal rationale for prior decisions in which Presidents and other public officials were granted immunity. The earlier cases, the Court observed, all granted immunity from lawsuits which were based on official acts, and were grounded in the rationale that public officials must be allowed to perform their designated functions without fear that a particular decision might give rise to personal liability. In the case at hand, this rationale was not applicable because the lawsuit was grounded in alleged acts that were not part of the defendant's official duties.

The Court relied on two long-settled propositions in rejecting the second argument, citing the Court's historical exercise of authority to determine whether a President had acted within the law and its prior decisions that a President is subject to judicial process in appropriate circumstances. As to the President's third argument, the Court concluded that it was "highly unlikely" that the litigation would occupy a substantial amount of the President's time, given the discretionary powers of the trial court to manage the case through its on-going supervisory authority.

The Court also determined that the trial court's decision to suspend the trial date was in error because such a lengthy and categorical stay of the proceedings did not take into account the plaintiff's interest in bringing the case to trial. In making this decision, the Supreme Court did not rule out the possibility that the trial court could, on the basis of evidence of undue interference with the President's duties, determine later in the proceedings that a suspension of the trial was warranted. However, no such evidence had been shown at the time the trial court made its decision.

Cross-references:

The Court distinguished the instant case from *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d (1982), in which it held that a former President was entitled to absolute immunity from damages liability based on his official acts. For the proposition that the courts have authority to determine when the President has acted within the law, the Court cited its decision in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), and for the principle that a President can be subject to judicial process, it cited *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

Languages:

English.

Identification: USA-1998-2-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.1997 / **e)** 96-552, 96-553 / **f)** Agostini v. Felton / **g)** 117 *Supreme Court Reporter* 1997 (1997) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Re-opening of hearing.
General Principles - Relations between the State and bodies of a religious or ideological nature.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Religion.

Keywords of the alphabetical index:

Church schools / Presumptions, constitutionality / *Stare decisis* doctrine / US Constitution, First Amendment / Establishment Clause / Religion, encouragement by the State / Religious neutrality of the State.

Headnotes:

When evaluating whether government funding violates the Establishment Clause of the First Amendment to the U.S. Constitution, courts must ask whether the government acted with the purpose of advancing or inhibiting religion, and whether the funding has such impermissible effects.

The Establishment Clause of the First Amendment to the U.S. Constitution rejects application of the presumption that placement of public employees on the school grounds of sectarian educational institutions will inevitably inculcate religion, or that their presence constitutes a symbolic union between government and religion.

Government funding that directly aids the educational function of religious schools is not categorically invalid.

Not all entanglements between the State and a religious organisation have the effect of advancing or inhibiting religious practice; only those which are excessive violate the Establishment Clause.

The doctrine of *stare decisis* does not preclude the Supreme Court from recognising a substantial change in its Establishment Clause jurisprudence.

A court is not precluded from re-examination of issues decided in earlier stages of the same litigation if the court is convinced that its prior decision was clearly erroneous and would work manifest injustice.

Summary:

Public school governing board and parents of children attending private schools with religious affiliation (parochial schools) sought relief from court orders which barred them from participating in a federal government program which provides funds for remedial education to disadvantaged children. Specifically, the court orders barred the New York City Board of education from sending public school teachers into parochial schools to provide such educational services. The court orders were issued following a 1985 U.S. Supreme Court decision (*Aguilar v. Felton*) which held that such activity by New York City public school teachers violated the Establishment Clause of the First Amendment to the U.S. Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".

The court of first instance denied the petitioners' motion for relief from the earlier court orders, and the court of appeals affirmed. Reviewing the denial, the Supreme Court in a 5-4 decision concluded that the teaching program did not violate the Establishment Clause and overruled its decision in *Aguilar v. Felton* because it was no longer good law. As a result, the Supreme Court reversed the lower court's denial of the petitioners' motion.

The Supreme Court based its decision upon its finding that certain elements of its Establishment Clause practice, employed to determine whether a law's effect advances religion and whether the law fosters an excessive government entanglement with religion, had changed since 1985. In cases subsequent to *Aguilar*, the Court abandoned both its presumption that the placement of public employees on parochial school grounds would result in an impermissible effect advancing religion and its categorical rule which invalidated all government funding that directly aids the educational function of religious schools. Examining the New York City program, the Court determined that the evidence did not support an assumption that public school teachers would inculcate religion or that their presence would constitute a symbolic union between government and religion. The Court also concluded that the absence of this assumption meant that "pervasive monitoring" of the teachers by public authorities is not required, and that therefore the New York City program no longer posed an "excessive entanglement" between church and State. With respect to the categorical rule, the Court found that the government funding was based on criteria neutral toward religion, and that it is provided to all eligible children regardless of their religious beliefs or whether they attend public or parochial schools. Therefore, under this evidence, the law does not have the effect of advancing religion.

