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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.

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   - a) *country or organisation*
   - b) *name of the court*
   - c) *chamber (if appropriate)*
   - d) *date of the decision*
   - e) *number of decision or case*
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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

Important decisions

Identification: ALB-1998-3-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 14.10.1998 / **e)** 48 / **f)** / **g)** Official Gazette, no. 26 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Executive bodies - Powers.
Institutions - Executive bodies - Relations with the courts.

Keywords of the alphabetical index:

Contract of sale / Right to initiate proceedings / State Monitoring Service / Privatisation, monitoring powers.

Headnotes:

The acceptance of an application lodged by a party not entitled to initiate legal proceedings, and in particular the fact that this application was the basis on which the case was heard in three courts, renders the proceedings in question unlawful and the respective decisions of the courts unconstitutional.

Summary:

The circumstances of the applicant's claim that Decision no. 248 of the Council of Ministers, of 27 May 1993, was unlawful and clearly unconstitutional under Article 8 of the Constitutional Law required the suspension of the proceedings and the referral of the case to the Constitutional Court.

The basis of the proceedings to have a contract of sale declared unconstitutional was Petition no. 35, of 23 March 1994, lodged by the State Monitoring Service, a body that does not have the authority to initiate proceedings in relation to privatisation problems. Under Law no. 7597 of 31 August 1992 concerning the State Monitoring Service, which is referred to in the complaint, the Service is authorised simply to monitor the privatisation of state property, not to initiate proceedings in relation to any problems involved. That being so, the acceptance of an application lodged by a party not entitled to initiate proceedings, and in particular the fact that this application was the basis on which the case was heard in three courts, renders the proceedings in question unlawful and the respective decisions of the courts unconstitutional.

Moreover, in the court of first instance, counsel for one of the parties asserted that Decision no. 248 of the Council of Ministers, of 27 May 1993, "on measures to accelerate the privatisation of small and medium-sized businesses" - which was the basis of the complaint - was in breach of Law no. 7512 of 10 August 1991 "on the sanctioning and protection of private property, freedom of initiative, independent private activities and privatisation". The court did not consider this claim and thus it was not referred to in the decision.

The Constitutional Court therefore decided to examine the case. It ruled that the contested decision was clearly unconstitutional, and took issue particularly with points 2 and 22. It found that, in these circumstances, the ordinary court had a duty to suspend the proceedings and refer the case to the Constitutional Court.

The failure to take account of constitutional provisions, the applicant's lack of standing and the fact that absolute priority had been given to a subordinate legislative provision (the decision of the Council of Ministers) without reference to the terms of the law, rendered the proceedings in question unlawful and the respective decisions unconstitutional and therefore void.

Languages:

Albanian.

Identification: ALB-1998-3-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 27.10.1998 / **e)** 55 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Exhaustion of remedies.

Keywords of the alphabetical index:

Court decision, non-enforcement / Immunity, diplomatic / Civil obligation, voluntary performance.

Headnotes:

The Constitutional Court may hear a claim by a person whose fundamental rights have been violated only after all the ordinary remedies have been exhausted.

Summary:

The Constitutional Court refused to hear an application by two individuals concerning the non-enforcement of a court decision, because the applicants had not exhausted all the ordinary remedies in their dispute with the Ministry of Justice.

The absence of a response from the Ministry of Justice about why authorisation had not been given to require the Italian Ambassador in Albania to pay ground rent in respect of his residence is not sufficient grounds for submitting the case to a review of constitutionality.

There are other possibilities, which have not been exhausted, for resolving the dispute by administrative means.

The Albanian Government must therefore intervene to facilitate the voluntary performance of what is a civil obligation.

Under Article 35 of Law no. 8373 of 15 July 1998 "on the organisation and functioning of the Constitutional Court of the Republic of Albania", the court may only hear a claim after all the ordinary remedies have been exhausted.

Languages:

Albanian.

Identification: ALB-1998-3-004

a) Albania / **b)** Constitutional Court / **c)** / **d)** 04.11.1998 / **e)** 57 / **f)** / **g)** Official Gazette, no. 27 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Constitutional jurisdiction - Relations with other institutions - Courts.

Constitutional Justice - Types of claim - Type of review - Abstract review.
Constitutional Justice - Types of litigation - Litigation in respect of fundamental rights and freedoms.
Constitutional Justice - Types of litigation - Litigation in respect of jurisdictional conflict.
Institutions - Jurisdictional bodies - Jurisdiction.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial.
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 - Double degree of jurisdiction.
Fundamental Rights - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Court of Cassation, interpretation of the Constitution / Constitutional Court, powers / Court decisions, review by the Constitutional Court.

Headnotes:

The Court of Cassation is empowered to examine the legal basis of contested court decisions but it cannot interpret the Constitution. Under Article 24.1 of the Constitutional Law, it is the prerogative of the Constitutional Court to interpret the Constitution and constitutional laws.

The Constitutional Court has jurisdiction to examine complaints lodged by natural persons or legal entities alleging violations of their fundamental rights by unlawful decisions. The term "decision" as used in the basic law covers not only decisions by other organs of the state but also court decisions.

Summary:

By Decision no. 928 of 30 June 1998, the Civil Chamber of the Court of Cassation set aside Decision no. 29 of 24 March 1998 of the Tirana Court of Appeal, and also ordered that proceedings before the Court of Appeal be suspended, on the grounds that Constitutional Court Decision no. 45 of 27 August 1997 - on which the contested ruling was based - was unconstitutional.

The Civil Chamber of the Court of Cassation held that the Constitutional Court was not entitled to review court decisions because there was no legislation providing for it to examine court proceedings. According to the Civil Chamber, it was not entitled to pass judgment on

whether the rules governing lower courts were well founded. Likewise, if the Constitutional Court decided to review a court decision it could only set aside or cancel that decision, but could not refer the case to a lower court.

The Court of Cassation has jurisdiction to examine the legal basis of contested decisions but may not interpret the Constitution. Under Article 24.1 of Law no. 7561 of 29 April 1992 "on certain changes and amendments to Law no. 7491 of 29 April 1991 on the main provisions of the Constitution", it is the prerogative of the Constitutional Court to interpret the Constitution and constitutional laws. In ruling that "the decision of the Constitutional Court is unconstitutional because it assumes powers beyond those provided for in the Constitutional Law", the Civil Chamber is interpreting constitutional law in relation to the extent of another body's powers. This in itself constitutes a serious violation of the Constitution.

The Constitutional Court has jurisdiction to examine complaints lodged by natural persons or legal entities alleging violations of their fundamental rights. The term "decision" as used in the law covers not only decisions by other organs of the state but also court decisions. Were this not the case, the law would make an explicit exception. The fact that there is no reference to any such an exception is sufficient to indicate that court decisions, like the decisions of other bodies, are subject to constitutional review. The Constitutional Court upholds the Constitution; it does not interfere in the areas of responsibility of the judiciary even when, on the basis of an application, it examines a violation of fundamental rights, i.e. considers whether or not a court decision is in conformity with a basic law. In this case, the Constitutional Court had a duty to examine the application lodged by the Confederation of Albanian Trade Unions and its claims in respect of the violation of its right to property, which is a fundamental right.

Under Article 24.9 of Law no. 7561 of 29 April 1992, the Constitutional Court rules on complaints concerning violations of fundamental personal rights. It gives a final ruling having regard to the fundamental right at issue, the question of whether or not it has been violated and the fundamental nature of the right, which by no means implies that it is the role of the Constitutional Court to decide specific disputes between persons, arising from the violation of their fundamental rights.

It is the prerogative of the ordinary courts to decide specific cases, on the basis of procedural rules and the relevant legislation.

It was for these reasons that the case was referred to the Court of Appeal. However, the ruling that the decision of the Civil Chamber of the Court of Cassation was unconstitutional left unresolved the proceedings initiated by the Confederation of Albanian Trade Unions. Failure by the Constitutional Court to refer the case to the Court of Cassation would entail a serious violation of various fundamental rights, such as the right of appeal (under Article 13 of chapter V of the Constitution) and the right to a fair hearing (Article 38 of chapter V of the Constitution) within a reasonable time (Article 40 of chapter V of the Constitution).

Decision no. 928, of 30 June 1998, of the Civil Chamber of the Court of Cassation is therefore unconstitutional and, in accordance with Article 45 of Law no. 8373 of 15 July 1998 "on the organisation and functioning of the Constitutional Court of the Republic of Albania", has no legal effect.

Languages:

Albanian.

Identification: ALB-1998-3-005

a) Albania / **b)** Constitutional Court / **c)** / **d)** 04.11.1998 / **e)** 58 / **f)** / **g)** Official Gazette, no. 27 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Constitutional jurisdiction - Relations with other institutions - Courts.
Constitutional Justice - Types of litigation - Litigation in respect of fundamental rights and freedoms.
Constitutional Justice - Effects - Effect *erga omnes*.
Constitutional Justice - Effects - Influence on State organs.
Institutions - Jurisdictional bodies - Jurisdiction.

Keywords of the alphabetical index:

Constitutional Court, decision, application / Constitutional provision, interpretation / Constitutional Court, powers / Court of Cassation, non-enforcement of decisions of the Constitutional Court.

Headnotes:

The Constitutional Court has jurisdiction to assess the constitutionality of decisions that violate citizens' fundamental rights; indeed this is the most important aspect of constitutional review. It does not interfere with the right of lower courts to decide specific cases on the merits.

Summary:

The applicants submitted that the joint Chambers of the Court of Cassation had acted unconstitutionally in deciding not to give effect to Decision no. 7 of the Constitutional Court of 10 April 1998, which, under the Law "on major constitutional provisions", is a final decision.

On 4 June 1998, the joint Chambers of the Court of Cassation decided to dismiss the case, which had been referred to it by the Constitutional Court, on the grounds that decisions of the Court of Cassation could not be set aside by other bodies.

In its decision, the Constitutional Court therefore points out that the ruling by the joint Chambers of the Court of Cassation fails to distinguish between the Court of Cassation's role of review and the process of constitutional review. Article 6.1 of the Law "on major constitutional provisions" asserts the independence of the judiciary and this provision must be seen not in isolation but in its full context, taking account of the Constitutional Court's jurisdiction – as the supreme organ for upholding the Constitution and ensuring compliance with it – to review the constitutionality of any decision that violates fundamental rights: not only decisions of the legislature, but also those of the executive and judiciary. Decisions of the Court of Cassation fall into the last-mentioned category.

The joint Chambers of the Court of Cassation exceeded their powers in taking it upon themselves to interpret provisions of the Constitution. In their interpretation of Article 24.9 of the Constitutional Law (which is moreover a misinterpretation) they encroached upon the jurisdiction of the Constitutional Court – the only court empowered to interpret the Constitution and constitutional laws. The above-mentioned provision, under which the Constitutional Court is empowered to make final rulings on applicants' claims in respect of violations of their fundamental rights by unlawful decisions, does not have the meaning imputed to it in the joint Chambers' decision.

Under Article 26.2 of Law no. 7651 of 29 April 1992 "on certain changes and amendments to Law no. 7491 of 29 April 1991 on major constitutional provisions", decisions of the Constitutional Court are final.

The application of those decisions is a constitutional obligation and no body has the right to call into question the validity of Constitutional Court decisions.

The decision by the joint Chambers of the Court of Cassation not to hear the case – despite the obligation to apply the Constitutional Court's decision under the Law "on major constitutional provisions" – constitutes a dangerous and unconstitutional precedent. Application of a decision by the Constitutional Court is an obligation under the Constitution, and no body has the right to question the validity of such a decision.

Languages:

Albanian.

Identification: ALB-1998-3-006

a) Albania / **b)** Constitutional Court / **c)** / **d)** 02.12.1998 / **e)** 71 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Institutions – Jurisdictional bodies – Jurisdiction.
Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Flooding, compensation for damage / Allegedly identical proceedings / Identical proceedings, impossibility / Similar proceedings, equal treatment.

Headnotes:

The concept of equality under and before the law does not mean that courts will deliver identical decisions in allegedly identical cases. The manner in which a case is decided is the exclusive responsibility of the courts, and because the elements of every case – the evidence and circumstances – are different, it is impossible for proceedings to be absolutely identical.

The concept of equality under and before the law applies not to the way in which the merits of a case are

examined, but to the legal safeguards afforded by the state to enable citizens to resolve their disputes.

Summary:

The Court of Appeal dismissed an appeal by the applicants (residents of the village of Balldré in the Lezha district). They were seeking compensation for flood damage to their land. The Civil Chamber of the Court of Cassation had already ruled in the case.

In the Constitutional Court, the applicants claimed that the principle of equal treatment before the law had been breached because, in similar cases, 65 people from the same village had been awarded compensation by the courts.

The Constitutional Court ruled that their claim was not founded. Under Article 25 of the Constitutional Law "on fundamental human rights and freedoms", all citizens are equal in the eyes of the law, and discrimination on grounds of sex, race, ethnic origin, language and political beliefs is prohibited. However, the concept of equality under and before the law does not mean that courts will deliver identical decisions in allegedly identical cases.

The standardisation of court practice does not follow from the principle of equality under and before the law; it is simply useful for the ordinary courts in the interests of maintaining a uniform or consistent approach, always bearing in mind the evidence and circumstances of each particular case.

For these and other reasons, the Court of Appeal had dismissed the application.

Languages:

Albanian.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-1998-3-011

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 25.08.1998 / **e)** M.653.XXVIII / **f)** Martínez López, Juan Antonio y otros c. Provincia de Mendoza / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 321 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Vested rights.
General Principles - Public interest.
General Principles - Proportionality.
General Principles - Prohibition of arbitrariness.
Fundamental Rights - Civil and political rights - Right to property - Other limitations.
Fundamental Rights - Economic, social and cultural rights - Right to social security.

Keywords of the alphabetical index:

Pensions, retirement, amount / Retirement scheme, reform / Pension contribution.

Headnotes:

Retired status is to be considered quite distinct from the amount of the pension for which a retired person is eligible. Where justified by considerations of public policy or public interest, subsequent reduction of the amount is possible without infringing the right of property secured by the national Constitution, provided that the reduction is not such as to be confiscatory or arbitrarily disproportionate.

The acceptable rates of reduction in the amount of pensions vary according to the circumstances.

The unconstitutionality of a 30% reduction in the amount of pensions, in so far as it discloses undue disproportion between this amount and the earnings of employed persons, must be assessed with reference to the period of actual service and to the contributions paid into the provident scheme.

Summary:

The applicants challenged the constitutionality of a law applicable in Mendoza Province under which their pension amount was reduced by 30%. Following the dismissal of their application by the provincial supreme court, they lodged an extraordinary application with the Supreme Court of Justice of the Nation.

The Court specified the two questions to be settled: (1) whether the deduction from the pensions was justified by considerations of public policy and public interest; (2) furthermore, whether it involved a confiscation in the material circumstances of the case and for each of the applicants.

The Court admitted evidence that the adoption of the impugned law had been dictated by an overriding need to systematise and rationalise the legislation in force in the province.

The Mendoza provincial authorities, in an effort to restructure the salary scale of their administrative staff, had enacted a law which provided that a certain percentage of the amount paid to serving staff did not enter into their salaries; this occasioned a subsequent 30% deduction from the applicants' pensions. The statutory scheme in force at the time of the applicants' retirement established a pension amount in proportion to the salary payable for the services performed at the time of termination of employment. This was in effect a replacement income as the pension amount was supposed to correspond to the salary which retired staff would have received had they still been actively serving.

The Court nevertheless observed that this principle should be complied with only in so far as contributions were paid into the retirement scheme over a minimum period of actual service. Far from constituting a State gratuity, retirement pensions were on the one hand tied to the contributions which pensioners had paid from their salaries during their term of service and on the other hand represented a contribution from the community in consideration of the services performed.

The Court thus found that the pensions of one group of claimants had been fixed under the terms of a special law which allowed them to have services made pensionable by implication without contributing to the general scheme at the appropriate time and without being able to complete the required periods of actual service. Most of the province's public servants, however, were expected to serve and to contribute for much longer periods. Therefore the deduction from the pensions of the first group of claimants was not arbitrarily disproportionate, particularly in the light of several previous rulings of the Court admitting the same reduction rate as the one complained of.

The other claimants, however, had completed the required periods of actual service and contribution payments, so that the provincial law was unconstitutional where they were concerned in causing undue disproportion between pensions and the salaries of active staff having regard to the services performed and the period thereof.

One judge delivered a concurring opinion and three judges declared their partial dissent, holding that the claims dismissed by the majority were also admissible. According to the dissenters, a distinction should be drawn between the amount of retirement pensions in respect of which there are no acquired rights - and the components of the pension, which are the natural components determining the state of inactivity, so that any interference with them by a subsequent law is bound to encroach on the benefits of social security guaranteed by Article 14bis of the Constitution.

Languages:

Spanish.

Identification: ARG-1998-3-012

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 29.09.1998 / **e)** C.131.XXXII / **f)** Cereales Asunción S.R.L. c. Administración Nacional de Navegación y Puertos de la República paraguaya s/daños y perjuicios (incumplimiento del contrato) / **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.
Sources of Constitutional Law - Categories - Case-law - Foreign case-law.
Sources of Constitutional Law - Techniques of interpretation - Intention of the author of the controlled enactment.
General Principles - Sovereignty.
Institutions - Jurisdictional bodies - Jurisdiction.

Keywords of the alphabetical index:

Immunity, foreign States / *Acta iure imperii* / *Acta iure gestionis* / Law, immediate effect / Private international law / Free zone / European Convention on State Immunity of 1972.

Headnotes:

Foreign States are immune from jurisdiction only as regards the exercise of sovereign authority (*acta iure imperii*), to the exclusion of administrative acts (*acta iure gestionis*).

Acta iure gestionis are deemed to include commercial activities.

The first criterion for interpreting the law is to grant the full effect of the legislator's intention, whose primary source is the letter of the law. The parliamentary antecedents, useful for establishing its meaning and scope, are not to be discounted.

The competence of national courts to entertain disputes involving a foreign State and arising from an act *iure gestionis* must be determined either by the original contract or by international law.

The rules establishing the jurisdiction of courts have immediate effect.

Summary:

A private firm had lodged an application before the Argentinian courts against an independent authority of the Paraguayan Executive, claiming damages for the termination of the franchise agreement between them authorizing the firm to operate in the Paraguayan free zone located in Argentinian territory. The independent authority and the Republic of Paraguay - joined to the proceedings as third party - invoked the defence of immunity from jurisdiction. This defence was declared admissible at first instance but rejected at appeal. The defendant and the third party therefore lodged an extraordinary appeal with the Supreme Court.

The Court adverted to a precedent dating from December 1994 in which, by virtue of an accepted international practice, it had already discarded the absolute doctrine of foreign States' immunity from jurisdiction. It had distinguished *acta iure imperii*, performed by the foreign government as a sovereign State, from *acta iure gestionis* of a commercial nature. Immunity was acknowledged in respect of the former, whereas the latter must be ruled on by the State having jurisdiction to entertain the litigation.

This position, the Court pointed out, had subsequently been incorporated into Law 24.448 of 1995, which was applicable even though the application had been lodged before its enactment and it had not been relied upon by the parties. Judges are in fact required to apply the law in force, and furthermore the rules governing assignment of jurisdiction have immediate effect.

The new law provides that foreign States may not invoke their immunity from jurisdiction in connection with a petition concerning their commercial or industrial activity, and that the jurisdiction of the Argentinian courts is established by the contract invoked or by international law.

The question is therefore to establish what commercial activity should be taken to signify. When the law was enacted, the legislator had been guided in this respect by the European Convention on State Immunity of 1972, the United Nations International Law Commission's draft articles on jurisdictional immunities of States, the draft Inter-American Convention on immunity from jurisdiction being prepared by the Inter-American Juridical Committee, the United States Foreign Immunity Act of 1976 and the United Kingdom Immunity Act of 1978.

According to the above texts, the law has given the term "commercial" an extensive meaning that comes within *acta iure gestionis*.

Without prejudice to the public aim pursued by any foreign State in its actions, including administrative acts, the nature of the activity is the criterion of interpretation to be used in determining whether the State should be tried by the competent courts. In the present case, port loading services constituted a commercial activity and were plainly distinct from acts of sovereignty or government despite the public character of the authority against which the case was brought.

General international law stipulates as a principle merely that there should be a reasonable link between a State's jurisdiction and the dispute, without specifically defining the link. The definition of specific links is left to be settled by the various systems of private international law, treaty law or the State's own law.

In the present case the 1940 Treaty of Montevideo binding Argentina and Paraguay is applicable. It recognises the jurisdiction of the place of performance of the contract, namely the free zone located in an Argentinian port, subject to the provisions of the applicable law.

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

Cross-references:

As to the characterisation of commercial acts, the Court referred to the decisions of the Italian Court of Cassation *(Governo degli Stati Uniti c. Soc I.R.S.A)*, the German Federal Constitutional Court (16 *BverfG*, 64) and the United States courts.

The Court's precedent of December 1995 referred to above was published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official digest), volume 317, p. 1880.

Languages:

Spanish.

Identification: ARG-1998-3-013

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 15.10.1998 / **e)** L.378.XXXIII / **f)** La Meridional Cía. Argentina de Seguros c. Iberia Líneas Aéreas de España y otros s/faltante y/o avería de carga transporte aéreo / **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 - Vienna Convention on the Right of Treaties of 1969.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
Institutions - Jurisdictional bodies - Procedure.

Keywords of the alphabetical index:

Air transport, contract / Warsaw Convention of 1929 / Procedure, applicable.

Headnotes:

The Warsaw Convention of 1929, amended by the Hague Protocol of 1955, contains no provision to the effect that its norms concerning protest and limitation of liability must be applied where the party does not invoke grounds of defence based thereon at the appropriate stage of the proceedings.

Summary:

A transport company had been ordered to pay damages in connection with the loss of goods dispatched under an air freight contract. The Federal Chamber of Appeal in civil and commercial litigation upheld the challenged decision. It ruled that it need not entertain claims founded on the absence of protest by the applicant and on limitation of the carrier's liability under the terms of Articles 26.2 and 22 of the 1929 Warsaw Convention as amended by the Hague Protocol of 1955, because these grounds of defence had not been raised at the appropriate stage of the proceedings. The defendant therefore lodged an extraordinary appeal with the Supreme Court, submitting that the claims in question did not constitute grounds of defence but substantive components of the system established by the international law applicable in the case; consequently, the decision under appeal, being founded on domestic procedural law, infringed the Vienna Convention on the Law of Treaties of 1969.

On the authority of the above, the Court held that the Warsaw Convention had not altered the principal points of procedure, especially considering the stipulation in Article 28.2 that procedure shall be governed by the law of the competent court ("la procédure sera régie par la loi du tribunal compétent").

The challenged decision therefore did not infringe the 1969 Vienna Convention on the Law of Treaties because it did not disregard the application of the Convention under a rule of domestic law, or interpret the convention in bad faith.

Languages:

Spanish.

Identification: ARG-1998-3-014

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 12.11.1998 / **e)** F.140.XXXIII / **f)** Fernández

Prieto, Carlos Alberto y otro s/infracción ley 23.737 - causa no. 10.099 / **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.
Institutions - Armed forces and police forces - Police forces - Functions.
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 - Rules of evidence.

Keywords of the alphabetical index:

Search, vehicle / General procedure / Evidence, admissibility / Drugs, trafficking / Behaviour, suspicious / Suspicion, reasonable.

Headnotes:

In order to ascertain the validity of police action in searching a vehicle and taking its occupants into custody without a prior court warrant, the complete circumstances in which the measure was taken must be assessed.

Search and custody are valid if police officers, specifically assigned to surveillance of roads for crime prevention purposes, stop a vehicle because they have observed "suspicious behaviour" in its occupants leading them to presume that an offence has been committed, and the suspicion is subsequently corroborated by the discovery of items connected with that offence.

Summary:

The vehicle carrying the accused and two other persons was stopped by police who had noticed their "suspicious behaviour". During the search, prohibited drugs, a firearm and ammunition were discovered in the vehicle. The Federal Appeal Chamber of Mar del Plata sentenced the person charged to five years of imprisonment and a fine for the offence of transporting narcotics. Having been convicted, he lodged an extraordinary appeal with the Supreme Court, claiming that the search had violated his right of defence secured by the national Constitution.

The Court adverted to the fact that where Article 18 of the Constitution requires the arrest warrant to be issued by a competent authority, it presupposes a rule specifying the cases and circumstances in which detention is appropriate. Article 4 of the Code of Criminal Procedure (in force when the case opened) is the implementing provision of the aforesaid Article 18. It provides that police officers have a duty to arrest persons caught in the act and persons giving indications of guilt, whether manifest or requiring corroboration *(semiplena prueba)* and furthermore to bring such persons to justice forthwith.

The police action, founded on the suspicion that a crime had presumably been committed, must be examined in the light of the circumstances of the detention in order to determine its legitimacy.

The Court referred to the case law of the United States Supreme Court which has laid down criteria intended to clarify the concepts of "reasonable suspicion", "emergencies" and "complete circumstances of the case".

The Court considered precedents relating to the conditions under which, according to the aforementioned case law, police search and custody without a prior court warrant were valid where "probable cause" and "reasonable suspicion" applied. It emphasised the United States Supreme Court's practice concerning the "exception formed by vehicles" and the duty to assess the "complete circumstances" in order to determine validity.

On that basis, the Court held that the United States precedents were a reliable authority in the case before it, since its examination of the special circumstances surrounding the police action complained of established conclusively that the search of the vehicle and the detention of its occupants were legitimate. Indeed, the police officers responsible had been assigned the task of patrolling the court district in order to carry out their specific function of crime prevention. In so doing they had stopped a motor vehicle after noting that its occupants displayed "suspicious behaviour" leading them to presume that an offence had been committed. This suspicion was subsequently corroborated by the discovery of real evidence of drug trafficking. Furthermore, they had immediately notified the court of the arrest.

Therefore the procedure was not vitiated by any irregularity that might violate the right to a fair trial; less still in that, having stopped the vehicle, the police officers had proceeded to search it in the presence of witnesses. One of the witnesses stated that weapons and other items had been seized in his presence.

The Court also adverted to the reasons of urgency that had prompted the police officers to dispense with a search warrant. Since a moving vehicle was involved, delay

would have led to its disappearance with the evidence which it contained, and possibly the occupants' escape.

Therefore Article 18 of the Constitution was not infringed.

Nor was there anything inimical to the Court's opinion as to the impossibility of adducing evidence obtained in breach of constitutional guarantees.

Three judges submitted dissenting opinions, holding the impugned police action to be invalid.

Supplementary information:

The Code of Criminal Procedure applied in this case has been replaced by the new Code (adopted under law 23.984) which came into force in September 1992. The new Code makes the following provisions regarding the subject-matter of the judgement appealed against: "Article 284: It is the duty of police officers and auxiliaries to arrest, even without being required to hold a court warrant: ... (4) Any person apprehended while in the act of committing an offence liable to criminal prosecution and punishable by a prison sentence". Article 285 provides that among other circumstances, "in the act" applies when the culprit is found "carrying items or showing signs which give rise to the obvious presumption that he has been involved in a crime immediately beforehand".

Languages:

Spanish.

Identification: ARG-1998-3-015

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 24.11.1998 / **e)** Z.97.XXXIII / **f)** Zurueta, Gilda Inés c. Serda, Juana Elva y Martín de Rallim, Concepción / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 321 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Reasonableness.
General Principles - Prohibition of arbitrariness.
Institutions - Jurisdictional bodies - Organisation - Members - Discipline.
Institutions - Federalism and regionalism - Institutional aspects - Courts.

Keywords of the alphabetical index:

Judges, sanctions / Court, supervisory powers.

Headnotes:

The supervisory powers vested in a provincial *Superior Tribunal de Justicia* - heading the local judiciary - include the review and penalisation of any act obstructing the administration of justice.

These powers become exceptional powers when exercised for the purpose of investigating a judge's conduct. In that case, they are only justified where serious and obvious facts or weighty presumptions raise reasonable doubt as to the propriety of a judge's conduct or the judge's fitness to perform the duties of office.

Summary:

The *Superior Tribunal de Justicia* of Jujuy Province had fined an appeal court judge the equivalent of a fortnight's salary for having departed from the court's practice by fixing legal fees below the minimum level established by one of its precedents. The judge made an extraordinary appeal against the penalty to the Supreme Court of the Nation.

The Court found that the Tribunal had exceeded its supervisory powers. The act held against the judge was, it pointed out, merely to have applied a criterion that diverged from the court's practice, and this was not sufficient to warrant penalisation. A mere difference in interpretation or a departure from established practice were normal contingencies of the judicial function as such, one which did not admit of any disciplinary oversight whatsoever.

The Court further ruled that the Tribunal had not adduced the serious reasons for which the stated rule was waived, nor had it considered the judge's motives in adopting the solution in question, particularly those relating to the nature of the litigation, the sum involved and the special points of procedure. This omission was all the more significant in that the fees thus determined were not contested by the parties.

The impugned decision was therefore arbitrary in not being reasonably founded on the law in force which was applicable having regard to the circumstances established in the case.

Languages:

Spanish.

Identification: ARG-1998-3-016

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 15.12.1998 / **e)** N.245.XXXII / **f)** Nobleza Picardo S.A.I.C. y F. c. Estado Nacional - Dirección Nacional Impositiva s/repetición D.G.I. / **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:

Institutions - Legislative bodies - Law-making procedure.

Keywords of the alphabetical index:

Bill, passing by both chambers of Parliament.

Headnotes:

The settled procedure for drafting and enacting laws is not amenable to justice except in the event of proven non-compliance with the minimum essential conditions stipulated for law-making activity.

If the text of a bill passed by one chamber of the legislature differs from that subsequently passed by the other chamber, non-compliance with the aforementioned conditions is patent.

Summary:

The applicant had asked to recover a tax payment considered to have been made without good cause, on the ground that the law extending the term during which the tax was payable lacked validity owing to infringement of the provisions of the national constitution concerning the procedure for the enactment and sanction of laws.

The Court upheld the challenged decision. It observed that the text of the bill passed by the Chamber of Deputies brought the law fixing the relevant tax back into force "until 31 May 1991". However, the text later adopted by the Senate - being the text of the law promulgated by the Executive and published in the Official Gazette - extended the limit "to 31 December 1991".

It plainly follows that there was disagreement between the two chambers as to the limit for the re-introduction of the rules fixing the tax. As the bill had not been passed by both chambers, it could not be returned to the Executive for examination and promulgation (Article 78 of the national Constitution).

Two judges expressed a dissenting opinion in which the application brought before the Court was considered ill-founded.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

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

- 23 decisions concerning the conformity of international treaties with the Constitution. All the treaties examined were declared compatible with the Constitution;
- 1 decision concerning the conformity of a law with the Constitution. The referral was initiated by the President of the Republic of Armenia. The compliance of two provisions with Articles 38 and 39 of the Constitution was challenged. The Constitutional Court decided that one of the challenged provisions contradicted Articles 38 and 39 of the Constitution, but the other was compatible with those articles [ARM-1998-3-004] below;
- 1 referral concerning the compliance with the Constitution of the President's refusal to convene an extraordinary session at the initiative of deputies. The referral was initiated by the deputies of the National Assembly. The referral was rejected by the Constitutional Court;
- 13 cases heard by written procedure.

Important decisions

Identification: ARM-1998-3-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 13.11.1998 / **e)** DCC-138 / **f)** On the conformity with the Constitution of Articles 71 and 93 of the Law on Joint-Stock Companies / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Joint-stock companies, shareholders / Damages, claim, access to courts / Shareholder, general meeting, decision, appeal.

Headnotes:

Article 38 of the Constitution establishes everyone's right to defend in court their rights as provided by the Constitution and laws, without any restriction. The Constitution allows for the temporary restriction of this right, but only on the basis of Article 45 of the Constitution. The legislative body may not restrict this right on other bases.

Summary:

The petitioner's opinion is that Articles 71 and 93 of the Law on Joint-Stock Companies restrict the individual's right to defend his or her rights in court.

According to the challenged Article 71, a shareholder has the right to appeal in a court the decision adopted by a general meeting of company shareholders, if he has not participated in the meeting or has voted against that decision and that decision has violated his legal interests and rights.

According to the challenged Article 93, the company or company shareholders who own at least one percent of the company's shares have the right to pursue a claim in a court against members of the company's board or the executive director of the company for damages caused to the company.

The petitioner considered that the challenged provisions contradicted not only Article 38 of the Constitution, but also Article 39 of the Constitution, according to which "everyone is entitled to the restoration of any rights which may have been violated, as well as to a public hearing by an independent and impartial court, under the equal protection of the law and fulfilling all the demands of justice, to clear himself or herself of any accusation".

The Constitutional Court held that Article 71 contradicted Articles 38 and 39 of the Constitution as the Constitution prohibits any restriction of Article 39 and permits the temporary restriction of Article 38 only on the bases prescribed by Article 45 of the Constitution.

The Constitutional Court held that Article 93 of the Law was in compliance with the above-mentioned Articles of the Constitution, as the challenged provision deprived shareholders who have at lease one percent shares of

the right to pursue a claim in a court for damages caused not to them, but to the company.

Languages:

Armenian.

Austria
Constitutional Court

Statistical data

Sessions of the Constitutional Court during September/October 1998

- Financial claims (Article 137 B-VG): 12
- Conflicts of jurisdiction (Article 138.1 B-VG): -
- Review of regulations (Article 139 B-VG): 16
- Review of laws (Article 140 B-VG): 48
- Challenge of elections (Article 141 B-VG): 6
- Complaints against administrative decrees (Article 144 B-VG): 609
  (492 applications were refused)

and during November/December 1998

- Financial claims (Article 137 B-VG): 4
- Conflicts of jurisdiction (Article 138.1 B-VG): -
- Review of regulations (Article 139 B-VG): 5
- Review of laws (Article 140 B-VG): 89
- Challenge of elections (Article 141 B-VG): 6
- Complaints against administrative decrees (Article 144 B-VG): 294
  (260 applications were refused)

Composition of the Court:

In December 1998 the Federal President appointed Prof. Korinek, a member of the Court since 1978, as Vice-President of the Court (on the proposal of the Federal Government), Prof. Ruppe, a substitute member of the Court since 1987, as member of the Court (on the proposal of the National Council *(Nationalrat)* and Mrs. Hofmeister as substitute member (on the proposal of the Federal Government).

Important decisions

Identification: AUT-1998-3-007

a) Austria / **b)** Constitutional Court / **c)** / **d)** 30.09.1998 / **e)** W II-1/98 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of claim - Claim by a public body - Legislative bodies.
Constitutional Justice - Types of litigation - Restrictive proceedings - Removal from office of Parliament.
Institutions - Legislative bodies - Status of members of legislative bodies.

Keywords of the alphabetical index:

Member of Parliament, absence / Detention abroad, excuse.

Headnotes:

The fact that a member of Parliament *(Nationalrat)* is detained by an organ of a foreign state is *prima facie* an appropriate justification for his/her absence from sessions of parliament in the meaning of Article 2.1.2 of the Parliamentary Rules of Procedure (*Geschäftsordnungsgesetz* 1975).

Summary:

The Parliament, represented by its President, asked the Constitutional Court to declare that one of its members should lose his seat, as the member in question had not attended the sessions of Parliament for a period of thirty days without giving reasons for his absence. After receiving information from the member's lawyer that the member was detained in Brazil and therefore not able to attend the sessions of Parliament - a reason which was not accepted by some members of Parliament - the President asked the member to participate in the parliament's sessions within another period of thirty days. This request was also broadcast. The member did not follow the request and Parliament did not accept his being detained as an excuse for his absence pursuant to Article 2.1.2 of the Parliamentary Rules of Procedure 1975. Referring to the particular circumstances of the case, the Court found that although the detention of the member of Parliament was generally a sufficient justification, in this case it was not an acceptable excuse for the member's absence from sessions. It was considered as proved that the member of Parliament when being arrested in Brazil had been offered the possibility of returning to Austria. If the member had accepted this offer to return to Austria his detention for extradition purposes would not have been necessary. As the member did not do his duty to prevent his detention for extradition purposes his being under arrest was no excuse for his absence from Parliament's sessions. The Court therefore declared that the member had lost his seat.

Supplementary information:

This was the first time that the Court had had to rule on such an application and to declare the loss of seat of a member of Parliament. Accordingly, and owing to the political background of these proceedings, the media took a high interest in them.

Languages:

German.

Identification: AUT-1998-3-008

a) Austria / **b)** Constitutional Court / **c)** / **d)** 13.10.1998 / **e)** G 297, 298/97 / **f)** / **g)** to be published *in Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
General Principles - Democracy.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.

Keywords of the alphabetical index:

Responsibility, political / Mayor, removal / Democracy, direct / Democracy, representative / Vote of no confidence.

Headnotes:

Provisions of a law of a *Land* determining that the removal of a mayor being directly elected by the citizens of a municipality needs a vote of no confidence passed by the municipal council and additionally a vote of the citizens confirming this vote of no confidence do not contradict Article 118.5 of the Constitution stipulating that a mayor is responsible to the council.

Summary:

A third of the members of the Parliament of the *Land* Salzburg had filed an application to annul certain statutes

of the Municipal Law of Salzburg and the Local Government Act of Salzburg. The applicants alleged that according to the federal Constitution a mayor is either elected by the municipal council or directly by the citizens of a municipality if the constitution of a *Land* enacts such a direct vote. The federal constitutional amendment of 1994 authorised the constitutional legislator of a *Land* to introduce legislation allowing for the direct vote of a mayor but did not change a mayor's political responsibility. Pursuant to Article 118.5 of the Constitution a mayor is only responsible to the municipal council. Therefore *Land* statutes putting a municipal council's decision on a mayor's responsibility to the vote of the citizens would be unconstitutional.

The Court dismissed the application stating that the federal constitutional legislator, by authorising the constitutional legislator of a *Land* to introduce the direct election of a mayor, also enabled the constitutional legislator of a *Land* to switch to a dual system comprising elements of the parliamentary-democratic as well as direct democratic system. Consequently, the impugned statutes of the *Land* on the removal of a directly elected mayor were in accordance with federal constitutional law.

Languages:

German.

Identification: AUT-1998-3-009

a) Austria / **b)** Constitutional Court / **c)** / **d)** 16.12.1998 / **e)** B 1172/98 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - Administrative acts.
Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
General Principles - Rule of law.
General Principles - Prohibition of arbitrariness.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Decree, validity / Minimum standards, rule of law.

Headnotes:

An administrative decree establishing the dominant position of undertakings which is based on proceedings initiated and conducted solely by the registration office of the competent authority and on the report of the evidence taken as well as the draft decree delivered by the registration office of the authority in question fails to meet the minimum standards of the rule of law.

Summary:

The Telecom-Control company, of which the shares are held by the Federation, was established by the Telecommunications Act 1997 (TKG) in order to safeguard market regulation insofar as such matters are not within the jurisdiction of the Telecom-Control Commission. The Commission's tasks are stipulated in Article 111 TKG and comprise granting of licences, establishing the dominant position of undertakings and defining the conditions of network interconnection. The Telecom-Control Commission is an independent administrative authority equivalent to a tribunal composed of three members and of which the chairman is a judge. The decisions of the Telecom-Control Commission are not subject to appeal but can be brought before the Constitutional Court. It is Telecom-Control which conducts the management of the Commission, acting as a kind of registration office. In this connection, the staff of Telecom-Control is subject to the instructions of the Commission's chairman or of one of its other members.

A stock company lodged a complaint against a decree of the Telecom-Control Commission, questioning the validity of a decree affecting it and claimed that the decree establishing the complainant's dominant position in the mobile telephone market and in the provision of network interconnection service violated the complainant's right to be heard by a court as the decree affected "civil rights and obligations" within the meaning of Article 6.1 ECHR. Beyond that, the complaint alleged that an unconstitutional provision had been applied (Article 33 TKG).

As to Article 6.1 ECHR the Court clarified that the complainant, who had not even asked for a hearing during the proceedings, had thus waived this right. With regard to the facts, the Court noted that the Telecom-Control Commission had neither initiated the proceedings nor at any stage of the proceedings asked questions, taken evidence or determined the objective and the purpose of the proceedings. On the contrary, it was the registration

office (Telecom-Control) which conducted the proceedings, collected data and took evidence. The Commission simply took note of the report on the evidence. Without further discussion the Commission had signed the decree drafted by Telecom-Control. Contrary to the complainant's view, the Court found there was no doubt that the authentic copy – certified by the manager of Telecom-Control, and of which the original was signed by the chairman of the Commission – was a valid decree.

Regarding the significance of the Telecom-Control Commission's jurisdiction for which the legislator had established the Commission as an independent authority (tribunal) and regarding the importance of the questions raised in the proceedings, the Court stated that the Commission's method of conducting its proceedings amounted to arbitrariness. The Court overruled the decree insofar as it concerned the complainant.

Languages:

German.

Identification: AUT-1998-3-010

a) Austria / **b)** Constitutional Court / **c)** / **d)** 17.12.1998 / **e)** B 3028/97 / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights of 1950.
Sources of Constitutional Law – Techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.
General Principles – Public interest.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of conscience.
Fundamental Rights – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Butchering, kosher / Religious custom / Animals, cruelty, prevention / Animals, protection / Morals, public.

Headnotes:

Kosher butchering, a certain way of slaughtering animals (sheep and cattle) without anesthesia according to Jewish and Islamic ritual, is considered a religious custom both by legal doctrine and precedent. Religious customs are part of religious exercise which is included within the scope of Article 14 of the Basic Law of 21 December 1867, Article 63.2 of the Treaty of Saint Germain-en-Laye and Article 9.1 ECHR. Thus the prohibition of kosher butchering encroaches on these constitutionally guaranteed rights. According to Article 60 ECHR (now Article 53) only the limits established in Article 63.2 of the Treaty of St. Germain-en-Laye might justify such an intervention. Actions severely disturbing the living together of people are incompatible with the "public order" within the meaning of the above-mentioned Article. Kosher butchering is not regarded as such an action. Although today the prevention of cruelty to animals is widely recognised as an important public interest its value cannot exceed the right to free exercise of religion. "Public morals" signify just those general ideas of people regarding "correct" conduct of life which are explicitly protected by legal regulation. Kosher butchering is not within the ambit of "public morals" and cannot contradict them.

