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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

EXAMPLE OF SPECIAL BULLETIN ON LEADING CASES

CONTENTS

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

Czech Republic
Constitutional Court

Important decisions

Identification: CZE-1992-S-001

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 04.09.1992 / **e)** Pl. US 5/92 / **f)** The Freedom to Hold and Express an Ideology including Communism and Fascism / **g)** *Sbírka usnesení a nálezů Ústavního soud CSFR*, 9, 25, Part 93/1992, 15.10.1992 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
3.10 **General Principles** – Certainty of the law.
3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Movement, extremism / Ideology, State, establishment / Fascism / Communism.

Headnotes:

The security of the state and the safety of citizens (public security) require that the support and propagation of movements that threaten the security of the state and the safety of citizens be hindered. Movements which are demonstrably directed at the suppression of civil rights or at spreading hatred, however they may be named or by whatever ideals or goals motivated, are movements which threaten the democratic state, its security, and the safety of its citizens. For this reason, legal recourse against them is in full harmony with the limitations allowed by Article 17.4 of the Charter.

The provisions of Article 2.2 and Article 4.1 and 4.2 of the Charter, together with the second paragraph of the Preamble, express the principle of the law-based state. The principle of legal certainty is, in addition, derived therefrom. Both principles require that commands and prohibitions be laid down in the law in such a manner as to give rise to no doubts regarding the basic content of the legal norm.

Summary:

§ 260 and § 261 of the Criminal Code criminalise support for and propagation of movements demonstrably directed at the suppression of the rights or freedoms of citizens or movements which promote hatred on the basis of national, racial, class or religious grounds. The original § 260 included a phrase in brackets giving fascism as an example of such a movement. Act no. 557/1991 expanded the brackets in § 260 so as to include communism as another such movement. A group of 52 Deputies of the Czech and Slovak Federal Republic Federal Assembly made a request to the Czech and Slovak Federal Republic Constitutional Court to annul these two provisions.

The Deputies first argued that the provisions established an exclusive state ideology in violation of Article 2 of the Charter of Fundamental Rights and Basic Freedoms. The Court rejected the argument that these provisions establish an exclusive ideology; on the contrary, by prohibiting movements that by their nature tend to exclude the spread of other ideologies, these criminal provisions make possible the expression and dissemination of various opinions and ideologies, as is evidenced in the Czech and Slovak Federal Republic by the rebirth of a wide range of opinions and political groupings and parties. If the state had an exclusive ideology, such a plurality of opinions would not exist.

The petition also claimed that the statute punished persons for their thoughts and violated freedom of expression. In view of the fact that the statute requires positive conduct such as “support” or “propagation”, the Court did not agree that the statute punished persons for their thoughts. In addition, the Court considered that the limitation on freedom of expression entailed by these criminal provisions constitutes a justified exception for the protection of the rights and freedoms of others, the security of the state and the safety of citizens, as the defined movements constitute a threat to those interests. Such an exception to freedom of expression is authorised both by the Czech Charter of Fundamental Rights and Basic Freedoms and the International Covenant on Civil and Political Rights.

The petition further objected that the provisions criminalise conduct without a clear definition of the

acts giving rise to criminal liability. The Court rejected this argument in relation to § 260 as a whole which sufficiently defines the prohibited conduct. However, it accepted this argument in relation to the wording in the brackets concerning fascism and communism which left uncertainty as to whether the provision automatically makes members of such groups subject to the criminal sanctions laid down in the statute (per se criminality) or whether in relation to such groups it remained necessary to prove the elements of the crime (support for a movement directed at the suppression of rights). As the wording in the brackets created uncertainty, this part of the provision violated the constitutional requirements that criminal conduct be sufficiently defined by statute. Accordingly, the Court declared the wording in the brackets unconstitutional, and, as the legislature took no action to amend it, it lost validity six months later.

Languages:

Czech.

Identification: CZE-1992-S-002

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 26.11.1992 / **e)** Pl. US 1/92 / **f)** On the Lustration Statute / **g)** *Sbírka usnesení a nálezů Ústavního soud CSFR*, 14, 56 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
3.3 **General Principles** – Democracy.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.23 **General Principles** – Equity.
4.6.11.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Totalitarian regime, values / Party, membership, privileges / State, loyalty / Secret police, records / Value system / Lustration.

Headnotes:

In contrast to totalitarian systems, which were founded on the basis of the goals of the moment and were never bound by legal principles, particularly principles of constitutional law, a democratic state proceeds on the basis of entirely different values and criteria.

Every state, particularly one which was compelled for a period of more than 40 years to suffer the violation of fundamental rights and basic freedoms by a totalitarian regime, has the right to enthrone a democratic order and to apply such legal measures as are calculated to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.

As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as regards values, may not adopt a criteria which is based on that differing value system. Respect for continuity with the old value system from the preceding legal order would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened, and citizens' faith in the credibility of the democratic system would be shaken.

A democratic state has not only the right but also the duty to assert and protect the principles upon which it is founded. Thus, it must not be inactive in respect of a situation in which the top positions at all levels of state administration, economic management, and so on, were filled in accordance with the now unacceptable criteria of a totalitarian system. A democratic state is entitled to make all efforts to eliminate an unjustified preference enjoyed in the past by a favoured group of citizens in relation to the vast majority of other citizens which was accorded exclusively on the basis of membership of a totalitarian political party and where, as was already inferred earlier, it represented a form of oppression and discrimination in regard to these other citizens.

In a democratic society, it is necessary for employees of state and public bodies (but also workplaces which

have some relation to the security of the state) to meet certain criteria of a civic nature, which we can characterise as loyalty to the democratic principles upon which the state is built. Such restrictions may also concern specific groups of persons without those persons being individually judged.

Summary:

Act no. 451/1991, which sets down some additional preconditions to holding certain offices in governmental bodies and organisations of the Czech and Slovak Federal Republic, the Czech Republic, and the Slovak Republic, disqualifies for five years (extended by an additional five in 1996) from certain key positions in the state apparatus (both by election and appointment) any persons who, during the communist regime, held or engaged in certain categories of functions or activities. The currently restricted state positions include all elective or appointed positions in state administrative bodies, the office of judge, the administrative office of various supreme state bodies, high ranking positions in the army or in universities, and positions in state radio, television, and press. The activities or positions held during the communist regime that disqualify persons include the following: higher Communist Party officials, an officer of the State Security Services or a student training for such a position at Soviet universities, and various types of secret police informants. The police informants included the category of "conscious collaborators", which meant a person registered in the files, who knew he was in contact with the secret police and supplied them information or performed some task for them. Persons elected or nominated to one of the restricted positions are required to submit a certificate from the Ministry of the Interior that they do not fall into any of the enumerated categories. The submission of this certificate is an absolute requirement to the holding of the office, and those who do not or cannot submit one are disqualified from holding the office. 99 Deputies of the Federal Assembly submitted a petition contesting this statute as unconstitutional.

The Court first reviewed the massive purges undertaken during the communist regime and the general personnel policies, pointing out the extent to which they resulted in the state apparatus being thoroughly compromised. The communist hold on power was further buttressed by the activities of state security and secret policy, which had an extensive network of collaborators and which, following November 1989, was preparing to carry on and destabilise democratic developments. Accordingly, much compromising file material was disposed of or hidden. On the basis of these facts, it came to the conclusion that "this calculated and malicious conduct created a real and potentially very perilous source of destabilisation and danger, which could easily threaten the developing constitutional order."

The Court drew a general conclusion about the challenged law to the effect that "it cannot deny the state's right … to lay down in its domestic law conditions or prerequisites crucial for the performance of leadership or other decisive positions if … its own safety, the safety of its citizens and, most of all, further democratic developments are taken into consideration".

The Court then determined that the challenged law did not violate any of the Czech and Slovak Federal Republic's international legal obligations. Article 26 of the International Covenant on Civil and Political Rights permits restrictions to be placed on the right of access to jobs in the public service if such are justifiable. In addition, Article 4 of the International Covenant on Economic, Social, and Cultural Rights allows conditions to be placed on the Covenant rights for the common good in a democratic society. The Court determined that the Lustration law satisfied these and other treaty provisions with reference to the fact that, in a democratic society, state positions that might involve a risk to the democratic constitutional system or the security and stability of the state may be made subject to criteria of a civic nature, such as loyalty to the state.

The Court further accepted the argument that the statute does not respect the principle of equality in that exemptions may be made at the request of the Minister of Defence or Interior, hence these exemptions were annulled. The Court also considered, but rejected, the objection that the Lustration law is retroactive.

The Court considered in detail the problem of secret police informants, and it drew a distinction between those that agreed to collaborate and those whom the secret police attempted to recruit, both of whom were affected by the Lustration law. The Court considered that it was justified to apply the prohibition to those who agreed to collaborate but not to those who were merely recruited. The records of the secret police concerning the first group were judged to be accurate and trustworthy evidence of actual collaboration in individual cases so that the reliance on secret police records was considered acceptable. In any case, the possibility of separately proving acts of collaboration was foreclosed when the secret police destroyed the files. On the other hand, the records concerning the second group were not considered reliable, however, because records were kept on such persons without their written commitment (even without their

knowledge); hence, the Court annulled the provision concerning them.

Languages:

Czech.

Identification: CZE-1993-S-001

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 21.12.1993 / **e)** Pl. US 19/93 / **f)** Act on the Lawlessness of the Communist Regime / **g)** *Sbírka nálezů a usnesení Ústavního soud ČR*, 1, 1, published as no. 14/1994 / **h)**.

Keywords of the systematic thesaurus:

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Legality.
3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Legal norm, purpose / Criminal law, limitation period / Communist regime, definition.

Headnotes:

The Constitution of the Czech Republic is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text certain governing ideas, expressing the fundamental, inviolable values of a democratic society. The Constitution accepts and respects the principle of legality as a part of the overall basic outline of a law-based state. Positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their content and substantive purpose, law is qualified by respect for the basic values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of "old laws" there is a discontinuity in values from the "old regime". This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state. Whatever the laws of a state may be, in a state which is designated as democratic and which proclaims the principle of the sovereignty of the people, no regime other than a democratic regime may be considered legitimate.

An indispensable component of the concept of limitation periods in criminal law is the willingness on the part of the state to prosecute a criminal offence. Without these prerequisites, the content of the concept is not complete and the purpose of this legal principle cannot be fulfilled. The principle of the limitation of actions acquires true meaning only after there has been a long-term interaction of two elements: the intention and the efforts of the state to punish an offender and the ongoing risk to the offender that he may be punished. If the state does not want to prosecute certain criminal offences or offenders, then the limitation of action is meaningless: in such cases, the running of the limitation period does not occur in reality and the limitation of action, in and of itself, is fictitious.

Neither in the Czech Republic nor in other democratic states is the general issue of the procedural requirements for criminal prosecution, or the issue of the limitation of actions, counted among those basic rights and freedoms of a fundamental nature that form part of the constitutional order. Neither the Constitution nor the Charter of Fundamental (and not of other) Rights and Basic Freedoms resolves detailed issues of criminal law; rather they set down, in the first place, uncontested and basic constitutive principles of the state and of law. Article 40.6 of the Charter of Fundamental Rights and Basic Freedoms deals with the issue of which criminal acts may in principle be prosecuted (namely those which were defined by law at the time the act was committed) and does not govern the issue of how long these acts may be prosecuted.

Summary:

The Czech Parliament adopted Act no. 198/1993 on the Lawlessness of the Communist Regime and Resistance to It. §§ 1-4 of the Act defined the basic characteristics of the communist regime: "for the systematic destruction of the traditional values of European civilisation, for the deliberate violation of human rights and freedoms, for the moral and economic bankruptcy carried out by means of judicial crimes and terror against those holding differing opinions, by replacing a functioning market economy with a command system, by the destruction of the

traditional principles of ownership rights, by the abuse of upbringing, education, science and culture for political and ideological purposes". It also condemned it in the strongest terms as "criminal, illegitimate, and despicable". § 5 of the Act declared that, for the duration of the communist era (25 February 1948 – 29 December 1989), the limitation period was suspended for politically inspired crimes that were shielded from prosecution "due to political reasons incompatible with the basic principles of the legal order of a democratic state". Opposition Deputies submitted a petition to the Constitutional Court challenging the constitutionality of nearly the entire statute.

Concerning §§ 1-4, the Deputies argued that it is improper for Parliament to place its assessment of historical events in a statute, which should, on the contrary, contain only legal norms prescribing conduct. Further, this creates an "official" historical truth limiting the freedoms of scholarship. Lastly, the statute creates implied criminal law and employment law liability for those who led the communist regime. The Court rejected these views, declaring that Parliament may embody its moral-political viewpoint in a statute; such does not constitute either a required opinion to the exclusion of all others or the disguised imposition of criminal or other types of sanctions. §§ 1-4 are not legally binding norms, hence they neither prescribe conduct nor impose sanctions.

The Deputies further objected that it is unconstitutional to declare the communist regime to have been illegitimate. As the Czech Republic's legal order is based on the reception of that regime's laws, this fact constitutes conclusive proof of the communist regime's legitimacy. The Court rejected this view: the continuity of law does not signify a continuity of values; legality cannot take the place of a missing legitimacy. The standards of a law-based state involves more than as embodied in the present Czech Constitution, hence it is proper to label it illegitimate.

Deputies made three arguments against the suspension of the limitations period:

1. § 5 constitutes a newly created obstacle to the extinguishment of criminal liability, which is in conflict with legal certainty;

2. criminal liability cannot be revived once extinguished by limitations, this violates the prohibition on retroactive laws;

3. equality is violated because only some whom the communist regime failed to prosecute are now subject to prosecution.

The Constitutional Court rejected all these arguments:

1. § 5 does not create a new impediment to the running of the limitation period - it is declaratory, not constitutive. It does not revive liability, it merely clarifies the fact that the limitation period was suspended. The Deputies' assertion that such liability was extinguished is mistaken; for such crimes the limitation period was a fiction; unless there exists a genuine will and effort to prosecute, the period cannot run. If this lessens the legal certainty of the perpetrators, it strengthens that of citizens generally, who can feel certainty that, even after a period of illegitimate rule, the legal order will come clean. Certainty in the continuity of legal rules is preferred over certainty in the state-guaranteed non-sanctionability of criminal acts.

2. In any case the right to have criminality barred by a limitations period does not rank among the fundamental rights, and the prohibition on retroactivity does not apply to it. The Constitutional requirement of legality (no crime or punishment without law) is that the type of conduct that constitutes a crime must be defined by law, this does not prescribe rules for how long they may be prosecuted.

3. In fact, § 5 does not treat political offenders worse than other offenders whom the state failed to prosecute in the period, rather it re-establishes a condition of equality where before the political offenders enjoyed an advantage over other offenders (whom the state did have the intention and desire to prosecute).

Languages:

Czech.

Identification: CZE-1994-S-001

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 12.04.1994 / **e)** Pl. US 43/93 / **f)** Disparagement of State Bodies as a Criminal Offense / **g)** *Sbírka nálezů a usnesení Ústavního soud ČR*, 16, 113, published as no. 91/1994 / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Public authority, protection / Disparagement, authorities / State body, definition.

Headnotes:

By employing the general and unambiguous phrase "state body" in § 154 of the Criminal Code, state bodies collectively and as individual institutions are protected to the extent provided in the definition of the material elements of the criminal offence. In § 156 individual public authorities are also protected.

The object of protection in § 154.2 and § 156.3 of the Criminal Code are not the institutions as such, in their "actualised" form, but their role in a democratic society: activities which make for the undisturbed functioning of a constitutional and law-based state.

§ 102 of the Criminal Code defines the material elements of an additional offence for acts which would otherwise be subject to prosecution on the basis of § 154.2 and § 156.3. This duality and divergence in the legislative formulation leads to an interpretation which would remove Parliament, Government and the Constitutional Court from the ensemble of state bodies, even though they are state bodies, and give them under § 102 a superior form of legal protection, otherwise common only for the protection of abstract state symbols.

Summary:

§ 102 of the Criminal Code prescribed criminal sanctions for anyone who disparaged Parliament, the government or the Constitutional Court. The President of the Republic submitted a petition requesting that the Court annul § 102 as a violation of freedom of expression both because the term, disparagement, is too imprecise and because such a prohibition is not necessary in a democratic society (not a justified exception to the freedom of expression). The Court decided that the term, disparagement, was not too imprecise. The fact that a state official might wrongly interpret a statutory provision does not in itself render the provision unconstitutional. The term, disparagement, has a long history in Czech law, so that its meaning is clearly settled to mean a "gross belittlement, abuse or ridicule, a gross attack on the dignity and honour committed in an outrageous manner".

With regard to the necessity of § 102, the Court determined that it was deficient in two respects. First it did not narrow the definition of the criminal conduct of disparagement to an attack upon the state bodies for the performance of their constitutional duties. This deficiency was demonstrated by the fact that the Criminal Code contains two other provisions, § 154 and § 156, which criminalise attacks upon state bodies and officials but are limited to attacks in connection with the performance of duties. In view of the fact that these provisions provide sufficient protection to state bodies generally, to give additional protection to certain state bodies is a disproportionate restriction upon the freedom of expression.

Languages:

Czech.

Identification: CZE-1996-S-001

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 28.05.1996 / **e)** I. US 127/96 / **f)** / **g)** 5 *Sbírka nálezů a usnesení Ústavního soudu ČR*, 41, 349 / **h)**.

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
4.9.6.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Candidacy.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Party, coalition, activity, condition / Party, co-operation between parties / Party, merger of parties / Election, coalition / Election, threshold.

Headnotes:

Act no. 247/1995 on Elections to the Parliament of the Czech Republic does not set down public law conditions for the creation and activity of coalitions and does not grant any state body the authority to decide the question whether a political party, movement or grouping should be considered to be a coalition taking part in the elections. Consequently, no state or other public body is authorised to take decisions interfering with the pre-election activities of political bodies. It was not the intention of the legislature for public authorities to intervene in the creation of electoral coalitions.

It may be inferred from the present state of the law that only political bodies themselves can decide whether they want to participate in an election as an independent party or as part of a coalition. When there is a lack of other legal rules, the only relevant issue is the means by which the subject registered its list of candidates. This follows from the fact that, in addition to political parties, the cited law also lists coalitions as among those persons authorised to submit lists of candidates for elections without any further specification or characteristics. The creation of an electoral coalition is subject to the agreement of the parties, which public law in no way regulates or forbids. The challenged law does not attach any consequences for the parties presenting candidates, nor does it designate that only members of such a party may be registered on the list of candidates. Under the present legal rules, the creation of a coalition is a free act. It is an expression of an intention on the part of two or more political parties or movements to create a coalition, which is not subject to any further approval or review by state bodies.

Summary:

The Free Democrats – National and Social Liberal Party (SD-LSNS) submitted a constitutional complaint against the decision of the Central Electoral Commission (CEC) holding that a registered list of SD-LSNS candidates in the elections to the Assembly of Deputies of the Czech Parliament, held on 1 May and 1 June 1996, was in fact a list of candidates of a coalition between SD-LSNS and SPR (Party of Entrepreneurs, Farmers and Tradesmen). It objected that if this decision, which the CEC was authorised to issue, remained in effect, then the SD-LSNS would be disadvantaged in relation to other political parties, because, instead of needing to receive 5% of all votes cast, which is what individual parties need in order to obtain representatives in the Assembly of Deputies, it would need at least 7% as a two-member coalition. This worsened their chances for success in the elections.

The Constitutional Court agreed with the complainant because no law, including the Electoral Act no. 247/1995, defines a coalition or authorises any body, such as the CEC, to decide with binding force whether a political body is a coalition or not. The term coalition is well known from political practice, deriving mostly from the co-operation between parties of a governing coalition, and has for a long time had a settled meaning. In other situations, the term coalition can designate various types of relationships, from mere co-operation between parties, closer and freer liaisons, up to a level of co-operation that precedes the merging of parties. In the case that legal rules are lacking, it is necessary to be guided by the rule that only a political party itself may freely decide if it will take part in the elections as a party or as a coalition, and the political party SD-LSNS had registered as an independent electoral subject.

For these reasons, the Constitutional Court ordered the Central Electoral Commission to annul its decision, to return the SD-LSNS to its status in the elections as an independent subject, and to inform the voters thereof through the press.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-1966-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 17.11.1966 / **e)** 107/1966 / **f)** Ancient Icelandic Manuscript Writings / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1967, 22.

Keywords of the systematic thesaurus:

4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Foundation, property, expropriation / Public policy.

Headnotes:

An Act providing for the return of a number of ancient writings and records to Iceland constituted an Act of expropriation. The constitutionality of the Act was examined accordingly by the Supreme Court, which found that the procedure prescribed by the Constitution for passing bills concerning expropriation had been followed.

Summary:

The private Foundation of Arne Magnussen had since the death of Arne Magnussen and his wife in the 18th century been in possession of, *inter alia*, a great number of ancient Icelandic manuscript writings and legal documents. According to an Act on amendment of the statute of the Foundation, a large proportion of the writings and legal documents were to be returned to Iceland where they were to be given to an independent foundation. The Foundation of Arne Magnussen contested the constitutionality of the Act with reference to the right to private property as protected under Article 73 of the Constitution.

The majority of the Supreme Court (8 members) found that the Foundation of Arne Magnussen was to be regarded as an independent institution as opposed to a publicly founded institution. The majority further stated that the disputed Act implied a forced renunciation of private property and thus constituted an Act of expropriation.

Article 73 of the Constitution provides for a special legislative procedure when the Parliament *(Folketing)* is presented with a bill concerning expropriation. A third of the Parliament can require that the bill be accepted first by the present Parliament and second by the Parliament as it is formed after the following general election, in accordance with Article 73.2 of the Constitution.

The majority of the Supreme Court found that the fact that the procedural prerequisites in Article 73.2 of the Constitution had been observed by the Parliament showed that the Parliament had given due consideration to the possibility that the bill possibly concerned expropriation. The majority further stated that the Act fulfilled the condition of Article 73 of the Constitution as regards expropriation on the grounds of public policy. The majority finally concluded that the lack of provisions with regard to damages did not deprive the Act of its validity.

A minority of the Supreme Court (5 members) agreed with the majority on the point that the rights of the Foundation were protected by Article 73 of the Constitution. The minority did not find, however, that the Act constituted a renunciation covered by Article 73 of the Constitution, since the documents and writings on Iceland would be part of a foundation with a similar charter and purpose to those of the Foundation of Arne Magnussen in Denmark.

The Supreme Court thereby jointly stated that the Act should not be considered invalid.

Languages:

Danish.

Identification: DEN-1974-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 28.01.1976 / **e)** II 236/1974 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1976, 184.

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

House search / Broadcasting, use of specific equipment, obligation / Broadcasting, equipment, inspection / Inspection, limited purpose.

Headnotes:

Pursuant to a statutory instrument, a person holding a radio transmission licence was fined for refusing an inspection at his home of his radio equipment. The statutory instrument was warranted by statute and did not infringe the constitutionally protected inviolability of the dwelling. The fact that a forced inspection was not warranted did not prevent the imposition of a fine.

Summary:

According to Article 72 of the Danish Constitution, a house search shall not take place except under a judicial order, unless particular exception is warranted by statute.

According to an Act on radio communication, radio transmission required a radio transmission licence. Licence holders were only allowed to transmit from specific types of radio equipment approved by the authorities. Pursuant to a statutory instrument under the Act, inspections of approved radio equipment could be carried out at any time. Refusal to give access to inspection of the equipment was punishable by a fine.

In this case, the defendant, who held a radio transmission licence, was fined for having refused access to his radio equipment in his home. The defendant argued that according to the Director of Public Prosecutions *(Rigsadvokaten)*, the statutory instrument did not warrant a forced inspection without a judicial order. The statutory instrument therefore did not contain a "particular exception" as required pursuant to Article 72 of the Constitution. The defendant therefore was of the opinion that he could not lawfully be forced to accept an inspection by means of being imposed a fine. The defendant further claimed that the imposition of the fine lacked sufficient statutory basis.

A majority of the Supreme Court (5 judges) first noted that a licence to make radio transmissions could only be obtained by accepting certain conditions, *inter alia* that inspections of the equipment could be carried out at any time. The majority further concluded that the rules on inspection in the statutory instrument did not go beyond the powers conferred on the Minister under the Act on radio communication.

In accordance with the opinion of the Director of Public Prosecutions *(Rigsadvokaten)*, the majority further noted that the Act did not warrant a forced house search without a judicial order. However, under such conditions as in the present case, Article 72 of the Constitution did not prevent a statutory instrument from stating that inspectors should have access to the equipment. The majority also found that the statutory instrument contained provisions pursuant to which a person denying access to inspectors authorized to carry out such inspections could be fined.

Accordingly, and without prejudice to the scope of Article 72 of the Constitution in relation to legal issues outside the criminal procedure, the imposition of the fine was lawful.

In a concurring opinion, one judge found it questionable whether the authorization of inspections as established in the statutory instrument had sufficient authority in the Act. He found, however, that Article 72 of the Constitution was inapplicable in this case because the inspections had a limited purpose and because it was a natural condition for obtaining a radio transmission licence to tolerate such inspections. Furthermore, the inspections could not be carried out with the use of force without observing the rules on searches laid down in the Danish Administration of Justice Act.

Accordingly and, without prejudice to the scope of Article 72 of the Constitution in relation to legal issues outside the criminal procedure, he voted for the same result as the majority.

In a dissenting opinion, one judge first reasoned that Article 72 of the Constitution is applicable also in relation to searches outside the criminal procedure such as the inspection in question. The Act on radio communication did not contain any provisions on inspections of radio equipment. The dissenting judge therefore seriously doubted whether the Act constituted a sufficient statutory basis for imposing a fine on a licence holder, who refused access to inspection of his radio equipment. Accordingly, this judge voted in favour of the acquittal of the defendant.

In accordance with the view of the majority, the imposition of the fine on the defendant was confirmed by the Supreme Court.

Languages:

Danish.

Identification: DEN-1980-S-001

a) Denmark / **b)** High Court / **c)** Eastern Division / **d)** 19.06.1980 / **e)** 16-313/1978 / **f)** Greendane / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1980, 955.

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Monopoly, state / Competition / Transport, sea, monopoly / Law, effect on individual / Compensation / Law, economic aim.

Headnotes:

An Act of Parliament re-establishing a state monopoly on the sea carriage of goods to Greenland, which solely affected one private company, was held to be an act of expropriation.

Summary:

Since 1776, carriage by sea to Greenland had been, by law, a Danish state monopoly. The Monopoly Act was repealed in 1951 but a new Act was passed re-establishing the state monopoly in 1973.

As a consequence, a shipping company, Greendane, which had been carrying goods to Greenland by sea since January 1972, was precluded from conducting its shipping business. Greendane therefore claimed that the Act constituted an act of expropriation and that Greendane was entitled to compensation according to Article 73 of the Danish Constitution. Under this provision the right to property is protected and no person shall be ordered to surrender his property except where required in the public interest. It shall be done only as provided by statute and against full compensation.

The majority of the High Court (2 members) found that free enterprise such as the shipping business conducted by Greendane was protected under Article 73 as a property right. As to whether the Act in question constituted an act of expropriation, the majority then reflected upon the purpose of the Act. According to the *"travaux préparatoires"*, the principal aim was to maintain a system of equal carriage rates for all parts of Greenland. The majority, however, held that the Act also pursued an economical aim for the Danish state. The majority further noted that Greendane was the only company directly affected by the establishment of the state monopoly. On this basis the Act was found to constitute an act of expropriation and thus Greendane was entitled to compensation, including an estimated amount for loss of expected profit. It was without significance that Greendane had been warned against starting the shipping business and that the business had only been conducted for a short time.

The minority of the High Court (1 member) found that the Act did not constitute an act of expropriation. The Act introduced an ordinary prohibition against private companies offering sea carriage to Greenland with the main purpose of maintaining the single tariff system for all parts of Greenland in accordance with public interests. The economic aim mentioned by the majority was secondary. The minority therefore held that the prohibition fell within the legislative powers of the Parliament. The minority further noted that the shipping business exercised by the plaintiff was not protected by Article 73 of the Constitution, as the plaintiff had very recently started his business.

Languages:

Danish.

Identification: DEN-1980-S-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 29.10.1980 / **e)** I 333/1979 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1980, 1037.

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Defamation / Trademark, close reproduction on poster / Poster, satiric manifestation / Public debate, contribution / Social matter, essential.

Headnotes:

A poster with a controversial text could not be prohibited nor should the text be modified.

Summary:

In 1978, the appellant had produced a poster with a drawing of a pig and the following text: "Danish pigs are healthy, they are bursting with antibiotics". The drawing was a close reproduction of the trademark used by two organisations representing the Danish meat industry.

The two organisations claimed that the content and the presentation of the poster constituted defamation towards the industry. They therefore wanted a prohibition against the use and distribution of the poster as well as a substantial modification of the expression: "They are bursting with antibiotics".

According to the appellant the poster was a satiric manifestation of the fact that antibiotics may be found in slaughtered pigs, and a contribution to the extensive public debate about the use of antibiotics for domestic animals and the effects of their use. The poster was not intended to be defamatory.

A majority of the Supreme Court (5 members) held that the poster was a satiric expression of the opinion that an unreasonable amount of antibiotics may be found in slaughtered pigs. This criticism was not addressed towards a particular group such as the slaughter-houses represented by the plaintiffs. It was meant rather as a contribution to the extensive public debate on the use of drugs for farm animals, a debate which had caused a legislative restriction on the drugs used for farm animals, and which had increased the number of samples taken from slaughtered animals tenfold. The majority stressed the importance of the principle of freedom of expression in essential social matters such as the one in question. Accordingly, the majority found that the poster did not contain an unlawful statement.

A minority of the Supreme Court (2 members) held that the poster should be interpreted as an accusation against the Danish slaughter-houses and producers, clearly stating that Danish pigs pose a health threat due to the use of antibiotics. The principle of freedom of expression could, according to the minority, not justify the harmful and unverified statement of the appellant.

Languages:

Danish.

Identification: DEN-1986-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 24.10.1986 / **e)** II 193/1985, 194/1985, 195/1985 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1986, 898.

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.6.1 **Constitutional Justice** – Effects – Scope.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Necessity, legal, justification / Membership, change, dismissal, trade union.

Headnotes:

Eight bus drivers, who had terminated their membership of certain trade unions, were subsequently dismissed. Their constitutional rights did not render the dismissal invalid nor could Article 11 ECHR be applied directly. Under the Act granting Protection against Dismissal due to Trade Union Relations, however, the bus drivers were awarded compensation. However, the bus drivers were not entitled to be reinstated in their service.

Summary:

Eight bus drivers employed at the Greater Copenhagen Bus Service had terminated their membership of certain trade unions, which until then had represented all bus drivers employed at the bus company. The bus drivers had instead joined either Denmarks Free Trade Union or the Christian Unemployment Fund. This resulted in extensive strikes and blocades of the bus service by their colleagues and finally led to the dismissal of the eight bus drivers.

The plaintiffs – the eight bus drivers – were of the opinion that the dismissals conflicted with their constitutionally-protected rights of worship (Article 68), choice of trade (Article 74), and association (Article 75) as well as the principle of access to employment in a suitable job, cf. Article 78 of the Constitution. They further referred to the principle of equal rights, the Act granting Protection against Dismissal due to Trade Union Relations, the Salaried Employee Act, and Article 11 ECHR.

The employer, the Greater Copenhagen Council, argued that the dismissal of the bus drivers was not due to the change in their trade union conditions but was solely a consequence of restrictions on the operation of the bus service in the metropolitan area. According to the Council, every other possible a verve had been explored to solve the conflict. The dismissal was in any case justified by legal necessity.

The Supreme Court stated that the Greater Copenhagen Council's decision could not be declared invalid pursuant to the paragraphs of the Constitution, referred to by the plaintiffs, or any other constitutional principles. The Supreme Court further stated that Article 11 ECHR could not be applied directly in this case. Instead, the dismissals had to be judged under the Act granting Protection against Dismissal due to Trade Union Relations, which had been adopted with the aim of fulfilling Denmark's obligations pursuant to Article 11 ECHR. The Supreme Court then went on to conclude that the dismissals were in contravention of the said Act as well as of the principle of equal rights. The bus drivers should therefore be granted compensation. The Act did not, however, contain any provisions pursuant to which the bus drivers could be reinstated in their jobs.

Supplementary information:

At the time of the judgment, Denmark was bound by the European Convention of Human Rights on the basis of international law. In 1992 the Convention was incorporated in Danish law.

Languages:

Danish.

Identification: DEN-1989-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 13.02.1989 / **e)** 279/1988 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1989, 399.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.17 **General Principles** – Weighing of interests.
5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Defamation, racial, statements / Broadcasting, racially derogatory statement / Racial discrimination, protection, principle / Racial hatred, incitation / Racial hatred, aiding and abetting.

Headnotes:

Two persons employed at the Danish Broadcasting Corporation had infringed the Danish Penal Code by broadcasting statements of a racially derogatory nature made by three youths. The majority of the Supreme Court found that the principle of freedom of expression did not outweigh the right to protection against such racially derogatory statements.

Summary:

In 1985 an interview with three members of a group of youths known as “the Greenjackets” by the Danish Broadcasting Corporation *(Danmarks Radio)* was broadcast nationwide. During the interview the three persons made abusive and derogatory remarks about immigrants and ethnic groups in Denmark, *inter alia*, comparing various ethnic groups to animals.

The three youths were subsequently convicted under Article 266.b of the Penal Code for having made racially derogatory statements. The City Court of Copenhagen and the Eastern Division of the High Court also convicted the journalist, who had initiated the interview, and the head of the news section of *Danmarks Radio*, who had consented to the broadcast, under Article 266.b in conjunction with Article 23 of the Penal Code for aiding and abetting the three youths. Both courts reasoned, *inter alia*, that the journalist had taken the initiative to make the programme while aware of the nature of the statements likely to be made during the interview and that he had encouraged “the Greenjackets” to express their racist views. The head of the news section was convicted because he had approved of the broadcasting of the programme though aware of the content.

A majority of the Supreme Court (4 members) voted in favour of confirming the High Court sentence. By broadcasting and thus making public the racially derogatory statements, the journalist and the head of the news section of *Danmarks Radio* had infringed Article 266.b in conjunction with Article 23 of the Penal Code. In this case, the principle of freedom of expression in matters of public interest did not outweigh the principle of protection against racial discrimination.

One dissenting judge voted in favour of the acquittal of the journalist and the head of the news section of *Danmarks Radio*. The judge noted that the object of the programme had been to make an informative contribution to an issue of sometimes emotional public debate and the programme had offered an adequate coverage of the views of “the Greenjackets”. Even though “the Greenjackets” only made up a small number of people, the programme still had a reasonable news and information value. The dissenting judge concluded that the fact that the journalist had taken the initiative with regard to the interview did not imply that the journalist and the leader of the news section should be found guilty.

In accordance with the view of the majority, the defendants' appeal was dismissed by the Supreme Court.

Cross-references:

Following the judgment by the Supreme Court, the journalist, Mr Jersild, lodged an application against Denmark with the European Commission of Human Rights on the grounds that his conviction violated his right of freedom of expression under Article 10 ECHR. On 23 September 1994 the European Court of Human Rights, by twelve votes to seven, decided that there had been a violation of Article 10 *(Publications of the European Court of Human Rights*, vol. 298, *Bulletin on Constitutional Case-Law*, 1994/3 [ECH-1994-3-014]).

Languages:

Danish.

Norway
Supreme Court

Important decisions

Identification: NOR-1866-S-001

a) Norway / **b)** Supreme Court **/ c) / d)** 01.11.1866 **/ e) / f) / g)** *Ugeblad for lovkyndighet mv.* (Official Gazette), 1866, 165 **/ h)**.

Keywords of the systematic thesaurus:

2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Crew list, participation, preparation, obligation.

Headnotes:

A senior state official was awarded remuneration for a commission imposed upon him that was additional to his normal duties. Failure to award compensation would have been in violation of the Constitution.

Summary:

In the National Service Act dated 12 October 1857, naval officers were ordered to participate in the keeping of crew lists without any special remuneration for this. A lieutenant commander, who was ordered to carry out such duties, was of the opinion that he was entitled to separate remuneration for this work as he regarded this to be unconnected with his duties as a naval officer. When he was refused remuneration, he brought legal action against the government, and judgment was passed in his favour in the City Court, and also in the Court of Appeal, following an appeal by the government. The case was appealed to the Supreme Court. The majority (4-3) found that he was entitled to remuneration. Article 97 of the Constitution disallowing retroactive legislation, the provisions of Article 105 of the Constitution concerning full compensation by the government with regard to sacrifices demanded from private persons whose interests are violated, and an analogy of Article 22.2 of the Constitution disallowing the transfer of a senior state official, formed part of the basis for the decision.

However, a condition for awarding compensation was that the imposed duties were sufficiently new, comprehensive and permanent in relation to the normal duties resting with the state official.

The judgment contains several separate opinions.

Chief Justice Lasson made a statement of principle in his deciding vote. He put forward a question concerning the right of the courts to review an act's conformity with the Constitution, replying to this as follows: “inasmuch as one cannot order the courts to pass judgment pursuant to the provisions of both acts at one and the same time, the Constitution must of necessity take precedence”.

Languages:

Norwegian.

Identification: NOR-1918-S-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 12.03.1918 / **e)** lnr 37/1 1918 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1918, 401 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
3.19 **General Principles** – Margin of appreciation.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Waterfall, right, acquisition.

Headnotes:

It rests with the courts to review whether an act is in violation of the Constitution. The provisions of an

earlier Act dated 18 September 1909 concerned the acquisition of rights over waterfalls. Sections 1 and 2 of this Act, relating to right of reversion for the government, did not contain intrusion of ownership to the extent that there was violation of Article 105 of the Constitution. The seller of the waterfall could not claim damages from the government for loss resulting from the application of the provisions of the act.