In overruling its earlier decision, the Supreme Court declared that the doctrine of *stare decisis* does not preclude the Court from recognising the change in its jurisprudence. It noted that the doctrine's policy rationale is at its weakest when the Court interprets the Constitution because such interpretation can be altered only by constitutional amendment or by the Court's overruling of its prior decisions.

In addition, the Court stated that the "law of the case" doctrine, which holds that a court normally should not reopen issues already decided in the same litigation, did not constrain the Court from overruling *Aguilar*. The Court noted that the doctrine does not apply when its prior decision is clearly erroneous and its application would work a manifest injustice.

The dissenting justices disagreed with the majority on several grounds. In the dissenting opinions, they concluded that the New York city program represented

a government subsidisation of parochial education, that the continuity of the law and the absence of changes in the relevant facts should require the retention of judicial precedent, and that the procedural rules invoked by the majority do not support a rehearing of the legal claims in the same litigation.

Supplementary information:

The Supreme Court stated in its opinion that although certain elements of its jurisprudence had changed since 1985, the general principles employed to determine whether government funding violates the Establishment Clause had not. These principles were articulated in the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971): the law must have a secular legislative purpose; its principle or primary effect must not advance or inhibit religion; and it must not foster an excessive government entanglement with religion.

Cross-references:

The decision constitutes an explicit departure from the Supreme Court's holding in an earlier stage of the litigation: *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985).

Languages:

English.

Identification: USA-1998-2-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.1997 / **e)** 95-2074 / **f)** City of Bourne v. Flores / **g)** 117 *Supreme Court Reporter* 2157 (1997) / **h)**.

Keywords of the systematic thesaurus:

General Principles - Separation of powers.
General Principles - Federal State.
General Principles - Relations between the State and bodies of a religious or ideological nature.
General Principles - Proportionality.
Institutions - Legislative bodies - Powers.
Institutions - Legislative bodies - Relations with the courts.
Institutions - Federalism and regionalism - Distribution of powers - Principles and methods.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Religion.

Keywords of the alphabetical index:

Substantial constitutional violation / Disproportionate means / Religious exercise, burdening.

Headnotes:

The enforcement power of the U.S. Congress under the Fourteenth Amendment to the U.S. Constitution extends only to legislation which advances enforcement of constitutional provisions. The Fourteenth Amendment does not give Congress the power to determine what constitutes a substantive constitutional violation.

Congressional legislation enacted pursuant to the Fourteenth Amendment must be proportionate; it must show a congruence between the means used and the ends to be achieved, and its appropriateness must be evaluated in light of the evil presented.

Summary:

City officials of Bourne, Texas, denied a church's application for a building permit to enlarge its building. The denial was based on a city ordinance which sought to foster historic preservation by regulating building activities within a designated district. The church appealed to the federal courts, challenging the denial on the grounds of a federal statute, the Religious Freedom Restoration Act of 1993 (RFRA). RFRA prohibited public authorities from "substantially burdening" a person's exercise of religious rights guaranteed under the First Amendment to the U.S. Constitution, even if the burden results from imposition of a rule of general applicability, unless the government can demonstrate that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. RFRA was enacted in response to the U.S. Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Court imposed a less stringent test than the "compelling governmental interest" standard on a generally applicable State law which burdened a religious practice.

The U.S. District Court ruled that RFRA was not enforceable because Congress had exceeded the scope of its powers. The Court of Appeals reversed the lower court's ruling, finding RFRA to be constitutional. The U.S. Supreme Court in a 6-3 decision reversed the decision of the Court of Appeals, holding that RFRA was

not a proper exercise of Congress' power because it violated principles necessary to maintain the separation of powers and the federal-state balance.

The issue in the case was the scope of Congress' enforcement power under the Fourteenth Amendment to the U.S. Constitution. Section One of the Amendment prohibits the States (and therefore local governments) from making or enforcing any law which deprives persons of life, liberty, or property without due process of law or which denies to persons within their jurisdiction the equal protection of the laws. Section Five of the Amendment states that "the Congress shall have power to enforce, by appropriate legislation" the Amendment's provisions. In finding unconstitutional RFRA's articulation of the standard for deciding religious exercise cases, the Supreme Court ruled that Congress had overstepped the line which separates appropriate enforcement legislation from an impermissible determination of what constitutes a substantive constitutional violation. Only the judiciary, the Court ruled, has authority under the separation of powers to make the latter determination. The Congress is limited to enactment of legislation establishing remedies for violations of constitutional rights.

