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(VENICE COMMISSION)

Supreme Court of the Netherlands

Working document for the Circle of Presidents of the Conference of European Constitutional Courts

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A. Description

I. Introduction

1. A brief history

The Republic of the United Provinces (1581-1795), which covered most of the territory that is now the Netherlands, grew out of a military alliance against Spanish efforts to establish central control of the Dutch provinces. In terms of the legal system, there were significant differences between − and even within − the provinces. Only two − Holland and Zeeland (the most important provinces) − had a common court of appeal, the Supreme Court of Holland and Zeeland, established in 1581. At the same time, the Council of State, which until that time had been no more than an advisory body to the sovereign, acquired judicial powers in important administrative matters involving the Republic.

In 1795 the Republic was overthrown and replaced by the Batavian Republic, a French vassal state, which in 1806 made way for the Kingdom of Holland under Louis Napoleon. A National Court of Appeal was set up in the Batavian Republic and the Kingdom of Holland, based on the Tribunal de cassation (later the Cour de cassation). After the restoration of Dutch independence in 1813, a constitutional monarchy − the Kingdom of the Netherlands − was established. The Hague Court of Appeal became the Supreme Court of Appeal of the Kingdom of the Netherlands, and thus the highest court of appeal for the entire country.

Since 1838, on the basis of the constitution of 1814-1815, the Supreme Court of the Netherlands has acted as a court of cassation in civil and criminal cases; its remit was later extended to include fiscal cases. Its chief task is to safeguard the uniformity and quality of the application of the law. Since 1815 the Council of State's main purpose has been to advise the Crown and the government. The Council gives its opinion on legislation before it is submitted to parliament. In the course of the twentieth century the Council of State has been accorded judicial powers in the field of administrative law. Prior to that, it had acted in an advisory capacity in administrative appeals to the Crown.

During the XIXe and early XXe centuries, the Netherlands was gradually transformed into a parliamentary democracy. The Kingdom of the Netherlands presently comprises the Netherlands (in Europe), the Netherlands Antilles and Aruba (in the Caribbean), which all have equal status. Relations between the countries of the Kingdom are regulated by the Charter for the Kingdom of the Netherlands.

2. The judiciary: Articles 112-122 of the Constitution

The administration of justice in criminal and civil cases largely occurs at two instances (usually the district court and court of appeal, sometimes at the sub-district court and district court) which are responsible for hearing the facts, after which there is the possibility of appeal in cassation to the Supreme Court.

Various procedures are possible in administrative cases. Sometimes there are two instances (the district court and Central Appeals Tribunal in social security cases and cases involving public servants; the district court and the Administrative Law Division of the Council of State in other cases); sometimes there is just one, in which event cases are heard by the Administrative Law Division of the Council of State, the Central Appeals Tribunal (concerning social security cases) or the Trade and Industry Appeals Tribunal.

In some administrative law cases, there is no immediate option of appeal from a decision by an administrative authority to a court; appeal lies initially to another, usually higher, administrative authority. In cases where an administrative appeal lies to the Crown, the Council of State issues an advisory opinion before the Crown's decision. The Council of State also hears disputes between administrative authorities which are not brought to court.

II. Main legislation

Article 116 of the Constitution charges the legislature with responsibility for the organisation of the judiciary. This is regulated by the Judiciary (Organisation) Act (sections 72-83 of which apply to the Supreme Court) and by the Council of State Act.

- Members of the judiciary responsible for the administration of justice and the procurator general at the Supreme Court are appointed for life (Constitution, Article 117).
- Members of the Supreme Court are appointed from a list of three persons drawn up by the Lower House of Parliament (Constitution, Article 118).
- The members of the Council of State are also appointed for life (Constitution, Article 74).
- The constitutionality of Acts of Parliament and treaties may not be reviewed by the courts (Constitution, Article 120).
- Except in cases laid down by Act of Parliament, trials are held in public and judgments must specify the grounds on which they are based. Judgments are pronounced in public (Constitution, Article 121).

III. Organisation

1. Composition of the Supreme Court

The Supreme Court has a President, a maximum of seven vice-presidents and up to 26 justices. The average age on appointment is around 50, and the maximum age for a member of the court is 70. Attached to the Supreme Court is the Procurator General's Office, the Procurator General

is its head. There is also a deputy procurator general and a maximum of 22 advocates general. The average age on appointment is around 45, and again the maximum age is 70.

Members of the Supreme Court are appointed by the Crown, i.e. the government and the Queen. When a vacancy arises, the Supreme Court submits to the Lower House of the States General a non-alphabetical list of six candidates nominated by majority vote by the members of the Court and the procurator general. The Lower House, which is not obliged to appoint one of the individuals on the list, usually nominates the first three names on the list. The Crown − government and Queen − chooses one of these three individuals, and usually appoints the first name on the list. The Supreme Court is thus supported by controlled cooption, as it were. The most senior vice-president, in terms of years of service, is usually appointed president and the most senior justice vice-president. The members of Procurator General Office are appointed by the Crown on the recommendation of the Minister of Justice, who usually follows the recommendation of the procurator general, made in consultation with the Supreme Court. Recently, the Supreme Court and the Office of the Procurator General decided to place a call in the legal trade press with an invitation to submit names of possible candidates for the position of Advocate-General or Justice. It is not possible to apply for an appointment to the Supreme Court or its Procurator's General Office; appointments are made by selection and do not form part of a normal career on the bench or in the prosecutions department. Approximately half the members of the Supreme Court and Procurator's General Office have been members of the judiciary. The others have been practising lawyers or academics.

2. Procedure and organisation at the Supreme Court

The Supreme Court has three divisions: one for civil cases (including compulsory purchase and enterprise section cases), one for criminal cases and one for fiscal cases. Each division, which comprises some ten justices, appoints sections in which five or three justices sit. When a division makes a decision, it has the status of a Supreme Court decision. There are no formal arrangements for consultation between the divisions before a decision is made, since Dutch law does not provide for plenary sessions except on ceremonial occasions. However, the divisions do hold informal consultations on important judgments that have implications for the entire legal system, such as when the law is being reviewed in the light of a treaty. In this way, legal uniformity is guaranteed wherever possible within the Court, without any need for statutory provisions to that end.

Cases are brought before the Supreme Court by summons or a petition for cassation; the defendant in cassation proceedings may conduct a defence; there is an opportunity for opening statements by counsel or written explanation of the positions in cassation and reply and rejoinder. The Procurator General then presents its advisory opinion. (The Procurator General always submits an advisory opinion in civil and criminal cases, and in fiscal cases if necessary, prior to the Supreme Court decision. This is an independent opinion issued by the Supreme Court, tailored specifically to the case in question, supported by reasons and based on case law and the literature. The Supreme Court and Procurator General are supported by a research department consisting of around 90 mainly younger lawyers, and by some 60 administrative and technical support staff.) The Court then considers the case. Its judgments are handed down in public, except in fiscal proceedings instituted prior to 1 January 1994 in which no fine was imposed. Judgments are given in public in fiscal cases brought since 1 January 1994. Cassation in the interests of the uniform application of the law is possible on the recommendation of the procurator general. This type of cassation has no bearing on the legal position of the parties.

3. Composition of the Council of State

Apart from the Queen, who is the president, the Council of State has a vice-president and a maximum of 28 Council members. The vice-president and members are appointed for life by the Crown, on the recommendation of the Minister of the Interior, with the approval of the Minister of Justice. The Council of State's opinion is sought before the appointment of the vice-president; the latter makes recommendations for appointments of Council members.

4. Procedure and organisation at the Council of State

The Council of State in plenary session deliberates and decides on opinions to be issued regarding matters of legislation. The Administrative Law Division of the Council of State is responsible for the Council's judicial functions. The Division administers justice in sections comprising one or three members. It hears administrative law disputes, sometimes being the court of first and final instance, sometimes the court of second and final instance. It should be noted that in many administrative disputes a notice of objection has first to be submitted to and dealt with by the appropriate administrative authority before the case can be brought to court.

The case is brought before the Administrative Law Division by means of a notice of appeal. The party of the second part may conduct a defence. The facts of the case are usually examined during the hearing, which interested parties, witnesses, experts and interpreters can be summoned to attend. The parties are given an opportunity to explain their positions. The Division then deliberates on the case and pronounces judgment in public (usually in writing).

IV. Powers of the Supreme Court and the Council of State

The Supreme Court reviews the judgments of lower courts in the light of the law, including treaties, in virtually every conceivable type of dispute between parties. This includes disputes involving the government, provided no other court has been declared the highest court responsible for setting such a dispute. If no other legal procedure with sufficient safeguards is available, or has been available, the civil courts regard themselves as competent to hear any case where it is established that the government has committed a tort. In this way, the civil courts afford additional legal protection. Here too, appeal in cassation lies to the Supreme Court.

The Council of State in pleno explains, in its opinions, any unconstitutionality in draft legislation, so that questions on this subject can be raised during the parliamentary debate. The Administrative Law Division passes judgment as the court competent to hear the facts at first or second instance and also as the highest court in administrative law disputes between members of the public and the authorities. This Division thus reviews the legality of decisions of administrative authorities and the judgments of administrative courts at first instance.

Neither the Supreme Court nor the Council of State may review the constitutionality of legislation in the formal sense, i.e. Acts of Parliament enacted by the Crown and the States General (Constitution, Article 120). However, in Parliament a bill is currently considered which proposes the possibility for the courts to test legislation against the classic basic rights in the Constitution. But for now the courts must review the constitutionality of regulations issued by the Crown (such as Royal Decrees and orders in council) and local authority bye-laws. They must also establish that legislation is in line with the provisions of treaties, including the European Convention on Human Rights and the International Convention on Civil and Political Rights. Under Article 93 of the Constitution, statutory regulations that contravene any binding provisions in treaties to which the Kingdom is party are inapplicable. In this way, therefore,

there is a form of judicial review of legislation or its application, in the light of fundamental rights.

V. Decisions

1. Supreme Court

The Supreme Court may declare itself incompetent to pass judgment or declare inadmissible the appeal in cassation submitted by either party. It may dismiss the appeal. It may quash the disputed judgment and refer the case back to the court that dealt with the facts of the case to settle the dispute, or settle the matter itself after it has quashed the judgment. As with all court judgments, the Supreme Court must explain the grounds on which its judgment is based. However, the reasons given may be brief if the appeal is unlikely to succeed and the case does not require legal questions to be answered in the interests of the uniform application or development of the law.

Appellants in civil and criminal cases wishing to gain access to the Supreme Court have to appoint legal counsel. A petition for cassation can only be drawn up and submitted by a lawyer. The petition has to contain in detail the objections to the judgment of the lower court. Cassation is possible on the grounds submitted only if, in short, insufficient reasons were given for the disputed judgment or if the law was violated. The facts are not examined in cassation proceedings.

In fiscal cases legal counsel is not necessary (an appellant can write his own petition for cassation), but only a lawyer may appear in the appellant's defence. In fiscal cases the petition for cassation is governed by the General Administrative Law Act (*Algemene wet bestuursrecht*) which states (in Article 6:5) that the petition must include the grounds of the appeal.. Court fees are payable for access to the Supreme Court.

2. Council of State

The Administrative Division may declare itself incompetent or declare an appeal inadmissible. Acting as the court of second instance competent to hear the facts, it may also uphold or quash a judgment by a district court. If the Administrative Division quashes a judgment, it may if necessary refer the case back to the district court or settle the matter itself. If the Division is acting as the court of first instance competent to hear the facts, it may also dismiss an appeal or quash a decision by an administrative authority. In the latter case it may call upon the administrative authority to take a new decision, or settle the matter itself. Here, too, the notice of appeal must state the grounds for appeal, although the Council of State is not bound to take them into consideration in its decision. Access to the Council of State is also subject to the payment of court fees.

B. Constitution (extracts)

Article 73

1. The Council of State or a division of the Council shall be consulted on Bills and draft orders in council as well as proposals for the approval of treaties by the States General. Such consultation may be dispensed with in cases to be laid down by Act of Parliament.
2. The Council or a division of the Council shall be responsible for investigating administrative disputes where the decision has to be given by Royal Decree, and for advising on the ruling to be given in the said dispute.
3. The Council or a division of the Council may be required by Act of Parliament to give decisions in administrative disputes.

Article 74

1. The King shall be President of the Council of State. The heir presumptive shall be legally entitled to have a seat on the Council on attaining the age of eighteen. Other members of the Royal House may be granted a seat on the Council by or in accordance with an Act of Parliament.
2. The members of the Council shall be appointed for life by Royal Decree.
3. They shall cease to be members of the Council on resignation or on attaining an age to be determined by Act of Parliament.
4. They may be suspended or dismissed from membership by the Council in instances specified by Act of Parliament.
5. Their legal status shall in other respects be regulated by Act of Parliament.

Article 75

1. The organisation, composition and powers of the Council of State shall be regulated by Act of Parliament.
2. Additional duties may be assigned to the Council or a division of the Council by Act of Parliament.

Article 112

1. The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary.
2. Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament.

Article 113

1. The trial of offences shall also be the responsibility of the judiciary.
2. Disciplinary proceedings established by government bodies shall be regulated by Act of Parliament.
3. A sentence entailing deprivation of liberty may be imposed only by the judiciary.
4. Different rules may be established by Act of Parliament for the trial of cases outside the Netherlands and for martial law.

Article 115

Appeal to a higher administrative authority shall be admissible in the case of the disputes referred to in Article 112, paragraph 2.

Article 116

1. The courts which form part of the judiciary shall be specified by Act of Parliament.
2. The organisation, composition and powers of the judiciary shall be regulated by Act of Parliament.
3. In cases provided for by Act of Parliament, persons who are not members of the judiciary may take part with members of the judiciary in the administration of justice.
4. The supervision by members of the judiciary responsible for the administration of justice of the manner in which such members and the persons referred to in the previous paragraph fulfil their duties shall be regulated by Act of Parliament.

Article 117

1. Members of the judiciary responsible for the administration of justice and the Procurator General at the Supreme Court shall be appointed for life by Royal Decree.
2. Such persons shall cease to hold office on resignation or on attaining an age to be determined by Act of Parliament.
3. In cases laid down by Act of Parliament such persons may be suspended or dismissed by a court that is part of the judiciary and designated by Act of Parliament.
4. Their legal status shall in other respects be regulated by Act of Parliament.

Article 118

1. The members of the Supreme Court of the Netherlands shall be appointed from a list of three persons drawn up by the Lower House of the States General.
2. In the cases and within the limits laid down by Act of Parliament, the Supreme Court shall be responsible for annulling court judgments which infringe the law (cassation).
3. Additional duties may be

C. Case-law (from the CODICES database)

NED-2005-1-001

a) The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 24-09-2004 / **e)** R03/122HR / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 2005/16; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Adoption, statutory requirements / Adoption, grandparent.

Headnotes:

Article 8 ECHR confers a right to protection of the family life existing between parents and their adopted child. However, it does not confer the right to adopt a child without complying with the statutory requirements governing adoption. After all, the European Convention on Human Rights does not guarantee the right to adoption.

Summary:

A grandmother applied to adopt her minor grandchild whom she had raised and cared for from birth.

Article 1:228.1, chapeau and (b) of the Civil Code, which states that a grandparent may not adopt his/her grandchild, stands in the way of the application. Correctly, the Court of Appeal did not consider itself at liberty to set aside this explicit and well-considered statutory provision on the basis of the exceptional circumstances of the case at hand. Equally correctly, the Court of Appeal held that the statutory provision was not incompatible with Article 8 ECHR.

Languages:

Dutch.

NED-1999-3-005

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 06-07-1999 / **e)** 5176 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1999/800.

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.

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.
4.5.8 **Institutions** − Legislative bodies − Relations with judicial bodies.

Keywords of the alphabetical index:

Judicial decision, implementation / Court, law-making task / Judicial review.

Headnotes:

A ruling by the European Court of Human Rights that certain provisions of the European Convention on Human Rights had been breached in Dutch criminal procedure did not constitute grounds for judicial review.

Summary:

By judgment of 23 April 1997 the European Court of Human Rights declared an application well-founded on the grounds that there had been a breach of Article 6 ECHR (use of anonymous witnesses). Dutch legislation does not provide for a special procedure following a judgment by the European Court of Human Rights that one or more provisions of the European Convention on Human Rights have been breached by Dutch criminal proceedings. There is a need for a legal remedy in such a case, which could take various forms. Deciding which is appropriate would involve political choices. It is not for the courts to repair this omission by applying the provision for judicial review in Article 457 of the Code of Criminal Procedure. It was for parliament to provide a legal remedy.

Languages:

Dutch.

NED-1999-3-004

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 29-06-1999 / **e)** 109.566 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1999/619.

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Sentence, serving, punishment / Sentence, custodial / Hospital, order.

Headnotes:

The imposition of a custodial sentence in combination with a hospital order, and the order in which they were imposed, did not constitute inhuman or degrading treatment.

Summary:

The contention that the imposition of a long custodial sentence combined with a hospital order including care, together with the stipulation that the enforcement of the hospital order should not commence until two-thirds of the custodial sentence had been served, constituted inhuman or degrading treatment within the meaning of Article 3 ECHR and Article 7 of the International Covenant on Civil and Political Rights was not founded in law.

Languages:

Dutch.

NED-1999-3-003

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 02-03-1999 / **e)** 110.005 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1999/576.

Keywords of the Systematic Thesaurus:

3.16 **General Principles** − Proportionality.
5.3.36.2 **Fundamental Rights** − Civil and political rights − Inviolability of communications − Telephonic communications.

Keywords of the alphabetical index:

Telephone tapping / Prisoner, interception of communications / Public order.

Headnotes:

Recording a detainee's telephone calls in the interests of maintaining order, peace and security in a penal institution was not incompatible with Article 8 ECHR.

Summary:

The Court of Appeal ruled that the recording of a detainee's telephone conversations served a legitimate purpose of maintaining order, peace and security in the prison and that it was also consonant with the requirement of proportionality. This view did not display an incorrect conception of the law. First, this judgment reflected the view that such recording may be justified in the interests of the objectives listed in Article 8.2 ECHR, in particular the prevention of disorder. Second, it reflected the Court of Appeal's examination of whether this interference with the rights protected by Article 8.1 ECHR was necessary in a democratic society in the interests of achieving the said objective.

Languages:

Dutch.

NED-1999-3-002

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 26-02-1999 / **e)** R97/140 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1999/716.

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **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.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.36.2 **Fundamental Rights** − Civil and political rights − Inviolability of communications − Telephonic communications.

Keywords of the alphabetical index:

Telephone communication, freedom of expression, applicability / *Lex specialis*.

Headnotes:

In respect of telephone calls, Article 8 ECHR is not a *lex specialis* in relation to Article 10 ECHR, in the sense that Article 10 ECHR is wholly inapplicable to telephone communications.

Summary:

Neither the wording of Articles 8 and 10 nor the case law of the European Court of Human Rights (European Court of Human Rights, *Klass et al.*, 6 September 1978, Series A no. 28; European Court of Human Rights, *Special Bulletin ECHR* [ECH-1978-S-004], *Silver et al.*, 25 March 1983, Series A no. 61, *Special Bulletin ECHR* [ECH-1983-S-002]) provide any grounds on which to argue that in respect of telephone communications Article 8 is a *lex specialis* in relation to Article 10, in the sense that Article 10 is wholly inapplicable to telephone communications. It would be at odds with the technological advances of the past few decades to withhold the protection afforded by Article 10 from users of the telephone network. In the case at hand, the Court of Appeal's ruling that the measures (deliberately tampering with call-back lines) constituted an interference within the meaning of Article 10.1 ECHR did not display an incorrect conception of law.

The argument that without restrictions loss of income would have occurred to such an extent as to render the maintenance and renewal of the infrastructure impossible indicates grounds that would justify the view that this interference was a restriction necessary in a democratic society in the interests of the prevention of disorder or the protection of the rights of others.

Languages:

Dutch.

NED-1999-3-001

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-01-1999 / **e)** 16.734 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1999/665.

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.
3.19 **General Principles** − Margin of appreciation.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.

Keywords of the alphabetical index:

Competition, economic, protection / Advertisement, misleading / Burden of proof / Consumer protection.

Headnotes:

In principle, the protection afforded by Article 10 ECHR extends to advertisements, but in determining whether it is necessary to restrict this protection States Parties must be allowed a certain margin of discretion that is essential in the realm of commerce, especially in a field as complex and volatile as unfair competition (see European Court of Human Rights, 20 November 1989, Series A no. 165, *Markt intern Verlag and Beermann*, *Nederlandse Jurisprudentie* 1991, 738, European Court of Human Rights 23 June 1994, Series A no. 29, *Jacobowski*, *Nederlandse Jurisprudentie* 1995, 365, *Bulletin* 1994/2 [ECH-1994-2-009] and European Court of Human Rights 25 August 1998, *Rep. of Judgments and Decisions* 1998, *Hertel v. Switzerland*, § 47). In this context parliament must be assumed to have concluded that the restrictions on the freedom of advertising ensuing from the regulations on misleading advertisements, as set forth in Article 6.194 *et seq.* of the Civil Code, especially the apportionment of the burden of proof in Article 6.194, are necessary in Dutch society to protect the rights and interests of consumers and competitors.

Languages:

Dutch.

NED-1998-3-024

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 09-10-1998 / **e)** 9117 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998/871; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** − Proportionality.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Illegitimate child, recognition, name.

Headnotes:

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

Summary:

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

Languages:

Dutch.

NED-1998-3-023

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 15-07-1998 / **e)** 31.922 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken* 1998/293; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.19 **General Principles** − Margin of appreciation.
3.20 **General Principles** − Reasonableness.
4.10.7 **Institutions** − Public finances − Taxation.
5.2.1.1 **Fundamental Rights** − Equality − Scope of application − Public burdens.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Privileged treatment.

Headnotes:

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

Summary:

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

there was a reasonable and objective justification for subjecting the cases concerned to unequal treatment.

Languages:

Dutch.

NED-1998-3-022

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 08-05-1998 / **e)** 16.608 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998/496; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.
2.3.6 **Sources of Constitutional Law** − Techniques of review − Historical interpretation.
3.20 **General Principles** − Reasonableness.
4.7.1 **Institutions** − Judicial bodies − Jurisdiction.
5.2.2.7 **Fundamental Rights** − Equality − Criteria of distinction − Age.

Keywords of the alphabetical index:

Review of constitutionality, prohibition / Age limit for post.

Headnotes:

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

Summary:

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

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

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

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

Languages:

Dutch.

NED-1998-3-021

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 08-05-1998 / **e)** 16.553 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998/890; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.13 **General Principles** − Legality.
4.10.7.1 **Institutions** − Public finances − Taxation − Principles.

Keywords of the alphabetical index:

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

Headnotes:

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

Summary:

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

Languages:

Dutch.

NED-1998-1-020

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 14-04-1998 / **e)** 106.758 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1998, 258.

Keywords of the Systematic Thesaurus:

5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.13.28 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to examine witnesses.

Keywords of the alphabetical index:

Witness, right of defence to examine.

Headnotes:

It was permissible for a statement made to the police by a witness who was not heard by the defence to be used in evidence if the involvement of the accused in the offences on the charge sheet was confirmed by other evidence.

Summary:

In this case, the court of appeal used as evidence a statement that a co-accused had made to the police, even though the defence had not been given an opportunity to examine this witness in court.

The Supreme Court observed that it had determined in relation to a previous case that if the defence had not had an opportunity to examine, or have examined, a person who had made a statement to the police, Article 6 ECHR did not impede the use of such a statement as evidence, provided that the statement concerned was corroborated to a substantial extent by other items of evidence. The Supreme Court continued that having regard to the European Court of Human Rights of 26 March 1996, no. 54/1994/501/583, judgment of the *Nederlandse Jurisprudentie* 1996/74, the phrase "to a substantial extent" should be understood to mean that it was sufficient for the involvement of the accused to have been confirmed by other evidence. Thus if this involvement derived sufficient support from other items of evidence, Article 6 ECHR did not present an obstacle to its admission as evidence.