Summary:

The Law of the *Land* Vorarlberg on Prevention of Cruelty to Animals restricts the slaughtering of animals without anesthesia (Article 11) and lays down sanctions for infringements (Article 18). In accordance with this statute, a farmer was fined for having allowed sheep he had sold to Turkish nationals to be slaughtered according to the Islamic ritual on his farm. He filed a complaint with the Court alleging that the impugned administrative decree encroached on his rights due to the unconstitutionality of the law applied. The provisions in question were allegedly contrary to Article 14 of the Basic Law of 21 December 1867 granting to everyone full freedom of faith (religion) and conscience; Article 63.2 of the Treaty of St. Germain-en-Laye of 10 September 1919, according to which all inhabitants of Austria are entitled to exercise freely, whether in public or in private, any kind of faith, religion or confession unless their exercise is inconsistent with public order or public morals; Article 9.1 ECHR which grants everyone the right to freedom of thought, conscience and religion and to manifest his religion or belief in practice.

The Court followed the reasoning of the complaint to the point that statutes which actually prohibited kosher butchering would contradict the constitutionally guaranteed rights listed above. Yet the Court found that the law applied could be and had to be interpreted in conformity with the Constitution. As Article 11 of the Law on Prevention of Cruelty to Animals stipulates an exception to slaughtering under anesthesia, the fining authority had mistakenly interpreted the law in an unconstitutional manner. Therefore the Court overruled the impugned decree.

Languages:

German.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-1998-3-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 29.12.1998 / **e)** 03/15-5 / **f)** / **g)** to be published in *Azerbaijan* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rules of evidence.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right not to incriminate one-self.

Keywords of the alphabetical index:

Evidence, false / Testimony, refusal / Criminal procedure.

Headnotes:

No person can be made criminally responsible for refusing to testify against him or herself or his or her spouse, children, parents or siblings.

No person can be prosecuted for not informing the law enforcement bodies about the crime committed by any relative mentioned in Article 66 of the Constitution.

A person who has knowingly provided false evidence can be held criminally responsible under Article 179 of the Criminal Code.

Summary:

The Prosecutor's Office asked the Constitutional Court to interpret Articles 67 and 70 of the Criminal Procedure Code and Articles 179 and 181 of the Criminal Code as to their conformity with Article 66 of the Constitution.

Articles 67 and 70 of the Criminal Procedure Code state that "any person who knows any circumstances regarding a case can be called to testify and he/she is obliged to give evidence he/she possesses and to testify

as to the personality of the accused" and "the witness and the victim bear responsibility under Article 181 of the Criminal Code for refusal to testify and responsibility under Article 179 of the Criminal Code for knowingly providing false evidence".

Meanwhile according to Article 66 of the Constitution, nobody can be forced to testify against him or herself or his or her spouse, children, parents or siblings.

The Constitutional Court decided that Articles 67 and 70 of the Criminal Procedure Code and Articles 179, 181, 182 and 186 of Criminal Code should be applied in conformity with Article 66 of the Constitution.

Languages:

Azerbaijani (official version), English and Russian (translation by the Court).

Belgium
Court of Arbitration

Statistical data

1 September 1998 - 31 December 1998

- 140 judgments
- 197 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 312 new cases
- Average length of proceedings: 300 days
- 53 judgments concerning applications to set aside
- 77 judgments concerning preliminary points of law
- 9 judgments concerning an application for suspension

- 4 preliminary decisions (re-opening of the hearing)
- out of 140 judgments, 19 were delivered in application of preliminary proceedings; 3 judgments concerned mixed proceedings (actions for annulment / suspension / preliminary points of law)

Important decisions

Identification: BEL-1998-3-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.10.1998 / **e)** 104/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 01.12.1998 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Gender.
Fundamental Rights - Civil and political rights - Right to family life - Descent.

Keywords of the alphabetical index:

Paternity, establishment by the court / Lawful descent, the child's interest.

Headnotes:

Article 323 of the Civil Code, interpreted as allowing a biological father to submit an application for a paternity test without the mother (who was married to another man at the time of conception), the child or the legal guardian being able to oppose the application, whereas an

unmarried mother, her child or the legal guardian may oppose an application to establish paternity if it is against the child's interest, is contrary to the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution.

Summary:

The Court of Arbitration was faced with a preliminary question on a point of law from a court which had received an application for a paternity test from a biological father. The mother, who was already married to another man at the time of conception, did not deny this biological paternity but opposed the establishment of paternity by the court. The court noted that Article 322 of the Civil Code, which applies to cases where the mother is single, allows the guardian of a minor to oppose the establishment of lawful descent on the grounds that it is not in the child's interest. An application to establish paternity based on Article 323 of the Civil Code, which is intended to cover cases where the mother is married and which, according to the court, applied to the present case, did not, however, provide for the same protection. The court put the preliminary question before the Court of whether, in this case, there were not a violation of the principle of equality and non-discrimination embodied in Articles 10 and 11 of the Constitution.

The Court found that there was no admissible reason for such a distinction and that Article 323 of the Civil Code, insofar as it established this differential treatment, did in fact violate Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.

Identification: BEL-1998-3-009

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.10.1998 / **e)** 107/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.11.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the formal validity of enactments.
Sources of Constitutional Law – Categories – Written rules – Quasi-constitutional enactments.
Sources of Constitutional Law – Categories – Written rules – International Covenant on Civil and Political Rights of 1966.
Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
General Principles – Proportionality.
General Principles – Weighing of interests.
Institutions – Jurisdictional bodies – Organisation – Prosecutors / State counsel.
Institutions – Jurisdictional bodies – Organisation – Registry.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Employment – Public.
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 – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Public servants, status / Incompatibilities.

Headnotes:

The establishment of an incompatibility between being employed in the registries and secretariats of Public Prosecutor's Departments in ordinary courts and being elected to public office is not contrary to the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution.

Summary:

A number of staff members of registries and Public Prosecutor's Departments who were elected to municipal councils or (municipal) social welfare councils in local elections brought an application before the Court to set aside Article 353bis of the Judicial Code as replaced by Article 84 of the law of 17 February 1997 "amending certain provisions of the Judicial Code concerning the personnel of registries and Public Prosecutor's Departments", an article which extends the incompatibility between holding public office as an elected representative and being employed in the courts to members of the ordinary administrative staff of a court's registry or Public Prosecutor's Department.

In their first argument, the applicants complained of the fact that the requirement to consult with the trade union

had not been fulfilled when the law being challenged was being drafted. However, the Court was only empowered to assess the content of the law against which an appeal had been brought and not the way in which it had been drafted.

The applicants also pleaded an infringement of Articles 10 and 11 of the Constitution (the principle of equality and non-discrimination) read in conjunction with Article 8 of the Constitution (the exercise of political rights) and Article 25 of the International Covenant on Civil and Political Rights (the right to stand for election). According to the applicants, there was no proportional relation between the objective pursued by the challenged provision, which was to strengthen confidence in justice and the general established incompatibility, especially since the persons concerned were not members of the courts but of their administrative staff.

After assessing the fundamental right in issue (the right to stand for election) compared with the right to impartial and independent courts, the Court of Arbitration accepted that parliament had considered that in order to guarantee the impartial functioning of the justice system in the eyes of a public which may not be sufficiently informed of the way in which tasks were shared out in the courts, the incompatibilities should be extended to all those who work in the registries and the Public Prosecutor's Departments, even if it were only in an administrative capacity.

A third argument, in which the applicants complained that the personnel of court registries and Public Prosecutor's Department secretariats were being discriminated against compared with other public service personnel, was also dismissed by the Court as was a fourth argument, which complained of discrimination between those who were elected to public office and other people who held public office.

The Court declined to judge the last argument, in which the applicants complained of an infringement of a transitional legal provision of the Judicial Code, on the grounds that this provision was not among the legal rules that fell within the Court's responsibility.

Supplementary information:

A transitional regulation allows members of staff who have already been elected to public office to continue to hold that office until the next elections.

Languages:

French, Dutch, German.

Identification: BEL-1998-3-010

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 04.11.1998 / **e)** 110/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.11.1998 / **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 - Convention on the rights of the Child of 1989.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Economic, social and cultural rights - Freedom to teach.
Fundamental Rights - Economic, social and cultural rights - Right to be taught.

Keywords of the alphabetical index:

Education, public / Education, private / Pupils, enrolment, refusal.

Headnotes:

A legally binding provision which empowers the governing boards of state-subsidised private primary schools to refuse to enrol pupils on condition that the boards comply with certain criteria neither infringes the freedom of education nor contravenes a number of provisions of international conventions that the applicants claim to be connected with the freedom of education.

Summary:

When basic education was being reorganised, the Flemish Community, in the decree of 25 February 1997, fixed the general conditions concerning the ages of children receiving pre-school or primary education and the supplementary conditions of admission for a few specific forms of education, and made regulations allowing school

governing boards to refuse to enrol pupils who did not meet the aforesaid conditions. In the field of state-subsidised private education, however, school authorities are also free to reject pupils for other reasons on condition that they inform the parents concerned of the reasons for their decision in writing within four calendar days, and provided that any refusal to enrol a pupil has under no circumstances been made on the basis of criteria which are unacceptable or which compromise human dignity.

A number of pupils and parents of pupils attending State schools requested the Court of Arbitration to set aside this provision. They did not challenge the fact that the governing body of a state-subsidised private school could base its choice of the type of education it wished to provide on religious or philosophical beliefs, but they did consider that the general restriction mentioned above was much too vague and as such compromised their right to a free choice of schools, and other fundamental rights.

The Court accepted that the applicants had an interest in their appeal, even though the pupils attended State schools, since they still had the constitutional freedom to choose to attend a private school. The Court considered that the provision being challenged did not affect parents' freedom of choice as guaranteed by Article 24.1.2 of the Constitution and by Article 2 Protocol 1 ECHR, or Article 29.1.d of the UN Convention on the Rights of the Child read in conjunction with Article 24.1 of the Constitution.

The Court also dismissed the argument insofar as it pleaded an infringement of Article 24.1 of the Constitution, Articles 5.e, 5.v and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 10.a, b and c of the Convention on the Elimination of All Forms of Discrimination against Women and Article 2 of the Convention on the Rights of the Child, in that the contested provision did not sufficiently guarantee respect for fundamental rights and freedoms and the principle of non-discrimination. It held that any criteria that might infringe the fundamental rights and freedoms of pupils or be discriminatory had to be considered as unacceptable or as compromising human dignity and had, therefore, to be deemed to be contrary to the challenged provision. It was up to the court to assess each individual case as it arose. According to the Court of Arbitration, the legislative provision being challenged did not, in itself, contain any infringement of the higher legal standards referred to above; only the application of the provision could give rise, in certain circumstances, to a possible infringement.

The Court also allowed that there was no discrimination in the fact that it was possible in private schools, and not in State schools, to apply an admissions policy linked to a specific educational scheme, based on a religious or philosophical belief, that private schools had the right to offer under Article 24.1.1 of the Constitution.

The Court recognised that the provision being challenged did not specify the criteria on which a refusal to register a pupil could be based, but it came to the conclusion that the obligation to give reasons for a refusal and to inform the parents of those reasons within four calendar days following the refusal and the opportunity open to the parents of bringing an emergency appeal before the court were sufficient to remedy the uncertainty of the law pleaded by the applicants.

Supplementary information:

The texts of the constitutional and conventional provisions quoted in the headnotes appeared in the judgment, which was delivered and published in the three national languages (Dutch, French and German) (see CODICES - Full text).

Languages:

French, Dutch, German.

Identification: BEL-1998-3-011

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 18.11.1998 / **e)** 114/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.01.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - Rules issued by the executive.
General Principles - *Nullum crimen sine lege.*
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Fundamental Rights - Civil and political rights - Equality.

Keywords of the alphabetical index:

Drugs, difference in penalisation / Narcotics / Cannabis.

Headnotes:

The rule requiring that criminal offences and punishments shall be strictly defined by law, guaranteed by Article 12.2 of the Constitution, does not mean that parliament cannot leave it to the Crown authorities to determine for which harmful or addictive substances possession, trafficking or transformation, etc, is punishable. It does not fall under the Court's jurisdiction to assess the criminal policy of the Public Prosecutor.

Summary:

A number of people were prosecuted for selling and/or consuming cannabis as a group or for enabling others to consume the substance. The judge asked the Court of Arbitration to rule on whether the provisions on which the criminal proceedings were based (Article 2bis.1 of the law of 24 February 1921 on the trafficking of poisonous, soporific, narcotic, disinfectant or antiseptic substances (...), and Articles 1.15, 11 and 28 of the Royal Decree of 31 December 1930 on the trafficking of soporific and narcotic substances) were not contrary to the principles of equality and non-discrimination contained in Articles 10 and 11 of the Constitution.

The Court had no jurisdiction to rule on a Royal Decree, but rather to assess the constitutionality of the legislative provision that empowered the Crown to draw up a list soporific and narcotic substances and of other psychotropic substances that were likely to lead to addiction.

In the Court's view, it was not contrary to the rule requiring that criminal offences and punishments shall be strictly defined by law, as guaranteed by Article 12.2 of the Constitution, to delegate such a decision to the Crown, on condition that the authorisation was sufficiently specific and bore on the execution of measures of which the main lines had previously been laid down by Parliament. If the law clearly defined its purpose, the behaviour and nature of the substances in question and the penalties to be applied, it determined the essential components of the potential offence and therefore satisfied the rule that criminal offences and punishments must be strictly defined by law, contained in Article 12.2 of the Constitution. Since the challenged provision did not deprive any category of citizens of the guarantee contained in Article 12.2 of the Constitution, it did not infringe the principle of equality and non-discrimination embodied in Articles 10 and 11 of the Constitution read in conjunction with the provision in question.

The preliminary questions put to the Court also concerned the compatibility of the various provisions being challenged with the principle of equality, insofar as those provisions punished the different forms of conduct that were the object of the law and the decree without differentiating between them by not distinguishing between whether the accused was in possession of the substances for reasons of personal consumption or whether he or she intended to sell them; by not distinguishing between cannabis and the other substances described in Article 1 of the Royal Decree of 31 December 1930; by penalising cannabis as opposed to other equally harmful or addictive substances; and by allowing divergent policies to be applied regarding proceedings. In its reply, the Court noted that, firstly, the alleged differences concerned the choices made by the Crown and which, therefore, came under the jurisdiction of the State Council and other courts, and that, secondly, any differences in proceedings did not emanate from the legislative provision being challenged and that the Court was not empowered to judge the government's crime policy.

Supplementary information:

Article 12 of the Constitution provides that: "Individual liberty is guaranteed. No person may be prosecuted except in cases established by the law and in the form it prescribes. [...].

Languages:

French, Dutch, German.

Identification: BEL-1998-3-012

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 18.11.1998 / **e)** 118/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.12.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - Quasi-constitutional legislation.
Constitutional Justice - Procedure - Summary procedure.

Constitutional Justice - Procedure - Time-limits for instituting proceedings - Ordinary time-limit.

Keywords of the alphabetical index:

Proceedings, time-limit for introducing, departure from / Constitutional control of the institutional law of the Court.

Headnotes:

The Court rejects in preliminary proceedings, any application to set aside a law when that application has not been made within the six months following publication in the *Moniteur belge* of the contested law.

The Court is competent to examine the conformity of its own institutional law with those constitutional provisions whose conformity it monitors.

Summary:

An application to set aside a decision that was not brought within the relevant period allowed by the special law of 6 January 1989 on the period within which applications for decisions to be set aside must be brought before the Court of Arbitration, which is six months after publication of the law being challenged in the official gazette, the *Moniteur belge*, was declared to be clearly inadmissible by a restricted bench of the Court after it had read the applicant's written pleadings on the subject.

The Court rejected the argument that the period allowed was discriminatory in that it deprived citizens who were born more than six months after the law had been published of the opportunity of lodging an appeal: the period was justified in the preparatory work for the institutional law on the Court by the need to limit the period during which the future of a law remains uncertain considering the requirement for stability, which, in public law, is particularly important for the relationship between the authority concerned and individual citizens or between the various authorities involved.

Supplementary information:

In making this judgment, the Court implicitly but firmly declares itself empowered to monitor its own institutional law, passed by a special majority, as regards the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.

Identification: BEL-1998-3-013

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 03.12.1998 / **e)** 122/98 / **f)** / **g)** *Moniteur belge* (Official Gazette), 20.01.1999 / **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 - Access to courts.
Fundamental Rights - Civil and political rights - Right to private life.
Fundamental Rights - Civil and political rights - Right to family life.

Keywords of the alphabetical index:

Foster parents / Protection of young people.

Headnotes:

The right to respect for private and family life guaranteed under Article 22 of the Constitution in conjunction with Article 8 ECHR includes the right for each of the interested persons to be able to be joined to court proceedings which may have repercussions on their family life. The provisions referred to above guarantee that both parents and children have this right. It also applies to the relationship between a child and its foster parents. The Court also found that the right to family life is a civil right in the sense of Article 6 ECHR.

Summary:

The court which referred this case to the Court of Arbitration had heard an appeal brought by a mother against a decision by the juvenile court forbidding her to contact her daughter, who was placed in a foster family. The foster parents wished to be heard in this case but the Appeal Court had found that the law did not allow it. This court had therefore referred the preliminary question to the Court of Arbitration of whether Articles 10

and 11 (concerning the principle of equality and non-discrimination) had been violated insofar as, in these proceedings, the law made a distinction between a child's biological parents and foster parents, between those children brought up by their biological parents and those brought up by foster parents and insofar as foster parents were not joined to the proceedings and their request to be allowed to intercede in the proceedings was not accepted.

The Court confirmed that there was discrimination in the present case. In reaching its decision, the Court took account of Article 22 of the Constitution and Article 8 ECHR which both guarantee the right to respect for private and family life, and of Article 6 ECHR.

Supplementary information:

For a similar decision, see judgment no. 47/96 of 12 July 1996 (B.4 and B.5), published in the *Moniteur belge* of 14 August 1996. All judgments are published in this gazette and can be consulted at the following Internet address: http://moniteur.be.

Languages:

French, Dutch, German.

Identification: BEL-1998-3-014

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 16.12.1998 / **e)** 140/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
General Principles - Proportionality.
Fundamental Rights - General questions - Limits and restrictions.
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 - Rights of the defence.
Fundamental Rights - Civil and political rights - Right to private life.
Fundamental Rights - Civil and political rights - Inviolability of the home.

Keywords of the alphabetical index:

Animal laboratory / Search / Animals, protection / Veterinary surgeon.

Headnotes:

The legal possibility open to veterinary inspectors to enter laboratories where live animals are kept or used without first obtaining a warrant may indeed infringe certain fundamental rights (the right to a defence, the inviolability of a person's residence and the right to respect for private life), but was nevertheless justified by the need for the special monitoring of premises where animals ran a particular risk of being ill-treated, given the legal guarantee that such monitoring was entrusted to persons with specific powers and bound by specific professional ethics.

Summary:

A number of people were accused of breaking the law of 14 August 1986 on the protection and welfare of animals. These persons challenged the lawfulness of the proceedings on the grounds that their laboratory had been searched without a warrant first being obtained from the investigating judge. As such a warrant was normally required before premises could be searched, the criminal court brought the preliminary question before the Court of Arbitration of whether the search were not contrary to the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution, possibly in conjunction with Article 15 of the Constitution (which guarantees the inviolability of a person's residence) and Articles 6 ECHR (the right to a defence and to be heard by an independent and impartial tribunal), 8.1 ECHR (the right to respect for private life) and 14 ECHR (non-discrimination).

The Court, which in monitoring the principle of equality also monitors the proportional application of that principle, ruled that in the present case, the fundamental rights of persons who kept animals in laboratories had not been disproportionately affected, considering the need for the special monitoring of laboratories and the observation that monitoring was entrusted to veterinary inspectors vested with specific powers and bound by specific professional ethics.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 September 1998 - 31 December 1998.

Bulgaria
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

Number of decisions: 12

Important decisions

Identification: BUL-1998-3-005

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 25.09.1998 / **e)** 23/98 / **f)** / **g)** *Darzhaven Vestnik* (Official Gazette), no. 113 of 30.09.1998 / **h).**

Keywords of the systematic thesaurus:

General Principles - Separation of powers.
Institutions - Head of State - Powers.
Institutions - Armed forces and police forces - Army.

Keywords of the alphabetical index:

National Security, information / National Security Council / Armed forces, peacetime, Commander in chief.

Headnotes:

The President of the Republic is the Commander in Chief of the Armed Forces of the Republic of Bulgaria in time of peace and in wartime. He is entitled to demand all information concerning national security from all government institutions. The President is free to express opinions and give recommendations to all Government institutions and to issue edicts that are related to his constitutional powers with regard to defence and national security all the time and not just when an immediate threat arises.

Summary:

Fifty Members of Parliament approached the Constitutional Court asking for a binding interpretation of Article 100.1 and 100.3 of the Constitution with regard to the following questions:

1. Is the President of the Republic the Commander in Chief of the Armed Forces only in wartime or is he also the Commander in Chief in time of peace?

2. Is the President while presiding over the Consultative National Security Council entitled to receive all the information that relates to national security and that is supplied by government bodies and institutions and can he express opinions and give recommendations to the executive, the legislature and the judiciary on the basis of this information and on the basis of decisions of the Consultative Council whenever there is an immediate threat to national security?

The Constitutional Court ruled as follows:

In accordance with the meaning of Article 100.1 and 100.2 of the Constitution the President is the Commander in Chief of the Armed Forces of the Republic of Bulgaria both in wartime and in time of peace.

As the Head of State, who embodies the unity of the nation, as Commander in Chief of the Armed Forces and presiding over the Consultative National Security Council, the President is free to demand that all Government institutions and other persons provide all information related to the country's defence and national security.

The President is free to express opinions and give recommendations to all Government institutions and to issue decrees in discharge of his constitutional functions, including the exercise of powers that are delegated to him by the Constitution with regard to the country's defence and national security, at all times and not just when an immediate threat arises.

Languages:

Bulgarian.

Canada
Supreme Court

All decisions reported are available via Internet at the address http://www.droit.umontreal.ca/doc/csc-scc/en/index/html.

Important decisions

Identification: CAN-1998-3-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 20.08.1998 / **e)** 25506 / **f)** Reference re Secession of Quebec / **g)** *Canada Supreme Court Reports*, [1998] 2 S.C.R. 217 / **h)** http://www.droit.umontreal.ca/doc/csc-scc/en/index/html; 228 *National Reporter* 203; 161 *Dominion Law Reports* (4th) 385; 51 *Canadian Rights Reporter* (2d) 1.

Keywords of the systematic thesaurus:

General Principles - Federal State.
General Principles - Territorial principles - Indivisibility of the territory.
Institutions - Federalism and regionalism - Distribution of powers.
Fundamental Rights - Collective rights - Right to self-determination.

Keywords of the alphabetical index:

Constitution, democratic change / Secession of province, unilateral / Secession, democratic legitimacy / People / Secession *de facto*.

Headnotes:

The province of Quebec does not have a right to secede unilaterally from Canada under either the Canadian Constitution or international law.

Summary:

Pursuant to Section 53 of the Supreme Court Act, the Governor in Council referred certain questions to the Supreme Court:

1. whether, under the Constitution, the legislature or government of Quebec can effect the secession of Quebec from Canada unilaterally; and
2. whether international law gives the legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally.

Since Confederation, the people of the provinces and territories of Canada have created close ties of interdependence based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province under the Constitution could not be achieved unilaterally, that is, without principled negotiation with other participants in the federation within the existing constitutional framework. The democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in the federation would have to recognise. Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. The continued existence and operation of the Canadian constitutional order could not, however, be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance

with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community. The obligations identified by the Court are binding obligations under the Constitution. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognised by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, neither the legislature nor the government of Quebec enjoys a right at international law to effect the secession of Quebec from Canada unilaterally.

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a *de facto* secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to the conduct of Quebec and Canada, amongst other facts, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution or at international law.

Languages:

English, French.

Identification: CAN-1998-3-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 01.10.1998 / **e)** 25852 / **f)** R. v. Cook / **g)** *Canada Supreme Court Reports*, [1998] 2 S.C.R. 597 / **h)** 230 *National Reporter* 83; 164 *Dominion Law Reports* (4th) 1; 55 *Canadian Rights Reporter* (2d) 189; 128 *Canadian Criminal Cases* (3d) 1; 19 *Criminal Reports* (5th) 1.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - Other international sources.
Fundamental Rights - General questions - Entitlement to rights.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to counsel.

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Extraterritorial application.

Headnotes:

The Canadian Charter of Rights and Freedoms applies to the taking of an accused's statement by Canadian police officers in the United States of America. In connection with their investigation of an offence committed in Canada for a criminal prosecution to take place in this country.

Summary:

The accused was arrested by U.S. authorities in that country pursuant to a warrant issued in connection with a Canadian extradition request following a murder

committed in Canada. The accused was read his Miranda rights upon arrest and said he understood them. The Canadian detectives who later interviewed the accused in a U.S. prison informed him of his right to a lawyer in a confusing and defective manner subsequent to asking the accused a series of background questions. The accused gave a statement in which he denied having committed the murder. At his trial in Canada, the Crown sought a ruling which would have permitted it to use the statement to impeach the accused's credibility. On a *voir dire*, the defence alleged that the statement was obtained in breach of the accused's right to counsel guaranteed by Section 10.b of the Canadian Charter of Rights and Freedoms and sought its exclusion under Section 24.2 of the Charter. The trial judge found that the statement was admissible, notwithstanding the Charter breach, for the limited purpose of impeaching the accused's credibility in cross-examination. The accused was convicted and his appeal to the Court of Appeal was dismissed. The Supreme Court allowed the accused's appeal and ordered a new trial.

The majority, a group of five judges, indicated that notwithstanding the general prohibition in international law against the extraterritorial application of domestic laws, the Charter is not absolutely restricted in its application to Canadian territory. It applies on foreign territory in circumstances where the impugned act falls within the scope of Section 32.1 of the Charter on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action and where the application of Charter standards will not conflict with the concurrent territorial jurisdiction of the foreign state. Here, the Charter applies to the actions of the Canadian detectives in the U.S. First, since the interrogation was conducted by Canadian detectives in accordance with their powers of investigation which are derived from Canadian law, the impugned action falls within the purview of Section 32.1. Second, applying the Charter to the Canadian detectives' actions in these circumstances does not result in an interference with the territorial jurisdiction of the foreign state. It is reasonable both to expect the Canadian officers to comply with Charter standards and to permit the accused, who is being made to adhere to Canadian criminal law and procedure, to claim Canadian constitutional rights relating to the interrogation conducted by the Canadian officers abroad. However, the application of the Charter in this case will not ultimately confer Charter rights on every person in the world who is in some respect implicated in the exercise of Canadian governmental authority abroad. The holding is an exception to the general rule in public international law of territorial limits upon a state's exercise of jurisdiction, and arises on the basis of the very particular facts. With respect to the admissibility of the evidence, the breach of the accused's right to counsel was very serious. The police misled him with regard to his Charter rights. The admission of the accused's statement in this case would bring the administration of justice into disrepute and should be excluded under Section 24.2 of the Charter.

Two concurring judges found that there is no conflict between an interpretation of Section 32.1 of the Charter which favours the application of the Charter to the activities of Canadian officials conducting an investigation abroad and international law principles of territorial jurisdiction. Section 32.1 defines the application of the Charter according to who acts, not where they act. It applies the Charter to those persons exercising legislative authority or to those who are part of the executive government. On its face, no mention is made of a territorial limitation. Section 32.1 dictates that the Charter may not be applied to any matter within the authority of a foreign government, or to foreign personnel. The key issue in cases of cooperation between Canadian officials and foreign officials exercising their statutory powers is determining who was in control of the specific feature of the investigation which is alleged to constitute the Charter breach. This inquiry involves weighing the relative roles of the Canadian officials and of the foreign officials. When a Canadian officer is invited by the foreign official to exercise some power during an investigation, whether Section 32.1 is engaged will depend on the extent to which the exercise of the power is supervised by the foreign official. If, in weighing these factors, it is found that the foreign authority was responsible for the specific circumstances leading to the Charter breach, then those activities are not subject to the Charter, notwithstanding the participation of the Canadian officials in the cooperative investigation. In cases in which an accused seeks to invoke Section 24.2 of the Charter to exclude evidence in a Canadian trial, the central issue must be the relative importance of the rules played by the Canadian and foreign officials in obtaining the evidence. If, as in this case, the Canadian officials were primarily responsible for obtaining the evidence in a manner which violated the Charter, then the Charter will apply to them and to the evidence obtained by them.

Two dissenting judges noted that a person invoking a Charter right must first show that he held that right. For the Charter to apply beyond Canada's territorial boundaries, (1) the action alleged to have violated the Charter must have been carried out by one of the governmental actors enumerated in Section 32 of the Charter; and (2) if there is cooperation between Canadian and foreign officials on foreign soil, that action will not trigger Charter application even if the action is attributable to a government listed in Section 32. Whether an investigation is cooperative depends on whether Canadian officials have legal authority in the place where the actions

alleged to have infringed the Charter took place. An investigation on soil under foreign sovereignty takes place under the authority of the foreign state, so Section 32 is not triggered. The accused in this case did not benefit from the protections of Section 10.b of the Charter because the Canadian police were acting under U.S. legal sovereignty. With respect to the accused's statement, the trial judge properly instructed the jury on the limited use that could be made of it.

Languages:

English, French (translation by the Court).

Identification: CAN-1998-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 26.11.1998 / **e)** 26042 / **f)** R. v. M. (M.R.) / **g)** *Canada Supreme Court Reports*, [1998] 3 S.C.R. / **h)** 166 *Dominion Law Reports* (4th) 261.

Keywords of the systematic thesaurus:

General Principles – Reasonableness.
Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial.
Fundamental Rights – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Seizure / School / Search of students by school authorities / Drugs, trafficking.

Headnotes:

A high school student suspected of drug dealing was searched by the vice-principal at school in the presence of a police officer. The search did not infringe the student's constitutional guarantee against unreasonable search and seizure.

Summary:

A junior high school vice-principal was given reasonably reliable information from students that the accused, a student, was intending to sell drugs at a school function on school property. He asked the accused to come to his office, where he was searched. A plain-clothed police officer, called by the vice-principal pursuant to school policy, was present but took no active part in the search. The vice-principal seized a bag of marijuana and gave it to the officer, who arrested the accused for possession of a narcotic and read him his rights. The trial judge found that the vice-principal was acting as an agent of the police; he held that the search violated the accused's rights under Section 8 of the Canadian Charter of Rights and Freedoms, excluded the evidence found in the search and dismissed the charge. The Court of Appeal allowed the Crown's appeal and ordered a new trial. The Supreme Court dismissed the accused's appeal.

The majority of the Court noted that to establish a violation of Section 8 of the Charter, the accused must first establish a reasonable expectation of privacy with respect to the relevant place. Given that the search was of the accused's person, the existence of a subjective expectation of privacy and the objective reasonableness of that expectation are important. A reasonable expectation of privacy, however, may be diminished in some circumstances. It is lower for a student attending school than it would be in other circumstances because students know that teachers and school authorities are responsible for providing a safe school environment and maintaining order and discipline in the school. The possession of illicit drugs and dangerous weapons at school challenges the ability of school officials to fulfil their responsibility. Current conditions require that teachers and school administrators be provided with the flexibility needed to deal with discipline problems in schools and to be able to act quickly and effectively. One of the ways in which school authorities may be required to react reasonably is by conducting searches of students and seizing prohibited items. Where the criminal law is involved, evidence found by a teacher or principal should not be excluded because the search would have been unreasonable if conducted by the police. The reduced expectation of privacy of students attending school or a school function coupled with the need to protect them and to provide a positive atmosphere for learning clearly indicate that a more lenient and flexible approach should be taken to searches conducted by teachers and principals than would apply to searches conducted by the police. The approach to be taken in considering searches by teachers may be summarised in this manner: (1) a warrant is not essential in order to conduct a search of a student by a school authority; (2) the school authority must have reasonable grounds to believe that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach; and (3) school authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Courts should recognise the preferred position of school authorities to determine if reasonable grounds existed for the search. Further, the

search conducted by school authorities must be reasonable, authorised by statute, and appropriate in light of the circumstances presented and the nature of the breach of school regulations. The permissible extent of the search will vary with the gravity of the infraction that is suspected. The reasonableness of a search by teachers or principals in response to information received must be reviewed and considered in the context of all the circumstances presented including their responsibility for students' safety. The circumstances to be considered should also include the age and gender of the student. In the case at bar, the mere fact that there was cooperation between the vice-principal and the police and that a police officer was present during the search was not sufficient to suggest that the vice-principal was acting as an agent of the police. The test applicable to searches conducted by teachers therefore applied. The search was by inference authorised by the provisions of the provincial legislation on education. The vice-principal had reasonable grounds to believe that the accused was in breach of school regulations and that a search would reveal evidence of that breach. The search was conducted in a reasonable and sensitive manner. Taking into account all the circumstances, the search was not unreasonable and did not violate the accused's Section 8 rights. This case dealt only with a search of students in an elementary or secondary school. No consideration has been given to searches made in a college or university setting.

The dissenting judge found that had the vice-principal been acting as vice-principal, he could have lawfully conducted the search because of the modified standard of reasonableness governing searches by school officials. However, because of the school policy requiring the school authorities to contact the police when a student was found in possession of drugs, the vice-principal was instead acting as a *de facto* agent of the police. The search as conducted therefore required that the accused be given his Charter protections. Further, the circumstances of the search breached Section 8 as they failed to meet the standards necessary for a valid search. The vice-principal, as a police agent, did not investigate to corroborate the information that he received and acted solely on the word of the informants. The admission of the evidence obtained in the search would adversely affect trial fairness and accordingly the evidence should be excluded under Section 24.2 of the Charter.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-1998-3-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.05.1998 / **e)** U-I-283/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 69/98, 1612-1614 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Vested rights.
Fundamental Rights - Economic, social and cultural rights - Right to social security.

Keywords of the alphabetical index:

Pension, adjustment.

Headnotes:

The legislator is constitutionally authorised to change laws and to introduce a completely new system of retirement and invalidity pensions. However, the modification of pensions and other payments from retirement and invalidity insurance funds (introduced by the law passed in February 1997) altered pensions obtained under valid retirement laws which covered all rights and duties of pensioners and which contained other principles for that modification. Since the modification of pensions on the basis of statistically expressed average costs of living in the previous six months deprived pensioners of the right to have their pensions altered in accordance with the wages and salaries of employed persons, that modification was unconstitutional.

Summary:

The Court's decision was passed in May 1998 when laws regulating retirement systems had still not been adjusted to the 1990 Constitution, although the Constitutional Act for the Implementation of the Constitution of the Republic of Croatia set 31 December 1997 as a deadline for that adjustment. The disputed law (disputed by pensioners individually or organised in associations and syndicates) modified retirement and invalidity pensions in a way which diminished the amounts to which pensioners were entitled under all valid laws regulating pensions. In addition, the discrepancy between pensions and salaries, as well as

between pensions of persons who became pensioners at different periods of time, was increased by Government decrees which in previous years had limited the total amount of resources to be paid as pensions. Modification of pensions by the disputed law was based on these limited amounts which were introduced as temporary and which thus became permanent.

Five provisions of the Law on Modification of Pensions and Other Payments from Retirement and Invalidity Insurance Funds and on Management of these Funds (published in *Narodne novine*, 20/1997) were repealed.

Cross-references:

In its decision of the same number, passed on 16 December 1998, (published in *Narodne novine*, 161/1998, 3912-3913) the Court warned the retirement and invalidity pensions funds (of workers, tradesmen and agricultural workers) that on the grounds of the above decision, passed on 12 May 1998, the rights which the pensioners had acquired on the basis of the Law on Modification of Pensions did not cease and are to be paid without delay. The sense of the decision was not to prevent modification but to have it determined in a different way.

Languages:

Croatian.

Identification: CRO-1998-3-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.05.1998 / **e)** U-I-952/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 77/98, 1772-1773 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Civil and political rights - Electoral rights - Right to be elected.
Fundamental Rights - Economic, social and cultural rights - Right of access to the public service.

Keywords of the alphabetical index:

Incompatibilities, local government.

Headnotes:

The constitutional principle guaranteeing the right of every citizen to take part, under equal conditions, in the conduct of public affairs and to have access to public service (Article 44 of the Constitution) is not violated by laws which introduce incompatibility between positions in different branches of the legislative, executive and judicial powers and also between positions of employees in bodies and services of local self-government and administration units and positions of members of a representative body of that unit.

Summary:

The Court did not accept the proposal to review the constitutionality of the Law on the Election of Members of Representative Bodies of Local Self-Government and Administration Units, holding that apart from the incompatibilities prescribed by the Constitution (incompatibilities in cases of the President of the Republic, ordinary judges and judges of the Constitutional Court) there are incompatibilities which may be introduced by laws.

Languages:

Croatian.

Identification: CRO-1998-3-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.06.1998 / **e)** U-III-219/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 84/98, 1883-1886 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Relations between the State and bodies of a religious or ideological nature.
Institutions - Jurisdictional bodies - Jurisdiction.
Fundamental Rights - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Religious institutions / Separation of Church and State / Religious objects / Cultural heritage.

Headnotes:

Article 41 of the Constitution according to which religious communities shall be separate from the State does not exclude the competence of State courts in disputes concerning religious objects which have the status of protected objects of cultural heritage.

Summary:

The case was submitted by the former president of the Jewish community in Dubrovnik against decisions of courts in his dispute with that municipality. During the applicant's termin office, religious objects from Dubrovnik synagogue were lent to a New York museum for exhibition and restoration but after the agreed time of lending the applicant refused to return them to Dubrovnik. The applicant was sued for return of the objects by the Jewish community and lost the case before municipal, district and the Supreme Court. He then claimed before the Constitutional Court a violation of the constitutional principle of separation of religious communities from the State, stating that the Jewish community is only and exclusively a religious community which is not subject to State courts. He also claimed a violation of the principles of equality and legality.

The Constitutional Court found that the religious objects in question are regulated under laws which deal with the use and protection of cultural monuments and also that the Jewish community is not only a religious but also an ethnic community of Jews who reside on the territory of the municipality. The action was denied.

Languages:

Croatian.

Identification: CRO-1998-3-014

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.06.1998 / **e)** U-I-408/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 98/98, 2438-2440 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Right to property - Other limitations.
Fundamental Rights - Economic, social and cultural rights - Right to housing.

Keywords of the alphabetical index:

Tenancy rights / Apartment, rent, determination, limits.

Headnotes:

The constitutionally protected right of ownership (Article 48 of the Constitution) is not violated by provisions of the Law on Renting of Apartments which have turned tenancy rights of previous tenants into a contractual relationship but prescribed at the same time a legally protected rental fee, the obligations of each contractual party concerning maintenance and repairs of the apartments, and the right of previous tenants and their families to keep the status of tenants.

Summary:

Owners of apartments disputed the Law on Renting of Apartments claiming the unconstitutionality of restrictions of their ownership rights in matters of status of tenants and their families. They also claimed that they themselves should determine the rent, that the legally protected rent is not high enough to cover the maintenance of apartments and that there is a possibility that the privately owned apartment may be sublet by tenants.

Languages:

Croatian.

Identification: CRO-1998-3-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 15.07.1998 / **e)** U-I-920/1995, U-I-950/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 98/98, 2432-2434 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Economic, social and cultural rights - Right to strike.

Keywords of the alphabetical index:

Strike, restrictions in public services / Railways, restriction on strike.

Headnotes:

The Constitution states that the right to strike may be restricted in the armed forces, the police, State administration and public services specified by law (Article 60 of the Constitution), the law being an instrument for restrictions of the constitutional right. Thus it is the law, and not a minister's decision, which has to state what are the vital interests of the State, and of other legal persons or citizens who reside in a certain area. The law must also determine which other subjects, apart from the minister, have to take part in making decisions concerning a strike (such as employers and trade unions) and also what is the legal remedy against a minister's decision. Restrictions by law should not lead to the prohibition of the right to strike.

Summary:

The disputed provision gave authority to the Minister of Transport to determine in the case of a strike which trains must keep running, which parts of railway-tracks have to be maintained and which workers must continue work during the strike in order to protect vital interest of State and of other legal persons or of citizens who reside in certain area. The consequence of disobedience was the termination of the contract of employment.

A provision of the Law on Croatian Railroads was repealed.

Cross-references:

The same reasoning was followed in Decisions nos. U-I-262/1998 and U-I-322/1998 by which a provision of the Law establishing a Croatian Post and Telecommunications Service was repealed. The decision was also passed on 15 July 1998, and published in *Narodne novine*, 98/1998, 2434-2437.

Languages:

Croatian.

Identification: CRO-1998-3-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.10.1998 / **e)** U-VII-833/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 133/98, 3441 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Elections.
Fundamental Rights - Civil and political rights - Electoral rights.

Keywords of the alphabetical index:

Elections, observers, non-governmental organisations.

Headnotes:

The concept of observers in election proceedings is to be interpreted widely.

Summary:

Political parties and groups of electors which have nominated candidates as members of the representative body of a local self-government unit may appoint observers to monitor the work of the bodies in charge of the conduct of the elections. This provision of the Law on the Elections [by mandatory directives of the Electoral Commission] of the Republic of Croatia was interpreted in a way that it is to be applied to foreign observers. The Court held that non-governmental organisations should be given the same treatment.