In response to the claim that RFRA was an appropriate exercise of Congress' enforcement power, the Supreme Court imposed a proportionality requirement and concluded that the means employed were disproportionate to the object of the legislation. Stating that the legislative record lacked evidence to show that modern laws of general applicability had been enacted because of religious bigotry, the Court compared RFRA to the record of constitutional violations which Congress encountered when it passed the Voting Rights Act of 1965. In contrast to the voting rights question, the Court determined that the scope of RFRA, which was potentially applicable to a host of generally applicable laws, far exceeded the possibility that many of those laws would have a significant likelihood of being unconstitutional. When considered in light of the extremely heavy standard which it imposed on State governments to justify the burdening of religious exercise, RFRA's scope was found to be so out of proportion to its object that the Court concluded that it was an impermissible attempt to effect a substantive change in constitutional protections, proscribing conduct by States that the Fourteenth Amendment itself does not prohibit.

The three dissenting justices differed with the Court's decision because the key holding in the 1990 *Smith* case was made without briefing by the parties to that case, or oral argument. Therefore, they maintained, the Supreme Court should permit briefing and argument on the merits of *Smith,* since it formed the basis for the Court's decision in the instant case. While two of the dissenters - Justices Breyer and Souter - withheld judgment on the soundness of *Smith*, Justice O'Connor in her dissenting opinion also stated her view that that case was decided incorrectly.

Cross-references:

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

Languages:

English.

Court of Justice of the European Communities

Summaries of important decisions of the reference period 1 May 1998 - 30 August 1998 will be published in the next edition, *Bulletin* 1998/3.

European Court of Human Rights

Important decisions

Identification: ECH-1998-2-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25.05.1998 / **e)** 15/1997/799/1002 / **f)** Kurt 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.
Fundamental Rights - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.
Fundamental Rights - Civil and political rights - Individual liberty - Deprivation of liberty - Arrest.
Fundamental Rights - Civil and political rights - Security of the person.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Security forces, operation / Terrorism / Custody / Evidence, specific, ill-treatment / Disappearance / Application, withdrawal under pressure / Petition, individual, right / Remedy, effective, denial.

Headnotes:

The failure of the authorities to account for the whereabouts or fate of the applicant's son, last seen surrounded by members of the security forces, infringed the right to liberty and security in respect of the applicant's son and the prohibition of torture and inhuman and degrading treatment as well as the right to an effective remedy of the applicant herself.

Summary:

The application was lodged on behalf of the applicant and on behalf of her son, whom she alleges, was last seen by her in the custody of members of the security

forces who were conducting an operation in her village, and thereafter disappeared. The applicant contended that the disappearance of her son engaged the responsibility of the authorities of the respondent State and she relied on Articles 2, 3, 5 and 13 ECHR. She also maintained that the authorities had interfered with the exercise of her right of individual petition under Article 25 ECHR.

Following an operation carried out by security forces which resulted in clashes with suspected terrorists in the village of Agilli between 23 and 25 November 1993, the applicant's son, Üzeyir, disappeared. The circumstances surrounding this disappearance were in dispute. According to the applicant, she last saw her son in the custody of soldiers and village guards. He appeared to have been beaten. According to the Government, the son was never taken into custody and there were strong grounds for believing that he had either left the village during the operation to join the PKK or been kidnapped by the PKK.

When Mrs Kurt contacted the authorities shortly after his disappearance in an attempt to discover his whereabouts, she was informed by the district gendarme command that he had not been taken into custody and by the State Security Court that there was no record of her son being taken into custody. On 21 March 1994 the Bismil Public Prosecutor issued a decision of non-jurisdiction in the matter of the son's abduction on the ground that the crime had been committed by the PKK.

The applicant claimed that since lodging her application with the Commission she and her lawyer had been the target of a concerted campaign by the authorities to make her withdraw her complaint. The Government denied that any pressure was brought to bear on the applicant. They questioned whether she truly intended to bring an application against the State and asserted that the applicant was manipulated for political purposes by elements hostile to the State.

As to Article 2 ECHR, the Court considered that the arguments relied on by the applicant were not sufficient in the absence of concrete proof to allow the inference to be drawn that her son met his death at the hands of the authorities. It concluded that it was not necessary to decide on the applicant's complaint that the authorities had failed to protect her son's life, being of the opinion that the issues raised by the applicant fell to be assessed from the standpoint of Article 5 ECHR.

The Court, as with the Article 2 ECHR complaint, considered that the applicant had not presented any specific evidence that her son was the victim of ill-treatment in breach of Article 3 ECHR. It took the view that this complaint should be dealt with from the angle of Article 5 ECHR.