Languages:

Dutch.

NED-1998-1-019

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 11-03-1998 / **e)** 33.086 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1998, 121.

Keywords of the Systematic Thesaurus:

5.2 **Fundamental Rights** − Equality.

Keywords of the alphabetical index:

Discrimination, married / Cohabitation / Marital status.

Headnotes:

Insofar as the regulation of the basic tax allowance for married persons differed from that for cohabiting persons, it did so with an objective and reasonable justification.

Summary:

In 1993 the complainant was living with his partner. He and his partner submitted a joint request for the transfer to him of his partner's basic tax allowance for 1993, on the basis of Section 56.1 in conjunction with Section 55.2 of the Income Tax Act. The couple were first registered in the population register as living together on 17 November 1994, at the complainant's address. In cassation proceedings the complainant argued that the statutory regulation on the transfer of the basic tax allowance, contrary to the prohibition of unequal treatment in equal cases enshrined in Article 26 ICCPR, made an unwarranted distinction between married persons who are not permanently separated and unmarried cohabitees by *inter alia* setting a longer reference period (viz. 18 instead of 6 months).

The Supreme Court rejected this argument. It held first and foremost that the situation of married persons and couples living together on a permanent basis differed to the extent that it was harder for the tax authorities to determine the permanency of the arrangement in the case of unmarried cohabitees, so that the legislature was permitted to impose conditions with a view to verifiability. The Supreme Court further held that the extra requirement in the case of unmarried cohabitees, namely that the persons concerned should have lived together throughout the entire year prior to the reference period of 6 months, was intended to establish the permanence of the cohabitation. This requirement, like the requirement that the two persons must be registered at the same address in the population register, was included, as appears from the parliamentary debate on Section 56, to prevent the improper use or abuse of the provision, whereby the legislature considered it to be of great importance that it would enable checks to be performed without any need to infringe privacy. In the opinion of the Supreme Court, it was reasonable for the legislature to have imposed these requirements in this case, given the margin of discretion it enjoyed in these matters. Hence insofar as one may speak of equivalent cases, there was an objective and reasonable justification for the difference in treatment.

Languages:

Dutch.

NED-1998-1-018

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 20-02-1998 / **e)** 9041 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 54.

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13.23.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − Right not to incriminate oneself.

Keywords of the alphabetical index:

Right to remain silent / Criminal charge / Benefit, application, obligation to produce evidence.

Headnotes:

A person who is under an obligation to produce information and particulars concerning all matters relating to the granting or continuation of benefit, in connection with an application for benefit, does not have the right to remain silent concerning the question of whether or not he has committed a crime.

Summary:

In cassation proceedings it was complained that the district court, ruling on appeal, had not addressed the question of whether a person who had committed a crime was required by law to report this fact to the benefit-awarding body, and that the district court had therefore violated that person's statutory right to remain silent.

In this connection the Supreme Court considered that this complaint must be dismissed insofar as "the right to remain silent" referred to the definition in Article 29.1 of the Code of Criminal Procedure of the right of someone being interviewed as a suspect to refrain from making a statement. This right of silence was not enjoyed by someone who was not being heard as a suspect, but who was required, in relation to an application for benefit, to produce information and particulars concerning all matters relevant to the granting or continuation of benefit.

Insofar as the "right to remain silent" cited in the complaint referred to the right laid down in Article 14.3.g of the International Covenant on Civil and Political Rights or − according to established case law of the European Court of Human Rights (see most recently European Court judgment of 20 October 1997 in the case of Serves v. France) − the "right to remain silent and the right not to incriminate oneself" that may be inferred from Article 6 ECHR, the complaint must likewise be rejected. For in the opinion of the Supreme Court, these rights presupposed the existence of a criminal charge, which was no more at issue than the circumstance of being heard as a suspect within the meaning of Article 29 of the Code of Criminal Procedure.

Languages:

Dutch.

NED-1998-1-017

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 06-02-1998 / **e)** 16.512 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 43.

Keywords of the Systematic Thesaurus:

5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.
5.3.13.20 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Adversarial principle.

Keywords of the alphabetical index:

Copyright / Evidence, use / Law, interpretation.

Headnotes:

The fact that someone who was alleged to have infringed an author's copyright did not have certain items of evidence at his disposal because of a protective order given in American discovery proceedings did not constitute a violation of either the principle of equality of arms or the right to adversarial hearings.

Summary:

The Supreme Court considered that the essential criterion in answering the question of whether there had been a fair trial was whether the proceedings as a whole could be deemed to have been fair. In this connection, the decisive issue relevant in the case at hand was whether one of the parties had an improper advantage over the other in respect of the use of evidence. In the Supreme Court's opinion, the appeal court's ruling that this was not the case in these proceedings did not display an incorrect interpretation of the law and was not unreasonable. The Supreme Court considered that the appeal court evidently assumed, and not unreasonably so, that the protective order did not make it impossible for the person alleged to have infringed copyright to have material belonging to him examined by experts, and that if he had wished to have at his disposal material that did not originate from him with a view to having it examined, he had made too little use of the scope afforded him in this respect by Dutch procedural law.

Languages:

Dutch.

NED-1998-1-016

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 30-01-1998 / **e)** 16.387 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 33.

Keywords of the Systematic Thesaurus:

5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.

Keywords of the alphabetical index:

Discovery of documents / Contract of sale / Cassation, proceeding.

Headnotes:

In civil cases, appeal courts are not obliged to examine evidence concerning fact which have been the object of the proceeding in the lower instance when both parties had the opportunity to present their case, to adduce evidence and to rebut the other side's evidence.

Summary:

The key issue in this case was whether the seller was obliged to produce in evidence a contract of sale that he had entered into with a third party in proceedings instituted by the buyer with a view to dissolving their contract of sale. On appeal, the appeal court had passed over this question, concluding that the evidence in dispute had already been supplied by the witnesses produced by the seller.

In cassation proceedings, the Supreme Court held that the choice and evaluation of evidence was the prerogative of the appeal court, as the court hearing the facts of the case. As the appeal court had evidently not doubted the credibility of the witnesses brought forward by the seller, the principles of due process did not require that the appeal court should grant the original buyer's request, made in a pleading after the examination of the witnesses, that the seller be ordered to produce the contract of sale or a copy thereof. Nor didArticle 6.1 ECHR require the appeal court to make such a order, since with the means at their disposal, concerning the contract concluded between the seller and the third party. It could therefore not be said that there had not been a fair hearing within the meaning of that article.

Languages:

Dutch.

NED-1998-1-015

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 28-01-1998 / **e)** 32.732 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1998, 147.

Keywords of the Systematic Thesaurus:

3.16 **General Principles** − Proportionality.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.
5.3.32.1 **Fundamental Rights** − Civil and political rights − Right to private life − Protection of personal data.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Identification, compulsory / Criminal prosecution / Criminal charge, disproportionate.

Headnotes:

The fact that an employee was required to allow his employer to verify his identity for income tax and national insurance salary deductions by handing over proof of identity to his employer for inspection could not be regarded as a violation of the employee's right to privacy.

The application of the higher "anonymous" rate on the grounds that an employee had failed to comply with the aforementioned compulsory identification was not a sanction of such a nature or weight as to merit in itself the appellation "criminal". Furthermore, consideration of the nature of the offence together with the nature and severity of the sanction did not lead to the conclusion that these had any criminal connotation.

Summary:

At dispute in these proceedings was whether it was right to deduct income tax and national insurance contributions from an employee's salary at what is called the anonymous rate (60%) on the grounds that she had failed to comply with the obligation laid down in Section 29.1 of the Wages and Salaries Tax Act to hand over proof of identity to the employer responsible for making deductions at source from her salary. In appeal proceedings, the court of appeal held that the obligation imposed on the employee to provide proof of identity for the employer's inspection constituted a violation of Article 8.1 for which there was no justification as there were no other grounds in this case for doubting her identity.

In cassation proceedings, the Supreme Court considered that it could not be regarded as an infringement of an employee's privacy that the employee was obliged to have his or her identity verified by his employer by allowing the latter to inspect an identity document. Insofar as the employer's obligation to pass on to the tax authorities the information thus supplied by the employee did amount to such an infringement, the Supreme Court held that this was fully justified, because the information was needed to process the salaries tax deducted at source prior to the determination of income tax, whereby the tax authorities had to be able to assess whether the right amount of salaries tax had been deducted at source, and whether an income tax demand had to be imposed as well. The desirability of combating fraud, and in particular tax and social insurance fraud, made it reasonable, and − insofar as it might result in a more serious violation − justifiable both that the employer had imposed on the employee the obligation to confirm his or her identity by handing over proof of identity for his inspection (which meant at least that he or she was obliged to show this document to the employer, to give him the opportunity to include the information on the employee's identity in his files and to retain a copy of the document) and that the legislature had imposed on the employer the obligation to include this information in his files and to retain a copy of the proof of identity submitted for his inspection. In such matters, the legislature had a certain margin of discretion that should be taken into account. Finally, the Supreme Court considered that the legislature was entitled, again taking into account its margin of discretion, with a view to the practical application of the regulations, to decide that only certain types of identity papers would be deemed adequate, and that no exceptions would be made for cases such as the one at issue here, in which there was no reason to doubt the employee's identity.

In cassation proceedings the question was also raised of whether the application of the "anonymous rate" was incompatible with Article 6 ECHR, as such application would amount to a criminal charge that was disproportionate and in relation to which the employee was not guaranteed the right of access to the courts.

In this connection the Supreme Court ruled as follows. As it was clear that the "anonymous rate" was not applied in pursuance of Dutch criminal law, the point was to consider the nature of the offence and the nature and severity of the penalty, viewed in the light of this provision of international law. The obligation at issue applied to all members of the public in their capacity of taxpayers, not only to a limited group, and the legislature had attached a penalty, namely a fine (under Section 69 of the State Taxes Act), as well as the application of the "anonymous rate" at issue here, to failure to comply with this obligation. These facts supported the argument that the general nature of the contravention of the norm should be regarded as criminal in the sense referred to. In assessing the nature of the offence in this regard, however, it was also important to determine if the object of the penalty was preventive and/or punitive (European Court ruling, *Nederlandse Jurisprudentie* 1988, 937 (Öztürk) and *Nederlandse Jurisprudentie* 1988, 938 (Lutz)). The application of the same rate to employees whose identity was indeed unknown to the tax authorities did not constitute a punitive or deterrent measure. If tax was levied in accordance with a differentiated system of tax rates and the taxpayer's identity was unknown, it was reasonable, partly in order to prevent any loss being incurred by imposing too low a rate, to set the tax deducted at source at the highest sum that the taxpayer could possibly pay from his salary, given the possibility of other unknown income. This was not a punishment, but a logical consequence of the differentiated rates of taxation. This was not altered by the fact that the tax rate system for "anonymous" employees led to a tax rate equal to the highest rate of salaries tax and income tax, whereas in general persons working without paying tax etc. and/or illegally would not come into the highest tax bracket if their particulars were known. In that regard, the regulation had a preventive and deterrent effect that did not, therefore, bring the application of the highest tax rate to employees whose identity particulars were unknown within the definition of a criminal charge within the meaning of Article 6 ECHR.

The Supreme Court went on to consider that the primary point of the regulation was to help ensure that the tax rate differentiation was applied to all employees correctly. That in cases such as that of the employee at issue here (cases that it was fair to assume would be largely confined to the initial period after the introduction of compulsory identification) the regulation made it essential to check and record identity particulars that had already been made known by other means, but that the taxpayer did not want to have checked in the way prescribed by law, did not imply that the application thereby acquired a punitive or deterrent character that made the offence "criminal". Another important point in this connection was the possibility of a refund, a corrective mechanism that punitive penalties did not generally have. Partly on the basis of this possibility, it could not be said that the application of the "anonymous" rate was a penalty of such a nature and of such severity that it should be regarded in itself as a "criminal charge". Nor did a consideration of the nature of the offence and the nature and severity of the penalty taken together lead to the conclusion that they had a criminal connotation (cf. European Court of Human Rights *Beslissingen in Belastingzaken* 1994/175 (Bendenoun) and European Court 24 September 1997 (Garyfallou AEBE)).

Languages:

Dutch.

NED-1998-1-014

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 27-01-1998 / **e)** 106.809 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1998, 160.

Keywords of the Systematic Thesaurus:

4.7.8 **Institutions** − Judicial bodies − Ordinary courts.
5.3.5.1.3 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty − Detention pending trial.
5.3.13.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Trial/decision within reasonable time.

Keywords of the alphabetical index:

DNA analysis.

Headnotes:

There was no undue delay in this case at first instance, in view of the special circumstances of the case, the extreme seriousness of the offences, the particular importance to society of discovering the truth about these offences and the provisional release of the accused from pre-trial detention. This view did not testify to an incorrect interpretation of the law and was not unreasonable, partly in view of the accused's denial of guilt and the great weight attached to the results of sound DNA analysis, pending which the proceedings were stayed.

Summary:

In this case the period relevant for assessing a "reasonable time" within the meaning of Article 6.1 ECHR commenced, in the opinion of the Supreme Court, with the arrest of the accused on 3 August 1993. The crucial period was that between 9 November 1993 and 29 February 1996, during which proceedings were stayed by the district court pending the outcome of DNA analysis. The appeal court established that sperm had been found in the victim's mouth, that the Forensic Laboratory had sent this material to an institute in Münster, and that because the sample was so small, this institute had proposed waiting until a new DNA extraction method being developed there was ready for use. The new method had been expected to be operational at the end of 1993, but this proved not to be the case; then, on 23 February 1995, the statements made by the experts at the trial in relation to technical developments again suggested that there was a realistic prospect that the method would be available for use within the foreseeable future.

The Supreme Court ruled that under these unusual circumstances, having regard to the seriousness of the offences with which the accused was charged and the particular importance to society of discovering the truth about them, and considering that the accused had been provisionally released from pre-trial detention on 9 November 1993, the proceedings at first instance had not exceeded the reasonable time referred to in Article 6.1 ECHR, taking into account the fact that the accused denied his guilt and that great weight was generally attached to the results of a sound DNA examination, whether for incriminating or exculpatory purposes.

Languages:

Dutch.

NED-1998-1-013

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 23-01-1998 / **e)** 16.490 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 27.

Keywords of the Systematic Thesaurus:

4.7.9 **Institutions** − Judicial bodies − Administrative courts.
5.3.13.14 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Independence.
5.3.17 **Fundamental Rights** − Civil and political rights − Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Administrative Court, independence / Relationship between the civil and administrative courts / Decision, administrative, unlawful / Appeals procedure.

Headnotes:

Before applying to a civil court to obtain compensation for damage allegedly arising from an unlawful administrative decision, the case should first have been brought before an administrative court, even though this legal remedy did not meet all the requirements of Article 6 ECHR.

Summary:

In these proceedings, the plaintiff was claiming compensation for damage allegedly suffered as a result of an unlawful administrative decision. The key issue was whether it could be objected that he should first have submitted the decision for review by the Trade and Industry Appeals Tribunal (CBB), an administrative court, before bringing his case before the civil court with a view to obtaining compensation.

In assessing the dispute, the Supreme Court noted first and foremost that the European Court of Human Rights had ruled in its judgment of 19 April 1994, *Nederlandse Jurisprudentie* 1995, 462, that the CBB did not meet the requirements of Article 6 ECHR. In reaching this judgment, the European Court of Human Rights deemed it a decisive factor that Section 74 of the Administrative Justice (Trade and Industrial Bodies) Act gave the Crown the power to intervene, and although the State had already argued that this power could no longer be exercised in law, because such exercise would be deemed unlawful by the civil court, this was insufficiently certain because there was no case law in support of this argument. The Supreme Court took the view that what the European Court of Human Rights held to have been a flaw in the judicial independence of the CBB prior to 1 January 1994, could not, by its very nature, be redressed retroactively by a Dutch court ruling that it was unlawful; furthermore, any such ruling would be incompatible with the obligation on the civil court under Article 53 ECHR to be bound by the European Court's decision on this flaw and the consequences the Court attached to it where the period prior to 1 January 1994 was concerned.

The Supreme Court went on to state that if an interested party had lodged an appeal before the CBB in accordance with the provisions of the Administrative Justice (Trade and Industrial Bodies) Act and the CBB had ruled against him, he could then submit his dispute to a civil court without the CBB's decision being used against him. However, in the Supreme Court's opinion, the right of the party to have his dispute heard by a court that met the requirements of Article 6.1 ECHR did not in principle imply that the entire appeals procedure prescribed by the Administrative Justice (Trade and Industrial Bodies) Act should be set aside, contrary to the legislature's intentions, given that the aforementioned procedure did in principle make sufficient provision. In the period prior to the European Court's judgment of 19 April 1994, some doubt did exist as to whether the CBB had met the requirements prescribed for tribunals under Article 6 ECHR in the period prior to 1 January 1994, but no certainty existed on this point. It was therefore incumbent on parties affected by decisions from which appeal lay to the CBB under the Act to take serious account of the possibility that if they did not lodge an appeal against the decision before the CBB within the set time, that decision would formally acquire the force of law, as a result of which the civil court would be obliged to proceed on the basis that the decision was lawful. Taking all these considerations into account, the Supreme Court concluded that the interested party could not apply to the civil courts in cases such as the one at issue without first having obtained the CBB's decision.

Languages:

Dutch.

NED-1998-1-012

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 13-01-1998 / **e)** 106.288 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 390.

Keywords of the Systematic Thesaurus:

5.3.13.15 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Impartiality.

Keywords of the alphabetical index:

Telephone tapping.

Headnotes:

An examining magistrate who had signed a number of orders for telephone taps on behalf of a fellow judge after having first conducted an investigation to determine whether his colleague's decision to extend the telephone taps should be upheld, and who subsequently sat on the bench when the case was tried was not an impartial judge within the meaning of Article 6 ECHR.

Summary:

In cassation proceedings, the Supreme Court considered that if a judge had conducted any form of investigation in a case as an examining magistrate, the same judge could not participate in the trial, as it would be reasonable for the accused to fear that the judge would lack the necessary impartiality. As a judge signed a number of orders for telephone taps on a colleague's behalf in this case, after first having scrutinised his colleague's decision to determine whether it should be

upheld, it must be assumed that he had performed a certain amount of investigative work. This disqualified the judge from sitting in the division of the district court that conducted the trial. As the said judge did take part in the trial, this case was not heard by an impartial tribunal within the meaning of Article 6.1 ECHR.

Languages:

Dutch.

NED-1998-1-011

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 09-01-1998 / **e)** 8915 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 10.

Keywords of the Systematic Thesaurus:

2.1.1.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments.
3.13 **General Principles** − Legality.
3.14 **General Principles** − *Nullum crimen, nulla poena sine lege*.

Keywords of the alphabetical index:

Criminal law / Enforcement, international request / Coercive measure / Treaty on mutual assistance in criminal matters.

Headnotes:

There was no sufficient basis in the law applicable in Aruba until 30 September 1997 for searching premises in order to seize and deliver documents in relation to a request for legal assistance from the United States.

Summary:

In the present case, the plaintiffs contended that, insofar as it was still relevant in cassation proceedings, there was no sufficient basis for searching premises as ordered by the examining magistrate and subsequently performed, for the seizure of documents found during these searches, or for the delivery of certain of these documents to the judicial authorities of the United States.

The Supreme Court held that it should be stated first and foremost that given the principle of *nullum crimen sine lege* to be observed for the application of coercive measures such as the one at issue here − which constituted a violation of fundamental rights − in connection with international legal assistance, a statutory basis, or a basis in international law, was indispensable.

The Supreme Court went on to consider that it must be inferred from the wording of Article 1.1 and 1.2 *chapeau* and 1.2.f of the Treaty between the Kingdom of the Netherlands and the United States of America on Mutual Assistance in Criminal Matters that these provisions were intended solely to impose obligations on the States Parties themselves. Considering that the Treaty did not include any directly applicable regulations on search and seizure, it should not be interpreted as being universally binding, in the sense of constituting a basis in international law for the

violations of the fundamental rights of the individuals concerned that were brought about by the search and seizure. Nor did the national legislation of Aruba that was applicable at the time provide the necessary basis. This applied in particular to the regulations on searches of premises contained in Articles 99 ff. of the Code of Criminal Procedure that applied in Aruba in 1992. For it was clear, according to the Supreme Court, partly in view of the fact that these regulations were included in the Third Title of the Code of Criminal Procedure, entitled, "On commencement of proceedings and other matters relating to the preliminary judicial investigation", that they concerned the application of this coercive measure only as part of a preliminary judicial investigation, and not in compliance with a request for legal assistance submitted by the authorities of a foreign State. Nor could the necessary basis be found in the provisions of Article 35.2 of the 1985 Uniform National Ordinance on the Organisation of the Judiciary, pursuant to which the Joint Court of Justice, the courts at first instance and the public prosecution service were obliged to comply with requests for legal assistance received from officials or official bodies of another country. Partly in view of the connection with the first paragraph of this Article, which related to mutual legal assistance within the Kingdom, the Supreme Court held that a reasonable interpretation of the second paragraph would be that it was not intended to call into being, independently, the competence to violate fundamental rights in the context of international legal assistance, but that it was solely intended to determine, in the event of such competence existing on some other basis, which authorities should exercise it.

Languages:

Dutch.

NED-1998-1-010

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19-12-1997 / **e)** 8974 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 3.

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **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.
5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.
5.3.13.21 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Languages.

Keywords of the alphabetical index:

Interpreter, right, civil proceedings / Language of civil proceedings, interpreter.

Headnotes:

Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms.

Summary:

The Supreme Court held that it was right that in the cassation proceedings of this civil case it was not being contested that the right to the free assistance of an interpreter in the verbal hearing of these divorce proceedings could be derived from Article 6.3.e ECHR. Where civil proceedings were concerned, Dutch law did not provide for any such right, so that the question arose of whether it could be directly derived from the provisions of Article 6.1 ECHR.

In the opinion of the Supreme Court, this question should be answered as follows. The mere fact that the ECHR provided for such a right in the treatment of criminal cases but not in that of civil cases did not justify the conclusion that such a right could never be held to exist in relation to civil cases (cf. European Commission of Human Rights 9 December 1981, application no. 9099/80, D&R 27, p. 210). Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms. Hence in principle, the same applied to the right to the free assistance of an interpreter as to the right to free legal assistance. The member States had an obligation to provide free legal assistance under Article 6.3.c ECHR, but the ECHR included no such express provision in regard to civil cases. Even so, the obligation to provide free legal assistance sometimes existed in civil cases, namely if such legal assistance was necessary to ensure that the fair trial requirement of Article 6.1 ECHR was met (cf. European Court, 23 November 1983 in the case of Van der Mussele vs. Belgium, series A, no. 70, § 29, p. 14); whether this applied depended entirely on the circumstances of the case at hand, in particular the question of whether free legal assistance was indispensable to a fair hearing of the case (cf. European Court, 9 October 1979, case of Airey vs. Ireland, series A, no. 32, §26, p. 16; *Nederlandse Jurisprudentie*, 1980, 376).

In the present case, the Supreme Court held that it could not be said in the present case that the failure to provide the woman with the free assistance of an interpreter at hearings by the two courts that dealt with the facts of her case was in breach of the requirements embraced by the concept of a fair hearing.

Languages:

Dutch.

NED-1998-1-009

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 16-12-1997 / **e)** 105.895 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 352.

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.
5.3.13.21 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Languages.

Keywords of the alphabetical index:

Translation / Interpretation of documents in the action.