Summary:

A had sold his property to a limited company and held that he had suffered a loss in that the company, in view of the provisions of the Act dated 18 September 1909 on the acquisition of the rights to waterfalls (and in particular Sections 1 and 2 relating to right of reversion to the government), would not pay as much for the property as the company would otherwise have paid if the provisions of the Act had not been applied to the sale.

In the assignment of waterfall rights to parties other than the government, Norwegian municipalities or Norwegian citizens, sales were subject to licences on specific conditions. A licence could be granted for a minimum of 60 years and a maximum of 80 years. Upon expiry of the licence period, the waterfall with its appartenant equipment would pass to the government free of charge.

Judgment by the City Court was in favour of the government. The judgment was appealed to the Supreme Court.

The majority of the members of the Supreme Court found that the legislative power has and must have broad authority to impose limits on property rights so that the owner's disposal may only be effected in accordance with any necessary legal provisions as required by developments in society.

The issue was whether the limitation of property rights provided for in the Act was so material that the provisions must be set aside as contravening against Article 105 of the Constitution which provides that when the government's interests demand that a party must relinquish property for public use, he shall receive full compensation from the government.

It was stated that there was no question of forced relinquishment and the case was not therefore directly governed by Article 105 of the Constitution. It was further stated that the provision of the Constitution must be strictly interpreted and must not be given any wider interpretation. The Act governing the acquisition of waterfalls included a prohibition against certain forms of disposal, namely sale to certain classes of buyer. However, this exclusion did not violate the Constitution. Inasmuch as the legislative power had found it necessary to apply the limitations specified in Section 2 of the Act of 1909, it had done so because it was of the opinion or feared that acquisition of the waterfall from the buyers mentioned in Section 2 involved material risk in respect of the social and economic developments of the future.

Three of the 7 justices dissented.

Languages:

Norwegian.

Identification: NOR-1925-S-001

a) Norway **/ b)** Supreme Court **/ c) / d)** 09.06.1925 **/ e)** Inr 155/1 1925 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1925, 526 / **h)**.

Keywords of the systematic thesaurus:

4.6.9.4 **Institutions** – Executive bodies – The civil service – Personal liability.
4.6.10.1 **Institutions** – Executive bodies – Liability – Legal liability.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Consulate, responsibility / Civil servant, authority, misuse.

Headnotes:

There was no legal basis for holding the government liable for an incorrect decision by a consul in respect of a wages demand pursuant to the provisions of Section 43 of the Seamen's Act dated 16 February 1923. Moreover, it was not clear that there was sufficient reasoning behind the claim for damages in the basic tenets of the law. This applied despite the fact that it was considered reasonable that the government should compensate for any loss suffered by a party due to imprudence on the part of a public servant, particularly when such loss is incurred due to

misuse of the authority vested in him by the government.

Cross-references:

See also decision lnr 69/1952 [NOR-1952-S-001].

Languages:

Norwegian.

Identification: NOR-1951-S-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 16.01.1951 / **e)** lnr 3/1951 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1951, 19 / **h)**.

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
3.22 **General Principles** – Prohibition of arbitrariness.
5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.

Keywords of the alphabetical index:

Licence, taxi, refusal.

Headnotes:

There was legal authority for the public authorities to refuse new licences to previous holders of taxi licences due to the fact that they had been sentenced for treason, although it must be remembered that such a decision on the part of the authorities must be discretionary. If the refusal is extremely unreasonable or if it contravenes the general opinion, it can be declared invalid by the courts.

Summary:

On 29 January 1946 the Ministry of Labour passed a decision based on a regulation valid at that time in Section 21.II of the Motor Vehicles Act, to the effect that a permit was required for all commercial transport of persons or goods by a motor vehicle not operating on a scheduled service. Simultaneously, all permits were declared null and void, so that all those concerned had to apply for new permits, irrespective of whether they had previously held permits or not.

Four taxi owners were refused new taxi licences by the Ministry of Transport and Communication, solely on the grounds that they had been non-active members of the Nasjonal Samling Party (NS) during the 2nd World War. Due to shorter or longer membership in NS, all those concerned had been sentenced to fines and loss of voting rights. Two of those concerned also lost the right to serve in the armed forces and one was ordered to pay damages. The fines were paid and the loss of rights in respect of all four persons expired with effect from 9 May 1950.

The parties concerned brought legal action against the government, represented by the Ministry of Transport and Communication, claiming that new taxi licences be granted and compensation be paid for financial loss.

Judgment was passed in favour of the government by Oslo City Court. The judgment was appealed to the Supreme Court. The appeal was allowed directly before the Supreme Court.

The Supreme Court stated that in deciding who was to be granted new licences, material importance should be given to whether the applications were submitted by previous holders of taxi licences, granted objectively or whether the applications were submitted by persons who had not previously held such licences.

It was accepted by all the parties that the four taxi owners had the necessary qualifications to be granted new licences. Moreover, it was stated that it would be a clearly unjust notion if the taxi owners were to be excluded from their old profession due to non-active membership in NS when they had paid their fines and their rights had been reinstated. Although the courts had limited access to control the exercise of discretionary decisions by public bodies, this result was so unreasonable and contrary to general opinion that the decision must be considered unlawful and be declared invalid.

Despite there being some dissenting votes, the Ministry was ordered to issue new licences.

Languages:

Norwegian.

Identification: NOR-1952-S-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 10.05.1952 / **e)** lnr 69/1952 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1952, 536 / **h)**.

Keywords of the systematic thesaurus:

2.3.4 **Sources of Constitutional Law** – Techniques of review – Interpretation by analogy.
4.6.10 **Institutions** – Executive bodies – Liability.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Consulate, item, safekeeping.

Headnotes:

The government must be liable for damages for loss suffered due to negligence on the part of a consulate following analogous application of Norwegian Law (N.L.) 5-8-17 concerning liability for effects held in custody. This decision is not in contravention of a previous judgment in *Norsk Retstidende*, 1925, page 526 (decision lnr 155/1 1925).

Summary:

A Norwegian physician died abroad during the Second World War and in accordance with the instructions in force the Norwegian consulate took custody of his effects. When these were returned to his widow in Norway after the war, a number of valuables were missing.

The widow claimed compensation from the government and was awarded damages by the City Court. The government appealed against the City Court judgment, and the hearing of the appeal was allowed directly before the Supreme Court.

In the Supreme Court, judgment was unanimous and the government was ordered to pay damages in respect of the loss which was considered to be the result of negligence on the part of the consulate.

The majority (4-1) did not expressly dissociate themselves from the long established doctrine – notably cited in the Supreme Court judgment in *Norsk Retstidende*, 1925, page 526 – to the effect that the government is not liable for subjectively accountable unlawful actions performed in service on the part of subordinate public servants. The majority based the finding principally on an analogous application of the rule concerning liability for goods in custody in N.L. 5-8-17. This rule states principally that those who accept items for safekeeping are under obligation to look after them, and if the items are lost or damaged while in the care of the custodian, he will in general be liable in damages unless he can provide evidence that he is without blame in the occurrence.

The minority found that the government pursuant to the principle of law embodied in N.L. 3-21-2 must be jointly liable for the indefensible actions of its servants.

Cross-references:

See also decision lnr 155/1 1925 [NOR-1925-S-001].

Languages:

Norwegian.

Identification: NOR-1952-S-002

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 29.11.1952 **/ e)** lnr 124/1952 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1952, 1089 **/ h)**.

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
3.19 **General Principles** – Margin of appreciation.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.3.36.4 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Adjustment, price, charge / Charge, refunding.

Headnotes:

A price adjustment charge stipulated by the Price Directorate was not defined as a tax under the provisions of Article 75.a of the Constitution. The Supreme Court had no basis for overruling the discretionary decision of the legislative authorities concerning the necessity of applying this charge in connection with price regulation.

The question of whether it was in violation of the Constitution, that the authority to stipulate this charge was delegated to the Price Directorate, had to be decided according to the actual policy considerations. There was a greater reason for the courts to exercise caution in overruling the legislator's decision in this case than in the case of whether the provisions of an Act contravene the regulation in the Constitution aimed at protecting the interests of citizens, e.g. Articles 97 and 105 of the Constitution.

Summary:

During the Second World War, the Norwegian government requisitioned all Norwegian whale factory ships and whalers that were outside the occupied areas of Norway.

After the War, an agreement was concluded between the government and the whaling companies concerning the return of the remaining part of the whaling fleet to the owners and concerning the restoration of the whaling industry on the basis that the companies were to take over the government contract for new factory ships and carry out whaling during the initial three seasons on the basis of a joint account.

By decisions of the Price Directorate dated 30 July 1946 and 29 March 1947, a price regulation charge was introduced on the whale oil production for 1945-46. The Association of Whaling Companies brought an action before the City Court claiming repayment of the charge and claiming damages for lower earnings due to the fact that certain quantities of the production for 1946-47 and 1947-48 had to be sold on the domestic market at a price which was lower than the price on the world market. The City Court judgment was in favour of both the government and the Price Directorate. The whaling companies appealed and permission was given for the appeal to be heard directly before the Supreme Court. The appeal was limited to that part of the judgment in which it was found that the government was not liable for refunding the charge.

The whaling companies argued that the charge was in violation of the agreement concluded with the government and the undertakings given in that connection. Moreover, it was pleaded that the charge was not authorized in law. As a result, it was asserted that the decisions were invalid as there was no access in the Constitution to delegate authority to the Price Directorate or the King as the charge was a tax pursuant to the provisions of Article 75 of the Constitution and could not be delegated by the Storting. It was further held that the charge was in violation of Article 97 of the Constitution disallowing retroactive legislation.

The Supreme Court was of the opinion that the decisions of the Price Directorate in 1946 and 1947 were not in violation of the agreement that was concluded. The undertaking concerning tax relief on the part of the government had been met and the objective of the agreement had been reached, i.e. the restoration of the whaling industry. Moreover the Supreme Court found that the decisions concerning charges were authorized in law by the provisions of Section 2.2, no. 4, in the provisional ordinance of 8 May 1945 and of Section 2.2, no. 4, of the intermediary Act dated 14 December 1946.

Moreover the charge was not defined as a tax in relation to Article 75.a of the Constitution. In this connection, particular emphasis was paid to the fact that the Act (the ordinance) specifies limits both with regard to the conditions for introducing the charge and with regard to the application of the funds and that the price adjustment charge was intended to act (and did in fact act) as a tool in the price regulation mechanism. The Supreme Court stated that it had no basis for overruling the decision of the legislative authorities concerning the necessity of applying this measure in price regulation.

The constitutional issue concerning the authority to apply the charge (the delegation) had to be decided pursuant to the actual policy considerations. It was stressed that the charge, by its nature as a price regulating measure, could be applied by the administrative authorities dealing with price regulation. Delegation of authority to apply the charge in this case was taken much further than in any similar cases in peacetime. Despite this, there was no basis for the courts to set aside the discretionary decisions of the legislative power as to how far it is necessary and constitutionally justifiable to go. The first voting justice remarked that there was greater reason for the court to exercise caution in setting aside the legislator's discretionary decision in a case such as this than there was in the case of deciding whether an Act was in violation of a regulation in the Constitution aimed at protecting the interests of the

country's citizens, e.g. Articles 97 and 105 of the Constitution.

The Supreme Court found that the decisions concerning charges were not in violation of Article 97 of the Constitution. The Supreme Court emphasized that the whaling companies did not at any time have the right to assume that they were exempted from price regulation and that the fixing of the charge implied a price fixing of the domestic oil. Moreover it was remarked that the decision concerning the charge dated 30 July 1946 was taken prior to the sale of the domestic oil.

Judgment was pronounced with two dissenting votes out of the 15 justices.

Languages:

Norwegian.

Identification: NOR-1962-S-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 02.05.1962 / **e)** Inr 51/1962 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1962, 369 / **h)**.

Keywords of the systematic thesaurus:

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.10.4 **Institutions** – Public finances – Currency.
4.10.5 **Institutions** – Public finances – Central bank.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Bond, loans, gold clause / Bank, obligation, suspension / Redemption commitment.

Headnotes:

The bonds connected with the government loans of 1896, 1900, 1902, 1903, 1904 and 1905, the *Kongeriket Norges Hypotekbank's* loans of 1900, 1902, 1905, 1907 and 1909 and the *Arbeiderbruk- og Boligbanken's* loan of 1904 included effective gold clauses, but in respect of all the loans these were linked to the Norwegian krone only. Loans of this type are encompassed by the Act of 15 December 1923 under which the gold clauses were suspended. The application of the law in connection with the aforementioned loans was not in violation of Article 97 of the Constitution, which prevents retroactive legislation. The finances of the country are the concern of the government authorities including the suspension or abolition of the issuing bank's obligation to redeem bank notes with gold.

Summary:

By a summons dated 15 August 1958, the *Association Nationale des Porteurs Français de Valeurs Mobilières* brought action against the Norwegian Government, *Kongeriket Norges Hypotekbank* and *Den Norske Arbeiderbruk- og Boligbank*, claiming the right to receive payment for specific bearer bonds according to the gold value at the time the loans were taken up. Furthermore, they claimed the right to receive payment according to the value of Swedish kroner on day of payment.

The government loans were taken up in 1896, 1900, 1902, 1903, 1904 and 1905. The *Norges Hypotekbank* loans were taken up in 1900, 1902, 1905, 1907 and 1909, and the *Arbeiderbruk- and Boligbanken's* loan dated from 1904.

Judgment by Oslo City Court was in favour of defendants.

The judgment was appealed and permission was granted to bring the appeal directly before the Supreme Court where it was dealt with in plenary session.

The Supreme Court found that all the loans contained effective gold clauses linked to the Norwegian krone. The bonds were not worded in such a way that buyers had any legitimate reason to assume that the clauses referred to other currencies.

Moreover the Court found that the loans were encompassed by the provisions of the Act of 15 December 1923 applying to all monetary obligations “in kroner in gold”. Under the provisions of this Act the gold clauses were suspended. Norges Bank's obligation to redeem bank notes with gold was suspended initially in 1914, a suspension which was lifted in 1916. In March 1920 the bank was again granted exemption from the redemption commitment, and this suspension was lifted in 1928. The obligation to redeem bank notes was again suspended in 1931.

In the opinion of the Supreme Court it was not disputed that it is the concern of the government authorities to arrange the finances of the country. This must be effected without anyone bringing claims against the government because he could not be paid the value of the notes in gold as he was entitled to pursuant to the law and the wording of the notes. Gold value clauses were not theoretically dependent on the existence of the redemption commitment as they could be fulfilled by means of bank notes.

However there was a link between the redemption commitment and a gold clause when claims in money are in general use in a society. Maintaining gold clauses despite the abolition of the redemption commitment would mean that private law agreements would intervene and complicate or even prevent the efforts of the government authorities to maintain proper and stable finances, which was of fundamental and decisive importance for society as a whole. This was the situation in the country in 1923, and the Act of 15 December 1923 contained a proper and justifiable decision which was not in violation of Article 97 of the Constitution.

The French bond holders had not acquired any right to payment according to the value of the Swedish kroner due to the fact that the debtors had paid the Swedish bond owners in Swedish kroner.

A minority of six justices voted in favour of the claim that payment according to the gold value should be made in respect of the *Hypotekbank* loan of 1909 and the *Arbeiderbruk- og Boligbank* loan of 1904, as in these cases the gold clause in the opinion of the minority was also linked to the franc. One of the dissenting justices held that the French bond holders were entitled to payment according to the value of Swedish kroner as a consequence of the payment made to the Swedish bond owners.

Languages:

Norwegian.

Identification: NOR-1976-S-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 27. 01.1976 / **e)** Inr 18/1976 / **f)** Kløfta / **g)** *Norsk Retstidende* (Official Gazette), 1976, 1 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.19 **General Principles** – Margin of appreciation.
5.2.1 **Fundamental Rights** – Equality – Scope of application.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Expropriation, compensation / Compensation, amount, calculation / Land, market value / Trading, voluntary, value.

Headnotes:

When the courts are asked to decide on the constitutionality of a statute, the Parliament's (Storting's) view of the matter inevitably plays an important role. If there is any doubt as to how a statutory provision should be understood, the courts have a right and duty to apply the statute in the manner which best accords with the Constitution.

Summary:

The case concerned the understanding of Sections 4 and 5 of a now-defunct Act of 26 January 1973 regarding compensation for expropriation of property, especially in light of Article 105 of the Constitution regarding “full compensation” for expropriation. The valuation of land areas under this Act was to be based on the actual use of the area, pursuant to Section 4 of the Act. The Act permits in Section 5 higher compensation in “certain circumstances”. The importance of the zoning plan to the valuation of the land was dealt with in Section 5.3 (cf. Section 5.2 and Section 4.3). According to Section 5.3 of the Act, a higher value could not be taken into account if it depended on a use of the area which conflicted with approved zoning plans for the expropriated property.

A municipality demanded the calculation, under the Building Act, of the amount of compensation payable for expropriation of a stretch of highway E6, approximately 2 km long, east of Kløfta town centre.

In a first valuation concerning 31 valuation items, some of the landowners were awarded compensation

for the land at the price of NOK 10 per square metre. The superior valuation which comprised 18 valuation items awarded compensation for some properties according to an agricultural value pursuant to Section 4 of the Act, for other properties an additional compensation was fixed in accordance with Section 5 of the Act at the rate of NOK 6 per square metre.

The superior valuation was appealed to the Supreme Court by nine landowners. They claimed principally that the Superior Valuation Court had established, in conflict with Article 105 of the Constitution, a lower compensation for land than the lawful market value. Alternatively they claimed that the Superior Valuation Court had misapplied the law, partly in respect of the interpretation of Sections 4 and 5 of the Expropriation Compensation Act, partly by applying non-statutory expropriation rules. Finally they maintained that the grounds for the valuation were unclear and/or defective.

Partly on account of misapplication of the law and partly on account of insufficient grounds for the valuation, the Supreme Court, acting in plenary session, declared the superior valuation void. Seven of the 17 justices dissented, and one of the majority had a different reasoning from his colleagues.

The first voting justice started with some remarks about the Court's competence to test the constitutionality of statutes. In the case of provisions intended to safeguard the personal liberty or safety of individuals, the first voting justice presumed that the constitution's overriding force should be substantial. If on the other hand the constitutional provision governs the mode of operation or mutual competence of the other powers of the state, the first voting justice agreed with his counterpart in the plenary case in *Norsk Retstidende*, 1952, p. 1089 (the whale tax case) that the courts had largely to accept the Storting's view. Constitutional provisions for the protection of financial rights would be in an intermediate position.

The Storting's understanding of the position of the Act relative to such constitutional provisions had to play an important part when the courts were to decide the issue of constitutionality, and the courts should be reluctant to set their views above those of the legislators.

Since the Storting had adopted the Expropriation Act of 26 January 1973, the issue before the courts was whether the rules of the Act lead to results that are compatible with Article 105 of the Constitution, not whether the results would have been the same without the statutory rules. Moreover the first voting justice made it clear that the courts had in any case to accept the legislators' political evaluations.

The question in this case was whether the Act cut back the compensation to the landowners to a greater extent than provided by Article 105 of the Constitution which requires full compensation. Any considerations of reasonable compensation in the specific case would not be decisive.

Subject to certain reservations the first voting justice declared that a landowner would not actually be paid full compensation if the government refused to pay the market value where this was demonstrably the highest value. In the present case it was unanimously held that compensation could not be awarded for land on the basis of Section 4 of the 1973 Act to the effect that the valuation should be based on the use of the property, even if sections of it had been parcelled off and some of the properties were subject to additional parcelling plans.

The provisions of Section 4 and Section 5 of the Act should be viewed in context as regards their position with regard to the Constitution. Section 5 permitted the payment of compensation in excess of the use value in cases where the valuation under Section 4 would lead to a substantially lower value than the value generally applying to similar properties in the district according to their normal use.

The majority of the justices pointed out that according to its wording, Section 5.1 authorized the Valuation Court to undertake a specific consideration of the fairness of the compensation, but that such a free position would not be compatible with the Constitution's requirement of full compensation. The majority held that in principle the Valuation Court was obliged to provide for additional compensation up to the lawful value in voluntary trading (subject to Section 5.2) in cases of discrepancy between valuation under Section 4 and the higher value under Section 5.1.

The landowners had maintained that the Superior Valuation Court had misapplied the law when failing to award additional compensation for land that had been zoned as a free area. The majority held that the zoning for a free area was a consequence of the highway plan which was at the origin of the expropriation. One should therefore disregard the value reduction which was due to the zoning as a free area. It was the natural and foreseeable regulation before the highway plan existed, which would have to be applied.

The minority of the justices agreed that additional compensation should be paid, but not necessarily to the full value in voluntary trading.

Languages:

Norwegian.

Identification: NOR-1977-S-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 29. 01.1977 / **e)** lnr 1/1977 / **f)** Østensjø / **g)** *Norsk Retstidende* (Official Gazette), 1977, 24 / **h)**.

Keywords of the systematic thesaurus:

5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Expropriation, zoning plan / Expropriation, compensation, amount.

Headnotes:

According to a now defunct Act of 26 January 1973, the zoning plan under which expropriation was to be conducted was to be disregarded. An earlier zoning plan, which did not form the basis for expropriation, was binding for the valuation.

When the zoning of an area which is otherwise to be developed prevents certain parts of the area from being built upon, because they have been set aside for streets, squares etc., the subsequent expropriation shall disregard the fact that building has been prohibited upon these parts and shall value them according to a uniform land price – a "neighbourhood price" – both for land where this prohibition applies, and for where it does not.

The situation is different if the zoning plan identifies the areas that are to be built up and the areas which are in general to be used for other purposes and thus left unbuilt. Owners of the areas to be kept in an unbuilt state may not claim compensation on the ground that the areas would have greater economic value if they could be built upon.

Summary:

The case concerned the expropriation of a strip of agricultural land in connection with the broadening of the Østensjø Road in Oslo. The basis for the expropriation was a road regulation of 1969. The expropriated land was part of an area which had been zoned as a park in 1956, and the Superior Valuation Court (High Court dealing with evaluation cases) found that Section 5.3 of the Expropriation Compensation Act did not in such case allow it to take into account the higher value the land would have had if it could be built up. The expropriated land was compensated according to its value for agricultural use, as to NOK 2 per square metre.

Under Section 5.3 of the Expropriation Compensation Act of 26 January 1973, it was a condition for compensation that the use leading to the higher value would have been in accordance with approved zoning plans for the property.

The landowners appealed this part of the valuation, claiming that it was unlawful to deny additional compensation on that ground and that compensation of NOK 2 per square metre was not in accordance with Article 105 of the Constitution which provides a right to full compensation in expropriation.

They also argued that the Supreme Court decision in *Norsk Retstidende*, 1976, page 1 *(Kløfta)* held that in valuing land under Section 5 of the Expropriation Compensation Act, one should disregard the zoning plan which forms the basis for the expropriation.

The Supreme Court, with 5 of 17 justices dissenting, agreed with the Superior Valuation Court.

The majority found that in valuing the area, one should disregard the road zoning in 1969. Compensation could not be calculated according to the area's value as building land. An essential point was that the area had been zoned as a park in 1956 and could consequently not lawfully be built upon. This zoning was still binding for the area apart from modest strips which were used for broadening the road. The 1956 park zoning had to be regarded as an element of the boundaries between areas that were to be built up and areas that were to be kept unbuilt. These boundaries were further explained by the first voting justice in his general remarks on the significance of a zoning plan which determines that certain areas may not be built up.

It was emphasized that the *Kløfta* case concerned expropriation of road land in an area which could have been developed before the road area was zoned. The first voting justice's statements in the

Kløfta case aimed therefore at a quite different situation from the one discussed in the present case.

The result was not in conflict with Article 105 of the Constitution. This was so whether or not Section 5.3 of the Expropriation Compensation Act, to a somewhat greater extent than under earlier expropriation law, excluded compensation for loss of hopes of a change in the applicable restrictions of use. The result in this case was not essentially different under the 1973 Act from the consequences of earlier expropriation law. In this case there had in recent years been no practical possibility of letting the area, which in 1956 had been zoned as a park, be fully or partly built up.

The minority on the other hand stressed the fact that the park zoning was not only a restriction of the owners' right of use, but forced the owners to surrender the area. Therefore, for valuation purposes one should disregard the fact that the area, as a result of the zoning, had been made unbuildable.

Cross-references:

See also decision lnr 18/1976 [NOR-1976-S-001].

Languages:

Norwegian.

Identification: NOR-1984-S-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.10.1984 / **e)** lnr 141/1984 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1984, 1175 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Privacy, invasion / Hospital, detention, compulsory / Detention, preventative.

Headnotes:

A person sentenced to detention in a mental hospital pursuant to Section 39.1 of the Penal Code may invoke the rule of Section 9.a of the Mental Health Act, and on that ground demand judicial review of the enforcement decision, under Chapter 33 of the Civil Procedure Act.

Summary:

A woman appeared persistently outside the home of a childhood friend and refused to leave, leading to her removal by the police. She was charged with invasion of privacy under Section 390.a of the Penal Code, and proceedings were instituted for preventative detention. In connection with these proceedings, she was placed under psychiatric observation. The two appointed experts found her insane, and agreed that there was a risk of repetition of the acts with which she had been charged.

She was sentenced to detention and placed in a mental hospital. While temporarily released in April and May 1983, she paid a further series of visits to her childhood friend. Renewed proceedings were instituted for preventative detention. When the first detention period expired without any decision having been made in the new detention case, the police requested her compulsorily detention in hospital under the Mental Health Act, and she was subsequently hospitalised. On 24 September 1983, she initiated a suit in the City Court under Section 9 of the Act. The detention case was decided on 12 September 1983, the prosecuting authority being authorized to apply detention under Section 39.1.a, b, d and e of the Penal Code for a period of three years.

She appealed the detention judgment, but the appeal was denied. Thereupon it was decided that she was to be placed in a mental hospital pursuant to the judgment.

The government moved for termination of the civil suit before the City Court pursuant to Section 9 of the

Mental Health Act. The government maintained that the enforcement decision that had been adopted pursuant to Section 5 of the Act was no longer relevant after the decision that had been made pursuant to the detention sentence.

Both the City Court and the Court of Appeal upheld the government's views. The woman appealed the decision to the Appeal Selection Committee of the Supreme Court. The Committee allowed the appeal to pass to the Supreme Court. The Supreme Court held that neither the wording nor the history of the Act furnished any direct guidance as to whether the right to have a judicial review pertained also to those who were forcibly placed in a mental hospital pursuant to a detention sentence. The decision would have to be made in accordance with the applicable considerations, including the consideration that Norwegian law should wherever possible be presumed to accord with treaties by which Norway was bound – in this case the European Convention on Human Rights, of 4 December 1950 (ECHR).

As for the material conditions for compulsory detention in hospital under the Mental Health Act, these would also have to apply to anybody placed in a mental hospital pursuant to a detention sentence.

The Supreme Court held that important guarantees of individual legal safeguards called for the right to obtain a judicial review of detention orders, pursuant to the rules of Chapter 33 of the Civil Procedure Act – in line with the right of review provided for other persons forcibly detained. This solution accords with the views applied in the interpretation of Article 5 ECHR. The Supreme Court referred to several decisions by the Court and the Commission, including the judgment of 24 October 1979 *(Winterwerp)*, the judgment of 5 November 1981 *(X v. United Kingdom)*, and the decision of the Commission of 22 April 1983 *(B v. United Kingdom)*.

Languages:

Norwegian.

Slovenia
Constitutional Court

Important decisions

Identification: SLO-1992-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 28.05.1992 / **e)** U-I-130/92 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), I, 39 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
2.2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Headnotes:

In accordance with Article 1.2 of the Enabling Statute for the Implementation of the Constitution of the Republic of Slovenia, the Constitutional Court may until harmonisation with the Constitution or until the expiration of the harmonisation period determine the constitutionality only of those regulations and general acts passed before the proclamation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia that infringe human rights and fundamental freedoms.

Statutory provisions according to which a municipal assembly may allocate the shoreline and the sea for a particular use do not infringe rights that would qualify for evaluation by the Constitutional Court during the harmonisation period indicated in Article 1.1 of the Enabling Statute. The right to a healthy living environment under Article 72 of the Constitution was not considered by the Constitutional Court as a right

which qualified for the purpose. Therefore, the Constitutional Court could not evaluate these statutory provisions during the above-mentioned harmonisation period.

Supplementary information:

Legal norms referred to:

- Article 162.2 of the Constitution;
- Article 1.2 of the Enabling Statute for the implementation of the Constitution of the Republic of Slovenia.

One dissenting opinion.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1993-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 27.05.1993 / **e)** U-I-25/93 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 35/93; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), II, 50 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
4.10.2 **Institutions** – Public finances – Budget.

Keywords of the alphabetical index:

Public official, salary, calculation.

Headnotes:

Locus standi is demonstrated if the impugned legal document affects the applicant's rights, obligations or legal benefits. Since none of the impugned laws determine the salaries of the applicants, or workers whose interests were represented by two trade unions acting as applicants, the procedural precondition determined by the Constitution for commencing proceedings was not fulfilled.

Supplementary information:

Legal norms referred to:

- Articles 2, 14, 162 of the Constitution;
- Article 7 of the Constitutional Law for Implementing the Constitution RS;
- Article 15 of the Law on Proceedings before the Constitutional Court RS.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1993-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 02.12.1993 / **e)** U-I-66/93 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 1/94; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), II, 113 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.4.14 **Constitutional Justice** – Procedure – Costs.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Prisoner, remuneration, exemption from enforcement of statutory maintenance and compensation for damage caused by criminal act.

Headnotes:

A provision of the former federal Enforcement Procedure Act, which remained in force in Slovenia, exempts from convicted persons' property in enforcement proceedings the remuneration of prison inmates, except for claims for statutory maintenance and compensation for damage caused by a criminal act of an inmate. However, this provision is not in conformity with the Constitution insofar as it fails to limit the enforcement of statutory maintenance and compensation for damage caused by a criminal act of an inmate in the same manner as Article 93.1 of the same Act. Furthermore, it fails to equalise claims for

statutory maintenance and similar claims under Article 93.1 of the same Act.

Supplementary information:

Legal norms referred to:

- Articles 50, 54, 34, 21, 161.1 of the Constitution;
- Article 414 of the Constitution of 1974;
- Article 7 of the Constitutional Law on Execution of the Constitution of the Republic of Slovenia;
- Article 25.3.2 of the Constitutional Court SRS Proceedings Act.

In this case the Constitutional Court used a new technique of decision-making: the declaration of unconstitutionality.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1993-S-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.12.1993 / **e)** U-I-96/92 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 4/94; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), II, 118 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
5.3.37.2 **Fundamental Rights** – Civil and political rights – Right to property – Nationalisation.

Keywords of the alphabetical index:

Inheritance, statutory rules / Inheritance, will / Inheritance, testator, intention.

Headnotes:

It was within the margin of appreciation of the legislature to draw up a statutory scheme on succession under which, in cases where provisions of a will were made before the Resolution on Denationalisation was issued, these testamentory provisions would have legal effect in relation to denationalised property only if this was expressly cited in the will. In view of the legal position in a case of the return of property nationalised in previous decades, the legislature were under a duty to resolve the issue of inheritance. Giving priority to the statutory rules on succession over testamentory provisions in these actual and legal circumstances did not violate the constitutional right to private property and inheritance.

Supplementary information:

Legal norms referred to:

- Articles 33, 67, 161.1 of the Constitution;
- Article 7 of the Constitutional Law for Implementing the Constitution RS;
- Article 25.3.2 of the Constitutional Court SRS Proceedings Act.

Negative separate opinion of a judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1995-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 13.04.1995 / **e)** Up-32/94 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IV, 38 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
5.3.34.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.

Keywords of the alphabetical index:

Right to property / Temporary injunction in constitutional complaint proceedings / Right of privacy / Possession, protection for the benefit of heirs / Exhaustion of remedies.

Headnotes:

It is possible to lodge a constitutional complaint against a court order making an interlocutory ruling in a lawsuit relating to interference with proprietorial rights, where other available remedies have been exhausted.

Petitioning the public prosecutor to request the protection of legality is not a condition required to be fulfilled to be able to lodge a constitutional complaint against a judicial decision.

A court decision that stated, on the basis of Article 73 of the Act on Basic Relations under Property Law, that one of the heirs had been granted the right of possession of the testator's house (when the testator still lived in the house with his wife), violated the rights of the testator under Article 35 (protection of privacy) and Article 36 (inviolability of dwellings) of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 15, 125, 153, 156, 35, 37, 38, 36 of the Constitution;
- Article 8.2 ECHR.

Dissenting opinions of judges of the Constitutional Court.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1995-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25.05.1995 / **e)** U-I-320/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 37/95; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IV, 49 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
5.3.37.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Mandatory exclusion of cultural monuments and natural sites from the programme of company ownership transformation / *Ultra vires*.

Headnotes:

Certain decrees, which provide for the mandatory exclusion of cultural monuments and natural sites from the lists of company property falling within the scope of privatisation programmes, are null and void *ab initio*, as they were not in conformity wit the statutory provisions under which they were issued *(ultra vires)* and were in breach of the principle of the rule of law.

Supplementary information:

Legal norms referred to:

- Articles 120, 153.3, 2 of the Constitution;
- Article 51 of the Natural and Cultural Heritage Act;
- Article 2 of the Companies Ownership Transformation Act;
- Articles 26, 45 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1995-S-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 20.11.1995 / **e)** U-I-266/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 69/95; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IV, 116 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.
3.10 **General Principles** – Certainty of the law.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.

5.3.8 **Fundamental Rights** – Civil and political rights – Right to a nationality.
5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Referendum, legislative / Citizenship, acquisition, conditions / Citizenship, divesting.

Headnotes:

The Constitutional Court has jurisdiction, in accordance with Article 16 of the Referendum and Popular Initiative Act, to decide at the request of the National Assembly for constitutional review of the content of a request for holding a legislative referendum, which has already reached the stage of collecting signatures in support of such a request.

The content of the request for holding a legislative referendum, according to which citizenship of the Republic of Slovenia should be taken away from all persons having obtained it on the basis of Article 40 of Citizenship of the Republic of Slovenia Act, is in conflict with the Constitution because revocation of individual administrative acts by which citizenship has been acquired would signify an encroachment upon the constitutional right to personal dignity and safety (Article 34 of the Constitution), upon the protection of the right to privacy and of personal rights (Article 35 of the Constitution) and would signify violation of the principle of legal security and confidence in the law (Article 2 of the Constitution).

Supplementary information:

Legal norms referred to:

- Articles 2, 160, 34, 35 of the Constitution;
- Articles 16, 12, 13, 14 of the Referendum and Popular Initiative Act.

Partially dissenting/concurring opinion of a judge of the Constitutional Court.
Concurring opinion of a judge of the Constitutional Court.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 29.02.1996 / **e)** Up-102/94 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V, 59 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Inheritance, probate proceedings.

Headnotes:

An interim Code of 1953, which had been passed at the time when the provisions of the Civil Procedure of 13 July 1929 were in force, and without the request for an interim declaratory decision, had the effects of a final decision only with regard to the claim on the grounds of which the judgment had been passed. This is why it is binding upon the parties involved and the courts only within these limits, and the effect of its finality cannot be wider than at the time of its passing.

The Constitutional Court did not review the constitutionality and legality of the interim judgment of 1953. Nor did it refuse its finality, but, having regard to the legislation then in force, which had allowed such an interim judgment, and to the manner in which it was passed, it could not have effects beyond the limits of express requests and proposals of parties in the civil proceedings.

The Constitutional Court repealed the disputed decisions as it found that the complainant's basic constitutional right to inherit property, as granted by Article 33 of the Constitution, was violated.

In a retrial, the court of first instance shall have to carry out a new probate procedure in accordance with the provision of Article 74 of the Denationalisation Act, and will not be bound by the interim judgment of 1953.

Supplementary information:

Legal norms referred to:

- Articles 54, 33 of the Constitution;
- Article 774 of the General Civil Code (ODZ);
- Article 333 of the Civil Proceedings Act (CPP);
- Articles 74, 81, 4, 83 of the Denationalisation Act (ZDen);
- Article 59.1 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.03.1996 / **e)** Up-134/95 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V, 62 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Judge, appointment, conditions, fulfilment / Fundamental rights, protection, administrative proceedings / Effective remedy.

Headnotes:

Under the provision of Article 49.3 of the Constitution (freedom of work), according to which there shall be no unjust discrimination in work opportunities available to each person, the statutory regulation of the appointment to judicial office and, consequently, the decision of the competent body in each particular case shall be such as will ensure that the office will be available to any candidate under equal conditions, and in this connection the legislator is bound directly by the Constitution, and the decision-making bodies envisaged under the Constitution and under statute.

The decision of the Judicial Council not to propose the sole candidate who fulfilled the conditions prescribed by the statute to be appointed to judicial office by the National Assembly, is a decision concerning the right of an individual person referred to in Article 49.3 of the Constitution.

The Constitution does not grant to a candidate a prior right to be proposed for the appointment to the office by the Judicial Council, but it does ensure that the office will be accessible to him/her under equal conditions as apply to all other candidates, which means that it is only the decision of a competent body envisaged under the statute which ensures the realisation of the constitutional right of an individual candidate.

In an administrative lawsuit, which is a means of ensuring legality, the court should not enter into the appropriateness of that part of decision-making by the Judicial Council which falls within the discretion of the Council, but it must (in addition to correctness in the application of substantive and procedural law) evaluate whether the purpose and scope of the discretionary power have been exceeded. This still falls within the framework of the review of legality, in accordance with the provision of Article 10 of the Administrative Lawsuit Act, and in line with *mutatis mutandis* application of Article 4 of the General Administrative Procedure Act as dictated by the nature of the decision-making with reference to the appointment procedure.

The right to judicial protection of the allegedly violated rights, which, in connection with the administrative and other matters referred to in Article 157 of the Constitution, is restricted to the review of legal validity of a disputed individual act, is not ensured solely by the fact that, in accordance with the statute and in the concrete case, it is possible to file an application to use the relevant legal remedy, if in the process of consideration of such a legal remedy the court should not decide on controversial matters being the object of judicial protection. By the fact that the court did not decide on the legal validity of the disputed decision of the Judicial Council, the complainant's right to the due process of law, arising from Article 23 of the Constitution read in conjunction with Article 157 of the Constitution, was violated.