As to Article 5 ECHR, the Court observed that the unacknowledged detention of an individual is a complete negation of the guarantees contained in Article 5 ECHR and a most grave violation of that provision. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 ECHR must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.

The Court noted that the detention of the applicant's son was never logged. That fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the Court's view, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 ECHR.

Furthermore, the public prosecutor gave no real consideration to the merits of the applicant's complaint that her son had been detained in the village. She was never asked to provide a written statement or interviewed orally. The public prosecutor accepted without question the gendarmerie's assertion that her son could not have been detained since his name did not appear in their custody records. The prosecutor discounted the applicant's insistence that her son had been detained in favour of an unsubstantiated and implausible line of inquiry linking her son's disappearance to the actions of the PKK.

In the Court's view the authorities had failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant's son after he was detained in the village. Having assumed responsibility for her son, they failed to account for him and it must be accepted that he was held in unacknowledged detention in the complete absence of the safeguards contained in Article 5 ECHR. This, for the Court, gave rise to a particularly grave violation of the right to liberty and security of the person guaranteed under that Article.

As to the applicant's contention that she herself was the victim of inhuman and degrading treatment on account of her son's disappearance at the hands of the

authorities, the Court recalled that no serious consideration was ever given by the authorities to her complaint. As a result she has endured over a prolonged period of time the anguish of knowing that her son had been detained and that there was no official information as to his subsequent fate.

In these circumstances, the Court found that the respondent State was in breach of Article 3 ECHR in respect of the applicant.

As to Article 13 ECHR, the Court stated that where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, 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 and including effective access for the relatives to the investigatory procedure.

On that understanding, the applicant's complaint was, as noted under her Article 5 ECHR complaint, given no serious consideration. The public prosecutor failed to carry out any meaningful investigation into her insistence that her son had been detained by the security forces in the village. The Court found that the applicant had on that account been denied an effective remedy and there had been a violation of Article 13 ECHR.

Finally, the applicant asserted that she had been subjected to pressure by the authorities to withdraw her application to the Commission and that her lawyer had been threatened with criminal proceedings in connection with statements he had made pertaining to her application.

In rejecting the Government's defence to these allegations the Court noted that the applicant was interviewed on several occasions by the authorities after her application had been communicated by the Commission to the Government. In the wake of these interviews she made statements repudiating all petitions which had been made in her name. The Court was not persuaded that those statements were made on the initiative of the applicant. Furthermore, the applicant made two visits to a notary. On each occasion she repudiated the complaints that had been lodged with the Commission in her name. The Court did not accept that these visits had been organised by the applicant herself. It found it noteworthy that she was brought to the notary's office by a uniformed soldier and was not required to pay the notary for drawing up the statements.

These circumstances suggested to the Court that the applicant was subjected to indirect and improper pressure to make statements in respect of her application to the Commission which interfered with the free exercise of her right of individual petition guaranteed under Article 25 ECHR.

As to the threat of criminal proceedings against the applicant's lawyer, the Court stressed that it was not for the authorities to interfere with proceedings before the Commission which had been set in motion by an applicant through the threat of criminal procedures against an applicant's representative. Even though there was no follow-up to the threat to prosecute the applicant's lawyer, the threat in itself must be considered an interference with the exercise of the applicant's right of individual petition.

For the above reasons the Court found that the respondent State had failed to comply with its obligations under Article 25 ECHR.

Cross-references:

24.03.1988, *Olsson v. Sweden* (no. 1), *Special Bulletin ECHR* [ECH-1988-S-002]; 20.03.1991, *Cruz Varas and others v. Sweden*, *Special Bulletin ECHR* [ECH-1991-S-002] 27.08.1992, *Tomasi v. France*, *Special Bulletin ECHR* [ECH-1992-S-005]; 22.03.1995, *Quinn v. France*; 27.09.1995, *McCann and others v. the United Kingdom*, *Bulletin* 1995/3 [ECH-1995-3-016]; 16.09.1996, *Akdivar and others v. Turkey*; 15.11.1996, *Chahal v. the United Kingdom*, *Bulletin* 1996/3 [ECH-1996-3-015]; 18.12.1996, *Aksoy v. Turkey*; 25.09.1997, *Aydin v. Turkey*, *Bulletin* 1997/3 [ECH-1997-3-016]; 28.11.1997, *Menteş and others v. Turkey*, *Bulletin* 1997/3 [ECH-1997-3-021]; 19.02.1998, *Kaya v. Turkey*, *Bulletin* 1998/1 [ECH-1998-1-004] .

Languages:

English, French.

Identification: ECH-1998-2-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 09.06.1998 / **e)** 14/1997/798/1001 / **f)** L.C.B. 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 - Reasonableness.
Fundamental Rights - Civil and political rights - Right to life.