Languages:

Croatian.

Identification: CRO-1998-3-017

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 02.11.1998 / **e)** U-III-601/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 149/98, 3660-3661 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Right to property - Expropriation.

Keywords of the alphabetical index:

Ownership / Expropriation, purpose.

Headnotes:

The purpose of expropriation is to be strictly retained and must not be changed subsequently.

Summary:

A constitutional action was submitted by the previous owners of a house which had been expropriated and pulled down. The purpose of expropriation had been defined as the construction of cross-roads to which the house had been an impediment for traffic visibility. Subsequently however, a new house was built on the piece of land on which the house had existed (a shop and a restaurant). The owners of the previous house claimed a violation of their property rights, stressing in particular that the purpose of expropriation had not been fulfilled, and demanded annulment of the acts of expropriation of their house. Their claim was denied by the Administrative Court which held that partial construction of cross-roads had been accomplished and thus the purpose of expropriation had been partially achieved.

The action was accepted and all the acts concerning the expropriation were repealed.

Languages:

Croatian.

Identification: CRO-1998-3-018

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.11.1998 / **e)** U-I-222/1995 / **f)** / **g)** *Narodne novine* (Official Gazette), 150/98, 3664-3665 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Health protection, scope / Insurance fund, contribution.

Headnotes:

Narrowing the protection of the health of employed persons and members of their families to cases of emergencies where their employer did not pay due contributions to health insurance funds violates the constitutional right to health protection (Article 58 of the Constitution).

Summary:

In dispute were provisions of the Law on Health Insurance which denied employed persons the right to all forms of health protection, except urgent medical help, where the patient's contributions to medical insurance funds had not been paid. The Court held that since the payment of these contributions is the obligation of employers, the fact that the employer did not fulfill that obligation may not deprive employees of their right to all forms of health protection prescribed by law, which include primary health protection, treatment by specialists and hospital care.

Two provisions of the Law were repealed.

Languages:

Croatian.

Identification: CRO-1998-3-019

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 02.12.1998 / **e)** U-II-441/1995, U-II-624/1995, U-II-831/1995, U-II-345/1996, U-II-444/1996, U-II-1011/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 160/98, 3882-3883 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Pension, determination / Social security funds, contributions.

Headnotes:

The amount of a pension is not to be determined by the number of dependents of a retired person and by his/her tax exemptions but should correspond to a person's contributions to social security funds.

Summary:

According to provisions (valid since January 1994) of the amended Statute of the Republic on the Retirement Fund and Invalidity Insurance of Workers, pensions were calculated on the basis of net earnings, the result being that insured persons who earned the same wages and salaries, and paid the same contributions to the Fund, got different amounts of pensions, due to the fact that persons with dependents were privileged in deductions from the taxable income.

The disputed provisions were repealed.

Languages:

Croatian.

Identification: CRO-1998-3-020

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 02.12.1998 / **e)** U-III-1162/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 156/98, 3795-3797 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Parties - *Locus standi.*
General Principles - Proportionality.
Fundamental Rights - Civil and political rights - Individual liberty - Deprivation of liberty - Detention pending trial.

Keywords of the alphabetical index:

Criminal procedure / Detention, reasons / Crime against official duty / Dismissal from office.

Headnotes:

Constitutional action concerning a violation of constitutional rights during detention is permissible.

When deciding on measures to secure the presence of an accused person, the court is not to apply a more strict measure if the same aim can be achieved by a less coercive measure.

The reasons for extending detention have to increase with its duration.

Summary:

Contrary to its previous position, according to which a violation of constitutional rights during detention could only be claimed and decided upon after the final decision in the criminal procedure, the Constitutional Court held that the effective protection of liberty, dignity and rights of detained persons requires constitutional protection during detention itself.

The crime of which the claimant was accused was a crime against official duty, which can be committed only by an employed person. Since the claimant's labour contract had been terminated, there was no danger that

he would commit the same crime. The abstract possibility that he could find another job was not a sufficient reason to prolong the detention.

The constitutional action in the case was accepted.

Cross-references:

The decision by which a constitutional action concerning protection of rights during detention was not accepted is case U-III-687/1998; it was passed on 8 December 1998, and published in *Narodne novine*, 159/1998, 3872-3874.

Languages:

Croatian.

Identification: CRO-1998-3-021

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 16.12.1998 / **e)** U-III-532/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 1/99, 18-19 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Democracy.
General Principles - Territorial principles.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Freedom of association.
Fundamental Rights - Civil and political rights - Right to participate in political activity.

Keywords of the alphabetical index:

Political party, registration, refusal.

Headnotes:

The constitutional right to freedom of association (Article 43 of the Constitution) is not violated by refusing registration of a political party which threatens the democratic constitutional order, independence, unity and territorial integrity of the Republic.

Summary:

The president of "The New Croatian Right" submitted a constitutional action after the Ministry of Administration refused to register it as a political party. The refusal was confirmed by the decision of the Administrative Court. The Law of Political Parties states that the Ministry of Administration may refuse registration of a party after reviewing its programme. The programme in this case contained a presentation of Croatian boundaries that included parts of Bosnia and Herzegovina and FR Yugoslavia. It declared as its party's aims and activities on these territories, which it described as "Croatian territories under Serbian occupation": "general destabilisation", "diversions", "subversions", assassinations", "devastations" and "conflicts".

The constitutional action was refused.

Languages:

Croatian.

Cyprus
Supreme Court

Summaries of important decisions of the reference period 1 September 1998 - 31 December 1998 will be published in the next edition, *Bulletin* 1999/1.

Czech Republic
Constitutional Court

Important decisions

Identification: CZE-1998-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 03.09.1998 / **e)** IV. ÚS 13/98 / **f)** Equality of Legal and Natural Persons in Court Proceedings / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Historical interpretation.
Fundamental Rights - General questions - Entitlement to rights - Legal persons - Private law.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Equality of arms.

Keywords of the alphabetical index:

Procedural rights, equality of legal persons / Court fees, exemption.

Headnotes:

The principle of the equality of parties is a cardinal principle of procedural fairness. It is enshrined in Article 37.3 of the Charter of Fundamental Rights and Basic Freedoms and in Article 96.1 of the Constitution and also infused into a number of provisions of the procedural statutes. Section 18 of the Civil Procedure Code explicitly provides for the equality of parties to proceedings, which results in a duty on the courts to ensure that parties enjoy the same, that is, equivalent opportunities to assert their rights. Therefore, if the provision concerning exemption from court fees is worded generally as allowing all parties to request it, this must be interpreted in light of the principle of equality as applying also to legal persons.

Summary:

In a proceeding before the ordinary courts, the complainant, a legal person, requested exemption from court fees on the basis of § 138 of the Civil Procedure Code, which authorises the chairman of the court senate

to grant such an exemption if justified by the party's financial situation. At both the trial and appellate level, the senate chairmen denied the complainant's request for an exemption, reasoning that the granting of such an exemption to a legal person is conceptually excluded, since the financial situation of a legal person cannot be judged from the perspective of its business relations and it would be difficult to define criteria for ascertaining the property relations of legal persons. In addition, it would be burdensome to examine the financial situation of individual legal persons already at the beginning of proceedings. Finally, by means of an historical interpretation of the provisions concerning exemptions, the courts decided that they applied only to natural persons.

The Constitutional Court granted the constitutional complaint, finding a violation of the complainant's fundamental right to equality in court proceedings as guaranteed by Article 37.3 of the Charter of Fundamental Rights and Basic Freedoms ("All parties to such proceedings are equal") and Article 96.1 of the Constitution ("All parties to proceedings have equal rights before the court"). The fact that it may be cumbersome or even costly to ascertain the financial situation of legal persons is no reason, in and of itself, to rule out, in advance and without more, the application of § 138 to such parties to a proceeding. It is the job of ordinary courts in their case decisions to define the criteria concerning financial situations on which it will base its decisions when applying the provision on exemption from court fees.

Languages:

Czech.

Identification: CZE-1998-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 22.09.1998 / **e)** Pl. ÚS 1/98 / **f)** The Principle of Equality in the Area of Restitution Policy / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Rule of law.
General Principles - Proportionality.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction.
Fundamental Rights - Civil and political rights - Right to property - Privatisation.

Keywords of the alphabetical index:

Restitution in relation to privatisation / Compensation.

Headnotes:

In view of the fact that the communist regime suppressed civil and human rights over a long period, the moral condemnation of the "old regime" may not be joined with an absolute elimination of, and full compensation for, all injustices caused in that period. Both for the State and for society, that would be a task "*ultra vires*" - beyond their powers. The modern State based on the rule of law is not founded on the principle "*fiat iustitia, pereat mundus*". It may be generally stated that the principle of the State based on the rule of law demands an assessment of the proportionality of the scale and range of particular State measures in relation to the degree of urgency which leads the State to such interventions. Hence, the policy of restitution of property was based on the principle not of removing all injustices which occurred but of mitigating them. This policy must not lead to interventions in private law relations that would do further injustices.

Summary:

Certain claimants to restitution became entitled to a restitution claim only three years after the original Restitution Act was adopted, as a result of the Parliament adopting an amendment to that act to widen the circle of entitled persons. Considering the passage of a considerable period of time since the adoption of the original Act and in order not to cause uncertainty in the field of privatisation, the amending Act provided, in addition, that the claimant was only entitled to compensation and not to the return of the actual property if, prior to the entry into effect of the amending act, that property had been included in a privatisation project or a decision on its privatisation had been taken.

As a consequence of this provision, the claimants' requests for restitution were denied by an ordinary court. They submitted a constitutional complaint against the decision and, in conjunction therewith, submitted a petition proposing the annulment of the amending act, which they asserted violated the principle of equality. The Court rejected this petition and upheld the constitutionality of the amending Act.

The Court pointed out that the property covered by the amending Act had already been able to be freely disposed of, so that there was concern when adopting the amending Act that further property injustices were not committed against those who took such property through privatisation or others who had legally acquired it since that time. Consequently, the claimant was not entitled to receive back the actual property but only financial compensation.

Supplementary information:

Two judges delivered dissenting judgments in this case.

Languages:

Czech.

Identification: CZE-1998-3-014

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 10.11.1998 / **e)** IV. ÚS 358/98 / **f)** Unnecessary Delay in the Consideration of a Person's Legal Case / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Determination of effects by the court.
Institutions - Jurisdictional bodies - Organisation.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Trial within reasonable time.

Keywords of the alphabetical index:

Court, overburdening / Court, inactivity.

Headnotes:

It is the duty of the State to organise its judiciary in such a way that the principles of the judiciary enshrined in the Charter of Fundamental Rights and Basic Freedoms are respected. Any deficiencies in this respect may not work to the detriment of those who rightfully expect from courts the protection of their rights within "a reasonable period of time". The overburdening of the court system cannot excuse a court's failure to respect an individual's fundamental right to have their case considered without unnecessary delay.

Summary:

The complainant filed a constitutional complaint against the regional commercial court charging that it had violated his right under Article 38.2 of the Charter of Fundamental Rights and Basic Freedoms "to have his case considered ... without unnecessary delay". The alleged violation consisted in the fact that, between the time when the complainant filed his ordinary suit for payment of a debt in the amount of 257,400 Czech Crowns with the commercial court on 10 January 1994 and the time when he filed his constitutional complaint with the Constitutional Court, on 12 August 1998, the commercial court had failed to schedule a hearing in the case, although it resolved other disputes before it in a substantially shorter time.

Initially the commercial court did take some action. In July 1995 it sent the defendant a request to file a defence, and in August 1995 it allowed a 15-day extension of the deadline for filing the defence. During the following three years, the court took no action in the matter: it did not respond to the complainant's amended complaint, made in 1997, to which he had attached a reminder, and it did not deliver this amended complaint to the defendant for his comments.

The commercial court argued first that, in its view, it had not delayed in resolving the matter. Alternatively, it argued that, if the delay was excessive, the reasons for this were well known: the courts are overburdened with work. The Constitutional Court rejected this argument, stating that, as it had declared in a number of its cases, overburdening of courts is no justification for failing to respect individuals' basic right to have their cases considered "without unnecessary delay". In this case, the commercial court failed to deal with the complainant's matter within a reasonable time frame, hence it violated the complainant's fundamental rights. The Constitutional Court ordered the commercial court to cease in its delay and to hear the matter.

Supplementary information:

In this case, the Constitutional Court exercised its power pursuant to § 82.3.b of Act no. 182/1993 Sb on the Constitutional Court, giving it authority when deciding on a constitutional complaint, "if a constitutionally guaranteed fundamental right or basic freedom was infringed as the result of an action by a public authority other than a decision, [to] enjoin the authority from continuing to infringe this right or freedom and order it, to the extent possible, to restore the situation that existed

prior to the infringement." In the majority of proceedings on constitutional complaints, the action complained of is a formal decision of a court or administrative body, in which case the Constitutional Court has the authority only to the annul the decision and remand the matter for reconsideration; it cannot order that body as to how it is to resolve the matter.

Cross-references:

The Constitutional Court had already come to the same conclusion in similar cases heard before it. See, for example, judgment IV. ÚS 55/94, 2 *Sbírka*, no. 42, p. 35; I. ÚS 5/96, 6 *Sbírka*, no. 116, p. 335 (*Bulletin* 1996/3 [CZE-1996-3-011]; IV. ÚS 466/97,10 *Sbírka*, no. 38, p. 251.

Languages:

Czech.

Denmark
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 1998 - 31 December 1998.

Estonia
Supreme Court

Important decisions

Identification: EST-1998-3-006

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 30.09.1998 / **e)** 3-4-1-6-98 / **f)** Review of amendments to the Ownership Reform Act / **g)** *Riigi Teataja I* (Official Gazette), 1998, no. 86/87, Article 1434 / **h).**

Keywords of the systematic thesaurus:

General Principles - Proportionality.
General Principles - Reasonableness.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Civil and political rights - Right to property - Expropriation.

Keywords of the alphabetical index:

Ownership reform / Compensation / Real property, demolished / Administrative acts.

Headnotes:

An amendment of the Ownership Reform Act resulting in a refusal to compensate owners who had already started to utilise their rights and whose subjective rights had already been acknowledged by an individual administrative act contradicts the principles of legal certainty and legitimate expectation. A slight improvement in the position of one group of owners by substantially aggravating the position of another group contradicts the principle of proportionality.

Summary:

The administrative judge of Hiiu County Court requested the Constitutional Review Chamber of the Supreme Court to invalidate Articles 1.8.3 and 15.7 of an Act Amending Legal Acts Concerning Ownership Reform because of their conflict with Article 10 of the Constitution.

Pursuant to the Ownership Reform Act (as of 2 June 1993) owners of an illegally expropriated but demolished property are entitled to compensation. The Act Amending Legal Acts Concerning Ownership Reform (which was adopted on 19 January 1997 and became effective on 2 March 1997; hereafter referred to as the Amendment Act) amended certain provisions of the Ownership Reform Act. According to the new wording, owners of an illegally expropriated but demolished property were no longer entitled to compensation, unless the law provided otherwise (compensation for some demolished property - e.g. collectivised property - was not abolished). The Amendment Act provided that compensation would still be paid for demolished property if the executive body of a local government had approved the determination of the value of the demolished property before the Amendment Act became effective.

The Constitutional Review Chamber referred to Article 10 of the Constitution: "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a State based on social justice, democracy, and the rule of law." It also referred to its position pronounced in the decision of 30 September 1994 (*Bulletin* 1994/3, p. 228 [EST-1994-3-004]) that such principles include legal certainty and legitimate expectation. Refusal to compensate owners who had already started to utilise their rights and whose subjective rights had already been acknowledged by an individual administrative act under the Ownership Reform Act, was deemed to contradict the principles of legal certainty and legitimate expectation.

The Constitutional Review Chamber mentioned that abolishing compensation for demolished property is also in conflict with Article 12 of the Constitution (the principle of equal treatment). The Amendment Act categorised owners into persons whose property was evaluated and the compensation allocated before the enactment of the Amendment Act, and persons whose property was not evaluated and the compensation not allocated before the enactment date, circumstances which did not depend on the individuals themselves. Such a ground of categorisation is not reasonable.

According to the principle of proportionality, the means applied must correspond to the aim. The Supreme Court held that a slight improvement in the position of one category of owners by substantially aggravating the position of another category of owners contradicts the principle of proportionality.

The Court declared that if a socio-economic analysis demonstrated that continuing compensation of illegally expropriated property to the same extent as previously would substantially undermine the Estonian economy, the limitation to the compensation must at least comply with the principle of equal treatment.

Cross-references:

Decision III-4/A-5/94 of 30.09.1994, *Bulletin* 1994/3, p. 228 [EST-1994-3-004].

Languages:

Estonian.

Identification: EST-1998-3-007

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 04.11.1998 / **e)** 3-4-1-7-98 / **f)** Review of the requirements of command of the Estonian language / **g)** *Riigi Teataja I* (Official Gazette), 1998, no. 98/99, Article 1618 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution.
General Principles - Separation of powers.
General Principles - Weighing of interests.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Fundamental Rights - Civil and political rights - Electoral rights - Right to be elected.

Keywords of the alphabetical index:

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

Headnotes:

It is unconstitutional to make references in a constitutional law to other laws in areas which fall within the sphere regulated by constitutional laws.

The enactment of a requirement of knowledge of the Estonian language for candidates to local government councils is justified under Articles 51.1 and 52.1 of the Constitution and its preamble.

Summary:

The Maardu City Elections Commission registered members of the local government council in the first constituency of Maardu City on 25 October 1996. On 25 July 1997 the State Election Committee submitted a complaint to the administrative judge of the Harju County Court concerning the registration of Juri Šutenko on the grounds that he did not have sufficient command of the Estonian language.

The Harju County Court requested the Constitutional Review Chamber of the Supreme Court to invalidate Articles 3.3 and 26.7.1 of the Local Government Elections Act, Article 5.1 of the Language Act, and a governmental regulation "Enactment of the description of the level of command of the Estonian language required for working in the *Riigikogu* and in a local government council", on the grounds that they were in conflict with the Constitution.

According to a decision of the Constitutional Review Chamber, Article 3.3 of the Local Government Elections Act provides for universal suffrage and stipulates that any person with a knowledge of the Estonian language at the level determined by the Language Act may run for election to a local government council. Article 26.7.1 of the Local Government Election Act requires the candidate to certify while submitting the consent to run for the local government council that he or she knows Estonian to the standard determined by Article 5.1 of the Language Act. Article 5.1 of the Language Act provides that an oral and written command of the Estonian language is required to work in a local government council, when the description of the level of command of Estonian shall be enacted in an order prescribed by the Government. The governmental regulation "Enactment of the description of the level of command of Estonian required for working in the *Riigikogu* and in a local government council" specified in a more detailed manner the requirements of the knowledge of Estonian language.

The Constitutional Review Chamber referred to its decision of 5 February 1998 (*Bulletin* 1998/1 [EST-1998-1-001]) where it stated that according to Article 104.2 of the Constitution, electoral laws are constitutional laws since a majority of the membership of the *Riigikogu* is necessary to pass or amend such laws. Determination of the conditions of elections is the competence of the *Riigikogu* and cannot be delegated to the Government (principle of separation of powers). It is also unconstitutional to make references in a constitutional law to other laws in matters which fall into the sphere regulated by constitutional laws.

The Constitutional Review Chamber held that the requirement of the command of Estonian as such does not contradict the Constitution. According to Articles 51.1 and 52.1 of the Constitution, everyone has the right to address State agencies, local governments and their officials in Estonian and to receive responses in Estonian, and the official language of State agencies and local governments shall be Estonian. The preamble of the Constitution states that one of the duties of the State is to preserve the Estonian nation and culture through the ages. Thus, the Court found that the requirement of the command of Estonian would be constitutionally justified if stipulated by the Local Government Elections Act, and provided that this restriction is necessary in a democratic society and does not distort the nature of the rights and freedoms restricted, or other principles of the Constitution (the Court referred to Articles 11, 154.1 and 156.1 of the Constitution).

The court invalidated Articles 3.3 and 26.7.1 of the Local Government Elections Act in the part where they referred to the Language Act; Article 5.1 of the Language Act in the part where it delegated to the Government the right to determine the description of the required level of command of Estonian; and the governmental regulation "Enactment of the description of the level of command of Estonian required for working in the *Riigikogu* and in a local government council" in the part where it enacted the description of the level of command of Estonian required for working in a local government council.

Cross-references:

Decision 3-4-1-1-98 of 05.02.1998, *Bulletin* 1998/1 [EST-1998-1-001].

Languages:

Estonian.

Identification: EST-1998-3-008

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 25.11.1998 / **e)** 3-4-1-9-98 / **f)** Review of the Police Service Act / **g)** *Riigi Teataja I* (Official Gazette), 1998, no. 104, Article 1742 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Institutions - Armed forces and police forces - Police forces.
Fundamental Rights - Civil and political rights - Rights of domicile and establishment.
Fundamental Rights - Civil and political rights - Right to family life.

Keywords of the alphabetical index:

Police officers / Residence, right to choose / Transferral without one's consent.

Headnotes:

A mandatory change of residence caused by the transfer of a police officer without his or her consent violates the right to choice of residence.

If some articles of a legal act are declared invalid by the Supreme Court, the other articles of the legal act must be interpreted in accordance with the decision of the court.

Summary:

The Legal Chancellor made a proposal to the *Riigikogu* to bring Articles 15 and 17 of the Police Service Act into conformity with Article 34 of the Constitution. The *Riigikogu* did not support the proposal of the Legal Chancellor, and the latter asked the Supreme Court to declare Articles 15.2, 17.1, 17.2.2, 17.3 and 17.4 of the Police Service Act invalid.

The Constitutional Review Chamber found that the disputed articles of the Police Service Act allowed for a police officer to be transferred to another permanent place of service without his or her consent in cases where the transfer required a change of residence. It could be concluded from the wording of the law that both the transfer and change of residence were mandatory for a police officer.

The court ruled that in case of mandatory change of residence caused by transfer of a police officer without his or her consent, the officer's right to choice of residence is restricted. Article 34 of the Constitution, securing the right to choice of residence, also foresees some legitimate restrictions to this right. However, the challenged articles of the Police Service Act did not conform to these restrictions. Neither were other possible

restrictions set forth in Articles 124.3 and 130 of the Constitution applicable. The court remarked in addition that such transfer may cause harm to the officer's and his or her family members' right to family life.

The court pointed out that it would not be permissible to transfer a police officer to another place of service without his or her consent, in cases where the transfer caused the need to change the residence, under other articles of the Police Service Act which were not being challenged by the Legal Chancellor. If some articles of a legal act are declared invalid by the Supreme Court, the other articles of the legal act must be interpreted in accordance with the decision of the court.

Languages:

Estonian.

Identification: EST-1998-3-009

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 22.12.1998 / **e)** 3-4-1-11-98 / **f)** Review of the Rules on driving and parking in the old town of Tallinn / **g)** *Riigi Teataja I* (Official Gazette), 1998, no. 113/114, Article 1887 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Documents lodged by the parties.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources.
Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
General Principles - Legality.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.
Institutions - Public finances - Taxation.
Fundamental Rights - Civil and political rights - Freedom of movement.

Keywords of the alphabetical index:

Motor vehicles / Taxation / Tax, local / Local government, powers / Town centre, access, fee.

Headnotes:

Local governments may, without delegation, resolve any issue which is not a national issue.

A charge imposed on motor vehicles for driving into the old town does not violate the right to freedom of movement. However, such a charge is a local tax and is unconstitutional, since it has not been foreseen by a law enumerating local taxes.

Summary:

The Tallinn City Council had enacted rules on driving into the old town of Tallinn and parking therein. The Legal Chancellor had made a proposal to the Tallinn City Council to bring Articles 2, 6, 7 and 8 of the Rules into conformity with the Constitution. Since the City Council did not debate the proposal of the Legal Chancellor, the latter asked the Supreme Court to declare Articles 2, 6, 7 and 8 of the Rules invalid.

The Legal Chancellor claimed in his proposal to the Supreme Court that according to the Parking Act a local government may impose a parking fee, but not a charge for driving into the old town. The Legal Chancellor interpreted the imposition of a charge for driving into the old town as a restriction to the right to freedom of movement. According to Article 34 of the Constitution, such restrictions may be imposed only by a law. At the court session the Legal Chancellor also pointed to the contradiction between Articles 2, 6, 7 and 8 of the Rules and Article 157.2 of the Constitution. Under the latter a local government has the right, on the basis of law, to levy and collect taxes, and to impose duties.

The Constitutional Review Chamber of the Supreme Court ruled that according to Article 154.1 of the Constitution, which states that all local issues shall be resolved and managed by local governments which shall operate independently pursuant to law, a local government may, without delegation, resolve any issue which is not a national issue. This view is also supported by the argument that it would not be possible to foresee every local issue. The clause "pursuant to law" in Article 154.1 of the Constitution shall be construed as a requirement of legality, analogously with the requirement of legality in Article 3.1 of the Constitution concerning the powers of the State. Thus, a local government has to resolve local issues in accordance with laws. If a normative act of a local government by which local issues are resolved is in conflict with a law, the act is illegal despite the fact that a local, not a national, issue was resolved.

The Constitutional Review Chamber did not find a conflict between the imposition of a charge for driving into the

old town and the right to freedom of movement provided for in Article 34 of the Constitution. The right to freedom of movement is above all a right to reach the destination and the charge imposed on motor vehicles for driving into the old town does not violate the right to freedom of movement.

The Court held that the charge for driving into the old town must be treated not as a payment for a service, but as a local tax with a specific purpose. Under Article 157.2 of the Constitution local governments have the right to levy taxes only on the basis of law. Local taxes enumerated in Article 5 of the Local Taxes Act do not include a tax for driving into some part of the town. Since such taxation did not have any legal basis, Articles 2, 6, 7 and 8 were declared invalid due to their conflict with the Constitution.

Although the Legal Chancellor mentioned this conflict only at the Court session, the Constitutional Review Chamber deemed it possible to decide the question of the conflict of Articles 2, 6, 7 and 8 of the Rules with Article 157.2 of the Constitution. The Court based this argument on the fact that since the Tallinn City Council did not dispute the proposal of the Legal Chancellor, the right of the local government to decide upon the proposal independently, provided for by Article 142 of the Constitution, lost its meaning due to the omission of the City Council.

Languages:

Estonian.

Finland
Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 September 1998 - 31 December 1998.

France
Constitutional Council

Statistical data
1 September 1998 - 31 December 1998

17 decisions including:

- 3 decisions on the review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution for the purposes of ascertaining their constitutionality
- 12 decisions on electoral matters taken pursuant to Article 59 of the Constitution, including 3 on by-elections and 9 on the 1998 three-yearly elections of the Senate
- 1 decision on an application by an investigating judge to make documents available for inspection
- 1 decision on the appointment of deputy reporting judges to the Constitutional Council

Note: the publication of the Constitutional Council's observations on the 1998 elections to the Senate.

Important decisions

Identification: FRA-1998-3-007

a) France / **b)** Constitutional Council / **c)** / **d)** 10.11.1998 / **e)** 98-405 DC / **f)** Decision of 10 November on the application by Ms Perdrix, investigating judge, to make documents available for inspection / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette of the French Republic - Acts and Decrees), 13.11.1998, 17114 / **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 - Types of litigation - Electoral disputes - Parliamentary elections.
Constitutional Justice - Procedure - Preparation of the case for trial - Reports.
Constitutional Justice - Procedure - Interlocutory proceedings - Joinder of similar cases.
Constitutional Justice - Decisions - Delivery and publication - In camera.
Constitutional Justice - Effects - Consequences for other cases - Ongoing cases.

Keywords of the alphabetical index:

Secrecy of deliberations / Case file.

Headnotes:

In keeping with the adversarial nature of the proceedings in electoral matters, all the pleadings submitted by the parties and all the documents filed in applications to set aside the election of a deputy are available for inspection by the parties. Consequently, there is no obstacle to their also being made available for information to a judge carrying out a criminal investigation. On the other hand, any report submitted to the investigation division of the Constitutional Council is covered by the secrecy applying to the deliberations of the Constitutional Council. The document cannot be regarded as being separable from those deliberations; it cannot therefore be made available to a judge carrying out a criminal investigation.

Summary:

On 20 February 1998, the Constitutional Council ruled that the election of Mr Jean Tibéri, Mayor of Paris, to the National Assembly was valid.

In this ruling, the Constitutional Council held that "serious and repeated acts" had been committed which, together, indicated that "manoeuvring" had taken place in the manner in which the electoral register had been drawn up. Although the Constitutional Council considered this manoeuvring "blameworthy", this fact did not lead it to cancel the election, on account of the large number of votes separating Mr Jean Tibéri from his main opponent.

However, as fraudulent registration on the electoral register is a criminal offence, the defeated candidate brought the case before the ordinary courts. This is what led the investigating judge to ask the Constitutional Council to make available certain documents contained in the case file.

In its reply, the Constitutional Council, for the first time, ruled on the nature of the documents produced in the course of its own investigation of a case and on whether they could be separated from its deliberations in electoral matters.

Languages:

French.

Identification: FRA-1998-3-008

a) France / **b)** Constitutional Council / **c)** / **d)** 18.12.1998 / **e)** 98-404 DC / **f)** Law on social security funding for 1999 / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette of the French Republic - Acts and Decrees), 27.12.1998, 19663 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Certainty of the law.
General Principles - Public interest.
General Principles - Proportionality.
General Principles - Reasonableness.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Public burdens.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Social security.
Fundamental Rights - Civil and political rights - Non-retrospective effect of law - Taxation law.

Keywords of the alphabetical index:

Social security, limitation of expenditure / Pharmaceutical laboratory / Medical fees / Medical prescription.

Headnotes:

Although Parliament is empowered to adopt fiscal measures with retrospective effect, it may only do so where there is a "sufficient general interest" and on condition that this does not deprive constitutional requirements of the necessary legal safeguards. Concern to forestall the financial consequences of a court decision censuring the method used to calculate a tax does not constitute a sufficient general interest for that method to be modified retrospectively.

Respect for the principle of equality requires that parliament should base its assessment on objective and rational criteria connected with the purpose of the law. In this case, "by requiring all doctors associated with the State health scheme, general practitioners and specialists alike, to pay a contribution based on their professional income, whatever their individual practice with regard to fees and prescriptions during the year in which overspending was observed", Parliament had violated the principle of equality.

Summary:

The third law on social security funding adopted since the constitutional law of 22 February 1996 was referred to the Constitutional Council by deputies and senators who challenged eleven of its articles. The Constitutional Council censured two of them.

In censuring Article 10 of the law, the Constitutional Council clarified its case-law on two important points: the permissible scope of retrospective fiscal measures under the Constitution and the existence in French constitutional law of a principle of legal certainty.

Article 10 provided for retrospective modification of the rate of and basis for assessing a tax that had been paid two years previously, to forestall the consequences of the setting aside of an article of an order with the force of a law which had previously been issued and which conflicted with Community law. This provision would have entailed a recalculation of the tax payable for the previous two years, leading some pharmaceutical laboratories to pay extra tax.

The Constitutional Council dismissed the applicants' argument that certainty of the law was a constitutional principle, stating that the body of constitutional law does not include a rule guaranteeing certainty of the law as it is understood by the European Court, that is to say a requirement that the legal environment should be reliable.

On the other hand, it adopted a stricter position than in the past regarding the retrospective effect of tax laws, since it now requires this to be justified by a "sufficient general interest". In other words, the Constitutional Council no longer merely ascertains whether there is a general interest justifying the retrospective measure, it also weighs up the scope of the retrospective measure against the importance of the aim pursued.

The second censured article contained provisions aimed at regulating medical expenditure by requiring all doctors associated with the State health scheme to pay a contribution in the event of overspending in relation to the targets set. The Constitutional Council ruled that by requiring all doctors to pay the same contribution irrespective of their individual practice with regard to fees and prescriptions, parliament had not selected a rational and objective criterion for achieving the goal which it had set itself: that of controlling medical expenditure.

As the provisions did not make it possible to distinguish between those doctors who were anxious to reduce expenditure and the rest, they consequently introduced an element of inequality between the doctors liable to pay this contribution.

Languages:

French.

Identification: FRA-1998-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.1998 / **e)** 98-405 DC / **f)** Finance law for 1999 / **g)** *Journal officiel de la République française - Lois et Décrets* (Official Gazette of the French Republic - Acts and Decrees), 31.12.1998, 20138 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - Quasi-constitutional enactments.
Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
Institutions - Public finances - Budget.
Institutions - Public finances - Taxation - Principles.
Fundamental Rights - Civil and political rights - Individual liberty.
Fundamental Rights - Civil and political rights - Right to private life - Protection of personal data.
Fundamental Rights - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Budget, re-inclusion / Budget, exclusion / Deductions from revenue / Dependants' allowance / Solidarity wealth tax / Property rights, sub-division / Computer files / Value added tax / Tax credit / Trade tax / Establishment permit / Independent administrative authority.

Headnotes:

On the basis of the principle enshrined in Article 13 of the Declaration of the Rights of Man, which states that common contributions should be equitably distributed among all the citizens in proportion to their means, the Constitutional Council laid down the rule that wealth tax must be assessed on the basis of the tax-paying ability represented by both the income and the other advantages derived from property. Consequently, constitutional principles and rules are violated by the provisions under which, in some cases, in the event of the sub-division of property rights, assessment of the solidarity wealth tax would be based on full ownership despite the fact that the bare owner derived no income from the property in question.

The legislative provision authorising the social security and tax authorities to collect, keep or exchange registration numbers of individuals on the national identification register (NIR) does not infringe the constitutional requirements concerning the protection of privacy and individual freedom since Parliament has limited its scope (the aim must be restricted to avoiding errors of identity) and has taken the necessary precautions (in particular, the power conferred on an independent administrative authority, the French data protection agency (*Commission nationale de l'informatique et des libertés*), to order, if necessary, data records to be destroyed).

Summary:

On the solidarity wealth tax: confirmation of Decision no. 81-133 DC of 30 December 1981 (http://www.conseil-constitutionnel.fr/decision/81/81133dc.htm).

On the identification number of individuals: Article 107 of the law in question, a provision that has been severely criticised by many areas of opinion, does not in fact entail any new transfer of personal data and simply makes it easier to identify persons registered with the social security and tax authorities. The decision that it complied with the Constitution was taken with strong reservations regarding its interpretation.

Languages:

French.

Georgia
Constitutional Court

Summaries of important decisions of the reference period 1 September 1998 – 31 December 1998 will be published in the next edition, *Bulletin* 1999/1.

Germany
Federal Constitutional Court

Summaries of important decisions of the reference period 1 September 1998 – 31 December 1998 will be published in the next edition, *Bulletin* 1999/1.

Hungary
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

Number of decisions

- Decisions by the plenary Court published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 14
- Number of other decisions by the plenary Court: 15
- Number of other decisions by chambers: 15
- Number of other (procedural) orders: 53
- Total number of decisions: 107

Note:

On 23 November 1998 three judges including the Chief Justice of the Court left the Constitutional Court, because their term of office expired on that day. The National Assembly elected three new judges to the Court on 28 December 1998. The new members of the Court are Dr. Ottó Czúcz, Dr. Attila Harmathy and Dr. János Strausz. Prior to the election of the new Members of the Constitutional Court, the judges elected Dr. János Németh to be the President of the Court.

Important decisions

Identification: HUN-1998-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 02.10.1998 / **e)** 42/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 90/1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Types of claim - Claim by a public body - Ombudsman.
Constitutional Justice - Types of claim - Type of review - Abstract review.
Constitutional Justice - Decisions - Types - Procedural decisions.
Sources of Constitutional Law - Categories - Case-law - International case-law - European Court of Human Rights.
Sources of Constitutional Law - Categories - Case-law - Foreign case-law.
Institutions - Ombudsman - Relations with the executive.

Keywords of the alphabetical index:

Petition, withdrawal / Procedure, discontinuing / Petition, binding / Ombudsman, powers.

Headnotes:

The Court is bound by the petition in its proceedings, except when the Court proceeds *ex officio*. The Court can extend the constitutional review to provisions not disputed in the petition, or the Court may examine the constitutionality of a legal rule instead of examining the petition as a constitutional complaint.

Summary:

The Parliamentary Ombudsman for Civil Rights and her Deputy, the Parliamentary Ombudsman for the Rights of National and Ethnic Minorities and the Data Protection Ombudsman submitted a petition to the Constitutional Court in which they requested the Court to declare that the Ombudsmen have the right to investigate or initiate the investigation of cases involving constitutional rights at the Public Prosecutor's Office. In their petition, the Ombudsmen requested the Court to interpret Article 32/B of the Constitution on the competence of the Ombudsmen and to review the constitutionality of the Act on the Parliamentary Commissioners. In addition, they asked the Court to eliminate the conflict arising in the sphere of authority between the Office of the Ombudsmen and the Public Prosecutor's Office. In September 1998, however, the Ombudsmen withdrew their petition when the case was still pending before the Court. Therefore the Constitutional Court had to decide whether the withdrawal of the petition meant that the Court should discontinue its procedure.

Based upon Article 20 of the Act on the Constitutional Court, the Constitutional Court in its present decision held that the procedure should be discontinued. However, the Court did not attach a detailed reasoning to this decision, instead concurring in the opinion of the justice who delivered the opinion of the court. Furthermore, the Chief Justice filed a partly concurring, partly dissenting opinion.

According to the judge who delivered the opinion of the Court, it is in accordance with the practice of the Court that the procedure should be discontinued when the petitioner withdraws his/her submission. In his opinion, the Court is bound by the petition in its proceedings

except when the Court proceeds *ex officio*. The Court thus proceeds based upon the submission of the petitioner; however, in order to solve an important constitutional problem properly, the Court can extend the constitutional review to provisions not disputed in the petition, or the Court may examine the constitutionality of a legal rule instead of examining the petition as a constitutional complaint. The same cannot be said when the Court continues proceedings against the will of the petitioner, because this conflates the difference between the procedure instituted *ex officio* and the procedure initiated by a petitioner.

In the dissenting part of his opinion, the Chief Justice argued that the Court should have decided on the merits of the case in so far as it concerned abstract review and the interpretation of the Constitution instead of discontinuing the procedure. In the case of abstract review, a petitioner submits a petition on behalf of the public (*actio popularis*) and when the Court decides the case, it does not take into account the facts which are in connection specifically with the petitioner but rather decides on the basis of the legal facts and circumstances. The procedure therefore is of public interest, and after initiating the procedure, the petitioner has no control over their submission. The Chief Justice cited the judgment made by the European Court of Human Rights in the Tyrer case (1978 Series A no. 26.), in which the Court decided not to strike the case in question out of its list, because "the case raised questions of a general character affecting the observance of the Convention", although the applicant wished to withdraw his application. The Chief Justice also referred to one of the decisions of the Constitutional Court of Germany (*Urteil vom* 14 Juli 1998, *Europäische Grundrechte Zeitschrift* 1998, 13/14, 395, 402), in which the Court decided to continue the procedure despite the fact that the petitioner withdrew the constitutional complaint. The competence of the Court concerning the abstract interpretation of the Constitution is *ab ovo* of public interest, and decisions made in the framework of this procedure always contain leading, guiding principles. Therefore, if one of the petitioners entitled to submit a petition initiates such a procedure, the Court should not discontinue the procedure even if the petitioner wishes to withdraw the submission.

The Chief Justice in the concurring part of his opinion held that if a petitioner withdrew a submission in which they requested the Court to eliminate a conflict of powers arising between State organs, the Court should examine whether this conflict raised a question of general character or whether the procedure was of public interest. In the opinion of the Chief Justice the issue whether the Ombudsmen have the right to conduct investigations at the Public Prosecutor's Office was a question of general character and public interest. However, in the instant case, this question could have been answered only in the framework of a procedure concerning the interpretation of the Constitution, and the Ombudsmen submitted a separate petition relating to this issue. Hence, the procedure regarding the conflict of powers could have been discontinued without violating public interest.

Languages:

Hungarian.

Identification: HUN-1998-3-009

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 26.10.1998 / **e)** 1042/B/1997 / **f)** / **g)** *Alkotmánybírósági Közlöny* (Official Digest), no. 10/1998 / **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 - Convention on the rights of the Child of 1989.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Civil and political rights - Equality - Affirmative action.
Fundamental Rights - Civil and political rights - Rights of the child.
Fundamental Rights - Economic, social and cultural rights - Right to be taught.

Keywords of the alphabetical index:

School, private, financial support / State contribution / Differences, church schools / Public education agreement.

Headnotes:

It is not unconstitutional if the State regulates the financial assistance given to private schools differently from the contributions made to state and church schools.

Summary:

The petitioners requested the constitutional review of some provisions of the Public Education Act. According to them, the Act, by regulating the funding mechanism of State and church schools and private schools in

different ways, violates Article 70A of the Constitution, which declares the prohibition of discrimination.

The Constitutional Court held this argument to be unfounded. It pointed out that those who establish and run private schools also have an entitlement to the compulsory budgetary contribution defined by the Budget Act. Referring to its Decision no. 22/1997 (IV. 25) (*Bulletin* 1997/2 [HUN-1997-2-005]), the Court held that since the compulsory budgetary contribution covered only a part of the expenses of the operation of the schools, the rest of this expenditure should have been covered by the founder itself. For schools not owned by the State, there is a possibility of concluding a public education agreement with the Government in order to ensure further financial assistance for the operation of the school not owned by the State. This solution is not in conflict with the Constitution.

In the petitioners' view, those provisions of the Act according to which only the state-run public primary schools are free are also unconstitutional, because this regulation means that a disproportionate burden is placed on those who wish to attend private schools.