While bound by the statute to observe the criteria of Article 29 of the Judicial Office Act, the Judicial Council is autonomous in evaluating who among the several candidates best satisfies the said criteria, and such a

candidate is then proposed to the National Assembly for appointment to judicial office, or is appointed to the announced post of a judge by the Council itself, on the basis of Article 25 of the Judicial Office Act.

According to the provision of Article 18.2, the Judicial Council is not bound by the evaluation of suitability on the part of a staffing council (that is, by the opinion or evaluation referred to in Articles 16 and 17 of the Judicial Office Act) but is – according to the applicable statutory regulation – bound by the evaluation of judicial service of the competent staffing council referred to in Article 35 and Article 104 of the Judicial Office Act on whether a judge satisfies the requirements specified for the office of a judge (or promotion within the judiciary), or not.

In accordance with the provisions of Article 28 of the Judicial Office Act, the Judicial Council is, in selecting candidates, expressly bound by the criteria mentioned in Article 29 of the Judicial Office Act. The decision of the Judicial Council to select one from among several candidates is not a decision which would not be at all bound by the statute (as is the case with the subsequent decision of the National Assembly on whether or not to appoint the proposed candidate to judicial office) but is a discretionary decision in which the state body concerned must act "within the limits of its authority and in accordance with the purpose for which that authority has been given to it" (Article 4 of the Administrative Procedure Act).

The nature of the decision of the Judicial Council in connection with Article 157 of the Constitution demands that the decision of the Judicial Council be substantiated. Failure to provide the reasons for such a decision is a violation of the constitutional right to legal remedies granted in Article 25 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 49, 15, 129, 130, 23, 157, 22, 25 of the Constitution;
- Article 10 of the Administrative Lawsuits Act (ZUS);
- Article 4 of the Administrative Procedure Act (ZUP);
- Articles 7, 8, 9, 10, 11, 12, 15, 19, 31, 32, 33, 34, 35, 36, 104, 16, 17, 18, 28, 29, 22, 49 of the Judicial Office Act (ZSS);
- Article 8 of the Universal Declaration of Human Rights;
- Article 13 ECHR;
- Articles 59.1, 59.2, 30, 40.2 of the Constitutional Court Act (ZUstS).

Concurring opinion of a judge of the Constitutional Court.

Dissenting opinion of a judge of the Constitutional Court.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.04.1996 / **e)** U-I-332/94 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V, 42 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.

Keywords of the alphabetical index:

Headnotes:

Provisions of the nature of norms of constitutional law did not fall within the jurisdiction of the Constitutional Court under Article 160 of the Constitution and Article 21 of the Constitutional Court Act. The provisions of the Enabling Statute on Amendments and Supplements to the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia were of such a nature. An application for review of the constitutionality of certain of these provisions was therefore not admissible.

Supplementary information:

Legal norms referred to:

- Articles 174, 160 of the Constitution;
- Articles 21, 25 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.04.1996 / **e)** U-I-18/93 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 25/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V, 40 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
4.7.3 **Institutions** – Judicial bodies – Decisions.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.
5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
5.3.13.11 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to be informed about the decision.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
5.3.13.25 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to be informed about the reasons of detention.

Keywords of the alphabetical index:

Detention, compulsory / Detention, reasons / Burden of proof / Danger to society / Constitutional review, identical provisions of old and new law.

Headnotes:

A statutory provision which demands compulsory detention for cases where it is probable that a criminal offence has been committed for which a penalty of more than twenty years' imprisonment is prescribed, unless justifiable reasons exist, is contrary to the constitutional requirement of a specific court decision on detention (Article 20.1 of the Constitution). It is also contrary to the right to a legal remedy (Article 25 of the Constitution) as it does not define what such justifiable reasons are, and contrary to the presumption of innocence (Article 27 of the Constitution) because it transfers the burden of proving that there are no reasons for detention onto the defendant.

A statutory provision according to which a court may order the detention of a person who has been sentenced to five or more years' imprisonment is contrary to the constitutional demand for a specific court decision on detention (Article 20.1 of the Constitution).

A statutory provision that is insufficiently clear in its definition of criminal offences that satisfy the constitutional requirement of presenting a danger to society, in which the test of danger is based only on the duration of the sentence and on no other criteria, and does not require that the court establish the real dangers of repeating the same criminal offence, is contrary to the Constitution (Article 20.1 of the Constitution).

A statutory regulation that envisages, for the protection of society, only the punishment of detention, which is the most serious interference with the personal freedom of an individual, and does not provide any alternative, more moderate preventive measures which would still ensure the protection of society, is contrary to the Constitution.

A statutory regulation is contrary to the Constitution if, in the procedure to decide on a detention order, or the extension or lifting of detention, it does not provide the affected person with the opportunity to learn the facts and evidence against him and does not prescribe a separate obligatory hearing for the decision on the existence of the conditions for detention, which would provide the affected person with an opportunity to be heard, answer the facts against him and submit evidence supporting his claims.

A statutory provision requiring the court to state only briefly the reason for the decision to put someone in detention, which must separately explain the reason for detention, is contrary to the Constitution. The Constitution demands a decision of the court which explains each significant point in a specific manner in order to enable an evaluation of whether each of the conditions for detention has been satisfied (Articles 20.2 and 25 of the Constitution).

As the contested provision of the statute ceased to apply during the proceedings, and since in the applicant's case the court had already passed a final decision on an issue regulated by the contested provision, and since the content of the provision of the new statute is identical to the provision of the previous statute, the Constitutional Court did not review the

constitutionality of the provision of the old law in the disposition, but only referred to the reason it gave for the identical provision in the new law.

The applicant cannot be said to have *locus standi* merely by stating that the statute could be applied to him as a citizen of the Republic of Slovenia.

By stating that the decision to place him in detention and to extend his detention was made on the basis of the contested legal provision, the applicant has *locus standi* for that part of the provision which regulates the reason for which he was detained, but not for the part of the provision that regulates other reasons for detention.

Supplementary information:

Legal norms referred to:

- Articles 20, 27, 2, 23, 19, 22, 25, 29, 17, 18, 28, 34 of the Constitution;
- Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL);
- Article 5.3 ECHR;
- Articles 5.3, 47, 24, 26, 30, 43, 48 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15.05.1996 / **e)** U-I-271/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 27/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V, 82 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.3 **General Principles** – Democracy.
3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
4.10.6 **Institutions** – Public finances – Auditing bodies.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
4.13 **Institutions** – Independent administrative authorities.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Temporary injunction / Constitutional Court, decision, execution, method / Bank, payment on behalf of legal entity / Court of Audit.

Headnotes:

1. The provisions of the Agency of the Republic of Slovenia for Payments, Supervision and Information (Amendments and Supplements) Act (ZAPPNI-A) are not inconsistent with the Constitution. The Act establishes an agency for the purpose of auditing the process of privatisation as an autonomous and independent entity under public law with a position as such an auditing body should have in accordance with the decision of the Constitutional Court U-I-158/94 of 9 March 1995.

2. The provisions of the ZAPPNI-A which ensure for employees of APPNI employment and the continued discharge of the same tasks in the state body in the field of activities into the competence of which the discharge of such tasks has been transferred do not interfere with the employees' right to freedom of work and free choice of employment granted under Article 49 of the Constitution.

3. The provisions of the ZAPPNI-A, which state that the Auditing Agency shall have its Council as a special management body but will in other respects be autonomous and independent, are not in conflict with the principles of a state governed by the rule of law (Article 2 of the Constitution). The disputed provisions concerning the Council do not make such control and influence of the legislative or executive branch over the Auditing Agency possible, as this would not be admissible under the Constitution.

4. The principles of a state governed by the rule of law demand that the powers of a state body be clearly defined and that proportionality between the adopted statutory solutions and the intent of the law be taken into consideration. A statute is in conformity with the

Constitution when it is possible to determine the subject matter of such a statute on the basis of linguistic interpretation and teleological construction, so that the conduct of the bodies - whose obligation it is to implement the statute - is in this way determined. The modification of the provision relating to the powers of the APPNI is in conformity with these principles where - while ensuring control over the disposal of state-owned property – it allows the interpretation according to which the control of all legal entities incorporating state-owned capital falls within the competence of the Auditing Agency, and not just the control of those subject to the privatisation process in accordance with the ZLPP.

5. The provision of the ZAPPNI-A that allows banks (under conditions equal to those applicable to all other banking operations, and under conditions equal to those applicable to the APPNI) to perform payment operations on behalf of legal entities within the country, is not contrary to the principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of separation of powers (Article 3 of the Constitution).

6. It is not contrary to Article 153 of the Constitution that a provision of the ZAPPNI-A empowers the Bank of Slovenia and the Minister of Finance, each within their own field of competencies as defined by statutes, to determine the sequence and method of transfer of the tasks relating to the payment operations between legal entities within the country to banks, and concerning the issuance of licences for banks to carry out such operations. However, it will only be possible to review the conformity of their general and individual acts with the Constitution and statutes when such acts are issued.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 150, 151, 49 of the Constitution;
- Articles 2, 15 of the Banks and Savings Banks Act (ZBH);
- Articles 22, 23 of the Foreign Exchange Transactions Act (ZDP);
- Article 9 of the Administration Act (ZUpr);
- Article 5 of the Organisation and Field of Activities of the Ministries Act (ZODPM);
- Article 20 of the Companies Ownership Transformation Act (ZLPP);
- Articles 55, 56 of the Employees in State Bodies Act (ZDDO);
- Article 5 of the Court of Auditors Act (ZRacS);
- Articles 29, 30, 31, 32, 33, 34, 35, 36.i, 100 of the Labour Relations Act (ZDR);
- Articles 21, 40.2 of the Constitutional Court Act (ZUstS).

Concurring opinion of a judge of the Constitutional Court.
Dissenting opinion of a judge of the Constitutional Court.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 20.06.1996 / **e)** U-I-184/96 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V,184 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.

Keywords of the alphabetical index:

Headnotes:

The Constitutional Court rejected an application proposing that it institute proceedings for review of the constitutionality of certain provisions. The Court ruled that, according to Article 160 of the Constitution and Article 21 of the Constitutional Court Act, the application fell outside its jurisdiction, as the challenged provisions of the Enabling Statute for the Implementation of the Basic Charter on Autonomy and Independence of the Republic of Slovenia were constitutional both in form and as to the contents.

Supplementary information:

Legal norms referred to:

- Article 160 of the Constitution;
- Articles 21, 25 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.07.1996 / **e)** U-I-98/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 44/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V, 118 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.
4.8.8.5 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – International relations.

Keywords of the alphabetical index:

Headnotes:

Statutory provisions which in an unclear and equivocal manner regulate the taking over by the state of powers from local authorities are inconsistent with the principles of a state governed by the rule of law.

The transfer of administrative tasks, representing the execution of regulations within the competence of state organs, to administrative units is not inconsistent with Article 140.1 of the Constitution. However, what is inconsistent with this constitutional provision is the state's taking over of those administrative tasks which are regulated by local authorities.

The transfer of administrative tasks in the sphere of planning (issuing of planning permits) to state organs constitutes an interference with the constitutionally protected nucleus of local self-government, yet this interference is not constitutionally inadmissible for it is based on the protection of other constitutional values - principles of a state governed by the rule of law (legal certainty and legality).

Supplementary information:

Legal norms referred to:

- Articles 120, 140, 141, 70, 2, 9, 33, 69 of the Constitution;
- Article 5 of the Enabling Statute for the Implementation of the Constitution (UZIU);
- Article 70 of the Waters Act (ZV);
- Articles 4, 15, 16, 17, 19, 21, 67, 81, 95, 113, 117, 118, 129, 131, 29, 12 of the Agricultural Lands Act (ZKZ);
- Article 10 of the Matrimony and Family Relations Act (ZZZDR);
- Article 67 of the Urban Planning Act (ZUN);
- Articles 101, 57 of the Administration Act (ZUpr);
- Articles 60, 64, 69, 85, 86, 90, 94, 109, 8, 33, 55, 75, 9 of the Road Traffic Safety Act (ZVCP);
- Article 35 of the Construction of Buildings Act (ZGO);
- Article 17 of the Expropriation and Coercive Transformation of Real Estate into Social Property Act (ZRPPN);
- Articles 18, 19, 21, 26, 28, 29, 37, 38, 45, 47, 50 of the Natural and Cultural Heritage Act (ZNKD);
- Articles 21, 30, 43, 48 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a Constitutional Court judge.
Concurring opinion of a Constitutional Court judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1996-S-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 24.10.1996 / **e)** U-I-103/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 64/96; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), V, 136 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
2.2.1.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and other domestic legal instruments.

5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

International conventions, *lex derogat legi priori* / Criminal procedure, juvenile.

Headnotes:

The United Nations Convention on the Rights of the Child ("the Convention") is a more recent and specific international act than the International Covenant on Civil and Political Rights ("the Covenant"). In compliance with general rules of interpretation that later regulations abrogate earlier ones, and that more recent specific regulations abrogate older, general regulations, the Constitutional Court decided that it is necessary to review the compliance of the challenged provisions of the Code of Criminal Procedure (ZKP) with the Convention as the more recent and specific international act.

Since the challenged provisions of the Code of Criminal Procedure can be interpreted and used only in the framework of a procedure against juveniles, the Constitutional Court found that they are not in conflict with Article 37.c of the Convention. From the overall criminal law arrangement of the position of juveniles in criminal proceedings, it undoubtedly follows that in procedures involving juveniles, all bodies are bound to respect the young person's emotional development, sensitivity and personality, to the highest extent possible, in order to ensure that the criminal proceedings do not have a detrimental effect on their development (Article 453.2 of the Code of Criminal Proceure).

On the basis of Article 8 of the Constitution, ratified and promulgated international agreements shall be applied directly, which means that a judge in a juvenile court is bound to respect the provisions of Article 37.c of the Convention directly, even if its provisions have not been incorporated in internal law, that is in the Code of Criminal Procedure. Such a judge, on the basis of the challenged provisions of the Code and the cited provisions of the Convention, may only exceptionally order the detention of a juvenile in an adult prison, and only on the condition that the detention is exclusively in the interest and to the benefit of the juvenile.

Supplementary information:

Legal norms referred to:

- Articles 8, 153 and 160 of the Constitution;
- Article 63 of the Foreign Affairs Act (ZZZ);
- Article 10 of the International Covenant on Civil and Political Rights;
- Articles 23, 24, 2, 1, 37 of the United Nations Convention on the Rights of Children;
- Articles 71,72, 73 of the Penal Code (KZ);
- Articles 451, 453, 472, 471 of the Criminal Procedure Act (ZKP);
- Articles 21, 22 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a constitutional judge.

Languages:

Slovenian, English (translation by the Court).

*SLO-1997-S-001 (à part)

Identification: SLO-1997-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.06.1997 / **e)** Up-20/93 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VI, 181, / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Right of reply to published information, limitation / Right to a retraction / International agreement, direct application / Freedom of expression, limitation, due to employment contract.

Headnotes:

The disputed verdict did not violate the complainant's constitutional right of reply under Article 40 of the Constitution by invoking in its support the provision of Article 73 of the then applicable Public Information Activities Act, which provided that mass media had to publish replies to published information where such replies essentially complement the facts and data from the published information.

The constitutional right of reply under Article 40 of the Constitution cannot be directly exercised in the manner expressed in Article 15.1 of the Constitution. The right of reply to published information is a case where the particular nature of the right is all-important, and because the content of the right has not been developed sufficiently well in the Constitution itself, it is crucial that the manner of exercising the right is regulated by statute. Without such regulation, it would be difficult to exercise this right - and in the case of such a gap in the law it would become necessary for law to be created by way of jurisprudence, in the process of solving concrete instances of controversial cases.

From the text of Article 40 of the Constitution it is possible to determine roughly the content and scope of the right of reply to published information. This, then, is not a case of a right which is only designated as such in the Constitution, while its content has remained completely undefined, so that it would only be possible for its scope and framework to be determined by statute. If that were the case, it would even be possible, prior to the formulation of the content of the right, to speak about interference with that right - for its scope and "area of protection" would still be unknown.

In the case of the constitutional right of reply to published information, it is possible, by taking into consideration the manner and circumstances relating to the coming into being of this provision, to conclude that this right necessarily in itself comprises - in addition to the notion of a right to “reply to published information” - a conceptual delimitation with respect to the right to correction. The condition for exercising this latter right is that damage must have been caused to personal and private interests. However, this is not a condition for one to be able to exercise the right of reply, which has been granted to individuals with a view to protecting public rather than personal interests (e.g., it must be a case of giving the public objective, true and unprejudiced information).

The following question was put to the court: would it be possible to consider, under the conditions specified in Article 15.3 of the Constitution, statutory regulation of this right to break the above strict delimitation between the right to correction and the right of reply? It would be admissible for all the other elements of this right to be subject to statutory regulation, which would for example specify when and under what conditions an individual has the said right of reply, and this would be evaluated in accordance with somewhat milder criteria of Article 2 rather than the more rigorous criteria of Article 15.3 of the Constitution. In the present case, it was not necessary to give a final answer to this difficult and complicated question, for the disputed statutory arrangement satisfies also the more rigorous criteria of evaluation under Article 15.3 of the Constitution.

Supplementary information:

Legal norms referred to:

- Article 209 of the Constitution of the 1974;
- Articles 8, 15, 39, 40, 160 of the Constitution;
- Article 1 of the Enabling Statute for the Implementation of the Constitution (UZIU);
- Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL);
- Articles 9, 32, 30, 33, 35, 36, 37 of the Mass Media Act (ZJG);
- Articles 11, 33, 42, 43, 72 to 77 of the Public Information Activities Act (ZJO);
- Articles 25, 35, 39 of the Public Information System Bases Act (ZTSJO);
- Article 10 of the European Convention on Human Rights and Fundamental Freedoms (EK_P);
- Article 59.1 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1997-S-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.06.1997 / **e)** Up-143/97 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VI/2, 179 / **h)**.

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.

4.7.13 **Institutions** – Judicial bodies – Other courts.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Defence counsel, official / Defence, effective / Criminal law, murder / Juvenile court / Offender, juvenile.

Headnotes:

Since no defence lawyer was allocated to a juvenile at a preliminary hearing before a judge in the juvenile court, the right of the juvenile to be defended by a legal representative under Article 29.2 of the Constitution was violated. The record of the preliminary hearing shall be excluded from the file.

Summary:

The Supreme Court rejected the request for the protection of legality filed by the complainant through his counsel against the final order of the Circuit Court in Murska Sobota, in reference to the criminal proceedings conducted against the juvenile complainant for murder under Article 127.1 of the Criminal Code of the Republic of Slovenia (KZ), by which the request of the complainant's counsel was rejected. The request concerned the exclusion of the record of the complainant's hearing on 7 July 1996 as a juvenile defendant. In all three decisions, the courts took the position that there were no reasons for the requested exclusion of the record, because no constitutional or statutory rights of the juvenile were violated at the time of the hearing. In particular, they point out that, prior to the hearing, the juvenile had been informed that he could appoint a legal counsel, but he expressly stated that he would defend himself; that the preparatory proceeding did not start on 5 July 1996, for the request for such proceeding was only made on 8 July 1996; that the situation was not one referred to in Article 70.1 of the Code of Criminal Procedure (ZKP), and that, consequently, defence by counsel on the occasion of a preliminary hearing was not obligatory under Article 454.2 of the Code.

The complainant maintained otherwise: as the assigning of counsel at the time of the preliminary hearing was merely offered to him as a possibility, and since counsel was not assigned to him *ex officio* in the sense of mandatory defence, both the Code of Criminal Procedure and Article 29 of the Constitution were in his view violated, and this is a condition specified by statute for excluding the record concerning a hearing as evidence in subsequent criminal proceedings.

The Court annulled the judgment and returned the case to the court of first instance for retrial. It held that according to the provision of Article 29.2 of the Constitution (legal guarantees in criminal proceedings), any person charged with a criminal offence must be afforded absolute equality regarding the right to conduct his own defence or to be defended by a legal representative. The Constitution makes not only the right to conduct one's own defence but the right to be defended by a legal representative a fundamental constitutional right, and makes professional assistance, such as can only be provided by a legal representative, one of the guarantees granted to a defendant in criminal proceedings with a view to ensuring his enjoyment of other constitutional rights, and especially the right to fair trial by impartial courts.

The constitutional right to a substantive and formal defence as a fundamental right of the defendant is summed up in Article 12 of the Code of Criminal Procedure as being among the fundamental principles of criminal proceedings. The refusal of a substantive and formal defence constitutes a relative violation of the provisions of criminal proceedings, and in some cases even an absolute violation, while in certain instances which are specified by statute it is expressly provided that the judgment may not be based on such evidence, which has been obtained in a manner that disregards the rights of the defence stipulated by statute. One such instance is the hearing of a defendant without a counsel where the need for a formal defence is obligatory under a statute: if any action has been taken in violation of the provisions which prescribe such a defence, a court decision cannot be based on the testimony of the defendant (Article 227.10 of the Code of Criminal Procedure).

The exercising of the constitutional right to a formal defence, that is, to a defence provided by a qualified counsel, is mainly regulated in Chapter VI of Part I of the Code (General provisions), concerning legal counsel. A formal defence may be optional or obligatory.

An obligatory formal defence *ab initio* – from the time of the preliminary hearing – is prescribed in Article 70.1 of the Code, which specifies the situations in which a counsel must have already been appointed at the preliminary hearing, despite the fact

that criminal proceedings have not yet formally started: a formal defence is obligatory if the defendant is deaf, mute or otherwise incapable of defending himself effectively, or if criminal proceedings are conducted against him for an offence for which a penalty of 20 years' imprisonment is prescribed by statute. An obligatory formal defence in the case of ordering pre-trial detention and of serving indictments for major criminal offences is prescribed in paragraphs 3 and 4 of the same Article.

The matter of formal defence in proceedings against a juvenile is regulated by special provisions of Article 454 of the Code. According to these provisions, an optional formal defence is possible from the beginning of preparatory proceedings. A formal defence, however, is obligatory from the beginning of preparatory proceedings if these proceedings relate to a criminal offence for which the prescribed penalty is more than three years' imprisonment, and for other criminal offences, if the judge should find that the juvenile needs such a defence. This arrangement extends the right to an obligatory defence in the case of juveniles. It is clear, due to juveniles' mental and social immaturity and lack of development, that juveniles may require a legal counsel even if they are not deaf, mute or unwell. Also involved are other, special characteristics and circumstances (degree of maturity, general level of knowledge and the related assessment of the criminal offence, and the scope and complexity of the proceedings), which show that representation is necessary. This is why the judge can come to the conclusion that counsel is necessary at any stage of the proceedings against a juvenile.

In the present case, the juvenile complainant was informed of the possibility of an optional formal defence at the time of preliminary hearing, which was conducted when the juvenile was brought before the judge of the juvenile court. This was before the preparatory proceedings were instituted, and even before the prosecutor requested that proceedings be instituted at all. It is not disputed that the complainant rejected the offer of defence by a legal counsel or of the presence of a counsel at the time of preliminary hearing. What is controversial is whether, as a juvenile, he should have been provided with an obligatory formal defence at the time of the preliminary hearing, bearing in mind that he had been subjected to questioning and suspected of committing a criminal offence which carries a maximum penalty of not less than five years' imprisonment (Article 127.1 of the Criminal Code). Moreover, an obligatory defence from the beginning of the preparatory proceedings is prescribed in such circumstances.

The Constitutional Court considered that the judge of the juvenile court should have assigned a counsel to the juvenile complainant on the occasion of preliminary hearing. In deciding on whether to provide the complainant with an obligatory defence in the sense of Article 454 of the Code of Criminal Procedure, the juvenile court should have taken into consideration in particular the special position held by juveniles in the proceedings because of specific personal characteristics, and should have ordered an obligatory defence *ratio legis*, since this is founded on constitutional demands. Article 454.2 of the Code of Criminal Procedure prescribes as obligatory the assigning of counsel to a juvenile at the beginning of preparatory proceedings, that is, from the beginning of any formal action on the part of the court in response to a request by the prosecutor that proceedings be initiated, in the case of major criminal offences. This obligation even covers the instant case of murder, one of the most serious criminal offences of all. The juvenile should have been deemed – because of his youth and personal characteristics connected with youth and immaturity – to have been unable to defend himself effectively. Since, in accordance with Article 70.1 of the Code of Criminal Procedure, a defendant must have counsel at a preliminary hearing if he is incapable of defending himself effectively, the juvenile court would have been obliged in the instant case to assign a counsel to the juvenile complainant at the preliminary hearing, regardless of the fact that preparatory proceeding had not yet been formally initiated. The inability to defend oneself is, in accordance with the Code, rightly one of the basic criteria for setting up an obligatory defence by legal counsel, since if the defendant – in the instant case a juvenile person – is not provided with professional assistance, his right to a defence in criminal proceedings, as guaranteed not only by statute but also by the Constitution, would remain at a merely declarative level.

The Constitutional Court therefore concluded that by failing to assign legal counsel to the complainant at the preliminary hearing, the juvenile court violated his right to be defended by a legal representative guaranteed by Article 29.2 of the Constitution. Since it was necessary to repeat the proceedings in order to eliminate the consequences of the violation of the Constitution, the Constitutional Court annulled all three decisions and returned the case to the court of first instance for retrial.

Supplementary information:

Legal norms referred to:

- Article 29 of the Constitution;

- Articles 12, 70, 227 to 233, 454 and 468 to 477 of the Code of Criminal Procedure (ZKP);
- Article 127 of the Criminal Code (KZ);
- Article 40 of the UN Convention on the Rights of the Child;
- Article 59.1 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its case no. U-I-103/95 (OdlUs V, 136) of 24.10.1996.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1997-S-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.07.1997 / **e)** Up-106/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), 66/2000; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VI/2, 185 / **h)**.

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Motor vehicle, seizure, security.

Headnotes:

Since the competent bodies did not assess whether there was a statutory basis for the confiscation of the vehicle of a third person, who is not the perpetrator of an offence, and – in the absence of these conditions – who is the owner of the vehicle that is said to have been confiscated, there was a violation of the complainant's right to private property (Article 33 of the Constitution).

Summary:

By the impugned decisions, the appellant was found liable for a violation under point 6 of the first paragraph of Article 68 of the Sales Tax Act (ZPD). On 5 August 1993, he was said to have negligently used ultra-light heating oil as fuel for his motor vehicle.

The appellant argued that the alleged violation could not be committed through negligence. The intention of the law was supposed to be the protection of tax interests. Avoiding tax obligations was claimed to be possible only with intent (with malice aforethought in order to avoid payment of tax). The possibility of guilt through negligence should, according to the appellant, have been excluded by the statutory provision that defines the offence. The provision was in fact said to require gross intent. The word “intent” can only be interpreted in connection with the mental attitude of the perpetrator to the act. It was alleged that the Supreme Court had not considered these points in relation to the appellant. Violation was thus claimed of his right to judicial review (Article 23 of the Constitution). The impugned decisions were claimed not to have cited the statutory or regulatory act from which the alleged duty of the appellant to prevent his extra-marital partner from putting such fuel in the fuel tank could have been derived. Violation was thus claimed of Articles 2 and 22 of the Constitution. The appellant claimed that there was no assessment in the decisions of the appellant's claims that he did not know that he had fuel oil in the tank, and that it was in fact a mistake. It was argued that the notion of objective responsibility should be introduced in the decisions.

It was further argued that the Sales Tax Act did not provide that the punitive measure of confiscation of a motor vehicle was mandatory; the measure was claimed to represent a disproportionate sanction, which it was claimed would have meant the financial ruin of the appellant and his family; the bodies that decided in the procedure did not consider whether the disproportionality of the measure could be the subject of their judgment. The bodies that tried the offence were claimed not to have established the circumstances in relation to ownership of the vehicle; it was claimed that the vehicle was not the property of the appellant, but of a third person.

Annulling the challenged judgments, the Court took into consideration the complainant's argument as to

the ownership of the seized vehicle. It found that the complainant's reproach concerning the need to establish the circumstances in relation to the ownership of the confiscated vehicle was well founded. The complainant stated this claim in appeal against the decision of first instance; according to his statements in the appeal and in the constitutional complaint, he drew attention to the fact that he was not the owner of the confiscated cargo vehicle in the proceeding before the court of first instance. The court of second instance, which decided on the appeal, rejected the complainant's reproach, on the grounds that confiscation of the cargo vehicle is mandatory under the third paragraph of Article 68. It referred in this to the same standpoint of the Supreme Court, taken in the same case.

The complainant also had a legal interest in the appropriate forum in proceedings concerning a violation establishing who is the owner of assets that are to be confiscated. An owner of confiscated objects, who is not at the same time the perpetrator of an offence, is entitled to compensation (Article 37.2 of the Violations Act). It was unnecessary for the Constitutional Court to go into a judgment of whether it was permissible in the case under consideration to confiscate the cargo vehicle of a third person and – if the answer to the first question was negative – whether the applicant, in drawing to the attention of the appropriate court that the owner of the confiscated vehicle was a third person, did everything necessary to be relieved of liability for damages.

A decision on the confiscation of assets is an encroachment on constitutionally guaranteed ownership (Article 33 of the Constitution). Encroachment is thus permissible only under conditions determined by the Constitution. The Constitution allows confiscation of property in order to protect the rights of others (Article 15.3 of the Constitution) and under conditions determined in Articles 67 and 69 of the Constitution (concerning ownership and confiscation respectively). In both the last two cases confiscation of property can only be based on an explicit statutory provision. There is not such a statutory basis in the Sales Tax Act for the confiscation of a cargo vehicle of a person found responsible for an offence. The Act does not provide that the motor vehicle shall be confiscated irrespective of whether the owner is responsible for the offence. The only statutory provision which could provide a statutory basis in the case under consideration for the confiscation of a cargo vehicle of a third person and not the perpetrator is thus the provision Article 37.2 of the Violations Act. Under this provision, assets may be confiscated from a third person who is not the perpetrator of an offence only if this is required for general safety, protection of human life and health, security of trade or reasons of public morality. The appropriate court must thus judge whether the conditions are provided for the confiscation of a cargo vehicle of a third person who is not the perpetrator of an offence and – if there are not these conditions – who is the owner of the cargo vehicle that is supposed to be confiscated. Because of a mistaken interpretation of the law, the complainant's right to private property under Article 33 of the Constitution was violated.

On the basis of this reasoning, the Constitutional Court annulled the impugned decisions and returned the case for a new decision by the body of first instance (Article 59.1 of the Constitutional Court Act). In the new proceedings, the court will have to decide whether reasons are given for the confiscation of a cargo vehicle of a person who is not the perpetrator of an offence (Article 37.2 of Violations Act), and in view of the answer to that question, perhaps further, who is the owner of the cargo vehicle which is to be confiscated.

Supplementary information:

Legal norms referred to:

- Articles 2, 15, 22, 23, 28 and 33 of the Constitution;
- Article 68 of the Sales Tax Act (ZPD);
- Article 37 of the Violations Act (ZP);
- Article 59.1 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court refers to its case no. Up-164/95 (OdlUs IV, 138) of 07.12.1995.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1997-S-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 20.11.1997 / **e)** U-I-85/96 / **f)** / **g)** *Odločbe in sklepi Ustavnega*

sodišča (Official Digest), VI, 154 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.13 **General Principles** – Legality.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
4.5.10.1 **Institutions** – Legislative bodies – Political parties – Creation.

Keywords of the alphabetical index:

National Assembly, election, names of parties and candidates, foreign names.

Headnotes:

The principle of legal certainty as established by the Constitution assures respect for constitutionality in proceedings before administrative agencies and courts. Thus, organs of the state and particularly the courts should interpret unclear legislation in a manner that complies with the Constitution. When a court interprets a statutory norm in such a manner, there is no need to go to the Constitutional Court for a decision. Political parties can use Slovenian names which are in frequently use. The use of other less common names is allowed, if Slovenian and if they do not contain the name of a foreign country or foreign legal entity or natural person.

In view of the Constitutional Court, this applies also to the use of names which are perhaps written even in the same manner in a language that is similar to Slovenian.

Supplementary information:

Legal norms referred to:

- Articles 120, 125, 153 of the Constitution;
- Articles 6, 23 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a Constitutional Court justice.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1997-S-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 27.11.1997 / **e)** U-I-25/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 5/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VI, 158 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.21 **General Principles** – Equality.
3.22 **General Principles** – Prohibition of arbitrariness.
4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of communications.

Keywords of the alphabetical index:

Criminal proceedings, measures / Listening devices, surveillance / Constitutional rights and freedoms, comparison with previous arrangement / State security / Public security service / Legal concept, undefined / Statutory arrangement, specificity *(lex certa)*.

Headnotes:

Two constitutional provisions protect privacy of communication: Article 35 of the Constitution, which sets out the rule that everyone has the right to privacy and personal integrity, and especially Article 37 of the Constitution, whereby the privacy of post and other forms of communication is guaranteed. Conditions for restricting these rights are contained in Article 37.2 of the Constitution.

Since surveillance, such as telephone-tapping and bugging, is an extreme encroachment on the constitutional right to privacy, it must be based on a particularly precise arrangement with clear and detailed rules.

These rules guarantee a citizen on the one hand the knowledge of measures and situations in which the measures may be used, and on the other hand effective judicial control and an effective remedy against the abuse of such measures.

Thus when individual statutory conditions for ordering the installation of listening devices in premises are not sufficiently defined and in conformity with the requirement of proportionality, which as a "necessary" encroachment is contained in Article 37.2 of the Constitution, the legal text which determines the conditions is in conflict with the Constitution. Insofar as specific groups of conditions are laid down in Article 150.1 of the Code of Criminal Procedure (ZKP), the law is in this part undefined and unconstitutional. Individual conditions must be defined and must out weigh the importance of the right to privacy and personal freedom for bugging and surveillance to be allowed.

The "necessity" of using listening devices, which is the constitutional condition for encroachment on privacy, must be shown not only on a statutory level but also in each individual case. In order to guarantee the right to an effective legal remedy, which includes the requirement for a court decision under Article 37.2 of the Constitution, a court order must contain the grounds for saying that the execution of the measure is urgently necessary in the specific case. The court order must also explain what it is that prevents the court or government agency from collecting evidence in a way which does not encroach (or encroaches in a less severe way) on the constitutional rights of the person affected.

The secret nature of installing listening devices in premises is such that, in addition to secrecy in implementing the measure, it also dictates the secret placing and removal of equipment. The conditions for the encroachment on privacy under Article 37.2 of the Constitution are restricted. Encroachment on the right to inviolability of the home is set out in Article 36.2 of the Constitution, which allows access to the home or other premises against the will of the householder only on the basis of a court order.

Article 2 of the Constitution declares that Slovenia is a state ruled by law. Article 150 of the Code of Criminal Procedure applies this principle by setting out a statutory arrangement for installing listening devices, to prevent abuses by the secret police and others. The purpose of criminal proceedings is protection from arbitrary state authority.

Article 151.4 of the Code of Criminal Procedure is in conflict with the Constitution. It prohibits incitement to certain criminal offences, including bribery, and (because of the principle of a state ruled by law) establishes a boundary at which the co-operation of the state in a criminal offence is permissible, because of its undefined content.

The established conflicts with the Constitution, and especially the manner of the statutory arrangements for installing listening devices, prevent the Constitutional Court from annulling only individual provisions. The impugned arrangement is thus annulled in its entirety, as was already done in case no. U-I-184/94.

Supplementary information:

Legal norms referred to:

- Articles 176, 185, 203, 216, 226, 249 of the Constitution 1974;
- Articles 2, 15, 21, 22, 23, 25, 28, 29, 34, 35, 36, 37, 38 of the Constitution;
- Article 10 of the Performing Internal Affairs from the Jurisdiction of Federal Organs Act;
- Article 24 of the Foundations of the System of State Security Act;
- Article 148 of the Penal Code (KZ);
- Articles 6, 8 of the European Convention on Human Rights (ECHR);
- Article 43 of the Constitutional Court Act (ZUstS).

Concurring opinion of a constitutional judge.
Dissenting opinion of a constitutional judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1997-S-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 27.11.1997 / **e)** U-I-90/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 1/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VI, 164 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.

3.5 **General Principles** – Social State.
3.9 **General Principles** – Rule of law.
4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
5.3.36 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Public institution, financial autonomy, interference / Old-age pension and disability insurance, constitutionally guaranteed duty of the State / Debts, conversion of debts into shareholding rights / Public institution, rights of founder / Legal entity, legitimate expectations.

Headnotes:

To provide compulsory health insurance in accordance with Article 50 of the Constitution, the Republic of Slovenia founded the Health Insurance Bureau of Slovenia.

The Health Care and Insurance Act defined the sources of finance for the activities of the Bureau; the determination of the amounts to be obtained from such sources falls within the competence of the State, and the power of the Bureau is in this respect limited to the preparation of proposals for determining the amounts to be derived from individual sources.

The Health Insurance Bureau of Slovenia – which was the applicant in the instant case – is a legal person and is empowered to administer and manage autonomously the financial resources acquired on the basis of the sources laid down by statute.

The compulsory conversion by statute of debts owed to the Health Insurance Bureau of Slovenia into shareholding interests in the debtor companies owned by the Bureau, did not do away with the right which the Health Insurance Bureau of Slovenia had acquired regarding the payment of debts. This was because its right arising from a relation established under civil law was changed into a right to an interest in shares. By converting the claims into shareholders' rights, the legislators actually interfered with the sources from which compulsory health care is as a rule financed, and thus also with the applicant's right to autonomous administration and management of these resources. However, the State, in so far as it is the founder of the Bureau, is responsible for its operation and the adjusting of the level of the sources of finance for compulsory health care to the requirements of beneficiaries. Since the state is liable, as founder, for the liabilities of the Bureau, the conversion effected by the legislature as dictated by public interest (to prevent the bankruptcy of the debtor companies and to preserve the majority of the jobs of the workers employed by both debtors), did not violate the Constitution (Article 2 of the Constitution).