Keywords of the alphabetical index:

Nuclear tests / Radiation, exposure / Serviceman, radiation, exposure / Causal link / Confidence, reasonable.

Headnotes:

Failure to take measures in respect of a child of a serviceman present during Christmas Island nuclear tests did not infringe the right to life of that child.

Summary:

Between November 1957 and September 1958 the United Kingdom carried out six atmospheric tests of nuclear weapons at Christmas Island in the Pacific Ocean. The applicant's father was serving on the Island as a catering assistant in the Royal Air Force at that time.

During the tests, military personnel were ordered to line-up in the open and to face away from the explosions with their eyes closed and covered until 20 seconds after the blast. The applicant alleged that the purpose of this procedure was deliberately to expose servicemen to radiation for experimental purposes. The Government denied this and stated that it was believed at the time of the tests, and was the case, that personnel were sufficiently far from the centre of the detonation to avoid being exposed to radiation at any harmful level and that the purpose of the line-up procedure was to ensure that they avoided eye damage and other physical injury caused by material blown about by the blast.

No record exists of the degree of exposure to radiation, if any, of servicemen such as the applicant's father, since film badges (which turn black if exposed to radiation) were issued only to the approximately 1,000 predominantly non-service personnel on Christmas Island who were working in identified, controlled and active areas.

In or about 1970 the applicant was diagnosed with leukaemia, which she attributes to her father's presence on Christmas Island. She received chemotherapy treatment which lasted until she was ten years old and is afraid to have children in case they inherit a genetic disposition to the disease.

The applicant complained that both the State's failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests, and its earlier failure to monitor her father's radiation dose levels, amounted to violations of Articles 2 and 3 ECHR.

In relation to the complaint concerning the State's failure to take measures in relation to the applicant's health, it observed that Article 2 ECHR requires each State to take appropriate steps to safeguard the lives of those within its jurisdiction.

The Court noted that records of contemporaneous measurements of environmental radiation on Christmas Island in the immediate aftermath of the nuclear tests indicated that radiation did not reach dangerous levels in the areas in which ordinary servicemen, such as the applicant's father, had been stationed. These records provided a basis for believing that the State authorities, during the period between the United Kingdom's recognition of the competence of the Commission to receive applications on 14 January 1966 and the applicant's diagnosis as suffering from leukaemia in October 1970, could reasonably have been confident that her father had not been dangerously irradiated.

Nonetheless, the Court also examined whether, in the event that there had been information available to the authorities which should have given them cause to fear that the applicant's father had been exposed to radiation, they could reasonably have been expected, during the period in question, to provide advice to her parents and to monitor her health. It considered that the State could only have been required of its own motion to take these steps in relation to the applicant if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a risk to her health. Having examined the evidence submitted to it, and particularly the judgment of the High Court in the cases of *Reay* and *Hope v. British Nuclear Fuels plc*, the Court was not satisfied that it had been established that there is a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived. It could not reasonably hold, therefore, that, in the late 1960s, the United Kingdom authorities could or should, on the basis of this unsubstantiated link, have taken action in respect of the applicant.

The Court therefore found no violation of Article 2 ECHR.

For the same reasons, the Court found no violation of Article 3 ECHR.

Cross-references:

25.02.1997, *Findlay v. the United Kingdom*; 19.02.1998, *Guerra and others v. Italy, Bulletin* 1998/1[ECH-1998-1-002].

Languages:

English, French.

Identification: ECH-1998-2-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 09.06.1998 / **e)** 42/1997/826/1032 / **f)** Twalib v. Greece / **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 - Entitlement to rights - Foreigners.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to have adequate time and facilities for the preparation of the case.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to counsel.

Keywords of the alphabetical index:

Drug trafficking / Appeal in cassation, non-admission / Legal aid, absence.

Headnotes:

Absence of legal aid in cassation proceedings infringed the right to a fair trial.

Summary:

The applicant, a Tanzanian national, was arrested at Athens airport on suspicion of involvement in drug trafficking and found to be in possession of a false passport. Criminal proceedings were instituted against him on 18 February 1990. On 21 June 1991 the trial of Mr Twalib and three other accused opened in the three-member Court of Appeal in Athens. The case was adjourned because the applicant's lawyer was on strike. The trial reopened on 12 July 1991. However, Mr Twalib's lawyer was absent and the lawyer of one of the co-accused agreed to assist Mr Twalib; a short adjournment was ordered for him to study the case-file.