Headnotes:

The right to translation of all the written evidence cannot be derived from Article 6.3.e ECHR. In general, it is sufficient for the summarised content of certain documents in the case to be interpreted. In certain exceptional cases, Article 6.3 ECHR could mean that interpreting is not sufficient, but that the translation of a certain document or a brief written rendering of it in a language intelligible to the accused could be necessary. Any request to this effect, the assessment of which must take into account the interests of due process, must be decided by the examining magistrate during the preliminary judicial investigation, during the preparatory examination by the public prosecutor, after the service of the summons by the president of the court, and during the trial before the district court or court of appeal. Should a decision be taken that failed to take this into account, this would not mean that the case brought by the public prosecutor was inadmissible and that he hence could not prosecute, since an omission of this kind could be remedied. Given the burden that the written translation of the documents in a case would place upon the proceedings, the legal counsel of an accused should indicate precisely which documents he or she wanted to be translated. The costs of translation cannot be charged to the accused, so that the granting of a request for a translation cannot be made dependent on payment of these costs by the accused.

Summary:

An accused person who had an inadequate command of the Dutch language did not have an unlimited entitlement to written translations of the documents in his action. Only in an exceptional case was interpretation insufficient and the translation of a specific document in the action deemed necessary. That not a single document in Chinese had been handed over, and the fact that the request for a translation was rejected, did not constitute a violation of Article 6 ECHR in this case.

The question at issue here was whether an accused person with an inadequate command of Dutch was entitled to written translations of the documents in the case. The Supreme Court held that in accordance with Article 6.3.e ECHR, an accused person was entitled to the assistance of an interpreter free of charge if he did not understand or speak the language used in court. In its judgment of 19 December 1989 (European Court of Human Rights, Series A, vol. 168, *Nederlandse Jurisprudentie* 94/26 (Kamasinski)), the European Court determined that the scope of this provision was not limited to the trial itself, but included the documents in the case and the preliminary investigation.

Languages:

Dutch.

NED-1998-1-008

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 12-11-1997 / **e)** 30.981 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1998, 22..

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.

3.19 **General Principles** − Margin of appreciation.
3.20 **General Principles** − Reasonableness.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2.1.2 **Fundamental Rights** − Equality − Scope of application − Employment.
5.2.2 **Fundamental Rights** − Equality − Criteria of distinction.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Grounds for justification / Legitimate purpose / Expenditure, exceptional / Tax, deduction.

Headnotes:

When assessing whether a regulation leading to the unequal treatment of equal cases met this criterion has a legitimate goal one must look also at the degree to which equal cases were treated differently. For this reason, quantitative issues − relative as well as absolute − must be taken into account.

Summary:

In this case the unequal treatment of working and unemployed persons in relation to tax deductions for travel expenses for study purposes was justified on objective and reasonable grounds.

The person concerned incurred study costs under the heading of exceptional expenditure, including travel expenses in relation to which she was entitled to a deduction based on NLG 0.28 per kilometre. In cassation proceedings she argued that this constituted a violation of Article 26 ICCPR because employees whose study costs were reimbursed by their employers were allowed to receive a tax-free refund of up to NLG 0.49 per kilometre.

The Supreme Court held that the statutory regulation that laid down the aforementioned deduction did indeed create an inequality. It added, however, that Article 14 ECHR and Article 26 ICCPR prohibited the unequal treatment of equal cases if there was no objective and reasonable justification for it, in other words, if it was not introduced in pursuit of a legitimate goal, or if there was no reasonable correlation between the unequal treatment and the objective pursued. The legislature was allowed a certain margin of discretion in this regard.

According to the Supreme Court, the regulation at issue ensured that employers who wished to award their employees a slightly higher kilometre allowance than the maximum tax-deductible sum (which was NLG 0.28 per kilometre in 1992) were not immediately confronted with an obligation to deduct income tax over this sum. This promoted efficiency, which was in itself a legitimate goal. In answering the question of whether a regulation leading to the unequal treatment of equal cases met this criterion, however, the Supreme Court was of the opinion that one must look not only at efficiency but also at the degree to which equal cases were treated differently. For this reason, quantitative issues − relative as well as absolute − must be taken into account. In this connection it was important that the exceptional expenditure provisions were not confined to employees, but applied equally to all taxpayers precisely for study costs incurred in a private capacity. In assessing the quantitative aspects of the regulation at issue, the “ordinary” cases should be taken as the point of departure, which meant leaving out of consideration exceptional cases such as the one at hand that involved great distances. Following this approach,

there was no reason to assume that the unequal treatment would involve significant sums of money, whether in absolute or relative terms.

Taking all factors into account, the Supreme Court concluded that there was an objective and reasonable justification for the unequal treatment at issue in this case.

Languages:

Dutch.

NED-1998-1-007

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 07-11-1997 / **e)** 16.424 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 220.

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2.2.12 **Fundamental Rights** − Equality − Criteria of distinction − Civil status.

Keywords of the alphabetical index:

Married and single person / Cohabiting persons / Job pool / Legitimate purpose.
Headnotes:

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

Summary:

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

In cassation proceedings, the Supreme Court held that on appeal the district Court had rightly adopted the position (which was not being disputed in cassation proceedings) that in order to decide whether the distinction that *Zaanwerk* had made was compatible with Article 1 of the Constitution and Article 26 ICCPR, it had to be determined whether this distinction was made in

pursuit of a legitimate goal and whether the distinction could be regarded as an appropriate means of achieving that goal.

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

Languages:

Dutch.

NED-1998-1-006

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 05-11-1997 / **e)** 32.632 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1997, 406.

Keywords of the Systematic Thesaurus:

3.20 **General Principles** − Reasonableness.
5.3.5.1.3 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty − Detention pending trial.
5.3.13.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Trial/decision within reasonable time.

Keywords of the alphabetical index:

Time, reasonable.

Headnotes:

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

Summary:

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

Languages:

Dutch.

NED-1998-1-005

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 01-11-1997 / **e)** 105.463 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 303.

Keywords of the Systematic Thesaurus:

5.3.5.1.3 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty − Detention pending trial.
5.3.13.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Trial/decision within reasonable time.

Keywords of the alphabetical index:

Appeal Court, procedure to follow.

Headnotes:

A period of 19 months violates the requirement that an accused person must be tried within a reasonable time. When there are no special circumstances to justify this time lag.

Summary:

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

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

Languages:

Dutch.

NED-1998-1-004

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 24-10-1997 / **e)** 16.429 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 211.

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.
4.5.6 **Institutions** − Legislative bodies − Law-making procedure.
5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.

Keywords of the alphabetical index:

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

Headnotes:

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

Summary:

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

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

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

Languages:

Dutch.

NED-1998-1-003

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 21-10-1997 / **e)** 105.652 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie* 1998, 173.

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.

5.3.13.23.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − Right not to incriminate oneself.

Keywords of the alphabetical index:

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

Headnotes:

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

Summary:

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

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

Languages:

Dutch.

NED-1998-1-002

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 14-10-1997 / **e)** 105.128 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1998, 187.

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.3.13.14 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Independence.

Keywords of the alphabetical index:

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

Headnotes:

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

Summary:

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

The Supreme Court considered that the mere circumstance that the accused's case was dealt with on appeal by a division of the Court of Appeal, two members of which also belonged to the division that had previously found that a fellow suspect, together with *inter alia* the accused, had contravened Article 140 of the Criminal Code in another case, did not in itself constitute a serious indication that the Court was biased against the accused, or that the accused's fear in that regard was objectively justified.

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

Languages:

Dutch.

NED-1998-1-001

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 12-09-1997 / **e)** 16.309 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 168.

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.
4.7.4.3 **Institutions** − Judicial bodies − Organisation − Prosecutors / State counsel.

5.3.13.6 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to a hearing.
5.3.13.20 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Adversarial principle.

Keywords of the alphabetical index:

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

Headnotes:

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

Summary:

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

Languages:

Dutch.

NED-1997-2-018

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 15-07-1997 / **e)** 30195 / **f)** / **g)** / **h)** CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
3.20 **General Principles** − Reasonableness.
4.10.1 **Institutions** − Public finances − Principles.
5.2.2 **Fundamental Rights** − Equality − Criteria of distinction.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Tax relief, discrimination between employer and employee.

Headnotes:

The exclusion from tax relief of entertainment costs does not, when compared with the non-taxing of an expense allowance provided by the employer for such costs, constitute a breach of

the prohibition of unequal treatment as contained in Article 26 of the International Covenant on Civil and Political Rights, as in this case there is an objective and reasonable justification for such unequal treatment.

Summary:

On appeal in cassation a taxpayer complained that the statutory provisions governing entertainment expenses amounted to unequal treatment contrary to Article 26 of the International Covenant on Civil and Political Rights, as an employer could provide an untaxed allowance for such costs but an employee who paid these costs himself was denied the opportunity to claim tax relief on them. It was argued that in the former case it was assumed that the allowance − provided it was not excessive − covered costs that were incurred in earning salary, whereas in the latter case it was assumed − where necessary by way of a legal fiction − that the costs were in the nature of a disbursement of income.

The Supreme Court held that as regards some items of expense it was often difficult to separate the business and private aspects. It was for this reason that the legislature had assumed − as in the case of food, drink and tobacco − that employers would be willing to reimburse these costs if the costs were reasonable from a commercial point of view. By the same token, the legislator had evidently taken the view, according to the Supreme Court, that for reasons of efficiency it would be sufficient to leave the allowance untaxed and not to allow tax relief on costs borne by employees themselves. The advantage was that the check on the costs referred to here could be limited to the checks on wages and salaries tax at the employers' premises. As a result of this reasoning, which was based on assumptions the correctness of which seemed obvious to the Supreme Court, the legislator was able to conclude that there was an objective and reasonable justification for unequal treatment of the kind referred to here. The argument based on Article 26 of the International Covenant on Civil and Political Rights therefore failed.

Languages:

Dutch.

NED-1997-2-017

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 01-07-1997 / **e)** 16423 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 156; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.4.2 **Constitutional Justice** − Procedure − Summary procedure.
5.1.1.2 **Fundamental Rights** − General questions − Entitlement to rights − Citizens of the European Union and non-citizens with similar status.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13.18 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Reasoning.
5.4.3 **Fundamental Rights** − Economic, social and cultural rights − Right to work.
5.4.4 **Fundamental Rights** − Economic, social and cultural rights − Freedom to choose one's profession.

Keywords of the alphabetical index:

Insurance, broking / Contractual limitation, written form of right.

Headnotes:

The horizontal effect of fundamental rights on the freedom to choose one's profession is not so far-reaching that a contractual limitation of these rights can be made only in writing.

The requirements regarding the reasons given for judicial decisions in interim injunction proceedings concerning the above-mentioned fundamental rights need not be stricter than those governing the reasoning to be given in other decisions in interim injunction proceedings.

Summary:

The appellant operated an insurance broking business. He sold the business by written contract and transferred it to the respondent. It was provided in the contract that the appellant's contract of employment with the business would be altered in the sense that the appellant would henceforth act as consultant for the benefit of the respondent. After the transfer, relations between the appellant and the respondent deteriorated. The appellant then started to interfere in the business, contacting clients from the insurance portfolio that had been transferred. After being in contact with the appellant, these clients then ceased using the respondent as their insurance broker and appointed a third party instead of him. In addition, the appellant started requesting quotations in his own name on behalf of third parties and held himself out as an insurance broker.

On appeal the Court of Appeal issued an injunction restraining the appellant from working as an insurance broker, including working as a consultant in the insurance business. The Court of Appeal limited this injunction both geographically and in terms of time. It reasoned in this connection that it followed from the transfer contract that the appellant was not free to enter into competition with the business he had sold.

Various matters were disputed in the cassation appeal. The Supreme Court upheld the decision and the reasoning given by the Court of Appeal. The Supreme Court dismissed the argument that although the right to a free choice of work, as contained in Article 19.3 of the Constitution, in conjunction with the general moral right to which everyone is entitled (in so far as this entails a "right to occupational development"), could be limited contractually, this was possible only in the form of a contract entered into in writing, in which such limitation was expressly agreed. In the opinion of the Supreme Court this argument could not be accepted as generally correct because this would accord a more far-reaching horizontal effect to these fundamental rights than they were entitled to.

Finally, it was also alleged in the cassation proceedings that the requirements regarding the reasons given for judicial decisions in interim injunction proceedings were stricter in cases such as the present one than in other interim injunction proceedings. This argument too could not, in the opinion of the Supreme Court, be accepted as correct. There were no grounds for holding that the above-mentioned fundamental rights had an impact of this kind in civil procedure.

Languages:

Dutch.

NED-1997-2-016

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 25-06-1997 / **e)** 31541 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1997, 276; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Trial/decision within reasonable time.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Civil right and obligation / Tax assessment, quality as "civil right".

Headnotes:

The determination of a tax assessment cannot be regarded in relation to the taxpayer or the person obliged to make the deduction at source as the determination of a civil obligation within the meaning of Article 6.1 ECHR.

Summary:

On appeal in cassation the appellant submitted that the Court of Appeal had failed to recognise on appeal that the decision to hold X liable in the tax assessment procedure constituted the determination of a civil obligation within the meaning of Article 6.1 ECHR and that, in view of the time that had elapsed between the filing of the notice of objection against the decision of 18 January 1990 and the dispatch of the judgment of the Court of Appeal, or in any event the oral hearing on 17 January 1995, the reasonable time referred to in Article 6.1 ECHR had been exceeded.

The Supreme Court dismissed the appeal. It held that the determination of a tax assessment could not be regarded in relation to the taxpayer or the person obliged to make the deduction at source as the determination of a civil obligation within the meaning of Article 6.1 ECHR. This was because it involved a financial obligation under tax law and therefore came within the ambit of public law. According to the Supreme Court, the obligation would retain this character even if an executive director of the taxpayer or the person obliged to make the deduction at source had been held liable for its payment pursuant to Section 32a of the Wages and Salaries Tax Act 1964 (text applicable prior to 1 June 1990) and such director could challenge this obligation in the context of the decision to hold him liable, in order to avoid all or part of this liability.

Cross-references:

- Decision no. 30646 of 18.06.1997, *Bulletin* 1997/2 [NED-1997- 2-006];

- Decision no. 31731 of 25.06.1997.

Languages:

Dutch.

NED-1997-2-015

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 25-06-1997 / **e)** 30864 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1997, 275; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.13.22 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Presumption of innocence.

Keywords of the alphabetical index:
Burden of proof / Insurance, contribution, withholding.

Headnotes:

Where a tax assessment is increased, the presumption of innocence means that the burden of proving that the failure to pay sufficient tax was due to intent or gross negligence rests upon the Inspector.

Summary:

The appellant, X. as executive director of a legal entity, had been held liable for failure to remit national insurance contributions, including the increase imposed on the legal entity in question in a subsequent assessment. The matter in dispute was whether X. had been rightly held liable.

The Supreme Court held that X. had been rightly held liable and made the following observations. Since such an increase is of a preventive and punitory nature, the Inspector who imposes it must prove that the failure to pay sufficient tax is due to the intent or gross negligence of the legal entity that is liable to tax. If, as in the present case, an executive director is held liable for the increase imposed on the legal entity, there seem to be no grounds for saying that the increase ceases to be of a preventive and punitory nature in relation to the director. It is therefore in keeping with this nature and with the safeguards contained in Article 6 ECHR to assume that such liability can be imposed only if the Inspector also proves that the manifestly improper management on which the finding of liability is based consists of such acts that the failure to pay sufficient tax is attributable to the intent or gross negligence of those who constituted the management board. To this extent, therefore, the presumption of guilt referred to in Section 32a.3 of the Wages and Salaries Tax Act 1964 does not apply. It is also in keeping with the safeguards contained in Article 6 ECHR that the provisions of the Wages and Salaries Tax Act 1964 that are applicable in this case should be interpreted as meaning that the executive director held liable for the increase may try to rebut the evidence submitted by the Inspector by showing that he is not to blame for the incurrence of the penalty and may rely on facts and circumstances which were not taken into account in the remission of the increase itself and which could be a ground for reducing the amount of the increase for which this director has been held liable.

Languages:

Dutch.

NED-1997-2-014

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 18-06-1997 / **e)** 30646 / **f)** / **g)** / **h)** CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.

Keywords of the alphabetical index:

Civil right and obligation / Insurance, contribution, quality as _"civil right_".

Headnotes:

Rights and obligations under national insurance schemes are not civil rights and obligations within the meaning of Article 6.1 ECHR.

Summary:

The issue in this case was whether, when fixing an assessment for national insurance contributions, the authorities had correctly levied contributions (the "supplementary contributions") under the Exceptional Medical Expenses Act (AWBZ) and the General Invalidity Benefits Act (AAW). On appeal in cassation, the appellant argued that the safeguards contained in Article 6 ECHR had not been observed by the lower court.

The Supreme Court dismissed this argument since it considered that a decision on the national insurance contributions owed could not be regarded as a "determination of his civil rights and obligations or of any criminal charge against him", as referred to in Article 6.1 ECHR. Rights and obligations under national insurance schemes could not be treated as civil rights and obligations within the meaning of Article 6.1 ECHR, contrary to what was decided with regard to employee insurances in the judgement of the European Court of Human Rights of 9 December 1994, *Beslissingen in Belastingzaken (BNB)*, 1995/113 (48/1993/443/522 and 49/1993/444/523).

Cross-references:

- Decision no. 31541 of 25.06.1997, *Bulletin* 1997/2 [NED-1997- 2-007];

- Decision no. 31731 of 25.06.1997.

Languages:

Dutch.

NED-1997-2-013

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 13-06-1997 / **e)** 16345 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 142; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2.2.2 **Fundamental Rights** − Equality − Criteria of distinction − Race.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.

Keywords of the alphabetical index:

Racism / Race, definition / Political party, racist.

Headnotes:

The word "race" must be interpreted in the light of the evident scope of the summary contained in Article 1 of the Convention of New York of 7 March 1996 on the elimination of all forms of racial discrimination where colour, descent and national or ethnic origin are mentioned together with race.

The right to express an opinion freely is not unlimited, and is instead bound by the duties of care and propriety owed to other persons in social intercourse. In political debate, the limits of acceptable criticism have to be fixed broadly in respect to content and form.

Summary:

In the present proceedings the appellant, a political party, submitted that the respondent had acted unlawfully towards it by describing it in public as a racist party, thereby far exceeding the limits of freedom of expression. The appellant claimed rectification and an injunction to restrain any future statements and pronouncements in public that were unlawful in relation to the appellant by virtue of their nature or content.

On appeal in cassation the appellant complained that the Court of Appeal had incorrectly interpreted the word racism as it had wrongly taken it to include the making of a distinction on the ground of descent or national or ethnic origin. The Supreme Court held in this connection that it is evident from the explanatory memorandum to the bill that became the Act of 18 February 1971, Bulletin of Acts and Orders 96, implementing the International Convention of New York of 7 March 1996 on the elimination of all forms of racial discrimination, that the word "race" must be interpreted in the light of the evident scope of the summary contained in Article 1 of the Convention, where colour, descent and national or ethnic origin are mentioned together with race. It followed that the Court of Appeal had, in the opinion of the Supreme Court, correctly interpreted the word "race".

As regards the scope of the right to freedom of expression, the Supreme Court held that this right was not unlimited, and was instead bound by the duties of care and propriety owed to other persons in social intercourse. It had to be taken into account in this connection that since this case involved reactions to public pronouncements of a political party, the interest of having open public debate on political matters, which was protected by Article 10 ECHR, meant that the limits of acceptable criticism had to be fixed broadly both as regards the content and as regards the form (cf. *inter alia* European Court of Human Rights 23 May 1991, Series A no. 204, *Nederlandse Jurisprudentie (NJ),* 1992, 456; see in particular §§ 57-59). The Supreme Court went on to hold that the answer to the question of whether the public disclosure of a negative value judgement of the kind at issue in the present case was unlawful could not be made

dependent on an opinion on the correctness of that value judgement (cf. European Court of Human Rights 23 May 1991, § 63).

Languages:

Dutch.

NED-1997-2-012

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 03-06-1997 / **e)** / **f)** / **g)** / **h).**

Keywords of the Systematic Thesaurus:

5.3.13.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Trial/decision within reasonable time.

Keywords of the alphabetical index:

Delay, undue.

Headnotes:

Where the decision of the court of first instance in a given case was quashed by the Supreme Court on three occasions, the case could no longer be said to have been disposed of within a reasonable time within the meaning of Article 6 ECHR.

Summary:

In quashing a decision of the sub-district court for the third successive occasion, the Supreme Court noted that it would be some time before a decision could be taken on the appeal. This delay, which was not imputable to the defendant, was so long that the requirement of a reasonable time referred to inArticle 6 ECHR had not been fulfilled. The Supreme Court took into account that the offence dated from November 1993.

Languages:

Dutch.

NED-1997-2-011

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 02-05-1997 / **e)** 16246 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 117; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.4.12 **Fundamental Rights** − Economic, social and cultural rights − Right to intellectual

property.

Keywords of the alphabetical index:

Portrait law / Right of picture / Photograph, use without consent.

Headnotes:

Since a person whose portrait has been taken has legal protection against infringement of the right to respect for his or her private life, this person will in principle always have a reasonable interest in opposing the use of the portrait in a commercial advertising message.

Summary:

The respondent operated the *IT* discotheque in Amsterdam. In the evenings when the discotheque was open, a group of around eight people performed as dancers. In August 1991 the appellant was one of those performing. A photograph was made of his performance and used by the respondent in an advertising brochure bearing the heading "Nice bare flesh wanted for topless party". The respondent also had the photograph printed in its entirety on the back cover of the *GAY* magazine.

The appellant sued the respondent, claiming compensation of NLG 10,000 for the damage which he alleged he had suffered as a result of the unlawful acts of the respondent, namely the publication of the photograph of his performance at the *IT* discotheque in the brochure and the *GAY* magazine, which thereby constituted an infringement of his right to respect for his private life contrary to Section 21 of the Copyright Act 1912. The appellant's specific objection was that as a result of the disputed publication of the photograph in the advertising brochure and the *GAY* magazine, he was associated by his acquaintances with the gay movement − an association which he − as a non-gay − did not desire.

Section 21 of the Copyright Act provides that publication by the copyright owner of a portrait made without instructions is not permissible if this would be contrary to the reasonable interests of the person portrayed. On appeal the Court of Appeal ruled that, having regard to all the circumstances of the case, no ground could be found in the appellant's objection to publication of the photograph for holding that the publication of the portrait constituted an infringement of the appellant's right to respect for his private life which could support his argument based on a reasonable interest as defined above. In the opinion of the Court of Appeal, a factor of particular significance in this connection was "that by performing (for money) in the *IT* discotheque, with which he was acquainted (and which was also known nationwide), the appellant had placed himself in a public atmosphere of eroticism and freedom of expression and had thus to a certain extent intentionally invited an association of the kind to which he had referred". The Court of Appeal also held that although the publication in print was indeed aimed at a wider public than the visitors to the discotheque "the nature of the photograph and of the media in which it was published were not so far removed from the appellant's earlier performance there − given that the announcement of the topless party in the *IT* discotheque was not such as to give offence − that a different view should be taken of this publication and the possible associations to which it might give rise".

On appeal in cassation, the Supreme Court held on this point that it should be stated at the outset that the protection afforded by Section 21 of the Copyright Act, in conjunction with Sections 30 and 35 of the Copyright Act, to a person whose portrait has been taken, in particular against

infringement of his right to respect for his private life, meant that in principle the person portrayed always had a reasonable interest in opposing the use of the portrait in a commercial advertising message. The Supreme Court explained this by stating that the inclusion of a portrait in an advertisement for a product or service means that the subject of the portrait would be associated by the public with that product or service. The public would also generally − and usually rightly − assume that the portrait would not have been used without the consent of the person portrayed and would regard the inclusion of the portrait in the advertising message as a sign of support for the product or service by the person concerned.