The Old Age and Disability Insurance Bureau of Slovenia is a public institution and is not designed to carry out activities on the market with a view to making a profit. This is why, by making the conversion compulsory, the legislature did not violate Article 74 of the Constitution.

The conversion of the applicant's rights arising from the law of obligations into shareholders' rights does not have retrospective effect. The disputed provision did not either prevent or render more difficult the asserting of the anticipated rights of beneficiaries regarding retirement and disability pensions, which is why the enacted provision of Article 6.2 of the Act on Measures for Rehabilitation of Economic Position of TAM Maribor d.d. and its Affiliated Companies and Avtomontaža AM BUS d.o.o. did not violate Article 155 of the Constitution. If the measure adopted by the legislature had had an adverse effect on the rights arising from old-age pension and disability insurance, the State would be obliged, on the basis of Articles 50 and 51 of the Constitution, to make up the deficit in public funds, even if by doing so it would exceed the amount earmarked in the budget.

The constitutionality of the disputed provision of the Act should be assessed from the viewpoint of those reasons which had led to its enactment, rather than from the viewpoint of subsequent events, which the legislature could not have foreseen. In the case where, after the conversion of debts into shareholding rights owned by the creditor in the debtor companies, bankruptcy proceedings have been instituted against the debtor companies, this is not of any importance for the purpose of constitutional review.

The inability of the creditor to collect the amounts due from debtors results from the constitutionally admissible conversion of the debts and the extinguishing of the same, which is why it does not conflict with Article 23 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 2, 23, 50, 51, 74, 155 of the Constitution;

- Articles 12, 13, 14, 15, 17, 18, 55, 56, 57, 60, 69 of the Health Care and Insurance Act (ZZVZZ);
- Articles 4, 49 of the Institutions Act (ZZ);
- Articles 26, 21 of the Constitutional Court Act (ZUstS).

Concurring opinion of a judge of the Constitutional Court.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1997-S-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 04.12.1997 / **e)** U-I-95/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 5/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VI, 166 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.5 **General Principles** – Social State.
3.9 **General Principles** – Rule of law.
4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.3.36 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Public institution, statutory independence / Public institution, financing / Healthcare, basic, guarantees, in constitutional law / Companies, conversion of debts into corporate rights / Public institution, rights of founder / Legal entity, legitimate expectations.

Headnotes:

The Republic of Slovenia founded the Institute for Pension and Invalidity Insurance of Slovenia as a public institute for providing pension and invalidity insurance in conformity with Article 50 of the Constitution. The Pension and Invalidity Insurance Act laid down the sources of financing for its activities, and the State (as founder) is competent to determine the level of funds. The Institute is thus restricted to forming proposals for determining the levels of individual sources.

The Institute for Pension and Invalidity Insurance of Slovenia has the status of a legal person and has jurisdiction to administer and manage independently the funds obtained on the basis of statutorily defined sources.

By the statutorily compulsory conversion of debts into capital shares, the legislature did not abolish the rights of the Institute for Pension and Invalidity Insurance of Slovenia which it obtained once these debts were due, but transformed its rights obtained under civil law into shareholders' rights. By the conversion of debts into such rights, the legislature encroached on sources from which pension and invalidity insurance is regularly financed, and thus on the applicant's right independently to administer and manage these resources.

Since the State, as founder of the Institute, is responsible for its operation and for balancing the level of sources of funds for financing pension and invalidity insurance with the needs of its beneficiaries and the financial capacities of its debtors, and since as founder it has overall responsibility for the obligations of the Institute, the legislator did not violate the Constitution (Article 2 of the Constitution) by the conversion. The legislation concerned was enacted in the public interest (in order to prevent the bankruptcy of debtors and in order to retain the majority of jobs of the debtors' employees).

The Institute for Pension and Invalidity Insurance of Slovenia is a person in civil law and is not meant to carry out activities on the market in order to obtain income or make profits. The legislature therefore did not violate Article 74 of the Constitution by legislating for this compulsory conversion.

The impugned provisions of the statutory transformation of the applicant's rights into corporate rights do not have retroactive effect. The impugned provision of the law did not prevent and did not make more difficult the validation of anticipated rights of those entitled to mandatory health insurance, so the legislator did not violate Article 155 of the Constitution through the enactment of Article 6.2 of the Measures for the

Rehabilitation of the Economic Situation of TAM Maribor d.d. and their Dependent Companies and Avtomontaže AM BUS d.o.o., Ljubljana Act. If the legislature enacted legislation that would negatively affect the state guarantee of pension and invalidity insurance, the state, on the basis of Articles 50 and 51 of the Constitution, would be bound to make up the deficiency from public funds, even though this exceeds the budgeted amount.

The constitutionality of the impugned provision of the Pensions and Invalidity Act must be assessed from the point of view of those reasons for which the legislation was first enacted, and not from the point of view of later events that the legislator could not envisage. In the case in which after the implementation of the conversion of debts, the bankruptcy of the debtor was instituted, this has no significance for the judgment of the constitutionality of the measure.

The impossibility of a creditor exacting payment of debts due from a debtor is a result of a constitutionally permissible conversion, so it is not in conflict with Article 23 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 2, 23, 50, 74, 155 of the Constitution.
- Articles 6, 219, 220, 275 of the Pensions and Invalidity Act (ZPIZ).
- Article 49 of the Institutes Act (ZZ).
- Article 21 Constitutional Court Act (ZUstS).

Concurring opinion of a constitutional judge.
Dissenting opinion of a constitutional judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 08.01.1998 / **e)** U-I-132/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 11/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 1 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

Keywords of the alphabetical index:

Criminal code / Criminal proceedings, expert witness, impartiality / Expert witness, incompatibility.

Headnotes:

In accordance with the Criminal Proceedings Act, expert witnesses – in contrast with ordinary witnesses – play an active role in criminal proceedings. Therefore the equality of parties in a case is ensured only if the expert witness is impartial. The position of a body which, on the basis of law, takes part in discharging the function of instituting criminal proceedings raises such doubt concerning its impartiality that appointing it as an expert witness in criminal proceeding would constitute a violation of the constitutional guarantee of equality in the protection of rights (Article 22 of the Constitution).

There is a constitutional requirement that the work of an expert witness cannot be entrusted to a body which, on the basis of law, assists in bringing criminal proceedings. The fact that such a body is not prohibited from sending expert witnesses to testify Article 249.2 of Criminal Proceedings Act, means that this legislation is in conflict with the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 22, 23, 29 of the Constitution;
- Article 1 of the State Prosecutor act (ZDT);
- Articles 21, 26, 50 to 60 of the Constitutional Court Act (ZUstS).

Concurring opinion of a judge of the Constitutional Court.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15.01.1998 / **e)** Up-301/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 13/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 98 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.3.4.7.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Banning of political parties.
4.5.10.1 **Institutions** – Legislative bodies – Political parties – Creation.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Discrimination, prohibition of incitement to / Intolerance, prohibition of incitement to / Violence, prohibition of incitement to / War, prohibition of incitement to.

Headnotes:

Only the Constitutional Court may decide by a two-thirds majority on the prohibition of a political party (i.e. on its expulsion from the register of political parties), if it finds that the acts and operations of the political party contradict the Constitution so severely that merely the abrogation of its unconstitutional acts or the prohibition of its unconstitutional operations is not sufficient, and that instead the party must be excluded from the political sphere.

To refuse the entry of a political party onto the register due to its alleged unconstitutional acts or deliberately unconstitutional operations would mean to prohibit a political party from operating. If an administrative agency establishes that an act of a political party is unconstitutional, it must refuse its entry onto the register. The Constitutional Court may first only abrogate the unconstitutional act, and abstain from ordering the expulsion of a party from the register. The Court may also prohibit a specific activity of a political party, without ordering at the same time its expulsion from the register.

According to the Political Parties Act (ZPolS), a political party is an association of individuals created for the realisation of their political goals. It is left to the founders of an association to define their association as a political party. Pursuant to the Act, the registration of a political party is, however, mandatory. By being registered, a political party becomes a legal entity, and it must not operate as a political party until it is registered (Articles 3.1 and Article 12.3 of the Political Parties Act). This means that a political party is actually created by the act of establishment, yet until its registration, it cannot operate as such except in cases when it initiates proceedings and starts activities connected with the registration (including claiming *locus standi* to file legal remedies if its registration is dismissed). The registrar issues an administrative decision on the entry of a political party into the register (Article 12.1 and Article 13 of the Act). By this decision, the registrar may only establish whether a political party fulfils the procedural conditions required by the Act.

In contrast, only the Constitutional Court may decide whether the substantive conditions have been fulfilled, i.e. if the acts and operations of a political party are consistent with the Constitution.

In the case at issue, the registrar had decided on the constitutionality of the political party's program as a condition required for entry into the register, and applied the statutory provision which the Constitutional Court abrogated as unconstitutional. That is why the challenged individual acts were abrogated *ab initio*. The registrar will have to reconsider the complainant's request to be registered as a political party, without applying the abrogated Article 3.4 of the Act. It will only be allowed to examine the fulfilment of procedural conditions prescribed by the statute, and if it finds that these are fulfilled it will have to enter the party into the register.

Supplementary information:

Legal norms referred to:

- Articles 14, 15, 42, 63, 160 of the Constitution;
- Articles 23, 59, 68 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court justice.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.02.1998 / **e)** U-I-283/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 20/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 26 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.9 **General Principles** – Rule of law.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.9.6 **Institutions** – Elections and instruments of direct democracy – Representation of minorities.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

National community, Italian / National community, Hungarian / National affiliation, declaration / National communities, special rights / Parliament, national communities, representatives / Local government, national community, representation.

Headnotes:

It is not in conflict with the Constitution that members of the ethnic Italian and Hungarian national communities have a constitutionally guaranteed right that in elections of delegates to the National Assembly and at elections of members to municipal councils they cast two votes – one for the election of the representative of the ethnic national community and the second for the election of other delegates or members of the municipal council. The Constitution guarantees members of these communities general and special voting rights.

It is in conflict with the constitutional provisions on a state governed by the rule of law, on the separation of powers, and on the legality of the workings of the administration and public authorities that certain measures are not determined by law. This means in particular those measures according to which the commissions of the self-governing national communities decide on the registration of electors in a special electoral roll of citizens who are members of the ethnic Italian and Hungarian national communities.

A citizen does not automatically have *locus standi* to impugn the standing orders or the statutory arrangement relating to the mandate of delegates to the National Assembly just because he has voting rights.

The provisions of a municipal statute, according to which the deputy mayor must be a member of the Italian national community if the mayor is Slovene, are not in conflict with constitutional provisions on equality before the law since the distinction among candidates is founded on the protection of the ethnic Italian or Hungarian national communities.

It is not in conflict with the Constitution and with the law if a municipal statute determines that the ethnic Italian national community is directly represented on the council of a local community.

It is not in conflict with the Constitution if a municipal statute gives local communities the status of legal persons.

Supplementary information:

Legal norms referred to:

- Articles 252, 338 of the Constitution 1974;
- Articles 2, 5, 14, 16, 61, 64, 83, 120, 121 of the Constitution;
- Articles 10, 37 of the Elections to the Assembly Act;
- Point 3.2 of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL);
- Articles 163, 250 of the Constitutional Amendments of 1989;
- Articles 21, 25, 48 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a constitutional judge.
Concurring opinion of a constitutional judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.03.1998 / **e)** U-I-340/96 / **f)** / **g)** *Uradni list RS* (Official Gazette),

no. 31/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 48 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.11 **General Principles** – Vested and/or acquired rights.
5.3.36.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.

Keywords of the alphabetical index:

Contract, parties, acquired rights.

Headnotes:

A statutory provision, under which contracts concluded prior to a law taking effect do not have legal effect if they are in conflict with it, is itself in conflict with Article 155.2 of the Constitution, since it infringes the acquired rights of the parties to a contract.

Supplementary information:

Legal norms referred to:

- Articles 15, 33, 35, 155 of the Constitution;
- Article 10 of the Code of Obligations (ZOR);
- Article 33 of the Fundamental Property Relations Act (ZTLR);
- Article 43 of the Constitutional Court Act (ZUstS).

Dissenting separate opinion of a constitutional judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.03.1998 / **e)** U-I-296/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 42/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 53 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.9 **General Principles** – Rule of law.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Fuel, supply / Public tender, conditions.

Headnotes:

Because the challenged order, on procedures and conditions for leasing areas beside motorways for the construction of facilities for associated activities and on determining the level of rent for the use of these areas, ceased to apply during the present proceedings, the Constitutional Court could examine whether the applicant had *locus standi*. For this to exist there must be a causal link between the asserted unconstitutionality and illegality of the regulation on the one hand and possible damage to the applicant on the other. It must be shown to be probable that a finding in favour of the applicant would signify a specific legal benefit which he could not achieve without this. When the unconstitutionality and illegality of an executive regulation is found, a finding of non-conformity with the Constitution and with the law is also possible with the effect of annulment *ab initio*. Since such a decision could affect the applicant's legal position in a possible civil action for compensation for damage which is claimed to have occurred because he was not chosen as the most advantageous bidder (in relation to service station contracts), the Constitutional Court ruled that it was competent to pass judgment on the order.

Entrepreneurial and commercial freedom under Article 74 of the Constitution guarantees above all protection of the free operation of private economic entities from state infringement. Freedom of enterprise guarantees in particular the right to found a company (under statutory conditions), to manage it in conformity with business principles (respecting mandatory regulations) and also, if so desired, to close it. It also embraces the right to choose an area of business activity and to choose business partners etc. According to Article 74.3 of the Constitution, in particular, unfair competition and activities which conflict with the law by restricting competition are banned. By determining mandatory references by which a bidder must prove that he or she has a base for the supply of oil derivatives in the country and that he or she already

manages the distribution of oil derivatives to at least three petrol service stations in the country, the offence of unfair competition cannot be committed because the perpetrator of such an offence can only be another participant on the market. So the provision of the order which contained the cited mandatory references was not in conflict with Article 74.3 of the Constitution.

According to the Protection of Competition Act, state organs may not restrict the free establishment of companies on the market. The impugned provision is not in conflict with the cited statutory arrangement because it does not regulate the free establishment of companies on the market; instead, it determines conditions for companies to be given equal commercial rights in a public advertisement for tenders in which they are applying for the lease of areas beside motorways. Since it is the arrangement of conditions for competition in public advertisements for tender, "free establishment on the market" is not restricted by the regulation that sets down such conditions, but by regulations that subordinate the conclusion of the transaction to the regime of public advertisements for tenders.

With respect to the impugned order, it was therefore necessary to decide only whether the impugned provisions perhaps signify a violation of equality of competition in a public advertisement for tenders. After excluding the possibility of a violation of the ban on discrimination under Article 14.1 of the Constitution, it was necessary also to reach a judgment on whether there was a violation of the general principle of equality before the law under Article 14.2 of the Constitution; therefore it was a judgment on the basis of the so-called “test of arbitrariness”. The maker of the order drew a distinction in the impugned arrangement between companies that have a supply base for oil derivatives in Slovenia, and at least three petrol service stations, and those that do not. However, this distinction is constitutionally permissible and thus is not in conflict with Article 14.2 of the Constitution. The maker of the order did not make the distinction arbitrarily, because there were well-founded reasons for the distinction: the legitimate interest of the state that public services be leased to a bidder who would be capable in conformity with the public interest of promoting traffic safety, of guaranteeing the undisturbed supply of fuel to motorway users; the legitimate interest of the state in guaranteeing national security in the event of possible military or other states of emergency; the public interest in a balanced supply of petrol over the entire territory of the state, including places which would be less profitable than beside motorways, or would even be unprofitable, in conformity with the principle of a social state (Article 2 of the Constitution); as well as the obligation of the state to ensure economic, cultural and social progress in mountainous regions (Article 71.3 of the Constitution); the legitimate interest of the state that users of all roads (including regional and local roads) and the inhabitants of all regions have an undisturbed and steady supply of fuel.

Supplementary information:

Legal norms referred to:

- Articles 2, 14, 71, 74, 160 of the Constitution;
- Articles 68, 81of the Public Services Act (ZGJS);
- Articles 2-10, 12, 13, 19, 21, 63, 64, 65-68 of the Power Economy Act (ZEG);
- Articles 17, 18, 19, 20 of the Protection of Competition Act (ZVK);
- Articles 21, 26, 47 of the Constitutional Court Act (ZUstS).

Concurring opinion of a constitutional judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.06.1998 / **e)** U-I-290/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 49/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 124 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Chamber of Commerce, membership, compulsory.

Headnotes:

Because the Chamber of Commerce was founded under the Chamber of Commerce Act, in order to perform certain tasks in the public interest, because it is funded from public contributions, and because membership of the Chamber does not prevent companies from joining voluntary forms of association, the provision of the Act on compulsory membership of the Chamber does not infringe the right of the affected parties to associate freely (Article 42 of the Constitution), nor does it infringe the right of freedom of enterprise (Article 74 of the Constitution).

Since the Chamber of Commerce Act contains no provisions that would guarantee that the positions formulated by the bodies of the Chamber are a representative reflection of the interests of the economy, and since it only transferred to the Chamber the power to set the amount of the membership fee but did not define the criteria for setting this amount nor ensure the required control over the implementation of this authority, it is contrary to the constitutional guarantee of general freedom of action (Article 35 of the Constitution).

Supplementary information:

Legal norms referred to:

- Articles 35, 42, 49, 74, 149 of the Constitution;
- Article 20 of the Universal Declaration on Human Rights;
- Articles 26, 30, 48 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.10.1998 / **e)** U-I-247/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 76/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII,195 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.
3.10 **General Principles** – Certainty of the law.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
5.3.36.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Criminal law, retroactive / Criminal law, more lenient.

Headnotes:

When the Republic of Slovenia gained its independence, the Crimes Against the Nation and the State Act (ZKND) did not become a part of its legal system. As a rule, the Constitutional Court lacks jurisdiction to review such an Act, save in cases where its jurisdiction is exceptionally granted by a provision of the Code of Criminal Procedure, according to which the modification of a final judgment of conviction may be requested on the grounds of a previous constitutional review of the regulation, on the basis of which the judgment was passed.

Under the provision of the Act that provided that this statute was to be applied for judging actions performed before its coming into force, if its provisions prescribed less severe penalties, the then legislature did not retroactively introduce statutory provisions that would have been contrary to the general legal principle of legality in criminal law, but only introduced, by this statute, a widely recognised principle of the application of a statute prescribing less severe penalties.

The Constitutional Court reviews regulations by which activities were criminalised after World War II, applying the criterion of their consistency with general legal principles which were already, at the time of their creation, recognised by civilised nations. One of these principles is the principle of legality, and, within this framework, particularly the principle of a precise definition of criminal offences in statutes. Provisions criminalise preparatory activities carried out by perpetrators with the explicit intent violently to destroy the existing State legal system, in order to protect the constitutional system and integrity of a State, cannot be said to have been inconsistent with the said principle. Insofar as the then proceedings concerned the abuse of criminal law for political purposes, this does not represent a reason to establish the inconsistency of

those statutory provisions, but a reason because of which the legislature must make possible the redress of injustices inflicted by such abuses.

The legislature determined two legal remedies by which persons who had fallen victim to the abuses of the law as described could achieve the restoration of their civil rights: (1) revision of their sentence or guilt according to the Redress of Injustices Act (ZPKri), and (2) request for the protection of legality pursuant to the Code of Criminal Procedure. Regarding the short time limit for requesting revision according to the Redress of Injustices Act, and concerning the duration of criminal proceedings, it appears that revision was not an effective legal remedy. By the time a decision was issued the time limit for filing a request for the protection of legality had already expired. In view of the fact that on the basis of the Crimes Against the Nation and State Act many serious abuses of law had occurred, the Constitutional Court ordered that the legislature extend as soon as possible the time limit for filing a request for the protection of legality.

Supplementary information:

Legal norms referred to:

- Articles 28, 161, 162 of the Constitution;
- Articles 18, 22 of the Introductory Statute to the Penal Code;
- Articles 416, 559 of the Code of Criminal Procedure (ZKP);
- Articles 348, 360, 368 of the Penal Code (KZ);
- Articles 22, 23 of the Redress of Injustices Act (ZPKri);
- Articles 21, 23, 44 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a Constitutional Court justice.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1998-S-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 26.11.1998 / **e)** U-I-31/96 / **f)** / **g)** *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VII, 212 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.11 **General Principles** – Vested and/or acquired rights.
3.18 **General Principles** – General interest.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pensions, adjustment.

Headnotes:

The Constitution does not prevent a statute from changing previous statutorily-determined rights by the introduction of provisions having prospective effect, if these changes are not contrary to certain rights determined by the Constitution, or other constitutional provisions. When looking at this issue, courts must also take into account the principle of maintaining confidence in the law as one of constitutional principles of a state governed by the rule of law. The extent of rights determined by statute may be reduced by statute, of course, if this reduction has prospective effect and also if due account is taken (in the present case) of the right to social security laid down under Article 50 of the Constitution, and the principle of maintaining confidence in the law as one of the principles of a state governed by the rule of law.

Because of a decision of the founder of the public Institution for Pension and Disability Insurance to separate from the remainder of the institution an internal part of it, i.e. the capital fund, which after the separation operates as a joint independent stock company, a repeated nationalisation of property did not occur.

A sufficient majority of the General Assembly of the Institution for Pension and Disability Insurance, being the representatives of persons, stated that people who are entitled to enjoy the social rights given to them under the Insurance scheme, which is determined by statute, must accept that the scheme may be changed by statute, if reasons exist in favour of a prevailing and legitimate public interest over the interest in the protection of trust in the law.

Supplementary information:

Legal norms referred to:

- Articles 2, 14, 15, 50, 155 of the Constitution;
- Article 26.2 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1999-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.06.1999 / **e)** U-I-89/99 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 59/99; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VIII, 147 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.17 **General Principles** – Weighing of interests.
5.5.3 **Fundamental Rights** – Collective rights – Right to peace.

Keywords of the alphabetical index:

Citizenship, acquisition exceptional naturalisation criteria.

Headnotes:

The legislature did not have any reason, based on a prevailing and legitimate public interest that would override the interest in maintaining confidence in the law, to prescribe an additional condition restricting access to citizenship based on the existence of a threat to the public order. The Constitutional Court therefore annulled Article 40.3 of the Republic of Slovenia Citizenship Act, insofar as it related to the reason of a threat to public order.

Supplementary information:

Legal norms referred to:

- Article 2 of the Constitution;
- Article 4 of the Constitutional Act for the Implementation of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (UZITUL);
- Article 43 of the Constitutional Court Act (ZUstS).

Dissenting opinion of a Constitutional Court judge.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-1999-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 01.07.1999 / **e)** U-I-273/98 / **f)** / **g)** *Uradni list RS* (Official Gazette), 05/98; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VIII/2, 169 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.20 **General Principles** – Reasonableness.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Family law, parents, rights and duties / Cohabitation / Child, custody, decision.

Headnotes:

It is inconsistent with the principle of equality before the law (Article 14.2 of the Constitution) that the power to decide on the protection and education of children was, according to Article 105 of the Marriage and Family Relations Act, granted to the Social Services, while, according to Article 78 of the same Act, such power was granted to the court. Under both provisions the object of the decision was the same,

and the legislature did not have any sound and rational reasons to determine the competence of two different bodies.

Summary:

The Supreme Court challenged Articles 105 and 114 of the Marriage and Family Relations Act insofar as they determined the competence of the Social Services to decide on the custody and education of children, as well as Article 88 of the Social Aid Act in its section referring to Article 105 of the Marriage and Family Relations Act. Because the legislature was inconsistent when it determined that in some cases of deciding upon the custody and education of children the court had jurisdiction, while in other cases with the same content it determined that the Social Services was competent, Articles 114 and 105 of the Marriage and Family Relations Act were allegedly not in conformity with Article 14 (equality before the law) and Article 22 (the equal protection of rights) of the Constitution.

The Court held that the argument in the request that the challenged provision of the Marriage and Family Relations Act was contrary to the principle of equality before the law (Article 14.2 of the Constitution) was well founded, since, under this provision, the competence of the Social Services to decide on the exercise of the parental right was determined in a different manner from other similar cases. Article 14.2 of the Constitution does not prohibit the legislature from regulating the positions of legal subjects differently, but from doing this arbitrarily, without rational and sound reasons. This means that such differentiation must serve a constitutionally admissible goal, that this goal must be rationally related to the object of regulation in a law and that the differentiation must be a proper means for achieving the goal.

Pursuant to Article 78 of the Marriage and Family Relations Act, the court decides on the custody and education of the children in divorce proceedings and may look at the case again if altered circumstances and the children's welfare require a change in the original decision. Article 105.2 in conjunction with Article 114.1 of the Marriage and Family Relations Act, determine the competence of the Social Services to decide on which of the parents will exercise rights over their children if the parents live separately and cannot reach an agreement on this matter. The object of decision-making is, following both provisions, the same: the competent body decides on which of the parents will exercise their rights over the children if they do not live together.

By asserting that the competence of different bodies may contribute to different substantive decisions, the Supreme Court did not substantiate the difference important for review from the perspective of Article 14.2 of the Constitution. In both cases the matter concerns the application of the same substantive rules: the competent body must determine the parent with whom the child will live, giving consideration to the welfare of the child. Furthermore, in both cases the Supreme Court decides at the highest level. In questions of importance for uniform case-law its decisions form legal opinions that are binding on all divisions of this court (Articles 109 and 110 of the Courts Act). The difference between both groups of cases is in the competence to decide on the question at issue and therefore in the procedures according to which the competent body reaches decisions. In the first case, the court decides on the exercise of child custody rights within a civil procedure. In the second case, the Social Services decide within an administrative procedure, given that the judicial review of its decision is subsequently provided for in the framework of the judicial review of administrative acts. Another important difference is that judicial proceedings to determine child support also need to be carried out if the Social Services decide on the exercise of custody rights, whereas, if the court decides on the exercise of such rights, and the parents cannot reach an agreement on child support, then this also is an object decided in the same proceedings.

The crucial circumstance for the distinction between the two proceedings is the parents' divorce. Regardless of the fact whether the children were born within a marriage or prior to it and regardless of the fact whether the matter concerns the first decision on the awarding of custody of children or a subsequent alteration, if the parents divorce, the court has jurisdiction to decide on the exercise of child custody rights (Article 78.1 and 78.4 of the Marriage and Family Relations Act). In all other cases, i.e. if the parents do not divorce but simply live separately, and if they never married but had previously lived together as cohabitees, or lived together only for a short period of time or even have not lived together at all, the Social Services decide on the custody and education of children by means of administrative procedures (Article 105.1 of the Marriage and Family Relations Act and Article 86 of the Social Aid Act).

The legislature did not have sound reasons for the differentiation described above. The Government argued that by such a process, priority was given to the negative aspect of the right to respect for one's family life, that is, to the State's non-interference if the parents have not decided to marry. Even disregarding the fact that the challenged provision regulates cases of married parents living separately and therefore the

mentioned presumption is not correct, the goal pursued was not achieved by the challenged statutory provision. Also, a Social Services decision is reached within an administrative procedure and is as such an administrative – that is authoritative – act. The difference cannot be justified by the assertion that only a community of spouses and children is (or has been until recently) a legally regulated family community. Already since the coming into force of the Marriage and Family Relations Act, relations between parents and children have been legally regulated regardless of the fact whether the parents are married or not; and such relations are an object of the challenged regulation. In both groups of cases, the matter first of all concerns a dispute between parents who no longer live together, not the State's interference with the relations between parents and children. If the parents reach an agreement, the Social Services do not make a decision at all. Moreover, the fact that when divorce proceedings fall within a court's jurisdiction all questions connected with such a decision are decided simultaneously, should not have been a reason for the determination of different competencies. If the court once decided on the custody and education of children it decides on this question in all cases when the circumstances change. Since the mere fact of whether the parents are divorced or not has no connection with the object of deciding, that is, with the decision on the exercise of custodial rights, Article 105.2 in conjunction with Article 114.1 of the Marriage and Family Relations Act is contrary to the principle of equality before the law (Article 14.2 of the Constitution).

Having established that Article 105.2 in conjunction with Article 114.1, of the Marriage and Family Relations Act was contrary to the principle of equality before the law, there was no need to review whether it was also inconsistent with the guarantee of the equal protection of rights laid down in Article 22 of the Constitution.

The challenged provision of the Marriage and Family Relations Act is not inconsistent with the Constitution merely because the legislature should not have determined the competence of the Social Services to decide on the exercise of parents' rights of custody if the parents do not live together and do not reach an agreement on the parent with whom the child will live. It is, however, inconsistent with the Constitution because in certain cases it provides for the jurisdiction of the court to decide on the custody and education of children, but in other cases determines the Social Services to be competent. Therefore, the Constitutional Court did not annul the challenged provision of the Marriage and Family Relations Act but only established its unconstitutionality. For the same reasons, the provisions of the Marriage and Family Relations Act which determine the competence of the court to decide on the custody and education of children if the parents do not live together (Article 78.1 and 78.4 of the Marriage and Family Relations Act) are also inconsistent with the Constitution. Pursuant to Article 30 of the Constitutional Court Act, the Constitutional Court may also review the constitutionality of other provisions of the same or some other regulation whose review of constitutionality and legality have not been requested, if such provisions are related or if this is necessary to resolve the case. Since the ruling as to the unconstitutionality of Article 105.2 in conjunction with Article 114.1 of the Marriage and Family Relations Act, inevitably entails the unconstitutionality of Article 78.1 and 78.4 of the Marriage and Family Relations Act, the Constitutional Court decided that the latter provisions were also inconsistent with the Constitution. The entry into force of the already published Civil Procedure Act (Official Gazette RS, no. 26/99 - ZPP), means that Article 78.4 of the Marriage and Family Relations Act will cease to apply (Article 501.1 of the Civil Procedure Act). Since the division of powers to decide on the custody and education of children challenged by the Supreme Court continues to be in force at the time of the issuing of this Decision, the cessation of the application of Article 78.4 of the Marriage and Family Relations Act has no impact on the decision in this case.

Supplementary information:

Legal norms referred to:

- Articles 14.2, 22, 23, 53, 54, 56.1, 127 and 156 of the Constitution;
- Article 8 ECHR;
- Articles 109 and 110 of the Courts Act (ZS);
- Articles 44, 49, 143 and 233 of the Administrative Procedure Act (ZUP);
- Article 14 of the Act on Judicial Review of Administrative Acts (ZUS);
- Articles 86 and 88 of the Social Aid Act (ZSV);
- Articles 21, 23, 24, 26, 30 and 48 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its cases no. U-I-48/94 (OdlUS IV, 50) of 25.05.1995 and no. U-I-225/96 (OdlUS VII, 7) of 15.01.1998.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-1999-S-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 01.07.1999 / **e)** U-I-289/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), 60/99; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), VI/2, 165 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Indictment, change / Hearing, termination.

Headnotes:

A statutory provision that authorises a court to judge whether it is necessary to terminate the main hearing because there is a change in the indictment at that hearing, is not in conflict with the Constitution since a judge, in reaching a decision on this in conformity with the purpose for which this authority has been given, must respect the constitutional rights of the accused. Whether these rights were respected in an individual case may only be the subject of judgment of a concrete judicial decision.

Summary:

The complainant submitted a constitutional complaint on 1 February 1994, on which the Constitutional Court decided by order no. Up-7/94 of 30 November 1995. At the same time, he also submitted a petition for the review of constitutionality of the provision of the Code of Criminal Procedure, which regulates changes of indictments. The petitioner believed that parties to proceedings were not guaranteed the same possibilities if during the hearing the prosecutor proposed a change of indictment. The statutory provision was thus claimed to be in conflict with Articles 14 and 22 of the Constitution. If a court permits such a procedure in conformity with the statutory provision, in the opinion of the petitioner, this would also result in an abuse of procedural rights guaranteed by the Constitution.

The Court did not find any constitutional violations. It held that criminal proceedings are commenced with an investigation against a specific person if there is a well-founded suspicion that he has committed a criminal offence. The investigation is directed at the collection of data required for a decision on whether to prefer an indictment or halt the proceedings (Article 167 of the Code of Criminal Procedure). In criminal proceedings, the so-called accusatory principle applies, which means that the proceedings are always introduced by and are run on the basis and within the bounds of the demand of an authorised prosecutor. When the investigation is completed, as well as when a charge can be brought without an investigation, the proceeding may only run on the basis of the indictment of the state prosecutor or the injured party as prosecutor (Article 268.1 of the Code of Criminal Procedure). Criminal proceedings may also be introduced under statutory defined conditions on the proposal of a charge by the state prosecutor or an injured party as prosecutor, or on the basis of a private charge. Article 269 of the Code of Criminal Procedure determines what an indictment must contain. Under point 2 of the first paragraph of this article, a charge must also contain a description of the deed from which derive the statutory indications of a criminal offence, the time and place that the criminal offence was committed, the subject of the criminal offence and the means by which it was committed, and other circumstances which are necessary for the criminal offence to be defined as accurately as possible. The Code also requires such a description of a criminal offence for a proposal of a charge or for a private charge (first paragraph of Article 434 in connection with Article 429 of the Code of Criminal Procedure). An indictment must therefore contain the basis and the framework for a proper and complete ascertainment of the material circumstance which is the subject of the main hearing.

Not to fulfil the requirement for a subjective and objective identification of the indictment and judgment (Article 354 of the Code) represents a major violation of the procedural provision (points 7 and 9 of the first paragraph of Article 371 of the Code). Since it is possible that at the main hearing the evidence introduced indicates different material circumstances from those asserted by the competent prosecutor, the law gives him the opportunity to change the indictment such that it is still based on the same historical event, but has changed facts or circumstances which represent the statutory components of a criminal offence. This right of the competent prosecutor is not in itself in conflict with any of the above-cited constitutional guarantees, provided the prosecutor does not abuse it and if at the same time, it is permitted that the other party to the proceeding – in this case the accused – may still in view of the changed circumstances protect his right in principle to the same legal position as if there had been no change to the indictment. The prohibition on the abuse of procedural rights derives from the principle of equality of the protection of rights and binds both prosecutor and accused to the proceedings. It is an abuse of the right if the potential beneficiary derives the right from a legally permissible abstract justification, which is concretised and materialised such that his behaviour exceeds the bounds of the justification. It creates a conflict of two rights that are mutually exclusive. Conflict occurs because one of the two rights is exercised in such a way that either partially or in whole prevents the activation and exercise of the other. The circumstance that an entitlement is exercised in such a way that harms the other party or "makes his position more difficult", represents an abuse of the right. In conformity with the provisions of Article 22 of the Constitution, in a case in which a party in a proceeding abuses their procedural rights, the court must reject legally relevant acts that exceed the intended entitlement and thus represent its abuse. The court must therefore at the time of passing judgment also verify a change of the indictment from this respect.

A change of indictment may not curtail an accused's right to a defence. The above-mentioned constitutional provisions guarantee to an individual that: 1) he is informed exactly and specifically on all material and legal circumstances of the indictment which he faces, and 2) he has suitable time and opportunity to prepare his defence. The right to prior exact information does not only give an accused the opportunity of being able to prepare a defence in advance, but also guarantees that an accused will not because of a change in indictment be disadvantaged or embarrassed in relation to the preparation of his defence, and he may also not be placed in the position of being taken by surprise.

A judge, under the provisions of Article 125 of the Constitution, is bound by the Constitution and law. In this he must respect the provisions of Article 23 of the Constitution, whereby charges against an individual must be decided upon without delay. However, efforts of the court to carry out proceedings without unnecessary delay may not end in violation of the accused's rights in criminal proceedings under Article 29 of the Constitution (decision of the Constitutional Court no. Up-34/93 of 8 June 1995, OdlUS 129, IV). According to the provisions of Article 15.1 of the Constitution, human rights and fundamental freedoms are exercised directly on the basis of the Constitution. If a judge believes that a statutory provision that he must use, or on the basis of which he must proceed in a concrete case, is unconstitutional, he must adjourn the proceedings and commence a new set of proceedings before the Constitutional Court (Article 156 of the Constitution). Although he must behave in conformity with law, no statutory provision may be used or interpreted such that it violates the constitutional rights of parties to a set of proceedings. The impugned statutory provision gives a court authority to judge whether it is necessary to adjourn a procedural act (such as a main hearing) or not. This authority is given to the court so that in the event of inessential changes to an indictment, and because of respect for rights under Article 23 of the Constitution and without detriment to other constitutional rights of parties to the proceedings, the economical procedural conduct of a criminal proceeding is assured. Such an intention of the authority is not constitutionally disputable. Whether a judge behaves in conformity with this authority and in compliance with the intention for which he has been given the authority, may always be the subject of judgment of a concrete judicial decision.

Whenever, therefore, a judge makes a judgment under the provisions of the second paragraph of Article 344 of the Code of Criminal Procedure, on whether because of a change in indictment in conformity with the first paragraph of Article 344 of the Code it is necessary to adjourn a main hearing, he must adopt such a decision whereby he does not encroach, in conflict with constitutional rights, on the accused's position in procedural law. He must in particular judge whether his decision respects the accused's right to a defence, as determined in Article 29.1 of the Constitution. So a statutory provision, whereby a judge is given authority to judge whether in order to protect an accused's constitutional rights it is necessary to adjourn a hearing because of a change in indictment, is not in itself in conflict with the provisions of Articles 22 and 29 of the Constitution. Only a concrete decision of a judge in an individual case could be in conflict with them. This cannot be the subject of a judgment in the context of

an assessment of the constitutionality of a law, but only the subject of a judgment in a concrete judicial decision on the lodging of a constitutional complaint. The petitioner's constitutional complaint was rejected by the order cited in point 2 of this reasoning, as premature, since under the provision of Article 559 of the Code of Criminal Procedure, the petitioner had available an extraordinary legal remedy whereby the asserted violation could be validated in a set of proceedings before the Supreme Court. If the appellant were to be unsuccessful in asserting this legal remedy, he could validate the protection of his constitutional rights with a constitutional complaint under the provisions of Articles 50 to 60 of the Constitutional Court Act.