On 16 July 1991 the applicant was found guilty of importing and transporting drugs, for which he was sentenced to life imprisonment and a fine of six million drachmas. He was also convicted of using forged documents, in respect of which he was sentenced to eight month's imprisonment. Mr Twalib appealed to the five-member Court of Appeal in Athens, which on 18 March 1993 reduced his sentence to twelve years and three months and a fine of five million drachmas.

On 26 March 1993 Mr Twalib lodged an appeal in cassation through the prison authorities, stating that the grounds of appeal would be submitted by his lawyer. On 8 June 1993 he addressed, through the prison authorities, a petition to the Public Prosecutor at the Court of Cassation requesting for legal aid counsel to be appointed to assist him with the preparation of his appeal. On 12 July 1993 the Court of Cassation declared Mr Twalib's appeal on points of law to be inadmissible on the basis that no grounds of appeal had been submitted. On 4 April 1994 the applicant addressed a second petition to the Public Prosecutor referring to his financial situation and enquiring about progress in his case. On 27 April 1994 the prison authorities informed Mr Twalib that his appeal had been rejected.

The applicant complained that a lack of adequate time and facilities for the preparation of a defence during a criminal trial and the absence of legal aid in cassation proceedings breached Article 6.1 ECHR taken together with Articles 6.3.b and 6.3.c ECHR.

Concerning Articles 6.1 and 6.3.b ECHR the Court noted that, in the absence of his own counsel, the applicant was assigned a lawyer representing one of his co-accused. Despite the seriousness of the offence and the complexity of the case the lawyer was afforded very limited time to consult the case file and prepare the applicant's defence. In view of the applicant's submission that there was a conflict of interest between him and his co-accused, the brevity of this period of preparation could not be defended on the basis of the argument that the lawyer was familiar with the case. There were therefore serious shortcomings in the fairness of the trial proceedings which may have adversely affected the position of the applicant.

However, the Court observed that the applicant was represented by a different lawyer before the court of appeal where he challenged his conviction and sentence. Although the court of appeal was empowered to examine all questions of fact and law and to quash the impugned judgment, the applicant's lawyer did not contend that the conviction was unsafe and that a retrial should be ordered. The Court found no clear indication that the appeal court could have assumed that there had been a defect in first instance proceedings without being alerted to the matter.

The court of appeal reached its conclusion after a hearing at which the applicant and his counsel were present. Given that the applicant had the opportunity to raise the alleged deficiency at the appeal hearing and that there was nothing to suggest that the fairness of the appeal proceedings could be called into question, the Court concluded that there had been no violation of Article 6.1 ECHR in conjunction with Article 6.3.b ECHR.

Concerning Articles 6.1 and 6.3.c ECHR, the Court found the applicant to be indigent and to lack sufficient means to pay for his legal representation in connection with his appeal to the Court of Cassation. Furthermore, in view of the seriousness of the offence for which the applicant was convicted and the severity of the sentence imposed on him, as well as the complexity of the cassation procedure and the lack of language and legal knowledge of the applicant, the Court considered that the interests of justice required that he be granted legal aid to pursue an appeal in cassation.

Hence, having concluded that Greek law made no provision for the grant of legal aid to individuals in cassation proceedings, the Court found a violation of Articles 6.1 ECHR and 6.3.c ECHR.

Cross-references:

25.04.1983, *Pakelli v. Germany*; 29.04.1988, *Belilos v. Switzerland*; 28.03.1990, *Granger v. the United Kingdom*; 25.09.1992, *Pham Hoang v. France*; 21.09.1993, *Kremzow v. Austria*; 28.10.1994, *Boner v. the United Kingdom*; 19.07.1995, *Kerojärvi v. Finland*; 16.12.1997, *Raninen v. Finland*.

Languages:

English, French.

Identification: ECH-1998-2-010

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 10.07.1998 / **e)** 57/1997/841/1047 / **f)** Sidiropoulos and others v. Greece / **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 - Territorial principles - Indivisibility of the territory.
General Principles - Proportionality.
Fundamental Rights - Civil and political rights - Freedom of association.
Fundamental Rights - Economic, social and cultural rights - Right to culture.

Keywords of the alphabetical index:

Association, non-profit-making, registration / Articles of association, validity / National interest / Minority, representation / Minority, existence.

Headnotes:

The refusal of the courts to register an association suspected of undermining the country's territorial integrity violated the right to freedom of association.

Summary:

On 18 April 1990 the applicants, who claim to be of "Macedonian" ethnic origin and to have a "Macedonian national consciousness", decided together with forty-nine others to establish a non-profit-making association (*somatio*) called "Home of Macedonian Civilisation" ("*Stegi Makedonikou Politismou*"). The association's headquarters were to be in Florina in northern Greece, near the border of the Former Yugoslav Republic of Macedonia.