The Supreme Court then ruled that the mere fact that a portrayed person is already associated in a particular circle with a product or service as a result of his cooperation in the making of the product or the provision of the service to which the advertisement relates did not mean that publication of his portrait in an advertising message intended for a wider audience and the resulting association of the portrayed person with the product or service by the wider public reached by this message could not be regarded as an infringement of his right to respect for his private life or that the portrayed person no longer had a reasonable interest in opposing the infringement. Whether the nature of the publication corresponds with the nature of the product or service was therefore not relevant in determining whether there has been a breach of Section 21 of the Copyright Act. In the view of the Supreme Court, an infringement of the right to respect for private life would exist in particular in the case of advertising messages which, as the Court of Appeal noted in the present case, placed the portrayed person in "a public atmosphere of eroticism and freedom of expression". Finally, the Supreme Court also held that no matter how much the commercial interests of the respondent in advertising the services provided by it also enjoyed the protection of Article 10 ECHR, they were not sufficiently important to justify an infringement of the appellant's right to respect for his private life.

Languages:

Dutch.

NED-1997-2-010

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 29-04-1997 / **e)** 103.976 / **f)** / **g)** / **h)**.

Keywords of the Systematic Thesaurus:

5.3.13.15 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Impartiality.

Keywords of the alphabetical index:

Challenging, judge, impartiality.

Headnotes:

Where an application had been made to challenge a judge, he had wrongly decided on the application himself.

Summary:

This case concerned the question of whether a single judge trying economic offences was himself entitled to decide on an application to challenge him, instead of awaiting a decision on the application by the multi-judge division of the District Court. The Supreme Court explained that the provisions governing the challenging and excuse of judges had been entirely revised by the Act of 16 December 1993 (Bulletin of Acts and Orders, 650, entry into effect: 1 January 1994). Where a challenge is made at the trial, the proceedings are stayed pursuant to Article 513.5 of the Code of Criminal Procedure. Article 515.1 of the Code of Criminal Procedure provides that an application for challenge must be dealt with as quickly as possible by a multi-judge division of which the challenged judge is not a member. According to the Explanatory Memorandum to the Act (*TK* '91-'92, 22 495, no. 3, p. 114) this is essential since this is the only way of ensuring that a ruling is obtained which is not open to doubt on the part of any of those involved. It followed, in the opinion of the Supreme Court, that if a single judge trying economic offences had himself decided − and dismissed − an application for challenge contrary to Article 513.5 in conjunction with Article 515.1 of the Code of Criminal Procedure and had thereafter continued the examination at the trial, the examination at the trial was void, having regard to the nature of the peremptory provisions and to Article 17 of the Constitution.

Languages:

Dutch.

NED-1997-2-009

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 22-04-1997 / **e)** 104.783 / **f)** / **g)** / **h).**

Keywords of the Systematic Thesaurus:

5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Appeal proceeding, representation.

Headnotes:

As representation on appeal by a person authorised in writing who is not a lawyer (attorney-at-law) is not allowed, courts have to stay the proceedings in order to allow the defendant to present his or her defence properly.

Summary:

In this case, the defendant wished to be defended by an authorised representative who was not a lawyer. However representation on appeal is possible only by a lawyer. The Supreme Court held that in these circumstances Article 6.3 ECHR, in conjunction with Article 6.1 ECHR, meant that the Court of Appeal should have examined whether there were grounds for staying the hearing in order to allow the defendant the opportunity to present his defence (or have it presented) properly. As it was not apparent from the documents that this had happened, the decision of the Court of Appeal could not be upheld.

Languages:

Dutch.

NED-1997-2-008

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 21-03-1997 / **e)** 16.214 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 74; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Social Charter of 1961.
3.16 **General Principles** − Proportionality.
3.17 **General Principles** − Weighing of interests.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.4.10 **Fundamental Rights** − Economic, social and cultural rights − Right to strike.

Keywords of the alphabetical index:

Collective agreement / Strike, damage / Strike, injunction proceeding / Service, essential.

Headnotes:

Deciding when a strike need no longer be tolerated and may be restricted by order of the court is a question of proportionality that can be answered only by weighing the interests involved in the exercise of the fundamental right − viewing these interests together and as a whole − against the interest that is being violated, while taking account of all the circumstances involved in the parties' dispute that are characteristic of the case. The court must in principle proceed on the assumption that the interest of the relevant union and its members in exercising that fundamental right are compelling.

Summary:

On 1 December 1994 the VSN (as employer) started negotiations with the trade unions FNV and CNV that were to culminate in a new collective labour agreement for the public transport sector for 1995. When these talks failed to produce any agreement between the parties, the two unions wrote to the VSN, in letters dated 17 January 1995, notifying it of imminent strike action. In response to this, further talks were held between the parties on 18 January 1995. As a result of these talks the VSN and the CNV reached agreement, but the FNV found the VSN's final offer unacceptable and called its members out on strike on 19 and 20 January 1995. From 20 January onwards the FNV repeatedly prolonged the strike by one day at a time, communicating this to the VSN by fax. For the duration and as a result of the strike, regional public transport, and in many places municipal public transport, was severely disrupted; some services had to be suspended altogether. The majority of the passengers − over one million people in total − who rely daily on regional public transport services were affected by this disruption. For many of them it was impossible to reach their work or other destination at all, let alone on time. Many companies and **Institutions** suffered considerable damage or other adverse effects as a result. When the strike had gone on for six days, VSN attempted to end it by instituting interlocutory injunction proceedings.

In cassation proceedings, the Supreme Court ruled first and foremost that a strike that in principle falls within the scope of the provisions of the preamble and point 4 of the Article 6, of the European Social Charter must in principle be tolerated by all parties, including the employer, as a lawful exercise of the fundamental right enshrined in this provision of international law, regardless of the adverse effects for employer and third parties that are the objective of the strike and that are experienced by those concerned. The question of the criteria that must be met before a strike need no longer be tolerated and may be restricted by order of the court has not been answered, as envisaged in Article 31 of the European Social Charter, by the legislature. The criteria developed in case law amount to a requirement that it must be possible to ascertain that, having regard to the care that must be exercised in social conduct in respect of the persons or goods of others pursuant to Article 6162 of the Civil Code, the strike prejudices the rights of third parties defined in Article 31 of the European Social Charter or the public interest to such a degree that restrictions, from the vantage-point of society, are an urgent social necessity. The unrestricted exercise of this fundamental right, in such a case, would be unlawful in relation to all those damaged by it, including the employer. Whether these conditions are met is a question of proportionality that can be answered only by weighing the interests involved in the exercise of the fundamental right − viewing these interests together and as a whole − against the interest that is being violated, while taking account of all the circumstances involved in the parties' dispute that are characteristic of the case. The employer is free to argue that the criteria defined above have been met, and that the strike is hence unlawful, or has become so, in relation to him.

In the weighing of interests referred to above − which is only at issue when it has been established that the strike concerned falls within the scope, in principle, of the fundamental right enshrined in Article 6.4 of the European Social Charter − the court must in principle proceed on the assumption that the interest of the relevant union and its members in exercising that fundamental right are compelling. After all, it is in principle not the court's task to assess the relative merits of the positions underlying the dispute that has led to the strike. Exceptional circumstances may arise that put this in a different light, however.

The Supreme Court also held that there was no need to answer conclusively the question of whether or not it was possible to differentiate sharply between "essential" and "non-essential" services: in any case, the more essential a service, the sooner it will be possible to impose restrictions as referred to in Article 31.1 of the European Social Charter. This is not to say, however, that there would be no place for such restrictions where a service is "non-essential". The same criterion as indicated above would be applicable in such a case.

Languages:

Dutch.

NED-1997-2-007

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 21-03-1997 / **e)** 8824 / **f)** / **g)** / **h)** *Rechtspraak van de Week,* 1997, 67; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13.15 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Impartiality.

Keywords of the alphabetical index:

Judge, challenging / Interlocutory decision.

Headnotes:

The fact that a judge has sat on the bench of the division of a court that has given judgment and has previously heard witnesses in his capacity of examining magistrate does not detract from his impartiality.

Summary:

In this benefits case, the district court, hearing the case on appeal, gave the person concerned the opportunity to prove a certain fact. In this connection the court appointed as examining magistrate a judge who had been on the bench of the division that had made the interim decision. Acting in this capacity, this judge interviewed several witnesses. In its final decision, the court ruled that the necessary proof had not been supplied. In accordance with the principles laid down in Article 212 of the Code of Civil Procedure, this decision was made by the same division, in the same composition, as the division that had made the interim decision.

In cassation proceedings, this procedure was contested, on the grounds of its alleged incompatibility with the requirement enshrined in Article 6 ECHR that the case should be heard by an impartial tribunal. The Supreme Court dismissed this contention. It considered that there was no question of circumstances that justified, objectively speaking, impugning the examining magistrate's impartiality when hearing witnesses or that of the judges who made the final decision (including the judge who had been appointed examining magistrate). For after its provisional assessment of the case, in its interim decision, the court had been entirely free in its appraisal of the evidence that had been introduced; nor could it be said, the Supreme Court continued, that the mere circumstance of the examining magistrate's having belonged to the bench that had made the interim decision gave rise to any justifiable doubts, objectively speaking, as to his impartiality in hearing witnesses.

Languages:

Dutch.

NED-1997-2-006

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 28-02-1997 / **e)** 8870 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 59; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Registry of births, marriages and deaths, municipal / Sex, change, confidentiality.

Headnotes:

A sex change constitutes sensitive information and it should not be possible to infer it from other information that is not in itself of a sensitive nature.

Summary:

The district court had previously made an order for the alteration of the applicant's birth certificate, changing the applicant's sex from "male" to "female" and at the same time changing her given names. This judgment was entered in the appropriate municipal register of births, marriages and deaths on 21 July 1993. In these proceedings the applicant requested that the municipality be ordered to remove all records relating to her marital history from the list of personal particulars within the meaning of the Municipal Database (Personal Records) Act (GBA Act). Her reason for making this request was that it would remain possible to infer from these records that the applicant had previously been male.

In cassation proceedings, the Supreme Court held first and foremost that under Section 81 of the GBA Act, where relevant to this case, in the case of a court order to change the sex stated in a birth certificate, the general information predating the change that relates to the individual's name, sex and the use of the husband's, or ex-husband's, family name, shall be removed from the list of personal particulars at the request of the individual concerned. It was apparent from the parliamentary debate on this provision, the Supreme Court continued, that a sex change constitutes sensitive information, and that it should not be possible to infer it from other information that is not in itself of a sensitive nature. It is clear, for the rest, that the legislature had appreciated this point as far as the information referred to in Section 81.3 is concerned. However, the legislature had evidently failed to appreciate that it is possible to infer that a sex change has taken place from other information, such as that at issue in this case. Given the purpose of the GBA Act, especially in the light of Article 8 ECHR, it should also be possible to have information other than that expressly referred to in Section 81, from which a previous sex change may be inferred, removed from the list of personal particulars. The Supreme Court added that the case might be different if specific interests were involved − that is to say, interests other than those encapsulated in the general criteria of universality, reliability and clarity − even taking account of the interest of the person concerned in the protection of his or her private life, that lead to the conclusion that this information should be retained in the list of personal particulars.

Languages:

Dutch.

NED-1997-2-005

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 18-02-1997 / **e)** 103.166 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 97.167.

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.36.2 **Fundamental Rights** − Civil and political rights − Inviolability of communications − Telephonic communications.

Keywords of the alphabetical index:

Telephone tapping.

Headnotes:

The recording of telephone conversations by the victim in her own home without the police being present, using equipment installed by the police, is not in this case incompatible with Article 8 ECHR or Article 17 of the International Covenant on Civil and Political Rights.

Summary:

In this case, the only proof that the suspect was guilty of a sexual offence was the victim's statement. In order to procure additional evidence, the police gave the victim practical (i.e. technical) assistance enabling her to record an incoming conversation with the suspect using an audio-tape they installed for her. The question is whether this constituted a breach, on the part of the police, of the exercise of the suspect's right to privacy within the meaning of Article 8 ECHR. According to the Supreme Court, the appeal court was right to hold that the police had not engineered events to such an extent as to constitute the interference of an authority in the exercise of this right within the meaning of Article 8 ECHR orArticle 17 of the International Covenant on Civil and Political Rights. Likewise, the appeal court had been right to hold that the circumstance that the suspect, as a lawyer, had the status of one required to preserve confidentiality, was not relevant in this case.

Languages:

Dutch.

NED-1997-2-004

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 05-02-1997 / **e)** 31.312 / **f)** / **g)** / **h)** CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.9 **General Principles** − Rule of law.
3.13 **General Principles** − Legality.
5.2.1.1 **Fundamental Rights** − Equality − Scope of application − Public burdens.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, lawfulness / Administration, proper, principle / Law, incorrect application, equality, right / Car, company taxation as revenue.

Headnotes:

A taxpayer may successfully invoke the principle of equal treatment under the law in relation to policy based on an incorrect interpretation of the law, unless the nature of the said policy is such that it is intended to apply to a very limited number of taxpayers.

Summary:

In his tax return form the taxpayer had omitted to mention the fact that his employer had given him the use of a company car. The inspector imposed a retroactive tax assessment on this account. In the proceedings that followed, the taxpayer invoked the principle of equal treatment under the law. He contended that the State Secretary for Finance was pursuing a policy whereby Ministers and State Secretaries could remain exempt from the application of the motor vehicle surcharge. Following the principle of equal treatment under the law, the motor vehicle surcharge should not be applied in his case either.

In cassation proceedings, the Supreme Court determined that the policy referred to, as pursued by the State Secretary for Finance, was based on an incorrect interpretation of the law. According to the Supreme Court, this policy is evidently based on the idea that the personal use of an official car within the Netherlands, given that the public interest is served by ensuring that Ministers and State Secretaries can travel as much as possible by official car, does not qualify as personal use. This opinion is incorrect. However, this does not mean that the invocation of the principle of equal treatment before the law fails on these grounds alone. Even in cases in which the policy pursued is based on an incorrect interpretation of the law, taxpayers may demand, invoking the principle of equal treatment before the law as a principle of proper administration, that the same interpretation of the law be followed in their own case. One reservation may be made, however: provided the other requirements for the application of the principle of equal treatment before the law are met, there may nevertheless be grounds for granting precedence to the principle that the law must be applied. When policy based on an incorrect interpretation of the law is only intended to be pursued in relation to a very limited group of taxpayers, and it may be assumed that it would not have been introduced were it not for the incorrect interpretation of the law, taxpayers who do not belong to the limited group should not be able successfully to invoke the application of the principle of equal treatment before the law as a principle of proper administration while the incorrectness of the interpretation of the law has not yet been pointed out. Viewed in this light, the invocation of the principle of equal treatment before the law fails in this case.

Languages:

Dutch.

NED-1997-2-003

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 17-01-1997 / **e)** 16.122 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1997, 23; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
3.4 **General Principles** − Separation of powers.
3.10 **General Principles** − Certainty of the law.
3.19 **General Principles** − Margin of appreciation.
4.7.1 **Institutions** − Judicial bodies − Jurisdiction.
5.2.2.12 **Fundamental Rights** − Equality − Criteria of distinction − Civil status.
5.3.33.2 **Fundamental Rights** − Civil and political rights − Right to family life − Succession.

Keywords of the alphabetical index:

Child, born out of wedlock, right to inheritance / Father, biological / Family life, definition / Interpretation, limit.

Headnotes:

It is not in contradiction with Article 8 ECHR if the law on succession does not consider an illegitimate child whose biological father has not acknowledged her or him as the latter's legal heir.

Summary:

In this case, H. laid claim to the estate of his biological father, submitting that while the testator had not acknowledged him and that the law did not therefore designate him the heir, he should nevertheless be regarded as the testator's heir because he and the testator had had a legal relationship that could be defined as family life within the meaning of Article 8 ECHR. On these grounds, in conjunction with Article 14 ECHR, H. pleaded that he could enforce claims against the estate under the law of succession.

In cassation proceedings the Supreme Court held as follows. In the first place, the significance of Articles 8 and 14 ECHR for the inheritance rights of illegitimate children must be viewed in the light of the European Court of Human Rights' rulings in the Marckx case of 13 June 1979, Series A no. 31 (*Nederlandse Jurisprudentie* 1980, 462) paragraphs 53-56 and 59, and in the Vermeire case, 29 November 1991, Series A no. 214-C, paragraphs 25- 28. Article 8 in itself leaves States Parties a certain amount of discretion in the regulation of claims under the law of inheritance, and therefore allows in principle limitation of the degree to which children born outside marriage may inherit from their parents, whether *ab intestato* or under the terms of a will. Excluding intestate inheritance on the sole grounds of illegitimate descent is discriminatory, however, and hence constitutes a violation of Article 8 ECHR in conjunction with Article 14 ECHR. This does not exclude the possibility that other kinds of limitations to the *ab intestato* inheritance rights of illegitimate children may exist that are justified on objective and reasonable grounds. In this respect too, national legislative authorities may exercise a degree of discretion.

Viewed against this background, it is important that the present case involves an illegitimate child who has not been acknowledged, and who is invoking the above-mentioned Articles in support of his submission that he has the right to inherit from the man he claims fathered him. It should be noted that this case differs from those involved in the aforementioned judgments; in particular it differs from the case of a) an illegitimate child, whether or not acknowledged by the father, that is its mother's heir under Dutch law, and b) that of an acknowledged illegitimate child that is also the heir under Dutch law of the man who has acknowledged it. One of the aims of the Act of 27 October 1982, *Bulletin of Acts and Decrees* 608, in which the rules given above under points a) and b) were incorporated in their present form into Dutch legislation, was to bring Dutch legislation on natural children into line with the principles applying in this connection that followed from Articles 8 and 14 ECHR according to the then recent judgment of the European Court of Human Rights in the Marckx case. A Bill to amend both the law of parentage and the adoption regulations, introduced on 20 March 1996, is now before the Lower House. Article 1207 of the Civil Code, in amendments proposed by the Government, provides in certain cases for the court to establish paternity at the request of the mother or the child, one consequence of which would be to establish the child's heirship. It is as yet unclear whether this

legislation will in fact enter the statute-books in the form now being proposed. One point to have emerged from this is that the legislature has adopted the point of view that a review of the law of parentage which would regulate *inter alia* the position under the law of succession of an illegitimate child who has not been acknowledged by the biological father is impossible without making important decisions in the sphere of legal policy, and that the legislative process needed for this has not yet been concluded. In the first place it must be inferred from this that the absence of a rule under Dutch law stating that an illegitimate child whose father has not acknowledged paternity is his biological father's heir cannot be said to be based exclusively on his illegitimate descent but rather on the difficulty, in the legislation that has been drafted, of striking a proper balance between all the interests involved in the law of parentage. In the second place, it follows from this that the choices to be made here go beyond the courts' task of making new law through interpretation. This also means in the case at hand that it is impossible to anticipate − whether wholly or in part − the legislation referred to above.

The Supreme Court identified three problems in relation to this point, including the following. If judgment were to be given at this stage on the basis of Article 14 ECHR in conjunction with Article 8 ECHR, it would raise the question of exactly what ties are required between the biological father and the child for sufficient grounds to be present for heirship. Invoking these Articles automatically implies the existence of family life within the meaning of Article 8 ECHR. According to the case law of the European Court of Human Rights, the essential factor here is the nature of the relationship between the father and the mother within which the child was born. If they were legally married, the birth of a child within that relationship in itself establishes the existence of family life with the father. The same applies in the case of a relationship between the father and the mother that can be equated with marriage to a sufficient extent to allow it to be defined as family life (European Court of Human Rights 26 May 1994, Series A no. 290, *Nederlandse Jurisprudentie (NJ)*, 1995, 247). Aside from this, a situation may arise in which, despite the lack of a relationship between the parents as referred to above, family life may be assumed to exist between the biological father and the child on the basis of attendant circumstances, as indeed arose in one specific case. The proof for the existence of such circumstances, however, may depend on coincidental events, and their assessment can easily lead to divergent opinions. It is therefore difficult to attach consequences under inheritance law to such circumstances without jeopardizing, to an almost unacceptable degree, the legal certainty that is of the essence precisely in inheritance law. Furthermore, only the legislature has the competence to introduce a stricter rule, one that would both be compatible with the aforementioned provisions of international law and serve the interests of legal certainty.

Languages:

Dutch.

NED-1997-2-002

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 17-12-1996 / **e)** 103.862 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 97.118.

Keywords of the Systematic Thesaurus:

3.4 **General Principles** − Separation of powers.
3.21 **General Principles** − Equality.
4.6.6 **Institutions** − Executive bodies − Relations with judicial bodies.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman

and degrading treatment.

Keywords of the alphabetical index:

Extradition, competence / European Convention on Extradition.

Headnotes:

It is the task of the Minister of Justice, not of the courts, to decide whether or not to grant a request for extradition. The court is however competent to advise the Minister in this matter.

Summary:

The question of whether there is good reason to suspect that the person requested risks being exposed to torture if he is extradited and whether any discriminatory prosecution is at issue within the meaning of Article 3.2 of the European Convention on Extradition is a matter for the Minister of Justice to decide. The court ruling on the extradition request is however competent to include in its advice to the Minister its view of any such submissions offered in defence.

Cross-references:

- Decision no. 104.267 of 15.10.1996, *Bulletin* 1996/3 [NED- 1996-3-017].

Languages:

Dutch.

NED-1997-2-001

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 19-11-1996 / **e)** 103.062 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.099.

Keywords of the Systematic Thesaurus:

5.3.18 **Fundamental Rights** − Civil and political rights − Freedom of conscience.
5.4.1 **Fundamental Rights** − Economic, social and cultural rights − Freedom to teach.
5.4.2 **Fundamental Rights** − Economic, social and cultural rights − Right to education.

Keywords of the alphabetical index:

Schooling, compulsory / Education.

Headnotes:

Compulsory schooling is not incompatible with the freedom of conscience.

Summary:

Under Section 2 of the 1969 Compulsory Education Act, anyone with parental responsibility for a child or who is in charge of actually caring for him or her is required to ensure, in accordance with the provisions of the said Act, that the child is enrolled as a pupil of a school and attends

classes regularly after enrolment. In cassation proceedings it was submitted that this obligation violates parents' rights under Article 9 ECHR to manifest their own religion or beliefs.

The Supreme Court rejected this submission. The Court considered that parents have the freedom to send the child to a school of their choice. Alternatively, they may enrol the child in a school they have set up themselves, where the teaching corresponds to their principles. In the second place, the 1969 Compulsory Education Act provides for exemptions. For instance, parents may be granted an exemption if they have compelling objections to the denomination of all the schools within a reasonable distance from their home that the child might otherwise attend (see Section 5b). From this it follows that Section 2 of the 1969 Compulsory Education Act does not violate Article 9.1 ECHR or Article 2 Protocol 1 ECHR.

Languages:

Dutch.

NED-1996-3-019

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-11-1996 / **e)** 8857 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 224; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
5.3.13.9 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Public hearings.

Keywords of the alphabetical index:

Medical malpractice / Public hearing, right, waiver.

Headnotes:
A waiver of the right to a public hearing must be made either expressly or tacitly, in an unambiguous manner, and may not conflict with any significant public interest.

In determining whether a medical practitioner has waived his right to a public hearing, it is significant that the Medical Malpractice (Disciplinary Sanctions) Act is based on the assumption of a hearing in camera, but that it does give the disciplinary court the power to hear the case in open court. It is also significant that the medical practitioner had legal counsel to assist him.

Summary:

In this medical malpractice case, the appeals hearing, as it is clear from its official report, did not take place in public. It was therefore contended in the appeal in cassation that there had been a violation of Article 6.1 ECHR.

There is no evidence in the disputed appeal court judgment or in the official report of the proceedings either that the medical practitioner requested the appeals court for his appeal to be dealt with in a public hearing or that he expressly waived his right to such a public hearing.

The Supreme Court considered that someone who is entitled to a public hearing pursuant to Article 6.1 ECHR may waive his right to this either expressly or tacitly, provided that this occurs in an unambiguous fashion and does not conflict with any significant public interest.