Under Article 70F of the Constitution, the State shall implement the right of education through the extension and general availability of public education, free compulsory primary schooling, secondary and higher education being available to all persons on the basis of their ability, and furthermore through financial support for training. The Public Education Act, however, goes further and declares higher education to be free. According to the Court, the duty of the State is only to establish and run neutral schools. The State therefore is not obliged to ensure free education in every kind of school.

The Court examined *ex officio* some provisions of the relevant international treaties, namely Article 14 ECHR and Article 2 Protocol 1 ECHR, Articles 2.1 and 2.2 of the Convention on the Rights of the Child of 1989 and also Articles 1, 2 and 5 of the Convention against Discrimination in Education adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation, and held that the duty of the State to ensure free education in every kind of primary school does not derive from these international human rights instruments.

Furthermore, the Court declared that it was not unconstitutional if in addition to the compulsory budgetary contribution the State provided schools owned by the church with additional financial assistance, as these schools assume duties which would otherwise be carried out by the State. This positive discrimination (affirmative action) was needed, held the Court, in the interest of the realisation of Article 60 of the Constitution, namely to ensure freedom of religion.

Languages:

Hungarian.

Identification: HUN-1998-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 23.11.1998 / **e)** 48/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 105/1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Certainty of the law.
General Principles - Weighing of interests.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Right to life.
Fundamental Rights - Civil and political rights - Freedom of conscience.
Fundamental Rights - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Abortion / Foetus, legal status / Unborn child, protection of life.

Headnotes:

It is not unconstitutional if the law makes it possible to terminate a pregnancy when a woman is in a crisis situation. The legislator can give up regulating the monitoring of whether a woman's condition is actually serious enough to qualify as a crisis situation in accordance with the Constitution only if at the same time the legislator protects by its laws the life of foetuses. The legislator should regulate the notion and the possible application of the notion of crisis situation by an act of parliament.

Summary:

A group of petitioners sought to challenge the constitutionality of Act LXXIX of 1992 on the protection of the life of the foetus (henceforth: Abortion Law). The petitioners contend that some provisions of the Abortion Law and the Law as a whole are unconstitutional. The pro-life petitioners requested the Court to find that the foetus was a legal person from the moment of conception. The Constitutional Court rejected these petitions recalling its previous Decision no. 64/1991 (XII.17), in which the Court had already held that it could not determine whether a foetus was a person within the meaning of the Constitution. It was for Parliament to legislate on the matter. The current decision was based upon the principles and guidelines determined by a previous decision of the Court on the regulation of abortion. In Decision no. 64/1991 (XII.17), the Court struck down the regulation by the Minister of Health which was at that time in force, on formal grounds: fundamental rights, the Constitutional Court held, should have been regulated by an act of parliament, and the Court refrained from making a determination on the merits of the constitutionality of the regulations on abortion. The Court however laid down guiding principles for the future abortion law.

On the basis of these guidelines, Parliament enacted the Abortion Law in 1992, which did not acknowledge that the foetus was a legally protected entity from the moment of conception, and hence permitted abortion for certain reasons and in the early months of pregnancy.

In its current decision, the Court examined the constitutionality of Article 6.1.d of the Abortion Law, which allowed abortion in the first 12 weeks of pregnancy if a woman was in a crisis situation, and the Court also dealt with the petitions concerning the legal status and the right to life of a foetus.

According to Article 12.6 of the Abortion Law, a crisis situation is one as a consequence of which a pregnant woman will be in a desperate mental, physical or social condition and this endangers the healthy development of the foetus. In order to prove there exists a crisis situation, the woman concerned should sign the claim for an abortion.

In the opinion of the petitioners, the foetus is insufficiently protected by this Abortion Law, because no one with the foetus's interest in mind oversees the process through which it is determined whether the pregnant woman meets the conditions laid out in the statute. Nor, in present Hungarian practice, is such a determination open either to the public or to someone guaranteeing the interests of the foetus.

The question the Constitutional Court had to answer was therefore whether the State, by enacting the Abortion Law, had fulfilled the requirements concerning its duty to protect the life of the foetus against the woman's right to dignity and to choose, when it permitted abortion for women in a crisis situation. The notion of crisis situation is unclear, since this is in fact an argument in favour of the woman's right to choose and against the protection of the life of the unborn, whereas under the Law it seems that abortion is permitted, paradoxically, in the interest of the foetus. According to the Court, this violates the constitutional principle of legal certainty, because the reason for allowing abortions is self-contradictory. The question is therefore whether it is unconstitutional if the reason for the termination of pregnancy is the woman's crisis situation. Under the Abortion Law, the abortion can be based only upon the assertion of the woman that she is in a crisis situation, without her having to prove or be subject to verification of the existence of these reasons. This is in order to protect the woman's right to privacy. The Constitutional Court, however, declared in the instant case, that the Law would not disproportionately restrict the woman's right to choose and to dignity if it requires the woman to provide justification for the abortion. The relevant provisions of the Abortion Law currently in force in practice meet the requirement concerning the woman's right to choose, but do not fulfil the duty of the State to protect human life. In consequence, the constitutional balance between the woman's right to dignity and the State's duty to protect life is upset. This regulation of the Abortion Law is unconstitutional since there is not a balance between the fundamental right of the woman and the constitutional duty of the State.

In its reasoning, the Court also laid down guiding principles for Parliament. The Court argues that there are two possible ways the State could protect the right to life of a foetus. The first possibility is that the legislator does not amend the Abortion Law, but instead counterbalances the regulation of the Abortion Law by making provisions aiming to protect the life of foetuses. (e.g. co-operation with the pregnant woman, providing the pregnant woman with proper psychical, medical, social and financial assistance). The second way would be to define the notion of crisis situation, giving some possible and typical reasons to qualify for an abortion.

Supplementary information:

Two judges attached a dissenting opinion, in which they pointed out that the Constitutional Court should have declared unconstitutional the provision of the Abortion Law under which the abortion was possible when the woman was in a crisis situation. Two justices out of eleven wrote separate concurring opinions. According

to one, to define some typical reasons to qualify for an abortion would seriously violate the woman's right to privacy.

Languages:

Hungarian.

Identification: HUN-1998-3-011

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 27.11.1999 / **e)** 49/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), no. 106/1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
Sources of Constitutional Law - Categories - Written rules - International Covenant on Civil and Political Rights of 1966.
Sources of Constitutional Law - Categories - Written rules - Other international sources.
General Principles - Rule of law.
General Principles - Certainty of the law.
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 - Double degree of jurisdiction.

Keywords of the alphabetical index:

Misdemeanour proceedings / Right to appeal / Limitation / Fundamental rights, essence / Criminal procedure.

Headnotes:

That provision of the Code of Criminal Procedure, under which in misdemeanour proceedings the court of second instance can only reverse the judgement of the court of first instance if the lower court did not settle all aspects of the accusation, is unconstitutional.

It is not contrary to the right to a legal remedy enshrined in Article 57.5 of the Constitution that in misdemeanour proceedings the court of second instance may modify the facts established by the court of first instance and impose a sentence based upon the facts established by the court of second instance itself, except when as a result of correcting factual error, an accused who was acquitted by the court of first instance or whose case was terminated should be found guilty.

Summary:

A judge of an appellate court initiated the proceedings before the Constitutional Court in a pending case on the basis that she considered one of the provisions of the Code of Criminal Procedure to be unconstitutional.

The petition asserted that the challenged provision of the Code was unconstitutional because in misdemeanour proceedings, the court of second instance could not declare the judgment of the lower court void if that court, examining the facts on which the charge was founded, acted in breach of procedural rules which exerted a substantial impact on the judgment, except when the lower court did not decide on all aspects of the accusation. In the opinion of the initiating court, this rule infringes the right to defence defined by Article 57.3 of the Constitution. According to the petition, when a court of second instance takes evidence and decides on a case as if it were a court of first instance, the right to appeal against this decision is not ensured. This is contrary to Article 57.5 of the Constitution, under which in the Republic of Hungary everyone is entitled to seek a legal remedy, as provided for by the law, against the decisions of the courts, the public administration or other authorities that infringe his rights or rightful interests.

Under Hungarian law, in order to simplify ordinary judicial process, in misdemeanour proceedings the legislature strongly limited circumstances where failure to comply with procedural requirements may lead to the voiding of the judgment. However, the power of the court of second instance to modify the judgment of the lower court is broad. In general, the judgment of the court of second instance should be based upon the facts already established by the lower court. In the interest of speedy trial in misdemeanour proceedings, the court of second instance may rule on the facts itself, when there are factual errors in the judgment of the lower court.

The Code of Criminal Procedure differentiates between absolute violations of procedural rules, which are specified by the Code and as a consequence of which the judgment of the court of first instance must be declared void, and relative violations of procedural rules, which make reversing and reviewing the judgment of the lower court mandatory only if these errors had a substantial impact on the judgment. The second type of procedural errors

may not be taken into consideration in misdemeanour proceedings except when the lower court does not decide on all aspects of the accusation.

The Constitutional Court examined the constitutionality of the two elements of the challenged provision separately on the basis that the procedures to be followed differ in the case of factual and other procedural errors.

The Court granted the petition in part and held that the challenged provision of the Code of Criminal Procedure was unconstitutional, since it violated the principles of the rule of law and legal certainty and the prohibition on limiting the essential contents of any fundamental right. The constitutional requirement concerning adjudicating disputes within a reasonable time derives from Articles 2 and 57.1 of the Constitution, and also from the obligations assumed under international law. The concept of speedy trial is embodied in Article 14.3.c of the International Covenant on Civil and Political Rights, Article 6.1 ECHR and Article 2 Protocol 7 ECHR. The Preamble of Recommendation no. R (87) 18 adopted by the Committee of Ministers of the Council of Europe concerning the simplification of criminal justice calls the attention of the Member States to the fact that delay in dealing with crimes brings criminal law into disrepute and affects the proper administration of justice. These delays can be remedied by so-called simplified procedures. In the interest of speedy trial, the Recommendation makes it possible to declare proceedings void on procedural grounds only in strictly defined circumstances where failure to comply with procedural requirements may have caused real damage to the interest of the defence or prosecution.

In the present case, the Constitutional Court took into consideration the interest of simplifying criminal justice as weighed against the fundamental rights of the person against whom proceedings were being taken. As a consequence of weighing these interests, the Court held that the legislature, by providing that in misdemeanour proceedings the court of second instance can only reverse the judgment of court of first instance if the judgment of the lower court did not decide on all aspects of the accusation (and thereby committed a relative violation of procedural rules), limited unconstitutionally the essential content of the fundamental right to a fair trial and the right to defence.

The Court also examined whether the disputed provision of the Code of Criminal Procedure violated the right to legal remedy. According to the second sentence of Article 57.5 of the Constitution, the right to a remedy may be restricted by a statute passed by a two-thirds majority of the Members of Parliament present and in the interest of adjudicating disputes in a reasonable time as well as being proportional thereto. The Court, referring to its previous Decision no. 1437/B/1996, held that neither the basic right to legal remedy nor the right of appeal guaranteed by the Code of Criminal Procedure equals a ubjective right to appeal against the judgment of the court of second instance which reverses the facts established by the lower court. It does not follow either from the fundamental right to a remedy that it is always the court of first instance that should establish the facts of the case. Besides, it does not infringe any constitutional provision that the court of second instance has a broad power concerning the reversal of judgment, since Article 275 of the Code of Criminal Procedure prohibits the court of second instance from finding the accused guilty on the basis of the facts established by the court of second instance itself, if the court of first instance failed to establish the guilt of the accused.

Languages:

Hungarian.

Ireland
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 1998 - 31 December 1998.

Italy
Constitutional Court

Important decisions

Identification: ITA-1998-3-007

a) Italy / **b)** Constitutional Court / **c)** / **d)** 22.09.1998 / **e)** 346/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 39 of 30.09.1998 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Weighing of interests.
Institutions - Jurisdictional bodies - Procedure.
Fundamental Rights - General questions - Basic principles - Equality and non-discrimination.
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 - Adversarial hearings.

Keywords of the alphabetical index:

Notification, postal / Notification by service / Bailiff / Civil procedure.

Headnotes:

While it lies within the discretionary power of the legislature to rule on procedural institutions and consequently the regulations concerning notification, when the interests of a party issuing the notification are weighed against those of the party to whom it is addressed a limit from which there is no possible derogation is imposed on that discretionary power by the right of the person concerned to be informed of their opponent's case. In this connection, it may be considered that legislation governing postal notification which fails to provide for the obligation, where it was not possible to deliver a copy of a legal document, to inform the addressee by registered letter with acknowledgement of receipt that the said document has been deposited at the town hall, reduces the likelihood of the individual becoming aware of the document and, thereby, of adversarial proceedings being established; this constitutes a violation of the right of the person concerned to put forward their case and be informed of their opponent's case as guaranteed by Article 24 of the Constitution. It must be added that such

inadequate guarantees of notification may be imputed to the choice of the individual by whom notification is made and of the bailiff. If the former has not instructed the bailiff to serve the copy of the document, the choice of notification by service or by post is left to that bailiff. Neither of these two individuals has any interest whatsoever in the person concerned being notified of the document.

The return of the dispatch to the sender once ten days have elapsed since its deposit at the post office, provided for in law for postal notification but not for notification by service, constitutes a further violation of the right to put forward one's case and be informed of the opponent's case. Such tight deadlines make it impossible for the person concerned to exercise this right and, in any case, identification of the document served is so difficult as to preclude any possibility of defending one's case. Consequently, there is a violation of Article 24 of the Constitution.

Summary:

Article 8.2 of the law on the postal notification of documents and postal communications relating to the notification of judicial acts is unconstitutional in so far as it fails to make provision that, in cases where it is impossible to deliver the dispatch to the addressee or persons authorised to receive it and an advice notice to that effect is delivered at the addressee's home, place of residence or workplace, a registered letter with acknowledgement of receipt is to be sent to the addressee informing him of the formalities completed and the deposit of the dispatch at the post office.

Article 8.3 of the law concerning the postal notification of documents and postal communications relating to the notification of judicial acts is unconstitutional in so far as it stipulates that the dispatch deposited with the post office in the event of impossibility of delivery to the addressee shall be returned to the sender after the tenth day following the date of deposit, without the addressee being able to ascertain the type, nature and origin of the document sent for notification.

The Court reached the conclusion that Article 8.2 of the aforementioned law is unconstitutional by comparing postal notification, the subject of the case in point, and notification by service, which is governed by Article 140 of the Code of Civil Procedure. This article requires the bailiff – in all cases where it is impossible to serve the document on the addressee – to deposit it with the town hall of the place of notification and post an advice of call on the door of the addressee's home, place of residence or workplace, stating that the copy of the document must be collected at the town hall. However, Article 140 also states that the addressee must be advised of these formalities by registered letter with acknowledgement of receipt, considering that posting an advice note on a door or in the mailbox does not adequately guarantee notification of deposit of the document.

The problem dealt with by the Court and settled in the above manner concerns only the delivery of the dispatch and not the validity of notification, which must be considered as having been made within ten days of deposit at the post office. The interest of the individual issuing the notification in establishing proof of notification in good time is in no way compromised from the moment when proof of notification may be provided independently of the dispatch through the return of the receipt of acknowledgement.

Languages:

Italian.

Identification: ITA-1998-3-008

a) Italy / **b)** Constitutional Court / **c)** / **d)** 22.09.1998 / **e)** 347/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 39 of 30.09.1998 / **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 – Right to family life – Descent.
Fundamental Rights – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Paternity, denial / Conception, medically assisted / Father, biological / Bioethics.

Headnotes:

It is the responsibility of the legislature to protect an individual born as a consequence of medically assisted fertilisation, in accordance with the various requirements of the Constitution. Nevertheless, given the current lack

of regulations in this area, it is the judge who will have to seek an interpretation within the entire legal system that is best suited to guarantee the protection of rights enshrined in the Constitution (right of minors to a surname, to personal identity, to a father, to education, to upbringing by parents, who must be considered in the event as those who took the decision to procreate).

Summary:

The case concerned the question of the constitutionality – in the light of Articles 2, 3, 29, 30 and 31 of the Constitution (guarantee of the inviolable human rights, principle of equality, recognition of the rights of the family) – of Article 235 of the Civil Code as regards actions to disclaim paternity. These articles among the absolute grounds for disclaiming paternity, includes *impotentia generandi* (inability to reproduce) between the 300th and 180th day before the birth. The question had been raised by the lower court on the supposition that the norm also applied to cases in which the husband had given his own consent to his wife for a medically assisted procreation procedure requiring the involvement of a third-party donor.

The question was deemed inadmissible owing to the inapplicability of the norm in the case brought before the lower court.

A civil action to disclaim paternity had been instituted before the Regional Court of Napoli by an individual afflicted by *impotentia generandi* against his wife and the special guardian of the minor son conceived by his wife as a result of medically assisted procreation requiring the intervention of a third-party donor, to which the husband had consented. Given that Article 235 of the Civil Code provides that the cases in which an action to disclaim paternity may be initiated include *impotentia generandi*, and not considering as an obstacle the fact that the child was conceived as a result of medically assisted procreation requiring the intervention of a third-party donor, to which the husband had consented, the Regional Court of Napoli raised the question of the constitutionality of this article. It argued that by depriving the minor of a surname, personal identity and the possibility of having a father, and this in the absence of any certainty as to the identity of the natural father, Article 235 deprives that child of the right to maintenance and education and is therefore patently contrary to the Constitution.

The Court ruled that the question was inadmissible as the norm in question was not relevant. The absolute grounds for disclaiming paternity (physical inability of cohabitation between the spouses between the 300th and 180th day before the birth, impotence if only for reproductive purposes over the same period; adultery of the woman or concealment of a pregnancy over the same period or concealment of the birth of the child) presuppose that the pregnancy is due to sexual relations with an individual other than the spouse. In this particular case, such a hypothesis did not apply.

Languages:

Italian.

Identification: ITA-1998-3-009

a) Italy / **b)** Constitutional Court / **c)** / **d)** 21.10.1998 / **e)** 356/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Officiel Gazette), no. 43 of 28.10.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of claim – Claim by a public body – Organs of regional authorities.
Institutions – Federalism and regionalism – Institutional aspects – Deliberative assembly.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Equality – Affirmative action.
Fundamental Rights – Civil and political rights – Linguistic freedom.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Threshold / Regional councillor / Minority, linguistic / Trentino-Alto Adige region / Proportional representation.

Headnotes:

The Special Statute of the Trentino-Alto Adige region provided for a system of special guarantees designed to protect linguistic minorities in order to safeguard their representation within regional and local institutions in the light of the region's specific historical and social

characteristics, the international undertakings made by the State and national interests.

Consequently, by taking on connotations specific to the region's community and institutions, the protection of linguistic minorities, which is a general principle established by the Constitution, has had particularly strong significance in this Statute.

In a system of the kind adopted through the Statute of Trentino-Alto Adige, which accords special importance, albeit differently in the two autonomous provinces, to linguistic groups in view of their relative sizes, by providing for the ascertainment of regional councillors' membership of the respective groups, and which establishes explicit guarantees for the Ladin group, the Statute's choice of the proportional system for the election of the Regional Council does not appear to be a simple preference solely in terms of the organisation and functioning of institutions. It also meets the need for an electoral system enabling these minorities to be represented in the institutions, so that the linguistic groups can express themselves as such, given their importance, and on the basis of the electorate's choice. In such a particular context, it is not possible to make general evaluations of the proportional system or conclusions as to its limits, in respect of any adjustments to be made to that system. The system may be challenged only if the adjustments actually made to it clash with the aims pursued by the region's Statute.

The fact that the proportional voting system has been adjusted, as the Court has confirmed on numerous occasions, has no effect on the parity of citizens' situations and voting equality, which does not extend to the specific result of the manifestation of wishes. The manifestation of wishes is conditioned by the machinery of the electoral system established by the legislature.

Summary:

The Constitutional Court held that Law no. 5 of Trentino-Alto Adige of 1998, amending the law of 1983, was unconstitutional.

The regulation challenged introduced a threshold into the electoral system for the Councils of the Trento and Bolzano provinces, which, on the basis of the Statute of the Trentino-Alto Adige Region, jointly constitute the Regional Council. This threshold was set at 5% of the valid votes for the province of Trento and at the "natural quotient" for that of Bolzano.

The application, declared admissible on a preliminary basis and then deemed well-founded, was lodged by the sole regional councillor representing the Ladin linguistic group, on the basis of Article 56 of the aforementioned Statute, which is designed to provide specific protection for the linguistic groups and governs appeals against the regional laws provided for in the Statute. The application defended the interests of the Ladin linguistic group, since the challenged threshold would, it was claimed, make it impossible or very difficult for that group to have its own representatives on the Regional Council.

On the merits, in both the Trento and Bolzano provinces, the electoral thresholds provided for constitute a barrier to representation on the Regional Council for the Ladin group. In order to be taken into account in the allocation of seats in the Trentino, the group was required to obtain a number of votes exceeding the level which would then be required for the allocation of a seat. In the Alto Adige (Bolzano province) the percentage of votes required in this connection was higher in concrete terms than the number of votes required for the allocation of the seat, with the result that, as claimed by the applicant, access to representation was made all the more difficult for the minority language group; on those grounds, the law challenged fails to comply with Article 25 of the Regional Statute, which, in providing for a proportional system for the election of the Province councils (and hence the Regional Council), does not tolerate the introduction of factors excluding or making more difficult the representation of the language groups taken into account by that statute and intending to stand for election in that capacity.

Cross-references:

As regards the protection generally granted to linguistic minorities under Article 6 of the Constitution, the Court recalled its own judgment no. 231 of 1988; as regards the special significance of this protection in the Statute of Trentino-Alto Adige, the relevant judgments are nos. 242 of 1988, 483 of 1993 and 233 of 1994; finally, as regards constitutionality, in general terms, judgments nos. 43 of 1961, 429 of 1995 and 107 of 1996 should be taken into account.

Languages:

Italian.

Identification: ITA-1998-3-010

a) Italy / **b)** Constitutional Court / **c)** / **d)** 27.11.1998 / **e)** 383/1998 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 48 of 02.12.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national and non-national sources - Subordinate Community law and other domestic legal instruments.
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.
Institutions - Executive bodies - Sectoral decentralisation - Universities.
Institutions - Executive bodies - The civil service.
Fundamental Rights - Economic, social and cultural rights - Right to be taught.
Fundamental Rights - Economic, social and cultural rights - Right to work.
Fundamental Rights - Economic, social and cultural rights - Freedom to choose one's profession.
Fundamental Rights - Economic, social and cultural rights - Right to culture.

Keywords of the alphabetical index:

Access to higher education / Minister for universities and scientific and technological research / Quota / Parliamentary legislative sphere.

Headnotes:

The two articles of the Constitution concerning the fundamental principles governing the organisation of schools and the right of access to them and to the services they must provide are to be interpreted jointly, since there cannot be any form of organisation that does not seek to guarantee rights, nor any right to a service that has no effect on organisation.

Public education is regulated on a unified basis but, for the university system, where "autonomous regulations" apply, unity is ensured by "limits established by the laws of the State". The universities must be considered in terms not only of their internal organisation but also of their external functional profile, which implies rights and repercussions for those rights. It is for the legislature of the State to establish limits for universities' autonomy as regards both organisation and the right of access to study at them. This conclusion is in fact borne out by the principles governing the democratic system, whereby citizens' rights may be limited only with the consent of the body which derives its direct appointment from them and determines general state policy, or even of Parliament. Thus, even the possible adoption of a quota concerning access to universities can be founded only on a legislative basis.

The monopoly of the legislature is generally ensured by the determination of "parliamentary legislative spheres"; this monopoly is implemented through key choices in the spheres provided for by constitutional norms, either by not permitting "secondary" regulation or by requiring "primary" regulation to perform its allocated function. While this value is common to any "parliamentary legislative sphere", each constitutional norm dictates whether the respective spheres are open or closed to the possibility of the law making secondary sources competent to evaluate the implementation of the choices characterising those spheres and made by it.

In those spheres reserved for legislation, on the basis of constitutional provisions, it is accepted that a legislative provision may assign rule-making powers to the executive on condition that, as far as the exercise of such powers is concerned, the legislation provides for set limits which may nevertheless be drawn from the legislative system as a whole; in this context, a similar function, aimed at determining the limits imposed on the discretionary capacity of executive authorities' rule-making powers, must be recognised in community norms under which state obligations with implications for the organisation of university studies arise.

As provided for in the Constitution, the "parliamentary legislative sphere" as regards access to university does not imply that all the regulations in that sphere are contained in legislative acts. It is necessary first of all to take into consideration the relationship between the law and universities' autonomy, which is guaranteed by the Constitution - a relationship on the basis of which legislative provisions have only the role of setting "limits" - and, furthermore the relationship between legislative power and the rule-making power of the Government, given that the secondary provision may be required by the same law to incorporate and implement substantial points, when - as in the case in question - unitary norms are required. These, on the other hand, must be tailored to varied and variable circumstances and are not, therefore, easily governable by general, fixed legislative provisions. The parliamentary legislative sphere must therefore cater, on the one hand, for the necessity of not restricting the autonomy of universities where the aspects of regulation that touch on that autonomy are concerned and, on the other hand, the possibility of the law providing for the rule-making intervention of the

executive in order to fine-tune legislative provisions where their implementation, requiring overall evaluation, could not be attributed to the autonomous action of the university, even if it was recognised.

The community directives which, on the basis of the Treaty setting up the EC, are binding on all Member States as regards the result to achieve while leaving national bodies to decide on the form and the means, must be implemented by the legislature and the authorities in line with the constitutional rules which set out the powers of the legislature and the authorities and govern relations between them. As regards the tasks of the legislature in the parliamentary legislative spheres described in the Constitution as being open to rule-making intervention on the part of the authorities, the existence of self-executing community directives implies a weakening of the obligation for the provision in the sphere where the discretionary power of the executive is exercised to govern the matter directly, according to the content of the directive itself.

Summary:

The Constitutional Court, in an interpretative judgment dismissing the application and expressly referring to the grounds, held that the question of constitutionality raised by various regional administrative courts, citing Articles 3, 33, 34 and 97 of the Constitution, as regards Article 9.4 of Law no. 341/90 amended by Article 17.116 of Law no. 127/97, was unfounded. The norm challenged (in the text currently in force) stipulates that "the Minister for universities and scientific and technological research shall define, with the approval of the *Consiglio Universitario Nazionale* (national universities council), the general criteria for regulating access to specialised training colleges and university studies, even to those for which the act promulgated by the Minister provides for a limit on enrolments". The administrative courts challenged the legitimacy of the powers granted by the legislature to the Minister in connection with the definition of college and university studies to which access was subject to quotas (*numerus clausus*), with reference to Articles 33 and 34 of the Constitution and particularly in the light of the parliamentary legislative sphere provided for in this respect. Some courts also complained of a violation of Articles 3 and 97 of the Constitution. Article 33 states *inter alia* that "the Republic lays down general rules for education and establishes public schools of all kinds and grades", with particular attention as regards institutions of higher learning including universities, which are granted "the right to draft their own regulations within the limits laid down by state legislation". Article 34 establishes that "education is available to everyone", and entitles capable and deserving students, even without financial resources, "to attain the highest grades of learning".

The Court holds that some articles of the Constitution not cited must also be considered as norms of reference: the Court notes that the organisation of universities involves the constitutional rights of the individual, such as the right to one's own education (see Article 2 of the Constitution) and the right to one's own vocational choices (see Article 4 of the Constitution).

The Constitutional Court judges held that the norm challenged had to be interpreted in the sense that the powers granted to the Minister could be exercised only if - and insofar as they arose from other legislative provisions - the setting of criteria for customising regulations on colleges and university studies for which overcrowding restrictions could be taken into account and the limiting of enrolments by ministerial decision enacting the norm challenged were justified; for the norm challenged to be deemed constitutional in terms of respect for the parliamentary legislative sphere, the powers it grants to the authorities must not be considered as freely useable. It is in this sense that the norm under consideration must be incorporated by other provisions defining such powers. Such provisions may be identified in various community directives of significance in this respect, which concern the mutual recognition of university diplomas in the Member States on the basis of uniform training criteria, the exercise of the right of establishment in the Union States and freedom of service provision. For the time being, these directives concern diplomas for doctors, veterinary surgeons, dental surgeons and architects and lay down minimum training standards, so that the diplomas attest to the genuine possession of knowledge required for work in those fields. In all the cases covered by these directives, there is provision for practical experience to back up theoretical study. This implies a proper balance, as far as teaching arrangements are concerned, between the availability of structures and the number of students. The directives in question have been implemented by legislative decrees containing analytical forecasts in the aforementioned sectors. The objectives laid down by the directives (which are binding for States under Article 189 EC) are imposed on the authorities. This means that the powers vested in the authorities in the field governed by the directives must be exercised in line with the obligations of result imposed by the community norms. In this connection, it is not important whether those powers are defined when the directives are implemented or provided for in another way by the legislature, as in the present case.

The Court holds that the doubts expressed as to constitutionality with reference to Articles 3 and 97 of the Constitution are not founded, given that they too rely

on the premise, considered as erroneous, that the ministerial powers in question may be exercised on a fully discretionary basis under the norm challenged.

In concluding its judgment, the Court makes the point that organised legislative change, lacking to date, must be undertaken to obviate uncertainty on the part of potential university applicants and to avoid any harmful disputes.

Cross-references:

The Court first recalled its own judgment no. 195 of 1972 in connection with the supervision of universities within the framework of the organisation of education, as far as teaching was concerned; while not recent, judgment no. 4 of 1962 was recalled in connection with the necessity of any restriction on the rights of citizens being consented to by the organ deriving its mandate from them and therefore by Parliament; it then mentioned judgment no. 61 of 1995 in connection with the right to one's own education and the right to one's own vocational choices, which is also a vital means for the development of one's personality; last, it mentions judgment no. 34 of 1986 as regards the following points: respect for the principle of the parliamentary legislative sphere must be considered as fulfilled even when definitions of a rule-making power of the authorities granted to them by a legislative provision may be deduced from the regulatory system as a whole. Those definitions do not necessarily have to be set out in the provisions granting that power.

Languages:

Italian.

Japan
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 1998 - 31 December 1998.

Latvia
Constitutional Court

Important decisions

Identification: LAT-1998-3-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 12.09.1998 / **e)** 04-06(98) / **f)** On Conformity of the Cabinet of Ministers' Regulations On the Procedure of Compensation for the Unrealised Forecast Real Estate Tax to Self-Governments with the Laws: the Structure of the Cabinet of Ministers and On the Equalisation of Self-Gov.Finances / **g)** *Latvijas Vestnesis* (Official Gazette), 11.12.1998, no. 367 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Techniques of interpretation - Teleological interpretation.
General Principles - Separation of powers.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.
Institutions - Public finances - Budget.
Institutions - Public finances - Taxation.

Keywords of the alphabetical index:

Taxes / Municipal finance / Municipal Finance Equalisation Fund.

Headnotes:

The Cabinet of Ministers can only use delegated rule-making powers strictly in the limits provided by law.

Summary:

On 5 March 1998 the *Saeima* of the Republic of Latvia passed the Law on the equalisation of local government finances. Item 9 of the Transitional Provisions of the above law establishes that self-government bodies for whom, because of conditions independent from their activity, it is not possible to collect the real estate taxes anticipated in the forecast for 1998, shall submit to the Ministry of Finance a substantiated application for compensation for the unrealised forecast real estate tax. Regulations by the Cabinet of Ministers determine the procedure for submitting and reviewing applications as well as the procedure of compensation for unrealised forecast real estate tax.

If necessary, the Cabinet of Ministers shall submit to the *Saeima* amendments to the Law on the State budget for 1998. On this basis, the Cabinet of Ministers on 4 August 1998 passed Regulation no. 294 on the procedure of compensation for unrealised forecast real estate tax (henceforth, "the disputed Regulation").

The application was submitted by Riga Dome (Council) petitioning to declare the disputed Regulation null and void, as it contradicted Article 14.1.2 of the Law on the Structure of the Cabinet of Ministers and the second part of the Law on the structure of the Cabinet of Ministers as well as Item 9 of the Transitional Provisions to the Law on the equalisation of local government finances.

The applicant pointed out that when passing the disputed Regulation, the Cabinet of Ministers exceeded its authority, determined in Article 14.1.2 of the Law on the structure of the Cabinet of Ministers.

The Cabinet of Ministers may only issue normative acts or regulations if the law specifically authorises it to do so. Besides, the authorisation shall formulate the main directions of the regulations' content. The applicant argued that the Law on the equalisation of local government finances only authorised the Cabinet of Ministers to determine procedural issues of compensation, not to elaborate different principles for compensating tax forecasts.

The application stressed that Item 9 of the Transitional Provisions envisages compensation to self-governments of the difference between the anticipated Real Estate Tax and the actual realisation of the forecast for 1998.

At the same time the disputed Regulation envisages compensating the difference between the initial forecast on Real Estate Tax and the specified forecast on Real Estate Tax, but not the difference between the planned Real Estate Tax revenues and its actual fulfillment.

The Constitutional Court concluded that the Law on the equalisation of local government finances determines the general principles and the procedure of equalising local government finances. In conformity with Article 2 of the Law, the self-government finance equalisation system shall create equal possibilities for self-government bodies to execute the functions established by law. At the same time, socio-economic differences of self-government bodies shall be taken into consideration. The system shall encourage initiative and independence

on the part of self-government bodies to create their own financial resources and to assure the protection of the financial activities of the self-government bodies.

This objective shall be taken into consideration when interpreting the norms of the above law. Besides, when interpreting the Transitional Provisions, it shall be taken into account that features of application of the law, included in the Provisions, have been determined considering socio-economic conditions in the sphere of assessment of Real Estate Tax.

In the disputed Regulation, the Cabinet of Ministers stressed that conditions independent of the activity of local government shall be non-taxable as regards the Real Estate Tax properties, that are determined in Article 1.2 of the Law "On Real Estate Tax". Thus, the Cabinet of Ministers, by interpreting the order of the legislator, expressed in Article 9 of the Transitional Provisions, in a narrow manner has not taken into consideration other normative acts regulating the collection of real estate tax.

Besides, the disputed Regulation does not envisage a procedure for reviewing substantiated applications, during which to detect and, when calculating the amount of compensation, take into consideration conditions independent from the activity of the self-government body, which do not permit to collect the real estate tax. Thus, the basic criterion for calculation of the real estate taxes anticipated in the forecast for 1998, and fixing compensation is not being taken into consideration.

Besides, when passing the disputed Regulation, the Cabinet of Ministers violated the authorisation stated in Article 9 of the Transitional Provisions of the Law on the equalisation of local government finances. It determined the procedure of compensating the difference between the initially calculated Real Estate Tax income anticipated in the forecast and the specified revenues anticipated in the tax forecast.

However, it has not established the procedure of granting compensation for the unrealised forecast real estate tax.

The *Saeima*, when on 26 November 1998 reviewing Amendments to the Law on the State Budget for 1998, submitted by the Cabinet of Ministers, and deciding on compensation for the unrealised forecast real estate tax to self-governments, did not back the wording suggested by the Cabinet of Ministers. It envisaged calculating the difference between the initial forecast of tax and the specified forecast to determine the compensation. Anticipating compensation for the unrealised forecast real estate tax in the sum of 4,5 million lats, which "was calculated to be the sum of unrealised real estate tax because of conditions independent from the activity of the self-government", the legislator once again affirmed the notion and objective of Article 9 of the Law on the equalisation of local government finances, i.e. to compensate unrealised forecast real estate tax because of conditions independent from the activity of the self-government body.

The Constitutional Court decided to declare the disputed Regulation as not being in compliance with Article 14.1.2 and 14.2 of the Law on the structure of the Cabinet of Ministers and Item 9 of the Transitional Provisions of the Law on the equalisation of local government finances and null and void from the moment of its adoption.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-1998-3-007

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 27.11.1998 / **e)** 01-05(98) / **f)** On Conformity of the Norm Established by the Second Part of Article 4 of the Law "On Maternity and Sickness Benefits" with Article 66 of the Constitution *(Satversme)* of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 01.12.1998, no. 355 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Unwritten rules - General principles of law.
General Principles - Vested rights.
Institutions - Public finances - Budget.
Fundamental Rights - Economic, social and cultural rights - Right to social security.

Keywords of the alphabetical index:

Social assistance / Social insurance / Expenses determined by normative acts, officials.

Headnotes:

Article 66.2 of the Constitution (*Satversme)* establishes that when passing a law or a resolution involving expenditure from the Treasury, the *Saeima* has to take into consideration the Basic Budget. If the *Saeima* passes

a resolution involving expenditure not foreseen in the Budget, it should specify the sources of revenue with which to meet such expenditure.

Summary:

The case was initiated by the Cabinet of Ministers, questioning conformity of the norm (hereinafter- "the disputed norm") established by Article 4.2 of the Law on maternity and sickness benefits, expressed in a new wording in Article 8 of the *Saeima* 19 June 1998 Law amending the law on maternity and sickness benefits, with Article 66 of the Constitution.

In the application it was submitted that the *Saeima*, when altering the Law on maternity and sickness benefits on 19 June 1998 and amending Article 4.1.2, enlarged the scope of persons entitled to receive maternity benefit, without envisaging funding for this. Thus, in the opinion of the applicant, the *Saeima* did not respect Article 66 of the Constitution,whichstipulates that if the *Saeima* passes a resolution involving expenditure not foreseen in the Budget, it should specify in this resolution the sources of revenue with which to meet such expenditure.

It was also stressed that by introducing the above norm and not envisaging extra funds, the 1998 Special Budget for Disability, Maternity and Sickness would be in deficit and would not cover expenses for services of social insurance.

Before these Amendments took place, the social insurance system was regulated by several laws and based on unified principles establishing that expenses and services from the social insurance funds should cover only those persons who are socially insured.

The Constitutional Court concluded that the special Budget for Disability, Maternity and Sickness is one of the 1998 confirmed Special Budgets of Social Insurance. This Budget was established on the basis of the Law on maternity and sickness benefits and the Law on State Social Insurance. In accordance with the above laws, revenues accrued in the Special Budget (resources of the Social Insurance) shall be utilised only for social insurance payments to socially insured persons.

On 19 June 1998 when adopting the disputed legal norm and anticipating that the above Budget shall also cover the payment of maternity benefits to persons who are not socially insured, but who are provided for by a socially insured person, the *Saeima* enlarged the scope of the Special Disability, Maternity and Sickness Budget.

The *Saeima* when passing the disputed legal norm was under an obligation to specify the sources of revenue with which to meet the expenditure. It could do so either by passing adequate amendments to the Law on the State Budget or by determining that the disputed norm shall take effect together with a respective Amendment to the existing Law on the Budget.

Thus, during the process of passing the disputed norm, the deputies of the *Saeima* as well as the officials of the Ministries of Welfare and Finance did not comply with the duties determined by normative acts, leading to a violation of the requirements of the second part of Article 66 of the Constitution.

When deciding on the time from which the disputed legal norm shall be declared null and void, it should be taken into consideration that in accordance with Article 89 of the Constitution, the State acknowledges and protects the basic right of a person to social insurance. Besides, in compliance with the principle of trust in law, the persons who were not covered by social insurance trusted in legality and stability of the disputed legal norm (see Decision of the Constitutional Court no. 04-05 (97) of 11 March 1998, *Bulletin* 1998/1 [LAT-1998-1-002]).

The Constitutional Court decided to declare that the disputed norm was not in compliance with Article 66 of the Constitution and null and void from the moment of the Law on the State Budget for 1999 taking effect, if the State Budget for 1999 does not envisage resources for covering the payment of maternity benefits to the persons indicated in the disputed norm.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Statistical data
1 September 1998 - 31 December 1998

Number of decisions: 34

Important decisions

Identification: LIE-1998-3-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 23.11.1998 / **e)** StGH 1998/27 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Documents lodged by the parties.
Constitutional Justice - Procedure - Parties - *Locus standi.*
Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
Fundamental Rights - General questions - Entitlement to rights - Legal persons - Public law.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Municipal autonomy, violation / Opinion, written, appeal proceedings.

Headnotes:

When an appeal concerning municipal autonomy is brought before the State Council, the municipality is justified in claiming violations of fundamental procedural safeguards, provided these safeguards serve to protect the municipality's autonomy.

The municipality's right to a hearing does not confer upon it the status of a party in its own right, but at the very least the right to submit a written opinion in proceedings concerning a violation of its autonomy.

Summary:

Following a decision by the government to dismiss an objection to a revision of a local development plan, several objectors lodged an appeal with the Administrative Tribunal.

The municipality concerned requested the Administrative Tribunal to grant it the status of a party in the proceedings, with all the rights that this status entails. Since the Administrative Tribunal dismissed this request, the municipality lodged an appeal with the State Council, claiming a violation of its autonomy and, in particular, a violation of the right to a hearing by tribunal.

The State Council partly allowed the appeal and found that there had been a violation of the municipality's right to a hearing. In its statement of reasons, the State Council stated first of all that in constitutional appeals by a municipality, not only violation of municipal autonomy but also fundamental procedural safeguards may be cited as grounds of appeal, provided these safeguards serve to protect the municipality's autonomy. However, a municipality cannot rely on ordinary civil rights and liberties, which are designed to provide spheres in which the state cannot intervene and to allow private individuals autonomy in exercising their free will. On the other hand, with regard to the development areas entrusted to them by the law, municipalities' autonomy relates only to the tasks assigned to them. Under Article 25 ECHR, they are not entitled to rely on the fundamental rights enshrined in the European Convention on Human Rights either. As regards the fundamental procedural safeguard of the right to a trial, the State Council found that the scope of this right was narrower for municipalities than for private individuals. However, municipalities should at least be entitled to submit a written opinion in appeals against violations of their autonomy.

Languages:

German.

Lithuania
Constitutional Court

Summaries of important decisions of the reference period 1 September 1998 - 31 December 1998 will be published in the next edition, *Bulletin* 1999/1.