On 12 June 1990 the applicants applied to the Florina Court of First Instance for registration of their association under Article 79 of the Civil Code.

On 9 August 1990 the Court of First Instance refused the application on the ground that the association's real aim was to promote the idea that there was a Macedonian minority in Greece; this was contrary to Greece's national interest and, consequently, contrary to law.

On 7 September 1990 the applicants appealed. On 8 May 1991 the Salonika Court of Appeal dismissed their appeal.

The court accepted the truth of the following information, on the ground that it was a matter of common knowledge:

The area corresponding to the Greek administrative region of Macedonia had always been Greek. The fact that part of its population spoke a second language, which was essentially Bulgarian mixed with Slav, Greek, Vlach and Albanian, in no way proved that they were of Slav or Bulgarian origin. The Socialist Republic of Macedonia had sought to create a Slav Macedonian State in order to have access to the Aegean. To that end, it had tried to win over to its cause the Greek inhabitants of the Greek administrative region of Macedonia who spoke the second language previously mentioned. In accordance with instructions from Slav organisations abroad, the applicants had set up the "Home of Macedonian Civilisation" in order to achieve that objective.

The court also relied on articles which had appeared in the newspapers *Ethnos* and *Ellinikos Voras* on 5 February 1991 and 12 May 1991 respectively. According to these articles, two of the applicants had attended a meeting of the Conference on Security and Cooperation in Europe in Copenhagen, at which they had disputed the Greek identity of the Greek administrative region of Macedonia, making a distinction between Greeks and Macedonians.

The court considered that this latter fact, combined with the association's name and the content of its memorandum and articles of association cast doubt on its objectives.

The applicants appealed to the Court of Cassation, which, in a judgment delivered on 16 May 1994, dismissed the appeal.

The applicants alleged that the national courts' refusal of their application to register their association had infringed their right to freedom of association, as guaranteed by Article 11 ECHR.

The Court held that there had been an interference with the exercise of the right to freedom of association: the Greek courts' refusal to register the applicants' association had deprived the applicants of any possibility of jointly or individually pursuing the aims they had laid down in the memorandum of association and thus of exercising the right in question.

The interference was prescribed by law; the Civil Code allowed courts to refuse an application to register an association where they found that the validity of its memorandum of association was open to question. It also pursued a legitimate aim: the protection of national security and the prevention of disorder.

The Court ascertained that the possibility for citizens to be able to form a legal entity in order to act collectively in a field of mutual interest was one of the most important aspects of the right to freedom of association. The way in which national legislation enshrined that freedom and its practical applications by the authorities revealed the state of democracy in the country concerned.

In the instant case, the aims of the association set out in its memorandum of association had been exclusively to preserve and develop traditions and folk culture of the Florina region; these aims were perfectly clear and legitimate. Concerning the relevant press articles, they had reported matters some of which were unconnected with the applicants and drawn inferences derived from a subjective assessment by the authors of the articles. The national courts had taken those articles into consideration and also the political dispute that then dominated relations between Greece and the Former Yugoslav Republic of Macedonia and had held that the applicants and their association represented a danger to Greece's territorial integrity. However, such a statement was based on a mere suspicion as to the true intentions of the association's founders and the activities it might have engaged in once it had begun to function. The Court also took into account in this context the fact that Greek law did not lay down a system of preventive review for setting up non-profit-making associations.

The Court did not rule out that, once founded, the association might, under cover of the aims mentioned in its memorandum of association, have engaged in activities incompatible with those aims. Such a possibility, which the national courts had seen as a certainty, could hardly have been belied by any practical action as, having never existed, the association had not had time to take any action.

Consequently, the refusal to register the applicants' association had been disproportionate to the objectives pursued and thus not necessary in a democratic society.

Cross-references:

13.08.1981, *Young*, James and Webster v. the United Kingdom, *Special Bulletin ECHR* [ECH-1981-S-002]; 20.09.1993, *Saïdi v. France*; 30.01.1998, *United Communist Party of Turkey and others v. Turkey, Bulletin* 1998/1[ECH-1998-1-001] .

Languages:

English, French.

Identification: ECH-1998-2-011

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 02.09.1998 / **e)** 65/1997/849/1056 / **f)** Ahmed and others 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.
General Principles - Margin of appreciation.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Freedom of expression.

Keywords of the alphabetical index:

Political activities, local government officers / Local government officers, neutrality / Political neutrality.

Headnotes:

Restrictions on the involvement of senior local government officers in certain types of political activities did not infringe the right to freedom of expression.