In deciding whether the medical practitioner waived his right it is significant on the one hand that he was represented at the hearing by legal counsel, and on the other hand that the Medical Malpractice (Disciplinary Sanctions) Act, in contrast to Article 6.1 ECHR, proceeds on the assumption of a hearing in camera, but does give the disciplinary tribunal the competence to hear the appeal in public, so that the medical practitioner, if he had wanted a public hearing, could have made a request to this effect to the appeal court. All things considered, the Supreme Court believes that it should be considered that the failure on the part of the medical practitioner and his counsel to make such a request constituted a tacit but nevertheless unambiguous waiver of the medical practitioner's right to a public hearing (cf. European Court of Human Rights, 21 February 1990, Series A no. 171 and 24 June 1993, Series A no. 263). Furthermore, since it cannot be said that a public hearing of the appeal at issue was required by any significant public interest, the appeal court did not violate the provision of international law invoked by the medical practitioner.

Languages:

Dutch.

NED-1996-3-018

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-11-1996 / **e)** 8770 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 221; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
3.17 **General Principles** − Weighing of interests.
3.19 **General Principles** − Margin of appreciation.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2 **Fundamental Rights** − Equality.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.23 **Fundamental Rights** − Civil and political rights − Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, subscriber television / Licence, exclusive / Monopoly.

Headnotes:

The rejection of an application for a licence to run a subscriber television company does not constitute a violation of Article 10 ECHR.

A restriction to the freedom of expression consisting of the granting of a monopoly position to a single enterprise in the establishment and running of a pay-TV service is permissible where

there are compelling reasons for it. It is important to establish whether the refusal of a licence is justifiable in principle and proportionate.

Summary:

By Country Decree of 26 February 1991, TDS was granted a licence, excluding other potential applicants, to establish and run a pay-TV service on Curaçao. For this reason, Multivision's request for a similar licence was turned down. In the interlocutory injunction proceedings at issue here, Multivision asked the court to order the Netherlands Antilles to grant it a licence to establish and run a pay-TV service. This application was denied.

The Joint Court of Justice dismissed Multivision's complaint that the refusal of its application for a licence constituted a violation of Article 10 ECHR. The Court considered *inter alia* with reference to the Lentia judgment (European Court of Human Rights, 24 November 1993, Series A no. 276) that restricting freedom of expression by granting a monopoly position to a single enterprise (TDS) is permissible only where there are compelling reasons for it, but that in deciding when this is the case, the authorities should be allowed a certain margin of appreciation within the context of local conditions. Briefly summarised, the Joint Court's view was as follows:

a. that against the backdrop of the above-mentioned margin of appreciation of national governments and the requisite circumspect examination of this by the court ruling in interlocutory injunction proceedings, it may be deemed financially and economically impossible at present for any company to establish and run a paid television system covering the entire island if a second provider were to be admitted;

b. that it is furthermore of importance that TDS's monopoly position is attached to a set period of time which cannot be extended − the ten-year period that now applies not necessarily being unreasonable in this respect − and that the point of granting TDS a monopoly is to enable it to earn back its start-up expenses, and finally that it is significant that TDS is under an obligation to provide the entire island of Curaçao with high quality television signals to which everyone is free to subscribe;

c. that under these conditions, it must be held, for the present, that there is sufficient proportionality between the violation of the fundamental right enshrined in Article 10 ECHR and protecting the interest of − in this case − preventing "harmful competition between providers of subscriber television that would be detrimental to viewers" and protecting the rights of others (TDS).

Ruling in cassation proceedings, the Supreme Court considered that the Joint Court had been right to ascertain whether the refusal of the licence had been justifiable in principle and proportionate. In answering this question in the affirmative, the court's reasoning, according to the Supreme Court, was evidently that allowing competition at present between a number of paid television providers would mean that none of those authorised to broadcast would be capable of running a paid television system at a profit, so that ultimately the viewers would suffer, and for this reason TDS's rights merit protection. Only if these rights are protected can the information supply of the viewers as a whole be safeguarded. This line of reasoning, in the view of the Supreme Court, does not display an incorrect interpretation of the law, and is interwoven with assessments of the facts to such an extent that its soundness is not susceptible to further examination.

Languages:

Dutch.

NED-1996-3-017

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 15-10-1996 / **e)** 104.267 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 97.047.

Keywords of the Systematic Thesaurus:

4.6.2 **Institutions** − Executive bodies − Powers.
4.7.1 **Institutions** − Judicial bodies − Jurisdiction.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Extradition, assurance by receiving state / Extradition, information about receiving state.

Headnotes:

The decision concerning whether a request for extradition should be denied on the grounds of an anticipated violation of fundamental rights, in particular of Article 3 ECHR, is the sole prerogative of the Minister of Justice.

Summary:

In this extradition case, it was argued in the district court proceedings, on behalf of the accused, that on the grounds of the rules that apply in the requesting state, the United States of America, she may expect to serve a minimum of 18 years in prison. It was submitted that extradition to the United States should be declared inadmissible on the grounds of an anticipated flagrant violation of Article 3 ECHR. The district court rejected this defence.

In cassation proceedings, the Supreme Court held that it follows from the Extradition Act system that it is the sole prerogative of the Minister of Justice to decide whether a requested extradition must be refused on the basis of a well-founded suspicion that, if the request is granted, the person requested will be exposed to a violation of her fundamental rights. It is clear from the passage through parliament of the Bill that led to the Extradition Act that this is based on the view:

> "that the government has at its disposal information concerning the political situation and the dispensation of the criminal law in other countries which are inaccessible to the court. If the government were bound to uphold the judgment handed down by the court, it could not be held accountable for the decision. This would attenuate the force of any intervention on the part of the Netherlands Government if, contrary to expectation, discriminatory prosecution were nevertheless to occur."

The Supreme Court said that it should also be taken into account that the court ruling on the extradition request does not have the power to insist on the requesting state giving assurances

that the person requested will not be deprived of any fundamental rights subsequent to extradition. As the court cannot judge whether the requested extradition should be refused on the grounds of the accused's defence in connection with the provisions of Article 3 ECHR, the district court was right to reject this defence.

Languages:

Dutch.

NED-1996-3-016

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 01-10-1996 / **e)** 103.094 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 97.034.

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman and degrading treatment.
5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.

Keywords of the alphabetical index:

Evidence obtained through torture.

Headnotes:

Witness statements obtained through torture may not be admitted in evidence.

Summary:

In appeal court proceedings the accused claimed that the identification procedures and interviews had been conducted in such a fashion as to render the gathering of evidence unlawful and to call for an acquittal. The accused's allegation was based on the fact that in several cases only one photograph was used for identification purposes, and on allegations that witnesses had been tortured and that suspects had been promised reduced sentences in return for full cooperation in the investigation.

The appeal court considered that these circumstances in themselves constituted insufficient grounds for ruling the evidence unlawful. Additional facts would be needed for the identification procedures and interviews to be deemed unlawful.

In cassation proceedings, the Supreme Court considered that the appeal court's assumption that more would be needed than the torture of witnesses for the way in which the interviews had been conducted and the evidence obtained from them to be ruled unlawful displayed an incorrect interpretation of the law, and in particular of the provisions of Article 3 ECHR and Article 7 of the International Covenant on Civil and Political Rights. For it follows from these provisions of international law that if a witness statement is obtained by torture, this in itself means that any

such statement, having been unlawfully obtained, cannot be admitted in evidence. As the appeal court's judgment included the ruling that it was implausible that the witness statements had been obtained under the influence of torture, the appeal was dismissed.

Languages:

Dutch.

NED-1996-2-015

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 14-05-1996 / **e)** 102.428 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1996, 305.

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.6 **Fundamental Rights** − Civil and political rights − Freedom of movement.

Keywords of the alphabetical index:

Ban, entering a sports stadium.

Headnotes:

The obligation on a person banned from attending a sports stadium to report to an authority is not incompatible with Article 2 Protocol 4 ECHR.

Summary:

In this case, the Appeal Court ordered the accused, in pronouncing sentence, to register at the police station of his home town during half-time of every match played by Feijenoord football club. The Court held that the point of this reporting obligation was to monitor the accused's compliance with the ban on attending the stadium that had been imposed on him.

The obligation to report was necessary in order to prevent a repeat of the criminal offences of which the accused was convicted. Having regard to the Appeal Court's arguments and the limited duration and extent of the restrictions on the accused's liberty, the Supreme Court held that it was reasonable for the Appeal Court to rule that the obligation to report was an acceptable means of achieving the set goal. The Supreme Court ruled that the ban on entering the sports stadium and the accompanying obligation to report to the police were not in breach Article 2.1 Protocol 4 ECHR, having regard to Article 2.3 ECHR and to Article 12.3 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

NED-1996-2-014

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 10-05-1996 / **e)** 8728 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 113; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.6.5.2 **Constitutional Justice** − Effects − Temporal effect − Retrospective effect (*ex tunc*).
1.6.5.4 **Constitutional Justice** − Effects − Temporal effect − *Ex nunc* effect.
2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
3.13 **General Principles** − Legality.
3.20 **General Principles** − Reasonableness.
4.7.3 **Institutions** − Judicial bodies − Decisions.
5.2.1.2.1 **Fundamental Rights** − Equality − Scope of application − Employment − In private law.
5.2.2.12 **Fundamental Rights** − Equality − Criteria of distinction − Civil status.

Keywords of the alphabetical index:

Employee, unequal treatment.

Headnotes:

As a result of a legal rule which was formulated in a court ruling handed down at the highest level but which had not previously been regarded as valid law, the unequal treatment of married and unmarried female employees could not be redressed retroactively. This was found not to be incompatible with Article 26 of the International Covenant on Civil and Political Rights.

Summary:

Ms. Cijntje was employed as a teacher by a Foundation. In accordance with the salary scales that applied at the time, until 31 December 1991 she received a lower salary than her married colleagues. Arguing that the Foundation had discriminated against her in favour of her married colleagues, Cijntje claimed payment in these proceedings of the difference between the amounts actually paid to her in her salary up to 31 December 1991 and the salary she would have been paid as a married teacher.

The Court ruling at first instance dismissed the claim. It held that the part of the claim that related to loss of earnings in the period prior to 11 February 1989 was barred by the statute of limitation. As a result of a transitional rule, the essence of which was that “barring exceptions, claims such as the present one will not in principle be granted retroactively any earlier than 7 May 1993”, the part of the claim that related to the period between 11 February 1989 and 31 December 1991 could not be granted. The Joint Court of Justice of the Netherlands Antilles and Aruba upheld this judgment of the Court.

The Supreme Court held that the Joint Court of Justice had accepted the transitional rule disputed at appeal on the basis of its finding that the development of the law in the Netherlands Antilles, where equal pay for married and unmarried persons is concerned, had not been completed before it was established by the Supreme Court judgment of 7 May 1993 (*Nederlandse Jurisprudentie*, 1995, 259, [NED-94-2-005]) that the practice pursued up to that

point by the Netherlands Antilles could no longer be deemed compatible with Article 26 of the International Covenant on Civil and Political Rights.

Furthermore, the Supreme Court held that when a stage in the development of the law is marked by a court handing down a judgment at the highest instance, formulating a rule of law that had previously not been regarded as valid law, this can be deemed equivalent to a new legal rule. In both cases, reasonableness and legal certainty may require an interim measure to be enacted which in principle excludes the retroactive application of the legal rule in question. According to the Supreme Court, the Joint Court of Justice was right to take account of this possibility.

Likewise, the Supreme Court held that the Joint Court had been correct in its opinion that, in the situation concerned, salary claims based on the interpretation and application of Article 26 of the International Covenant on Civil and Political Rights given in the judgment of 7 May 1993 could not be granted if they related to the period prior to the judgment, during which time customary practice was based on a different point of view.

Languages:

Dutch.

NED-1996-2-013

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 10-05-1996 / **e)** 8722 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 112; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
3.18 **General Principles** − General interest.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.22 **Fundamental Rights** − Civil and political rights − Freedom of the written press.

Keywords of the alphabetical index:

Media, journalist, source, disclosure, refusal, right.

Headnotes:

Article 10.1 ECHR gives a journalist the right to refuse to answer questions, except in special circumstances, if he would risk exposing his source by doing so.

Summary:

This case concerns the refusal of two journalists to answer questions put to them when they were being questioned as witnesses. The purpose of this questioning was to ascertain the journalists' sources and hence to discover what information the latter had supplied to them.

The Supreme Court held that it follows from the judgment of the European Court of Human Rights of 27 March 1996 (*Goodwin vs. United Kingdom*, [ECH-1996-1-006]) that it must be

accepted that Article 10.1 ECHR entitles a journalist in principle to refuse to answer a question put to him if he would risk exposing his source by doing so. The court is not obliged to accept an invocation of this right, however, if it is of the opinion that in the particular circumstances of the case, revealing the source is necessary in a democratic society with a view to protecting one or more of the interests referred to in Article 10.2 ECHR, provided that the person hearing the journalist as a witness cites such an interest and, where necessary, provides a plausible case for its existence.

In the case at hand, the Supreme Court took the view that the only interest the plaintiffs had in exposing the journalists' sources was their desire to locate the "leak" so that they could go on to bring legal proceedings against the State and the parties involved, personally, both to obtain compensation and to forbid those involved, personally, to "leak" any more information to the press. On the basis of the aforementioned judgment of the European Court of Human Rights, it must however be assumed, according to the Supreme Court, that this interest is in itself insufficient to offset the compelling public interest at stake here in the protection of the journalists' sources.

Languages:

Dutch.
NED-1996-2-012

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 07-05-1996 / **e)** 101.910 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1996, 286.

Keywords of the Systematic Thesaurus:

5.3.13.8 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right of access to the file.
5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.13.26 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Document, police photograph / File.

Headnotes:

The photograph books used by the police are not documents in a case and therefore do not have to be added to the case file.

The defence may not be refused access to documents which are not documents in the action when it is alleging in defence that the evidence has been obtained in an unreliable or unlawful manner. Whether defence counsel or the accused is entitled to access to the documentation, or to copies thereof, is assessed by striking a balance between the various interests involved.

Summary:

In this case, the police conducted an investigation relating to members of the Turkish human rights organisation Dev Sol, who were suspected of having committed certain criminal offences. In the course of this investigation, the police showed the informants books containing photographs of persons who were possibly connected with Dev Sol. The official report of these interviews includes copies of the photographs in which the accused was recognised. Counsel for the accused asked the court to incorporate the photograph books into the case file. In support of this request, she argued that the investigation, arrest and examination had been based entirely, or to a significant extent, on the recognition of photographs from these books. As these documents were available to the police and the judicial authorities, the accused and his counsel should not be refused access to them.

The District Court rejected counsel's request. In support of this decision, it held that granting the request would not have been in the general interests of the investigation. The District Court also held that the defence's right to monitor the way the photographs were being used was sufficiently safeguarded by an opportunity to consult them in court, and invited counsel to do so. Counsel then contended that the prosecution case should be deemed inadmissible. In support of this contention she alleged that there had been a violation of the fair trial principle enshrined in Article 6 ECHR because essential documents in the case had not been supplied to defence counsel and the accused well before the court hearing, having been made available for consultation only in court, and then only to defence counsel, and not to the accused. The District Court rejected counsel's defence, which ruling was upheld by the Appeal Court.

The Supreme Court held that the concept of documents in a case is not defined by law, nor does the law stipulate which official should decide the contents of a case file. Where documents are concerned that may affect the evidence, it may be assumed, according to the Supreme Court, that the public prosecutor will add the documents containing the findings of the investigation to the file. Documents which it is reasonable to assume may be of importance in that they may tend to inculpate or exculpate should also be documents which the accused and his counsel have access to in a case, barring certain exceptional cases. Given the nature and function of the photograph books, the Appeal Court's ruling that these were not in themselves documents in the case that should have been added to the case file did not display an incorrect conception of law.

The Supreme Court further held that if the defence disputed the reliability or lawfulness of the way in which any piece of evidence had been obtained, this defence should be investigated. The principles of due process of law require that the defence not be denied access to documents which are not included in the documents of the case but which are of importance to an assessment of these questions. But this does not mean that both counsel for the defence and the accused have an automatic right to access to or a copy of the documents in question. The Supreme Court found that the Appeal Court's ruling that in the case at hand the interests of the investigating authorities in future investigations of extortion practices by Dev Sol and the legitimate interests of the persons depicted in the photograph books outweighed the interests of the defence in inspecting these books, such that counsel for the accused, but not the accused himself, might be permitted to inspect them, did not display an incorrect conception of law. On the basis of the aforesaid considerations, the Appeal Court had sufficient grounds for its dismissal of the defence's contention that the case of the public prosecutor should be deemed inadmissible.

Languages:

Dutch.

NED-1996-2-011

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 26-04-1996 / **e)** 15.951 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 99; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

4.8.3 **Institutions** − Federalism, regionalism and local self-government − Municipalities.
5.2 **Fundamental Rights** − Equality.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.4.8 **Fundamental Rights** − Economic, social and cultural rights − Freedom of contract.

Keywords of the alphabetical index:

Freedom, contractual / Preventive restriction / Hypnosis, show.

Headnotes:

Public authorities may not introduce any preventive restrictions to the right of freedom of expression for reasons of content.

Summary:

The interim injunction proceedings at issue concerned the question of whether the municipality of Rijssen was entitled to refuse to hire out a hall in a centre under its management on the grounds of objections to a hypnosis show which the applicant hirer wished to organise there. The municipality of Rijssen is a particular type of community: the majority of the population are Orthodox Protestants, and they roundly reject much of what is common in the realm of theatre and show business. The Appeal Court upheld the applicant hirer's invocation of the right of freedom of expression, and dismissed the municipality's invocation of the principle of freedom of contract.

The Supreme Court held that Article 7.3 of the Constitution must be construed as a prohibition on any preventive restriction on the right to freedom of expression (by means other than the printed press, radio and television) by a public authority on grounds of content. The Supreme Court held that the Court of Appeal, in considering that the municipality's refusal to hire out the hall amounted to a "prohibition of a performance on the grounds of the show's content" evidently wished to make it clear that this refusal, in the circumstances, had the actual effect of introducing a preventive restriction on what was expressed in the show, because of its content.

The Supreme Court endorsed the Appeal Court's view, namely that the obligation to protect the public interest makes it incumbent on the authorities to observe the principles of good governance and to respect the fundamental rights of the public when it comes to entering into and implementing agreements under private law. The Appeal Court was therefore right to rule that the municipality had violated the right to freedom of expression.

Languages:

Dutch.

NED-1996-2-010

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 23-04-1996 / **e)** 101.655 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1996, 548.

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
4.11.2 **Institutions** − Armed forces, police forces and secret services − Police forces.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.35 **Fundamental Rights** − Civil and political rights − Inviolability of the home.

Keywords of the alphabetical index:

Residence, limits / Premise, inviolability.

Headnotes:

Opening a movable roof to look inside a garage which neither the occupant or the accused is using as residential accommodation does not constitute a violation of the right to respect for private life.

Summary:

The police suspected on the basis of surveillance activities that criminal offences within the meaning of the Opium Act were being committed in a garage. As part of their investigation, the police opened up the movable portion of the garage roof and looked into the garage through the opening thus created. On the day of the investigation the garage was not being used as residential accommodation either by the occupants of the house to which the garage belonged or by the accused, who had been given the use of the garage.

In response to complaints about an invasion of privacy, the Supreme Court held as follows: The concept of “home” or “domicile”, as these terms appear in the English and French texts, respectively, of Article 8.1 ECHR, is not confined to dwellings but may in certain circumstances include premises used for business or other work. In the Supreme Court’s opinion, where a garage belonging to a home is being used by the occupant, it will in general come under the protection of Article 8 ECHR because the garage is part of the home. Where a garage that belongs to a home is not being used by the occupant, or is otherwise not in residential use, a court, in coming to a decision on whether action taken in the course of an investigation such as that referred to in the case at hand breaches the right of the user of the garage to respect for private life, having regard to the customary purpose of a garage, is entitled to proceed on the assumption − unless exceptional circumstances have either been established or brought forward with respect to the use of that garage − that there is no question of any such violation. In the case at hand, the Supreme Court found no exceptional circumstances that would have called for an investigation to determine whether the garage was in fact covered by the protection to which the accused was entitled under Article 8 ECHR. The Supreme Court then went on to dismiss the allegation that the disputed investigative activities had constituted an invasion of the accused person’s privacy.

Languages:

Dutch.

NED-1996-2-009

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 23-04-1996 / **e)** 101.367 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1996, 275..

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
4.8.3 **Institutions** − Federalism, regionalism and local self-government − Municipalities.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.6 **Fundamental Rights** − Civil and political rights − Freedom of movement.
Keywords of the alphabetical index:

Order to move on.

Headnotes:

An order to move on, issued in the interests of preserving public order, does not violate the right to freedom of movement.

Summary:

The accused was ordered to leave an area that the burgomaster of Amsterdam had designated as liable to emergency measures. Some time later, the accused was found within this area once again. The police court convicted the accused of intentional non-compliance with an order issued in accordance with statutory provisions by an officer in the performance of his duties. The Appeal Court upheld the judgment of the police court.

The Supreme Court held that where an alleged violation of Article 6 ECHR was concerned, the statement of grounds for appeal in this case overlooked the fact that the order to leave the area was not issued to the accused on the basis of criminal proceedings against him, but as a public order measure. In accordance with Article 2.3 Protocol 4 ECHR, the exercise of the right to freedom of movement is subject to restrictions which are provided for by law and which are necessary in a democratic society, among other reasons, to preserve public order. The Supreme Court held that the order to leave the area issued to the accused, an order which was based on the Municipalities Act and which was issued on account of disruptive conduct within the area concerned (the use of narcotics in public), was not in violation of Article 2 Protocol 4 ECHR, nor of Article 12 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

NED-1996-2-008

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19-04-1996 / **e)** 15.980 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 92; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.4.4 **Constitutional Justice** − Procedure − Exhaustion of remedies.
4.7.1 **Institutions** − Judicial bodies − Jurisdiction.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.

Keywords of the alphabetical index:

Effective remedy, right, scope.

Headnotes:

The right to an effective remedy, enshrined in Article 13 ECHR, cannot be invoked to guarantee the possibility of appeal to a higher court against a judgment given by another judicial tribunal if there is no domestic statutory provision for such a remedy.

Summary:

The plaintiff lodged an appeal to overturn a judgment given by the Agricultural Tenancies Division of Arnhem Appeal Court. Pursuant to the provisions of the Agricultural Tenancies Act, however, such an appeal does not lie against such judgments, so that the Supreme Court cannot admit an appeal of this kind. This remains the case, according to the Supreme Court, even if the statement of grounds for appeal must be understood as an allegation that the Appeal Court's decision was in violation of Article 6 ECHR and Article 1 Protocol 1 ECHR, simply because Article 13 ECHR, which the statement of grounds for appeal invokes in this connection, cannot create the possibility of appeal to a higher court where domestic law does not provide for such.

Languages:

Dutch.

NED-1996-1-007

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 27-03-1996 / **e)** 30.758 / **f)** / **g)** / **h)** CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.10 **General Principles** − Certainty of the law.
4.10.7.1 **Institutions** − Public finances − Taxation − Principles.
5.2.1.1 **Fundamental Rights** − Equality − Scope of application − Public burdens.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Expectation, legitimate.

Headnotes:

In answering the question of whether there has been a violation of the principle of equality before the law or the principle of legitimate expectations, it is not only important to determine whether the inspector was competent in respect of other taxpayers, but it is equally important to establish whether the inspector who was formally competent did not depart from his own practice.