Supplementary information:

Legal norms referred to:

- Articles 15, 22, 23, 27, 28, 29, 125 and 156 of the Constitution;
- Article 6 ECHR;
- Articles 21, 47 and 50 to 60 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court refers to its cases no. Up-34/93 (OdlUS IV, 129) of 08.06.1995, Up-88/94 (OdlUS V, 201) of 31.05.1996 and no. U-I-18/93 (OdlUS V, 40) of 11.04.1996.

Languages:

Slovene, English (translation by the Court).

Identification: SLO-2000-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 29.06.2000 / **e)** Up-78/2000 / **f)** / **g)** *Uradni list RS* (Official Gazette), 66/2000; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IX, 2000 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.18 **General Principles** – General interest.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.2 **Fundamental Rights** – Equality.
5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.
5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Asylum, request, refusal / Criminal procedure, extradition.

Headnotes:

The Court set aside the challenged judgment since it did not substantiate the existence of a subjective danger posed by the complainant, for reason of which his asylum request was denied. The judgment did not refer to a final court decision on the existence of extradition conditions, nor did it state any concrete circumstances on the basis of which it could be considered that there existed substantial reasons for the suspicion that the complainant had committed a serious crime prior to entering the Republic of Slovenia.

Summary:

The Constitutional Court set aside a judgment of the Administrative Court and returned the case to the Administrative Court for fresh adjudication. Furthermore, the Constitutional Court commenced proceedings for the review of the constitutionality of Article 40.2.2 of the Asylum Act and, until the final decision on the issue, suspended the application of that legislative provision.

The Constitutional Court noted that only the existence of extradition conditions, or concrete circumstances on the basis of which it would be considered that there exist substantial reasons for the suspicion that the complainant had committed a serious crime prior to entering the Republic of Slovenia, if demonstrated, could substantiate the existence of reasons for denying an asylum request. Since such reasons were not stated in the challenged judgment, the complainant's constitutional right to the equal protection of rights (Article 22 of the Constitution) was violated.

Supplementary information:

Legal norms referred to:

- Articles 5, 13, 14, 18, 22, 34, 35 and 48 of the Constitution;
- Article 3 ECHR;
- Articles 30, 39, 40.2, 59.1 and 2 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its case no. Up-I-275/97 (OdlUs VII, 231) of 16.07.1998.

Languages:

Slovene.

Identification: SLO-2000-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.12.2000 / **e)** Up-50/99 / **f)** / **g)** *Uradni list RS* (Official Gazette), 01/01; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IX/2, 310 / **h)**.

Keywords of the systematic thesaurus:

2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Advertisement, right / Public benefit / Person, data, dissimination, consent / Association, internal agreement.

Headnotes:

Special rules for the resolution of a conflict between the right to privacy and the right to freedom of expression or to artistic endeavour apply when the private life of another person is mentioned in an autobiography or other work of art about the artist's life. People must be able not only to form opinions but also to communicate them with others and possibly modify their opinions after expressing them. In this respect, individuals must have the right to mention in their own work (or in conversations about their life) people with whom they have come into contact and events experienced with such people, without needing these people's consent. They are entitled to that right in the framework of their freedom of expression or artistic endeavour.

Summary:

The defendants filed a constitutional complaint against the judgments stated in the disposition, in which they asserted that the court had incorrectly weighed up the relationship between the right of the plaintiff to privacy and the defendants' rights to free expression and freedom of artistic endeavour. In their opinion, the court did not establish a balance between the conflicting rights, but favoured the right to privacy. They asserted that the complainant, as the author of the book "The Signs of the Lodge" published by the A. A. company, had described in it the problem of freemasonry in Slovenia and his personal experiences of membership in the society. In this context he described some of the people he encountered in the society. The prohibition against disseminating such information allegedly violated the right to freedom of expression.

The Constitutional Court noted that set aside the contested judgments and returned the case to the court of first instance for retrial.

Modern legal theory defines privacy as an area of the individual with which no one may interfere without special statutory authority. The right to privacy creates a sphere of an individual's own intimate activities, within which, with the guarantee of the state, they alone may decide which interferences they allow. However, the right to privacy is not an absolute right, but is limited by the protection of the rights and benefits of others and by the behaviour of the

individual in public. People are social beings, who constantly come into contact with others. They cannot fully avoid the fact that, for various reasons and inclinations, other people are interested in them and in their private life. In this context, an individual's private life can be divided into the area of intimate and family life, the area of private life which is not lived in public, and the area of the individual's life in public. In general the less intimate the area of the private life of an individual, the less legal protection it enjoys when in conflict with the interests and rights of other individuals.

In reviewing the admissibility of an interference with the individual right to privacy, the characteristics of the subject whose right is interfered with must also be considered. In this context, legal theory states that it is possible, without the consent of the affected person, to write about the private life of a contemporary personality (a so-called "absolute person" in the public eye) in whom the public is interested, and about persons in whom the public is interested only in connection with a concrete event (so-called "relative persons" in the public eye), but not about other persons. In describing events in the lives of absolute and relative persons in the public eye, it is possible to describe, without the consent of the affected persons, only what is important to establish the character, activities and thoughts of these persons concerning their public activities. Furthermore, as regards such persons, without the consent of the affected person, it is not permissible to publish intimate information about their private life.

Special rules for the resolution of the conflict between the right to privacy and the right to freedom of expression or to artistic endeavour apply when someone, in an interview, publication or work of art about his life, discloses details of the private life of another person. The free development of an individual's personality demands that a human being is entitled to a right to an existence which is isolated from other people. Furthermore, this self-same free development of an individual's personality (which is the basis for the recognition of all individual personal rights), entitles the individual to an active social and personal development. A human being, as a social being, must be allowed not only to form their opinions, but also to communicate (orally, in writing, or by other means) these opinions and to modify them in contact with others. In this respect, the author must have the right, giving consideration to the limitations concerning an individual's private life, to mention in their copyrighted work (or in a conversation which refers to their life), persons with whom they have had contact and the events they have experienced with them, without needing the consent of such people to do so. They are entitled to that right in the framework of their freedom of expression and of artistic endeavour, irrespective of whether the matter concerns someone in the public eye or a wholly private individual.

In the present case, the plaintiff, as the former President of the Bar Association, President of the Rotary Club, President of the Slovene Basketball Association, a noted lawyer in Ljubljana, and a freemason (the plaintiff did not deny this fact during the civil suit), was often put in the public eye, which narrowed his sphere of privacy. The position of the higher court (with which the Supreme Court agreed), that the previous functions of the plaintiff could contribute to the fact that the public knew him, but that without his consent his name was not allowed to be used for purposes which did not have any remote connection with his previous functions, is not only in conflict with the actual standards enforced in the Slovenian press and other media, where the tolerance shown by individuals concerning the disclosure of their private life is generally much greater than in the case of the plaintiff, but is also contrary to the positions taken in legal theory. The legal theory of human rights, for example, cites that the right to private life is restricted by the protection of the rights and benefits of others and the behaviour of the individual in public. The Constitutional Court has already emphasised that when entering the sphere of social activities, the individual must assume the risk that his/her activities will be the subject of discussion and judgment (Decision no. U-I-172/94 dated 9 November 1994 (*Bulletin* 1994/3 [SLO-1994-3-020]) – Official Gazette RS, no. 73/94 and DecCC III, 123).

In this respect, the present case did not concern a disclosure of facts from the most intimate areas of the plaintiff's private life, but a description of his role in events in the context of which he came into contact with numerous people, including the complainant, who then described in his book their contact in connection with freemasonry. The complainant's basic intention was not the disclosure of data from the private sphere of the plaintiff, but a wish to describe freemasonry as a phenomenon and his own experience and views on freemasonry. In such a manner he described also the persons with whom he had come into contact in connection with freemasonry and the events he had experienced with these persons. Thus, he mentioned also the plaintiff, who played a central role in his life as regards freemasonry by acting as a sort of guide in his becoming a freemason. The complainant described only the events from the plaintiff's activities within that sphere and not from his family life. Such a right to describe only the events in which he participated and the persons who came into contact with him in his life undoubtedly pertains to the complainant as a social

being in the framework of the freedom of expression and the freedom of artistic endeavour. The fact that he thereby violated the internal agreements reached between the members of the lodge does not affect the existence of his freedom of expression and artistic endeavour. The present legal situation cannot thus be equated with the case from American jurisprudence, in which the U.S. Government required a list of the members of a certain association. Since the matter does not concern a violation of the plaintiff's right to privacy, the question of whether or not the complainant also mentioned in his book other persons by their real names has no impact on this review. Accordingly, the view that in the present case the right to privacy must have precedence over the freedom of expression and artistic endeavour is inconsistent with the Constitution. The court decision thus violated the complainant's freedom of expression (Article 39 of the Constitution) and of artistic endeavour (Article 59 of the Constitution).

Pursuant to Article 39 of the Constitution, the right to freedom of expression also encompasses the right to advertise for commercial purposes. The Constitutional Court reaffirmed that stricter criteria apply to the review of whether the mention of names for advertising or commercial purposes violates the right to privacy than if the matter concerns the mention of names in a copyrighted work. In foreign and domestic legal theory and case-law, it is not disputed that an individual name or image is not allowed to be used for advertising and commercial purposes without that person's consent. In the present case it was necessary to consider that the matter concerned the publication of the name in an advertisement for the copyrighted work in which the plaintiff's name was mentioned, according to the complainant's assertions, even by way of a literal citation from the book. The courts based their finding in the challenged judgments, that the publication of the plaintiff's name in the advertisement violated his right to privacy, on the evaluation that the publication of the plaintiff's name in the book already entailed such a violation. However, the Constitutional Court established that such position is not in conformity with the Constitution. Thus, a new review of this question is needed.

Accordingly, the Constitutional Court reversed the challenged judgments. Applying Article 60 of the Constitutional Court Act, it alone decided on the matter in the part of the challenged judgments that referred to the publication of the plaintiff's name in the book, by dismissing the claim in this part. The Constitutional Court decided in such a manner because it established that the position that the right to privacy had to have precedence in the present case over the freedom of expression and artistic endeavour was inconsistent with the Constitution. It found enough data in the case documents to reach such a decision. It also considered that the proceedings have been pending for a few years and, in the case of repeated adjudication on this question, they would be additionally delayed to the detriment of the complainant's constitutional rights.

Supplementary information:

Legal norms referred to:

- Articles 25, 39 and 59 of the Constitution;
- Articles 59.1 and 60 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its case no. U-I-172/94 (DecCC III, 123) of 09.11.1994, *Bulletin* 1994/3 [SLO-1994-3-020].

Languages:

Slovene, English (translation by the Court).

Identification: SLO-2000-S-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 21.12.2000 / **e)** Up-273/2000 / **f)** / **g)** *Uradni list RS* (Official Gazette), 01/01 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.2 **Fundamental Rights** – Equality.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Asylum, seeker / Detention, extradition, duration / Criminal procedure, extradition.

Headnotes:

The Court dismissed a complaint alleging violations of equality provisions, since the complainant had been detained for reason of ongoing proceedings for his extradition to the Russian Federation. This was the reason why his position is different from the position of other persons who have filed asylum requests and were then sent to an asylum centre. Furthermore, the provisions determining the maximum duration of detention prior to filing the indictment refer to a detention ordered within criminal proceedings before a domestic court, and do not apply in case of detention as part of extradition proceedings.

Summary:

The Constitutional Court was seized about the unconstitutionality of the district court orders by which the complainant's motion to cancel his extradition detention had been dismissed. The complainant alleged that a decision not to send him to an asylum centre after he had filed an asylum request, allegedly violated the Asylum Act, and the rights to equal protection of his rights, and to equality before the law, guaranteed by Articles 22 and 14 of the Constitution.. In addition, the complainant alleged that his constitutional right relating to orders for and the duration of detention, in accordance with Article 20 of the Constitution (determining the maximum six-month time limit for detention), was also violated since he had already been detained for more than six months.

The Constitutional Court dismissed his constitutional complaint. Concerning the first ground of the complaint, i.e. the alleged violation of Articles 14 and 22 of the Constitution, it held that the complainant was detained as part of ongoing proceedings for his extradition to the Russian Federation. The provisions of the Code of Criminal Procedure, or treaties governing extradition procedures, are special provisions in relation to the Asylum Act. As for the second ground of the complaint, i.e. the alleged violation of Article 20 of the Constitution, the Court held that neither Article 20 of the Constitution (providing the conditions for the order of detention prior to the filing of the indictment) nor the Code of Criminal Procedure provisions on the extension of detention, referred to a detention ordered within extradition proceedings. The duration of detention of six months at most applies only to a detention ordered within criminal proceedings before a domestic court. Moreover, the maximum period of detention determined by the Code of Criminal Procedure, which is two and a half years, had not yet expired. Furthermore, the complainant did not allege an undue delay in the extradition procedure.

Supplementary information:

Legal norms referred to:

- Articles 14, 19, 20, 22 and 23 of the Constitution;
- Article 5 ECHR;
- Articles 192, 200, 201 and 207 of the Code of Criminal Procedure (ZKP);
- Article 59.1 of the Constitutional Court Act (ZUstS).

Languages:

Slovene.

Switzerland
Federal Court

Important decisions

Identification: SUI-1966-S-001

a) Switzerland / **b)** Federal Court / **c)** Public Law Chamber / **d)** 16.02.1966 / **e)** P.319/1966 / **f)** Schreyer v. Civil Court of Cassation of the Canton of Neuchâtel / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 92 I 9 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

04.07.01 **Institutions** – Judicial bodies – Jurisdiction.
04.07.02 **Institutions** – Judicial bodies – Procedure.
05.02 **Fundamental Rights** – Equality.
05.03.13.02 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Denial of justice, formal / Formalism, excessive / Court, filling of legislative gap.

Headnotes:

Article 4 of the Federal Constitution. Denial of formal justice.

In procedural terms, formalism constitutes a denial of formal justice when it becomes excessive, namely where it does not serve to protect any interest and where it places an intolerable burden on the application of the substantive law.

Such formalism is manifested by a cantonal appeal Court which declares an appeal inadmissible because it is not supported by a certified copy of the decision appealed against, without granting the appellant a brief adjournment to remedy the omission.

Summary:

At the end of 1965, Marius Schreyer, in the course of civil proceedings, appealed on a point of law against the decision of the Neuchâtel District Court. He attached to his appeal form a photocopy of the decision against which he was appealing. The Civil Court of Cassation of the Canton of Neuchâtel declared the appeal inadmissible because it was not supported by a certified copy of the decision appealed against. Marius Schreyer brought a public-law appeal before the Federal Court, arguing a denial of justice. The Federal Court upheld the appeal and quashed the finding of the Neuchâtel Civil Court of Cassation.

The provision of the Neuchâtel Civil Procedure Code relating to appeals on a point of law imposes no express obligation on an appellant to lodge together with the appeal form a copy of the decision forming the subject of the appeal. However, cantonal case law requires an appellant, in order to avoid his appeal being ruled inadmissible, to submit such a copy and, more specifically, a copy issued and certified by the registrar to any person requiring it. It is not permissible to substitute for it a copy, even a photocopy, unless such a copy has been certified by the registrar as constituting a true copy of the original.

The Federal Court found that where a judge discovers a gap in the law he or she must fill it; in thereby carrying out a legislative task, he or she is as bound by the principles of the Constitution as Parliament itself. In procedural terms, the article of the Constitution guaranteeing equality before the law would allow for a degree of formalism insofar as this is prescribed in order to ensure the proper conduct of the proceedings and the protection of the substantive law. According to federal case law, excessive formalism, which does not serve to protect any interest and which places an intolerable burden on the application of the substantive law, amounts to a denial of procedural justice that is contrary to the Constitution. The following have been held to be examples of excessive formalism: the finding that a case is inadmissible because the lawyer, who normally practises in another canton, had only received his practice certificate after the expiry of the appeal deadline; the finding that an appeal is out of time because it was addressed to the court instead of the registry and it was only re-submitted to the registry after the deadline had passed; the finding that a notice of appeal was invalid because the representative had omitted to lodge at the same time the authority to act that was on his file.

In the present case, the Neuchâtel Civil Court of Cassation might very well have filled the gap left by the legislature, by requiring the appellant to produce a copy of the decision in question that would contain adequate proof of conforming to the original. It was not open to the Court to declare the appeal to be invalid there and then because the copy produced was not a certified copy. There was no justification for such a draconian measure. The cantonal court should

have allowed the appellant a brief periode of time in order to correct the formal omission, failing which the appeal would be declared inadmissible. To follow cantonal case law in declaring the appeal inadmissible at the outset is indeed to deprive the appellant, without good reason, of his legal right of appeal. Such a penalty is not only of a formalist nature which is not justified by a need to protect any given interest, but it also prevents the fair application of substantive rules of law. This immediately produces a denial of procedural justice that is contrary to the Constitution. This finding is all the more inevitable in that the declaration of inadmissibility at the outset was based not on statute law, but on case law, which would make it all the more likely that the appellant would have been unaware of it.

Languages:

French.

Identification: SUI-1969-S-001

a) Switzerland / **b)** Federal Court / **c)** Public Law Chamber / **d)** 26.11.1969 / **e)** P.122/1969 / **f)** Della Savia v. Attorney-General of the Confederation / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 95 I 462 / **h)** *Journal des Tribunaux,* 1970 IV 54; CODICES (Italian).

Keywords of the systematic thesaurus:

02.01.01.04 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
03.16 **General Principles** – Proportionality.
05.03.09 **Fundamental Rights** – Civil and political rights – Right of residence.
05.03.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Extradition, political offence / Political offence, definition / Political offence, politically motivated offence / Terrorism.

Headnotes:

European Convention on Extradition.

The concept of a political offence and of facts arising from such an offence (Article 3.1 of the Convention), for which extradition is not available. Case of an offence committed for anarchistic motices.

Summary:

On 13 June 1969 the Italian Embassy in Bern requested the extradition of one Della Savia, an Italian national, who was suspected of having committed terrorist attacks using explosives in several Italian towns. The person sought objected to extradition, relying chiefly on the political nature of the alleged offences.

The Federal Court found that Article 3.1 of the European Convention on Extradition, by which it was bound in this matter, did not define the term “political offence”. Accordingly, the criteria established by case law and authority applied. As the said provision leaves the matter in the hands of the requested Party (“is regarded by the requested Party as a political offence”), the starting point is the Swiss position and the application of Swiss law, setting aside the legislation and jurisprudence of the requesting State. The European Convention on Extradition precludes extradition not only for a political offence pure and simple, but also for a politically motivated offence in association with a political offence, that is to say a common law offence committed solely in preparation for or in furtherance of a political offence. This means that the concept of a political offence as mentioned in Article 3.1 of the Convention includes both absolute political offences, directed against the social and political organisation of the State, and politically motivated offences, that is to say common law offences which acquire a preponderantly political character because of the circumstances in which they were committed, and in particular their motivation and their objectives. In order to recognise the offence as preponderantly political in character, it must either have been committed in the struggle against, or in favour of, power, or it must shield someone from a power that will not brook any form of opposition. Between the act committed and the political objective there must be a clear, close and direct link. There must also be a certain proportionality between the act and the intended objective; the interests at stake must be sufficiently great, while not justifying the action, at least to render it excusable. In assessing the gravity and the extent of such interests, account should be taken of the subjective assessment that has inspired the perpetrator together with the means used by him, independently of the realistic chances of success.

In this case, the political struggle in Italy had not crossed the democratic boundaries so far as to take

on the character of a revolutionary upsurge. The sporadic skirmishes between demonstrators and police had not become widespread. Moreover, the terrorist attacks alleged against the person sought bore no direct link with those local demonstrations either as to time or as to place. Furthermore, the offences were out of all proportion to their averred objective. The declared aim of the person sought – in relation to the episodes that he admitted to – was to protest against alleged police abuse in suppressing demonstrations by Sicilian peasants. There was held to be no justification for this; indeed, the methods that he had chosen were considered to be acts of violence which, by their seriousness and their dangerous nature, gave rise to general reprobation and amounted to acts of terrorism. In such circumstances, to refuse extradition would be to bestow a right of asylum on an objector who, according to the evidence, was unworthy of it.

Languages:

Italian.

Identification: SUI-1971-S-001

a) Switzerland / **b)** Federal Court / **c)** Public Law Chamber / **d)** 03.03.1971 / **e)** P.99/1970 / **f)** Griessen v. State Council of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 97 I 499 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

03.13 **General Principles** – Legality.
03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
04.08.08.02.01 **Institutions** – Federalism, regionalism and local self-governement – Distribution of powers – Implementation – Distribution *ratione materiae*.
05.01.03 **Fundamental Rights** – General questions – Limits and restrictions.
05.04.06 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
05.04.16 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Law, undue force / Shop, closure / Police, measure / Social policy, measure / Worker, protection.

Headnotes:

Undue force of federal law. Commercial and industrial freedom. Social measures.

In areas governed by federal employment law, cantons have no further legislative powers to protect workers subject to that law (recital 3c).

Unconstitutionality of cantonal economic policy measures (recital 4a).

The restraints imposed on cantons by Article 31.2 of the Federal Constitution extend not only to policing measures, but also to social and socio-political measures (recital 4c).

Conditions with which social measures must comply to be compatible with commercial and industrial freedom (recital 4c and 5).

Summary:

The Geneva law of 15 November 1968 on the opening hours of shops (LHFM) requires shops to close in the evenings, on Sundays and on bank holidays, and for one half day per week. Exceptions are allowed during certain periods of the year, where obvious commercial or tourist interests so justify, on the advice of the relevant trade associations.

G. operated three shops in Geneva where he sold, *inter alia*, souvenirs, knick-knacks, toys, guns, watches and transistor appliances. As well as direct retail sales, he conducted postal sales and import and export trade. In May 1970, he applied for permission to keep two of his shops, located in the centre of town, open throughout the weekly early closing day, arguing that his business relied essentially on tourism. The competent authority refused to lift the restriction; after consulting the trades associations it had decided to grant exceptions only within certain economic sectors and to businesses which fell largely within those sectors, and the appellant's shop did not come within those.

When the State Council of the Canton of Geneva dismissed his application, G. brought a public law appeal before the Federal Court, which dismissed it.

The cantonal and local authority regulations obliging shops to close for half a working day (or even a whole

working day) per week are considered by case law as being compatible with commercial and industrial freedom: being intended first and foremost to allow staff sufficient time to rest, they constitute rules of public policy that the cantons can enact mainly in the interests of public health.

The appellant, however, contended that since the entry into force of the Federal Employment Law of 13 March 1964, such restrictions could not longer be intended to protect employees, the said law being itself exclusively for their protection. It is true that the said law overrides cantonal law in this matter. However, the law deliberately retained cantonal and local authority policy regulations and in particular those concerning Sunday closing and opening hours for retail outlets. There could be no doubt that this provision related in any case to the prohibitions on keeping shops open in the evening, on Sundays and on bank holidays: these are typical measures designed to promote public order and keep the peace; their main intention is not the protection of staff. Whether such prohibitions are based on considerations of public order is, on the other hand, more debatable when it comes to provisions on the closure of shops one half working day per week. The Federal Court has always considered such measures to form part of the public order in the widest sense, but this opinion has been criticised on a number of occasions by legal opinion.

The fact that cantons are unable to legislate on the subject of the protection of workers and the fact that it is a moot point whether the closure of shops for a working half-day per week can still truly be considered to be a prohibition based on considerations of public order nevertheless does not preclude such closure from being ordered by cantons, as they do not thereby restrict competition or attenuate its effects. Article 31.2 of the Federal Constitution on commercial and industrial freedom, maintains the rights of cantons to pass and implement regulations concerning trade and industry; however, they may not derogate from the principle of commercial and industrial freedom, unless the Constitution provides otherwise. The Constitution, in maintaining the right of cantons to make regulations, does not restrict these measures to protect public order; the requirement is simply that they should not be economic policy measures. The Federal Court has always stated that the only exceptions to the general principle of commercial and industrial freedom were regulations intended to maintain public order, that is, public peace, security and morality together with honest business dealings. Consideration must be taken of the social evolution over the last few decades which has resulted in a considerable improvement in people's standard of living, health and recreational activities, and which has led cantons to take different measures (for example, in the matter of paid holidays, opening hours of shops). The Federal Court stated that such measures, which are considered justified by a large sector of the community, were compatible with commercial and industrial freedom, seeing them as measures to protect public order. It would, however, appear better to confine that term to the classic and traditional concept of protection from danger and to describe regulations such as those relating to the opening of shops as social measures or measures of social policy.

The Geneva provision ordering shops to close for half a working day per week complies with the requirements of the constitutional principles of legality, public interest, proportionality and fairness. The legal basis is complied with because these restrictions are imposed by the law itself. The measure enables people who are not subject to the federal law, such as the traders themselves and members of their families, to benefit from a weekly day of rest and may therefore be considered to be in the public interest. It is true that the sole purpose of these provisions is not to obtain for traders leisure time of which they have as much need as the employees; insofar as they facilitate the application of provisions which grant extra time off for workers, they also have a certain economic policy aspect. Their social purpose, which is recognised as being in the public interest, would in itself suffice, however, to justify them, as long as it does not come to be of manifestly secondary significance.

The principle of proportionality is also preserved. The social purpose can only be achieved by imposing the obligation to close on one half working day per week; the freedom to choose which one is left to the trader.

There is also no unfairness of treatment. On the contrary, the provision complained of places shop proprietors on the same footing as many workers by allowing the former to benefit from an advantage bestowed on the latter. In relation to members of the liberal professions, their situation essentially differs too much from that of shop traders for the two categories to be compared on an equal footing.

Supplementary information:

When viewed from the angle of its main objective, this case law would appear to be somewhat outdated at the present time when the tendency is rather the liberalisation of shop opening hours; the need for traders to rest is not of prime importance. It is, however, an important decision because it considers for the first time, naming them for what they are, social measures (previously concealed under the

terminology of “measures to protect public order”) as being capable of justifying a restriction of commercial and industrial freedom.

Languages:

French.

Identification: SUI-1975-S-001

a) Switzerland / **b)** Federal Court / **c)** Public Law Chamber / **d)** 08.10.1975 / **e)** P.184/1974 / **f)** R. and others v. State Council of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 101 Ia 473 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

03.12 **General Principles** – Clarity and precision of legal provisions.
03.13 **General Principles** – Legality.
03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
03.22 **General Principles** – Prohibition of arbitrariness.
05.04.06 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Public place, use / Prostitution, solliciting in public place.

Headnotes:

Use of a public place by prostitutes in order to solicit clients.

The professional activity of prostitutes, insofar as it does not constitute an offence, may in principle benefit from the protection of Article 31 of the Federal Constitution (recital 2).

Legal basis of impugned regulation (recital 4).

A person who avails himself of a customary common use of public land in order to exercise a commercial activity may rely on the principle of the freedom of trade and industry, insofar as the designation of the public land so allows (change of case-law; recital 5).

The prohibition on “engaging in prostitution in a public place” during daylight hours, throughout Geneva territory, is in breach of the principle of proportionality (finding 6).

Summary:

On 28 August 1974 the State Council of the Canton of Geneva supplemented the regulation on keeping the peace with the following article: “It is prohibited to engage in prostitution in a public place during daylight hours and, as a general rule, in such a manner as to disturb public order”. Several prostitutes have applied to the Federal Court to revoke the regulation insofar as it prohibited prostitution in a public place during daylight hours.

The wording of the new article is highly unsatisfactory. Prostitution as such is not an offence. Federal legislation has confined itself to ruling on the suppression of certain preliminary activities, certain excesses and certain secondary manifestations of prostitution. The provision of the Swiss Criminal Code on soliciting is not intended to incriminate every venture of a prostitute onto the public highway in search of clients. It is, however, precisely that which the impugned regulation seeks to prohibit, at least during daylight hours. The professional activity of prostitutes, insofar as it does not constitute an offence, may in principle benefit from the protection of Article 31 of the Federal Constitution, which guarantees commercial and industrial freedom.

The question whether this is common use of public land or a customary common use of public land can remain open, given that the government has a sufficiently broad legal base to regulate either. A customary common use does not necessary preclude the interested party from asserting the principle of commercial and industrial freedom. A person availing himself of a customary common use of public land in order to exercise a commercial activity may rely on the principle of commercial and industrial freedom, insofar as the designation of the public land so allows. The authorities whose task it is to regulate customary use of public land should act in the public interest, according to objective criteria, and not base their judgment solely on considerations of economic policy. The restrictions applied to such use can be based on other than policing requirements. They must, however, respect the principle of proportionality. Jurisprudence has recognised the right of authorities to prohibit prostitutes, in order to maintain the peace and public order and in the interests of public health, from openly frequenting certain places

for purposes of prostitution. The Federal Court examining the Zurich regulations in 1973 concluded that it was not contrary to the Constitution to prohibit prostitutes from loitering and soliciting for clients on streets and other public places surrounded by dwelling houses (except for red light districts, from 8 p.m. to 3 a.m.), at public transport stops during service hours, in and around parks open to the public and in the vicinity of churches, schools and hospitals. Such regulation leaves prostitutes day and night access to a high proportion of communal territory, precisely defined by means of maps.

The Geneva State Council has not adopted such regulatory measures, but has prohibited prostitutes from loitering and soliciting for clients in daylight hours throughout the Canton territory. By acting in this way, it has contravened the principle of proportionality. The fact, relied on by the Government, that prostitution in Geneva is confined to two districts, does not change anything, inasmuch as it is the wording of the regulation that is at issue and the wording draws no distinction between the districts concerned.

The provision appealed against should therefore be repealed and the attention of the State Council drawn to the fact that the terms contained in it of "engaging in prostitution" and "during daylight hours" are inappropriate in that they allow the authorities whose task it is to police them too wide an area of discretion. Such police authorities should be able to rely on precise wording that is not open to discussion.

Languages:

French.

Identification: SUI-1977-S-001

a) Switzerland / **b)** Federal Court / **c)** Public Law Chamber / **d)** 08.06.1977 / **e)** P.248/1976 / **f)** Perren Sarbach v. State Council of the Canton of Valais / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 103 Ia 259 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
05.01.03 **Fundamental Rights** – General questions – Limits and restrictions.
05.04.06 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Certificate of competence, requirement / Beautician, certificate of competence / Police, measure / Public health, protection.

Headnotes:

Article 31 of the Federal Constitution; commercial and industrial freedom.

Concept of commemrcial and industrial freedom; cantonal restrictions, especially public order measures justified for reasons of public interest (recital 2a).

The requirement imposed by Article 1.d of the Valais regulation on the profession of beautician, of 24 May 1972, of the holding of a certificate of competence or a recognised equivalent qualification in order to practise that profession is justified in the interests of public health (recitals 2b, c and d).

The requirement of a certificate of competence or an equivalent recognised qualification is not in breach of the principle of proportionality (recital 3).

Summary:

Mrs Perren-Sarbach is the holder of a qualification as a beautician granted to her on 8 November 1971 by the Swiss Association of Beautician Owners of Beauty and Therapy Parlours. As she did not meet the requirements of Valais legislation to practise independently the profession of beautician within the Canton, the competent authority refused her the permit for which she had applied. She then served an apprenticeship in a beauty parlour for one year and subsequently, without applying for permission, took over the running of another parlour. The competent authority ordered the latter to be closed. While she was running, still without permission, a parlour in another locality within the Canton, the authority fined her and ordered her to abandon with immediate effect all activity within the field of beauty care. Having had her appeal against this decision dismissed by the State Council of Valais, Mrs Perren-Sarbach brought a public-law appeal before the Federal Court, which dismissed it.

The appellant did not dispute the constitutionality of the cantonal provision authorising the Valais government to regulate the profession of beautician, but argued that the regulation passed in implementation of that provision was contrary to the constitutional principle of commercial and industrial freedom. That regulation draws a distinction between permission to exercise the profession of beautician and permission to run a beauty parlour. The appellant complained of the fact that she had been forbidden to practise in future as a beautician even in the capacity of an employee.

The freedom of trade and industry protects all gainful economic activity carried out professionally. It covers the right to choose and to exercise freely all private commercial activity anywhere in Swiss territory and applies to employees or salaried staff as well as self-employed persons. The cantons may, however, apply to that constitutional freedom restrictions mainly comprising policing measures in order to maintain the peace and public order and in the interests of public health, and to save or protect from danger. Such restrictions should be limited to what is strictly necessary for carrying out these responsibilities. It is forbidden to impose restrictions in restraint of free competition in order to protect or promote certain branches of gainful activity or certain forms of trade which steer economic activity along a certain path. It is permissible to impose restrictions the general aim of which is the protection of the public where the activity presents dangers which only a professionally qualified person is capable of eliminating to any significant degree. The Federal Court has already conceded that such is the case with mountain guides, ski instructors, midwives, chiropractors, estate agents, dental technicians, taxi drivers, electricians and directors of ski schools.

The Valais regulation on the profession of beautician requires, *inter alia*, that the party concerned should be the holder of a certificate of competence or a recognised equivalent qualification. It was this requirement that the appellant disputed, arguing that it was contrary to the Constitution. The regulation in question prohibited beauticians from carrying out any medical or paramedical activity (giving consultations or medical care, prescribing medicines, practising therapeutic massage, performing electrical depilatory treatment without special authorisation, etc…). This was not sufficient, however, to allow one to conclude, as had the appellant, that the profession of beautician, thus circumscribed, did not present dangers to the public which only a professionally qualified person is capable of eliminating to any significant degree. The beautician is chiefly concerned with giving facial and body beauty treatments. She must thus learn to work in conditions of scrupulous cleanliness; even if she does not run the beauty parlour, she must be capable of working independently, as she generally gives all the treatments required by her clients herself. She must also be capable of using accurately and appropriately such apparatus as inevitably carries a concomitant risk, and must know the properties, the indications and the doses of the various cosmetics, which could sometimes give rise to allergies. It should be observed that as early as 1918 the Federal Court judged that it was not incompatible with commercial and industrial freedom to impose on the exercise of the profession of masseur (for non therapeutic massages) certain conditions considered necessary in order to prevent the risks that the masseur's ignorance or inexperience would pose to the public. Indeed, facial and body massage would appear to play a not inconsiderable part in the activities of the beautician.

It is for these reasons that the federal authorities on 18 February 1971 adopted a regulation on the apprenticeship and the end of apprenticeship examination for the profession of beautician that would give rise to a federal certificate of competence. The prescribed courses are aimed at the professional training of future beauticians (only 10% of the time is occupied by sales techniques, language teaching and general culture).

It follows that the requirement of the federal certificate of competence by the Canton of Valais is not disproportionate to the objective pursued, namely the interests of public health.

Languages:

French.

Identification: SUI-1978-S-001

a) Switzerland / **b)** Federal Court / **c)** Public Law Chamber / **d)** 08.03.1978 / **e)** P.166/1976 / **f)** Swiss Union of Journalists, Hanspeter Bürgin, Gasser SA and others v. Government of the Canton of Graubünden / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 104 Ia 88 / **h)** *Journal des Tribunaux,* 1980 I 625; CODICES (German).

Keywords of the systematic thesaurus:

02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
03.22 **General Principles** – Prohibition of arbitrariness.
05.02 **Fundamental Rights** – Equality.
05.03.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
05.03.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
05.03.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
05.03.23 **Fundamental Rights** – Civil and political rights – Right to information.
05.03.24 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.
05.04.06 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Government and administration, information of the public.

Headnotes:

Articles 4, 31 and 55 of the Federal Constitution (on equality of treatment and prohibition of arbitrariness), commercial and industrial freedom and freedom of the press respectively); freedom of expression, freedom of information and Article 10 ECHR; information of the public by the government and the administrative authorities.

Freedom of expression and the freedom of the press safeguard the freedom of opinion and the freedom to receive and to communicate information and opinions, including the general freedom to obtain information from accessible sources (recital 4).

The freedom of information included in the freedom of expression and the freedom of the press does not place the authorities under an obligation to communicate information. Insofar, however, as the authorities give information concerning their activities, they must respect the requirements of equality of treatment and prohibition of arbitrariness (recital 5).

The directives of the Canton of Graubünden on information of the public by the government and administrative authorities, of 12 July 1976, are not in breach of the said fundamental rights (recitals 6-12).

Summary:

On 12 July 1976 the Government of the Canton of Graubünden passed directives on the information of the public by the authorities. They lay down the principle that the public should be informed of the activities of the Government and the administrative authorities insofar as it is required in the public interest. They establish the limits of information, create a list of recipients and rule on issues of competence; they also set out the means by which information is to be imparted, make it obligatory for recipients to state their name and address and set out the circumstances in which recipients can be excluded.

The Swiss Union of Journalists and certain individuals brought public-law appeals against these directives before the Federal Court, claiming that they contravened their constitutional rights, namely freedom of expression, freedom of information, the freedom of the press and commercial and indusrial freedom, as well as the principle of the separation of powers and equality before the law. The Federal Court dismissed the appeals.

The constitutionality of the directives in question must be examined first in the light of the freedom of expression, as guaranteed by the European Convention on Human Rights and the Federal Constitution. According to Article 10.1 ECHR the freedom of expression to which everyone is entitled includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. According to prevailing legal opinion, freedom of information, as included in the freedom of expression, includes the general freedom to obtain information from accessible or available sources. However, this does not oblige the public authorities to divulge information. The same applies to the freedom of information arising under the Federal Constitution. For some time, efforts have been made both at Convention level and Federal Constitution level, to create a general obligation to inform comprising a right to obtain information. Such efforts have not, however, produced any concrete results. The rule by which freedom of information, interpreted in the light of freedom of expression and the freedom of the press, does not place the authorities under any obligation to communicate information, remains valid. To the extent, however, that the authorities give information concerning their activities, they must respect the requirements of equality of treatment and prohibition of arbitrariness. These two fundamental rights are not contravened by

the directives in question. The limits established by them (public interest, private interests worthy of protection, confidentiality, insofar as they oppose disclosure) are all in accordance with the Constitution and they are, moreover, reasonable. The drawing up of a list of recipients is not in itself contrary to the freedom of information, particularly since the directives do not state who the recipients are to be (the appellants had asked that such a list be open also to non-journalists). The provision according to which information could not be communicated by just any official, but only by a restricted number of officials, is not contrary to the Constitution but responds to the needs of organisation and responsibility; it should be remembered in this context that the citizen has no right to information from the public authority; it is sufficient that the information communicated should not be restricted to one part of the designated recipients.