Malta
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

Number of decisions: 14
New Cases: 6

Important decisions

Identification: MLT-1998-3-003

a) Malta / **b)** Constitutional Court / **c)** / **d)** 16.11.1998 / **e)** 514/94 / **f)** Joseph Arena nomine v. Commissioner of Police et al / **g)** / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Exhaustion of remedies.
Sources of Constitutional Law - Categories - Case-law - International case-law.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Administrative decision / Constitutional complaint / Business licence, conditions / Ordinary remedies, non-exhaustion.

Headnotes:

The fact that administrative decisions can be judicially reviewed under ordinary law does not in itself mean that an aggrieved party has no right to file a constitutional application alleging breach of a fundamental right. A declaration that an individual's rights have been violated does not depend on whether or not the applicant had other remedies for redress, and which emerge from ordinary law.

Summary:

Following proceedings held before the Appellate Tribunal for Police Licences, drastic changes were introduced to the conditions stipulated in a licence for the operation of a laundry owned by the applicant. The applicant filed

proceedings wherein he contended that the Tribunal had never afforded him the right to be heard. Thus, the applicant's complaint concerned the violation of his fundamental right to a fair hearing.

The respondents contended that the applicant had other remedies at law in order to contest the administrative action. Under such circumstances it was alleged not possible to assert a violation of one's fundamental human rights. It was argued that in terms of Article 742 of the Code of Organisation and Civil Procedure (Chapter 12), the applicant should have requested the judicial review of the administrative act whereby the conditions of the business licence were modified.

The Constitutional Court examined Article 46.2 of the Constitution of Malta which provides that the Civil Court, First Hall (in its constitutional jurisdiction), may decline its original jurisdiction to hear and determine a constitutional application "where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".

The Court observed that there was no provision in the Constitution which expressly or implicitly declared that the remedies applicable under any other law were to be exhausted prior to the filing of a constitutional application. While it was an established principle that a constitutional application should be filed as an ultimate remedy, the right to such a remedy is not subjected to the fulfilment of such a condition. The fact that the Constitution itself affords the Court this discretionary power is a confirmation that the Constitution considers as being relevant the fundamental right which is breached and not the remedy available to the aggrieved party.

The Constitutional Court also held that the non-exhaustion of ordinary remedies was not a formal plea, as in this respect the Court enjoyed a discretionary power whether to present an effective remedy to the applicant. The principle is that the Constitutional Court is legally bound to provide a remedy unless it is satisfied that there is an adequate and effective remedy under another law. However, the Constitutional Court is not precluded from providing a constitutional remedy even though other remedies might be available under the ordinary law.

Thus, it was emphasised that the breach of fundamental human rights does not depend on the fact that the aggrieved party had no right of redress under the ordinary law. The Constitution is concerned with the actual breach of the human right and not with the remedies available to the aggrieved party.

The Constitutional Court also referred to the fact that the European Commission of Human Rights had recognised the possibility that in special circumstances the applicant is exonerated from the obligation to exhaust domestic remedies, even though they may nonetheless be effective and adequate.

Cross-references:

In its reasoning the Constitutional Court referred to reports by the European Commission of Human Rights:

Reed v. United Kingdom (Application no. 7630/76); *Hilton v. United Kingdom* (Application no. 5613/72).

Languages:

Maltese.

Identification: MLT-1998-3-004

a) Malta / **b)** Constitutional Court / **c)** / **d)** 16.11.1998 / **e)** 594/97 / **f)** Gaetano Busuttil 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.
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 examine witnesses.

Keywords of the alphabetical index:

Criminal law / Criminal procedure / Drug law / Evidence, inadmissibility / Witness, oath, refusal.

Headnotes:

The admissibility as evidence of a written declaration confirmed on oath before a magistrate does not amount to a breach of one's right to a fair trial. What is essential

is that the accused had every opportunity to cross-examine such witness.

Summary:

Criminal proceedings relating to drug offences were instituted against the applicant. The Court of Magistrates (Malta) as a Court of Criminal Judicature upheld the prosecution's request to introduce, as part of its evidence, written declarations sworn on oath by a number of witnesses. This request was filed after the witnesses, who were the sons of the accused, requested that they be exempted from tendering evidence against their father.

The applicant contended that in the course of a criminal trial, witnesses were supposed to give evidence *viva voce*. Furthermore, Article 661 of the Criminal Code (Chapter 9 of the Laws of Malta) stipulates that:

"A confession shall not be evidence except against the person making the same, and shall not operate to the prejudice of any other person".

However, according to Article 30A of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta), where a person is involved in any offence against this Ordinance, "any statement made by such person and confirmed on oath before a magistrate and any evidence given by such person before any court may be received in evidence against any other person charged with an offence against the said Ordinance".

The applicant contended that this provision was in breach of Article 39.6 of the Constitution of Malta and Article 6 ECHR.

By means of a judgment delivered on 19 December 1997, the First Hall of the Civil Court dismissed applicant's claim. The Constitutional Court, in confirming the first judgment, argued that Article 30A of the Dangerous Drugs Ordinance regulated the admissibility of a sworn declaration and evidence tendered by witnesses in front of a magistrate or a court in other criminal proceedings.

The Court held that the fact that a provision of law was not deemed to be in breach of the Constitution or the European Convention on Human Rights did not necessarily mean that the provision was in conformity with the procedural rules of criminal law. It is possible to envisage situations where the Criminal Code provides a wider protection to the accused than that guaranteed by the Constitution and the European Convention on Human Rights.

The admissibility of a sworn declaration is an issue regulated by the procedural law of a country. From a constitutional point of view, it is essential to afford the accused ample opportunity to effect control over this form of evidence and also to cross-examine such a witness, in conformity with the principle of equality of arms. The Constitutional Court reiterated that such evidence is admissible like any other documented evidence. Thus, it could not be argued that the evidence was tendered in the absence of the accused.

From an examination of the relevant acts of proceedings, it was evident that the applicant had been granted every opportunity to produce the said persons as witnesses and to cross-examine them. The Court merely applied the law and introduced as evidence the sworn declarations, a procedure which it was bound to follow in terms of Article 30B of the Dangerous Drugs Ordinance.

Languages:

Maltese.

Moldova
Constitutional Court

Summaries of important decisions of the reference period 1 September 1998 - 31 December 1998 will be published in the next edition, *Bulletin* 1999/1.

The Netherlands
Supreme Court

Important decisions

Identification: NED-1998-3-021

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 08.05.1998 / **e)** 16.553 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998/890.

Keywords of the systematic thesaurus:

General Principles - Legality.
Institutions - Public finances - Taxation - Principles.

Keywords of the alphabetical index:

Taxation, legal basis / Tax return, information / Tort action.

Headnotes:

A taxpayer who submits incorrect information to the tax authorities cannot be sued in tort by the State, even if the incorrectness or a causative factor is his own fault. This would be incompatible with the principle enshrined in Article 104 of the Constitution that taxation shall be levied pursuant to an Act of Parliament.

Summary:

It is wrong to take the view that a taxpayer who submits incorrect information to the tax authorities in his tax return - in the case at hand a provisional return - can be sued in tort for damages by the State if, in the words of Article 6:162.3 of the new Civil Code, the error results from his own fault, or from a cause for which he is answerable according to law or common opinion. For this would imply that if the taxpayer submits incorrect information in a provisional or final tax return, either through his own fault or through another cause referred to in Article 6:162.3 of the Civil Code, the State, without regard to the statutory basis for taxation, could bring a private-law action in tort for damages for tax or advantage lost to the State that would have accrued if the initial return had been correct, through which it could collect sums of money that the tax authorities would not be able to collect using the public-law rules that constitute the basis for taxation, because it would conflict with the

restrictions included in the rules on taxation and their consequences.

Languages:

Dutch.

Identification: NED-1998-3-022

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 08.05.1998 / **e)** 16.608 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998/496.

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.
Sources of Constitutional Law - Categories - Case-law - International case-law - European Court of Human Rights.
Sources of Constitutional Law - Techniques of interpretation - Historical interpretation.
General Principles - Reasonableness.
Institutions - Jurisdictional bodies - Jurisdiction.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Age.

Keywords of the alphabetical index:

Review of constitutionality, prohibition / Age limit for post.

Headnotes:

The age limit of 72 laid down in Article 2:252 of the Civil Code for the appointment of a member of the supervisory board of a private company with limited liability does not constitute unjustifiable discrimination on the grounds of age within the meaning of Article 26 of the International Covenant on Civil and Political Rights (ICCPR) of 1966.

Summary:

Parliament concluded, on adequate grounds that did not exceed the bounds of reasonableness, that objective and reasonable grounds existed to justify the discrimination on the basis of age in Article 2:252.4 of the Civil Code. Where this distinction is made in the pursuit of a legitimate aim and can be regarded as appropriate means for achieving this aim, there is no unjustifiable discrimination on the grounds of age within the meaning of Article 26 ICCPR.

Nonetheless, as the developments that culminated in the introduction of a Bill to prohibit age discrimination in job recruitment and selection make clear, the social climate has changed since the introduction of Article 50b (old) of the Commercial Code and Article 2:252 of the Civil Code, such that distinguishing on the grounds of age is now more likely than in the past to be regarded as unjustified. It cannot be said, however, that setting age limits beyond which certain positions can no longer be held is no longer compatible with the conception of law of a large proportion of the population. Against this background, the development outlined above does not mean that the disputed statutory regulation should be deemed to have lost its justification.

Even if a liberal interpretation is given to the autonomous term "possessions" within the meaning of Article 1 Protocol 1 ECHR, it is difficult to see, at the present time, how the plaintiffs in the cassation proceedings could be deemed to possess a right that can be regarded as an asset within the meaning of this provision (cf. e.g. European Court of Human Rights 23 February 1995, Series A, no. 306-B, p. 46, §53, and European Court of Human Rights 20 November 1995, Series A, no. 332, p. 21, §31; *Bulletin* 1995/3 [ECH-1995-3-019]).

Pursuant to Article 120 of the Constitution, the district court was not permitted to review the constitutionality of the disputed statutory provision.

Languages:

Dutch.

Identification: NED-1998-3-023

a) The Netherlands / **b)** Supreme Court / **c)** Third division / **d)** 15.07.1998 / **e)** 31.922 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken* 1998/293.

Keywords of the systematic thesaurus:

General Principles - Margin of appreciation.
General Principles - Reasonableness.
Institutions - Public finances - Taxation.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Public burdens.
Fundamental Rights - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Privileged treatment.

Headnotes:

A different treatment for taxation purposes of employees using company cars exclusively for commuting and those also using company cars for private purposes is unjustified.

Summary:

It was not reasonable for Parliament to treat cases in which a car made available by an employer was used for commuting but not, or only to a negligible extent, for exclusively private use, as different from other cases. By prescribing an increment to the employee's income of 4% of the list price of the car thus made available in cases in which the company car is not used privately, or only to a negligible extent, parliament singled out a limited group within a group of equal cases for privileged treatment, and was hence guilty of treating equal cases unequally. Even when parliament's margin of discretion is taken into account, there were no reasonable grounds on which it could have concluded that the cases concerned were not equal, or at any rate, that there was a reasonable and objective justification for subjecting the cases concerned to unequal treatment.

Languages:

Dutch.

Identification: NED-1998-3-024

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 09.10.1998 / **e)** 9117 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998/871.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
General Principles - Proportionality.
Fundamental Rights - Civil and political rights - Right to family life.

Keywords of the alphabetical index:

Natural child, recognition, name.

Headnotes:

A provision of the Civil Code that is incompatible with Article 8 ECHR shall remain inapplicable.

Summary:

In a case such as this one, in which both the mother and the man who has acknowledged paternity wish the children to continue to bear the mother's name after this acknowledgement, it cannot be said, or it can no longer be said, given the stage of the development of the law that applied at the time of the appeal court's judgment, that the application of Article 1:5.2 (old) of the Civil Code is necessary in a democratic society and is in the interests of one of the objectives listed in Article 8.2 ECHR. Thus Article 1:5.2 (old) of the Civil Code, which is incompatible with the parents' right to choose their children's family name as enshrined in Article 8 ECHR, must remain inapplicable in this case.

Languages:

Dutch.

Norway
Supreme Court

Important decisions

Identification: NOR-1998-3-002

a) Norway / **b)** Supreme Court / **c)** / **d)** 20.11.1998 / **e)** Inr 77 B/1998 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1998, 1795 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
General Principles - Margin of appreciation.
General Principles - Reasonableness.
Institutions - Executive bodies - Powers.
Fundamental Rights - General questions - Entitlement to rights - Foreigners.
Fundamental Rights - Civil and political rights - Prohibition of torture and inhuman and degrading treatment.
Fundamental Rights - Civil and political rights - Right to private life.
Fundamental Rights - Civil and political rights - Right to family life.

Keywords of the alphabetical index:

Expulsion of offender.

Headnotes:

An expulsion order imposed on a foreign national convicted of serious crimes (drug offences) is not contrary to Article 8 ECHR.

Summary:

A, a foreign national, was convicted in 1993 of serious drug offences, and sentenced to imprisonment for 1 year and 2 months. Previously, A had been convicted four times between 1981 and 1986 of several crimes against property. A had come to Norway in 1976 at the age of 13, and had mainly lived in Norway since. In 1983 he married a Pakistani woman in Pakistan. They had 3 children. His spouse and children live in Pakistan, as well as A's parents and six siblings.

The immigration authorities decided to expel A from Norway when the sentence was served on him. This decision was based on Sections 29 and 30 of the Immigration Act of 24 June 1988. A complaint to the Ministry of Justice confirmed the expulsion order. A then filed a civil case against the State/the Ministry of Justice claiming that the expulsion order was invalid.

The City Court found, with one dissenting vote, that the expulsion order was invalid. In the Court of Appeal, this decision was unanimously reversed.

A then appealed to the Supreme Court. He claimed that the expulsion order was contrary to Articles 3, 14 and 8 ECHR, and furthermore that the order was invalid due to national rules on unfair discrimination or highly unreasonable administrative decisions. The Supreme Court found that none of these arguments was sufficient to support the claim of invalidity.

The Supreme Court held that the Norwegian authorities had a certain margin of appreciation in relation to the Convention. This margin must also be applied by Norwegian courts. The expulsion order - whose purpose was the "prevention of disorder or crime" in Norway - was within the framework established in Article 8.2 ECHR. It could not be considered unreasonable to expel the appellant.

The Supreme Court stated that a similar evaluation of reasonableness had to be undertaken by the immigration authorities according to the Immigration Act Sections 29 and 30. In the present case, an evaluation of reasonableness according to Sections 29 and 30 of the Immigration Act would lead to the same result as Article 8.2 ECHR.

A had claimed that the expulsion would be contrary to Article 3 ECHR because he had received threats, and that the Pakistani government would not be able to guarantee his security if he was expelled. The Supreme Court noted that it was somewhat unclear whether Article 3 ECHR was applicable to threats from persons or groups that did not represent public authorities. It was unnecessary for the Supreme Court to take a stand on this question because the alleged threats could not be considered to be sincere.

There were no grounds for the allegations that the expulsion order was highly unreasonable or based on any unfair discrimination.

Cross-references:

See also decision Inr 38/1996 of 29.04.1996, *Bulletin* 1996/1 [NOR-1996-1-002], decision Inr 39/1996 of

29.04.1996, *Bulletin* 1996/1 [NOR-1996-1-003], decision Inr 40/1996 of 29.04 1996, *Bulletin* 1996/1[NOR-1996-1-004] and decision Inr 72/1996 of 26.11.1996, *Bulletin* 1996/3 [NOR-1996-3-009].

Languages:

Norwegian.

Identification: NOR-1998-3-003

a) Norway / **b)** Supreme Court / **c)** / **d)** 11.12.1998 / **e)** Inr 82 B/1998 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1998, 1965 / **h).**

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - Other international sources.
General Principles - Reasonableness.
Institutions - Jurisdictional bodies - Jurisdiction.
Fundamental Rights - Civil and political rights - Non-retrospective effect of law.

Keywords of the alphabetical index:

International jurisdiction, place of performance, non-retrospective effect / Lugano Convention of 16 September 1988 / Procedural laws, retrospective application / Private international law.

Headnotes:

An amendment that extended the international jurisdiction of Norwegian courts with effect on previous obligations was not considered to be in conflict with Article 97 of the Constitution, which prohibits legislation with retrospective effect.

Summary:

In 1997 an action before a Norwegian court of first instance (Oslo City Court) was brought against a former Norwegian national A, who was at that time an Australian national living in Australia. The claim arose from a mortgage loan A had signed in 1988, while he was still living in Norway. The loan was secured against A's apartment in Oslo. He failed to fulfil his obligations, and the mortgagee, a bank, exercised its power of sale in 1992. When A's apartment had been sold, there was still a deficit.

Before an amendment was made to Sections 24 and 25 of the Civil Procedure Act in 1993, a person could be sued in Norway even if his domicile was elsewhere. But the person had to have temporary residence in Norway, or there had to exist a written acknowledgement of the obligation in question. It was evident that until 1992, as long as the bank had not exercised its power of sale, A could be sued before Norwegian courts although he was then living in Australia. However, once the apartment had been sold, Norwegian courts would no longer have jurisdiction in litigation concerning the remaining deficit.

Section 25 of the Civil Procedure Act was amended due to the implementation in Norwegian national legislation of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988. The new Section 25 corresponds to Article 5.1 of the Convention, whereby a person, in matters relating to contract, may be sued in the court of the place of performance of the obligation in question. The amendment of Section 25 came into force in 1993.

For the deficit, the place of performance was Oslo. The City Court and the Court of Appeal held that the amendment of Section 25 of the Civil Procedure Act extended the international jurisdiction of Norwegian courts, and thus the bank's action against A could proceed. A appealed to the Supreme Court.

Before the Supreme Court, A claimed that the application of the new Section 25 would be in conflict with Article 97 of the Constitution, which prohibits legislation with retrospective effect. His obligation under the contract arose before the amendment was passed, and under the old procedural rules he could not have been sued in Norway. He claimed that the litigation should be dismissed from Norwegian courts.

The Supreme Court found that the new Section 25 was applicable. The Supreme Court held that the amendment of Section 25 extended the international jurisdiction of the Norwegian courts to include defendants living in countries not participating in the Lugano Convention.

The Supreme Court stated that as a general rule, new procedural legislation must also apply to previous obligations. However, in some cases new procedural rules could have a retrospective effect that would be unreasonable or unjust. In such cases, the principle enshrined in Article 97 of the Constitution would imply that the procedural rules were not applicable. In the present case there was no such unreasonable or unjust

retrospective effect. Thus the Supreme Court held that the litigation could proceed before the City Court.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 September 1998 – 31 December 1998

I. Constitutional review

Decisions:
- Cases decided on their merits: 9
- Cases discontinued: 0

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

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 8
- Cases on the legality of other normative acts under the Constitution and statutes: 1

Findings:
- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 6
- Upholding the constitutionality of the provision in question: 3

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 9
- Motions requesting such interpretations rejected: 0

III. Additional information

Judge Blazej Wierzbowski has recently retired. Mr Jerzy Ciemniewski was appointed in his place.

Important decisions

Identification: POL-1998-3-015

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 01.09.1998 / **e)** U 1/98 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 5, item 63 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution.
General Principles - Legality.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Institutions - Public finances - Taxation - Principles.
Fundamental Rights - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Tax law / Public duty, introduction / Tax dominion, principle.

Headnotes:

A new public duty is introduced where a similar public duty did not exist previously and is totally different from previously existing public duties. The differences may concern the category of entities, subjects of taxation, taxation basis, method of determination of the tax rates or the method of allowance of the public duty.

Summary:

Pursuant to Article 217 of the Constitution, taxes and other public duties shall be imposed and subjects of taxation, tax rates and the principles of granting reductions shall be determined by virtue of an Act. This provision constitutes the principle of the tax dominion, according to which the State may impose certain duties on entities acting within its territory, in order to finance the State's activity. The aforementioned provision also determines the number of issues which may only be regulated by an Act.

In the examined case the difference concerned a decrease of the excise tax within the limits set forth by the Act which already existed. Since both the category of subject of taxation and the tax basis remained unchanged, the Regulation of the Minister of Finance is in conformity with the Constitution.

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-016

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.09.1998 / **e)** K 10/98 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 5, item 64 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Rule of law.
General Principles - Maintaining confidence.
General Principles - Vested rights.
Fundamental Rights - Civil and political rights - Non-retrospective effect of law - Taxation law.

Keywords of the alphabetical index:

Alcohol, sale permits.

Headnotes:

An extension of the duty to pay administrative fees for permits for selling alcohol at premises which were granted such permits before the date of introduction of the fees infringes the principles of *lex retro non agit*, the rule of law, maintaining confidence in the law and vested rights.

Summary:

An amendment of the Law on Upbringing in Sobriety and Counteracting Alcoholism introduced the duty to pay administrative fees for permits for the sale of alcohol at all premises including those which were granted such permits before the date of introduction of this provision. The legislator introduced this duty to enable the communes to realise tasks connected with the prevention and solving of alcohol-related problems. In the Tribunal's opinion, however, regardless of whether such a regulation is justified and socially necessary, it may not infringe the *lex retro non agit* principle. Therefore, bodies which were entitled to sell alcohol in a said calendar year without obtaining permission shall not by obliged at the

end of that year to pay any administrative fees for the permits.

Cross-references:

Resolution of 12 January 1995 (K 12/94), *Bulletin* 1995/1 [POL-1995-1-003].

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-017

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.10.1998 / **e)** K 36/97 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 5, item 65 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Executive bodies - Application of laws - Delegated rule-making powers.
Institutions - Jurisdictional bodies - Jurisdiction.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.
Fundamental Rights - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Drugs, fight against / Forfeiture / Pharmaceutical inspectors, powers / Administrative procedure.

Headnotes:

The authorisation by a special administrative body to forfeit certain articles, determined in the Law on Fighting Drugs, for the benefit of the State Treasury, infringes the constitutional principle that only courts may decide on forfeiture of any articles.

Summary:

The Law on Fighting Drugs grants to provincial Pharmaceutical Inspectors the right to decide, according to administrative procedure, on the forfeiture of drugs and other articles determined in the Law for the benefit of the State Treasury. It results from the relevant provisions of the Law that such a decision shall be treated as final and binding.

However, the Constitution of Poland determines that only the courts may decide on forfeiture of any articles. Irrespective of the fact that under the previous regulation such competences could also have been granted to the customs bodies, adjudication boards and various financial bodies, under the regulation currently in force any delegation of such powers to the administrative bodies is prohibited. Therefore, regardless of the method of interpretation of the aforementioned provision, provincial Pharmaceutical Inspectors may not be granted the right to decide on forfeiture of any articles for the benefit of the State Treasury.

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-018

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.11.1998 / **e)** K 39/97 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 99 / **h)**.

Keywords of the systematic thesaurus:

General Principles - Rule of law.
General Principles - Proportionality.
General Principles - Prohibition of arbitrariness.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Employment - Public.
Fundamental Rights - Civil and political rights - Individual liberty.
Fundamental Rights - Civil and political rights - Right to participate in political activity.

Keywords of the alphabetical index:

Vetting / Secret services, past co-operation / Rights, essence, guarantee / Lustration.

Headnotes:

The vetting procedure, understood as a legally determined mechanism of examining links and connections of persons in the highest State and public positions (for whom a particularly high level of responsibility arises), may not, as a rule, be called into question. Generally, it shall be treated as concordant both with the Constitution and with international standards.

An issue connected with the vetting procedure which does need to be examined is the question whether the choice of constitutional values has an arbitrary character. It should be determined whether this procedure observes the constitutional values and the rights of individuals and whether the procedure provided in the act is concordant with the requirements of a democratic State ruled by law.

The purpose of the Act on Vetting was to "prevent use of political past" and fact of co-operation with secret services for the purposes of blackmail. In consequence, certain restrictions of the constitutional right to privacy and a determination of each person's private life must be introduced. In a democratic State, such restrictions may only be introduced if they are necessary for the protection of the environment, health, public morality, freedom or rights of third persons. The restrictions may not, however, infringe the essence of freedoms and rights. That means that persons applying for important State or public positions must calculate certain restrictions therewith.

Supplementary information:

Four judges (Z. Czeszejko-Sochacki, W. Johann, F. Rymarz, M. Zdyb) delivered dissenting opinions.

Cross-references:

Resolution of June 24, 1998 (K 3/98), *Bulletin* 1998/2 [POL-1998-2-014]; resolution of November 21, 1995 (K 12/95), *Bulletin* 1995/3 [POL-1995-3-016]; resolution of June 19, 1992 (U 6/92).

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-019

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.11.1998 / **e)** K 42/97 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzêdowy* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

General Principles – Public interest.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Freedom of association.
Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Supreme Auditing Office, employees, independence / Trade union membership, political declaration.

Headnotes:

Depriving certain Supreme Auditing Office employees of the right to join any trade unions does not infringe the constitutional principle of freedom to form associations.

Summary:

Performance of professional tasks by employees of the Supreme Auditing Office (SAO) involves a high level of confidentiality which is associated with the protection of State and public security. Therefore, an important characteristic of all SAO employees is that they should be impartial. Consequently, the auditor should be independent and free from any external and internal pressures. It should be stressed that employee participation in any trade union should be treated as a declaration of his political feelings, which would cause conflict with the nature and sense of the function performed by her or him.

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-020

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.11.1998 / **e)** SK 7/98 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzêdowy* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Equality - Scope of application - Social security.

Keywords of the alphabetical index:

Pensions.

Headnotes:

The constitutional principle of equal treatment means that persons having the same characteristics shall be treated equally and that persons having similar characteristics shall be treated similarly.

Summary:

A difference in treatment between persons who acquired the right to a pension or have fulfilled the conditions to acquire such a right before the Act on Revaluation of Pensions became effective and persons who have fulfilled such conditions after the aforementioned Act became effective is in conflict with the constitutional principle of equality.

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-021

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.11.1998 / **e)** K 22/98 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzêdowy* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Local self-government.
Institutions - Executive bodies - Territorial administrative decentralisation - Principles - Supervision.
Institutions - Public finances - Principles.

Keywords of the alphabetical index:

Municipality, financial independence / State authority, decentralisation, limitation.

Headnotes:

The constitutional rights and duties of local self-government are mainly determined by the principle of independence. That means that the self-government units participate in the performance of public tasks within the scope determined by the legislator.

The principle of financial independence of the communes on the basis of their budgets is not equal to an independence which would result in the full freedom to collect taxes and assign them for any purposes. On the contrary, communes may only conduct activities permitted by the law. The financial independence of communes should be treated, therefore, not as financial autonomy but as a kind of decentralisation leading to the limitation of the State's authority.

Summary:

The duty to assign the funds from payments for a licence to sell alcohol for the purposes set forth in the Act on Counteracting Alcoholism and Upbringing in Sobriety does not infringe the constitutional principle of the financial independence of communes.

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-022

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 01.12.1998 / **e)** K 21/98 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzêdowy* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Institutions - Legislative bodies - Powers.
Institutions - Legislative bodies - Guarantees as to the exercise of power.
Institutions - Public finances - Auditing bodies.

Keywords of the alphabetical index:

Supreme Auditing Office, principles / Supreme Auditing Office, organisation.

Headnotes:

The relationship of dependence existing between the Supreme Auditing Office (SAO) and the Parliament is demonstrated by the Parliament's review function. Consequently, the SAO performs its tasks for the benefit of and under the supervision of the Parliament. The SAO statutes shall also be laid down under the Parliament's supervision. Since the statutes determine the SAO's organisational structure, the number of SAO internal departments and its territorial scope and division, they should be treated as being outside the scope of the SAO's relations with the Parliament.

Supplementary information:

One judge (L. Garlicki) delivered a dissenting opinion.

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-023

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.12.1998 / **e)** K 41/97 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzêdowy* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

General Principles - Legality.
Institutions - Jurisdictional bodies - Jurisdiction.
Institutions - Jurisdictional bodies - Liability.

Keywords of the alphabetical index:

Disciplinary responsibility of the court's executive officers / Administration of justice, definition / Disciplinary commission.

Headnotes:

The term "administration of justice" shall be understood objectively as a process of solving legal conflicts, not subjectively as a sole competence of the courts in said matters.

The jurisdiction of constitutional bodies is within the monopoly of the State's power and they issue their resolutions on behalf of the Republic of Poland. That does not exclude, however, the legality of action of other non-State and non-public bodies, established to solve legal problems, should the provisions of law admit such a possibility. Decisions and resolutions adopted by such bodies are not, however, issued on behalf of the Republic of Poland. As a rule, the legality of such decisions is supervised by the State's administration of justice.

An examination of the disciplinary responsibility of the court's executive officers by the disciplinary commission in the first instance and by the voivodship's court (labour court) in the second instance is in conformity with the Constitution.

Cross-references:

Resolution of 13 March 1996 (K 11/95), *Bulletin* 1996/1 [POL-1996-1-005].

Languages:

Polish; substantial parts of the resolution are also available in English.

Identification: POL-1998-3-024

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.12.1998 / **e)** U 7/98 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution.
Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.
General Principles - Legality.
Institutions - Executive bodies - Application of laws - Delegated rule-making powers.

Keywords of the alphabetical index:

Regulation, issuing.

Headnotes:

A regulation is an executive act issued pursuant to the authorisation contained in a legislative act and for the purpose of implementing that act. The following consequences therefore arise: First of all, a regulation shall be issued on the basis of a clear and express authorisation of a legislative act. Second, a regulation shall be concordant both with the act containing the authorisation and with all other constitutional principles. Third, if the regulation is issued in order to determine the principles of certain proceedings, such principles must be concordant with the provisions of the act. The legislator's failure to take a position in certain matters must be interpreted as a lack of the requisite legislative authorisation.

Summary:

The Minister of National Defence's Regulation on the Proceedings and Mode of Sale of Quarters, which was recognised by the Constitutional Tribunal, determines the conditions of sale of the quarters. Since the act did not contain the necessary normative authorisation, the regulation was issued inconsistently with the constitutional provisions.

Cross-references:

Resolution of 4 November 1997 (U 3/97), *Bulletin* 1997/3 [POL-1997-3-022]; resolution of 23 October 1995 (K 4/95), *Bulletin* 1995/3 [POL-1995-3-014].

Languages:

Polish; substantial parts of the resolution are also available in English.

Portugal
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

Total: 215 judgments, of which:

- Abstract *ex post facto* review: 1 judgment
- Appeals: 146 judgments
- Complaints: 65 judgments
- Political parties and coalitions: 1 judgment
- Political parties accounts: 1 judgment
- Referenda: 1 judgment

Important decisions

Identification: POR-1998-3-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 14.10.1998 / **e)** 578/98 / **f)** / **g)** to be published in *Diário da República* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

General Principles - Weighing of interests.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rules of evidence.

Keywords of the alphabetical index:

Undercover agent / Evidence, illegal obtaining / Criminal procedure / Drugs, trafficking / Evidence, freedom, principle.

Headnotes:

Criminal proceedings are governed by the principle of freedom of evidence, in that any source or method may be used in order to establish the facts, but also in that the law does not stipulate any particular method for obtaining evidence of any given facts.

Although the criminal justice system has an ethical and legal duty to ascertain the facts, this is subject to a number of restrictions based on respect for the right to individual moral and physical integrity - laid down in Article 25 of the Constitution and expanded upon in Articles 32.8 and 34.4 of the Constitution (safeguards in criminal proceedings, nullity of evidence obtained by torture, force, violation of the physical or moral integrity of the individual, wrongful interference in private life in the home, correspondence or telecommunications). Evidence will therefore be dismissed where the means by which it was obtained or produced is contrary to principles whose importance outweighs its value, that is, where the use of certain methods constitutes a violation of privacy and breaches elementary rules of fairness such that it must be prohibited on the very ethical grounds that require the facts to be ascertained.

Summary:

The question concerned the constitutionality of a provision contained in the rules governing traffic in, and consumption of, narcotics and psychotropic substances. According to the provision at issue, police officers who acquire, possess, transport or deliver such narcotics or products for the purpose of an investigation are not criminally liable. Undercover agents must draw up a report and place it on the case-file within 24 hours.

In the instant case, the constitutional question did not concern the admissibility of evidence obtained by an undercover agent or the impunity of his actions, but whether or not a specific preliminary investigation had been undertaken.

The Court found that the provision was constitutional, since the constitutional legitimacy of the undercover agent's actions does not depend on the commencement or conduct of an investigation, but on the fact that a police officer must not instigate or provoke an offence and must confine his/her role to getting on familiar terms with the offender with a view to closer surveillance and gathering evidence or proof of an offence. Nonetheless, the actions of undercover agents must be authorised in advance or ratified subsequently by the competent judicial authority.

Supplementary information:

With regard to telephone tapping, see judgment 407/97 in *Bulletin* 1997/2 [POR-1997-2-003].

Languages:

Portuguese.

Identification: POR-1998-3-005

a) Portugal / **b)** Constitutional Court / **c)** First Chamber/ **d)** 21.10.1998 / **e)** 616/98 / **f)** / **g)** to be published in *Diário da República* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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 - Adversarial hearings.
Fundamental Rights - Civil and political rights - Right to family life - Descent.

Keywords of the alphabetical index:

Biological test / Paternity / Blood test.

Headnotes:

The right to integrity of the person, enshrined in Article 25 of the Constitution, is a personal right relating to an element that is inherent in individual human dignity. The right to physical integrity is given practical form in the right not to be subjected to bodily injury. Within the limits of constitutional protection, a "blood test" designed to determine the paternity of a minor, to which the defendant refused to submit, may therefore violate the right to individual physical integrity.

In actions to establish paternity, it is also important to enforce the child's right to his/her personal identity (Article 26.1 of the Constitution). This entails safeguarding those elements that identify each person as a unique, irreducible individual; as well as the right to a name, it must surely include the right to a "personal background", that is, the right to recognition of the identity of one's parents.

Summary:

The Court was asked to rule on two constitutional questions arising from the rules governing actions to establish paternity.

First, it found that the preliminary phase of the investigation - culminating in a report by the public prosecutor concerning the execution of the action to establish paternity, with a view to a court decision as to whether it should be declared admissible or dismissed - was of an administrative nature and did not as such constitute legal proceedings. Refusal to allow the defendant any right of appeal against this decision on the admissibility of his case did not violate the guarantee of access to the courts in order to defend one's rights and interests, or the adversarial principle.

With regard to the second constitutional question, the Court ruled that the Civil Code simply referred to blood tests as a form of proof in actions to establish paternity; it did not prescribe or legitimise the enforcement of such tests, as the person concerned could refuse a blood test. The defendant was obliged to co-operate in appropriate blood tests where essential in order to determine the paternity of a minor, in view of his duty to co-operate in the administration of justice; in the event of an unwarranted refusal by the person concerned to submit to a blood test, the court must freely assess this refusal to co-operate when taking evidence.

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

The Constitutional Court has handed down 71 decisions, as follows:

- 1 decision on the constitutionality of legislation prior to its enactment
- 70 decisions on preliminary questions of unconstitutionality

Important decisions

Identification: ROM-1998-3-007

a) Romania / **b)** Constitutional Court / **c)** / **d)** 10.11.1998 / **e)** 161/98 / **f)** Decision on a preliminary question on the unconstitutionality of Article IV.7 of Government Order no. 18/194 / **g)** *Monitorul Oficial al României* (Official Gazette), no. 3/10.11.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
Sources of Constitutional Law - Categories - Case-law - International case-law - European Court of Human Rights.
Institutions - Legislative bodies - Powers.
Institutions - Public finances - Currency.
Fundamental Rights - Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Currency, obligation to repatriate / Market economy / Liability, strict / Penalty / Penalties for petty offences.

Headnotes:

The obligation to repatriate foreign currency is not contrary to the principles of a market economy and free trade, but rather is an expression of the State's obligation to protect the national interests in economic and financial activity. The legislator has the power to set fines either on a fixed-rate or on a percentage basis.

Summary:

The decision in question was a Constitutional Court decision on a preliminary question on the unconstitutionality of Article IV.7 of Government Order no. 18/1994 dealing with measures to improve the financial discipline of economic operators, as approved and amended by Law no. 12/1995.

The Court of Oradea asked the Constitutional Court to rule on the objection raised by the commercial joint stock company "GOLDENVIOLET IMPEX" of Salonta, alleging the unconstitutionality of Article IV.7 of Government Order no. 18/1994, as approved and amended by Law no. 12/1995.

In the grounds of objection, it was shown that the relevant provisions infringed the rules laid down in Article 72.3.f of the Constitution, which stated that criminal offences, penalties and the execution thereof must be regulated by "organic", i.e. institutional, laws. Reference was made to the case-law of the European Court of Human Rights, which extended the guarantees specified in Article 6 ECHR to include all categories of "penalty", and hence also penalties for petty offences, which were to be governed by institutional laws.

On examining the preliminary question, the Constitutional Court judged it to be unfounded. Its arguments were as follows:

- As far as changing the system of fines from fixed-rate fines to fines calculated on a percentage basis was concerned, there was nothing in the Constitution to imply that the legislator's freedom of choice should be restricted.

- The provisions of Article IV.7 of Government Order no. 18/1994 were of a financial nature; they fell within the sphere of currency regulation and did not come within the regulatory scope of institutional laws. The case-law of the European Court of Human Rights, based on the interpretation of Article 6 ECHR, could not therefore be relied upon.

- With regard to the alleged violation, in the Government Order, of the principle of freedom of contract, as enshrined in Articles 134.2.a and 134.2.e of the Constitution, the Constitutional Court had handed down a number of decisions, stating that the obligation to repatriate foreign currency was not contrary to the market economy and free trade, but was an expression of the State's obligation to ensure the protection of national interests in economic and financial activity.

- The Court also found that the principle of proportionality invoked did not apply in this instance; the contention that the article in question provided for the introduction of strict liability was likewise unfounded.

For the reasons stated, the Court answered the preliminary question on the unconstitutionality of Article IV.7 of Government Order no. 18/1994 in the negative.

Languages:

Romanian.

Identification: ROM-1998-3-008

a) Romania / **b)** Constitutional Court / **c)** / **d)** 15.12.1998 / **e)** 177/98 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 213.2 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), no. 77/24.02.1999 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Equality - Scope of application.
Fundamental Rights - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Preliminary complaint by the owner / Private property of the State, discrimination.

Headnotes:

Article 41.2 of the Constitution provides for private property to be afforded equal protection, irrespective of whether it belongs to the State or to another legal entity or natural person, and tacitly prohibits criminal law from making separate rules regarding the protection of private property.

Summary:

The decision in question was a Constitutional Court decision on a preliminary question on the unconstitutionality of the provisions of Article 213.2 of the Criminal Code, which stated:

"If the property is privately owned, save where it belongs wholly or partially to the State, criminal proceedings shall be instituted pursuant to a preliminary complaint by the injured party. In the event that the parties should be reconciled, no criminal liability shall be incurred."

In the public prosecutor's application to the Court of Brãila, two persons were brought before the court on charges of misappropriation, under Article 213 of the Criminal Code, while a third was charged with aiding and abetting them.

The first two defendants, as employees of the commercial joint stock company "Comcereal" in Tulcea, had, upon the insistence of the third, wrongfully disposed of a quantity of cereal belonging to the commercial joint stock company "BRAIGAL" in Brãila.

The party responsible in civil law, the commercial joint stock company "Comcereal" in Tulcea, as the employer, raised a preliminary question on the unconstitutionality of Article 213.2 of the Criminal Code.

"Comcereal" argued that all offences classed as misappropriation should be subject to a single set of rules. The discrimination engendered by Article 213.2 of the Criminal Code, in the sense that such offences, if the property to which they related was wholly or partially the private property of the State, could be prosecuted automatically and not just on the basis of a preliminary complaint by the injured party, contravened Article 41.2 of the Constitution. According to this Article, "private property shall be equally protected by law, irrespective of its owner". The Constitutional Court held that Article 41.2 of the Constitution was to be interpreted as referring to the equal protection of property belonging to natural persons or private-law corporations and private property belonging to the State.

The Constitutional Court found that the provisions of Article 41.2 of the Constitution afforded equal protection for private property, irrespective of whether it belonged to the State or to another legal entity or a natural person, and tacitly prohibited criminal law from making separate rules regarding the protection of private property. In Article 213.2 of the Criminal Code, however, an unconstitutional distinction was made between private property belonging to the State and private property belonging to other subjects of law, since, if "the property is privately owned, save where it belongs wholly or partially to the State, criminal proceedings shall be instituted pursuant to a preliminary complaint by the injured party". On these grounds, the Court found that,

under Article 41.2 of the Constitution, the provision in question was unconstitutional. It therefore answered the question in the affirmative and ruled that the part of the sentence in Article 213.2 of the Criminal Code which read "save where it belongs wholly or partially to the State" was unconstitutional.

Languages:

Romanian.

Identification: ROM-1998-3-009

a) Romania / **b)** Constitutional Court / **c)** / **d)** 17.12.1998 / **e)** 184/98 / **f)** Decision on a preliminary question on the unconstitutionality of the provisions of Article 21.2 of Legislative Decree no. 66/1990 / **g)** *Monitorul Oficial al României* (Official Gazette), no. 35/28.01.1999 / **h)**.

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Equality - Scope of application.
Fundamental Rights - Civil and political rights - Right to property.

Keywords of the alphabetical index:

Craft-industry organisations, protection of property / Private property, equal protection in criminal law.

Headnotes:

Craft-industry co-operatives are legal persons under private law, whose assets are subject to the ordinary rules governing the exercise of property rights.

Summary:

The decision in question was a Constitutional Court decision on the referral of a preliminary question on the unconstitutionality of the provisions of Article 21.2 of Legislative Decree no. 66/1990 on the organisation and functioning of craft-industry co-operatives.