Summary:

In 1990 the Secretary of State for the Environment, pursuant to Section 1.5 of the Local Government and Housing Act 1989, made Regulations to restrict the political activities of local government officers in "politically restricted posts". These measures were a follow-up to the recommendations made by a Committee ("the Widdicombe Committee") which had been set up in 1985 to inquire into the respective roles of elected members and officers of local government authorities in view of the increasing politicisation of local politics.

The applicants all held politically restricted posts. Mr Ahmed was a solicitor with the London Borough of Hackney. He was adopted as a Labour candidate for municipal elections in Enfield in 1990, but was unable to stand because of the Regulations. Mr Perrin was Principal Area Planner with the Devon County Council and had to give up his position as vice-chairman and property officer of the Exeter Labour Party. Mr Bentley, a Planning Manager with Plymouth City Council was forced to resign from his position as Chairman of Torridge and West Devon Constituency Labour Party. Mr Brough, head of Committee Services with the London Borough of Hillingdon, had previously been involved in local politics in Harrow East and was regularly invited to speak at public meetings, but he had to abandon these activities when the Regulations came into force.

The applicants and the trade union NALGO applied to the High Court for judicial review of the Regulations. The application failed on 20 December 1991 because the judge, Mr Justice Hutchison, found *inter alia* that the Regulations had been properly made within the terms of the 1989 Act and that the applicants could not rely on arguments based on the European Convention on Human Rights. An appeal to the Court of Appeal was dismissed on 26 November 1992 and the House of Lords refused leave to appeal on 24 March 1993.

The applicants complained that the Regulations constituted an unjustified interference with their rights to freedom of expression given that they prevented them from pursuing normal political activities. In the applicants' view, the Regulations were both vague and framed in an overly subjective manner, did not pursue a legitimate aim and could not be considered necessary in a democratic society.

The Court noted that the Regulations were designed to lay down rules for a large number of local government officers restricting their participation in certain forms of political activity which could impair their impartiality. It considered that it was inevitable that conduct which might lead third parties to question an officer's impartiality cannot be defined with absolute precision. It was open to an officer to seek advice if he was uncertain as to whether a particular action might infringe the Regulations. Furthermore, the scope and application of allegedly vague provisions had to be seen in the light of the vice which the parent Act sought to avoid.

In addition, the interferences which resulted from the application of the Regulations to the applicants pursued a legitimate aim: to protect rights of others, council members and electorate, to effective political democracy at the local level.

The Court noted that the Regulations had been adopted in the light of the findings of an official inquiry into the impact of involvement of senior local government officers in political activities on their duty of political impartiality. The findings pointed to specific instances of abuse of power by certain officers and potential for increased abuse in view of the trend towards confrontational politics in local government. The Court considered that the Regulations replied to an identified pressing social need: to strengthen the tradition of senior officers' political neutrality. Addressing that need through the adoption of Regulations restricting participation of senior officers in defined forms of political activity which might call into question their duty of political impartiality was well within the margin of appreciation of respondent States in this sector.

In the eyes of the Court, the restrictions imposed on the applicants were not open to challenge on grounds of lack of proportionality. The Regulations only applied to carefully defined categories of senior officers like the applicants who performed duties in respect of which political impartiality vis-à-vis council members and public was a paramount consideration. The restrictions only concerned speech or writing of a politically partisan nature or activities within political parties which would be likely to link senior officers in the eyes of the public with a particular party political line. The recent Government review of continuing need for restrictions concluded that their maintenance in force was justified.

Therefore, there had been no violation of Article 10 ECHR.

Cross-references:

26.09.1995, *Vogt v. Germany, Bulletin* 1995/3 [ECH-1995-3-014]; 30.01.1998, *United Communist Party of Turkey and others v. Turkey, Bulletin* 1998/1[ECH-1998-1-001].

Languages:

English, French.

Other Courts

Republic of Korea Constitutional Court

Summaries of 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.

1. **Revocation of a disposition of non-prosecution**
(95 KCCR 100, 25.06.1998)

Institutions - Head of State - Status.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial.
Fundamental Rights - Civil and political rights - Right to property.

2. **Confirmation of the unconstitutionality of Article 108.1 of the Act on the Election of Public Officials and the Prevention of Election Malpractice**
(97 KCCR 362, 28.05.1998)

Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Freedom of the written press.
Fundamental Rights - Civil and political rights - Right to information.
Fundamental Rights - Civil and political rights - Electoral rights.

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

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.

pages

29 For procedural aspects see the key-word "Electoral disputes" under "Constitutional justice - Types of litigation".
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.

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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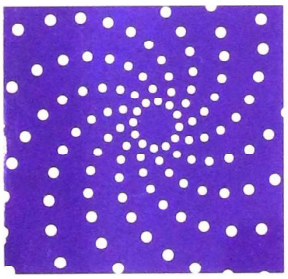

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