Summary:

The interested party X owed NLG 512,737 in special tax on private cars (BVP) for the import of used cars in the period 1987-1989. For the periods concerned he consistently specified on his tax return form that he had no outstanding taxes to pay. For the second quarter of 1989, X asked the then competent tax inspector for the repayment of BVP in respect of the export of used cars. After an initial negative decision, the inspector eventually approved repayment, although the statutory provisions did not permit this. Restitution of this kind was also approved in other tax districts. As from 1 January 1991 a new competent inspector was appointed. The latter issued a tax demand for the BVP for which repayment had been granted for 1987-1989.

The interested party argued before the appeal court that since repayment of BVP on the export of used cars had been granted in tax districts other than that of the inspector concerned, the principle of equality was violated if he was not granted repayment of BVP in respect of the used cars exported by him.

The appeal court ruled that there was no question of a violation of the principle of equality, as the new inspector had also refused to grant repayment to other entrepreneurs.

The Supreme Court considered that the appeal court had applied an incorrect standard. In answering the question of whether the principle of equality or that of legitimate expectation had been violated in respect of the interested party, the Supreme Court held that the point was not simply whether the inspector who had imposed the tax assessment was the competent inspector when the case was heard before the appeal court. An equally decisive point may be whether the inspector who was competent in respect of the interested party, during the period of time covered by the subsequent tax assessment, during the period when the tax demand was imposed or when a decision was made concerning his notice of objection, did or did not depart from his own practice. The Supreme Court then quashed the judgment of the appeal court and referred the case back.

Languages:

Dutch.

NED-1996-1-006

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 19-03-1996 / **e)** 102.009 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.256.

Keywords of the Systematic Thesaurus:

5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Police, power / Parked car, opening the door.

Headnotes:

Opening the door of a car parked in a public thoroughfare does not constitute a violation of Article 8 ECHR, and is permissible without the need for any statutory basis.

Summary:

The reporting officers saw a parked car the windows of which, unlike those of other cars parked in the same place, exhibited condensation. They also saw that a man was seated at the steering-wheel. Upon opening the car door, the reporting officers saw that the man was using narcotics. The accused alleged a violation of Article 8 ECHR.

The appeal court ruled that the reporting officers were entitled to open the car door on the basis of their duty to enforce the law and to provide assistance, in order to ascertain the state of health of the car's occupant. Moreover, the appeal court maintained that simply opening an unlocked door of a car parked in a public thoroughfare in order to speak to the car's occupant cannot be seen as an infringement of privacy.

The Supreme Court considered that the appeal court evidently judged that there was no reason for the reporting officers, seeing a person seated in a car in the circumstances described, to assume that the situation was one in which the person in question wished not to be disturbed, and that they were therefore entitled to open the car door without any statutory justification. The Supreme Court found that in arriving at this judgment, the appeal court had not demonstrated an incorrect interpretation of the law concerning the right to protection of privacy.

Languages:

Dutch.

NED-1996-1-005

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 19-03-1996 / **e)** 101.094 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.251.

Keywords of the Systematic Thesaurus:

2.1.1.1.1 **Sources of Constitutional Law** − Categories − Written rules − National rules − Constitution.
2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
4.11.2 **Institutions** − Armed forces, police forces and secret services − Police forces.
5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Police, power / Video surveillance.

Headnotes:

The covert and continuous surveillance, using a video camera and monitor, of a suspect who has been confined in a police cell for questioning, without his being able to take account of the possibility that he is under surveillance, constitutes such a drastic measure, in the light of Article 10 of the Constitution and Article 8.1 ECHR, as to require a separate provision by or pursuant to an Act of Parliament. As no such provision exists, this *modus operandi* on the part of the police constitutes a violation of the suspect's privacy. Observations procured by these means may not be used as evidence.

Summary:

After a suspect in a shooting incident had been locked up prior to questioning, the reporting officers following the suspect's movements in his cell on a monitor, and observed the suspect urinating over his hands and scratching his nails and hands against the wall. This was recorded in an official report drawn up under oath of office. The lorensic laboratory stated that the suspect's actions were capable of obliterating traces left after a shooting.

The suspect contended that the observations could not be used as evidence, because placing the suspect in a special cell fitted with video cameras with a view to observing his behaviour constituted a violation of Article 8 ECHR. The appeal court rejected this defence, and held that there had been no violation of Article 8 ECHR.

The Supreme Court, however, reached a different conclusion. The Supreme Court considered that during the stage at which a suspect is being held awaiting questioning, unlike the stages of police custody and pre-trial detention, the law does not provide for the possibility of ordering measures in the interests of the investigation. It may however be necessary, in the interests of the investigation, to ensure that a suspect is prevented, in the period between his arrest and his subsequent questioning, from getting rid of any evidence that may be present or rendering it unusable. As a preventive measure, it may be necessary for the suspect to be placed in a secure room under continuous police guard. The power to impose a security measure of this kind is a derivative of the power to hold the suspect for questioning.

However, continuous covert surveillance as a means of investigation, using a camera or other device, of a suspect who has been confined in a police cell or an equivalent room in which it is in principle reasonable for him to assume that he is unobserved, without the suspect being able to take account of the fact that he is to be subjected to this form of surveillance as he has been told nothing about it and has no way of knowing it, constitutes, in the light of the right to privacy enshrined in Article 10 of the Constitution and Article 8.1 ECHR, such a drastic measure as to require a separate provision by or pursuant to an act of parliament. As no such provision exists, the police was not justified in subjecting the suspect to continuous surveillance in the manner described.

Languages:

Dutch.

NED-1996-1-004

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-03-1996 / **e)** 15.778 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 70; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

4.7.2 **Institutions** − Judicial bodies − Procedure.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.13.6 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to a hearing.

Headnotes:

A party to legal proceedings should be given an opportunity, if that party so requests, to explain their position verbally to the court. Only compelling reasons advanced by the other party can lead to the denial of the request. The court may also deny the request *ex officio*.

Summary:

This case concerned the question of whether the district court had broken the law by denying the defendant's request, on appeal, to state his/her case, while the other party made no objection to the request being granted and there were no considerations of due process that militated against it.

The Supreme Court held first and foremost that it followed from the fundamental principles of procedural law as enshrined in Article 6 ECHR that any party to proceedings should have the opportunity, at their request, to give an oral explanation of their position to the court. The provisions of the Code of Civil Procedure do not, in a case such as the one in question, in which the defendant did not submit a statement of defence on appeal, constitute an impediment to the granting of the defendant's request to state their case. If the other party objects to the request being granted, only reasons of a compelling nature, for instance that the proceedings would suffer an unacceptable delay if the case were to be stated, may result in the request being denied. In a case such as the present one, the court may also on appeal deny the defendant's request *ex officio*, but solely on the grounds that to grant it would be incompatible with the requirements of due process. In each of the two cases referred to above, the court must clearly state its reasons for denying the request, and must give sound arguments in support of its decision.

It followed from the above, in the view of the Supreme Court, that the district court had either failed to appreciate the rules outlined above or failed in its duty to give reasons, as its judgment did not show that the plaintiff had submitted objections of a compelling nature to the defendant's request on appeal, nor that the request could not be granted from the point of view of due process.

Languages:

Dutch.

NED-1996-1-003

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 13-02-1996 / **e)** 101.665 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.211.

Keywords of the Systematic Thesaurus:

5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Police, power / Garbage bags, search.

Headnotes:

Police searches of garbage bags put outside do not constitute a violation of Article 8 ECHR. The local Waste Substances Ordinance does not protect the interests of an individual who has placed his garbage bags outside the door.

Summary:

The police removed garbage bags that the accused had put outside. The accused's counsel argued that evidence thus procured had been obtained unlawfully and could hence not be admitted as evidence. The accused's counsel contended that there is no statutory provision permitting investigating officers to confiscate garbage bags that have been put outside. Furthermore, counsel submitted, the Waste Substances Ordinance of the municipality of Venlo prohibits the unlicensed removal of garbage bags, so that the police had committed a criminal offence by removing the bags.

The appeal court rejected this line of defence. The Supreme Court held that there was nothing in the appeal court's rejection of the defence that pointed to an incorrect interpretation of the law. In the view of the Supreme Court, the search did not constitute a violation of the right to respect for private life within the meaning of Article 8.1 ECHR. For, objectively speaking, it is not reasonable for someone who puts garbage bags out in the street to expect their contents to be subject to rules governing the protection of privacy.

The Supreme Court further held that the relevant provision of the municipality of Venlo's Waste Substances Ordinance is clearly intended to promote the orderly collection and processing of domestic waste and not to protect the interests of someone such as the accused who has disposed of his garbage bags by depositing them in a refuse container placed in a public thoroughfare. Even if it is assumed that the reporting officers in question did contravene the ordinance in collecting garbage bags without a licence, this does not mean that material obtained as a result of these actions cannot be used as evidence.

Cross-references:

- See also Supreme Court Judgment of 19.12..1995, no. 101.269, *Delikt en Delinkwent*, 96.152, [NED-96-1-001].

Languages:

Dutch.

NED-1996-1-002

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 09-01-1996 / **e)** 101.558 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.159.

Keywords of the Systematic Thesaurus:

5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Psychiatric report, use.

Headnotes:

It is incompatible with Article 8 ECHR for the contents of a psychiatric report to be used, without permission, for a purpose other than that for which the report was drawn up, and hence to be made more widely known.

Summary:

In this criminal case, the accused asked for psychiatric reports that had previously been drawn up on two witnesses for use in their own criminal cases to be made available and hence to be incorporated into the file of the case at hand. The appeal court denied this request. In cassation proceedings, it was argued that the appeal court had denied the accused a fair trial in violation of Article 6 ECHR.

The Supreme Court considered it inadmissible for a psychological or psychiatric report that has been compiled about an individual with that individual's cooperation during criminal proceedings against him, and which contains highly personal and confidential information, to be added to the file by the court or public prosecutions department in criminal proceedings against another accused, at any rate without the permission of the individual concerned. It is incompatible with the person's right to respect for his private life as enshrined in Article 8.1 ECHR for the contents of a report of this nature to be used, without special permission being obtained, for a purpose other than that for which the report was drawn up, so that they become more widely known.

Languages:

Dutch.

NED-1996-1-001

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 19-12-1995 / **e)** 101.269 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 96.152; *Nederlandse Jurisprudentie*, 1996, 249..

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
4.11.2 **Institutions** − Armed forces, police forces and secret services − Police forces.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.36.2 **Fundamental Rights** − Civil and political rights − Inviolability of communications − Telephonic communications.

Keywords of the alphabetical index:

Fundamental right, violation, pro-active stage / Police, power / Garbage bag, search.

Headnotes:

Violations of fundamental rights, in particular the right to privacy, at a stage at which it is unclear, or insufficiently clear, that a criminal offence has been or is being committed (the pro-active stage) and no suspect can be identified, are permissible only if they are allowed under the Constitution or a treaty provision.

Police searches of garbage bags placed outside do not constitute a violation of Article 8 ECHR.

The scanning, monitoring and recording of conversations conducted on mobile telephones in principle constitutes a violation of Article 8 ECHR. However, as telephone conversations of this kind can easily be monitored, interference of this kind in the right to respect for private life must be accepted up to a point.

Summary:

The central question to be answered in this case is what kinds of interference are permissible when fundamental rights are concerned, such as the right to respect for private life, in the stage preceding that of the investigation within the meaning of the Code of Criminal Procedure, in other words before suspicions have been formulated, when it is unclear, or insufficiently clear, that a criminal offence has been or is in the process of being committed. It is sometimes described as the pro-active phase.

In the case at hand, during the pro-active phase the police used powers which are vested in them by law for the purposes of investigating criminal offenses which have been, or which are suspected of having been committed. The question is whether the police were justified in doing so, and if so, the limits of acceptability that should have been taken into account. The action taken by the police included searching garbage bags that had been placed outside, and using scanners to monitor calls made by mobile telephone.

The Supreme Court considered that in the phase prior to that of investigation within the meaning of the Code of Criminal Procedure, any infringement by police officers of individuals' fundamental rights as enshrined either in the Constitution or in provisions of treaties whose content can be universally binding is unlawful, unless such an infringement is permitted in the conditions and restrictions contained in, or laid down pursuant to, the Constitution or treaty provision concerned. Where the Constitution regards the imposition of restrictions on any fundamental right to be permissible, such restrictions can acquire legitimacy only by or pursuant

to an Act of Parliament. The power to commit such an infringement must be defined in the legislation in a sufficiently accessible and foreseeable manner. A provision in general terms such as Section 2 of the 1993 Police Act does not fulfil this requirement. The continuing development of the fundamental right to the protection of privacy combined with the increasing technological sophistication and intensification of investigative methods and techniques make it essential for such infringements to be based on a more precise justification than Section 2 of the 1993 Police Act.

The Supreme Court observed however that the above does not detract from the police's authority, pursuant to Section 2 of the 1993 Police Act, to perform actions in the pro-active phase which properly belong to its duties as defined in the Section 2, such as, in the interests of public policy, ordering someone to leave a particular location, impounding property, the surveillance and following of individuals and photographing them in public, and that even where actions of this kind amount to a limited infringement of privacy, the general definition of the duties of the police as defined in Section 2 of the 1993 Police Act provides a sufficient basis for this.

The Supreme Court then proceeded to discuss the disputed investigating methods. It endorsed the appeal court's ruling that someone who has put garbage bags out to be collected must be deemed to have relinquished possession of these bags and their contents. Police searches of these bags do not therefore constitute a violation of Article 8 ECHR. For objectively speaking, according to the Supreme Court, it is not reasonable for someone who puts garbage bags out in the street to expect their contents to be subject to rules governing the protection of privacy.

As far as a three-week period of monitoring (by means of a scanner) and recording conversations conducted by mobile telephone is concerned, the Supreme Court held that the confidentiality of telephone conversations is protected by Article 8 ECHR. The Court observed however that it is widely known that conversations conducted by mobile telephone can be monitored by anyone who wishes to do so with the aid of simple and readily available electronic devices. This in itself not only means that persons conducting conversations by mobile telephone should take into account the possibility that a third party may be able to receive and overhear the call, but also that he is up to a point obliged − given that everyone is in principle free to receive radio signals − to resign himself to it. This does not however mean that he forfeits every right to respect for privacy in this regard.

If investigating officers, as in the case at hand, for a long period of time and using specially placed apparatus, deliberately and systematically monitor and record telephone calls that are made from inside or from the immediate vicinity of an individual's home by mobile telephone, the limit of acceptability is exceeded, thus constituting a violation of the right to telephone confidentiality pursuant to Article 8.1 ECHR. In such a case, the interference with the person's right to respect for his private life is of such a nature that it must be provided with a statutory basis, having regard to the provisions of Article 8 ECHR and Article 10 of the Constitution, by or pursuant to an Act of Parliament. This did not occur in the present case. The interference with the right to privacy was not however, in the view of the Supreme Court, so serious as to constitute grounds for ruling the prosecution's case against the accused inadmissible.

Supplementary information:

Section 2 of the 1993 Police Act states: "The police has the task, acting in a subordinate capacity in relation to the competent authorities and in accordance with the applicable rules of law, to ensure the active enforcement of the law and the provision of assistance to those who require it".

Article 10 of the Constitution concerns respect for, and protection of, privacy.

Cross-references:

- In relation to the removal of garbage bags that have been put out for collection, see also Supreme Court Judgment of 13.02.1996, no. 101.665, *Delikt en Delinkwent*, 96.211, [NED-1996-1-003].

- Supreme Court Judgment of 23.01.1996, no. 101.302, *Delikt en Delinkwent*, 96.178, likewise concerns police scanning of mobile telephone calls. In it, the Supreme Court reiterated its considerations in relation to the judgment given on 19.12.1995.

Languages:

Dutch.

NED-1995-3-016

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 22-12-1995 / **e)** 8643 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 10; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
2.1.1.4.13 **Sources of Constitutional Law** − Categories − Written rules − International instruments − Convention on the Rights of the Child of 1989.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.
5.3.44 **Fundamental Rights** − Civil and political rights − Rights of the child.

Keywords of the alphabetical index:

Paternity.

Headnotes:

The mere fact of a child's birth does not create a relationship between the father and the child which may be described as family life. The right of a child to know his or her parents does not extend to the right to enforced contact with the child's biological father against the latter's wishes.

Summary:

In June 1985 a child was born out of the relationship between a man and a woman who had never lived together. The man broke off the relationship when he learned that the woman was pregnant. The child expressed a wish to meet his father. The man was married and had no contact with the child since his birth, nor did he wish to; there was never any agreement between

the man and the woman concerning contact with the child. In the proceedings the woman applied for an arrangement for meetings between father and child.

In response to the woman's application, the Supreme Court held that the requirements which should determine the existence of family life depend on the context in which Article 8 ECHR is invoked and on who invokes it. If a child invokes the protection of Article 8 ECHR in order to establish some form of contact with his biological father the conditions to be met are not the same as those which would apply if the biological father were seeking some form of contact with a child he had fathered but not acknowledged. The Supreme Court was of the opinion that, in view of the case-law of the European Court of Human Rights, it must be assumed that a relationship which could be described as family life within the meaning of Article 8 ECHR could not be said to exist simply because the child was fathered by its biological father, even in the context of a request by the child for access arrangements involving him and his biological father. The nature and the permanency of the relationship between the mother and the biological father prior to the child's birth could not be overlooked.

Article 7.1 of the Convention on the Rights of the Child states that a child has, as far as possible, the right to know and be cared for by his or her parents. The Supreme Court believed that the right of a child to know his or her parents, as referred to here, embraces more than the simple right to know the parents' names. However, the Supreme Court did not deem it likely that the States Parties to the Convention intended to confer a right that extends to the point where, if a biological father has not acknowledged his child and has refused to have any personal contact with the child, the child has the right to enforce personal contact against the father's wishes. In the opinion of the Supreme Court, the District Court was correct to declare the woman's application inadmissible, as the arguments on which her application was based are insufficient to render it admissible.

Supplementary information:

The Supreme Court would refer in particular to the following judgments handed down by the European Court of Human Rights: 21 June 1988, Series A no. 138, NJ 1988, p. 746 (Berrehab), *Special Bulletin ECHR* [ECH-1988-S-005]. 26 May 1994, Series A no. 290, NJ 1995, 247 (Keegan), *Bulletin* 1994/2, 178 [ECH-1994-2-008] and 27 October 1994, Series A no. 297, NJ 1995, 248 (Kroon), *Bulletin* 1994/3, 301 [ECH-1994-3-016]. The Convention on the rights of the Child was concluded in New York on 20 November 1989 and approved by the Netherlands by Kingdom Act of 24 November 1994 (*Bulletin of Acts and Decrees*, no. 862). It entered into force for the Netherlands on 8 March 1995 (Netherlands Treaty Series 1995, no. 92).

Languages:

Dutch.

NED-1995-3-015

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 08-12-1995 / **e)** 8659 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 261; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.

3.17 **General Principles** − Weighing of interests.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.44 **Fundamental Rights** − Civil and political rights − Rights of the child.

Keywords of the alphabetical index:

Paternity, acknowledgement.

Headnotes:

The mere fact of birth does not create a relationship between father and child that may be characterised as family life. Acknowledgement affects a child's interests as protected under Article 8 ECHR. The child's interests must therefore be weighed against those of the man acknowledging paternity.

Summary:

On 16 January 1987 a child was born out of the relationship between a man and a woman, who were both unmarried. They had not lived together before the child's birth. After the child was born, the man and the woman lived together for a year with the woman's grandmother, in the latter's home. The relationship then came to an end, after which the man lived abroad for two and a half years, during which time he had no contact with the woman or the child. He returned to the Netherlands in 1991. The woman consistently refused to give permission to the man to acknowledge the child. She died on 15 February 1994. In accordance with the woman's wishes expressed in her will, the child was being cared for and brought up in her brother's family. The man applied to the registrar of births, deaths and marriages to add to the register of births a certificate containing the man's acknowledgement of the child.

The Supreme Court based its ruling on the principle that the child was not born of a relationship which, in the opinion of the Appeal Court, could be equated with a marriage. The Supreme Court also held that it had been established that the man had not lived with the woman before the child's birth, while there was nothing in the documents in the case to demonstrate the existence of any other circumstances which could justify the conclusion that the relationship between the man and the woman was nonetheless sufficiently lasting to be equated with marriage (cf. European Court of Human Rights judgment of 27 October 1994 in the case of Kroon vs. the Netherlands, series A, no. 297-C, no. 30, p. 56, *Bulletin* 1994/3, 301 [ECH-1994-3-016]). A relationship which could be described as family life did not therefore exist between the man and the child by virtue of the mere fact of the child's birth.

The Supreme Court then held that legally valid acknowledgement by the man would create a family-law relationship between the child and the man acknowledging her. As a result of this far-reaching consequence, acknowledgement affects interests of the child which are protected by Article 8 ECHR. Although acknowledgement may serve these interests, it is equally possible for these interests to be opposed to acknowledgement. The latter case involves both the law's defence of respect for the ties of family life which exist between the child and others and the freedom of choice regarding one's own life which forms part of everyone's right to respect for personal privacy. Since it was argued on the child's behalf, with reasons, that this latter situation was the case in the proceedings in question, the Appeal Court could not ignore such an argument. Indeed, the Appeal Court was bound, in accordance with the ECHR provision referred to above, to weigh the man's interest, assuming that a relationship which could be described as family life existed between him and the child, in having this relationship recognised

under family law against the child's interests which enjoyed the protection of Article 8 ECHR in equal measure.

The factors which could be taken into account were the importance to the child of a stable place of residence, the nature and depth of the assumed relationship between the father and the child, the fact that the father had never previously indicated a desire actually to assume responsibility for caring for the child, and the fact that he had not been able to argue convincingly that he would be able to assume this responsibility in a proper manner. It also had to be borne in mind that recognition would give the child the father's name, so that she would have a different name from the other members of the family in which she was growing up, a situation which would not be in her interest. The Supreme Court took the view that the Appeal Court had been right in concluding that the interests of the child must prevail in this case.
Languages:

Dutch.

NED-1995-3-014

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 20-10-1995 / **e)** 15.767 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 212; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.7 **General Principles** − Relations between the State and bodies of a religious or ideological nature.
5.2.2.1 **Fundamental Rights** − Equality − Criteria of distinction − Gender.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Ecclesiastical office, training.

Headnotes:

Failure to admit a woman into a course for deacons because she was a woman was not degrading treatment within the meaning of Article 3 ECHR. The ban on discrimination between men and women does not apply to admissions to training courses for ecclesiastical office.

Summary:

This case arose out of an application by a woman for admission to the training course for deacons in the diocese of 's-Hertogenbosch. The woman in question also expressed the wish to be ordained as a deacon once she had completed the course. She was refused admission on the grounds that only men could be ordained deacons in the Roman Catholic Church and that anyone who was ineligible for ordination could not be admitted to the training course. The woman sought in these proceedings an order compelling the Bishop to allow her to be admitted to the diocesan training course for deacons.

The Appeal Court ruled that the woman's invocation of Article 3 ECHR could not be upheld, since her non-admission to the training course on the sole grounds that she was a woman did not

constitute degrading treatment within the meaning of the said provision. The Supreme Court held that this ruling showed no evidence of an incorrect interpretation of the law relating to the term "degrading treatment" within the meaning of Article 3 ECHR. The Supreme Court also held that the applicability of Article 3 did not depend on whether the person involved felt degraded by the treatment in dispute.

The Supreme Court further held that it was indisputably clear from the Equal Opportunities Act that the legislature's intention, in calling for respect for the freedom of religion and belief enshrined in Article 6 of the Constitution in respect of admission to and training for ecclesiastical office, was to introduce a generally applicable exception to the ban on discrimination between men and women.

Languages:

Dutch.

NED-1995-3-013

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 20-10-1995 / **e)** 8648 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 210; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.17 **General Principles** − Weighing of interests.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Paternity / Register of births, deaths and marriages.

Headnotes:

In assessing the relative weight to be attached to two interests protected by Article 8 ECHR, namely respect for private and family life and the importance of recording facts in the registers of births, deaths and marriages in a way which is legally and factually accurate, the latter must prevail.