The provisions in question read as follows:

"Article 21 - Ownership or interests in any movable or immovable property and any fixtures belonging to craft-industry co-operatives may be transferred solely against payment, in the manner provided for by law.

Creditors of the co-operatives and personal creditors of members of the co-operatives may not seek to attach the property referred to above."

The Court of Orsova asked the Constitutional Court to rule on the preliminary question raised by the Directorate of Public Finance and Financial Control of the State of Mehedinti, alleging the unconstitutionality of Article 21.2 of Legislative Decree no. 66/1990 on the organisation and functioning of craft-industry co-operatives.

It was argued that the provisions in question violated Article 41.2 of the Constitution, according to which "private property shall be equally protected by law, irrespective of its owner".

The Constitutional Court found that it was competent to rule on the question raised, since, even though the disputed provisions predated the Constitution, under these same provisions, legal relations had arisen after the Constitution's entry into force. The craft-industry organisations' title to their assets was a form of private property, as provided for in Article 135 of the Constitution.

The provisions of Article 21.2.1 of Legislative Decree no. 66/1990 contravened Article 41.2 of the Constitution; the Court had ruled that the provisions of Article 21.2.1, of Legislative Decree no. 66/1990, whereby assets owned by craft-industry co-operatives were exempt from attachment by the organisations' creditors, by creating a situation of preferential treatment, contravened the provisions of Article 41.2 of the Constitution. Accordingly, Article 21.2.1 was repealed under Article 150.1 of the Constitution.

The Court held that the second indent of the same article, whereby assets belonging to craft-industry co-operatives could not be attached by the personal creditors of members of the co-operatives, was compatible with the Constitution.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

Total number of decisions: 5

Types of decisions:
- Rulings: 5
- Opinions: 0

Categories of cases:
- Interpretation of the Constitution: 1
- Conformity with the Constitution of acts of State bodies: 4
- 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: 2
- Individual complaints: 3
- Referral by a Court: 1
  (Some claims were joined)

Important decisions

Identification: RUS-1998-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.11.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 29.12.1998 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Unwritten rules - Constitutional custom.
Sources of Constitutional Law - Techniques of interpretation - Literal interpretation.
General Principles - Democracy.
General Principles - Separation of powers.
Institutions - Head of State - Powers.
Institutions - Executive bodies - Composition.

Keywords of the alphabetical index:

Government, head, method of appointment / Government, head, number of candidates / Parliament, dissolution / Elections, free.

Headnotes:

The constitutional provision under which the State Duma can reject three candidates for the office of Prime Minister entitles the President of the Russian Federation either to put forward the same candidate two or three times or to present a fresh candidate each time. The President's right, on the one hand, to put forward candidates, and the State Duma's right, on the other, to consent to the appointment must be exercised in the light of the constitutional stipulations on the smooth functioning of the process and the interaction of the parties involved.

Summary:

The Constitutional Court heard the case concerning the interpretation of Article 111.4 of the Constitution.

The proceedings were initiated following an application by the State Duma in relation to the interpretation of the article in question.

Under Article 111.4 of the Constitution, after the State Duma thrice rejects candidates for the office of Prime Minister, the President of the Russian Federation shall appoint the Prime Minister, dissolve the State Duma and call a new election. The State Duma was seeking to establish whether the President of the Russian Federation was entitled to re-submit for the office of Prime Minister a candidate rejected by the State Duma, and to clarify the legal consequences of its rejecting the same candidate three times.

The Constitutional Court found that, in the strictest interpretation of the provision in question, the words "thrice rejects candidates for office of Prime Minister of the Russian Federation" could cover three rejections of any candidacy for the post or three rejections of individual candidates. The text of Article 111 of the Constitution did not rule out either of these interpretations.

It is clear that this Article of the Constitution, considered in conjunction with Articles 83, 84 and 103 of the Constitution, is intended to prevent conflict between the three separate branches of state power, the legislature, executive and judiciary. The Constitution stipulates methods of resolving differences between the three

branches so as not to delay the formation of the government and thus impede its functioning.

The choice of candidates presented to the State Duma for the office of Prime Minister is the prerogative of the President of the Russian Federation, who has the discretion, in the unrestricted practical exercise of that prerogative, either to put forward the same candidate two or three times or to present a fresh candidate each time.

Equally, the aim of civil peace and accord, asserted in the preamble to the Constitution, requires that the organs of state power function smoothly and interact. That is also the reason that the President of the Russian Federation and the State Duma must act in concert when exercising their powers in the procedure for appointing the Prime Minister. The procedure depends upon the two parties' seeking agreement on the candidacy, either through those forms of interaction provided for in the Constitution, or by other constitutionally acceptable means that emerge from the exercise of the powers of head of government and from parliamentary practice.

In practice, the application of Article 111 of the Constitution has included approval of the first candidate proposed by the President for the office of Prime Minister, presentation of the same candidate three times, and recourse to arbitration procedures after the rejection of two candidates. However, there is nothing to prevent the development of a constitutional tradition founded on any one such variant.

Under Article 111 of the Constitution, the mandatory consequences if the State Duma thrice rejects candidates put forward by the President of the Russian Federation for the office of Prime Minister – whatever variant has been used in the presentation of the candidates – are the appointment of the Prime Minister by the President, the dissolution of the State Duma and the calling of new elections. This procedure, under constitutional law, for resolving a dispute through the mechanism of free elections reflects the basic constitutional principles of the Russian Federation, as a democratic state founded on the rule of law.

Languages:

Russian.

Identification: RUS-1998-3-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.11.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 08.12.1998 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice – Effects – Determination of effects by the court.
General Principles – Democracy.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
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:

Eections, parliamentary / Electoral system / Constituencies, number of voters / Political groups and alliances, requirements for candidacy / Political groups and alliances, presentation of candidates / Seats, allocation / Threshold / Vacant seats, filling / Electoral threshold.

Headnotes:

The Constitution does not provide directly for the system of election of deputies to the State Duma. Stipulating that the Federal Assembly, as the representative and legislative body, shall have two chambers and that the State Duma shall consist of 450 deputies and shall be elected for a term of four years, the Constitution provides that the procedure for electing the deputies shall be established by federal law. The federal law in question established a mixed system for elections to the State Duma (combining majority and proportional representation). Mixed electoral systems exist in a number of democratic countries and are fundamentally compatible with the principles and rules of electoral legislation that are universally recognised in international law and enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights of 1966. Such a system serves the purpose of elections as the supreme direct manifestation of the people's power. It enables the citizens' shared opinions to be reflected through free elections on the basis of universal, equal suffrage by direct and secret ballot, and gives appropriate expression to their will with regard to the formation of the parliament as a representative organ of the state.

Summary:

The Constitutional Court heard the case concerning the constitutionality of certain provisions of the Federal Law of 21 June 1995 "on the election of deputies to the State Duma of the Federal Assembly of the Russian Federation".

The proceedings were initiated following an appeal by the Regional Duma of Saratov.

Article 5 of the above-mentioned federal law provides that 225 deputies of the State Duma shall be elected in single-seat electoral districts (one deputy for each constituency) and that the other 225 shall be elected in a federal electoral constituency in proportion to the number of votes cast for federal lists of candidates drawn up by political groups and alliances (paragraph 3). The applicant submitted that this provision violated the principle of equality of electoral rights and was thus in breach of Articles 3, 19 and 32 of the Constitution of the Russian Federation.

The Constitutional Court found that the following provisions of the disputed federal law are in accordance with the Constitution:

- the provision in Article 5 for the system of elections to the State Duma, under which some deputies are elected in single-seat constituencies and some in a federal electoral constituency in proportion to the number of votes cast for federal lists of candidates drawn up by political groups and alliances;

- the provisions in Articles 5.2 and 11.2 on the formation of an electoral constituency on the territory of a subject [constituent part] of the Russian Federation where the number of voters is less than the standard constituency size;

- the provision in Article 36.3 on the right of political groups and alliances to put forward as candidates for seats in the State Duma persons who are not members of the societies that make up those groups or alliances;

- the provision in Article 37.5, under which a federal list may include candidates for seats in the State Duma who are standing for the same political group or alliance in single-seat constituencies;

- the provision in Article 39.2, under which a political group or alliance that puts forward a federal list of candidates must collect at least 200,000 voters' signatures in support of that list, no more than 7% of them within one subject of the Russian Federation;

- the provision in Article 67, under which a vacant seat may be allocated to a deputy elected on a federal list.

The court found that the provision, in Article 39.3 of the federal law, under which the signatures collected in support of a candidate standing for a political group or alliance in a single-seat constituency and registered by the district electoral committee are included by the central electoral committee in the total number of signatures in support of that group or alliance's federal list of candidates, is in breach of Articles 19.1, 19.2 and 32.2.

It ruled that the provision in Article 62.2 of the federal law under which only political groups or alliances whose lists attract at least 5% of the votes cast can have a share of the federal constituency seats is constitutional provided that the application of the 5% threshold allows the seats to be shared between at least two political groups that together represent more than 50% of the poll. The Court found that the Federal Assembly would have to include additional provisions in the federal law, on the basis of the Constitution, to ensure that the principle of proportionality was properly implemented when the results of voting in the federal electoral constituency were determined.

The Constitutional Court also ruled that the 5% threshold should not be used in ways contrary to the purpose of proportional elections. The Federal Assembly should therefore seek to ensure that when the quota was used, the principle of proportional representation was implemented to the fullest possible extent. It should also bear in mind that, under Articles 1 and 13 of the Constitution, democracy on the basis of political plurality and a multi-party system depends upon the existence of an opposition and cannot admit a monopoly of power. Therefore, if only one political group or alliance clears the 5% threshold it cannot claim all the seats in the federal constituency even if it has a majority of the votes cast, because that would violate the principle of democratic electoral proportionality, thus invalidating the application of the 5% threshold.

In reviewing the law, the Federal Assembly should establish a statutory regulatory mechanism to ensure that the requirements of the democratically based constitutional system were met. It was up to the Assembly to make the necessary practical provisions for such a mechanism (e.g. by introducing a "floating" threshold or arrangements for groups to signal the formation of alliances in advance).

Languages:

Russian.

Identification: RUS-1998-3-009

a) Russia / **b)** Constitutional Court / **c)** / **d)** 10.12.1998 / **e)** / **f)** / **g)** *Sobraniyé Zakonodatelstva Rossiyskoy Federatsii* (Official Gazette), 1998, 51 / **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.
Institutions - Jurisdictional bodies - Procedure.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Double degree of jurisdiction.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Equality of arms.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Adversarial hearings.

Keywords of the alphabetical index:

Judgments, setting aside / Sentencing, presence in court / Criminal procedure.

Headnotes:

In deciding whether a judgment is lawful and correct, a district appeal court is entitled to require the presence in court of the convicted person. While a court is entitled to hear a case in a prisoner's absence if he or she has not asked to be present, it cannot refuse a convicted person's request to attend.

Summary:

The Constitutional Court heard the case concerning the constitutionality of Article 335.2 of the Russian Code of Criminal Procedure.

The proceedings were initiated following a claim by Mr A. Baronin that his constitutional rights had been violated. Mr Baronin, who had been given a custodial sentence by the Moscow municipal court and imprisoned, appealed against the conviction and sentence and asked to be present when the appeal was heard in the district appeal court. The Criminal Division of the Supreme Court refused the appellant's request on the grounds that he had been questioned in detail on a number of occasions in the preparatory stages of the proceedings and in court and that his position was set out in full in the appeal that he had lodged.

The case was therefore considered under the appeal procedure with the participation of the appellant's legal representative, the judgement was altered and the length of the sentence reduced. Mr Baronin, who maintained that he was innocent, applied to the Constitutional Court on the grounds that Article 335.2 of the Code of Criminal Procedure - under which the appeal court has discretion with regard to the presence in court of a sentenced prisoner - violated his right to legal protection and his right to have the judgment in his case reviewed by a higher court.

The Constitutional Court found that Article 50 of the Constitution - which provides that everyone sentenced for a crime shall have the right to have the sentence reviewed by a higher court - required that anyone accused of a crime must have the right to have the case heard by at least two courts, and that it was the prerogative of the legislature to make federal law stipulating the procedure in each of those courts.

Under Article 46 of the Constitution, read in conjunction with Articles 19, 47, 50 and 123 of the Constitution, and in the light of the respective provisions of the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, the implementation of the constitutional guarantees of legal protection required - given the particular nature of the appeal procedure - that if the convicted person wished to be present in court, he or she could not be denied the opportunity to challenge and file petititons, to hear the positions of participants in the hearing and see any documents that they might submit, or indeed to file pleadings, with the prosecutor's approval or otherwise.

The contested legislation did not prevent the court - when reviewing at appeal whether judgments were lawful and correct - from deciding that convicted persons must be present in court and making the necessary arrangements. At the same time, the court was entitled to hear cases in the absence of convicted prisoners if the latter had not asked to be present.

The provision in question also allowed the appeal court to deny convicted prisoners the right to request that they attend hearings, and to pass final judgments. In such

cases, therefore, convicted persons were denied the possibility of challenging or filing petitions, filing additional documents or seeing additional documents filed with the court by other parties, hearing what was said in court or filing pleadings, with the prosecutor's approval or otherwise, before the bench retired to consider its decision on the appeal. This represented an exception to the principle that everyone is equal before the law and in the court of law, and a restriction of the constitutional rights to legal protection, to a hearing before a lawfully constituted court and to have that court's decision reviewed by a higher court. The contested legislation also breached the provision in Article 123 of the Constitution to the effect that trials shall be conducted on an adversarial and equal basis, a stipulation that depends upon the prosecution and the defence being guaranteed equal procedural opportunities to defend their positions, at first instance and at appeal.

The Constitutional Court found that the contested provision was unconstitutional inasmuch as it allowed the appeal court – if it rejected a sentenced prisoner's request to attend the hearing – to take a final decision on the case without giving the sentenced person the opportunity to see the documents filed at the hearing and to state his or her position on the issues being considered by the court.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data

1 September 1998 – 31 December 1998

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 3
- Decisions on the merits by the panels of the Court: 6
- Number of other decisions by the plenum: 2
- Number of other decisions by the panels: 28
- Total number of cases submitted to the Court: 197

Important decisions

Identification: SVK-1998-3-010

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 15.10.1998 / **e)** PL.ÚS 19/98 / **f)** Petition from members of Parliament / **g)** *Zbierka zákonov slovenskej repuhbliky* (Official Gazette), no. 316/1998 in brief; complete version to be published in *Zbierka nálezov a uznesení Ústavného sú du Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law – Techniques of interpretation – Historical interpretation.
General Principles – Democracy.
Fundamental Rights – General questions – Limits and restrictions.
Fundamental Rights – Civil and political rights – Equality – Scope of application – Elections.
Fundamental Rights – Civil and political rights – Equality – Criteria of distinction – National or ethnic origin.
Fundamental Rights – Civil and political rights – Electoral rights – Right to be elected.
Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Competition of political forces / Minorities, representation in elected bodies / Right of access to elected office.

Headnotes:

The participation of representatives of national minorities or ethnic groups in local self-government authorities must be derived from general principles of democracy.

Summary:

A petition was submitted by a group of 38 members of the parliament claiming constitutional conflict between a series of provisions of the amendment of the Act on Elections for Local Self-Government - Law no. 346/1990 as amended by Law no. 233/1998 - and the provisions of the Slovak Constitution. The most serious conflict concerned the provisions on the election of deputies representing national minorities and ethnic groups. According to Law no. 233/1998, in towns and villages where national minorities or ethnic groups lived, the total number of deputies was divided proportionally so that the ratio between Slovaks and individual minorities would be reflected. An identical key was also provided for the elections in towns and villages where Slovaks constitute the local minority. In other words, for local elections the system of limited seats in local authorities was established and that system depended on national origin of the citizens. It was claimed that those provisions of the law were in conflict with Articles 12.1 and 30.4 of the Constitution.

Under Article 12.1: "All human beings are free and equal in dignity and rights. Their fundamental rights and freedoms are inalienable, irrevocable, and absolutely perpetual."

Article 30.4 reads as follows: "All citizens shall have equal access to elected and other public offices."

The Constitutional Court decided that there is no provision within the Slovak Constitution, explicit or implicit, which allows a fundamental individual right to be reduced or modified to improve the status of a national minority or an ethnic group. Persons belonging to a national minority or an ethnic group are like any other citizen, and in conformity with this principle they carry out their right to elect. The participation of representatives of national minorities or ethnic groups in local self-government must be derived from the general principles of democracy. The constitutional scheme of the right to elect and be elected is completely grounded on the civic principle of the Slovak Republic, not on national origin. This conclusion of the Court is based on the following considerations:

1. the power of all deputies is derived from the citizens who are the very source of all public authority (Article 2.1 of the Constitution);
2. the right of citizens to participate in the administration of public affairs is carried out through the election of representatives (Article 30.1);
3. the passive right to be elected is explicitly granted to any citizen (Article 30.4);
4. the equal right to elect is given to any citizen; his or her national origin is of no constitutional significance, and thus may never may be taken into account.

The Court further analysed and compared the purpose of Articles 12.1 and 30.4 of the Constitution. The "equal-right" principle under Article 12.1 was held to be a general provision while "the equal access to public office" principle under Article 30.4 was found to be *lex specialis.* Thus, the law no. 233/1998 was held to be in conflict with Article 30.4 of the Constitution. The claim of unconstitutionality of the law in respect of Article 12.1 was dismissed.

The other claim of unconstitutionality concerned the relationship between the system of division of seats on the basis of national origin, and Article 31 of the Constitution. Under this constitutional provision: "The regulation of political rights and freedoms, and the interpretation and usage thereof, shall facilitate and protect political competition in a democratic society."

The Court ruled that Article 31 does not guarantee any right or freedom to an individual. Article 31 imposes an obligation on the Slovak parliament to adopt laws which protect and allow for fair competition of political forces in democratic society. Laws, and especially the laws on elections, are expected not to restrict but to promote fair and free political competition. The provisions of Law no. 233/1998 which are referred to above were found to be in conflict with the intention of the Constitution-maker, and thus unconstitutional according to the finding of the Court. According to some other provisions of Law no. 233 of 1998 candidates for deputies and mayors were obliged to have permanent residence in the town or village where they were running as candidates for a minimum period of one year. This regulation was held to be unconstitutional too. The Court qualified it as an infringement on equal access of all citizens to elected office (Article 30.4 of the Constitution). The condition of permanent residence remains (Article 64.2 of the Constitution). No time limit, however, is imposed on the permanent residence. Thus, it may not be imposed through the law.

The Court dismissed the petition in other parts. The alleged conflict between provisions on local electoral campaigns and the constitutional protection of freedom

of expression was the most significant of the arguments submitted by the petitioner that the Court dismissed.

Languages:

Slovak.

Identification: SVK-1998-3-011

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 17.11.1998 / **e)** PL.ÚS 12/98 / **f)** Petition from members of Parliament / **g)** *Zbierka nálezov a uznesení Ústavného sú du Slovenskej republiky* (Official Gazette), no. 398/1998 in brief; complete version to be published in *Zbierka nálezov a uznesení Ústavného sú du Slovenskej republiky* (Official Digest), 1999 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Constitutional jurisdiction - Status of the members of the court - Sources - Constitution.
Constitutional Justice - Constitutional jurisdiction - Status of the members of the court - Term of office of Members.
Constitutional Justice - Constitutional jurisdiction - Status of the members of the court - Disciplinary measures.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Independence.

Keywords of the alphabetical index:

Judge, suspension / Constitutional Court, judge, independence.

Headnotes:

A judge of the Constitutional Court of the Slovak Republic may not be suspended from his or her office.

Summary:

A group of 33 members of the parliament claimed a constitutional conflict between Articles 13.4 and 13.5 of Law no. 38/1993 on the Organisation of the Constitutional Court and the Constitution. Those provisions established the possibility of suspending the office of a judge, the President of the Court or the Deputy President of the Court. The President of the Court was empowered to interrupt the office of a judge. The President of the Slovak Republic was vested with the power to interrupt the office of the President of the Court as well as the office of the Deputy President of the Court. That power was provided for circumstances under which a member of the Court had been indicted of a crime. The power to suspend the judge from office under such circumstances was limited "until the ordinary court deciding on the indictment passes a decision on the guilt of the judge of the Constitutional Court".

The Constitutional Court of the Slovak Republic was established directly by the Constitution. The competence of this authority is fully regulated by the Constitution. As far as the status of judges is concerned, the constitutional provisions regulate the appointment of judges, their removal from office and their resignation. Those constitutional rules must not be amended by the legislator. Suspension from office is not included within the constitutional rules on appointment, resignation or removal of the judge. Under Article 2.2 of the Slovak Constitution: "State authorities may act solely in conformity with the Constitution. Their actions shall be subject to its limits, within its scope and governed by procedures determined by law". That provision was infringed by the parliament by the adoption of Articles 13.4 and 13.5 of Law no. 38/1993.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 September 1998 - 31 December 1998

Number of decisions

The Constitutional Court had 27 sessions (17 plenary and 10 sessions in chambers) during this period. There were 481 unresolved U- cases (in the field of protection of constitutionality and legality, which are denoted U- in the Constitutional Court Register) and 452 unresolved Up- cases (in the field of protection of human rights and basic freedoms, which are denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 September 1998). The Constitutional Court accepted 135 new U- and 94 new Up- cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

- 64 cases (U-) in the field of protection of constitutionality and legality, in which there were (taken by the Plenary Court)
  - 30 decisions and
  - 34 resolutions;
- 59 cases (U-) were joined to the above-mentioned cases for common treatment and decision; accordingly the total number of resolved cases (U-) is 123.

In the same period, the Constitutional Court resolved 69 cases (Up-) in the field of protection of human rights and basic freedoms (13 decisions taken by the Plenary Court, 56 decisions taken by the Chamber of three judges). 9 cases (Up-) were joined to the above-mentioned cases for common treatment and decision.

The decisions have been published in the Official Gazette of the Republic of Slovenia; Resolutions of the Constitutional Court are not as rule published in an official bulletin, but 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, the Slovenian Constitutional Court Act and the European Convention for the Protection of Human Rights and Fundamental Freedoms translated into Slovene language);
- since August 1995 on Internet (Slovene constitutional case law of 1994 and 1995, as well as some important cases prepared for the Bulletin of the Venice Commission from 1992 through 1997, in full text in Slovene as well as in English "http://www.sigov.si/us/eus-ds.html"); since 1 January 1997 also on the mirror site in U.S.A.: "http://www.law.vill.edu/us/eus-ds.html";
- since 1995 some important cases in English full-text version in the *East European Case Reporter* of Constitutional Law, published by BookWorld Publications, The Netherlands. The *East European Case Reporter* is available also on Internet (http://www.bwp-mediagroup.com/bookworld/eecrcl.htm).

Important decisions

Identification: SLO-1998-3-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 23.09.1998 / **e)** U-I-371/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 68/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Constitutional Justice - Decisions - Types - Annulment.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - National or ethnic origin.

Keywords of the alphabetical index:

National origin, expression / Injustices, redress.

Headnotes:

The legislature decided to give the opportunity to assert the status of former political prisoner to persons who had been convicted by the courts of other republics or the former Yugoslav federation. By ensuring this right it must not discriminate against such persons on the basis of their personal circumstances. The provision of the Redress of Injustices Act, which grants certain rights only to "persons of Slovenian national origin", thereby excluding other potential claimants merely on the basis of their national origin, is therefore unconstitutional.

Summary:

The Redress of Injustices Act (ZPKri) regulates the rights to compensation and pension insurance of former political prisoners and the close relatives of persons killed after World War II (Article 1 ZPKri). All persons who were, between 15 May 1945 and 2 July 1990, on the territory of the present Republic of Slovenia, unjustly and in a manner contrary to the principles and regulations of a State governed by the rule of law, sentenced in court or administrative proceedings to imprisonment, or who were arrested in the course of these proceedings on the basis of the regulations cited in Article 3 ZPKri or other regulations, are considered to be former political prisoners if the statute was violated in the manner described above (Article 2.1 ZPKri). On the same conditions, persons of Slovenian national origin who were convicted by the courts of other republics or the former Yugoslav federation, if they resided at the time of the Redress of Injustices Act coming into force on the territory of the present Republic of Slovenia and are Slovenian citizens, are also considered to be former political prisoners (Article 2.3 ZPKri).

The Redress of Injustices Act also determines special conditions and a procedure for altering a final criminal judgement (a special revision; Articles 1.2, 21 to 35 ZPKri), which supplements the provisions of the Code of Criminal Procedure on extraordinary legal remedies. A person affected has thus two possibilities for the redress of injustices, which are not necessarily alternatives: they could either assert the status of political prisoner or/and, according to the Code of Criminal Procedure and the Redress of Injustices Act, file an extraordinary legal remedy with the court.

Revision according to the Redress of Injustices Act may be requested only against judgements rendered on the territory of the present Republic of Slovenia (Article 22.1 ZPKri). If the judgement is based on the application of the penal provisions explicitly stated in Article 3 ZPKri, revision may be requested regardless of the fact of whether the persons were recognised as having the status of former political prisoner - that is, even if they do not request the recognition of this status (Article 22.2 ZPKri). However, if the judgement is based on the application of any other penal provisions, revision according to the Redress of Injustices Act may only be requested insofar as the violation of penal provisions cannot be remedied by other extraordinary legal remedies according to Article 35.1 of the Code of Criminal Procedure. The consequences of a decision altered in revision proceedings according to the Redress of Injustices Act are the same as those altered in the Code of Criminal Procedure proceedings (Article 35.1 ZPKri). Furthermore, Article 35.2 ZPKri excludes the claim for compensation on the basis of a positive decision on revision (that is compensation on the basis of the provisions of Section XXXII of the Code of Criminal Procedure, not also other rights), if the convict has already been compensated as a person entitled under the Redress of Injustices Act, that is as a former political prisoner.

Insofar as the persons convicted on the territory of the present Republic of Slovenia are concerned, there is no difference as to the possibility to request the redress of injustices according to the Redress of Injustices Act or the Code of Criminal Procedure. Neither national origin, citizenship, nor residence are determined as conditions. The Code of Criminal Procedure also extends the possibility to file extraordinary legal remedies against the judgement of military courts having jurisdiction in any of the republics of the former Yugoslavia, and grants this right to convicts "who are or who have at any time been Slovenian citizens according to the regulations applied until 25 June 1991". However, the Redress of Injustices Act extends the possibility of the recognition of the status of former political prisoner to persons who have been convicted by any courts (not only military) of other republics or the former Yugoslav federation. But, in addition, the requirements to have Slovenian citizenship and residence on the territory of the Republic of Slovenia on 26 October 1996, one must also be of Slovenian national origin.

Slovenia is a State comprised of all its citizens (Article 3 of the Constitution). On its own territory, Slovenia protects human rights and basic freedoms (Article 5.1 of the Constitution). In Slovenia each individual is guaranteed equal human rights and basic freedoms irrespective of national origin (Article 14.1 of the Constitution), and every individual is entitled to freely express affiliation with their nation or national community (Article 61 of the Constitution).

The Constitutional Court already established in Decision no. U-I-46/96 (OdlUS VI, 93) that the drawing of a distinction between persons who have been convicted on the territory of the present Republic of Slovenia and persons who have been convicted by the bodies of other republics or the former Yugoslav federation, was not contrary to the constitutional provision on equality before the law (Article 14.2 of the Constitution). But as the legislature has also granted the opportunity to assert the status of former political prisoner to persons convicted by the courts of other republics or the former Yugoslav federation, it should not have made any differences as to the personal circumstances of such persons (Article 14.1 of the Constitution).

The part of Article 2.3 ZPKri which grants certain rights only to the "persons of Slovenian national origin" is thus unconstitutional. The Constitutional Court decided to only abrogate the unconstitutional part of this provision, which means that the entire part of the provision does not lose its meaning and application. This provision should be interpreted as granting the right to assert the status of political prisoner to all Slovenian citizens equally if they have residence in Slovenia, irrespective of their national origin, provided that these persons fulfil other conditions prescribed by statute. Also, this right equally pertains to the "persons of Slovenian national origin" who had been convicted by the courts of other republics or the former Yugoslav federation, and ensures them the same rights as persons convicted by the courts of the former Republic of Slovenia. By abrogating the unconstitutional part of the provision, the objective of the disputed provision is achieved.

Supplementary information:

Legal norms referred to:

- Articles 3, 5, 14 and 61 of the Constitution;
- Articles 26 and 43 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision the Constitutional Court refers to its Decision no. U-I-46/96 (OdlUS VI, 93).

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1998-3-009

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.09.1998 / **e)** U-I-248/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 76/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - Rules issued by the executive.
Constitutional Justice - Effects - Temporal effect - Retrospective effect.
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.
Sources of Constitutional Law - Techniques of interpretation - Interpretation by analogy.
General Principles - Certainty of the law.
General Principles - Legality.
General Principles - *Nullum crimen sine lege.*
General Principles - Prohibition of arbitrariness.
Institutions - Jurisdictional bodies - Jurisdiction.
Fundamental Rights - Civil and political rights - Non-retrospective effect of law - Criminal law.

Keywords of the alphabetical index:

Regulations which have ceased to apply, constitutional review / General legal principles recognised by civilised nations / Criminals offences, definiteness.

Headnotes:

The provisions of the Act on the Punishment of Crimes against the Slovenian National Honor were at the time of their adoption and application inconsistent with the general legal principles recognised by civilised nations, insofar as they were, because of their vagueness, the basis for an arbitrary application of statute. To this extent, their application in today's court proceedings would be unconstitutional.

Summary:

The Constitutional Court has jurisdiction to review this statute under Article 416 of the Code of Criminal Procedure (Official Gazette RS, Nos. 63/94, 25/96 - dec.CC, 39/96 - dec.CC and 5/98 - dec.CC). Article 161.1 of the Constitution provides that the Constitutional Court abrogates a statute in whole or in part if it determines that statute is unconstitutional. Such abrogation takes effect

immediately or within a period of time determined by the Constitutional Court. Article 162.1 of the Constitution provides that the proceedings before the Constitutional Court are regulated by statute. The Constitutional Court Act (Official Gazette RS, no. 15/94) in Article 44 provides that a statute or its part abrogated by the Constitutional Court does not apply to relations that had been established before the day such abrogation came into effect, if by that day such relations had finally been adjudicated. In contrast, Article 416 of the Code of Criminal Procedure provides for the right to request the modification of a final judicial decision pursuant to the decision of the Constitutional Court by which the Court abrogated or abrogated *ab initio* the regulation on the basis of which the final judgement of conviction had been passed. In these proceedings the Code of Criminal Procedure provisions on reopening of criminal proceedings are sensibly applied. Thus, Article 416 of the Code of Criminal Procedure is in relation to Article 44 of the Constitutional Court Act *lex specialis,* with regard to the determination of effects of constitutional judicial review on the constitutionality of statute. Article 28.2 of the Constitution requires the criminal court to determine the criminal offence and pronounce the penalty according to the statute that was in force at the time the action in question was performed (save where a new statute prescribes a milder penalty), but which in some cases may not anymore be applied during the trial. Article 416 of the Code of Criminal Procedure imposes an obligation even on the Constitutional Court, at the request of a party to constitutional court proceedings, to review any regulation which prescribes or has prescribed criminal offences even if it does not apply anymore at the time of its review. The Constitutional Court therefore has jurisdiction to review the Act on the Punishment of Crimes against the Slovenian National Honor (ZSN).

The Constitutional Court already answered the question of which criteria should have been followed in order to review the constitutionality of pre-constitutional regulations when it adjudicated on the Decree on Military Courts (Decision no. U-I-6/93 dated 1 April 1994, OdlUS III, 33). Regulations are to be reviewed from the point of their consistency with the then applicable constitutional and general legal principles which were recognised by civilised nations, and, concerning their application in new trials, also from the point of their consistency with the present Constitution.

The abuses of law which, as more recent historical research proves, undoubtedly occurred under the previous system do not mean that the law of that time (in this case the penal provision which defines a criminal offence) was itself inconsistent with the then applicable general legal principles recognised by civilised nations. The Constitutional Court in case no. U-I-6/93, in which it reviewed the constitutionality of the Decree on Military Courts, emphasised that a fixed definition of a criminal offence *(lex certa)* was one of the basic guarantees in criminal substantive law, and that it was derived from a broader definition of the principle of legality. The principle of legality in defining criminal offences was already at the time of the adoption and application of the Act on the Punishment of Crimes against the Slovenian National Honor recognised by civilised nations as one of the general legal principles. Even today, the application of provisions that would contradict this principle is not allowed in court proceedings by virtue of Article 28 of the Constitution.

Criminal offences in Article 2 ZSN were defined by an introductory clause as actions which had "harmed or could have harmed the reputation and honour of the Slovenian nation" and "which could not be characterised as treason or an assistance offered to the occupier to perpetrate war crimes". This matter obviously concerned a delineation from criminal offences defined in Articles 13 and 14 of the said Decree on Military Courts. According to Article 5 ZSN, the special court, if it found that a "more serious criminal offence had been committed for which a military or other court had jurisdiction", would have to declare its lack of jurisdiction and send the case to the competent court. In addition to the introductory clause, each criminal offence also included in its definition concrete forms of perpetration enumeratively listed. This means that in order to determine the existence of a criminal offence under Article 2 ZSN, the court would have to establish in every particular case whether the individual's action fulfilled all the elements included in the introductory clause as well as some additional elements. The definition of particular criminal offences did not fulfill the criterion of definiteness since it could have embraced an indefinitely broad circle of actions. But it is not possible to assert this in the case of those actions whose forms of perpetration were precisely enough defined, as, for example, in the case of a "direct denouncement which might have entailed dangerous consequences for the person denounced", or in the case of "giving a business company at the service and aid of the occupier". In these cases the statutory provision did not violate the principle of legality.

Given the legal structure of Article 2 ZSN, the Constitutional Court cannot in the proceedings of the review of a regulation finally determine to which extent particular constitutive parts of this provision were consistent with the rule *lex certa,* and to which extent they were not. For these reasons the Constitutional Court adjudicating on the constitutionality of the Act on the Punishment of Crimes against the Slovenian National Honor provisions used the same technique of decision making as it had applied in case no. U-I-6/93. Courts in the case of possible renewed proceedings will have

to, on the basis of Article 416 of the Code of Criminal Procedure, establish in every case separately whether the provision which was the basis for the judgement of conviction was consistent with the rule *lex certa*. Such a Constitutional Court decision does not deny individuals constitutional protection. If they opined that a court had used Article 2 ZSN in conflict with the above-said, they would be able in constitutional-complaint proceedings to assert the violation of the principle of legality in criminal law.

Supplementary information:

Legal norms referred to:

- Articles 28, 126 and 162 of the Constitution;
- Article 10 of the Introductory Statute to the Penal Code;
- Article 416 of the Code of Criminal Procedure (ZKP);
- Articles 23 and 44 of the Constitutional Court Act (ZUstS).

Concurring opinion of a constitutional judge.

Cross-references:

In the reasoning of its decision the Constitutional Court refers to its decisions no. U-I-6/93 dated 1 April 1994 (OdlUS III, 33) and no. Up-301/96.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1998-3-010

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.09.1998 / **e)** U-I-204/98 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 73/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1998 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

General Principles - Social State.
General Principles - Rule of law.
General Principles - Certainty of the law.
General Principles - Maintaining confidence.
General Principles - Vested rights.
General Principles - Public interest.
Fundamental Rights - Civil and political rights - Non-retrospective effect of law.
Fundamental Rights - Economic, social and cultural rights - Right to health.

Keywords of the alphabetical index:

Constitutional Court, delayed abrogation / Health care, rights resulting from mandatory health insurance / Insemination, artificial, costs / Bioethics.

Headnotes:

Since the challenged provision of the amendments to the Rules of Mandatory Health Insurance was to come into force later than the Rules themselves, the provision does not have retroactive effect and is not contrary to the constitutional provision on the prohibition of retroactive legislation (Article 155 of the Constitution).

The legislature did not have a reason based on a prevailing and legitimate public interest to include the number of attempts at artificial insemination made before the amended Rules came into force in the four attempts at artificial insemination permitted by the amendments. The provision of the Rules which restricts the previous unlimited number of attempts at artificial insemination covered by mandatory health insurance to four is therefore inconsistent with the principle of trust in the law as a constitutive part of the principle of a State governed by the rule of law (Article 2 of the Constitution), insofar as it also applies to the attempts at artificial insemination made before the amended Rules came into force.

Summary:

Article 155 of the Constitution states that statutes, other legal regulations and general acts cannot have retroactive effect. A regulation has retroactive effect when it determines any moment before it came into force to be the moment of the beginning of its application, and thereby applies to questions of legal positions or facts which had been resolved under the previous legal norm (Decision no. U-I-112/95 dated 8 May 1997 - OdlUS VI, 57). The challenged provision of Article 2 of the amended Rules does not have retroactive effect. According to Article 35, the amended Rules were to begin to apply on the fifteenth day following their promulgation in the Official Gazette; since they had been promulgated on 26 July 1996, they came into force on 10 August 1996 and began to be applied from 1 September 1996 on.

However, this does not mean that the Constitution does not protect the rights of citizens against statutory interventions having future effect. This protection is ensured by Article 2 of the Constitution, which provides that Slovenia is a State governed by the rule of law. The principles of a State governed by the rule of law include the principle of the protection of trust in the law. This ensures that the State will not arbitrarily worsen an individual's legal position, *i.e.* without a reason based on a prevailing and legitimate public interest. Not only vested rights, but also expectant rights are to a great extent protected by health insurance (OdlUS VI, 57). In weighing constitutional values, on the one hand it is important to know how significant the expectant right is to the person affected and what the significance of the changes is, and, on the other hand, whether the changes in a particular field of law were relatively predictable such that the persons affected could have predicted them (See Decision no. U-I-206/97 dated 17 June 1998, Official Gazette RS, no. 50/98).

The amended Rules restricted the previous unlimited number of attempts at artificial insemination covered by mandatory health insurance to four. By such a change the legislature interfered with a very delicate sphere of personal dignity. The amendments for the most part affected the legal position of the petitioner and other persons who had already undergone attempts at artificial insemination, or who had before the amendments came into force taken advantage of all four attempts as later permitted by these amendments. Persons who had decided to undergo artificial insemination attempts before the amended Rules became effective could not have anticipated that the number of attempts permitted would subsequently be restricted. They had not decided to pay by themselves for artificial insemination attempts before the amendments came into force. From the responses of the Ministry of Health, the Health Insurance Institute (hereinafter: ZZZS), and from the petitioner's assertions, it follows that findings in the area of artificial insemination are developing, and, according to the amendment, attempts at artificial insemination made in the experimental phases of this development have been taken into consideration as such. The Health Insurance Institute also stated that before the amendments came into force, the main incentive for carrying out artificial insemination attempts had been the information and professional experience doctors wanted to obtain concerning these techniques. It is reasonable to assume that it was not only a desire to have children which was decisive in order to decide to carry out an artificial insemination attempt, but particularly the need to improve this medical procedure, which then could result in one or more attempts at artificial insemination, and it was not necessary to optimize the circumstances which might contribute to a higher probability of success of an attempt (the selection of a therapy and doctor, health conditions, etc.).

The legislature did not have a reason based on a prevailing and legitimate public interest to interfere with the legal position of the petitioner and other persons who had already undergone at least one attempt at artificial insemination before the amended Rules came into force. The Health Insurance Institute did not state in its reply the reasons for the disputed interpretation, but only the reasons for introducing the restriction that only four attempts at artificial insemination were permitted. Due to material, financial and personnel limitations only 2,000 attempts at artificial insemination can it is claimed be made per year, and because the number of persons who would like to undergo artificial insemination exceeds 2,000, the said restriction allegedly reinforced the equal position of all these persons.

Due to the fact that insufficiently grounded reasons were shown to interfere with the legal position of persons who had already undergone one or more attempts at artificial insemination, the provision of Article 2 of the amended Rules was abrogated in the challenged part. Such a decision means that in the four attempts at artificial insemination covered by mandatory health insurance, only the attempts made after the amendments came into force are included.

Supplementary information:

Legal norms referred to:

- Articles 2 and 155 of the Constitution;
- Articles 26 and 45 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court justice.

Cross-references:

In the reasoning of its decision the Constitutional Court refers to its Decisions no. U-I-112/95 dated 8 May 1997 (OdlUS VI,57) and no. U-I-206/97 dated 17 June 1998.

Languages:

Slovene, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-1998-3-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 23.09.1998 / **e)** CCT 37/97 / **f)** Osman and Another v. The Attorney General, Transvaal / **g)** / **h)** 1998 (4) *South African Law Reports* 1224 (CC), 1998 (11) *Butterworths Constitutional Law Reports* 1362 (CC).

Keywords of the systematic thesaurus:

Fundamental Rights - Civil and political rights - Individual liberty - Deprivation of liberty - Arrest.
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:

Right to remain silent / Goods reasonably suspected to be stolen, explanation / Explanation, appropriate / Burden of proof.

Headnotes:

Section 35.1.c of the Constitution guarantees the right of every person arrested for allegedly committing an offence not to be compelled to make any confession or admission that could be used in evidence against that person. Section 35.3.h of the Constitution furthermore enshrines the rights to be presumed innocent, to remain silent, and not to testify during proceedings as integral components of the right of all accused persons to a fair trial.

In this instance, the legislator had created a statutory offence based on the inability of any person found in possession of goods reasonably suspected to have been stolen to give a satisfactory account of such possession. Such a provision did not violate the right of an arrested person not to be compelled to make any admission that could be used against him or her. Nor did the provision violate the right of an accused person to remain silent and to be presumed innocent until proven guilty.

Summary:

The appellants, the Osmans, had been found in possession of a number of tyres, reasonably suspected of having been stolen, and were unable to explain such possession. Their trial was stayed to allow them to pursue the constitutional challenge in the High Court, which found that the provision did not violate the appellants' rights. On appeal to the Constitutional Court, the Osmans again argued that the impugned statutory provision conflicted with their rights enshrined in Sections 35.1.c and 35.3.h of the Constitution.