The directives provide for a monthly meeting with representatives of the Graubünden press. The appellants objected that other journalists are not to be invited. The Graubünden Government, however, stated that non Graubünden media correspondents who so wish may also participate in such meetings and that so far nobody had been excluded from them. According to the directives, anyone who applies for information is required, if asked, to give his or her name and address. That obligation, which aims to prevent abuse, cannot be criticised, as it corresponds to the basic rules of common courtesy that would require any person wishing to obtain information from the public authority to give his name. The possibility of excluding from the ranks of recipients of information any who have obtained, or tried to obtain, information fraudulently is completely justified, as all regulations should contain sanctions in the event of their breach; such sanctions should be applied according to the principle of proportionality.

Languages:

German.

Identification: SUI-1979-S-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 21.09.1979 / **e)** A.390/1978 / **f)** F.D. v. Revenue Law Chamber of the Court of Appeal of the Canton of Ticino / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 105 Ib 245 / **h)** *Archives de droit fiscal Suisse,* 49 318; CODICES (Italian).

Keywords of the systematic thesaurus:

05.03.13.05 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.
05.03.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
05.03.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Decision, review / Taxation, decision, reasons / Taxation, decision, review.

Headnotes:

Requirements for giving reasons for a revenue decision.

1. Where taxation imposed is at variance with the taxpayer's declaration, the authority must indicate, however succinctly, the reasons, so as to allow the taxpayer to understand the positions and the taxable factors that have been changed or adjusted and to appreciate the reasons why the amounts he has given have not been taken into consideration (recital 2a).

2. Having recourse to a coded statement of reasons, acceptable in principle because of its being practical and speedy becomes dubious in law in the light of Article 95 of the judgment of the Federal Council concerning the levying of a tax for national defence (reason f of the revenue decision) and, in more general terms, could be unconstitutional from the point of view of Article 4 of the Federal Constitution, where the amount of taxation imposed is markedly at variance with the declaration or contains new items or factors which were unknown to the appellant during the process of taxation (recital 2b).

3. Where a revenue authority, being required by law to give reasons for its decisions, fails to do so or gives wrong or insufficient reasons, this constitutes a denial of natural justice and a contravention of a basic rule of procedure (recitals 2a and c).

Review of a final tax assessment for contravention of a basic rule of procedure.

1. To constitute a reason for review, the procedural breach must by its nature or by the way in which the

reasons were given or by the contents of those reasons, have had the effect of depriving the person concerned of the possibility of availing himself of the usual legal channels or at least of dissuading him from using them (recitals 3a and b).

2. Existence of such a reason recognised in the case in point (finding 3c).

Summary:

Mrs F.D. was legally married but *de facto* separated from her husband, who lives in America. In assessing tax for the fiscal period 1977/1978, the relevant authority of the Canton of Ticino, where Mrs F.D. was domiciled, accepted the information given by the taxpayer, but refused to agree a family responsibility allowance because the person concerned was separated from her husband. In determining the level of tax, the taxing authority nevertheless added to the taxable sum an estimated income of 12,000 francs earned by her husband abroad. The only reasons given were contained in the code number 32, which in the text printed at the back of the tax form corresponds to the wording: "increased rate to take account of non taxable items in the canton or in Switzerland". The taxpayer did not appeal against these amendments and the tax assessment became final.

On 6 March 1978, after receiving the payment forms, Mrs F.D. reacted and asked for the tax assessment to be revised. She asserted that the obscure coded reason given by the revenue authorities had prevented her from appealing the assessment by the relevant date. She had only learned the significance of this reason when she had approached the revenue authorities. In substance she appealed against the increase to the taxable figure, given that she had never received any maintenance from her husband, from whom she had been separated for many years. The cantonal authorities dismissed the application for review. Mrs F.D. then applied to the Federal Court, relying on the inadequate reasons given for the assessment. The Federal Court upheld the appeal.

In a State governed by the rule of law, a public authority is obliged to give reason for its decisions in order to allow the person concerned to make effective use of the means of appeal available under the law. This obligation on the part of the authority derives from the right to a hearing accorded by Article 4 of the Federal Constitution. In the matter of taxation, jurisprudence and legal opinion require that decisions which are at variance with the declaration must indicate, at least succinctly, the reasons, so as to allow the taxpayer to understand without more the positions and the taxable factors that have been changed or adjusted and to appreciate the reasons why the amounts he or she has given have not been taken into consideration. Only if the taxpayer is clear as to the meaning of the decision and knows why it went one way rather than another is he or she in a position to appeal effectively against the assessment. In other cantons, quite rightly, the revenue authority sends the taxpayer, together with the assessment, a form on which are shown the items and the amounts which diverge from those shown on the taxpayer's declaration, in such a way that the taxpayer is in a position to appreciate immediately the changes made by the authority.

Coded reasons of the kind used in this case would appear to be manifestly inadequate, taking account also of the fact that the appellant, in common with a vast number of other taxpayers, has no specialised knowledge of fiscal matters; a mere reference to the number 32 could not have been of any help to the taxpayer; she would hardly have been able to deduce from that generic term that it referred to estimated income earned in America by her husband from whom she had been separated for a long time.

A review is generally possible where the decision was taken in breach of the essential rules of procedure; it is, however, excluded, according to case law and according to a relevant provision in Ticino revenue law if the person concerned might have been able, by using the care that one might reasonably expect of him, plead the grounds for review in an ordinary action to have the assessment put aside or within the appeal procedure. Such an eventuality did not come about in this case because the statement of reasons could not in these actual circumstances, prompt the taxpayer, ignorant in fiscal matters, to apply to the competent authority within the time limit for appeal so that she could be given the necessary explanations. Even though the appellant had been somewhat negligent, this negligence was excusable from a subjective view point.

Languages:

Italian.

Identification: SUI-1981-S-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 27.11.1981 / **e)** P.1536/1980 / **f)**

Wyss v. Altdorf Municipal Council and State Council of the Canton of Uri / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 107 Ia 234 / **h)** *Journal des Tribunaux,* 1983 I 59; *Archives de droit fiscal Suisse,* 50 453; CODICES (German).

Keywords of the systematic thesaurus:

03.13 **General Principles** – Legality.
05.03.23 **Fundamental Rights** – Civil and political rights – Right to information.
05.03.31.01 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
05.03.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Fiscal register, public access.

Headnotes:

Freedom of expression in regard to information; examination of register of taxpayers.

The refusal of a district council in the Canton of Uri to allow a taxpayer resident in the district to examine the register in which the taxable items in relation to each taxpayer are shown is contrary to canton law and in contravention of the freedom of information.

Summary:

The Revenue Law of the Canton of Uri, 1965, imposes a duty of discretion on the fiscal authorities; they may only reveal the facts that have come to their knowledge to other national fiscal authorities. The Law confers an express right for the taxpayer to have access to the tax registers. The implementing order for this Law, passed in 1968, provides that fiscal data not contained in the tax registers cannot be divulged, but that the taxpayer has the right of access to the said register in the district to which he makes his tax returns. The tax registers contain the total amount of revenue and the taxable sums on which the taxpayers are assessed.

On 24 September 1979, Mrs Wyss applied to the municipal records office of Altdorf to be allowed to examine the entries for two taxpayers in the tax registers. She was given permission to examine the position of one of the two taxpayers, a salaried employee, but she was refused permission to examine the position of the other, a self employed man, on the grounds that she herself was a salaried employee.

The canton authorities to whom the interested party complained upheld this decision. Mrs Wyss appealed by way of public-law to the Federal Court, which allowed the appeal.

The Cantonal Government accepts that the tax register was originally a public register to which every taxpayer had automatic right of access; the implementing order requires the interested party to be a taxpayer in the district where he wishes to examine the register. On Government instructions, having regard to the rules on data protection that have meanwhile come into existence, such access should from now on be subject to the condition that the applicant can prove that he has a legitimate interest. Such is nowadays the case for most registers maintained by the authorities. The legal provisions must consequently be interpreted in the light of the above principles.

Public access to the fiscal registers is regulated by canton law. Such registers are inaccessible to the public in three cantons only; this is also the case in the matter of direct federal tax.

Four cantons make access to the registers subject to proof of a legitimate interest. Eight cantons grant access without proof of such an interest and in the ten remaining cantons the registers are open to the public in one form or another and even published in part.

The opinion of the Uri Government, namely that access to the register should be subject to proof of a legitimate interest by the applicant, certainly has merit. But the Government applied this rule for the first time in this case, ignoring the need for a prior modification of the cantonal legislation, which does not contain any such condition. This manner of proceeding cannot be accepted. While, on the one hand, it protects the privacy of the taxpayers listed, on the other hand it restricts the right of information and the right of verification by the public, which is also made up of taxpayers. Such a restriction can therefire only be introduced by a formal legal provision.

Languages:

German.

Identification: SUI-1982-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 03.11.1982 / **e)** P.337/1982 / **f)** Bufano, Martinez and Sanchez Reisse v. State Prosecutor of the Confederation and Federal Justice and Police Department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 108 Ib 408 / **h)** *Journal des Tribunaux,* 1983 IV 158; CODICES (French).

Keywords of the systematic thesaurus:

02.01.02.02 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
05.03.03 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Extradition / Political offence, politically motivated offence / International Federation of Human Rights, opinion / Political offence.

Headnotes:

Extradiction. Political offence. General principles of Human Rights.

Concept of politically motivated offence (recital 7b).

Refusal to extradite on the basis of general human rights principles (clarification of case law; recital 8).

Summary:

Five Argentine citizens, three of whom were resident in Buenos Aires and two in Florida, were arrested in Switzerland in relation to two kidnappings of financiers, which took place in Buenos Aires. The Ambassador of the Republic of Argentina in Bern made two requests for extradition, to which the interested parties objected; the Federal Court upheld their objection.

Contrary to what the objectors assert, the Argentine courts before which their cases would come in the event of extradition did not constitute a special court within the meaning of the Extradition Treaty between Switzerland and Argentina. The offences with which they were charged could not in themselves be considered politically motivated offences, despite the fact that some of the perpetrators were or had been connected with the secret services or the Argentine police. The aim of these offences was extortion and any struggle for power was incidental, a fact that would militate against regarding them as offences that were mainly political in nature within the meaning of the case law on extradition.

According to Article 3.2 of the European Convention on Extradition, it is not possible to accede to a request for extradition for an ordinary criminal offence where it has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons. This provision takes has the character of a general principle of international law; it therefore applies also in relations with a State such as Argentina, which is not a party to this Convention. The refusal to extradite for purely political or politically motivated offences (a concept which is touched upon but not defined in the bilateral treaty between Switzerland and Argentina) is based on the generally accepted idea not that such acts are not in themselves punishable, but that their perpetrator should not be put at risk of being judged in proceedings that are tainted by political motives. Such a refusal is justified for the same reasons when, in a specific case, the request for extradition is related to ordinary criminal offences, but where the position of the person claimed could be exacerbated, particularly for political reasons.

Article 3 ECHR, prohibiting torture or inhuman or degrading treatment or punishment, applies to every person appearing before a Swiss court, whatever his nationality or domicile. It also enacts a general principle of international law which must be borne in mind in considering a request for extradition.

The constitutional rights of citizens were suspended in Argentina as the result of the state of emergency proclaimed on 6 November 1974. That measure included the right to detain people in order to deliver them to the executive authorities. The changes which subsequently occurred to the State leadership were not accompanied by a lifting of martial law or any perceptible change to the institutional structures. A specific politico-legal situation would inevitably result in a general refusal by Switzerland to grant any extradition towards a given State, notwithstanding any international agreements it has reached with it. Such a refusal will only be made where it is possible to reach an objective finding, within a specific context, that extradited parties may be directly and personally exposed to the risk that the general principles of international law referred to will be contravened. In this particular case, two of the objectors made serious

and specific allegations to the International Federation for Human Rights against leading members of the *de facto* government in Buenos Aires. Even if, in principle, this aspect must be viewed with extreme caution lest the objectors to extradition should in the course of their provisional detention devise a system of *ex post facto* objection, one could not in this case ignore the opinion expressed by such a prestigious and objective body as the International Federation for Human Rights, a body with close links with the United Nations, to the effect that to return those two objectors to Argentina would be to place their lives at certain risk. This assessment would apply to the entire group of persons claimed if one considers the interdependence of their offending behaviour and their personal relations. These circumstances as a whole gave the Federal Court substantial grounds for fearing that the treatment that might be meted out to the objectors by the requesting State either at the pre-judgment stage or in administering the sentence, would be in contravention to their human rights. The general principles of international law would therefore stand in the way of authorising extradition.

Supplementary information:

The extradition refused in 1982 was, however, granted in 1986, following a new request for extradition, the Federal Court having noted that international public order was no longer an obstacle in that Argentina had meanwhile returned to being a State governed by the rule of law (see Decision of 21 May 1986, published in the *Arrêts du Tribunal fédéral* (Official Digest), 112 Ib 215).

Languages:

French.

Identification: SUI-1983-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 23.06.1983 / **e)** P.327/1983 / **f)** Gelli v. Federal Police Bureau / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 109 Ib 223 / **h)** *Journal des Tribunaux,* 1984 IV 90; *La Semaine judiciaire,* 1984 221; CODICES (Italian).

Keywords of the systematic thesaurus:

02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
05.03.05.01 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
05.03.09 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Extradition, detention / Dentention for purpose of extradition, provisional release / Detention for purpose of extradition, legality / Detention for purpose of extradition, duration.

Headnotes:

Extradition. European Convention on Extradition, Federal Law on legal co-operation in criminal matters of 20 March 1981 (EIMP).

General principles on provisional release in extradition proceedings. Application of those principles to the case in point.

Summary:

Having been provisionally arrested in Geneva, the Italian citizen Gelli was the subject of a request for extradition to Italy, based on a number of Italian arrest warrants for a long series of offences. In the course of the extradition proceedings, Gelli applied for provisional release on 29 March 1983. He argued that some of the offences with which he was charged were of a political nature, that others were the subject of an amnesty or were statute barred, the likely duration of the extradition proceedings, his age and his state of failing health, together with the fact that to prolong his detention would be to exceed the maximum time limits set in Italy for remand in custody, a fact that would procure his automatic release.

The Federal Court refused the application for provisional release following the lodging of an opposition notice by the Federal Police Bureau.

In the matter of detention for purposes of extradition, the European Convention on Extradition provides only that the requesting Party may request provisional arrest, that provisional arrest may be terminated if the request for extradition has not been made formally within the prescribed time limits and that the possibility of provisional release at any time is not excluded, but the requested Party shall take any

measures which it considers necessary to prevent the escape of the person sought.

Under the applicable Swiss law (Federal Law on International Co-operation in Criminal Matters, hereinafter "EIMP"), provisional arrest becomes final and as a rule justifies detention throughout the extradition proceedings when the request for extradition together with supporting documents is received within the prescribed deadlines and and extradition is not blatantly inadmissible (Article 51.1 EIMP). Article 47 EIMP provides that detention need not be ordered if it appears that the person claimed will not seek to avoid the extradition and will not obstruct the proceedings, or if an alibi can be supplied without delay. If the person sought cannot undergo imprisonment or if other reasons so justify, other measures can be used instead of detention. The person sought can at any time apply to be freed (Article 50.3 EIMP). Provisional release is governed solely by Swiss law. Because of the treaty-based undertaking assumed by Switzerland to extradite persons sought and to prevent their flight, detention is the rule. The less stringent conditions for granting bail following arrest for criminal proceedings do not therefore apply here.

In this particular situation, the grounds put forward by Gelli in objecting to the request for extradition should be examined in the extradition proceedings themselves; they are inadmissible in the proceedings with respect to detention for the purpose of extradition; accordingly, the only justification for releasing him would be his inability to undergo imprisonment, a request for extradition that is blatantly inadmissible or the immediate production of an alibi.

Contrary to what Gelli avers, the extraditing judge is not required to consider what his position would be if he were to be detained in the requesting State, and therefore the fact that the time limits for preventive detention in that State had been exceeded would not be a basis for freeing him from detention with a view to extradition. The same rule, based on the fundamental difference between the two sorts of detention depending on their specific purpose, is followed in Italy.

It is true that the extradition proceedings – and therefore the concomitant detention – should not be subject to undue delay, as this would infringe the principle of Article 5.1.f ECHR, which permits only a normal detention. However, in this case the person sought has not complained of any such delays and there is no evidence of them on the file.

Languages:

Italian.

Identification: SUI-1983-S-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 06.07.1983 / **e)** P.847/1982 / **f)** Committee against the Police Act and Duvanel v. Grand Council of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 109 Ia 146 / **h)** *Journal des Tribunaux,* 1984 IV 95; *La Semaine judiciaire,* 1984 1; CODICES (French).

Keywords of the systematic thesaurus:

02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
02.01.02 **Sources of Constitutional Law** – Categories – Unwritten rules.
03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
04.06.02 **Institutions** – Executive bodies – Powers.
05.03.05 **Fundamental Rights** – Civil and political rights – Individual liberty.
05.03.13.02.01 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts – *Habeas corpus*.

Keywords of the alphabetical index:

Police, powers / Identity, check / Identification, measures / Photograph, identification / Prints, identification / Body search, officer of same sex.

Headnotes:

Judicial review. Personal freedom. Police involvement. Conformity with the constitutional guarantee of personal freedom of the Geneva Police Act of 18 September 1981 on the *modus operandi* of police officers (Articles 17 B to 17 E LPol).

- Reasons for and restrictions on identity checks (recital 4b).

- Conditions governing the transfer of an individual into police premises for purposes of identification (recital 5a).

- Length of identification procedures (recital 5b).
- Supervision and complaint procedures (recital 5c).
- Right of the detainee to make contact with family or friends (recital 5d).
- Special means of identification (photographs and prints) of persons whose identity has not been verified. Such are to be considered a "last resort" (recital 6a).
- Destruction of identification materials at the end of the inquiry (recital 6b).
- Circumstances in which the search of a person detained for purposes of identification may be carried out (recital 8a).
- Principle that the search of a person should be carried out by an officer of the same sex; derogations from that principle (recital 8b).

Summary:

On 18 September 1981, the Parliament of the Canton of Geneva passed a new Police Act. One section of that Act, endorsed by referendum, was concerned in particular with the conditions for verifying identity. These provisions gave a legal basis to the practice that had been previously developed under the general police powers. They were challenged by an organisation and an individual through a constitutional complaint to the Federal Court under the judicial review procedure for legal rules. The complainants contended that the provisions were in breach of the personal freedom guaranteed by federal constitutional law.

One of the impugned provisions authorises all police officers to require proof of identity from any person whom they stop and question in the course of duty.

Such a provision is in accordance with the constitutional principles of public interest and proportionality insofar as questioning should not be performed in a vexatious or harassing manner and should not be engaged in simply to gratify idle curiosity. It should be confined to the bare necessities, such as establishing that there has been an incident or what the person concerned is doing in the neighbourhood of a recently committed crime. The principle of proportionality would require the officers to treat the persons being questioned with respect and to refrain from putting indiscreet and unnecessary questions. The verification methods should not in any event go beyond what is required in order to check identity; verbal assertions, which one easy to confirm on the spot, should be adequate where the person questioned is not carrying any form of identification document.

A further provision allows for a person who is not in a position to prove his identity, if further verification proves necessary, to be taken to a police station to be identified there; such identification should be carried out without delay and once it has been completed, the person questioned is to leave the police premises at once.

This provision, required for reasons of public interest, is also constitutional if it is applied with due regard for the principle of proportionality. The mere absence of identity papers, the nature of which should be given its broadest meaning, would not be sufficient to bring it into play, as in most cases verification can be carried out on the spot by technical means (and in particular by radio contact with police headquarters). Removal to a police station should only take place subsequently and in exceptional circumstances. Parliament could have set a maximum period of detention in police custody, but the absence of an exact limit – as provided for in other cantons – cannot prejudice the person concerned; indeed, he should be able to secure his release as soon as the verification process – which normally would require only a few hours – has been completed. Case law has upheld the lawfulness of a detention of between 4 and 6 hours and even as long as 7 hours; it has held that a detention lasting 19 hours is manifestly excessive. If it is not possible for the detainee to make an immediate appeal to a judge because of the very nature of the identification check, he nevertheless has the right to ask that the Principal State Prosecutor be informed of the steps taken in relation to him and to make immediate contact with family or friends.

A third provision allows for identification measures such as the taking of photographs or fingerprints to be ordered in relation to persons whose identity is in doubt and cannot be verified by any other means, especially where there is reason to believe that such persons have given false details. When the inquiry has been completed, any person cleared of suspicion may apply for the destruction of the collected data.

In regard to the case law of the European Commission of Human Rights (cf. in particular the report of 18 March 1981 of the case of *McVeigh and others v. United Kingdom*, Decisions and Reports, vol. 25, March 1982, p. 15), such procedures are to be seen as constitutional and in accordance with the ECHR as long as there is an overriding interest and there is no less drastic method of protecting it. This is definitely a

"very last resort" and because of its implications, the law expressly provides that such measures can only be ordered by a senior police officer (of which there are nine in the canton).

The last provision challenged provides that a personal search may be conducted of persons held in order to check identity if this is justified for reasons of security. Unless there are compelling reasons of immediate security, the persons concerned may only be searched by police officers of the same sex.

The criteria for construing compelling reasons of immediate security must be applied strictly and wisely and must be weighed up against the need to protect privacy. Searching is not necessary to identify a person; it can be perceived as necessary in particular when an individual taken to the police station is seen to be dangerous; for example, where he is in possession of weapons which he refuses to surrender. A search by a member of the opposite sex can only be carried out in exceptional circumstances: the situation must be one of immediate danger where there is no person of the same sex to undertake the search. Stripping and intimate searches are forbidden in this context; such actions can only be carried out by a person who is not a member of the police force of the same sex for purposes of a medical examination.

Languages:

French.

Identification: SUI-1984-S-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 13.04.1984 / **e)** P.1378/1982 / **f)** Hegetschweiler v. State Council of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 110 Ia 7 / **h)** *Journal des Tribunaux,* 1986 I 37; *Archives de droit fiscal suisse,* 53 365; *Revue de droit administratif et de droit fiscal,* 1985 51; CODICES (German).

Keywords of the systematic thesaurus:

01.06.01 **Constitutional Justice** – Effects – Scope.
04.10.07.01 **Institutions** – Public finances – Taxation – Principles.
05.02.01.01 **Fundamental Rights** – Equality – Scope of application – Public burdens.
05.02.02.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
05.03.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Cohabitation / Taxation, married couple / Taxation, single person / Taxation, persons cohabiting.

Headnotes:

Equal taxation for spouses and persons cohabiting.

General meaning of the obligation of equal treatment under tax law (recital 2).

Consequences when taxing spouses of the obligation of equal treatment under Article 4.1 of the Federal Constitution (recital 3) and the right to marry under Article 54 of the Federal Constitution (recital 5).

The tax legislation of the Canton of Zurich fails to fulfil the requirements of Article 4.1 of the Federal Constitution in that for no good reason it disadvantages spouses as against cohabitees in imposing higher taxes (recital 4).

There is no reason to repeal the impugned provisions, as equality of treatment can be achieved neither by the reinstatement of the earlier law nor by taxing each spouse individually, but only by a positive change in the law (recital 6).

Summary:

On 6 June 1982, the citizens of the Canton of Zurich were called to vote on, *inter alia*, a request for a referendum on a proposal whereby gainfully employed married couples should pay taxes no higher than those imposed on similarly employed non married couples, together with additional allowances for married couples with children, where the wife was not earning. Parliament presented a counter-proposal providing for certain marginal relief for gainfully employed married couples. The request for a referendum was rejected and the counter-proposal accepted.

A married couple brought a public-law appeal before the Federal Court; they sought the repeal of certain provisions of the counter-proposal inasmuch as they allow for married couples to be taxed more heavily than unmarried couples. The Federal Court dismissed the appeal on the grounds stated.

In Switzerland married couples are taxed together, on the basis of a computation of the taxable items for each of the two spouses; in addition, income tax is charged on a sliding scale. Certain allowances, in the form of a special scale or certain deductions that are made for couples, are made to attenuate the difference between the tax levied on a married couple and that levied on a single person. The Federal Court has held that the Constitutional Law allows either the joint assessment of the married couple or the individual assessment of each of the spouses, although adjustments are to be made to take into account in either case the particular situation of married couples by comparison to people living alone; account must be taken, for example, of the savings made by married couples through running a joint household. Because of the current prevalence of cohabitation, the legislation can no longer avoid the problem posed by the drawing of a comparison between non married couples and married couples where both spouses are gainfully employed. There are sometimes considerable differences between the tax assessment of a married couple and that of a non married couple; the persons cohabiting are not jointly assessed and their income is therefore not calculated as a lump sum, each cohabitee being assessed independently at the rate applicable to single people. The Zurich tax legislation includes two different tariffs: one for married couples, the other for single persons, which can amount to a difference of over 10%, particularly when the joint income of the married couple is high and the joint income of the non married couple comprises two individual incomes that are more or less equal in size. This is incompatible with the principle of equality of treatment.

On the other hand, the appellants cannot rely on the constitutional provision protecting the right to marry. That provision, for historical reasons, does not guarantee equality before the law over and above that arising under Article 4 of the Constitution.

Although the cantonal regulations appealed against are contrary to the Constitution, it is not appropriate to repeal them, as is normally the case when the Federal Court allows an appeal within proceedings to set aside a decision. Equality of treatment can be achieved in this case neither by the reinstatement of the earlier law (which complies even less with the principle of equality before the law) nor by taxing each spouse individually (which, without the necessary adjustments, would then be treated too favourably compared with of people living alone); only Parliament can remedy the situation by amending the impugned provisions.

Languages:

German.

Identification: SUI-1985-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 27.03.1985 / **e)** P.644/1983 / **f)** Hôtel Astoria SA and La Réserve Immobilière SA v. Grand Council of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 111 Ia 23 / **h)** *Journal des Tribunaux,* 1987 I 501; *La Semaine judiciaire,* 1985 545; CODICES (French).

Keywords of the systematic thesaurus:

02.03.02 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
03.16 **General Principles** – Proportionality.
03.17 **General Principles** – Weighing of interests.
03.18 **General Principles** – General interest.
05.03.37.03 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
05.04.06 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Hotel, restriction on demolition / Hotel, conversion, restriction / Hotel, change of use, restriction / of Economic policy, measure / Social policy, measure / Housing, shortage, struggle.

Headnotes:

Restrictions on the demolition, the conversion or the change in use of hotels; Articles 22ter and 31.1 of the Federal Constitution (guarantee of ownership and commercial and industrial freedom).

Examination of the constitutionality of rules imposing restrictions on property rights and assessment of the discretion of the authorities responsible for enforcing these rules (recital 3).

The prohibition on converting into commercial premises hotels intended for the lodging of a passing clientele – that is, establishments that are not on the

whole required to satisfy the general needs of the population within the meaning of Article 3.2.b of the impugned law – is a measure of economic policy that is incompatible with Article 31 of the Federal Constitution (recital 4c).

Summary:

On 26 June 1983, the Cantonal Law on the demolition, conversion and renovation of dwelling houses (LDTR) was passed in Geneva by popular vote. Article 5 of the Law lays down that in order to preserve the existing living accommodation and the present character of the urban zones, nobody may, save in exceptional circumstances, demolish or convert a dwelling house, whether occupied or unoccupied, or change its use. Article 3.2 provides that "change of use means any modification, even in the absence of building works, the effect of which is to replace premises intended for living accommodation by premises for commercial, small scale manufacture or industrial use. The term change of use also covers: … b) the replacement of furnished housing or hotels by commercial premises, where such housing or hotels satisfy the general needs of the population".

The Federal Court dismissed, insofar as it was admissible, the appeal brought against those provisions by two hotel holding companies in Geneva.

Article 22ter of the Federal Constitution safeguards ownership. Cantons may, however, introduce restrictions by means of legislation on the grounds of public interest. The prohibition against replacing hotels by commercial premises, as laid down by the above provisions, does not undermine the actual institution of ownership. The only thing that needs to be examined is whether it unlawfully restrains the rights of owners. The Cantonal Law on the Demolition, Conversion and Renovation of Dwelling Houses mainly addresses the housing shortage. The problem of retaining an adequate supply of furnished housing and hotels in Geneva addresses the same concerns insofar as the housing or hotels in question are dwelling houses serving the general needs of the population and not merely places of temporary stay, as are, for example, hotels that essentially serve tourists.

Any restriction on property must respect the principle of proportionality. In this case, this principle is respected, the challenged provisions merely providing for the possibility of a restriction on ownership in terms of the intended social purpose and, moreover, leaving the enforcing authorities wide powers of discretion. The replacement of hotels by commercial premises is only analogous to a change of use where such hotels "satisfy the general needs of the population". The possibility of exceptions is, moreover, expressly provided by the Cantonal Law on the Demolition, Conversion and Renovation of Dwelling Houses, especially when the maintenance or the development of commerce and cottage industries is desirable and compatible with the living conditions of the district, taking account of the proportion of premises put to a use other than living accommodation within a building. It is therefore not to be ruled out that the appellants might be granted an exception, depending on the actual situation in the district where their hotel is situated when they submit their application. Having regard to the powers of discretion allowed to the enforcing authorities, it must be recognised that the law does not sanction any contravention of the guarantee of ownership and that it upholds, within the framework of a judicial review, the principle of proportionality.

The appellants further claim that there is a grave infringement of their economic freedom, protected by the constitutional provisions guaranteeing commercial and industrial freedom. While restrictions on property may take place for very different reasons, including considerations of economic policy, this is not true of restrictions on economic activity, apart from restrictions expressly provided by the Constitution. The Federal Court has held that measures of social policy taken by the canton, as long as their intention is not that of intervening in free competition, are compatible with commercial and industrial freedom, provided that they conform to the constitutional principles which must govern all restrictions on individual freedom. While it is premature to examine the proportionality of the restrictions in question, they must, within the framework of abstract judicial review, be recognised as conforming to the freedom of trade and industry, insofar as they comply with the public interest described above.

It would be different if the prohibition on converting hotels to commercial premises also affected hotels mainly intended for visitors. Such a measure would constitute an economic intervention by the State with the intention of promoting tourism in Geneva. As the Constitution contains no clear authority for the cantons to intervene in the economy in such a way, Article 3.2 LDTR would be in contravention of commercial and industrial freedom if it restricted the possibility of converting hotels serving a passing clientele. Such an interpretation is, however, not advocated by the Geneva authorities, who only mention in the provisions that are the subject of this appeal hotels providing accommodation to an "atypical" hotel clientele. The enforcing authority should, therefore, simply exclude from the provisions of Article 3.2.b LDTR such hotels as do not serve "the

general needs of the population", that is, mainly hotels accommodating tourists and other visitors.

Languages:

French.

Identification: SUI-1986-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 03.09.1986 / **e)** P.721/1986 / **f)** X. v. Public Prosecutor's Department of the District of Zurich and Public Prosecutor's Department of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 112 Ia 161 / **h)** *Journal des Tribunaux*, 1987 IV 79; CODICES (German).

Keywords of the systematic thesaurus:

02.01.02 **Sources of Constitutional Law** – Categories – Unwritten rules.
02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
03.13 **General Principles** – Legality.
03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
05.01.03 **Fundamental Rights** – General questions – Limits and restrictions.
05.03.03 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
05.03.04 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
05.03.05 **Fundamental Rights** – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Beard, compulsory shaving / Defendant, identification / Witness, identity parade / Constitutional law, unwritten.

Headnotes:

Personal freedom; Article 3 ECHR.

Forced shaving. Ordering a defendant's beard to be shaved off for purposes of an identity parade in connection with a serious crime with which the person is charged does not constitute a particularly serious physical assault on him (recital 3); considering it from the point of view of arbitrariness, such a measure has a sufficient legal basis under Sections 145 and 146 of the Zurich Criminal Procedure Code (recital 4a) and is in keeping with the heavy suspicions falling on the defendant (recital 4b); it is therefore in accordance with the personal freedom guaranteed by the unwritten constitutional law (recital 4c).

This measure does not, moreover, constitute degrading treatment and therefore does not breach Article 3 ECHR (recital 5).

Summary:

The Zurich authority responsible for criminal prosecutions suspected X. of having, together with Y., having participated in a bank raid in Zurich. When he was arrested soon after the robbery, X was clean-shaven. During his detention on remand, he allowed his beard to grow. The authority decided that the beard had to be removed in order to allow eye witnesses of the hold-up to be able to recognise him during an identity parade. X. objected to this. Having had his appeal to the cantonal Public Prosecutor's Department dismissed, he appealed to the Federal Court, claiming an infringement of his personal freedom, of the principle of proportionality and of the prohibition of degrading treatment. The Federal Court dismissed the appeal.

The guarantee of personal freedom is an unwritten basic right under the Federal Constitution which protects not only freedom of movement and physical integrity, but also all fundamental freedoms which are necessary for the fulfilment of a person. It may be restricted only if such restrictions have a sound legal basis, are justified in the public interest and are in accordance with the principle of proportionality, but it can never be wholly suppressed or utterly diminished.

In the appellant's case, there was a forced shaving of his beard, that is, abreach of his physical integrity. Where there is a breach of a constitutional right, the Federal Court will only study in depth the interpretation and the application of the cantonal law if the breach is serious; if it is less serious, the examination will be confined to whether the cantonal law has been interpreted and applied reasonably. In this instance, it is clear that this is not a serious assault. The shaving of a beard can clearly be distinguished from the complete shaving of the head. Most Swiss men, and indeed the appellant himself for a long time, are in the habit of shaving and are beardless.

There is a sufficient legal basis in that there is express provision in the Zurich Criminal Procedure

Code for the holding of an identity parade. Such a parade would be pointless if the defendant, on account of the beard that he had meanwhile grown, no longer bore any resemblance to the clean-shaven man suspected of having participated in the attack.

The principle of proportionality has been adhered to in that at least one of the participants was unmasked throughout the raid and that the witnesses, having seen a photograph of him, had stated that the appellant could well be one of the perpetrators.

Finally, the forced shaving of the beard cannot be termed degrading treatment within the meaning of Article 3 ECHR, particularly as the appellant himself did not wear a beard for a long time. As it was done entirely to assist with the identification of the perpetrator of a serious crime, the forced shaving was therefore entirely justified and could not in any way be degrading to the person concerned.

Languages:

German.

Identification: SUI-1986-S-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 09.12.1986 / **e)** P.436/1985 / **f)** B. and others v. Grand Council of the Canton of St. Gall / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 112 Ia 240 / **h)** *Journal des Tribunaux,* 1988 I 268; CODICES (German).

Keywords of the systematic thesaurus:

03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
04.05.06.04 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
04.09.02 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
04.10.07.01 **Institutions** – Public finances – Taxation – Principles.
05.02.01.01 **Fundamental Rights** – Equality – Scope of application – Public burdens.
05.03.37.03 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
05.03.39 **Fundamental Rights** – Civil and political rights – Electoral rights.
05.03.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Housing, ownership, promotion / Housing, rental value, taxation.

Headnotes:

Request for a referendum for the abolition of tax on the rental value of housing; Articles 4, 22ter and 34sexies of the Federal Constitution.

Equality before the law would militate against a total and indiscriminate abolition of tax on the rental value of owner-occupied housing (recitals 3-5).

Relationship of the request for a referendum with Articles 22ter and 34sexies of the Constitution (guarantee of property rights and promotion of home ownership respectively) (recital 6).

Summary:

Presented in the form of a general proposal, a request for a referendum was lodged in the Canton of St. Gall which, *inter alia*, within the framework of measures to promote home ownership, aimed at abolishing tax on the rental value of owner-occupied housing. The Cantonal Parliament considered this request contrary to the principle of equality of treatment guaranteed by the Federal Constitution and accordingly struck it out.

Several citizens brought a public-law appeal against this decision before the Federal Court. They claimed that the request could be formulated so as to comply with the Constitution and that Parliament, by rejecting the request, had contravened their political rights. The Federal Court dismissed the appeal.

In an earlier, unpublished judgment, the Federal Court found that the tax on rental value was a unique feature, as the income obtained from the enjoyment of other assets was not affected by the tax. However, this is not a notional income: although he or she does not obtain any cash income, the taxpayer who lives in his own home derives a definite economic advantage from it, as he thereby avoids having to pay rent to a third party; the advantage corresponds to what the owner could raise by renting his home to a third party instead of occupying it himself. The rental value thus represents a part of the total income of the taxpayer.

The St. Gall tax legislation adopts the principle, generally recognised in Switzerland, of taxing the total net income of the taxpayer, whether it is an income in cash or an income in kind, irrespective of its source. To allow taxpayers who are owner occupiers a tax exemption for the rental value of the housing that they occupy would be to derogate from the system of total income taxation and would favour a category of taxpayers, especially those who have been able to finance the purchase of their homes totally or to a large extent out of their own capital. This would result in unfairness not only in relation to taxpayers who are not home-owners, but also owner-occupiers, on the one hand, and those renting their property to third parties, on the other, together with owner-occupiers of apartments who are paying mortgage interest. In revenue matters, the principle of equality before the law requires all taxpayers to pay tax according to their financial capacity. A general abolition of the rental value for tax payers who are owner-occupiers would be an infringement of this basic principle.