Summary:

A child was born out of the relationship between the petitioners, who had been living together for a considerable time, within 307 days of the dissolution of the woman's marriage. The name of the child's father given on the birth certificate was that of the woman's former husband. In the presence of the register of births, deaths and marriages the woman denied that her former husband was the father and the man acknowledged paternity of the child. These acts established, having regard to the Supreme Court judgment of 17 September 1993, NJ 1994, 373 (*Bulletin* 1994/2, 143 [NED-1994-2-011]) that the child was not the legitimate child of the woman's former husband but the natural child of the man. The petitioners took the view that the respect for their private and family life to which they were entitled under Article 8 ECHR meant that it should not be possible to infer from a copy of the entire birth certificate that anyone other than the man had been referred to as the child's father.

The Supreme Court held that to maintain the public registers of births, deaths and marriages, which serve to assemble and keep certificates containing all the facts relating to people's personal status or changes therein, in the most accurate and impartial way possible so that they may provide incontrovertible evidence undoubtedly serves one of the purposes defined in Article 8.2 ECHR. In the opinion of the Supreme Court, the interest of the persons in question in respect for their private lives must therefore be weighed against the interests of the objectives served by the maintenance of the registers of births, deaths and marriages.

The Supreme Court took the view that in principle it is for the legislature to compare these interests. Acting on this basis, the legislature had considerably restricted public access to the registers of births so as to protect personal privacy. There was therefore no reason to depart from the conclusion of the legislature embodied in the Act of 14 October 1993 (*Bulletin of Acts and Decrees*, no. 555).

The Supreme Court held that the interests invoked by the petitioners were protected as much as possible by the statutory provisions referred to above and that their interests could not justify a departure from the provisions of the said Act. The Supreme Court found that their request for the actual course of events to be concealed from those who would have a legitimate interest in its disclosure conflicted with the Dutch legal system.

Languages:

Dutch.

NED-1995-3-012

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 22-09-1995 / **e)** 8651 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 180; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.13.8 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right of access to the file.
5.3.25.1 **Fundamental Rights** − Civil and political rights − Right to administrative transparency − Right of access to administrative documents.

Keywords of the alphabetical index:

Bankruptcy, file, access.

Headnotes:

A bankrupt may request access to the non-public part of the bankruptcy file.

Summary:

The examining magistrate refused to allow a bankrupt access to the non-public part of the bankruptcy file held at the registry of the District Court.

As the Bankruptcy Act states that certain documents are open to public access, the bankrupt always has the right to examine them. However, the Supreme Court held that this did not mean that the bankrupt is never entitled to access the non-public parts of the file. Given the nature of the data which could be contained in the non-public sections of the file and which might relate to financial and other aspects of the bankrupt person's position, it must be accepted that he should be able to request such access. The question of whether such a request should be granted should be decided by the court after weighing the bankrupt person's interest in access to the file against any interests opposed to the granting of access. The Supreme Court held that it should be clear from the reasons given for any denial of access that the interests in question had been considered, and that any other approach would be at odds with developments in relation to the law on access to information collected on an individual, including his financial assets, by the government or an equivalent body. The developments in question are reflected in the Government Information (Public Access) Act and the Data Protection Act, which are based on Article 10.3 of the Constitution which states that rules concerning the rights of persons to be informed of data recorded concerning them and of the use made of such data shall be laid down by an Act of Parliament. The complaints lodged by the bankrupt person were therefore well-founded.

Languages:

Dutch.

NED-1995-3-011

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 20-09-1995 / **e)** 30.567 / **f)** / **g)** / **h)** CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.21 **General Principles** − Equality.
3.22 **General Principles** − Prohibition of arbitrariness.
4.8.3 **Institutions** − Federalism, regionalism and local self-government − Municipalities.
5.2.1.1 **Fundamental Rights** − Equality − Scope of application − Public burdens.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Sewerage charge, levy.

Headnotes:

A municipal ordinance under which only a few of the users of plots of land from which waste water is disposed of by means of the municipal sewerage system are required to pay sewerage charges while the remaining users are exempt violates the principle of equality.

Summary:

In 1992 the interested party was the user of a plot of land from which 381 cubic metres of waste water were disposed of through the municipal sewerage system. In that year 819 users of land, including the interested party, received an assessment under the Sewerage Charges (Levy and Collection) Ordinance for the municipality of T (hereinafter referred to as the Ordinance). A

total of 4,574,892 cubic metres of waste water was disposed of from these plots of land in 1992. Users of dwellings and plots from which less than 250 cubic metres per year was disposed of were not required to pay the charges under the Ordinance. In 1992 this exemption applied to 67,728 users of plots from which 6,772,800 cubic metres of waste water were disposed of. The interested party took the position that this Ordinance was not binding because it violated Article 1 of the Constitution (the ban on discrimination).

The Appeal Court ruled that the relation between the charges and actual use was so disproportionate that, as no justification could be given for it, the charges were deemed to be arbitrary and unreasonable. This rendered the Ordinance non-binding. The Supreme Court held that this meant that the failure, without objective, reasonable justification, to levy the charges on 98.8% of users who must be assumed to be responsible for at least half the use of the sewerage system rendered the Ordinance non-binding on the grounds that it contravened the general legal principle enshrined in Article 1 of the Constitution that all persons shall be treated equally.

Languages:

Dutch.

NED-1995-2-010

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 23-06-1995 / **e)** 8627 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 143; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Paternity, social.

Headnotes:

In assessing an application to determine access arrangements for a "social parent" (in the case at hand, a partner from a former non-cohabitational relationship, referred to as a "Living-Apart-Together" or "LAT" relationship) there are strict requirements concerning the existence of family life within the meaning of Article 8 ECHR between a man who is not the child's biological father and the child.

Summary:

The applicant and the mother, who has a child from a previous marriage, had a LAT relationship from 1987 to 1993. During that period, the mother and the child spent all weekends and holidays at the applicant's home. The man was not the child's biological father. When the LAT relationship was severed, access arrangements were determined by the parties. In 1994 the mother refused to continue implementing these arrangements into practice. The applicant then brought proceedings to request that access arrangements be determined by the Court.

The Court of Appeal ruled that his application was inadmissible. In the Court's opinion, the man had brought insufficient evidence to show that a sufficient personal relationship between him

and the child existed so as to constitute family life within the meaning of Article 8 ECHR. The parties at no time lived together. Although the applicant contended that he undertook activities that contributed to the child's care and upbringing, this had not been objectively established, as there was insufficient indication that the behaviour alluded to by the applicant was perceived as such by the child.

In cassation proceedings, the applicant argued that the Court of Appeal had applied unduly strict criteria in assessing whether or not family life had existed between him and the child. The Supreme Court held that as the case at hand was one involving social parenthood, the Court of Appeal had been right to require that the specific circumstances to be advanced relating to the existence of family life within the meaning of Article 8 ECHR between him and the child would have to fulfil strict criteria. The appeal was therefore dismissed.

The Supreme Court also ruled that the Court of Appeal had not violated any rule of law by taking into account the way in which the child had perceived the contact with the applicant when deciding whether there had been family life between the two.

Languages:

Dutch.

NED-1995-2-009

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 16-06-1995 / **e)** 15.664 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 135; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.2 **Fundamental Rights** − Civil and political rights − Right to life.

Keywords of the alphabetical index:

Abortion / Abortion.

Headnotes:

The protection of the right to life enshrined in Article 2 ECHR did not extend so far as to render the termination of pregnancy inadmissible.

Summary:

In the proceedings at issue, a foundation contended that the State should be forbidden from refunding expenses incurred for the termination of pregnancy in special clinics, and that the Health Insurance Funds Council should be forbidden from subsidising these terminations of pregnancy. The foundation claimed that the regulation governing the termination of pregnancy constituted a contravention of the right to life as enshrined in Article 2 ECHR.

The Court of Appeal had held that the foundation's argument could not necessarily be endorsed, as it was uncertain whether the above-mentioned provision of the European Convention of Human Rights extends to the protection of developing human life, i.e. human life before birth.

Upon appeal in cassation instituted by the foundation, the Supreme Court held that whatever the validity of the arguments that the Court of Appeal had advanced for its judgment, the foundation's contention could not be accepted. The Supreme Court ruled that the protection of the right to life enshrined in Article 2 ECHR did not extend so far as to prevent States Parties to the Convention from enacting a statutory regulation that permitted the termination of pregnancy on certain conditions.

Supplementary information:

On the entry into force on 1 November 1984 of the Termination of Pregnancy Act ("TPA"), an Article was added to the Criminal Code determining that the termination of pregnancy is not an offence if the procedure is conducted by a medical practitioner in a hospital or clinic in which treatment of this kind may be given under the terms of the TPA. The procedures required to terminate pregnancy are paid for by the State, the funds concerned being managed by the Health Insurance Funds Council.

Languages:

Dutch.

NED-1995-2-008

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 06-06-1995 / **e)** 99.663 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 95.384.

Keywords of the Systematic Thesaurus:

5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Video surveillance.

Headnotes:

In the absence of any special circumstances video surveillance is not incompatible with Article 8 ECHR.

Summary:

The police suspected that serious criminal offences were being committed in a lock-up being used by the accused. Acting on this suspicion, the police set up a surveillance operation using video cameras placed outside the lock-up, i.e. surveillance in an area that was accessible to persons other than the accused and his accomplices. The accused alleged that the use of this mode of investigation constituted a serious violation of the right to respect for his private life.

The Supreme Court held that there had been no violation of Article 8 ECHR.

Languages:

Dutch.

NED-1995-2-007

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 16-05-1995 / **e)** 98.804 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 95.384.

Keywords of the Systematic Thesaurus:

4.7.2 **Institutions** − Judicial bodies − Procedure.
5.3.13.15 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Impartiality.

Keywords of the alphabetical index:

Tribunal, impartial.

Headnotes:

In case of a lack of a challenge to the Court of Appeal's impartiality, an appeal in cassation alleging a contravention of the right to a fair trial by an impartial tribunal cannot be upheld.

Summary:

In this case the accused complained in cassation proceedings that the Court of Appeal had displayed bias during the trial, and thus he had not been tried by an impartial tribunal within the meaning of Article 6.1 ECHR.

The Supreme Court held that the accused could have challenged the Court of Appeal on the grounds of bias, as soon as he had become aware of facts or circumstances which could impair judicial impartiality. As the accused failed to do so, despite the fact that the Appeal Court had expressly apprised him of his statutory right to enter a challenge, it was not possible to sustain a defence to this effect in cassation proceedings. The only exception would have been if special circumstances had existed that provided compelling reasons to believe that one or more of the judges of the Court of Appeal had been biased against the accused, or at any rate that a concern to this effect on the part of the accused could be justified objectively, which did not apply in the case at hand.

Languages:

Dutch.

NED-1995-1-006

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 21-04-1995 / **e)** 15.645 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 100; *Nederlandse Jurisprudentie*, 1996, 39; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.13.26 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to have adequate time and facilities for the preparation of the case.
5.3.13.27 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to counsel.

Headnotes:

The right to free consultations between an accused detained in a maximum security establishment and his legal counsel is governed by Article 6.1 ECHR, read together with the provisions of Article 6.3 ECHR, which determine the admissibility of restrictions.

A detained accused has the right to conduct personal consultations with his legal counsel in such a way that he can express himself fully and without feeling constrained. This right may be restricted, however, by the legally competent authorities, provided that such restrictions do not go so far as to undermine its essential features. The latter would in any case apply if the consultations could be monitored by or on behalf of the authorities. Furthermore, restrictions of this kind must serve a legitimate purpose − e.g. preventing a detainee from escaping − and must comply with the requirement of proportionality.

Summary:

C. was detained in a maximum security establishment, where several general rules applied to visits of legal counsel to detainees classified as posing a high escape risk, such as C. These rules required both C. and his counsel to submit to a prior body search to detect any undesirable objects. In addition, C. and his counsel were required to conduct their consultations in one of three set ways:

- in a room, under the supervision of a prison officer behind a two-way transparent wall;

- under supervision in the same room in the presence of a second lawyer; or

- without supervision in two rooms separated by a two-way transparent wall in which C. and his counsel could communicate by intercom.

In none of these cases would the discussion be monitored or recorded. C. contended that the visiting rules described above constituted an unacceptable violation of the right to free consultations between him and his legal counsel necessary for the proper preparation of his case, in breach of Article 6.3 ECHR.

The Supreme Court ruled that the restrictions imposed in this case did not contravene Article 6 ECHR.

Languages:

Dutch.

NED-1995-1-005

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 18-04-1995 / **e)** 99.320 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 95.289; *Nederlandse Jurisprudentie*, 1995, 611.

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
2.1.3.2.1 **Sources of Constitutional Law** − Categories − Case-law − International case-law − European Court of Human Rights.
3.20 **General Principles** − Reasonableness.
4.11.1 **Institutions** − Armed forces, police forces and secret services − Armed forces.
5.2.2.6 **Fundamental Rights** − Equality − Criteria of distinction − Religion.
5.3.18 **Fundamental Rights** − Civil and political rights − Freedom of conscience.
5.3.26 **Fundamental Rights** − Civil and political rights − National service.

Keywords of the alphabetical index:

Conscientious objection, discrimination / Jehovah's witness, exemption from national service.

Headnotes:

Exemption of Jehovah's Witnesses from military and alternative service does not constitute discrimination against other persons who object to both military and alternative service.

Summary:

The defendant in these proceedings refused to perform military service and was convicted by the military division of the Court of Appeal. In cassation proceedings, the defendant argued that Article 26 of the International Covenant on Civil and Political Rights (ICCPR) in conjunction with Articles 8 and 18 ICCPR had been violated, because the defendant − who also refused to perform alternative service − had suffered discrimination in comparison to Jehovah's Witnesses by having been prosecuted for his refusal to perform military service.

The Supreme Court observed that, in accordance with the case-law of the European Court of Human Rights, the exemption of Jehovah's Witnesses from military service does not constitute discrimination in comparison to other persons who refuse to perform both military and alternative service. Even if it is accepted, following the European Commission of Human Rights, that the exemption of a single group of conscientious objectors − Jehovah's Witnesses − from both military and alternative service cannot be deemed reasonable, and that the state must ensure that persons with equally compelling objections to both military and alternative service are treated equally, this still does not necessarily mean that the defendant was a victim of a violation of Article 26 of the International Covenant on Civil and Political Rights. For this, the objections of the defendant to performing military or alternative service would have to be just as serious as those advanced by Jehovah's Witnesses.

Given that the accused objected only to the performance of military service and not to an alternative form of service, his objections could not be considered comparable to those of Jehovah's Witnesses, as the latter reject alternative service as well. The Supreme Court held the Court of Appeal's judgment to be not unreasonable, and dismissed the appeal.

Languages:

Dutch.

NED-1995-1-004

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 17-03-1995 / **e)** 8604 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 70; *Nederlandse Jurisprudentie*, 1995, 432; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Disciplinary code / Profession, medical.

Headnotes:

An investigation concerning a medical practitioner's activities under the profession's disciplinary code did not constitute an unjustifiable interference with his fundamental right to respect for his private life.

Summary:

A medical practitioner had sexual intercourse with a psychiatric patient under his care, after they had expressed their feelings for one another and the medical practitioner had stated that he would therefore have to cease treating her. The health inspector lodged a complaint against the medical practitioner. The latter was of the opinion that this complaint was inadmissible because the patient had not submitted a complaint against him, and the doctor-patient relationship had been broken off.

The Supreme Court rejected this argument. The point at issue under the disciplinary code of the medical profession is not the attitude of the patient but the question whether the medical practitioner acted in accordance with prescribed standards of professional conduct. General interests are at stake in the latter connection, and with a view to safeguarding these interests the health inspector is competent to lodge a complaint on his own initiative, even if this would be contrary to the patient's wishes.

The medical practitioner's view that the sexual intercourse took place within the context of the personal lives of those concerned did not alter this competence. The complaint necessitated an assessment of the medical practitioner's actions in the light of the disciplinary norms, namely whether the doctor-patient relationship had indeed been severed, and if so, whether this had been done in a way that was in accordance with responsible medical procedure, and whether the patient, despite the severing of the doctor-patient relationship, was in a position of dependency in relation to the medical practitioner. An investigation of this kind did not constitute

unwarranted interference with the fundamental rights safeguarded by Article 8 ECHR and Article 17 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.

NED-1995-1-003

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 31-01-1995 / **e)** 237-94 t/m 252-94 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 95.196.

Keywords of the Systematic Thesaurus:

4.7.2 **Institutions** − Judicial bodies − Procedure.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.
5.3.13.9 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Public hearings.

Keywords of the alphabetical index:

Security, prohibitive.

Headnotes:

The requirement that security must be given for the payment of an administrative fine may constitute an unacceptable impediment to access to an independent tribunal, in contravention of the European Court of Human Rights.

The assessment of this impediment should be based on the total amount of the security.

Summary:

The person concerned lived on social security benefit and could not pay the cumulative sum required by way of security in connection with several cases (NLG 800). Therefore, the sub-district court declared inadmissible all the cases she had introduced.

The Supreme Court ruled that the rigid application of the requirement of security as a condition for admissibility may in a particular case constitute a contravention of the right laid down in Article 6.1 ECHR to have one's case heard by an independent tribunal. The test is whether the amount of security demanded constitutes such a barrier for the person concerned, having regard to the person's financial capacities, that application of the system of security would amount to an unacceptable restriction of the aforementioned right as enshrined in Article 6.1 ECHR.

The assessment of whether the security requirement raises an unacceptable barrier to a person's access to an independent tribunal should be based on the total sum requested in security. This is not affected by the fact that in each separate case the sum imposed as a fine − and hence also the security − remains within acceptable limits, nor by the fact that the person concerned has caused the cumulative increases himself. After all, the total sum could be so prohibitive for the person concerned as to effectively bar his passage to the courts in each separate case. If the person

concerned argues that he cannot reasonably be required, given his lack of financial resources, to stand security for the total amount, the sub-district court must give his case a hearing in open court.

Languages:

Dutch.

NED-1995-1-002

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 13-01-1995 / **e)** 15.542 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 28; *Nederlandse Jurisprudentie*, 1995, 430; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.2.1.2.1 **Fundamental Rights** − Equality − Scope of application − Employment − In private law.
5.2.2.1 **Fundamental Rights** − Equality − Criteria of distinction − Gender.
5.2.2.7 **Fundamental Rights** − Equality − Criteria of distinction − Age.
5.4.3 **Fundamental Rights** − Economic, social and cultural rights − Right to work.

Keywords of the alphabetical index:

Dismissal on grounds of age.

Headnotes:

The dismissal of 65-year-old employee during her probationary period does not constitute discrimination on the grounds of age or sex.

Summary:

An employee had entered into an employment agreement for an indefinite period of time. The contract stipulated that the first two months would be a probationary period. At the head office it was discovered that the employee had been 65 years old when she took up her duties. She was then immediately dismissed, as this company did not allow persons aged 65 or over to be taken into service.

The Supreme Court held that it cannot be said that the rule that employment generally ends when the employee reaches 65 years of age no longer accords with the sense of justice of a large proportion of the population. Nor can it be said that the customary arguments used to justify dismissal on reaching the age of 65 can no longer serve as a reasonable and objective justification for the dismissal in question. The dismissal did not, therefore, contravene the law against unequal treatment on account of age.

The employee's contention that the company's attitude amounted to a discrimination on the grounds of sex was also rejected, since it was deemed implausible that dismissal of employees at the age of 65 affects proportionately more women than men.

Languages:

Dutch.

NED-1995-1-001

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 06-01-1995 / **e)** 15.549 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1995, 20; *Nederlandse Jurisprudentie*, 1995, 422; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments − European Convention on Human Rights of 1950.
3.17 **General Principles** − Weighing of interests.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.19 **Fundamental Rights** − Civil and political rights − Freedom of opinion.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.22 **Fundamental Rights** − Civil and political rights − Freedom of the written press.
5.3.31 **Fundamental Rights** − Civil and political rights − Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Right to be 'left in peace' / Second World War, action during.

Headnotes:

Concerning protection of the rights of a person who had been the victim of defamation, two opposing fundamental rights were balanced: the right to freedom of expression and the right to an unblemished name and reputation, and above all the right to be "left in peace", which latter right prevailed in this case.

The interference with the right to freedom of opinion was permissible, as the requirements of the European Court of Human Rights had been met.

Summary:

The questions to be resolved in this case were whether three Articles that had been published in a national daily newspaper were defamatory, and whether the suit brought by the person offended was admissible, in the light of the right to freedom of expression. The Articles suggested that V. had murdered a Jewish person who was living in hiding during the Second World War. However, a District Court acquitted V. of murder in 1944, and in 1946 he was rehabilitated when it was established that he had been acting in the interests of the resistance to the oppressor.

The Supreme Court began by observing that the suit had been brought against a journalist and a newspaper, so that allowing it would constitute interference with the freedom of expression to which this journalist and this newspaper are entitled. This interference was justifiable, however, as the conditions set out in Article 10.2 ECHR, namely that the interference must be prescribed by law and necessary for the protection of the reputation or rights of the person insulted, had been met.

In this case, it was not only this person's reputation that was at stake, but also − and indeed primarily − his right not to be publicly confronted yet again, over forty years later, with the actions he had taken in the past, in the form of offensive and defamatory accusations. The Supreme Court held that the only way to assess whether allowing the suit was necessary in a democratic society for the protection of the defamed person was by weighing the opposing fundamental rights against each other, taking all the details of the case into account.

The Supreme Court ruled that in this case the right to an unblemished name and reputation and above all the right to be "left in peace" prevailed over the right of the press to freedom of expression. One of the consequences of respect for the private individual is that a person who has been convicted of an offence should not in principle be held to account for his actions after he has paid the penalty for them. This implies that making an accusation of this nature after such a long period of time and giving to this accusation wide publicity would only have a valid justification in special circumstances in which such information would serve a justifiable public interest. Therefore, to justify publication in such a case, compelling reasons related to the public interest must exist, and it is legitimate to require that the accusation be based on extremely meticulous research.

Languages:

Dutch.

NED-1994-3-029

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 23-11-1994 / **e)** 29.392 / **f)** / **g)** / **h)** *Vakstudie Nieuws*, 15.12.1994, 3829, nr. 3; *Beslissingen in Belastingzaken*, 1995, 25; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.13.23.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − Right not to incriminate oneself.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Audit.

Headnotes:

Cooperating with an audit does not have the effect of making the imposition of a fine incompatible with any rule of law, and in particular with the right to a "fair trial". Since there was no question, during the audit, of criminal charges, the evidence obtained as a result of that investigation was not obtained in a manner incompatible with Article 6 ECHR.

Summary:

X BV voluntarily cooperated with an audit by allowing its accounts and other documents to be scrutinised and by answering questions. During this investigation it was found that X BV had neither deducted the discounts it had allowed its clients from the invoices nor credited them separately. The Inspector of Taxes imposed a fine in the adjusted tax assessment.

The point at issue was whether the Court of Appeal violated the "fair trial" principle of Article 6 ECHR, from which may be inferred the right of any person charged with a criminal offence to remain silent and not to incriminate himself, and/or Article 14.3.g of the International Covenant on Civil and Political Rights, by using evidence obtained during the audit in arriving at its decision to impose the fine.

The Supreme Court held that the obligation to cooperate with an audit on the basis of domestic legislation, at least where there is no question of a situation in which the taxpayer may be regarded as having been charged with a criminal offence, does not have the effect of making the imposition of a fine incompatible with any rule of law. In particular, it did not contravene the right to a fair hearing of its case, as invoked by X BV.

The Supreme Court also held that inasmuch as the substance of X BV's complaint was that the evidence on which the fine was based was obtained in contravention of Article 6 ECHR. it was ill-founded, as the facts did not in themselves lead to the conclusion that there was any question of criminal charges, whether prior to or during the audit, within the meaning of the Articles referred to.