Justice Madala, delivering the unanimous judgment of the Court, held that the purpose of the right against self-incrimination was to protect individuals from being exposed to unacceptable methods of extracting confessions. In the case before the Court, however, the persons charged with the relevant statutory offence, as a result of their failure to proffer an appropriate explanation at the time of their arrest, suffered no prejudice, since they retained the express right to furnish a satisfactory explanation at the subsequent trial. In light thereof the Court held that the challenged statutory provision did not compel arrested persons to make an incriminating statement and did not therefore violate the Constitution.

With regard to the alleged violation of the accused's right to a fair trial, Justice Madala held first that the presumption of innocence, in the context of a criminal trial, placed a duty on the State to prove all the elements of the crime beyond reasonable doubt. In the present case, the presumption of innocence had not been violated where the impugned statutory provision did not burden the accused with the onus of proving their innocence. Second, the right to silence was aimed at protecting an accused person from being compelled, on pain of punishment, to give evidence that may incriminate him or her. In the present case, however, the relevant statutory provision did not force the accused to make any statement, since they could still elect whether or not to testify. If they chose to remain silent, even when the State case was sufficient to prove all the elements of the offence, they did so at their own risk, but voluntarily.

Applying these principles, the Court found that the requirements of the provision did not apply pressure which infringed the rights of persons under the Interim Constitution. Consequently the appeal was dismissed.

Cross-references:

Other relevant cases in which the right to be presumed innocent have been analysed include:

Mello and Another v. The State 1998 (3) *SA* 712 (CC), 1998 (7) BCLR908 (CC), *Bulletin* 1998/2 [RSA-1998-2-

005]; *S v. Ntsele* 1997 (11) BCLR 1543 (CC), *Bulletin* 1997/3 [RSA-1997-3-012]; *Scagell and Others v. Attorney-General, Western Cape and Others* 1997(2) SA 368 (CC), 1996 (11) BCLR 1446 (CC), *Bulletin* 1996/3 [RSA-1996-3-017]; *S v. Julies* 1996(4) SA 313 (CC), 1996 (7) BCLR 899 (CC), *Bulletin* 1996/2 [RSA-1996-2-011]; *S v. Mbatha; S v. Prinsloo* 1996(2) SA 464 (CC), 1996 (3) BCLR 293 (CC), *Bulletin* 1996/1 [RSA-1996-1-001]; *S v. Bhulwana*; *S v. Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008]; *S v. Zuma and Others* 1995 (4) BCLR401 (CC), *Bulletin* 1995/3 [RSA-1995-3-001].

Languages:

English.

Identification: RSA-1998-3-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.10.1998 / **e)** CCT 11/98 / **f)** National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others / **g)** / **h)** 1998 (12) *Butterworths Constitutional Law Reports,* 1517 (CC).

Keywords of the systematic thesaurus:

General Principles - Prohibition of arbitrariness.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - Gender.
Fundamental Rights - Civil and political rights - Right to private life.
Fundamental Rights - Civil and political rights - Right to self fulfilment.

Keywords of the alphabetical index:

Law, application / Arbitrariness, statutes / Order of invalidity, confirmation / Constitution, function in a democratic society / Constitutional invalidity / Criminal law / Human dignity / Legitimate purpose / Sodomy / Homosexuality.

Headnotes:

While Section 20A of the Sexual Offences Act 1957 and other legislation sought to prohibit and criminalise homosexual conduct between men the Constitution guarantees the right to equality, privacy and human dignity as well as the equal protection of the law.

The purpose of a Bill of Rights is to recognise the rights of historically disadvantaged groups such as the gay and lesbian community, and free such communities from the shackles of past injustices and discrimination. The offence of sodomy was therefore unconstitutional as it violated an individual's right against unfair discrimination and the rights of privacy and human dignity. Such laws had no legitimate purpose and could not be saved by the limitations clause.

Summary:

In a unanimous decision written by Justice Ackermann the Court held that the offence of sodomy as contained in Section 20A of the Sexual Offences Act of 1957 and other legislation was unconstitutional as it infringed on Section 9 of the Constitution, the equality provision, and other rights contained in the Constitution. The National Coalition for Gay and Lesbian Equality challenged the constitutionality of these provisions and the High Court had declared these provisions to be inconsistent with the Constitution. The Constitutional Court was asked by the applicants to confirm the High Court's decision. The Court held that the common law and statutory offence of sodomy was unconstitutional.

It was argued that the purpose of applying the criminal sanction to acts of sodomy was purely to criminalise private sexual conduct between consenting male adults which caused no harm to others. The provisions failed to criminalise similar intimacy between a man and a woman, or any sexual intimacy between women. Section 9.3 of the Constitution listed sexual orientation as a protected ground against discrimination and therefore any discrimination was presumed to be unfair unless the contrary was proven. No evidence was lead to prove that the legislation had a legitimate purpose or that the discrimination was fair. The ultimate determining factor was the impact of the discrimination on the affected group. The Court held further that the infringement on the right could not be justified under the limitations clause (Section 36 of the Constitution), as the tainted provisions contained no legitimate purpose, but merely served to enforce majority views over the conduct of a historically marginalised group.

In a separate concurring judgement in which Justice Ackermann concurred, Justice Sachs held that human rights are better approached and defended in an integrated rather than a dislocated fashion.

In addition Justice Sachs held that the right to privacy as contained in Section 14 of the Constitution had been violated as the scope of the privacy right was closely related to the concept of personal identity. The expression of sexuality required a partner and it was not for the State to arrange the choice of partner, but for the individual to choose for him or herself.

Justice Sachs reiterated the centrality of dignity and self-worth to the Court's jurisprudence on equality. Inequality is established not simply through group-based differential treatment but through differentiation which perpetuates disadvantage. This leads to the scarring of the sense of dignity and self-worth of members of the gay and lesbian community. Fear of discrimination would lead to concealment of true identity, thus harming personal confidence and self-esteem.

Finally, in Justice Sachs' view, the Constitution requires that the law and public institutions acknowledge the diversity of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal is no longer the basis for establishing what is legally normative. The scope of what is constitutionally acceptable has expanded to include the widest range of perspectives and to acknowledge and accommodate the largest spread of difference. The decision of the Court should thus be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa.

Cross-references:

Brink v. Kitshoff NO 1996 (4) SA 197, 1996 (6) BCLR 752 (CC), *Bulletin* 1996/1 [RSA-1996-1-009]; *Fraser v. Children's Court*, Pretoria North 1997 (2) SA 261, 1997 (2) BCLR 153 (CC), *Bulletin* 1997/1 [RSA-1997-1-001]; *Harksen v. Lane NO* 1997 (11) BCLR 1489 (CC), *Bulletin* 1997/3 [RSA-1997-3-011]; *Larbi-Odam v. Member of the Executive Council for Education, North-West Province* 1997 (12) BCLR 1655 (CC); *President of South Africa v. Hugo* 1997 (4) SA 1, 1997 (6) BCLR 708 (CC), *Bulletin* 1997/1 [RSA-1997-1-004]; *Prinsloo v. Van der Linde* 1997 (3) SA 1012, 1997 (6) BCLR 759 (CC), *Bulletin* 1997/1 [RSA-1997-1-003].

Languages:

English.

Identification: RSA-1998-3-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.11.1998 / **e)** CCT 15/98 / **f)** Jooste v. Score Supermarket Trading (Pty) Ltd (The Minister of Labour Intervening) / **g)** / **h)** 1999 (2) *Butterworths Constitutional Law Reports* (1) (CC).

Keywords of the systematic thesaurus:

Justice - Constitutional jurisdiction - Relations with other institutions - Courts.
Constitutional Justice - Effects - Scope.
General Principles - Reasonableness.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Employment - Private.

Keywords of the alphabetical index:

Employment contracts / Legitimate purpose / Statutory health insurance / Constitutional Court, powers / Occupational injuries, compensation / Employee, compensation for workplace injuries.

Headnotes:

The South African Constitution guarantees everyone the right to equality before the law and the right to equal protection and benefit of the laws. Compulsory participation in statutory health insurance schemes does not, however, violate the right to equality of those employees subject to the statute.

The South African Constitutional Court is the highest court with respect to constitutional matters. Although it now shares jurisdiction with respect to constitutional matters with the Supreme Court of Appeals, all orders invalidating an act of Parliament on the grounds of unconstitutionality must be confirmed by the Constitutional Court.

Summary:

In South Africa, workers subject to Section 35.1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("the Act") are barred from asserting claims directly against their employers for injuries or death caused by accidents or disease in the workplace. Under the statutory workers' compensation scheme embodied in the Act, employees are required to submit a claim to the statutory insurance agency, which establishes in advance a prescribed payment depending on the type of injury sustained. Non-employees or employees of certain small-scale employers are not subject to the Act and are thus entitled to assert general damages claims

where the resulting workplace injury or death is caused by the negligence of their co-workers or employers.

The case was brought to the Constitutional Court for confirmation of an order of the High Court of the Eastern Cape which had declared that the relevant provision of the Act was unconstitutional on the grounds that it violated the right to equality and the right to equal protection and benefits of laws, as contained in Sections 9.1 and 9.3 of the Constitution, respectively.

The complainant alleged that the Act unfairly discriminated against employees covered by the Act in that it denied them the right to claim damages directly from their employers. The Act thus puts covered employees at a disadvantage as compared to non-employees and workers not covered by the Act who are free to assert their common law right to claim damages when they sustain injuries in the place of employment.

The question before the Court was whether the impugned provision was rationally connected to a legitimate government purpose. If so, then the complainant would have failed to establish that she was unfairly discriminated against. If the Act was found to have no rational connection to a legitimate government purpose, the burden would then rest upon the State to justify the Act as a permissible infringement on the fundamental right to equality, as required by Section 36 of the Constitution.

In a unanimous judgement written by Justice Yacoob, the Constitutional Court found that the legitimate purpose of the Act is to provide a system of compensation for employees for disability or death caused by injuries or diseases in the workplace. The Act bars covered employees from asserting damages claims based on negligence. The trade-off is that employees may claim for workplace injuries from a limited compensation fund supported by employers, even where the employer has not been found negligent. The Court found that, when viewed as a whole, the Act was not arbitrary or irrational. The decision of the High Court invalidating the impugned provision was thus not confirmed.

Languages:

English.

Identification: RSA-1998-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 02.12.1998 / **e)** CCT 10/98 / **f)** The Premier, Province of Mpumalanga and Another v. Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Maintaining confidence.
General Principles - Legality.
General Principles - Reasonableness.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial.
Fundamental Rights - Civil and political rights - Non-retrospective effect of law.

Keywords of the alphabetical index:

Administrative decisions, opportunity to be heard / Administrative principles, reasonable prior notice / Administrative procedure, procedural fairness / Contractual obligations, restructuring / Legitimate expectation / Procedural fairness, principle.

Headnotes:

In administrative procedure the content of procedural fairness will depend on the circumstances of a case, and does not require that a hearing be given in all cases. In determining what constitutes procedural fairness, a court should be slow to impose obligations upon the government which will inhibit its ability to make and implement policy effectively. To permit the implementation of retroactive decisions without affording parties an effective opportunity to make representations would flout the principle of procedural fairness.

Summary:

The Member of the Executive Council responsible for education in the Province of Mpumalanga took a decision to discontinue retrospectively the bursaries paid to schools which mainly educated white pupils. This was done without reasonable prior notice and without affording the Association of Governing Bodies of State-aided Schools: Eastern Transvaal and its members an opportunity to be heard or to restructure their contractual obligations in the light of the diminished income; furthermore, it was in breach of the Association's right to procedural fairness.

A Member of the Executive Council (the MEC) charged with the executive authority for education in the province

of Mpumalanga decided to discontinue all bursaries to State-aided ("Model C") schools in the province of Mpumalanga. The Association of Governing Bodies of State-aided Schools: Eastern Transvaal ("the Association") challenged this decision in the Transvaal High Court. The High Court set aside the MEC's decision, finding that it was inconsistent with the Association's right to procedurally fair administrative action. The MEC appealed against the High Court's ruling to the Constitutional Court. During the appeal proceedings before the Constitutional Court, the parties were in agreement that the bursaries paid to schools which mainly educated white pupils were one of the unfair legacies of the past dispensation (apartheid) that needed to be eradicated. The only dispute between the parties concerned the manner in which the bursaries were terminated.

In a unanimous judgement written by Justice O'Regan, the Constitutional Court dismissed the appeal. The Court held that the Association had a legitimate expectation that bursaries paid to Model C schools would continue to be paid during the 1995 school year subject to reasonable notice by the government of its intention to terminate them. In terms of the Association's right to fair administrative action, this meant that the government had either to give reasonable notice to the termination of the bursaries or to act otherwise in a procedurally fair manner if it wished to bring the bursaries to an end before December 1995.

The Court found that the MEC did not give reasonable prior notice to the Association and its members. The bursaries were thus discontinued retrospectively, without reasonable prior notice and without affording the Association and its members an opportunity to be heard or to restructure their contractual obligations in the light of the diminished income. The MEC's decision was a breach of the Association's constitutional right to procedural fairness and was therefore constitutionally invalid.

Cross-references:

Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others 1998 (12) BCLR 1458 (CC).

Languages:

English.

Identification: RSA-1998-3-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 02.12.1998 / **e)** CCT 12/98 / **f)** Beinash and Another v. Ernest and Young and Another / **g)** / **h)**.

Keywords of the systematic thesaurus:

General Principles - Weighing of interests.
Fundamental Rights - General questions - Limits and restrictions.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Access to courts.

Keywords of the alphabetical index:

Access to courts, meaning / Appeal procedure / Vexatious litigant.

Headnotes:

The right of access to courts is of fundamental importance for the adjudication of justiciable disputes. However, the restriction of this right in the case of a vexatious litigant is necessary to protect the effective functioning of the courts, the sound administration of justice and the interests of innocent parties subject to the vexatious litigation. These important purposes are served by ensuring that courts are neither swamped by matters without merit, nor abused in order to victimise other members of society.

Section 2.1.b of the Vexatious Proceedings Act 3 of 1956 provides that a judge may declare a person a vexatious litigant if that judge is satisfied that the person has, persistently and without any reasonable cause, instituted legal proceedings in any court. The person may thereafter only institute legal proceedings with the prior authorisation of a court. Although the provision does infringe the right of access to courts, this is reasonable and justifiable in terms of Section 36 of the Constitution.

Summary:

This case involved an application for leave to appeal against a decision of the Witwatersrand High Court declaring the complainants to be vexatious litigants inb)terms of Section 2.1.b of the Vexatious Proceedings Acts 3 of 1956. An order under this provision may only be made after a judge has heard the views of all the parties and is satisfied that the person has persistently and without reasonable grounds instituted legal proceedings against one or more individuals.

The effect of this order is that the party declared a vexatious litigant may not institute any legal proceedings in any court against any persons for an indefinite period without first obtaining authorisation from a court to do so. To obtain such authorisation, the person would have to show that the proceedings sought to be instituted are not an abuse of the court process and that a *prima facie* case does exist.

One of the factors that the Court had to consider when granting leave to appeal was whether there was a reasonable prospect of success on appeal. The Court heard arguments together on whether leave to appeal should be granted as well as on the merits of the case. The complainants argued that the right of access to courts in Section 34 of the Constitution was impermissibly infringed by Section 2.1.b in two ways: first, the provision gives no discretion to a judge and once s/he declares a person a vexatious litigant, the blanket order in Section 2.1.b must be imposed; and second, the facts that a declared vexatious litigant must show in order to obtain leave to proceed are too onerous and this impedes the person's access to courts.

In a unanimous judgment written by Justice Mokgoro the Constitutional Court held that the provision did constitute an infringement of the right of access to courts. However, the Court found the infringement to be a reasonable and justifiable limitation in terms of Section 36 of the Constitution. In its limitations analysis, the Court looked at the nature and purpose of the right balanced against the nature and purpose of the restriction imposed by Section 2.1.b.

An order made under Section 2.1.b merely regulates the manner in which a declared vexatious litigant would institute future proceedings. It puts in place a screening mechanism that ensures that only *bona fide* and meritorious matters occupy the time of the courts. The litigant is thus not denied the right of access to courts in the case of such litigation.

The Court noted that in terms of the existing common law it is possible for a court to make a narrower order than the one prescribed in Section 2.1.b. In the instant case, however, no evidence was placed before the Court to suggest that the complainant was not deserving of the wider order under Section 2.1.b made by the Witwatersrand High Court.

On the basis of this reasoning, the Court found that the complainant had no reasonable prospect of succeeding on appeal and the application for leave to appeal was accordingly dismissed.

Languages:

English.

Spain
Constitutional Court

Important decisions

Identification: ESP-1998-3-016

a) Spain / **b)** Constitutional Court / **c)** Second Chamber/ **d)** 28.09.1998 / **e)** 187/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 260 of 30.10.1998, 15-18 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - The subject of review - Court decisions.
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 - Reasoning.

Keywords of the alphabetical index:

Consistency / Miscarriage of justice / Inconsistency by omission.

Headnotes:

For a complaint of miscarriage of justice to be admissible on constitutional grounds, there are two essential preconditions: first, the complaint must have actually been heard by a court; second, the latter must establish the absence of a ruling, or a statement of the reasons for a ruling, on one of the key parts of the complaint.

Summary:

This application for constitutional protection was made against a decision of the administrative courts which, the applicant claims, failed to rule on all the points made in the application and in particular the claim that, over the two fiscal years in question, the tax-payer had been subject to a particular method of calculating his tax base (indirect assessment). The question therefore was whether there had been a violation of the applicant's fundamental right not to be deprived of a defence (Article 24.1 of the Constitution), in which case there would have been a miscarriage of justice on the ground of failure to make a ruling (inconsistency by omission) on the part of the court which heard the case.

Before ruling on the matter raised in the instant appeal, the Constitutional Court referred to its abundant case-law on this question. As a general principle, the Court had stated (in decision no. 91/1995 of the Constitutional Court) that there could be no general ruling on the question because the individual circumstances of each case had to be taken into account (a doctrine also adopted by the European Court of Human Rights in its interpretation of Article 6.1 ECHR). Accordingly, the main issue to be decided was whether the question had actually been raised at the relevant point in the proceedings and, above all, whether the lack of a ruling on the matter by the court hearing the case had given rise to a violation of the right to a defence.

In order to make this judgment, the Constitutional Court has drawn up a number of rules enabling it to establish whether the lack of a ruling is tantamount to a miscarriage of justice (inconsistency), violating a fundamental right. These rules are said to be positive if there is no question of a denial of judicial protection (for instance, if the judicial body deals with the main claim) and negative if there has been a violation of the right to effective judicial protection because of the omission or total absence of a ruling (it should be noted in this respect that a general or overall ruling on the question raised cannot be regarded as a violation of this right). This led the Court to conclude that a distinction must be made (a) between the rulings on the allegations made by the parties in support of their claims and the allegations themselves and (b) between the rulings on these two questions and their reasons.

Regarding the allegations, the mere fact that the court hearing the case did not provide an explicit and detailed reply to all the allegations made during the proceedings was not sufficient reason to rule that there had been a violation of the right to effective judicial protection. It should not be forgotten that a ruling in respect of the central allegations forming the backbone of the parties' reasoning can be perfectly sufficient to satisfy this right provided it takes account of the particular circumstances of each case, and even if it is general or leaves a secondary allegation unanswered. Otherwise, failure to rule on allegations can amount to a violation of the right to effective judicial protection on the ground of miscarriage of justice and, more precisely, on the ground of failure to state sufficient reasons.

By contrast, the requirement to rule on claims is much more binding. In this case, the failure to rule on any of the claims directly caused a miscarriage of justice (inconsistency by omission), constituting a violation of the right to effective judicial protection.

Languages:

Spanish.

Identification: ESP-1998-3-017

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 01.10.1998 / **e)** 195/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 260 of 30.10.1998, 61-66 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Temporal effect - Postponement of temporal effect.
Institutions - Federalism and regionalism - Distribution of powers.

Keywords of the alphabetical index:

Nature reserve, protection, powers / Environment, protection, powers, distribution / *Vacatio legis*, redress.

Headnotes:

Under Article 39.1 of the Organic Law on the Constitutional Court, any judgment given in the framework of proceedings challenging constitutionality which declares the provisions at issue unconstitutional renders those provisions null and void. Nonetheless, the Constitutional Court considers that, under certain circumstances, with a view to limiting as far as possible any harmful effects that may be caused by a declaration of unconstitutionality, it is appropriate for the enforcement of the judgment to be delayed until the relevant authorities have introduced legislation on the matter.

Summary:

The present case was brought before the Constitutional Court by the Governing Council of the Assembly of Cantabria (one of the autonomous communities that make up the Spanish state) against Article 23.1 of the national Law on the conservation of nature areas and wild species of flora and fauna, and two articles and the appendix of the national law under which the Santoña and Noja marshes (on the territory of the appellant autonomous community) had been declared nature reserves. The appellant contested the aforementioned articles on the grounds that they were at variance with the apportionment of powers between the state and the autonomous community laid down in the Constitution and by law.

In order to clarify what powers are concerned and how the Constitution and the law apportion the functions relating to them, the Court pointed out that, despite the very close link between environmental matters and those relating to protected nature areas, public activities relating to these two matters were regarded as separate physical areas for which powers were apportioned differently. However, the Court itself had repeatedly stated in previous decisions that the designation of nature reserves and the resulting delimitation of their territorial scope clearly brought them within the ambit of protected nature areas. As the State counsel pointed out, although the autonomous community made no direct claim to powers in this field - despite the fact that its own Statute of Autonomy gave it jurisdiction in this area - it had to be taken into account that, because they were inalienable, these powers could not be transferred at all, even if they were the subject of a defective claim. It should also be pointed out that, in this case, the fact that the subject-matter at issue could be attributed to one or another set of powers was of no practical consequence since Cantabria also had legislative powers in the environmental field since the reform of its autonomous status in 1994 (it should not be forgotten that disputes of this type must always be settled in accordance with the system of apportionment of powers in force at the time of the judgment). Thus, there was absolutely no doubt that the public activity of defining the territorial limits of the Santoña and Noja nature reserve lies within the competence of the autonomous community of Cantabria. Consequently, the contested rules were unconstitutional.

Nonetheless, the Court felt that it was necessary, in this case, to define the scope of this declaration of unconstitutionality because, under the present circumstances, if this declaration were to nullify the contested law immediately, major harm could be caused to the natural resources of the area which was the subject of the controversy. In constitutional proceedings such as this one, relating to conflicts of jurisdiction between the state and an autonomous community, the main purpose of the judgment handed down is to determine which of them holds the contested power. It is for this reason that, once this fundamental conclusion has been drawn, every effort must be made to avoid any harm the declaration may cause to the interlocking set of assets, interests and rights affected by the laws at issue (in this case, the protection, conservation, rehabilitation and improvement of the natural habitat of the Santoña marshes). From the constitutional point of view, it was impossible to remain indifferent to the, admittedly

temporary but no less irreversible, harmful consequences which this decision could have for the protected area. Moreover the harm caused would have been entirely unconnected, or even in direct conflict with, the claims made during this case by the party that initiated the proceedings before the Court. To avoid such harmful consequences, the Court decided that the declaration of unconstitutionality should not nullify the law concerned immediately and that its effects should be deferred until the autonomous community introduced an appropriate provision whereby the Santoña marshes were declared a protected nature reserve in accordance with one of the cases provided for in the applicable rules.

Languages:

Spanish.

Identification: ESP-1998-3-018

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.11.1998 / **e)** 214/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 301 of 17.12.1998, 5-10 / **h)**.

Keywords of the systematic thesaurus:

Institutions - Executive bodies - Territorial administrative decentralisation - Structure - Municipalities.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Employment - Public.
Fundamental Rights - Economic, social and cultural rights - Right of access to the public service.

Keywords of the alphabetical index:

Public office, termination on grounds of resignation / Local authority, resignation from public office / Municipal councillor, resignation, date of effect / Resignation, date of effect.

Headnotes:

The right of equal access to public office under the conditions laid down by the law (Article 23.2 of the Constitution) is not confined to the initial moment of access to public office but also extends to the entire term of office, thereby ensuring that incumbents may remain in office without unwarranted interference. Therefore, the right to resign one's office forms part of the prerogatives inherent in this fundamental right, though it may of course be made subject to certain restrictions by the relevant legislation.

Summary:

The question raised in this application for constitutional protection was whether the decision at issue, which the applicant regarded as a violation of the right of equal access to public office (Article 23.2 of the Constitution), entailed a constitutionally admissible interpretation of the rules governing the procedure whereby the status of municipal councillor could be declared forfeited in the event of resignation. Under the aforementioned rules, resignation is regarded as entailing forfeiture of the status of municipal councillor, council member or member of any local authority if it is submitted in writing to the full assembly of the local authority concerned.

In the decision at issue, the court that heard the case held that the resignation from the office of municipal councillor took full effect from the moment it was submitted for entry in the records of the local authority concerned, so that a subsequent change of mind produced no legal effect. It based its interpretation on the fact that the statement of termination of office and vacancy by the full council of the local authority concerned was merely an ordinary finding verifying the circumstances leading to termination of office. The court in question considered that, if this were not the case, the local authorities could set at their own convenience the date on which the post in question became vacant, and consequently the date on which the person who had relinquished the post should be replaced, thereby enabling them to delay the decision regarding the appropriateness of the termination of office.

The Constitutional Court, however, considered that the contested decision gave a needlessly restrictive interpretation regarding the effectiveness of the fundamental right to uninterrupted tenure of public office. In this connection, the Constitutional Court pointed out that under the regulations in force, resignation took effect only when it was made final before the full council of the local authority, in other words not when it was submitted for entry in the records of the local authority but at the precise time when, after having been registered, it was presented to the full council. Up to this point it was possible to talk about a resignation pending or in progress, but it did not take real legal effect until the precise moment when it was presented to the full council of the local authority. It was thus not a question of informing the council of a resignation which had already become effective, but of one that became so following

this notification and not before. Resignation is therefore, as it were, automatic, but only when it is presented to the full council of the local authority, and takes effect as a result of this act of presentation. Therefore, it can perfectly well be revoked as long as the full council has not been notified of it.

Languages:

Spanish.

Identification: ESP-1998-3-019

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 25.11.1998 / **e)** 25/1998 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), no. 312 of 30.12.1998, 18-27 / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution.
General Principles - Proportionality.
Institutions - Federalism and regionalism - Distribution of powers.
Fundamental Rights - Civil and political rights - Equality - Scope of application - Elections.
Fundamental Rights - Civil and political rights - Electoral rights.
Fundamental Rights - Economic, social and cultural rights - Right of access to the public service.

Keywords of the alphabetical index:

Elections, electoral thresholds / Autonomy statute, correct procedure and reform / Autonomy statute, reference to the regional legislative authority.

Headnotes:

It is wholly legitimate to leave it to the legislative authorities of an autonomous community to decide entirely or in part on the final content of provisions of the statute of autonomy which cover areas falling outside the sphere of competence officially attributed to it.

The democratic principle of equality allows for the most diverse electoral arrangements, provided there is equality before the law, in other words equality which must be rooted within an electoral system freely devised by the legislative authorities and not on the basis of any other system. At the same time, the constitutional requirement of proportional representation, as an objective guarantee resulting from the electoral system, also covers the substantive right of equal access to representative public office by virtue of the link between the legislation and the office, whereby the right of access to the status of elected representative can only be fully exercised if the electoral system upholds the principle of proportionality.

Summary:

This decision was a ruling on an application for constitutional review of the first transitional clause of Organic Law no. 4/1996 of 30 December 1996 on the reform of the Statute of Autonomy of the autonomous community of the Canary Islands, which reads as follows: "...save as otherwise provided in a law of the Parliament of the Canary Islands passed by a two-thirds majority, only the lists of parties or coalitions which have gained the majority of valid votes in their respective constituencies shall be taken into account, as well as following lists which have obtained at least 30% of the valid votes on the island concerned or at least 6% of the total vote throughout the autonomous community, once all the votes in all the constituencies where they stood as candidates are aggregated". In his application the Ombudsman relied, on the one hand, on the non-conformity of the aforementioned provision with the basic principles of Spanish law and, on the other, as regards its formal content, on a violation of the constitutional principle of proportionality in elections to the legislative assemblies of the autonomous communities (Article 152 of the Constitution) and the right of equal access to public office (Article 23.2 of the Constitution).

As regards the first ground of complaint, the applicant asserted that the provision at issue enabled regional legislation to be changed in an area which, since the adoption of the contested provision, had the role and status of a statutory provision and was therefore subject to the reform procedure provided for in the Statute of Autonomy itself. The applicant also argued that the inclusion of this provision in the Statute of Autonomy and the requirement of a two-thirds majority in the Parliament of the Canary Islands for it to be amended was effectively fossilising the electoral legislation in respect of thresholds, thereby limiting the legislative power of the legislative assembly of the autonomous community despite the fact that it was for this assembly to regulate these matters in accordance with the democratic majority principle. These allegations were rejected by the Court, which considered that, though the legal rules governing questions that were not part of the formal sphere of

competence of the Statutes of Autonomy could not be reformed by procedures other than those prescribed in the Statute of Autonomy, it was possible for the final content of these rules to be established by regional legislation either in whole or in part. This was so in the present case, in which a provisional rule had been established by national legislation and it had been left to the regional legislature to decide on the final content of the rule. The Court held that this measure was in no way tantamount to opening up the Statute of Autonomy to unconstitutional reform and that the attribution of such powers was constitutionally possible. It also held that, in the instant case, this was neither a unilaterally imposed constraint nor a change introduced *ex novo* by the national parliament to the detriment of the constitutionally recognised powers of the Autonomous Community of the Canaries. The reform of the electoral thresholds had been proposed by the parliament of the Canaries itself as part of the procedure to reform its Statute of Autonomy presented to the national parliament. Therefore there is nothing to prevent the Statute of Autonomy, as the basic source of the autonomous community's institutional rules, from requiring a majority for the exercise of legislative power in this area.

In its judgment the Court also examined the substantive aspects of the case, particularly those relating to the effect of raising electoral thresholds on the right of equal access to representative public office (Article 23.2 of the Constitution) and the constitutional requirement of proportionality in regional electoral systems (Article 152.1 of the Constitution). On this subject, the Court referred to its established doctrine on electoral thresholds and insisted that, because they pursued constitutional aims, these thresholds could not be considered a violation either of the right to equality or of the basic right to vote, provided that the restrictive effect of the proportional voting system was uniformly applied to a relatively small section of the population exercising their right of representation. This means that, in principle, thresholds of over 5% are not constitutionally admissible unless justified by exceptionally important reasons.

Regarding the contested provision, the Constitutional Court stressed that, among the various rules it contained, the only one likely to have a significant impact on the citizens' right to vote because of the difference in treatment which it implied was the clause setting a threshold of 6%. It considered however that, bearing in mind the particular characteristics of this autonomous community (an island community), this electoral threshold was in fact at the limit of what was constitutionally admissible, since the higher percentage and the fact that it gave minority parties less chance of gaining seats was offset to a degree, in the smaller islands, by the preferential treatment granted to local political minorities by other clauses in the same legal provision. Though it was true that, on the largest islands, the electoral threshold was set at over 5% of the valid votes in the autonomous community, the difference was not enough for the Constitutional Court, which had not actually set a figure for the limit, to declare the threshold unconstitutional when seen in the overall context of the electoral system in the Canaries.

Finally, the Constitutional Court pointed out that the constitutional requirement of proportionality common to regional electoral systems could be tempered in the case of the autonomous community of the Canaries because of the peculiar significance, in the autonomous island communities, of the need to ensure that the different areas were properly represented. In this connection, the Constitutional Court considered that an overall appraisal of the system described in the contested provision revealed no ground for ruling it contrary to the proportionality required by Article 152.1 of the Constitution, if it could not be otherwise proved that the new percentages fixed were such as to deprive the electoral system of the Canaries of its proportional nature.

Supplementary information:

One judge issued a dissenting opinion on this judgment.

Languages:

Spanish.

Sweden
Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 September 1998 - 31 December 1998.

Switzerland
Federal Court

Important decisions

Identification: SUI-1998-3-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.08.1998 / **e)** 1P.662/1997 / **f)** Verein gegen Tierfabriken Schweiz v. Einsiedeln District Council, Council of State and Administrative Court of the Canton of Schwyz / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 267 / **h)**.

Keywords of the systematic thesaurus:

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 - Freedom of expression.
Fundamental Rights - Civil and political rights - Freedom of assembly.

Keywords of the alphabetical index:

Public property, use / Demonstration / Extended collective utilisation.

Headnotes:

Freedom of expression and assembly; ban on demonstrations on the square in front of the Einsiedeln convent.

Meaning of the freedom of expression and assembly with regard to authorisation to demonstrate in public areas (recital 3a). No right to organise an event on a specific public square (recital 3d).

Admissibility of a general ban on demonstrations on the square in front of the Einsiedeln convent in view of its particular function as an area of calm reserved for pilgrims and other visitors to the convent; provision of an alternative location suitable for the organisation of public demonstrations (recitals 3b - e).

Summary:

The "Association against Animal Factories" is active in all areas relating to animal protection and in particular combats animal factory-farming. This association informed the cantonal police of the canton of Schwyz that it intended to hold a demonstration on 23 February 1997 on the square in front of the Einsiedeln convent; the demonstration was in protest against the holding of animals in the Fahr convent, a foundation of the Einsiedeln monastery.

The association subsequently submitted an official application for authorisation to demonstrate. This was turned down by the Prefect and then by the District Council. The association's appeals against this refusal were dismissed by the Council of State and the Administrative Court of the canton of Schwyz.

By means of a public-law appeal, the association asked the Federal Court to set aside the decision refusing to grant the authorisation requested. It relied on the freedom of expression and assembly and argued that the decision limited its fundamental rights in a disproportionate way.

The Federal Court dismissed the appeal. The use of public property by demonstrators constituted an extended collective utilisation and could, consequently, be subject to restrictions. When considering an application for authorisation, the competent authorities may take into account public order considerations and also other public interests such as the appropriate use of public facilities in the interests of the community and residents. They are not merely bound by the principles of equal treatment and the prohibition of arbitrary decisions; they must also uphold the freedom of expression and assembly. Inherent in these fundamental freedoms is not only a negative obligation on the part of the public authority but also a positive obligation; the State must ensure that demonstrations can take place without being disturbed by opposing movements. The authority must weigh up the interests at stake in accordance with objective criteria. It must not rule on and ban a demonstration on account of the ideas expressed there.

In the case in question, it was essential to take into account the nature of the square in front of the convent. It provided access for pilgrims to the church and the holy places and offered visitors and tourists a moment for reflecting on the beauty of the façade and the complex as a whole. The particular function of the square justified a general ban on demonstrations. Moreover, demonstrations by the same association had led to disturbances in the recent past.

Certainly, the demonstrators had a right to a public square to transmit their ideas. However, the choice of location did not fall to the organisers. In the case in question, the authorities provided the association with a public square which appeared appropriate to the aims of the organisers: it was in the centre of the locality and on the main road leading to the monastery and would thus have enabled the association to address a wide public and alert them to the problems related to the convents of Einsiedeln and Fahr.

The ban therefore did not constitute a disproportionate restriction on the freedom of expression and assembly of the applicant association.

Languages:

German.

Identification: SUI-1998-3-008

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 23.09.1998 / **e)** 1P.684/1997 / **f)** André Plumey v. Public Prosecution Service and the Appeal Court of the canton of Basle-Urban / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 274 / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Effects - Scope.
Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
Sources of Constitutional Law - Categories - Case-law - International case-law - European Court of Human Rights.
Fundamental Rights - Civil and political rights - Individual liberty - Deprivation of liberty - Detention pending trial.
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 - Right to examine witnesses.

Keywords of the alphabetical index:

Committee of Ministers, decision, binding force / Remand in custody, compensation / Criminal procedure.

Headnotes:

Consequences of the finding of a violation of the European Convention on Human Rights for criminal proceedings under way; the authority ordering remand and the public prosecutor being one and the same person; cross-examination of prosecution witnesses (Articles 5.3, 5.5, 6.3.d and 32.4 ECHR).

Binding force of a decision of the Committee of Ministers based on Article 32.4 ECHR (recital 3b).

Instances in which the authority ordering remand and the public prosecutor are one and the same person are in breach of the guarantee contained in Article 5.3 of the ECHR. A finding of a violation opens the way for an action for damages in accordance with Article 5.5 ECHR, but does not require a new indictment to be drawn up by another representative of the Public Prosecution Service (recital 3; change in case-law).

Principles relating to the right to cross-examination of prosecution witnesses; a decision not to allow the accused to examine a large number of witnesses does not violate Article 4 of the Constitution nor Article 6.3.d ECHR (recital 5).

Summary:

In early 1986 the Public Prosecutor's Office of the canton of Basle-Urban initiated investigations against André Plumey for various financial offences committed against a large number of clients. Extradited, André Plumey was remanded in custody in 1989 by Prosecutor Helber, who charged him on 14 July 1992 with professional fraud.

Following the European Court of Human Rights' judgment of 23 October 1990 in the case of Jutta Huber v. Switzerland (Series A, vol. 188), André Plumey challenged the decision of the public prosecutor, maintaining that the fact that the authority ordering the remand and the public prosecutor were one and the same person was contrary to the European Convention on Human Rights; he therefore asked for a new indictment to be drawn up by an impartial prosecutor. In response to a public-law appeal, the Federal Court accepted an indirect violation of the European Convention on Human Rights; nevertheless, it dismissed the appeal by judgment of 4 October 1993 on the grounds that it was out of time. André Plumey then referred his case to the European Commission of Human Rights which found a violation of Article 5.3 ECHR (the officer ordering remand and the representative of the Public Prosecution being one and the same person). In an interim resolution, the Committee of Ministers confirmed this finding on 29 October 1997.

On 22 December 1993, the Criminal Court of the Canton of Basle-Urban sentenced André Plumey to seven years' imprisonment. The Appeal Court upheld only professional fraud and reduced the sentence to 5 years' imprisonment.

By means of a public-law appeal, André Plumey asked the Federal Court to set aside this ruling. He challenged the indictment drawn up by a biased prosecutor in violation of Article 5.3 ECHR. He asked the authorities to take account of the decision of the Committee of Ministers and consequently that a new indictment be drawn up. He also relied on Article 6.3.d ECHR on the grounds that he was unable to examine prosecution witnesses. The Federal Court dismissed this appeal.

Under Articles 52 and 32.4 ECHR (the version prior to the adoption of Protocol 11) States undertake to abide by the decisions of the European Court of Human Rights and the Committee of Ministers. These decisions require States simply to produce a specific result and leave them to decide on what measures they take in order to comply with the findings of the European Convention on Human Rights organs. It is a question therefore of examining the practical consequences to be drawn from the Committee of Ministers' interim resolution.

Article 5 ECHR guarantees in a general way a right to freedom and security. Any person arrested or detained must be brought promptly before a judge or other officer authorised by law to exercise judicial power. Such a person must be impartial and independent. There may however be some doubt as to impartiality and independence if the person who ordered the detention subsequently acts as public prosecutor. This is what happened in the case in question; it therefore follows that the detention of André Plumey was contrary to the guarantee contained in Article 5.3 ECHR.

The appellant can rely directly on the acknowledged violation of Article 5.3 ECHR to request compensation within the meaning of Article 5.5 ECHR; the assessment made by the Committee of Ministers can no longer be called into question in these new proceedings.

Contrary to the view held by André Plumey, there are no other consequences to be drawn in the case in question. Detention as such cannot be annulled subsequently. Even a new indictment would not

compensate for the period of detention already spent. Neither the Constitution nor Article 5 ECHR give the accused any particular protection with regard to the prosecutor, whose primary role is to support the prosecution. Although the Federal Court adopted different and varied solutions in other cases, the only means of compensating for the period spent in detention is the one provided for by Article 5.5 ECHR.

André Plumey also claims a violation of Article 6.3.d ECHR. This provision guarantees any person accused the right to examine or have examined witnesses against him or her. According to the case-law of the Strasbourg organs, the accused may demand exercise of this right only once. Even taken in this sense, the right to examine or have examined witnesses is not an absolute one.

In the case in question, the appellant did not request the appearance of witnesses during the criminal investigation; he submitted his request to examine or have examined hundreds of witnesses only during the proceedings before the cantonal judicial authorities, which dismissed this request without violating the guarantees enshrined in the Convention. The witnesses' statements would have carried significantly reduced weight given the time which had elapsed since the facts in dispute took place (8-12 years). They could scarcely have elucidated the facts; in fraud matters it is primarily written documents which are decisive, and the appellant was able to present his case before the judicial authorities. Moreover he did not challenge the statements gathered during the investigation which were meticulously examined by the cantonal courts. The right to a fair trial was therefore complied with.

Languages:

German.

Identification: SUI-1998-3-009

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 05.11.1998 / **e)** 1P.525/1998 / **f)** Mikhailov v. Public Prosecutor of the canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 336 / **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 - Natural persons - Prisoners.
Fundamental Rights - General questions - Limits and restrictions.
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.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Reasoning.

Keywords of the alphabetical index:

Remand in custody, right to take part in proceedings.

Headnotes:

Personal freedom; Article 6.1 ECHR; right of a person remanded in custody to take part in proceedings.

The right to take part in proceedings is an aspect of personal freedom (recital 4a) and of the right to a fair trial guaranteed by Article 6.1 ECHR (recital 4b).

Extent of the right of a person remanded in custody to take part in proceedings (recital 4c).

In the case in question, the cantonal authority failed to specify its suspicions which it believed justified, in the light of the personal freedom referred to in Article 6.1 ECHR, the prohibition imposed on the person remanded in custody from bringing an action abroad (recital 4d).