The appellants assert that the principle of equality of treatment could be adhered to, if appropriate, by giving the equivalent relief to taxpayers who pay rent. Such a proposal was not put forward in the application for a referendum and Parliament would not have been able to adopt it in reaching a decision on the application. At the risk of misinterpreting the intentions of those drafting it, it was not open to Parliament to amplify or interpret the request for a referendum by making a substantial amendment that might have important implications. The appellants also state that the Federal Constitution itself lays down in general terms measures aimed at encouraging the construction of housing and ownership of flats and houses. This is not, however, sufficient justification to stretch the aforementioned principles of universality and proportionality of the levying of taxes with measures of another kind that could be brought into consideration in this area.

Supplementary information:

In subsequent case law, the Federal Court has conceded that in determining the rental value, it is permissible for cantons to reduce the monetary value by up to 30%, such a reduction being justified in the light of actual surrounding circumstances (for example, in order not to disadvantage owners of one floor accommodation units by comparison with owners of family houses, in the case of difficulty in determining a fair rental value, etc.).

Languages:

German.

Identification: SUI-1988-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.10.1988 / **e)** 1P.274/1988 / **f)** Swiss Association for the decriminalisation of abortion and Ursula Meier v. State Council and Department of Public Health of the Canton of Zug / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 114 Ia 452 / **h)** *Journal des Tribunaux,* 1990 IV 49; CODICES (German).

Keywords of the systematic thesaurus:

02.03.06 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
03.06 **General Principles** – Federal State.
03.18 **General Principles** – General interest.
04.08.08.01 **Institutions** – Federalism, regionalism and local self-governement – Distribution of powers – Principles and methods.
05.03.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Abortion, condition / Abortion, consent, certificate / Law, federal, binding force for entities.

Headnotes:

Lawful termination of pregnancy; cantonal implementing provisions for Article 120 of the Criminal Code.

Cantonal legislation is incompatible with the Article 120 of the Criminal Code where:

- it restricts the right to carry out lawful terminations of pregnancy to Swiss Medical Association doctors specialising in gynaecology / obstetrics (recital 2b/aa);
- it appoints a panel of experts for performing the duties of a doctor qualified as a specialist in the care of pregnant women (Article 120.1.2 Criminal Code) (recital 2b/bb);
- it restricts the issuing of a consent certificate to pregnant women domiciled in the canton of the specialist doctor (recital 2b/cc).

Summary:

Article 120.1 of the Criminal Code states that it is lawful for a qualified doctor to carry out a termination of pregnancy with the written consent of the pregnant woman and with a consent certificate signed by a second qualified doctor, in order to avoid a danger that it is impossible to avoid otherwise and which poses a threat to the mother's life or a threat of serious and permanent damage to her health. The consent certificate must be signed by a doctor qualified as a specialist in the care of pregnant women and with general authority or authorisation in each particular case granted by the competent authority in the canton where the pregnant woman is domiciled or in which the operation is to take place.

On 5 January 1988, the Canton of Zug passed legislation concerning the application of Article 120 of the Criminal Code. It authorised the government to set up a panel of experts qualified to sign the consent certificate. The Public Health Department is directed to adopt provisions on the carrying out of lawful terminations of pregnancy. The directives of the authority authorise the setting up by the government of a panel of four named experts presided over by the cantonal chief medical officer, who has administrative responsibility for the panel. The directives provide that no termination of pregnancy may be carried out within the Canton of Zug without a consent certificate signed by the panel and that such a certificate is compulsory for terminations of pregnancy of women domiciled in the Canton of Zug; a termination must take place in the gynaecology and obstetrics department of a hospital and be carried out exclusively by a specialist in gynaecology and obstetrics.

The Swiss Association for the Decriminalisation of Abortion appealed to the Federal Tribunal against the implementation order of the Zug government and the directives of the Department of Public Health. The time limit for appeal – by way of an application for judicial review – against the implementation order had already passed by the time the appeal was lodged and therefore the Federal Court examined only the appeal against the directives. It confined its examination to the points set out by way of specific complaint.

Where matters are governed entirely by federal criminal law, the cantons cannot adopt criminal law provisions. They are able, however, to prescribe administrative provisions as required in the public interest, but only insofar as they do not hinder the application of federal law; they may not, in any event, contradict the letter or the spirit of that law. In the matter of the lawful termination of pregnancy, the federal legal provision has exhaustively regulated both the material conditions for such a termination and measures intended to prevent abuse. The cantons cannot manipulate this legislation to render it more or less rigorous; in particular, it is not open to them to introduce further measures intended to prevent abuse.

Article 120.1 of the Criminal Code requires terminations of pregnancy to be carried out by a qualified medical practitioner, that is, one authorised to practise medicine within the canton. It does not require such a practitioner to be a specialist in gynaecology and obstetrics. A strict interpretation of that condition imposed by the federal law is incompatible with the principle of the free choice of a doctor and the need for there to be a relationship based on trust between the doctor and the pregnant woman, a very important factor in this situation. It is possible – although it seems unlikely, having regard to the conditions laid down in the Canton of Zug for the setting up of a medical panel – that some doctors might not have the necessary equipment to carry out such a termination or that they might object to doing it. This does not, however, justify restricting terminations of pregnancy to specialist practitioners.

In the course of lengthy preparatory studies (from 1918 to 1937), it was agreed, in order to avoid any collusion among doctors, that the second doctor was to be appointed by the competent authority. This does not mean that he has to be a medical officer, that is, a doctor working in the public health department. On the contrary, Parliament expressly ruled against such a possibility.

The Criminal Code only requires the second doctor to be a specialist in the field where the risk lies to the health of the pregnant woman. The Zug legislation does not satisfy this requirement; indeed, the panel members do not necessarily have the required specialist expertise and the reference of the case to external experts, as provided for in the directives, would not obviate the participation of non-specialists in the decision. The federal legislation specified that only one doctor should sign the consent certificate in order to avoid the unnecessary participation of several practitioners in the private affairs of the pregnant woman.

Article 120.1 of the Criminal Code states that authorisation for a doctor to sign the consent certificate must be granted by the competent authority in the canton where the pregnant woman is domiciled or in which the operation is to take place. The Federal Court has previously held that it is contrary to federal law for the second practitioner to be able to sign the consent certificate only for persons domiciled in this canton. The preliminary studies show that the

parliament of the time expressly rejected this notion and intended that a pregnant woman should be able to undergo this operation and obtain the necessary consent certificate wherever she wished in Switzerland. This interpretation takes account of the desire for confidentiality of the pregnant woman and the fact that in some cantons there are no suitably qualified specialists.

Languages:

German.

Identification: SUI-1988-S-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 20.12.1988 / **e)** P.1749/1987 / **f)** Heinz Aebi and others v. Grand Council of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 114 Ia 427 / **h)** *Journal des Tribunaux,* 1990 I 162; CODICES (German).

Keywords of the systematic thesaurus:

01.04.06.01 **Constitutional Justice** – Procedure – Grounds – Time-limits.
02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
03.10 **General Principles** – Certainty of the law.
03.13 **General Principles** – Legality.
03.16 **General Principles** – Proportionality.
04.08.01 **Institutions** – Federalism, regionalism and local self-governement – Federal entities.
04.08.05 **Institutions** – Federalism, regionalism and local self-governement – Definition of geographical boundaries.
04.09.02 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
04.09.08.01 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Financing.
05.03.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
05.03.39.01 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Ballot, illegal campaign / Ballot, campaign, public funds.

Headnotes:

Referendum of 11 September 1983 on the political future of Laufon; participation of the authorities of the Canton of Bern in the political campaign conducted in the district of Laufon on its proposed annexation to the Canton of Basel-Land.

Political rights of citizens; freedom of expression. Permitted limits of participation of the cantons concerned; such limits exceeded in this case by the unlawful payments made by the authorities of the Canton of Bern in favour of a private pro-Bern association. Absence in this case of sufficient relevant grounds of certainty of the law to justify desisting from the invalidation of the ballot and the further ballot; these steps are necessary inasmuch as it is not possible to exclude the possibility that the irregularities noted may have had a determining influence on the result of the ballot.

Summary:

On 11 September 1983, the citizens of the Bern District of Laufon were called to decide by a referendum (as prescribed by an amendment of the Bern Constitution) on a proposal to attach Laufon to the Canton of Basel-Land. By a majority of 4 675 votes to 3 575 votes, on a turnout of 93%, the proposal was rejected. The result of the ballot was declared shortly afterwards. On 2 September 1985, a parliamentary commission of inquiry of the Canton of Bern discovered that the government of that canton had at the time paid 330 000 francs, drawn directly or indirectly from cantonal resources, to a private association that had been set up in order to persuade citizens to vote in favour of maintaining Laufon within the Canton of Bern. Five citizens of Laufon then called upon the Bern Parliament to declare the referendum of 11 September 1983 null and void and to hold a new one. When Parliament declared this application inadmissible, they appealed to the Federal Court, which held that Parliament should have considered the request. Parliament then rejected the request on the grounds that the intervention of the Bern authorities that was the subject of the appeal was justified because its aim was to inform citizens and the payments had been spread over five years, the length of this period having a greatly moderating effect on the size of the payments made. Those five citizens appealed in turn against this decision to the

Federal Court, which upheld the appeal and quashed the decision of the Cantonal Parliament.

The appellants only cited in their reply the contravention of Article 10 ECHR, which guarantees freedom of expression. This claim is not out of time, as within the context of the referendum on which the appeal is based, it coincides with the issue of the contravention of political rights, which was set out in the notice of appeal.

A higher authority (here the Canton of Bern) is not normally allowed to participate in an election campaign that is taking place within an inferior authority (here the District of Laufon). In this case, however, having regard to the peculiarities of the matter and the complexity of the situation arising from the Laufon issue, the conditions are on the whole met for the imparting of additional information by the Bern Cantonal authorities in order to amplify the clarifications of the District Commission on the referendum and to redress the balance in the process of forming the opinion of the citizens. The decision of the Bern Parliament endorsing the ballot should, however, be declared null and void on the grounds that the cantonal government unlawfully invested public funds in the pre-election campaign; that this was not in fact objective information, but rather propaganda through the intervention of a private committee; that this propaganda, which was disseminated covertly and disproportionately, was without a legal basis; and that it cannot be said with certainty that the result of the ballot appealed against would not have been different in the absence of any irregularity. There were, moreoever, no reasons – having particular regard to the certainty of the law – to prevent the holding of a fresh referendum on the annexation of Laufonnais to the Canton of Basel-Land.

Supplementary information:

A fresh ballot was held on 12 November 1989 and the decision declaring its reuslt (in favour of annexation to Basel-Land) was in turn appealed against before the Federal Court. The Court, while concluding that there had been irregularities (this time to the advantage of the separatists), dismissed the appeal on the grounds that these irregularities were not important enough to cast doubt on the result of the ballot and accordingly to justify declaring it null and void (Judgment of 13 March 1991, published in *Judgments of the Federal Court* 117 Ia 41).

Languages:

German.

Identification: SUI-1990-S-001

a) Switzerland / **b)** Federal Court / **c)** Criminal Cassation Division / **d)** 16.05.1990 / **e)** 6S.594/1989 / **f)** A. v. Public Prosecutor of Sopraceneri / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 116 IV 294 / **h)** *Journal des Tribunaux,* 1992 IV 42; *La Semaine Judiciaire,* 1991 194; CODICES (Italian).

Keywords of the systematic thesaurus:

02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
03.16 **General Principles** – Proportionality.

Keywords of the alphabetical index:

Penalty, determination / Undercover agent, participation / Penalty, reduction / Culpability, reduction due to presence of undercover agent / Drug, trafficking.

Headnotes:

Article 63 of the Criminal Code (Penal Code): appropriate penalty where the investigating authorities have made use of an undercover agent.

Interpreting Article 63 of the Criminal Code in the light of the Federal Constitution and human rights, the consequences of using an undercover agent should be weighed heavily in favour of the convicted person when considering penalty (recital 2b/aa).

This principle must be followed save in quite exceptional cases, for example, when the involvement of the undercover agents is regarded as being of minimal importance, that is, when it had no effect on the criminal behaviour of the convicted person (recital 2b/bb).

Application to the case in point (recital 2b/cc).

Summary:

In February 1987, two Turkish drivers were arrested at Bellinzone for carrying in their lorry 20 Kg of heroin and 80 Kg of base-morphium with the intention of supplying it to supposed buyers; the latter were, in fact, plain-clothes police officers. The preparation and organisation of the trafficking had in fact been

followed by the police, who had been alerted from the start by a third party whom the traffickers believed to be a prospective buyer or a go-between. One of the organisers of the trafficking was sentenced by the cantonal court to 17 years' imprisonment. Considering the sentence to be excessive, he appealed on a point of law to the Federal Court, which upheld the appeal and set aside the sentence of the Cantonal Court of Cassation.

The appellant argued that the cantonal court had not taken account of the influence that the participation of the undercover agent had brought to bear on his criminal conduct. The court had simply taken the view that the undercover agent had taken no active part in the trafficking and that his passive behaviour could not therefore give rise to a reduction in sentence inasmuch as the trafficking had taken place without the participation of that agent. It must, however, be noted that generally speaking any participation of an undercover agent will have an effect on the degree of culpability of a drug trafficker; the presence of such an agent will nearly always, even if his participation is only passive, facilitate the commission of criminal acts, thus reducing the degree of culpability of the perpetrators. The participation of an undercover agent can, for example, relieve the traffickers of the need to search for affluent customers or make it easier when the agent pretends to be a prospective buyer. The less daunting the difficulties the perpetrators have to face, the less serious, in general is their *modus operandi.* An interpretation of the provision of the Criminal Code under which the judge is obliged to pass sentence according to the culpability of the offender should, in the light of the Federal Constitution and the European Convention on Human Rights, take this fully into account. This principle must be followed save in quite exceptional cases, for example, when the involvement of the undercover agents is regarded as being of minimal importance, that is, when it had no effect on the behaviour of the perpetrator. In not taking into account the influence brought to bear by the involvement of the undercover agent on the culpability of the appellant, the Cantonal Court of Cassation has contravened the criteria established for passing sentence and its decision must therefore be set aside.

Supplementary information:

Upon re-sentencing, the Cantonal Court of Cassation proceeded to reduce the sentences by a quarter and one fifth respectively. Upon appeal from the Public Prosecutor, the Federal Court set that judgment aside too, stating that in the case in point the reduction of the penalty had been excessive and that the court should not have gone beyond one tenth of the sentence that had been passed when ignoring the involvement of the undercover agent (Judgment of 10 March 1992, published in the *Arrêts du Tribunal fédéral* 118 IV 115).

Languages:

Italian.

Identification: SUI-1990-S-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 31.10.1990 / **e)** 1P.341/1990 / **f)** Bar Amici SA v. District of Disentis/Mustér and Administrative Court of the Canton of Graubünden / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 116 Ia 345 / **h)** *Journal des Tribunaux,* 1992 I 616; *Europäische Grundrechte-Zeitschrift,* 1991 284; CODICES (German).

Keywords of the systematic thesaurus:

01.03.01 **Constitutional Justice** – Jurisdiction – Scope of review.
03.16 **General Principles** – Proportionality.
03.17 **General Principles** – Weighing of interests.
03.18 **General Principles** – General interest.
04.03.04 **Institutions** – Languages – Minority language(s).
05.01.03 **Fundamental Rights** – General questions – Limits and restrictions.
05.02.01 **Fundamental Rights** – Equality – Scope of application.
05.03.38 **Fundamental Rights** – Civil and political rights – Linguistic freedom.
05.04.06 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Irregularity, past, reliance on, prohibition / Language, Romansch / Territoriality, principle.

Headnotes:

Articles 31 and 116 of the federal Constitution (concerning, respectively, freedom of trade and industry and national languages); restriction of commercial and industrial freedom for the preservation of the Romansch language.

Under Article 116 of the Federal Constitution, measures intended to preserve the Romansch language in regions where it is still used are of considerable public interest. This constitutes a valid reason for restricting commercial and industrial freedom (recital 5).

In this case, weighing together the different interests, the prohibition of non-Romansch signs is justified by an overriding public interest (recital 6).

Summary:

The public limited company Bar Amici is concerned with the running of restaurants and bars; it applied to the local authority of the Disentis/Mustér for permission to place on the front of a building in that locality, in which it ran a business, an illuminated sign consisting of the reproduction in red of the handwritten words "Bar Amici". The district is situated in a region of the Canton of Graubünden where the majority of the population speaks Romansch. The District building regulations require the wording of advertising signs placed on buildings to be in Romansch. As the words "Bar Amici" are not Romansch but Italian, the local authority refused permission. This refusal was upheld by the Cantonal Administrative Court. The company concerned brought a public-law appeal before the Federal Court, which dismissed it.

The restriction imposed by the Disentis/Mustér building regulations must be examined from the point of view of various constitutional provisions. It affects not only the freedom of trade and industry guaranteed by the Constitution, but also the guarantee of property ownership (from the fact that it is imposing restraints on the use of the building owned by the appellant company) and the freedom of speech (as it is preventing the owners of the bar/restaurant – whose language is Italian – from using their language). However, as the appellant has confined its grounds of appeal to the infrigememnt of commercial and industrial freedom, the deliberations of the Federal Tribunal must confine themselves to that aspect. As this is not a serious infringement of that freedom, the Federal Court examined the application and the interpretation of the law only under the head of arbitrariness.

The cantons may restrict commercial and industrial freedom in the public interest, but they cannot undermine the very principle of that right. While the Federal Court will readily consider whether or not such a public interest exists, it exercises a certain reserve where the initial task of adopting the necessary measures falls primarily to the cantonal authorities. In this case, the Cantonal Court considered that the interest of preserving the Romansch language constituted a public interest justifying the restriction of the freedom in question. The Federal Constitution in fact requires authorities to maintain the extent and homogeneity of linguistic areas (principle of territoriality). This is particularly important for Romansch, which is the mother tongue of only 1% of the Swiss population (52,000 persons) and which, for various reasons, might well disappear unless effective steps for its preservation are taken. The district in question is a place where Romansch is clearly a majority language. This character should therefore be protected.

The constraint on commercial and industrial freedom should as far as possible prevent the pattern of economic competition from being distorted. While the appellant argued that in the past derogations had been allowed in similar circumstances, this neither proves nor goes to show that it was likely that the competent authorities had the intention of allowing such exceptions either now or in future; the appellant could not therefore rely on any past irregularities. The theoretically guaranteed right to use a trade name, that is to say, the name of a company, is not of any help to the appellant, inasmuch as his trade name is made up – either in whole or in part – of an imaginary name, which as such is not inexorably linked with that of the company; such would be the case if the name of the company contained one or more of the surnames of its associates. The public interest thus requires the imaginary name to be translated, which in this case would not present any difficulty.

Languages:

German.

Identification: SUI-1991-S-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 31.05.1991 / **e)** 2P.208/1990 / **f)** X and others v. City of Bern and Administrative Court of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 Ia 270 / **h)** *Journal des Tribunaux*, 1993 I 106; CODICES (German).

Keywords of the systematic thesaurus:

05.02.01.02.02 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
05.02.02.01 **Fundamental Rights** – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Teacher, equality of pay / Teacher, level of training.

Headnotes:

Article 4.2 of the Federal Constitution third sentence; equal pay for equal work; Bern female handicraft teachers.

Scope of third sentence of Article 4.2 of the Federal Constitution (recital 2).

A higher level of education may justify a higher salary provided that it is required or is of use in the work to be carried out. The training of primary school teachers, in the disciplines that they are authorised to teach under Bern law, is more demanding than that of female handicraft teachers. The differences relate to the professional activities undertaken which assumes wider specialist knowledge in primary school teachers than in female handicraft teachers (recitals 3 and 4).

Summary:

Under the legislation of the Canton of Bern on the salaries of teaching staff in state schools, the salaries of female handicraft teachers are lower than those of female home economics teachers and primary school teachers. The difference is of the order of 250 francs per month. On 6 April 1989, a group of female handicraft teachers requested that they be paid the same salary as home economics teachers and primary school teachers. They argued that the difference to their disadvantage arose from the fact that their profession was seen as typically feminine and that this was in contravention of the constitutional provision guaranteeing equal pay for equal work. Having had their claim dismissed under the administrative procedure, they were equally unsuccessful in proceedings before the Cantonal Administrative Court. The Federal Court dismissed the appeal brought by the parties concerned against the judgment of the Cantonal Court.

According to Article 4.2 of the Federal Constitution, men and women are equal under the law (1st sentence); they are entitled to equal pay for equal work (3rd sentence). The determination of salary cannot therefore depend on whether the worker is male or female. Differences in salary that are based on the differences between male and female (for example, less physical strength, more frequent absence from work, a lower age of retirement, special legislative provisions benefiting women who work within certain sectors), for these have no impact on the work itself. They may, on the other hand, result in different pay to reflect individual differences, irrespective of the gender of the workers. The term "work of the same value" does not refer only to identical work, similar work or roughly comparable work. In order to avoid hidden discrimination in salaries, the comparison should be capable of being extended to work of a different kind.

The appellants do not complain of being less well paid than men exercising the same profession; they argue that their salary is lower because their profession is one typically followed by women. It merits examination, therefore, in order to ascertain whether this is in fact hidden discrimination.

Female handicraft teachers, female home economics teachers and primary school teachers are entitled to teach within the same levels of school (primary level, secondary level I) and are required to give the same number of compulsory lessons. According to the evidence on which the court based the decision appealed against, the teaching requirements, the workload and the level of responsibility are more or less the same. A difference in salary is, however, justified on account of the training requirements, both from the quantitative and qualitative points of view (length of the training, number of courses, teaching methods, level of qualification). In general, primary school teachers and home economics teachers have taken more courses than female handicrafts teachers (twice as many courses in general education and one and a half times as many courses in professional training). Primary school teachers are qualified to teach all subjects on the primary school syllabus, including handicrafts; home economics teachers are qualified to teach five specific subjects, including handicrafts. Handicrafts teachers are qualified to teach their own subject together with physical education.

According to case-law, a difference in salary is justified when it is based not on gender but on such objective criteria as age, the number of years in service, family responsibilities, the level of qualification, the inherent professional risks, etc. A broader training may also be considered to be one of these criteria, at least where it is required for a particular job or where it is useful in that job. The training of primary school teachers is broader in that it must allow for a broader range of teaching. Thus not only do primary school teachers have a broader education, but their

professional activity demonstrates a higher level of qualification.

In the circumstances, it is not necessary to inquire as to whether the profession of primary school teacher, as compared to that of female teacher or handicrafts, constitutes a typically male profession (something not proved statistically: in 1989, in the Canton of Bern, the number of women who had obtained the primary school teaching certificate and who were employed as teachers was higher than that of men).

Languages:

German.

Identification: SUI-1991-S-002

a) Switzerland / **b)** Federal Court / **c)** Criminal Cassation Division / **d)** 07.06.1991 / **e)** 6S.33/1991 / **f)** Public Prosecutor of the Canton of Zurich v. K./ **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 IV 124 / **h)** *Journal des Tribunaux,* 1993 IV 189; *Europäische Grundrechte-Zeitschrift,* 1991 427; CODICES (German).

Keywords of the systematic thesaurus:

02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
02.01.03.03 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
04.07.08.02 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
05.03.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.
05.03.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

Keywords of the alphabetical index:

Criminal procedings, discontinuance / Decision, reasons / Delay, proceedings, undue, mitigation.

Headnotes:

Articles 63 ss and 70 ss of the Criminal Code, Article 6 ECHR.

Contravention of the principle of trial within reasonable time in criminal proceedings; possible consequences (for example, reduction of the penalty, dispensing with any penalty, discontinuance). Duty of the judge to deal expressly with the contravention in passing judgment and to indicate how and to what extent he or she has taken these circumstances into account (recitals 3 and 4).

Summary:

On 28 June 1989, the Zurich High Court found a defendant guilty of a series of offences and ordered a suspended sentence of 15 months' imprisonment. The facts giving rise to the conviction dated back to the years 1976 to 1978. The Cantonal Court of Cassation allowed the appeal of the convicted person, setting aside the decision and declining to examine the merits of the indictment because of the contravention of the principle of conducting criminal proceedings promptly, on the part of the prosecuting authority. The Public Prosecution Department of the Canton of Zurich brought an appeal on a point of law before the Federal Court, asking that the decision of the Cantonal Court of Cassation be quashed and that the said court be required to examine the merits of the indictment. The Federal Court allowed the appeal.

It is common ground between the parties that the proceedings in question have dragged on too long through no fault of the defendant. Under Article 6.1 ECHR everyone is entitled to a hearing within a reasonable time. This principle is particularly important in criminal proceedings. Time begins to run from the moment when the competent authority officially informs the person concerned that he is charged with having committed an offence. According to the established case-law of the European Court of Human Rights, time ceases to run on the date of the final decision. The length of any appeal proceedings, together with cassation proceedings and proceedings to commit or refer to another court are also included within this time. There is, however, some question as to whether it is right in principle to include those last proceedings; according to German jurisprudence, time ceases to run when the lower court reaches its decision; it never includes the length of proceedings before the Constitutional Court. According to the jurisprudence of the Strasbourg courts, there are no fixed time limits beyond which the principle of prompt proceedings must be held to have been breached. In this case, the two cantonal courts found that this

principle had been contravened by the time the lower court reached its decision.

Federal law makes no express provision for the consequences of a contravention of the principle of promptness within criminal proceedings. The statute of limitations is not of any practical use, inasmuch as it begins to run at the time of committing the offence and not the start of the criminal proceedings. The same is true of the mitigation of the standard penalty when a relatively long period has passed since the offence and the offender has behaved well during that period (such mitigation is not to be considered, according to case-law, unless the normal prescriptive time limit is close.) The contravention of the principle of prompt proceedings must also be of advantage to people who have not been of good behaviour and where the prescriptive time limit is not close. Switzerland, a signatory to the European Convention on Human Rights, has undertaken to give concrete expression to the consequences of an infringement of the principle of promptness in criminal proceedings. According to the European Commission of Human Rights, German constitutional jurisprudence and legal opinion, the following sanctions may be considered where the proceedings are not in any event to be discontinued because of the prescriptive time limit: a mitigation of the penalty when determining sentence; a finding of guilt without imposing any penalty; a simple discontinuance of the proceedings. The last expediency is one of last resort and may not be adopted unless the other possibilities are clearly inadequate to make amends for the inherent injustice of contravening the principle of prompt procedings. In this connection, consideration should be given to the actual circumstances, such as the degree of prejudice to the person concerned, the seriousness of the offences that he has committed, the sentence that would normally be passed on him, together with the interests of the victims. The contravention of the principle of prompt proceedings should be expressly stated in the reasons for the decision, which should also indicate the reasons why one or other of the means of reparation has been adopted. In this case, the discontinuance of the proceedings would not on the face of it appear to be justified. The Cantonal Court of Cassation, which considered that but for the contravention of the principle of prompt proceedings, a sentence of several years' imprisonment would probably have been appropriate, failed to give reasons why a lesser sentence might not be justified.

Languages:

German.

Identification: SUI-1991-S-003

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 15.11.1991 / **e)** 2A.120/1991 / **f)** Federal Tax Office v. Estate X. and Administrative Court of the Canton of Lucerne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 Ib 367 / **h)** *Journal des Tribunaux,* 1993 I 273; *Archives de droit fiscal suisse,* 61 779; *Der Steuerentscheid,* 1992 B 101.6 4; *Revue fiscale,* 47 1992 390; *La Semaine judiciaire,* 1992 448; *Revue de droit administratif et de droit fiscal,* 1992 324; *Europäische Grundrechte-Zeitschrift,* 1992 416; CODICES (German).

Keywords of the systematic thesaurus:

01.03.05.05 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
02.01.01.04.08 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.
02.02.01.05 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
05.03.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
05.03.32.02 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
05.03.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Sucession, tax, penalty, liability of heirs / Tax, criminal, legislation / International law, domestic law, relationship.

Headnotes:

Article 114bis.3 of the Federal Constitution (under which the Federal Court applies the Federal legislation and the agreements passed by the Federal Assembly), Article 130.1 of the Order of the Federal Council on the collection of a direct federal tax

(AIFD), Article 6.2 ECHR; criminal tax legislation; liability of heirs; presumption of innocence; examination of Federal legislation.

It is not open to the court to examine the constitutionality of the provisions of the AIFD, by virtue of Article 114bis.3 of the Federal Constitution (recital 1).

Is it possible to examine to what extent the provisions of the AIFD are compatible with the ECHR (recital 2)?

The liability of the heirs for the taxes avoided and penalties incurred by the deceased – provided for under Article 130.1 AIFD – is not contrary to the presumption of innocence arising from Article 6.2 ECHR (recitals 3-5).

Summary:

X died on 18 October 1988. His legal heirs discovered that he had not declared his entire assets and income to the tax authorities. They accordingly advised the tax authorities, who proceeded to initiate proceedings to recover the tax and to hold the heirs liable for the tax evaded together with a penalty. The heirs appealed to the Cantonal Administrative Court, which set aside the tax penalty. The Federal Court heard the appeal brought by the Federal Tax Office and affirmed the obligation of the heirs to pay the tax due together with the penalty.

The heirs do not oppose their obligation to pay the tax due from the deceased; the proceedings are confined to the question of whether the provision in the order of the Federal Council on direct federal tax, under which the heirs are jointly liable for the penalty incurred by the deceased in proportion to their share of the estate and irrespective of any fault on their part, is contrary to the principle of presumption of innocence as laid down by Article 6.2 ECHR.

According to the Federal Constitution, the Federal Court is required to apply the laws and agreements passed by the Federal Parliament. The European Convention on Human Rights is part and parcel of Swiss law, the Federal Parliament having approved the accession of Switzerland to the Convention. The Federal Court, like any other authority, is thus bound by the Convention. It ranks higher than a mere federal law. International public law (Vienna Convention on the Law of Treaties, 23 May 1969, to which Switzerland is a party) expressly provides that international treaty law is to prevail over domestic law. The Federal Constitution does not preclude the Federal Court from inquiring as to whether a federal law is compatible with the Convention; it merely precludes repealing or amending it; on the other hand, it may refrain from applying it in a specific case where to do so would be contrary to international law and would thus render Switzerland liable to a conviction for contravening that law. In examining whether a provision of federal law is in accordance with the European Convention on Human Rights, the Federal Court must first of all ascertain whether it is possible to interpret such a provision as being in accordance with the Convention.

In this case, the provision in the federal decree whereby heirs are responsible for a penalty imposed on account of tax evasion on the part of the deceased during his lifetime is not contrary to the European Convention on Human Rights. While it is true that heirs are not liable for fines imposed for ordinary criminal law offences by the deceased, the case is otherwise with tax law because of its pecularities (the heirs not being entitled to benefit in any way from a more favourable situation than that of the deceased to whose estate they succeed; moreover, the heirs have the right to repudiate the succession). The presumption of innocence on the part of the heirs is not at issue. The penalty is imposed not on account of any fault on their part, but purely as the result of that of the deceased. Moreover, the penalty in this particular case has been reduced to one quarter because the heirs of their own accord informed the tax authorities of the tax evasion by the deceased; such a reduction is aimed to ensure that heirs are not treated worse than a deceased person who, while he was alive, could at any time have advised the tax authorities of the tax evasion and thereby himself obtained a reduction in the fine.

Languages:

German.

Identification: SUI-1992-S-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 29.10.1992 / **e)** 2P.298/1991 / **f)** P. v. Board of Administration of the Cantonal University Hospital of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 118 Ia 410 / **h)** *Journal des Tribunaux,* 1994 I 157; CODICES (French).

Keywords of the systematic thesaurus:

03.16 **General Principles** – Proportionality.

03.17 **General Principles** – Weighing of interests.
04.06.09 **Institutions** – Executive bodies – The civil service.
05.03.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Civil servant, residence requirements.

Headnotes:

Article 45 of the Federal Constitution (freedom of establishment): residence and domicile requirements for public servants.

The freedom of establishment guaranteed by Article 45 of the Federal Constitution may not be restricted for public servants either generally or for reasons of pure fiscal expediency, but only where there are pressing needs connected with the work done or where the post requires particular relations with the public.

Summary:

P. works as a driver-ambulance attendant at the Cantonal University Hospital in Geneva. He has lived in that town for three years with his wife and two small children. In 1990 the couple decided to build a home in Saint-Cergue in the Canton of Vaud, some fifty kilometres from Geneva, near the home of the wife's parents. This would enable the couple to have a bigger and cheaper home than in Geneva. The employee concerned applied for exemption from the obligation imposed on public servants to be domiciled and effectively resident in the Canton of Geneva. Although the service for which P. worked gave evidence that the fact of living at Saint-Cergue would in no way prevent the applicant from carrying out his duties with the mobile cardio-unit, the Hospital Board of Administration turned down the application. P. brought a public-law appeal before the Federal Court, which allowed the appeal and set aside the decision appealed against.

According to the jurisprudence of the Federal Court, the public interest served by imposing a residence requirement on a public servant exists not only where the nature of the work requires it, but also where certain contacts can be built up between the public servant and the local population, contacts which can be built up more effectively if the person concerned lives at the heart of the community of the public service employer; such is the case for teachers and police officers or for some community employees who who have particularly close links with the local population (as, for example, a chief census officer or borough cashier). In the interests of the principle of proportionality, however, it should be possible for exemptions from the general residence requirement to be granted and for the competent authority in each case to be able to weigh up the conflicting public and private interests. The Federal Court has thus held that in cases where there is little public interest at stake, the private interests of the public servant should prevail. Such a preponderance of private interest has been recognised, for example, in the case of a prison officer and a university lecturer. Geneva legislation provides for exemptions to be granted to the obligation of domicile and of residence "to take account of home ownership before recruitment, major family constraints, a reduced level of activity or of the impending retirement from service of a member of staff", provided that the fact that the persons concerned live at some distance away will in no way be detrimental to their carrying out of their duties. In this case, there were no overriding service requirements. The authority relies solely on a general public interest in imposing the domicile and residence requirement on Geneva public servants. According to case-law, a mere economic interest cannot be the deciding factor. The freedom of establishment guaranteed to each citizen under the Federal Constitution cannot be constrained by the general considerations of a public authority which, for underlying economic reasons, wishes to impose a rigid obligation of domicile on its employees. In the instant case, where the person concerned is under no obligation to maintain close ties with the local population or be a member of the community which he represents, the principle of proportionality does not justify the refusal of an exemption. The fact that the appellant rescinded his tenancy agreement in Geneva before learning the decision concerning his application for an exception is certainly unfortunate, but in the light of the actual circumstances (particularly the favourable advice of his superior), is not sufficient to refuse an exemption, in the absence of any significant public interest, from the obligation to be domiciled in the Canton of Geneva.

Languages:

French.

Identification: SUI-1993-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 11.02.1993 / **e)** 1P.465/1991 / **f)** M. v. Principal State Prosecutor of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 119 Ia 28 / **h)** *Journal des Tribunaux,* 1995 I 516; *La Semaine judiciaire,* 1993 293; *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht,* 94 1993 378; CODICES (French).

Keywords of the systematic thesaurus:

03.04 **General Principles** – Separation of powers.
03.16 **General Principles** – Proportionality.
03.22 **General Principles** – Prohibition of arbitrariness.
04.06.06 **Institutions** – Executive bodies – Relations with judicial bodies.
04.07.04.03 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
04.11.02 **Institutions** – Armed forces, police forces and secret services – Police forces.
05.01.02.02 **Fundamental Rights** – General questions – Effects – Horizontal effects.
05.03.37.03 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Squatter, eviction / Housing, shortage / Housing, eviction / Public order, threat / Right, abuse / Police, right to protection.

Headnotes:

Articles 4 and 22ter of the Federal Constitution (prohibition of arbitrariness and guarantee of land ownership); proprietor seeking the forcible eviction of squatters.

Are the authorities responsible for maintaining law and order under an obligation to intervene without a court order to restore a fundamental right that has been infringed not by any measure of the state, but by the behaviour of individuals? The question was not decided, as in this case, the refusal to expel the squatters is in any event compatible with Article 22ter of the Federal Constitution (recital 2).

The competent authorities are under an obligation to execute a judgment ordering the squatters to evacuate premises; they are guilty of arbitrariness in subjecting the execution to a condition that does not form part of the judgment (recital 3).

Summary:

On 31 May 1991, a dozen persons gained forcible entry in order to set up home in empty apartments in a dwelling house in Geneva. Work had been carried out in the building without planning consent and the competent authority had served an abatement notice on it. M., the owner, immediately asked the help of the police, who arrived on the premises without carrying out any expulsion. He then applied for an order for the eviction of the squatters to the Principal State Prosecutor, who replied, on 14 June 1991, that eviction would only be ordered either to enable the tenants of the proprietor's choice to take up residence or to enable the execution of work under planning consent, but not in order to leave the building empty. M. brought a public-law appeal against this decision before the Federal Tribunal.

M. also sought a possession order against the squatters under the Civil Code. The Geneva Civil Court of first instance granted his application and ordered the respondents occupying the building to evacuate the premises. M. thereupon asked the Principal State Prosecutor to order the judgment's enforcement. The law enforcement agencies were ordered to proceed with the eviction but only as from the day when the owner would have obtained full planning consent to carry out such necessary work as was needed to let the apartments. M. in turn brought a public-law appeal before the Federal Court against this new decision. The Federal Tribunal dismissed the first appeal and allowed the second.

The constitutional guarantee of the right of land ownership is designed to protect the individual against any encroachment by the public authorities on his proprietorial rights; it does not, on the whole, entitle him to require of them such services as, in this case, the eviction of squatters. It is, however, also one of the duties of the State to prevent an infringement of a fundamental right when it is threatened by the behaviour of other individuals. It is, therefore, conceivable that in certain conditions the police, whose task it is to maintain public order, will intervene when a person is hindered or threatened in the exercise of a fundamental right. It is nevertheless unnecessary to answer the question whether M. could require, by virtue of the application made to the Principal State Prosecutor immediately after the occupation of the premises, that the police should expel the squatters, as such a right is not absolute and in the present case the refusal of the Principal State Prosecutor is not contrary to the Constitution. The Principal State Prosecutor argued that public order was at stake, that the forcible eviction could not therefore be decided exclusively according to the criteria applying to private matters and that the

principle of proportionality had to be respected. The use of force to keep premises empty would have carried a risk of provoking serious unrest. It is a fact that in Geneva the occupation of empty premises also constitutes a public protest against the housing shortage, such protests carrying the support of part of the population. In the circumstances, the Principal State Prosecutor did not exceed his powers of discretion in refusing to order the eviction for as long as the proprietor did not wish to use the building or undertake the work in accordance with the relevant legislation.