Summary:

Sergei Mikhailov, a Russian national, was charged among other things with belonging to a criminal organisation, money laundering and forgery of documents. He was suspected of having transferred to Switzerland funds derived from various illicit activities carried out as leader of the Russian criminal organisation known as "Solntsevskaya". Mikhailov was remanded in custody in October 1996 in the canton of Geneva.

In summer 1998, Sergei Mikhailov asked the public prosecutor responsible for the case to authorise a solicitor to visit him so that he could draw up a power of attorney to a Russian lawyer whom he wished to authorise to bring an action against the press in Russia on his behalf. The public prosecutor rejected the request on the grounds

that the authorities could not grant a solicitor the right to visit in order to draw up a power of attorney to a Russian lawyer whose instructions would be to bring a libel action against the Russian media; nor could they take part in the intimidatory manoeuvres of a leader of a criminal organisation.

Bringing a public-law appeal, Sergei Mikhailov asked the Federal Court to set aside the public prosecutor's decision and to request the authority in question to grant him permission to receive a visit from the solicitor in order to draw up the power of attorney. The Federal Court upheld the appeal and set aside the impugned decision.

Personal freedom guarantees not only freedom of movement and personal integrity but respect for personality in general. Similarly, Article 6 ECHR is not limited to the guarantee of the right to a fair trial, but also recognises the right to access to the courts for anyone wishing to bring an action concerning civil rights and obligations. Referring to the judgement of the European Court of Human Rights in the case of Golder v. the United Kingdom, the Federal Court acknowledged that there were instances where limitations to the right to access to the courts were justified; however, such limitations should not restrict access in such a way that the right was violated in its very substance.

People held in custody are subject to the restrictions which ensue from the custodial measure imposed upon them; these restrictions must not, however, go beyond what is necessary. The aim of remand in custody is not merely to prevent the detained person from committing further offences or evading criminal proceedings but also to prevent any type of collusion or attempt to interfere with the administration of justice. These public-interest grounds are such as to justify a restriction on the civil rights of the detained person, including that of bringing an action before the courts in cases where there are well-founded suspicions that action before the courts is actually intended to pervert the course of justice.

In the instant case, the public prosecutor did not specify the concrete facts showing that the actual aim of the solicitor's visit was to further the activity of a criminal organisation and to interfere with criminal proceedings. No facts in the case suggested that the intervention of the appellant's Russian attorney was intended as a screen for an attempt to manipulate the criminal proceedings initiated in Geneva. The inadequacy of the grounds for the impugned decision was a violation of the right to be heard. The public-law appeal was well-founded for this reason alone, and the public prosecutor's decision had to be set aside. The public prosecutor was required to decide again on Sergei Mikhailov's application. If it were to be allowed, it remained to be considered to what extent the public prosecutor could arrange supervision of the meeting between the appellant and the solicitor instructed to draw up in due form the power of attorney and to what extent he would be entitled to demand information on the nature and purpose of the court proceedings the appellant intended to initiate in Russia.

Languages:

French.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-1998-3-007

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 18.11.1998 / **e)** U.br.141/97, U.br.146/97 / **f)** / **g)** *Sluzben Vesnik na Republika Makedonija* br. 59/98 (Official Gazette), no. 59/98) / **h)**.

Keywords of the systematic thesaurus:

General Principles - Sovereignty.
Institutions - Head of State - Status.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - National or ethnic origin.
Fundamental Rights - Civil and political rights - Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Nationality / Flag, national / Flag of State.

Headnotes:

The use of the flag of another State by national minorities resident in Macedonia is not one of the constitutionally defined ways through which such persons have the right to express, foster and develop their identity and national characteristics.

The State flag belongs to all citizens of the Republic of Macedonia, including those who belong to national minorities.

The official journey of the President of the Republic on State interests does not mean he/she is unable to fulfil his/her functions, which would empower the President of the Assembly to replace him/her.

Summary:

In its judgment on a petition lodged by several political parties, the Court annulled not only the Law on the Use of Flags, by which inhabitants belonging to a national minority in the Republic of Macedonia express their identity and national characteristics, but also the decree for its promulgation.

According to the disputed provisions, the members of national minorities enjoy the right to use their national flag in order to express, foster and develop their identity and national characteristics. The national flag is the flag that they choose or use as their own. The law states that the national flag cannot be used in front of or within buildings of bodies of local self-government, except in those local self-government units where the members of the nationality in question are the majority of the population, and only during State holidays. Furthermore, the law stipulates appropriate sanctions for legal entities and persons in charge of them who use the flag by which members of a national minority express their identity and national characteristics contrary to this law.

Taking into consideration the preamble and content of the Constitution it is apparent that one of the fundamental values of the constitutional order is the fundamental freedoms and rights of man and the citizen. Taking into account the sovereignty of the State (civil sovereignty), not the sovereignty of the Macedonian people, it is not possible for the members of national minorities to use their national flag, because they are also citizens and residents of the Republic of Macedonia, which means that the State flag is also their flag.

The Constitution guarantees the ethnic, cultural, linguistic and religious identity of national minorities, as well as their right to establish cultural and artistic institutions and scholarly and other associations aiming to express and develop their identity.

Relating the number of members of a national minority in local self-government units to the right to raise their national flag is not in conformity with the Constitution, because the number of members itself is not relevant for the use of flag. The essential question is whether such a flag can be used as national symbol.

On the other hand, these provisions violate the principle of equality, because by granting such a right only to the members of the national minorities who are in fact in the majority in certain local self-government units, such persons are put in a more favorable position than those inhabitants belonging to national minorities who are considerable in number but not sufficient.

In addition there is a lack of an international standard within the corpus of rights of national minorities that enables them to express their identity and national characteristics by using their own national flag.

The right of inhabitants belonging to national minorities to use their flag in private life during cultural, sporting and other public activities is not clearly defined and provides the possibility under this term for there to be organised showings of the flags that would be contrary to the core of the Constitution.

Pursuant to Article 75.1 of the Constitution, laws are promulgated by a decree signed by the President of the Republic and the President of the Assembly.

Article 82 of the Constitution prescribes the cases (death, resignation, permanent inability to perform duties, termination of office in accordance with constitutional provisions, inability of the President of the Republic to perform his/her functions) when the President of the Assembly replaces the President of the Republic, i.e. performs the office of the President of the Republic. The departure of the President of the Republic on an official journey as chief of the State does not mean he/she is unable to perform his/her office. Therefore it does not authorise the President of the Assembly to replace him/her.

Supplementary information:

Dissenting opinions were handed down in this case.

Languages:

Macedonian.

Identification: MKD-1998-3-008

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 25.11.1998 / **e)** U.br.36/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
General Principles - Democracy.
Fundamental Rights - Civil and political rights - Equality - Criteria of distinction - National or ethnic origin.
Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Languages.
Fundamental Rights - Civil and political rights - Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Language, co-official / Criminal procedure / Language, official / Language, minority, use in criminal proceedings / Summons, delivery, language used.

Headnotes:

The right of residents of the Republic of Macedonia belonging to national minorities to use the language and alphabet of the nationality that they belong to in communication with a court, whereby the court ensures free translation, is based on the principle of a fair trial and does not put in question the official use of the Macedonian language.

Official court activities (delivery of summonses and other documents) cannot be undertaken in a language other than the official one.

Summary:

The applicant argued that besides the Macedonian language, the Law on criminal procedure introduced the languages of national minorities into official use within criminal proceedings, which is not in compliance with Articles 7.2 and 7.3 of the Constitution, according to which the languages of the national minorities can be officially used only in local self-government units (under certain conditions) and not within State bodies such as the courts.

Pursuant to the disputed provisions, residents of the Republic belonging to national minorities are granted the right to use the language and alphabet of the nationality that they belong to. They can lodge petitions with courts using the language and alphabet of the nationality that they belong to. This right is also granted to other persons who do not understand and speak the Macedonian language and its alphabet. Furthermore, these provisions introduce an obligation for the court to deliver the summons and other documents to these individuals not only in the Macedonian language, but also in the language and alphabet of the nationality that they belong to.

One of the minimum rights of the accused in criminal proceedings is the right of free translation in cases when he/she does not understand or speak the language of the court (Article 6.3 ECHR). The principle of a fair trial is an essential and legitimate condition required for the protection of human rights. The use of a language in

criminal proceedings should be considered not only in relation to the question of its official use, but also within the framework of the position in the proceedings, not only of the accused, but also of the other parties. Therefore, attaching the right to use one's own language and the right of free translation to a person's citizenship and national affiliation, and not to the ignorance of the language used by the court, constitutes a higher standard in the protection of human rights in criminal procedures. This enables individuals to use the language which they naturally understand and speak more fluently.

The extension of this right to other parties in proceedings (including foreigners) also contributes to the principle of a fair trial and it is a higher standard in the protection of all parties to proceedings, not only of the accused.

Imposing an obligation on the court to deliver the summons and other documents in the language of the nationality that the party belongs to (as well as in Macedonian) does not constitute a right of the individual as part of the duty to ensure a fair criminal trial, but rather introduces duties for the court to use a language other than the official one. This is not in conformity with Article 7.1 of the Constitution, according to which the official language of the Republic is the Macedonian language and its Cyrillic alphabet.

Languages:

Macedonian.

Identification: MKD-1998-3-009

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 24.12.1998 / **e)** U.br.223/97 / **f)** / **g)** *Sluzben Vesnik na Republika Makedonija* br.64/98 (Official Gazette), no. 64/98) / **h)**.

Keywords of the systematic thesaurus:

Sources of Constitutional Law - Categories - Written rules - Other international sources.
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 worship.
Fundamental Rights - Civil and political rights - Right to a nationality.
Fundamental Rights - Civil and political rights - Freedom of association.

Keywords of the alphabetical index:

Church, registration / Community, religious, registration / Religious institutions, registration / School, religious / Separation of Church and State.

Headnotes:

The constitutional guarantee of the freedom of religious confession and its free expression implies that it is possible for religious activities to be undertaken outside of registered religious communities, i.e. religious groups.

The requirement of a high number of founding members of religious groups and the inclusion of numerous details concerning founders entails the restriction of the freedom of religious confession and the freedom of citizens to form associations in order to realise the protection of certain rights and convictions.

Religious communities and groups are separate from the State and equal before the law.

Summary:

Judging the petition lodged by several religious communities, the Court abolished certain provisions of the Law on religious communities and religious groups as they were in conflict with some constitutional guarantees of the freedom of religious confession.

According to the statute in question, only registered religious communities or groups can conduct religious activities, which should be in conformity with the Constitution, statutes and other regulations. The law prescribes the minimum number of founders of the religious group (50 mature residents of the Republic of Macedonia with a place of permanent residence therein) and imposes compulsory application for registration. The application must include the name and personal details of the founding members, the seat and scope of activities of religious community or group, an indication of the place where the activities are conducted and information about persons in charge of the work of the group and its representation. This information is included in the register, which is administered by the administrative body competent in matters of religious communities and groups, which passes specific regulations concerning the

administration and contents of the register and provides an opinion on the construction or acquisition of building for the purposes of religious communities or groups.

According to Article 9 of the Constitution all citizens are equal in their freedoms and rights regardless of their affiliations and all are equal before the Constitution and laws.

The freedom of religious confession and the right of free and public expression of religious faith, individually or with others are guaranteed.

Religious communities and groups are equal before the law and are free to establish religious schools and other social and charitable institutions, by way of a procedure regulated by law.

Citizens are free to establish associations of citizens, to join them or resign from them, provided their activities are not directed to violent destruction of the constitutional order, or at encouragement of or incitement to military aggression or ethnic, racial or religious hatred or intolerance.

Similar standards are applied within Articles 18 and 29.2 of the Universal Declaration of Human Rights.

The freedom of religious confession and free expression of one's faith is a confirmation of the constitutionally determined equality of citizens regardless of their religious convictions. The separation of the State from the church is introduced in order to prevent State interference and intervention in church and religious matters, on the one hand, and to prevent the church from interference and engagement in political life and governmental activities on the other. Therefore, statutory authorisations concerning the administrative body in this domain restrict the freedom of religious confession and enable the violation of the constitutionally determined relationship between the State and church. This exceeds the constitutionally and statutory competencies of administrative bodies.

No church is privileged in any way.

The statutory provision that connects the exercise of religious matters with the registration of religious communities or groups restricts and enters into individuals' personal and intimate feelings and religious convictions. This violates the constitutional guarantee of freedom of religious confession, thus enabling the punishment of persons when religious activities are conducted outside of a registered religious community or group.

This freedom is restricted by introducing a minimum number of founders and requiring the inclusion of numerous details in the application for registration, which is not the case in other associations of citizens. These restrictions are in conflict with the freedom of citizens to form associations in order to accomplish and protect certain rights and convictions, including religious ones.

Languages:

Macedonian.

Ukraine
Constitutional Court

Summaries of important decisions of the reference period 1 September 1998 - 31 December 1998 will be published in the next edition, *Bulletin* 1999/1.

United States of America
Supreme Court

Important decisions

Identification: USA-1998-3-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 18.05.1998 / **e)** 96-779 / **f)** Arkansas Educational television Commission v. Forbes/ **g)** 118 *Supreme Court Reporter* 1633 (1998) / **h)**.

Keywords of the systematic thesaurus:

General Principles - Reasonableness.
Fundamental Rights - Civil and political rights - Equality.
Fundamental Rights - Civil and political rights - Freedom of expression.
Fundamental Rights - Civil and political rights - Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Elections, campaign, televised debates / Forum, public / Television broadcaster, State-owned, duties / Media, access.

Headnotes:

Generally, the First Amendment to the U.S. Constitution does not compel a state-owned broadcaster to allow third parties access to participate in its programmes; however, when the programme is a debate among candidates for public office, a broadcaster cannot grant or deny access on the basis of a candidate's viewpoint.

A televised debate among candidates for public office, to which not all candidates for a particular office are invited, is not a traditional public forum or designated public forum from which a speaker may be excluded only if the State can meet a heavy burden of justification for its action.

Summary:

Ralph Forbes, a candidate for a seat in the U.S. House of Representatives from the State of Arkansas, sought in August 1992 to participate in a television debate to be broadcast on stations owned and operated by the Arkansas Educational Television Commission ("AETC"),

an agency of the State of Arkansas. Forbes, who was not affiliated with a political party, was qualified to appear on the ballot for the congressional seat because he had obtained the required number of signatures.

The debate was arranged by the staff of the AETC, who invited the candidates of the two major political parties - the Democratic and Republican parties - to participate in the debate. AETC owns and operates a network of five noncommercial television stations. In order to insulate its programming decisions from political pressure, AETC employs an Executive Director and professional staff who exercise editorial discretion in the selection of the network's programming.

In September, the Executive Director of the AETC denied Forbes's request, stating that AETC had determined in the exercise of its journalistic judgment that viewers would best be served by limiting the debate to the candidates already invited. This decision was based on AETC's conclusion that Forbes was not a "viable candidate" because he lacked a campaign organisation, had not generated significant voter support, and was not considered a serious candidate by journalists covering the election. Forbes sought judicial relief, including an injunction requiring AETC to include him in the debate.

The issue before the U.S. Supreme Court was whether the First Amendment allows a state-owned broadcaster to select a limited number of debate participants based on its exercise of journalistic discretion, or instead requires it to grant access to all candidates. The latter approach is not required by legislation. The First Amendment, which is made applicable to the States by means of the Fourteenth Amendment's Due Process clause, states that "Congress shall make no law... abridging freedom of speech, or of the press".

The Court's First Amendment analysis centered on its "public forum" doctrine, which furnishes the methodology and standards for a State's regulation of expressive activity on property that it owns or controls. Under the public forum doctrine, State property is deemed to fall into one of three categories, with corresponding duties imposed upon the State. In the case of a "traditional" public forum (streets and parks), the First Amendment dictates that the State can exclude a speaker only when necessary to serve a compelling State interest and the exclusion is narrowly drawn to achieve that interest. In a "designated" public forum, in which the State has intentionally opened for public discourse a place not traditionally available for assembly and debate, the State's exclusion of a speaker will be subject to strict judicial scrutiny, with a heavy burden placed on the State to justify its action. The third category of State properties includes those places which are deemed to be "non-public for a", where the State can restrict access if its action is reasonable and not an effort to suppress expression simply because public officials oppose the speaker's viewpoint.

At trial, the jury had found that AETC's decision to exclude Forbes had not been influenced by political pressure or opposition to his views. The court of first instance, having concluded as a matter of law that the debate was a non-public forum, thereupon dismissed Forbes's First Amendment claim. The Court of Appeals disagreed with the trial court's categorisation of the forum, concluding that AETC had made the debate a designated public forum, giving a presumptive right of access to all qualified candidates. Employing strict scrutiny, the Court of Appeals then ruled that AETC's assessment of Forbes's "viability" as a candidate was not a sufficiently compelling reason for excluding him from the debate, regardless of the fact that AETC had exercised reasonable journalistic judgment in doing so.

Reversing the decision of the Court of Appeals, the U.S. Supreme Court concluded that the debate was a non-public forum from which AETC could exclude Forbes in the reasonable, viewpoint-neutral exercise of journalistic discretion. The Court first noted that the debate could not be considered a traditional public forum, since the almost unlimited access to such a forum would not be compatible with a broadcaster's programming activities. Next, concluding that the debate was not a designated public forum, the Court drew a distinction between "general access", in which a forum is opened to a certain class of speakers, and "selective access", in which the members of an identified class must still obtain permission for access. The Court found selective access to be consistent with the notion of a non-public forum, and said that its use furthers First Amendment interests by encouraging the State to open its property to some expressive activity, whereas it might not do so at all if faced with an all-or-nothing choice. Having concluded that the debate was a non-public forum, the Court reviewed the factual record and found that it provided ample support for the jury's conclusion that Forbes was not excluded because of his views. As a result, the decision of the Court of Appeals was reversed and the judgment of the court of first instance reinstated.

Three of the nine Justices dissented from the Supreme Court's decision. The dissenters did not disagree with the Court's categorisation under public forum analysis, but questioned instead the doctrine's applicability in circumstances where the State's direct planning and management of political speech during a campaign for public office is at issue. Instead, the dissent focused on the State broadcaster's almost limitless discretion to select or exclude debate participants, so long as not based

on opposition to a candidate's views, and maintained that instead such decisions should be governed by pre-established, objective, and definite criteria.

Languages:

English.

Identification: USA-1998-3-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.1998 / **e)** 97-1374 / **f)** Clinton v. City of New York / **g)** 118 *Supreme Court Reporter* 2091 (1998) / **h)**.

Keywords of the systematic thesaurus:

Constitutional Justice - Procedure - Parties - Interest.
Sources of Constitutional Law - Techniques of interpretation - Historical interpretation.
Sources of Constitutional Law - Techniques of interpretation - Literal interpretation.
Institutions - Head of State - Powers.
Institutions - Legislative bodies - Relations with the Head of State.
Institutions - Executive bodies - Relations with the legislative bodies.

Keywords of the alphabetical index:

Presentment Clause / Veto, line-item, legislation / Veto, presidential, selective.

Headnotes:

President's statutory authority to cancel individual items in draft legislation presented to him or her by the legislature has the effect of giving the President the power to amend or repeal legislation.

The President of the United States lacks constitutional authority to amend or repeal legislation; instead, the President's only choice when presented with draft legislation passed by both houses of the legislature is to approve it, thereby enacting it into law, or return it to the legislature for reconsideration.

Summary:

Under the Presentment Clause of the U.S. Constitution, draft legislation which has been approved by the two houses of the U.S. Congress must, before it becomes law, be presented to the President of the United States. If the President approves the bill by signing it, it will become law. If the President does not approve, he or she must return it to the Congress for reconsideration. The Congress has the power to override this presidential veto if both houses approve the bill by votes of at lest two-thirds of their members.

In 1996, the Congress enacted the "Line Item Veto Act" (the "Act"), which entered into effect on 1 January 1997. The Act authorises the President to approve draft legislation presented by the Congress, but at the same time to delete individual items that fall within certain categories such as budgetary matters. The individual items cancelled by the President are not returned to the Congress for its reconsideration.

After the Act entered into effect, the President exercised his line-veto authority to cancel one item (out of some 500 pages of text) in the Balanced Budget Act of 1997 and two items in the Taxpayer Relief Act of 1997. The complainants, who included the City of New York which was required to make certain tax payments unless relieved of this duty under the item cancelled by the President, claimed that they had been injured by the cancellations and filed actions challenging the constitutionality of the Act. The court of first instance ruled that the Act was invalid. Pursuant to expedited review procedures in the Act, review of the court of first instance decision went directly to the U.S. Supreme Court, instead of to the Court of Appeals.

After concluding that the complainants had demonstrated an "actual injury" and therefore presented a concrete case, the Supreme Court ruled that the Act was unconstitutional under the Presentment Clause. The Court's reasoning was based on a literal reading of the applicable constitutional texts. Noting that the line item veto power in effect gives the President the authority to amend or repeal congressional actions by canceling individual items, the Court observed that the constitutional text lacks authorisation to the President to amend or repeal legislation. Under the Presentment Clause, the President's only choice is to approve the entire bill or to return the entire bill to the Congress before it becomes law. The Court buttressed its literal reading of the constitutional text with citations of "familiar historical materials" which "provide abundant support" for the conclusion that the proper enactment of statutes may take place pursuant only to the single procedure set forth in the Presentment Clause.

The Court also rejected arguments in support of the Act which were grounded in judicial precedent and traditional budgetary practice. The Court declined to recognise the applicability of its 1892 decision in *Field v. Clark*, in which the Court upheld the President's statutory power to suspend exemptions on import duties. The Act's provisions, the Court ruled, were distinguishable from those in *Field v. Clark* because in the 1892 legislation the President was simply authorised to act if certain conditions, identified by the Congress, should arise after the legislation entered into effect. In the Act, on the other hand, the President is given the power to amend or repeal legislation for his or her own policy reasons. As to traditional budgetary practice, under which the President may decline to spend funds appropriated by the Congress, the Court distinguished this exercise of executive power from that granted in the Line Item Veto Act to change the text of properly enacted statutes.

In invalidating the Act, the Court carefully stated that its decision rested on the narrow conclusion that the Act's procedures are not authorised by the Constitution. The Court expressly declined to consider the broader issue of whether congressional delegation of law-making authority to the President in the form of the line-item veto would constitute an impermissible disruption of the balance of powers among the three branches of government.

Supplementary information:

The Presentment Clause is found in Article I.7 of the U.S. Constitution.

Prior to the instant case, six members of the U.S. Congress filed an action challenging the Act's constitutionality. *Raines v. Byrd*, 117 *Supreme Court Reporter* 2312 (1997). However, the Supreme Court ruled that their challenge did not present a concrete case under the doctrine of standing, which serves to identify those disputes which are appropriately resolved through the judicial process, pursuant to Article III of the U.S. Constitution. Article III confines the jurisdiction of the federal courts to "actual cases and controversies", and therefore prohibits abstract judicial review. To meet the standing requirements of Article III, a plaintiff must allege a personal, or "actual", injury. In *Clinton v. City of New York*, the Court determined that the complainants had sustained actual injury, owing to the fact that the presidential line-item veto deprived them of benefits provided in the legislation.

Cross-references:

Raines v. Byrd, 117 *Supreme Court Reporter* 2312 (1997); *Field v. Clark*, 143 *U.S. Reports* 649, 12 *Supreme Court Reporter* 495 (1892).

Languages:

English.

Court of Justice of the European Communities

Summaries of important decisions of the reference period 1 September 1998 – 31 December 1998 will be published in the next edition, *Bulletin* 1999/1.

European Court of Human Rights

There was no case-law during the reference period 1 September 1998 – 31 December 1998, following the entry into force of Protocol 11 to the European Convention of Human Rights.

Introduction to the 11th Conference of the European Constitutional Courts

Warsaw 16 - 20 May 1999
by Marek Safjan, President of the Polish Constitutional Tribunal

Mr President, Ladies and Gentlemen - Judges and Presidents of the Constitutional Courts in Europe,

Dear Guests, Participants of the XI Conference of European Constitutional Courts in Warsaw,

Ladies and Gentlemen!

The idea of constitutional jurisprudence in Europe and world-wide has nowadays become a permanent feature of democratic political systems. It is difficult to imagine a democratic state without a constitutional court system. Presently this concerns not only Europe. Constitutional courts exist and function also in South Korea, Mongolia, the Republic of South Africa, in many countries of North America, and in most South American countries.

After the Second World War, the emergence on a large scale of courts of justice in Western-European countries was an obvious reaction to authoritarian and totalitarian regimes. These institutions were perceived as a necessary guarantee of a democratic legal order, as the most important judicial guarantee of constitutionalism. As we know, the concept of constitutional jurisprudence was derived from the principle of the triple separation of powers, in a similar way as previously the administrative jurisprudence had been conceived. The emergence and development of that idea is often associated with the name of the outstanding theorist of the state and the law, the creator of normativism and "pure theory of law", the Austrian judge of the constitutional court, Prof. Hans Kelsen *(quotation)*. The need for judicial control of the constitutional nature of the law, exercised by an independent and sovereign state body - the constitutional court, was initially received in Europe after World War I with a degree of scepticism. Its true development occurred only after the common European experience of authoritarian and totalitarian regimes. It is no accident that the constitutional courts of Italy and Germany, Austria, and recently also Spain and Portugal, enjoy unchallenged authority and respect in their respective countries, have a rich record of judicial decisions, and safeguard the law and civic liberties in a very significant way.

A characteristic feature of the transformations of the political systems at the turn of the 1980s and 1990s in Central and Eastern Europe, in the countries previously known as those of so called "real socialism", consisted also of the massive emergence of constitutional courts. They frequently provided the starting point for the political reforms, and the constitutional courts became their guarantors. The experiences of our region have fully confirmed the necessity to introduce the vehicle for the control of the constitutional nature of the law in a political system ruled by the parliamentary majority. Under the political transformation process occurring in the countries of our region, the role of the bodies which we preside over has been invaluable.

The emergence of a large number of constitutional courts in Europe is characteristic of our time. It provides a certain challenge to the Conference of European Constitutional Courts. This situation makes us think today of closer forms of collaboration and exchange of experiences. This becomes an especially urgent task in the face of the process of European integration. We discuss this issue increasingly frequently during our meetings.

There is yet another special reason for which we would like to say more, here in Warsaw, about the quest for new forms and increasing the close co-operation among the constitutional courts in Europe and world-wide. For many years, especially after 1980, the Polish nation, the democratic opposition in Poland, enjoyed the support of the European democratic institutions in their struggle towards the implementation of democratic forms of political life. In Poland a particular political experiment was initiated, somewhat ahead of time for the region, consisting of the introduction in the mid nineteen-eighties, in a country of "real socialism", such democratic institutions as the Constitutional Tribunal, the Ombudsman for Civic Rights, and the Tribunal of State. This was possible, to some extent, thanks to the support from the European democratic institutions. For those reasons we regard with full understanding and recognise the value of co-operation and exchange of information and experiences between the Constitutional Courts functioning in different parts of Europe. This includes both those courts which have a long history and rich traditions, and those which have been established only recently, as the result of political system transformations. Our strivings and efforts correspond also with the process of European integration, and constitute an important part of it.

The XI Conference of European Constitutional courts is taking place in a very special place. The Royal Castle in Warsaw, in the period of the Polish Republic of Two Nations, as it was called until the end of the 18th century - was above all the location where the most important public institutions resided and worked.

It was here that the Parliament of the Republic - the Seym (consisting of the deputies and senators chambers) was housed, here was the place from which the elected King ruled - whose competencies were more like those of modern presidents in presidential political systems than of his contemporary European monarchs.

It was also here that the so called "referendarian" courts convened, while the Marshall Seyms of the Republic introduced the laws, which according to Polish and Lithuanian tradition were called "constitutions" (*Constitutiones*). It was also here that the first modern constitution in Europe was proclaimed - the Constitution of May 3, 1971 - which was drafted following the principle of tripartite separation of powers. Let us remember, that that very Constitution, which established the Catholic religion as the ruling faith, guaranteed, at the same time, the legal protection for people of other confessions and expressed the principle of religious freedom:

> "but as the same holy religion commands US to love our neighbours, we therefore owe to all people of whatever persuasion, peace in matters of faith, and the protection of government; consequently we assure, to all persuasions and religions, freedom and liberty, according to the laws of the country, and in all dominions of the Republic".

[quoted from the edition: New Constitution of the Government of Poland, London 1791, Printed for J. Debrett.]

Today, the Royal Castle in Warsaw, hosting the representatives of constitutional jurisprudence, turns for these days into a centre of European constitutionalism.

Mr President, Ladies and Gentlemen, Judges and Presidents of European Constitutional Courts.

Distinguished Guests, Participants of the XI Conference of the European Constitutional Courts in Warsaw.
Ladies and Gentlemen!

Contemporary issues of the freedom of conscience and religion.

The choice of the subject of the conference is not accidental and it relates to one of the most basic themes of constitutional jurisprudence.

The role of constitutional courts in defining the normative content of the freedom of conscience and religion cannot be overestimated. To a large extent it is the constitutional courts that deserve the credit for bringing the general constitutional stipulations down to earth in specific applications and for providing legal guarantees of such liberty. The principles of the separation of the churches and the state, the neutrality of the state on religious issues, or the resulting solutions concerning the registration, status and functioning of religious organisations, obtain unequivocal contents only on the basis of the rulings of the constitutional courts. Some of the verdicts of the constitutional courts are regarded as turning points in European constitutional thought. The Conference which we are just beginning, however, is not only intended to summarise the existing achievements of the constitutional courts with regards to the freedom of conscience and religion. On the contrary, the already existing accomplishments of the constitutional courts should provide us with the starting point for the resolution of new problems. Their appearance stems from many different causes, such as the emergence of open pluralistic societies, whose members rely on differing value systems and religious plurality. Traditional confessions in many countries sometimes are turned into religious minorities, while non-Christian religions expand their scope of influence. In some countries the process of increasingly lay leanings in society is becoming more entrenched and is concurrently associated with the emergence of para-religious movements and sects. New problems arise regarding the status of the different religious associations, the practical application of the principle of equality with regards to them, the definition of the concept of religious union and the determination of the forms of co-operation of the state with the para-religious movements. The constitutional practice of many countries demonstrates that these problems are not purely theoretical, and that they cannot wait to be resolved only at some future time.

The common roots of constitutional jurisprudence and the need for co-operation.

Many new questions concerning the freedom of conscience and religion are brought before the constitutional courts, and this seems obvious. But the question arises, which is significant for our conference, whether the exchange of information and experiences

among the constitutional courts with regards to the above presented problems is necessary and what should be the effect of such exchanges? The question is particularly pertinent in the context of declaration No 11, constituting the annex to the Amsterdam Treaty, which recognises the diversity of constitutional guarantees of the freedom of conscience and religion as a positive phenomenon which does not require to be brought to uniformity. Is it not so, therefore, that in today's pluralistic Europe instead of introducing uniform standards one should provide for the diversity and multiplicity of the applied standards, taking into account the diversity of traditions, historical customs and preferences of the different societies?

The idea of co-operation among constitutional courts and their role in developing constitutional standards, however, has its common, historical justification. At the source of contemporary constitutional jurisprudence there are two fundamental ideas, which are common to most constitutional courts. The first one was an outcome of the Vienna school of the theory of law and the hierarchical ordering of the system of law. The possibility to control the legislator in order to ensure the hierarchical consistency of legal norms has become a characteristic feature, the common trait distinguishing European constitutional courts. Consequently, the resolution of a number of problems concerning the freedom of religion has been transferred from the legislative plane to the level of constitutional issues. The second idea at the source of European constitutional jurisprudence is related with the nature of constitutional human rights. After the Second World War, the view that human rights are based on a higher order than positive law became increasingly universally accepted, together with the belief in the necessity of expressing these rights in the constitution, and in the constitution's attachment to the decisions of all of the state bodies. The constitution came to be perceived as an axiological foundation of the legal system not just in the sense of its programme, pointing only at the orientations of the activities of the state, but also in the normative sense, assuming the existence of constitutional imperatives and prohibitions addressed to such bodies. The substance of the constitutional norms was indeed to be determined by the constitutional courts. The above two concepts fundamental for constitutional jurisprudence, together with similar expression in the different constitutions of the fundamental rights, currently determine the common ground in the jurisprudence of the European constitutional courts. The constitutional courts come to be faced with ruling on similar issues, which also include the rights which are guaranteed in the sphere of the freedom of conscience and religion.

The common roots of European constitutional jurisprudence, the progressing level of integration of the different legal systems on a European scale, the universal recognition of the protection of the rights of the individual guaranteed by the European Convention on Human Rights, the flow of information on the particular legal solutions and the free flow of persons all justify the need to seek common solutions and standards in the area of the freedom of conscience and religion. When justifying the diversity of the different legal systems, one may observe many common points, the need to develop a common approach to the most important issues, and to apply the same methodology of determining the universal legal standard. Our conference is an excellent opportunity for discussions on those topics.

A common action method

As was rightly observed in his opening speech at the last conference of constitutional courts in Budapest by Laszlo Solyom, there is a "common language" of the constitutional courts, based on common constitutional culture, common methods of resolving problems, and consensus concerning many controversial issues. The common nature of that language originates from the previously indicated common roots of the judicial decisions of the constitutional courts and from the common methodology gradually developed by these courts.

Right from the beginning of their activities, constitutional courts have been forced to refute the traditional model of the application of the law, according to which the court was constricted by an act of law in the sense that its task was to determine the substance of a legal norm in keeping with the intentions of the legislator. It has become the universal belief that the text of a constitution is often ambiguous, and as operating with general clauses it needs to be treated in many instances only as a starting point for the determination of the substance of constitutional rights and liberties. A fundamental issue is how, on the basis of the open text of constitution and its general statements, to determine the substance and the limits of constitutional human rights and liberties. The question is all the more difficult since the general statements of the constitution most frequently concern the axiological foundations of the legal system. The method of answering this question is determined, above all, by assuming the normative and binding nature of the constitutional provisions. That very assumption forms the basis for the practical legal discourse and the opening of jurisprudence to new levels which, until recently, had only been subject to consideration in terms of doctrine. Today the statement used to justify many legal solutions – that they are binding due to the will of the legislator – does not suffice, as one also needs to demonstrate their rationality and conformity with the axiology of the

constitution. Constitutional jurisprudence is becoming increasingly open to the theory of rational legal argumentation. On the other hand, however, the verdicts of constitutional courts increasingly often provide the impulses for theoretical stipulations. It is currently a truism to say that the rightness of the decisions arrived at on the constitutional level is achieved, above all, by way of argumentation used as part of the rational legal discourse. That is one of the significant reasons for which the exchange of information between the different constitutional courts is so important. In order to preserve the "common language" which these courts use, it is necessary to know the way, or rather the method, by which similar cases are being adjudicated. In the case of freedom of conscience and religion, one may indicate a number of examples of different solutions of similar issues. The position with regard to sects of para-religious associations adopted in court decisions may vary, for example, owing to such factors as the principle of the separation of the churches from the state, or the model of registration of religious unions. The position with regard to at least some rights contained within the scope of religious liberty is of a general nature, regardless of any political system. It is the reasons, arguments and constitutional values which were decisive for the adoption of a specific solution that are significant. The method of arriving at their verdicts particular to the constitutional courts, for those very reasons require the conduct of continuing legal discourse not only within the scope of the legal system, but also between the various constitutional courts.

The convergence of legal language, a similar and sometimes identical universe of constitutional concepts, principles and values, excellently facilitates the exchange of experiences, thoughts and ideas among the constitutional courts. For example, in the jurisprudence of the constitutional courts it is frequent practice to apply the well known concept of public subjective rights, developed by Jelinek and his followers. All the constitutional courts have in common the awareness of the delicate and complex relations, mutual links and conditions pertaining in the area of fundamental rights and liberties. It is probably also part of our common experience that we are aware of the inevitability of conflicts between the particular rights and liberties, and that it is impossible for every constitutional principle and value to be treated separately as an absolute given. This was very well confirmed in the debate at the conference of constitutional courts in Ankara. For it is appropriate to introduce an intrinsic hierarchy among the different constitutional provisions, but only assuming that none of the constitutional rights may be awarded an absolute nature. The essence of constitutional discourse consists, in consequence, in the ability to balance the inevitable collisions, but in such a way as not to infringe on the essence of the rights which are guaranteed by the constitution. For that very reason, the attempts so often made in the practice of constitutional jurisprudence at defining the essence of the particular rights and liberties are so important. It is worth noting here the belief of K. Hesse, according to whom, in our times, the definition of the essence of any given constitutional right or liberty should be provided in the context of its relation to a right which is in collision with it, on the basis of the principle of proportionality. The proportionality principle thus becomes yet another common trait of the constitutional language in the jurisprudence of the European constitutional courts. It is widespread to refer to that principle both in practice and in thinking about doctrine and developing theoretical concepts, providing an excellent example of how strongly constitutional jurisprudence can influence the shaping of legal beliefs and judgements. This principle, which until recently had not been a part of Polish doctrine nor practice, is currently widely used, in the wake of the judicial decisions of the Constitutional Tribunal, when determining the acceptability of limitations on the constitutional rights of the individual.

An important accomplishment of constitutional jurisprudence consists in the universality of the standards concerning human rights. Before our eyes, the different branches of the law become constitutionalised. The constitutional issues lose their purely abstract dimensions and become significant for criminal law, civil or administrative law. Increasingly frequently, scientific monographic works in those areas begin with the analysis of constitutional problems and the verdicts of the courts referring to the constitution. The transfer of constitutional principles and values to the different areas of the law occurs also through the interpretation of the acts of law in keeping with the constitution, which is a generally applied practice in some countries. Consequently, for example, the constitutional liberty of religion might provide not only the basis for the selection of a determined model of legalisation of religious organisations, but also the basis for the verdict of a court ruling on a specific individual issue of the registration or de-legalisation of such an organisation. The impact of constitutional thought upon the dogmatics of the law undoubtedly expands the scope of consideration of the freedom of conscience and religion. Constitutional jurisprudence contributes, therefore, to the saturation with axiology of the entire body of the law. In this way one of the important stipulations of the democratic state and the rule of law is realised in a pluralistic society. The acceptance of differing value systems, reflected at the legal level, ought to accompany the quest for a common axiological dimension of legal verdicts. In order to recognise the legal validity of the existing legal norms it is not enough to indicate that they had been established by the respectively authorised body of public governance.

The common features and differentiation of European constitutional courts.

Meetings of judges of constitutional courts lead to questioning the factors which enhance closer co-operation and which determine the mutual differentiation. The European constitutional courts have an increasingly extensive common area of interest and activity, which is enhanced by the constitutionalisation of the different fields of the law, the application of a similar methodology of resolving constitutional problems. But there are also rather significant differences as well. They result, above all, from the differences between the historical conditions and legal traditions concerning solutions pertaining to the political system. The Austrian model of constitutional jurisprudence exerted significant impact on the shaping of the competencies of many constitutional courts. Similar significance may be attached also to the German model, with the broadly conceived constitutional complaint.

Rather different was the shaping of the competencies of the French Constitutional Council, owing to the traditionally strong position of the legislative bodies in which the guarantor of the democratic system was believed to be embodied. Regardless of such differences, reflected in the competencies of the constitutional courts, which refer to different models, a principle role is played by the basic competence of the constitutional court consisting of the control of the constitutional nature of the legislative activities. Paradoxically enough, also common to the activities of European constitutional courts are the problems and controversies arising in their work; among other things, they concern the sources of legitimacy of constitutional jurisprudence. The fundamental question concerning the line dividing the competencies of the constitutional court and the legislative bodies continues to be the issue of the day. And although on the level of general assumptions this problem has been settled, many specific issues still remain to be resolved. The problem of the relationship between the constitutional court and the courts of justice and the Supreme Court is also not devoid of fundamental controversies. These basic questions and dilemmas which appear in the operation of almost all of the constitutional courts speak strongly in favour, therefore, of the need for dialogue and exchange of experiences and information.

The words pronounced by Prof. L. Sólyom at the previous conference of the constitutional courts remain fully valid. The occurring constitutional changes, the advancement of the processes of integration and the common problems currently facing the constitutional courts mean that it does not make any sense to differentiate between the "old established" and "newly formed" constitutional courts, the "old" and the "new" members of the Conference of European Constitutional Courts. It would be even more inappropriate to differentiate the constitutional courts as "Eastern" and "Western", given that both similarities and differences today exist regarding issues of substance, and not ideology or politics. The development of a common legal European space lies in the construction of solid foundations for the democratic state based on the rule of law. It is, therefore, a great obligation, but also an impressive challenge for the constitutional courts of contemporary Europe.

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.

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.).

[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.

pages

25 Bicameral, monocameral, special competence of each assembly, etc.

26 Including specialised powers of each legislative body.

27 Presidency, bureau, sections, committees, etc.

28 State budgetary contribution, other sources, etc.

29 For procedural aspects see the key-word "Electoral disputes" under "Constitutional justice - Types of litigation".

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.

pages

[36] E.g. Court of Auditors.
[37] Ombudsman, etc.
[38] E.g. Court of Auditors.

pages

39 Open-ended or finite.

40 If applied in combination with another fundamental right.

41 The question of "Drittwirkung".

42 Used independently from other rights.

43 Here, the term "national" is used to designate ethnic origin.

pages

[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.

pages

[50] Militia, conscientious objection, etc.

[51] Aspects of the use of names are included either here or under "Right to private life".

[52] This keyword also covers "Freedom of work".

pages

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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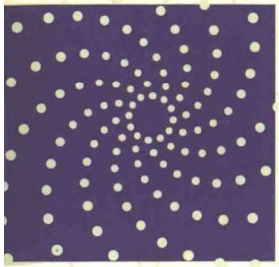

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