The appellant, in civil proceedings, was successful in obtaining from the Geneva Court of first instance a judgment in his favour, which ordered the squatters to vacate the premises. According to Geneva law, the Principal State Prosecutor was under an obligation to execute such an order. Under a rule of Geneva procedure, the terms of the execution could only be waived for humanitarian reasons in order to enable the person named in the order to be re-housed. In this case, the Principal State Prosecutor stated that his decisions were not based on this provision. Even taking account of his powers of discretion and his wish to preserve the peace, the Principal State Prosecutor was obliged to execute unconditionally the order of the court. This would also apply if the proprietor refused to market his property. It is Parliament alone that can adopt, to the extent allowed by civil law and by the constitutional regulations guaranteeing property rights, provisions that would prevent the maintenance of empty living accommodation. The Principal State Prosecutor considered that the appellant was guilty of an abuse of his right, inasmuch as he had no intention of making use of the premises in their present state and he had not yet even applied for planning consent to undertake the work. The decision of the Court of First Instance was, however, based on a provision of the Civil Code granting an owner who is being harassed or dispossessed a protection that is not subject to any requirement that he draw revenue from the property. The appellant is therefore not abusing his right by leaving his building empty. Even supposing the judge had misapplied the provisions protecting ownership of property, it would not have been up to the Principal State Prosecutor to refuse to execute that order, by virtue of the principle of the separation of powers, under which one State authority is forbidden to encroach on the powers of another.

Languages:

French.

Identification: SUI-1993-S-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 12.11.1993 / **e)** 2P.312/1992 / **f)** Circus Gasser Olympia SA v. Cirque National Suisse Knie SA, District of Schaffhausen, State Council and Cantonal Court of the Canton of Schaffhausen / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 119 Ia 445 / **h)** *Journal des Tribunaux,* 1995 I 313; *Die Praxis des Bundesgerichts,* 1995 1 1; CODICES (German).

Keywords of the systematic thesaurus:

01.03.01 **Constitutional Justice** – Jurisdiction – Scope of review.
01.04.09.01 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
01.04.09.02 **Constitutional Justice** – Procedure – Parties – Interest.
03.13 **General Principles** – Legality.
03.18 **General Principles** – General interest.
03.22 **General Principles** – Prohibition of arbitrariness.
05.02.01 **Fundamental Rights** – Equality – Scope of application.
05.04.06 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Competitor, equality of treatment / Public land, use.

Headnotes:

Articles 4 and 31 of the Federal Constitution (equality of treatment and commercial and industrial freedom); equality between circuses in making public land available to them.

Right deriving from Article 31 of the Federal Constitution to use public land for commercial purposes; right to appeal against restrictive permission (recital 1).

Legal basis; opportuneness of establishing rules on the conditions for use of public land (recital 2).

Criteria for choosing between conflicting applications for use. Extending the right of equality of treatment to

competitors (here: circuses). Taking into consideration the needs of the local population (recital 3).

Summary:

On 18 December 1989 the police of the town of Schaffhausen refused Cirque Gasser Olympia permission to stage its shows in that town over the 1990 season; because of competition, the public square used for that purpose could not be made available every year for this event. The same authority, however, granted Cirque Knie the permission that had been refused to its competitor; it emphasised the special status enjoyed by Cirque Knie on account of its international reputation; it emphasised too the fact that this was the biggest and most popular circus in Switzerland. Having had its appeal dismissed by the cantonal appeal authority, Cirque Gassser Olympia appealed against this decision to the Federal Court on the grounds that it had contravened the principle of the equality of treatment in the use of public land. The Federal Court dismissed the appeal insofar as it was admissible.

In granting permission to use land that has traditionally been public property, that right can be made subject to certain conditions when it is an activity protected by the principle of commercial and industrial freedom. The appellant is entitled to complain of a breach of that constitutional right not only where the right to use the public property is refused, but also where that use is subject to restrictions as to its use. The principle of equality of treatment can only be invoked in cases of direct competition. This was such a case and the appeal was admissible.

As the infringement on commercial and industrial freedom claimed by the appellant was not particularly serious, the Federal Court, in accordance with its established precedents, only examined the constitutionality of the decision appealed against from the point of view of arbitrariness. From this point of view, the condition of an adequate legal basis was met, in that the Schaffhausen communal law contained express provision for granting permission for the customary use of public land.

On the public land of the District of Schaffhausen there is in fact only one place where performances with a large audience can take place. That place is not reserved for circus performances; it is, on the contrary, sought after by many other interested parties. That is why the district council, which is unable to grant all the applications that come before it, is entitled to establish certain rules of priority. In this case, it felt that it was not possible to place on an equal footing a big and very popular circus, with a tradition of visiting the town of Schaffhausen every year, whose performances aroused a great deal of public interest, and a smaller and less well known circus. If the town is obliged to give other circuses also the opportunity to give performances at Schaffhausen they may arrange for them to do so less frequently, for example biennially instead of annually. The Schaffhausen authority rightly stated that if it had to treat all circuses alike it would only be able to give them permission to come every two years, with the public land being reserved the rest of the time for other performances. By favouring the country's leading circus, it had taken reasonable account of public interest; the principle of equality of treatment would only have been contravened if the two circuses had been equal in status, which was not the case.

Languages:

German.

Identification: SUI-1994-S-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 27.05.1994 / **e)** 2P.400/1993 / **f)** District of Bern v. M.K., Association of Local Authority Employees of the City of Bern and Executive Council of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 120 Ia 203 / **h)** *Journal des Tribunaux,* 1996 I 622; *Le Droit de l'environnement dans la pratique,* 1994 382; CODICES (German).

Keywords of the systematic thesaurus:

03.24 **General Principles** – Loyalty to the State.
04.06.09 **Institutions** – Executive bodies – The civil service.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
05.01.03 **Fundamental Rights** – General questions – Limits and restrictions.
05.02.01.02.02 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

Keywords of the alphabetical index:

Civil servant, duties under terms of service / Administration, public confidence.

Headnotes:

Local government, Article 4 of the Federal Constitution (equality of treatment); travel to and from work in a private motor vehicle prohibited under terms of service.

Autonomy of the Bern local government in setting conditions of service (recital 2).

Constitutional restrictions of rules of conduct for officials on and off duty (recital 3).

A condition of service to travel to and from work as a rule without using a motor vehicle contravenes Article 4 of the Federal Constitution (recital 4).

Summary:

On 21 November 1991, the City of Bern introduced into its staff regulations a provision requiring its staff to travel to and from work otherwise than in a private motor vehicle. The only exceptions to this rule were those who because of their working hours or for medical reasons were not able to use public transport. Following an appeal by an individual and the Association of Local Authority Employees of the City of Bern, the cantonal government refused to approve this provision. The City of Bern brought a public-law appeal against the government's decision on the grounds that it was in breach of the communal autonomy before the Federal Court, which dismissed it.

In serving as a local government officer, a public servant is required not only to perform his working duties conscientiously, but also to conform to a general duty of loyalty which may extend to his behaviour when off duty. While on the whole being free to lead his private life as he wishes, the public servant is nevertheless subject to certain restraints arising from his special status. As the Bern Government pointed out, it was not necessary in this case to ascertain whether the impugned provision affected the personal freedom of the officer in such a way as to threaten it. The restraints that can be imposed on a public servant, both in and out of work, must be related to the particular needs of his employment. The authority can only derogate from the general principle of equality before the law by prohibiting behaviour that undermines public confidence in the administration.

The restraint imposed in the instant case did not fulfil that condition. It would only be permissible if it were imposed – always supposing that this were possible – on all rush hour travellers, and not simply those employed by the municipality. It was of no avail for the City of Bern to rely in its arguments on the efforts being made to reduce rush hour traffic, efforts aimed at discouraging it in the long term which appear to meet with the approval of the majority of the population. But there was no evidence to show that the population was genuinely opposed to the use of private transport for travel to and from work. Even if this were the case, it is not lawful within a democratic State to force a public servant to behave according to the wishes of the majority, except in matters relating to the requirements of his employment. The City of Bern exaggerated in claiming that the transport policy risked losing all credibility if public servants failed to conform. Having regard to the large number of workers in the city of Bern and the very small proportion of them who might be said to represent directly the political will of the local government, it was hardly likely that the fact that a worker in the civil engineering, industrial services, abattoirs or refuse collection department used his motor vehicle to travel to and from work would undermine the credibility of the local government transport policy. A restriction of this sort might be imposed at the very most on senior public servants carrying out administrative tasks, in particular in the field of transport, but certainly not on all public servants whatever their position in the hierarchy.

Languages:

German .

Identification: SUI-1994-S-002

a) Switzerland / **b)** Federal Court / **c)** First Civil Law Chamber / **d)** 16.11.1994 / **e)** 4C.1/1994 / **f)** M. v. Arab Republic of Egypt / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 120 II 400 / **h)** *Die Praxis des Bundesgerichts,* 1995 203 660; *Journal des Tribunaux,* 1995 I 287; CODICES (French).

Keywords of the systematic thesaurus:

02.01.01.04.13 **Sources of Constitutional Law** – Categories – Written rules – International instruments

– International conventions regulating diplomatic and consular relations.
02.01.02 **Sources of Constitutional Law** – Categories – Unwritten rules.
02.01.02.02 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
02.01.03.01 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
03.17 **General Principles** – Weighing of interests.
04.07.01 **Institutions** – Judicial bodies – Jurisdiction.

Keywords of the alphabetical index:

Employment, contract / Immunity, diplomatic / European Convention on State Immunity / *Acta jure imperii* / *Acta iure gestionis*.

Headnotes:

Contract of employment. Immunity from legal proceedings of foreign States.

In the absence of an international treaty between the sending State and the State of the forum (where the case is being heard), the greatest caution must be applied when referring to a convention – in this case, the European Convention on State Immunity of 16 May 1972 – to which the Respondent State is not a signatory, when a ruling is to be given on the immunity from legal proceedings of that State (recital 3).

Reminder of the principles of jurisprudence on immunity from legal proceedings, particularly in relation to a contract of employment (recital 4a). The fact that the applicant is a national of the defendent State does not of itself justify allowing the State individual immunity from legal proceedings (recital 4b).

Summary:

M. is an Egyptian national. He is married to a Moroccan, he is the father of two children and he arrived in Switzerland in 1979 to follow a course of study for four years. Afterwards he worked in Geneva first for the Consulate of Saudi Arabia from 1984 to 1987, then for the Egyptian Consulate from 1987 to 1988. In 1988 he was engaged on a full time basis as second driver of the Permanent Mission of the Arab Republic of Egypt to the European Office of the United Nations in Geneva. At about the end of January or the beginning of February 1992, the head of that Mission dismissed him with effect from 1 March of that same year. On 10 June 1992, M. brought proceedings against the Arab Republic of Egypt to obtain the payment of his salary for February and March 1992, plus overtime and residual holiday pay, making a total of about 15 000 francs. At the outset of the proceedings, the respondent pleaded diplomatic immunity. The Industrial Tribunal and the Industrial Appeals Tribunal of the Canton of Geneva accepted the respondent's plea of diplomatic immunity. M. appealed against the latter finding of the cantonal court to the Federal Court. The Federal Court allowed the appeal, quashed the judgment appealed against, ruled that the exemption from immunity did not apply and returned the file to the cantonal court for a rehearing.

Switzerland and the Arab Republic of Egypt are not linked by any convention covering the matter at issue. In this field there are no general principles at a supranational level that would settle the matter for once and for all. The law on immunity is, to a large extent, a matter of national law, even though customary international law contains a minimum degree of protection in favour of foreign States. The development of case law in the Federal Court has shown that the European Convention on State Immunity, to which only a small number of European States are signatories and which does not apply to the Arab Republic of Egypt, constitutes a unit which either has to be applied totally or not at all. Where the Convention does not apply, any reference to the solutions offered by this treaty must be made very sparingly and using the utmost caution. A solution to the problem must accordingly be sought in the case law of the Federal Court which, far from being set in stone, merely reflects the present state of thinking in the field concerned.

It is generally accepted that the privilege of diplomatic immunity is not an absolute rule and that a foreign State can only benefit from it when acting by virtue of its sovereignty (*jure imperii*). It cannot, on the other hand, avail itself of it if it places itself on the same level as a private individual, particularly if it is acting as the holder of a private right (*jure gestionis*). Things done *jure imperii* are to be distinguished from things done *jure gestionis* not by their purpose but by their nature. In defining a particular action, the authority required to give a ruling may also look to criteria beyond the act itself. It will thus, in each case of this kind, balance the interests of the foreign State in claiming immunity with the interests of the State of the forum in exercising its legal sovereignty and those of the applicant in seeking legal protection for his rights. Furthermore, Swiss case-law has always shown a tendency to restrict the area of immunity. In relation to a contract of employment, the case-law accepts that while the sending State might have a significant interest in avoiding the bringing of litigation against a high ranking official of one of its embassies

before foreign courts, the circumstances are not the same when it comes to junior employees. In any case, when the employee is not a national of the sending State and he has been recruited and employed within the jurisdiction where the embassy is situated, the jurisdiction of the State where the embassy is situated can be accepted under that rule. The sending State thus remains unaffected in the matter of carrying out its tasks as holder of sovereign authority.

In this case, the applicant held the position of driver, which is a junior post. The fact that he is a national of the sending State (to which he only occasionally returns on holiday) is only one of a number of circumstances that have to be taken into consideration, not on its own, but looking at the total position. The decision appealed against does not indicate that the nationality of the appellant played a significant role when he was employed. It should be noted in this regard that the appellant, before working for the respondent, worked for a third country. In these circumstances, the nationality of the appellant does not have any significance when it comes to addressing the issue of immunity from legal proceedings. For the Swiss court to be able to hear the case, the legal issue (here the contract of employment) must have some nexus with Swiss territory. This condition is clearly fulfilled here, the appellant having been recruited in Geneva, the town where he has carried on working, has lived for several years and continues to live with his wife. Moreover, the file does not show what interest the respondent could have in pleading immunity in such circumstances, whereas the interest of the appellant in bringing the case before the Geneva court is obvious.

Languages:

French.

Identification: SUI-1995-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 22.03.1995 / **e)** 1P.595/1994 / **f)** Left Wing Alliance and others v. State Council of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 121 I 252 / **h)** *Journal des Tribunaux,* 1997 I 378; *Die Praxis des Bundesgerichts,* 1996 92 275; *La Semaine judiciaire,* 1996 109; CODICES (French).

Keywords of the systematic thesaurus:

01.04.09.01 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
01.04.09.02 **Constitutional Justice** – Procedure – Parties – Interest.
03.18 **General Principles** – General interest.
04.06.02 **Institutions** – Executive bodies – Powers.
04.09.02 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.
04.09.08 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
05.03.39.01 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Referendum, government press campaign.

Headnotes:

Press campaign of the State Council in favour of a new link road for Geneva Harbour.

Admissibility of appeal on the grounds of contravention of civil constitutional rights appeal for infringement of the right to vote (recitals 1a and 1b). The government of a canton has the right to get involved in the political forum outside the periods leading up to cantonal elections; it is only during the run-up to a popular vote that it should abstain from exerting any influence on the electorate (recital 2).

Following an informal call for a referendum, the plan for a new harbour link road should be finally drawn up and put to a referendum. Preliminary studies were underway and the State Council would no doubt be expressing its views on the matter, particularly before the Grand Council. The referendum appeared to be an outcome that was still far removed from those studies; in the circumstances, the press campaign bore no direct influence on the result and therefore posed no threat to electoral rights (recital 3).

Summary:

On 9 January 1986 a request for a cantonal referendum “for a harbour link road” was lodged with the registry of the State Council of the Canton of Geneva. The aim was for the Grand Council (the Cantonal Parliament) to pass a law making funds available for the construction of a new link road in the town of Geneva, between the banks of the lake, in order to relieve the embankments of a substantial part of their traffic. The Grand Council declined to act

on this initiative and decided to put it to the electorate. The electorate accepted it in a referendum on 12 June 1988. The Grand Council then extended a line of credit to the State Council for the carrying out of two preliminary studies for the work called for under the popular initiative, each in connection with a specific site. In September 1994 the Cantonal Public Works Department published in the Geneva press, under the title "Info RADE" advertising pages relating to the projected link. They stressed its importance, gave information about the different construction stages and invited the readers' views on the subject. A Geneva-based political association together with ten constituents of the Canton brought a public-law appeal before the Federal Court on the grounds of breaches of constitutional civil rights and of the right to vote. They called for a stop to this press campaign, which they denounced as an anti-democratic way of influencing the electorate before the ballot to be held in the spring of 1995. The Federal Court dismissed the appeal insofar as it was admissible.

The appellants claimed that the spending of public funds on the press campaign was an infringement of their constitutional rights. However, a public-law appeal for the infringement of constitutional rights is only available to individuals whose legally protected personal rights are threatened; it is inadmissible if it only protects general interests or mere factual concerns. The spending complained of did not threaten the legal situation of the appellants; their complaints were therefore inadmissible under this head. They could, however, be examined to see whether they disclosed any breach of the right to vote. In such an appeal the measures taken in the run-up to a referendum may indeed be challenged; for example, the official notices addressed to voters and referendum results. The right to vote guaranteed by the Constitution entitles every voter to insist that the result of any poll or election should only be accepted if it is the accurate and reliable expression of the freely expressed will of the electorate. The legality of the ballot depends on such a will having been arrived at freely. The result may thus be invalidated by the exercising of undue influence on the public will.

The State Council found that these principles were not paramount in this case because the electoral campaign leading up to the referendum had not yet begun. That is indeed the case. The case law on the subject relates to the "pre-referendum" campaign and covers referenda the precise subject of which was known by the time the public authority became involved in the political debate; furthermore, in almost every case, the date of the poll had also been set. It is the task of the government of the canton, as it also the task of the executive body of a district, to lead the community. The government can only achieve this task by promoting its own agenda and showing clearly what it considers necessary or conducive to the general interests. The government must be accorded the right – even the duty – to participate in public debate outside the periods leading up to referenda.

In this particular case, the pre-referenda campaign was still a fairly remote prospect, as a number of different preparatory steps had to be taken before the preliminary studies that were then underway could have political consequences. The cantonal government still had to express its views on the matter, particularly before Parliament, which would presumably consider first the preliminary studies and then the completed plans, ready to put to the electorate. At this stage of the project, the electoral campaign had not yet begun and the publication of the "Info RADE", the subject of this appeal, did not therefore have any direct political bearing on the outcome of the popular vote. As this publication could not threaten the right to vote, the criticisms levelled at it by the appellants concerning its contents, its financing and its close resemblance to commercial advertising, were untenable.

Languages:

French.

Identification: SUI-1995-S-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 05.09.1995 / **e)** 2P.360/1994 / **f)** Franziska Friederich and others v. Executive Council of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 121 I 273 / **h)** *Journal des Tribunaux,* 1997 I 688; *Die Praxis des Bundesgerichts,* 1996 113 359; CODICES (German).

Keywords of the systematic thesaurus:

03.13 **General Principles** – Legality.
04.06.03.02 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
04.10.07.01 **Institutions** – Public finances – Taxation – Principles.
05.03.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, principle of covering expenses / Tax, principle of equivalence / University, fees, amount.

Headnotes:

Order establishing the enrolment fees at University.

Delegation to the Executive Council (cantonal government) of the power to regulate the amount of university enrolment fees. Requirements relating to the legal basis (recital 3).

The principles governing the granting of marginal relief for expenses and equivalence give the Executive Council too wide a margin of discretion (recital 4).

Legality of an increase in view of the rise in the cost of living and in what has long been considered the norm (rectial 5).

Summary:

In a decision of 1 June 1994 the Executive Council of the Canton of Bern amended the order relating to enrolment fees and tuition fees at the University of Bern, increasing them sharply. Several individuals affected by this amendment brought a public-law appeal before the Federal Court.

Article 12.1 of the Bern University Act provides that the Executive Council is to set the enrolment and tuition fees payable to attend the university. The appellants maintained that this provision did not constitute a sufficient legal basis for increasing the enrolment fees at the university. Insofar as the appeal concerned the law itself, on the grounds that it was in breach of the constitutional requirements for the delegation of legislative power, the Federal Court could not proceed to judicial review of the matter, as the time limits for appealing against the University Act had long since expired. However, there was reason to examine the impugned order to ascertain whether it was well founded in law.

According to established case-law, contributions to the public purse must have a firm legislative basis. Where parliament delegates to an executive body the power to establish the conditions for such a contribution, it should itself determine at the very least the class of people on whom the tax is to be imposed together with the purpose of the contribution and the basis of calculation. That latter requirement has been relaxed for certain categories of contributions for specific things, particularly where contributions must obey the principle of covering costs or matching grants. For university fees, which by their nature only cover a nominal part of the costs, the principle of covering costs can hardly arise; the principle of equivalence also presents problems here, as reciprocal grants are hard to compare. In an earlier case relating to the fees of the University of Zurich, where the law was also silent as to the criteria for implementing the measure, the Federal Court accepted the increase ordered by the government, finding that the new fees were in line with those normally paid in other Swiss universities, even if they did amount to more than a simple adjustment to take account of the rise in the cost of living. The adjustment for the rise in the cost of living is not carried out on any particular legal basis. The fact of allowing exceptionally an increase in excess of the rise in the cost of living without any specific legal basis, on condition that it remains at the level of the fees paid at the other universities, does not, however, mean that universities can increase their fees by enacting orders, in order to have great financial resources at their disposal and not simply to meet a rise in the cost of living. That would amount to an unlawful avoidance of the requirements of a legal basis for the increase.

The question of how far increases dictated by reasons of financial policy can be considered constitutional could nevertheless remain open in the instant case, as the increase ordered remained within the limits of rises in the costs of living as examined over a fairly long period.

The appellants further claimed that such an increase, not being met by an increase in student grants, was clearly detrimental to students who lacked sufficient private means to meet university fees. While this was a logical enough argument, it could not play any part from a legal point of view in an action relating to the increase in fees, which applied to all students, irrespective of their financial circumstances. Such a complaint should be made in separate appeal proceedings on the failure to adjust student grants.

Languages:

German.

Identification: SUI-1995-S-003

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 29.09.1995 / **e)** 2P.3/1994 / **f)** Ärztekollegium Klinik Liebfrauenhof and others v. State Council of the Canton of Zug / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 121 I 230 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

03.13 **General Principles** – Legality.
04.05.06 **Institutions** – Legislative bodies – Law-making procedure.
04.06.03.02 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
05.03.13.05 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Doctor, fees / Doctor practising in publicly funded hospital / Legislative process, right to a hearing.

Headnotes:

Principle of legality. Reimbursement to the State of a proportion of the fees received from private medical practice carried out by independent doctors in publicly funded hospitals.

According to the case-law on Article 4 of the Federal Constitution, there is no right to a hearing in the legislative process; even if such a right were to be acknowledged, the principles developed in relation to decisions could not be applied as they stand (recital 2).

The reimbursement of fees as provided under Article 8 of the Zug Hospitals Act constitutes a tax that is independent of expenses incurred and that is not subject to the principle of covering costs. The formal legal basis, which delegates to the State Council the power to set the amount at a maximum of 40% of fees received, is precise enough (recital 3).

Summary:

The Canton of Zug Hospitals Act of 20 February 1975 established the conditions under which hospitals can be publicly funded. Under Section 8 of the Act, doctors using the infrastructure of publicly funded hospitals for their private professional activities must reimburse to the State a proportion of the fees that they receive. The government is empowered to set the proportion of fees payable at a rate not exceeding 40%. On 6 December 1993, it increased this proportion from 30 to 35%. Doctors affected by this increase brought a public law appeal against the decision before the Federal Tribunal, which dismissed it.

The appellants first claim a breach of their right to a hearing, the government having failed to consult them before deciding the increase in question. The right to a hearing, which arises both under cantonal rules of procedure and under the Federal Constitution itself is intended to guarantee for citizens minimum grounds of defence whenever proceedings are brought against them. According to established case-law such a right does not exist in relation to the legislative process; notional and general rules do not affect the citizen so directly that it would appear justified from the outset to give him the right to make individual submissions; the possibility that he has to influence the legislative process by exercising his political rights must be regarded as sufficient. It remains true that in terms of decrees this possibility is very limited; moreover, a general and notional prescriptive measure can in practice relate to a particular category of persons who are differently affected by it from other persons. Thus it is that in the field of town and country planning the Federal Court has approved, under certain conditions, a right to a hearing based on the extent to which different people are affected by those rules. It has also acknowledged a right to prior consultation in relation to decisions of general interest, irrespective of the form of the decision-making process, where certain individuals are appreciably more affected than others to whom it applies. Legal opinion also criticises the drawing of a distinction between the decision and the legislative process in relation to the right to a hearing; it advocates the granting of such a right according to the strength of the impact. However, if the right to a hearing is extended along the lines mentioned above, it will inevitably be exercised in other ways than in the case of an individual consultation. It will find its limits in a collective consultation, as is already the practice with the Confederation and the cantons. In this case, the persons directly affected by the impugned decree had the chance to express their views before its enactment, in particular in the context of the written representations which the hospitals concerned sent to the Public Health Department.

As far as the reimbursement of fees is concerned, this is that is independent of expenses incurred, and that is not subject to the principle of covering costs. It is due not only to cover use of the infrastructure of publicly funded hospitals, but also to cover the right to carry out private professional practice there. It is justified by the fact that the doctors concerned benefit

from the subsidies given to the hospitals; their income too is accordingly (indirectly) subsidised. To establish at 35% of turnover the cost of the infrastructure that a doctor normally has to pay appears reasonable; the appellants did not claim that the reimbursement of the fees assessed was disproportionate to the value of the infrastructure. Moreover, it should be pointed out that the doctors are entirely free to refrain from using this infrastructure and from carrying on their practice in publicly funded hospitals if they consider the conditions too onerous. It is also evident that there is a mechanism in place to adjust the proportion to reflect market forces. This justifies the power of discretion given under the legislation to the government in establishing the percentage of fees due. The formal legal basis delegating to the government the power to establish the amount payable by doctors at a maximum of 40% of the fees received is in accordance with the principle of the equivalence of services rendered; it is sufficiently precise. This being the case, there was no need to examine whether one of the aims of the increase appealed against might be to limit the income of the doctors concerned, nor whether the income of doctors in general was thereby increased and whether or not such an increase could be attributed to the State. As the cantons are autonomous in the matter, it was of no consequence either to discover whether the percentage of the reimbursement of fees imposed is higher or lower in other cantons. Finally, commercial and industrial freedom, to which doctors are also entitled, does not confer upon doctors the right to carry out private professional practice in publicly funded hospitals.

Languages:

German.

Identification: SUI-1998-S-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 18.03.1998 / **e)** 1P.626/1997 / **f)** X v. Court of Cassation and of Review of Criminal Cases of the Court of Appeal of the Canton of Ticino / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 92 / **h)** *Die Praxis des Bundesgerichts,* 1998 132 730; *La Semaine judiciaire,* 1998 633; CODICES (Italian).

Keywords of the systematic thesaurus:

02.01.01.04.03 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
02.01.01.04.06 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
03.19 **General Principles** – Margin of appreciation.
05.03.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Right of appeal, power to examine / Fact, review / Point of law, review.

Headnotes:

Article 2.1 Protocol 7 ECHR and Article 14.5 of the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR): right to appeal to a higher court against a criminal conviction.

The conditions for exercising the right of appeal to a higher tribunal are laid down by national laws. Article 2.1 Protocol 7 ECHR and Article 14.5 ICCPR do not require such a court to have full powers to hear the case as to fact and as to law.

The Court of Cassation and of Review of Criminal Cases of the Court of Appeal of the Canton of Ticino constitutes a higher tribunal within the meaning of the said provisions, despite the fact that the appeal on points of law only guarantees a thorough examination of points of law, the examination of facts and evidence being confined to the issue of arbitrariness (recital 2).

Summary:

On 9 April 1997, the Criminal Assize Court of the Canton of Ticino found X. guilty of a series of serious offences and sentenced him to 8 years of imprisonment. When the convicted person appealed to the Cantonal Court of Cassation, the court dismissed his appeal, specifically rejecting the appellant's claim that the court had failed to apply its discretion correctly in examining the facts of the case.

X brought a public-law appeal against the finding of the Court of Cassation before the Federal Court, which dismissed the appeal insofar as it was admissible.

The appellant argued that the Ticino judicial system had no court of criminal appeal, but only an appellate court with limited powers of examination. The impossibility for a convicted person to have his case re-opened by a judicial authority with full examining powers was incompatible with Article 2.1 Protocol 7 ECHR and Article 14.5 ICCPR. Under the first of these provisions, "everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law". Under the second provision, "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." The European Commission of Human Rights has specified that the review guaranteed by Protocol 7 ECHR may be carried out in various ways depending on the legal system within each country: a review of legal issues only (for example in France and in Germany), issues both of law and of fact, or the requirement to seek leave to appeal. According to the case law of the European Commission and legal opinion, Protocol 7 ECHR does not require that the higher tribunal should be able to review freely questions of fact and law. The Contracting States enjoy great freedom in the choice of legal procedure and particularly in drawing up the conditions for their implementation. A review limited to issues of law, as provided by the Ticino system (which also allows for examination as to arbitrariness), thus satisfies the requirements of Protocol 7 ECHR.

The same is true of Article 14.5 of the ICCPR, the provisions of which reflect those of Article 2.1 Protocol 7 ECHR and also establish that the review must be carried out "according to law" in the State in question. The ICCPR provides no exception of the kind allowed under Article 2.2 Protocol 7 ECHR for offences of a minor character, as prescribed by law, for which it is possible to exclude review by a higher court. This distinction was not of relevance here in considering serious offences. Accordingly the review merely on issues of law and arbitrariness as chosen by the Canton of Ticino, does not contravene any provision of international law.

Languages:

Italian.

Identification: SUI-1998-S-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 20.03.1998 / **e)** 1P.113/1998 / **f)** X. v. District Public Prosecutor of Bülach and Public Prosecutor of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 80 / **h)** *Journal des Tribunaux*, 2000 IV 24; *Revue de droit administratif et de droit fiscal*, 1999 1 478; *sic!,* 4 1998 391; *Europäische Grundrechte-Zeitschrift,* 1998 450; CODICES (German).

Keywords of the systematic thesaurus:

03.13 **General Principles** – Legality.
03.16 **General Principles** – Proportionality.
03.18 **General Principles** – General interest.
05.01.03 **Fundamental Rights** – General questions – Limits and restrictions.
05.03.04 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
05.03.31.01 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Blood sample / Suspicion / Sexual assault / Inquiry / Blood sample, destruction / DNA analysis, destruction of results.

Headnotes:

Personal freedom; lawfulness of taking a blood sample.

It is not contrary to personal freedom to take blood and DNA samples from a person who, because of his resemblance to an identikit picture, is suspected of having committed serious sexual offences. If the DNA analysis gives a negative result, the blood sample and personal data must be destroyed (recital 2).

Summary:

Between 17 March 1992 and 7 December 1996, five serious sexual offences were committed against young girls in the Zurich region. The DNA analyses showed that all the offences had been perpetrated by the same individual. On the basis of an identikit picture which resembled X., the public prosecutor concerned ordered that saliva swabs be taken from him; in the event of his refusing, a doctor was to take a blood sample, which would then be submitted for analysis to the Institute of Forensic Medicine in Zurich. X. resisted these measures. Having had his appeal to the Public Prosecution Department of the

Canton dismissed, he brought a public-law appeal before the Federal Court, which dismissed it insofar as it was admissible.

The taking of a blood sample constitutes a minor breach of physical integrity; the Federal Court therefore examined the interpretation and application of cantonal law only for arbitrariness. The Federal Court had previously held that express provisions under cantonal law for the physical examination of a convicted person, including the taking of a blood sample constituted a sufficient basis in law for the plucking of a few hairs, in order to establish whether a person had committed the sexual offences of which he was suspected.

In this case, the appellant argued that the procedural provision in question only permitted the taking of a blood sample from a person whom there are firm reasons to suspect; it did not authorise a systematic examination of the entire male population. The appellant, however, disregarded the fact that his resemblance to the identikit picture would in itself justify the taking of a blood sample, *a fortiori* in that he refused to provide a saliva swab that would have achieved the same result. There was, therefore, an adequate legal basis. The public interest was self-evident, as serious offences were involved, and the requirement of proportionality was also fulfilled, having regard to the suspicions held against the appellant because of his resemblance to the identikit picture and the minimal breach of physical integrity involved.

In the event of a negative result to the DNA analysis, no encroachment on the personal freedom of the appellant is permissible.

Finally, if the appellant is eliminated from the list of suspects, it is the duty of the authority to destroy the blood sample (or, where appropriate, the saliva sample), together with the results of the DNA analysis, in accordance with the rules relating to the preservation of anthropometric material. The complaint of a lack of proportionality in the steps ordered to be taken was therefore without substance.

Languages:

German .

Identification: SUI-1998-S-003

a) Switzerland / **b)** Federal Court / **c)** Criminal Cassation Division / **d)** 18.06.1998 / **e)** 6P.49/1998 / **f)** B. v. Public Prosecutor of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 170 / **h)** *Die Praxis des Bundesgerichts,* 1998 148 796; *La Semaine Judiciaire,* 1998 736; *Revue de droit administratif et de droit fiscal,* 1999 1 454; CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
03.20 **General Principles** – Reasonableness.
03.22 **General Principles** – Prohibition of arbitrariness.
05.02 **Fundamental Rights** – Equality.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.

Keywords of the alphabetical index:

Detention pending trial, costs.

Headnotes:

Article 5 ECHR, Article 4 of the Federal Constitution, costs of detention on remand payable by convicted person, personal freedom, equality of treatment, arbitrariness.

A decision to charge a convicted person for the costs of his detention on remand is not an infringement of his personal freedom (recital 2b).

Article 5 ECHR is silent as to how the costs of detention on remand are to be met (recital 2c).

It is not contrary to the principle of equality of treatment for the costs of detention on remand to be charged to the convicted person, while those arising from detention following sentence to a term of imprisonment are not (recital 2e). The cantonal legislation allowing the costs of detention on remand to be charged to the convicted person is not in itself arbitrary (recital 2g).

Summary:

On 21 July 1997, the Lausanne District Criminal Court sentenced B. to 6 years' imprisonment for a series of offences. This sentence was in the main

upheld by the Cantonal Court of Cassation. Both courts ordered the convicted person to pay the costs of his period of detention on remand. In appealing against the judgment of the Cantonal Court of Cassation, the convicted person challenged the decision of the cantonal authority requiring him to pay the costs of his detention on remand. The Federal Court dismissed the appeal insofar as it was admissible.

The appellant argued that he had suffered an infringement of his personal freedom. In challenging the decision requiring him to meet the costs of his detention on remand, but not the detention itself, he was not complaining of unlawful imprisonment as it is understood by jurisprudence and legal theory, that is, the freedom to come and go, physical integrity, or any other basic freedom of expression; he was, on the contrary, objecting to a pecuniary charge by the State. His personal freedom was, therefore, not affected by the decision that was the subject of the appeal.

It was also unjustified for the appellant to claim a breach of Article 5 ECHR. While it establishes the circumstances in which a person may be deprived of his liberty and confers certain procedural rights on any person arrested or detained, it is silent as to how the costs of detention on remand are to be met.

The appellant further complained of inequality of treatment between the detention on remand, the costs of which the convicted person is required to pay, and the sentence of imprisonment, which is free of charge to him.

Equality of treatment as granted under Article 4 of the Federal Constitution requires like to be given equal treatment with like, to the extent of the similarity, and that where there is a difference, treatment should differ to the extent of the dissimilarity. There is a fundamental difference between detention on remand and the serving of a sentence of imprisonment. Penal servitude and imprisonment are served in such a way as to rehabilitate the offender and prepare him to return to society; the serving prisoner is obliged to work and in exchange should receive a small remuneration, which should also help in setting him up upon his release from prison. A person who is remanded in custody is presumed to be innocent and should not be obliged to work. Detention on remand has no aim of rehabilitation and should simply enable the period of remand to be spent in good conditions, while preventing the accused person from absconding, interfering with witnesses or committing further offences.

The nature of detention on remand, which differs markedly from the serving of a sentence, does not necessary imply free board and lodging. The distinction complained about can thus be justified by the difference between the legal positions. The crediting of time spent on remand towards the sentence only affects the remainder of the sentence to be served and changes nothing. As for the system of advance enforcement of sentence, this stems logically from the distinction between detention on remand and serving a sentence. The appellant did not in any case claim to have applied for advance enforcement of sentence, which was then unreasonably refused. Inasmuch as he did not claim under any admissible head that the length of his detention had breached the principle of prompt criminal proceedings, there was no need to examine the question from that point of view.

The appellant was unjustified in his view of the cantonal legislation as being of its nature arbitrary. Detention on remand engenders costs for the community, whereas the person detained receives State subsidies, particularly in the form of food and medical supplies, that he would have to meet himself if he were at liberty. In the same way as a patient who has to pay the costs of staying in a public hospital, it is not illogical to impose costs for board and lodging on a person who is remanded in custody. It is indeed a forced stay, but if the prisoner is convicted, it should be observed that he has put the community to expense by committing an offence: it is therefore not unreasonable to make him pay those costs.

It is true that meeting the cost of detention on remand can make it more difficult for the prisoner to return to the community. The same observation could be made of the other costs of proceedings, particularly the fees of expert witnesses. However, detention on remand does not aim at facilitating return to the community. Whether or not the community should have to bear such charges is a moot point. To conclude that something is arbitrary, it is not enough that another interpretation might be considered or even that it might be preferable; inasmuch as it is not untenable for such costs to be to charged to the prisoner, the complaint is without substance.

Languages:

French.