Languages:

Dutch.

NED-1994-3-028

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 11-11-1994 / **e)** 8465 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 237; *Nederlandse Jurisprudentie*, 1995, 99; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.13 **General Principles** − Legality.
4.7.8.1 **Institutions** − Judicial bodies − Ordinary courts − Civil courts.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.

Keywords of the alphabetical index:

Criminal procedure.

Headnotes:

A civil court cannot institute criminal proceedings by virtue of its own authority, because this would constitute a conflict with the principle of legality.

Summary:

The plaintiff's bank statements were seized following an application by the examining magistrate. The plaintiff requested permission to inspect these statements so as to be able to prepare his objections to the seizure. The Court of Appeal (Civil Division) declared his request to be inadmissible. The Court of Appeal subsequently held that the criminal court could decide, in proceedings based on the Aruban Code of Criminal Procedure, not only in the matter of a suspect's request to consult documents in the case, but also on a similar request submitted by another interested party. The plaintiff should therefore have applied to the criminal court. The plaintiff appealed against this judgment.

The Supreme Court held that the Court of Appeal had failed to appreciate that it is incompatible with the principle of legality on which the Aruban Code of Criminal Procedure, like its Dutch equivalent, is based, that the court should institute criminal proceedings by virtue of its own authority, thus excluding the possibility of appeal to the civil court.

The Supreme Court considered that it should be taken into account that an appeal to the civil court presents certain advantages to the individual citizen from the point of view of legal safeguards which were not provided by the criminal proceedings which the court in this case had wrongly taken to be the only available course.

Languages:

Dutch.

NED-1994-3-027

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 04-11-1994 / **e)** 8493 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 226; *Nederlandse Jurisprudentie*, 1995, 249; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.3.5.5 **Constitutional Justice** − Jurisdiction − The subject of review − Laws and other rules having the force of law.
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.
5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.

Keywords of the alphabetical index:

Paternity, denial.

Headnotes:

Stipulating a positive obligation of the State to amend a law goes beyond the scope of competence of the Supreme Court. In the instant case, it could not consider whether the impossibility of repudiating the paternity of a child born during a marriage was in contravention of Articles 8 and 14 ECHR.

Summary:

In this case, the mother and W requested the official of the registry of births, marriages and deaths to order that the birth certificate of their son, who was born when the mother was still married to A but had been living with W for several years, be cancelled and replaced by a certificate affirming that the boy was the son of the mother and W.

The mother and W were of the opinion that pursuant to the provisions of Articles 8 and 14 ECHR, the mother must be allowed to repudiate the paternity of her husband, or ex-husband, free of the restrictions imposed under domestic law.

The Supreme Court denied the appeal of the mother and W. It held that it was not its task to resolve either the question of whether the present regulations as laid down in the Dutch Civil Code contravened the provisions of Article 8 ECHR in conjunction with Article 14 ECHR, which would imply that the State had a positive obligation to amend the regulations, or the question of whether it must be assumed that the impossibility, for a mother, of repudiating the paternity of her husband in relation to a child born during the marriage constituted unnecessary interference within the meaning of Article 8.2 ECHR. The Supreme Court held that the seeking of solutions for what should apply in the event that any such contravention or interference be deemed present would go beyond the role of the court in developing the law.

The Supreme Court also considered that it must be borne in mind that if the claim were be admitted, the question would immediately arise as to what restrictions should then apply if the child's interest in possessing certainty regarding his parentage, which is a general interest and is one of the principles underlying the present regulations, is not to be prejudiced.

Supplementary information:

See in this connection also the ruling by the European Court of Human Rights of 27-10-1994, no. 29/1993/424/503, CEDH A 297-C, of K et al. against the Kingdom of the Netherlands. In this judgment, the European Court of Human Rights considered that the fact that it is impossible for a mother to deny the paternity of her ex-husband in respect of a child born during the marriage, with the consequence that no legal family ties may be created between the child and its biological father by his acknowledgment of paternity, means that the Netherlands has failed to assure the applicants of the respect for their family life to which they are entitled under Article 8 ECHR.

Cross-references:

In a judgment of the Supreme Court of 17.09.1993 (see *Bulletin* 1994/2, 143 [NED-1994-2-010]), the Court did grant the mother the possibility of repudiating the paternity of a child born within 306 days after her marriage had been dissolved.

Languages:

Dutch.

NED-1994-3-026

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 21-10-1994 / **e)** 15.480 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 211; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.22 **Fundamental Rights** − Civil and political rights − Freedom of the written press.

Keywords of the alphabetical index:

Inviolability of the person / Freedom of speech / Photo, reportage.

Headnotes:

The fundamental right to freedom of expression protects both the form and the content of a series of shocking photographs.

There is no infringement in this case of the inviolability of the person.

Summary:

This case concerned the publication in *RAILS*, a magazine that is available to train passengers free of charge, of a photo reportage that the plaintiff claimed was unlawful. The publication in question consisted of a set of photographs displaying the latest fashion in clothing, advertised on the cover under the title of "Dressed to Kill". The photographs, which were placed amid serious Articles on theatres, ballet, forthcoming events etc., were in colour and took up eight entire pages. The first photograph showed a man with a nylon stocking over his head threatening a woman with a firearm and abducting her. The second and third photographs showed the woman tied up and blindfolded. In the fourth photograph, the man was carrying away the woman's dead body. The final photograph showed the body discarded among refuse and rubble. In each photograph the man and the woman were wearing different clothes, and each photograph gave the name of the shop where they could be bought and what they cost.

The Supreme Court held that the fundamental right to freedom of expression enshrined in Article 10 ECHR protects both the form and the content of the photograph series. Were the Dutch court to grant the application for an order requiring the publisher of the magazine to publish a rectification, this would therefore necessarily constitute a penalty within the meaning of Article 10.2 ECHR. For such an application to be granted, it is at least essential for it to be established clearly and conclusively that the series is in violation of, or infringes upon, the rights or interests of which an exhaustive list is given in this clause, and why this is so.

The Supreme Court also held that the plaintiff's contentions that the images displayed in the series were unlawful because they "constitute an incitement to violence against women", or because they "present violence to women in an attractive light" must be set aside as insufficiently well-defined. Furthermore, the series could not be said to incite violence against women, encourage or condone such violence, to violate the right of every person to the

inviolability of his person, to be offensive or unnecessarily hurtful to women, or to deride the feelings of women who have been abused or the plaintiff's work in that field.

Finally, the Supreme Court considered that the plaintiff's contention that the person whose acts cause another person to be confronted, against his or her will and without any preparation, with images that are so shocking to him or her that he or she is precipitated into a state of mental distress, is thereby violating the other person's right to the inviolability of his or her person, was based on a misinterpretation of the law.

Languages:

Dutch.

NED-1994-3-025

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 18-10-1994 / **e)** 97.852 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 95.063.

Keywords of the Systematic Thesaurus:

5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Examination.

Headnotes:

Allowing a victim to hear a suspect's voice does not constitute examination. Listening in on a conversation does not contravene Article 8 ECHR.

Summary:

The victim of an indictable offence was allowed to hear a voice that she recognised as the voice of the perpetrator. The person so identified objected to this procedure.

The Supreme Court held that there is nothing in the law to substantiate the view that if a victim is allowed to hear a suspect's voice, the latter must be informed that he is not obliged to cooperate, that his legal counsel must be informed about the procedure beforehand and that such a procedure should be considered equivalent to an examination, so that the suspect must be informed, in accordance with proper procedure, that he is not obliged to answer questions. In the case of an examination, it is the content of the conversation that is important. As the sole objective of the conversation at issue here was evidently to allow the suspect's voice to be heard, the Court of Appeal was not obliged to construe this conversation as an examination. Listening in on such a conversation does not contravene Article 8 ECHR, since neither the documents in the case nor the Court of Appeal established that the conversation was of a private nature, nor was any such argument advanced in defence.

Languages:

Dutch.

NED-1994-3-024

a) The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 18-10-1994 / **e)** 97.537 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 95.052; *Nederlandse Jurisprudentie*, 1995, 101.

Keywords of the Systematic Thesaurus:

4.10.7 **Institutions** − Public finances − Taxation.
5.3.35 **Fundamental Rights** − Civil and political rights − Inviolability of the home.
5.3.36.1 **Fundamental Rights** − Civil and political rights − Inviolability of communications − Correspondence.

Keywords of the alphabetical index:

Account, seizure / Investigation, fiscal.

Headnotes:

Entry into the premises and seizure of documents is not in contradiction with Article 8 ECHR if the suspect has voluntarily and intentionally given his consent to the entry into the premises.

Privacy of correspondence does not extend to records of accounts that have been seized.

Summary:

The suspect voluntarily and intentionally admitted officials of the Fiscal Information and Investigation Department (FIOD) to the office housing his accounts. During this visit, the FIOD officials seized several documents belonging to these accounts. The suspect was of the opinion that the FIOD officials should have had a written warrant. The suspect also claimed that he could not be regarded as an expert who could give informed consent to the inspection and seizure of his accounts, thereby waiving his right to protection under Article 8 ECHR.

The Supreme Court considered that there was no question either of the premises having been entered against the suspect's will or of their having been searched, so that the FIOD officials did not have to be in the possession of a general or specific written warrant. The Supreme Court further held that the FIOD's entry into the premises and seizure of documents should be deemed to be in accordance with the law, within the meaning of Article 8 ECHR. The situation in which the protection accorded by Article 8 ECHR must be waived was therefore not at issue here.

Furthermore, the Supreme Court held that the suspect's contention that the seized accounts were protected by Article 13.1 of the Constitution (privacy of the correspondence) could not be upheld. Debates on this in Parliament had established that this principle relates to respect for privacy of correspondence in the period during which it has been surrendered for delivery to a third party to a body entrusted with such delivery. The inviolability of privacy of correspondence did not extend to the accounts seized from the suspect in this case.

Languages:

Dutch.

NED-1994-3-023

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 22-07-1994 / **e)** 29.632 / **f)** / **g)** / **h)** *Vakstudie Nieuws*, 11.08.1994, 2465, nr 5; *Beslissingen in Belastingzaken*, 1994, 296; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.3.5.7 **Constitutional Justice** − Jurisdiction − The subject of review − Quasi-legislative regulations.
1.3.5.9 **Constitutional Justice** − Jurisdiction − The subject of review − Parliamentary rules.
4.10.7.1 **Institutions** − Public finances − Taxation − Principles.

Keywords of the alphabetical index:

Legitimate expectation, protection, principle.

Headnotes:

On the basis of the principle of protection of legitimate expectations, a taxpayer may proceed on the assumption that a policy rule laid down in a resolution will continue to be applied until this resolution is revoked or amended. This applies even in the event that the amount levied, corresponding to the expectations thus aroused, is *contra legem*.

Summary:

In this case, a taxpayer invoked a resolution dating from 1985 that had never been revoked. A later resolution stipulated that the resolution dating from 1985 could no longer be applied. The State Secretary for Finance was of the opinion that the 1985 resolution could not be applied because policy rules lose their validity even without being revoked or amended if substantive amendments are made to the legislation to which they relate.

The Supreme Court did not however share the opinion of the State Secretary for Finance. The Supreme Court ruled that the interested party had every right to expect the 1985 resolution to be applied. The elements of the later resolution that impeded the application of the 1985 resolution constituted insufficient grounds for departing from the rule that interested parties are entitled to expect that policy rules laid down in the resolution will continue to be applied until the latter is revoked or amended.

For the rest, the Supreme Court held that it would constitute an infringement of the interested party's rights under the principle of legal certainty if the interested party were not permitted to invoke the application of the 1985 resolution.

Languages:

Dutch.

NED-1994-2-022

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 22-04-1994 / **e)** 15.322 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 100; *Nederlandse Jurisprudentie*, 1994, 560; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.21 **General Principles** − Equality.
4.10.7.1 **Institutions** − Public finances − Taxation − Principles.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.35 **Fundamental Rights** − Civil and political rights − Inviolability of the home.

Keywords of the alphabetical index:

Tax / Confiscation.

Summary:

The seizure of the wife's property to pay her husband's tax debts is not unlawful.

There is no contravention here of the right to respect for one's private life and home (Article 8 ECHR).

Inasmuch as the seizure of moveable property in the marital home may be regarded as interference in the wife's exercise of her right to respect for her private life within the meaning of Article 8.1 ECHR, this interference is nevertheless admissible under the terms of Article 8.2 ECHR. It derives sufficient justification from the government's need to ensure payment of taxation in situations in which such payment could easily be frustrated. Furthermore, there is a clear and sufficient statutory basis for such action, within the meaning of Article 8.2 ECHR, in the policy regulations that have been drawn up and published by the Tax Department.

There is no violation here of the principle of equality: the difficulty of determining ownership of property in the shared home of persons who are married or cohabiting is sufficient justification for treating them differently from other persons between whom no such relationship exists.

Languages:

Dutch.

NED-1994-2-021

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-04-1994 / **e)** 15.493 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 96; *Nederlandse Jurisprudentie*, 1994, 576; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

4.7.1 **Institutions** − Judicial bodies − Jurisdiction.
5.1.1.1 **Fundamental Rights** − General questions − Entitlement to rights − Nationals.
5.1.1.4.1 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Minors.

5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.

Keywords of the alphabetical index:

Child, right to care / Child, born out of wedlock.

Summary:

An unmarried woman gave birth to a child in Brazil. Her aunt registered the child's birth at the Registry of Births, Marriages and Deaths in Brazil, giving her own name as the mother. The aunt then brought the child to the Netherlands and surrendered it to foster-parents. The child's mother had been in the Netherlands since 1992, and had applied for her natural child to be returned to her.

As both the mother and the child were resident in the Netherlands, they came within the jurisdiction of the Netherlands within the meaning of Article 1 ECHR. The Netherlands is therefore bound to respect the rights and freedoms of both mother and child as safeguarded by the European Convention on Human Rights. By virtue of the single fact of birth, the two have a "family life" within the meaning of Article 8 ECHR. An essential part of this family right is the right of mother and child to have the child cared for and brought up by the mother, and their right to enjoy each other's company. Preventing them from exercising these rights constitutes interference within the meaning of Article 8.2 ECHR.

The single circumstance that the mother does not have parental authority over the child in accordance with Brazilian law, and that she is unlikely to acquire this authority in the near future, cannot be regarded as circumstances that may justify restrictions on the right to family life, according to the standards of Article 8.2 ECHR. If the child's interests are at odds with the granting of the mother's application, this does constitute grounds that are admissible under Article 8.2 ECHR for denial of the application.

Languages:

Dutch.

NED-1994-2-020

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15-04-1994 / **e)** 15.307 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 94; *Nederlandse Jurisprudentie*, 1994, 608; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

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.
3.17 **General Principles** − Weighing of interests.
5.3.24 **Fundamental Rights** − Civil and political rights − Right to information.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Child, right to know parents / Child, born out of wedlock.

Summary:

An illegitimate child, having atteined the age of majority, desired to know the identity of his biological parents and demanded access to documents concerning his father. The child's claims held to be be weighed against the right of secrecy invoked by the defendant, as the information had been provided in confidence to a body that may be defined as a care institution. This body was only willing to supply the information with the mother's consent.

The right to know one's parentage is not absolute: it is superseded by the rights and freedoms of others when these weigh more heavily in a particular case. As far as determining priorities is concerned, between on the one hand the right of a natural child over the age of majority to know who fathered him or her and the right of the mother (encompassed by her right to respect for her private life) to conceal this matter, even from her child, the child's right must be deemed to prevail. This order of priority is justified not only by the vital importance of this right to the child, but also because the mother, as a rule, is in part responsible for the child's existence. It should be noted here that this case does not concern artificial insemination. The same applies to the interests of the (probable) father as to those of the mother.

Languages:

Dutch.

NED-1994-2-019

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 08-04-1994 / **e)** 15.292 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 88; *Nederlandse Jurisprudentie*, 1994, 704; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.2.1 **Fundamental Rights** − Equality − Scope of application.
5.4.17 **Fundamental Rights** − Economic, social and cultural rights − Right to just and decent working conditions.

Keywords of the alphabetical index:

Employee, temporary.

Summary:

An employee working on the basis of a "zero hours" / flexible contract demanded payment at the same rate as staff in permanent employment. The "temporary worker" was in fact doing the same work in the same way for (virtually) the same number of hours a week as staff in permanent employment.

The employer − employee relationship in this case was indistinguishable, or almost so, from that which applies to staff who are in permanent employment. There was no good reason for the employer having continued to treat the employee as a temporary worker paid according to an

hourly rate, given that the employer made no exceptions, in respect of pay and conditions of staff in permanent employment. In these circumstances, the employer was obliged to act as a good employer and was required to pay the employee in question at the same rate as staff in permanent employment. This conclusion followed from the generally accepted principle of law whereby equal work in equal circumstances must be accorded equal pay, unless there are objectively valid grounds that justify allowing unequal pay.

Languages:

Dutch.

NED-1994-2-018

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 08-04-1994 / **e)** 8397 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie,* 1994, 439; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.

Keywords of the alphabetical index:

Maintenance obligation.

Summary:

A father applied for a change in his maintenance obligations to take account of the mother's cohabitation with a new partner having an income. This application was based on an analogy with the step-parent's maintenance obligations.

To be defined as a step-parent, a person must be married to the parent of a legitimate or natural child that belongs to his family but of whom he is not the parent. It cannot therefore be accepted that the mother's new partner, while not being married to her, should contribute to the cost of the children's care and upbringing by analogy with the rules that apply to the step-parent. This remains true even if the new partner and the children have a family life within the meaning of Article 8 ECHR. Nor is there any question here of a violation of Article 8 ECHR in conjunction with Article 14 ECHR.

Languages:

Dutch.

NED-1994-2-017

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 25-02-1994 / **e)** 8345 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie,* 1994, 437; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

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.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.

Keywords of the alphabetical index:

Adoption.

Summary:

A biological father, who had remarried since the dissolution of his previous marriage by divorce, wished to adopt the child that was born of the husband's previous marriage. Since the divorce, the child had been living with his father and the latter's new wife. The biological mother of the child had stated her opposition to the adoption.

The family life that is protected by Article 8.1 ECHR may of its nature, in principle, imply the right to adoption. The natural parent's right to veto an adoption, enshrined in the Civil Code, is not absolute, as it is restricted by the principle to be applied in this case, that powers may not be invoked in an abusive manner.

Languages:

Dutch.

NED-1994-2-016

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 28-01-1994 / **e)** 15.227 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1994, 40; *Nederlandse Jurisprudentie*, 1994, 687; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

4.7.15.1 **Institutions** − Judicial bodies − Legal assistance and representation of parties − The Bar.
5.1.1.4.2 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Incapacitated.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.13.27 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to counsel.

Keywords of the alphabetical index:

Legal guardian, authority.

Summary:

A ward demanded that his legal guardian give him the opportunity to have unconditional and undisturbed contact with his lawyer, on a permanent basis.

The fact that a ward is empowered to act independently at law implies that such a person is entitled to the necessary legal assistance to do so, in particular to immediate, undisturbed and sufficient contact with the lawyer concerned. In principle, therefore, the guardian should not be permitted to forbid or impede such contact or, more generally, to forbid or impede the ward's free access to a lawyer. Given that care and responsibility for the person of the ward are among the guardian's statutory responsibilities, however, a reasonable interpretation of the fundamental right to legal assistance implies that the guardian is indeed authorised to forbid such action if, having regard to the mental and physical health of his ward, whether or not considered in combination with the lawyer's actions, it is feared that contact between the ward and his lawyer will have such an unfavourable effect on that state of health that it must be deemed irresponsible.

Languages:

Dutch.

NED-1994-2-015

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 21-01-1994 / **e)** 15.309 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1994, 473; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.17 **General Principles** − Weighing of interests.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.22 **Fundamental Rights** − Civil and political rights − Freedom of the written press.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Fundamental rights, hierarchy / Copyright / Photograph, publication.

Summary:

At the end of 1988, a man was convicted for an offence that attracted considerable public attention. Photographs of the man were published in two issues of a weekly magazine. Were the publishers entitled to publish portrait photographs of the man without his permission? A balance should be struck between the rights to respect for private life and the right to freedom of expression.

The Copyright Act protects the person depicted against violations of his right to respect for his private life, but this right does not possess an absolute weight that is in principle greater than the right to freedom of expression. Two freedoms are at issue here, which are of essential importance both for the life of the individual and for democratic society as such, and there are no grounds for introducing a hierarchy between the two.

Whether a portrait photograph of a person, taken without consent and published in the press without the person's permission constitutes a violation of his right to respect for his private life can be determined only by balancing the merits of the two fundamental rights that are at issue, taking all the details of the particular case into consideration, to determine which one must take

precedence in this case. Ultimately, the right to freedom of expression was held to prevail in this case.

Languages:

Dutch.

NED-1994-2-014

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 01-12-1993 / **e)** 243 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1994/64, *Administratiefrechtelijke Beslissingen*, 1994, 55; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.2.2 **Sources of Constitutional Law** − Categories − Unwritten rules − General principles of law.
2.2.2.2 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national sources − The Constitution and other sources of domestic law.
5.2.1.3 **Fundamental Rights** − Equality − Scope of application − Social security.
5.2.2.1 **Fundamental Rights** − Equality − Criteria of distinction − Gender.
5.4.14 **Fundamental Rights** − Economic, social and cultural rights − Right to social security.

Keywords of the alphabetical index:

Invalidity benefit.

Summary:

A married woman requested invalidity benefit as from 1 November 1982. Her application was denied on the grounds that her husband was employed in Germany and that therefore her request came within the scope of German social security. A married man whose wife works abroad, on the other hand, is eligible for invalidity benefit on the grounds of a generally binding regulation.

The denial of the wife's application constitutes discrimination on the grounds of sex. The court may examine a generally binding regulation that has not been enacted by Parliament to determine its compatibility with the principle of equality, which is one of the unwritten principles of Dutch law. This principle, which was enshrined in the Constitution on 17 February 1983, had already belonged to these unwritten principles for some considerable time, so that the relevant served merely to define it more fully.

Languages:

Dutch.

NED-1994-2-013

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19-11-1993 / **e)** 8380 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1994, 330; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Grandparents, care of a child.

Summary:

Grandparents expressed a desire to take the care and upbringing of their grandchild upon themselves in their own home when it transpired that it was necessary, in the interests of the child that be entrusted to persons other than the parents.

In such cases the grandparents' interest in having their wishes taken into account when a decision is taken concerning the child's placement in a foster home is one of the interests protected under Article 8 ECHR.

Languages:

Dutch.

NED-1994-2-012

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 12-11-1993 / **e)** 8213 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1993, 221; *Nederlandse Jurisprudentie*, 1995, 424; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

2.1.1.4.7 **Sources of Constitutional Law** − Categories − Written rules − International instruments − International Covenant on Civil and Political Rights of 1966.
5.3.6 **Fundamental Rights** − Civil and political rights − Freedom of movement.
5.3.9 **Fundamental Rights** − Civil and political rights − Right of residence.
5.3.10 **Fundamental Rights** − Civil and political rights − Rights of domicile and establishment.

Keywords of the alphabetical index:

Free movement of persons / Residence permit.

Summary:

Before Aruba achieved separate status, Dutch nationals born within the Netherlands Antilles and Aruba had the right of free entry to, and freedom of establishment on, all the islands. Since the conferral of its separate status, only persons exercising a profession have this right.

The right of free entry to, and establishment on, all the islands was based on a principle of Antillean constitutional law. This right is of fundamental significance, having regard to its nature and viewed in the light of the provisions of Article 2 Protocol 4 ECHR and Article 12.1 of the International Covenant on Civil and Political Rights.

The Minister's scope for determining policy, which allows him in principle to refuse a temporary or other residence permit, or to refuse to extend such a permit, is restricted not only by the general principles of proper administration but also by the principle of freedom of movement of persons exercising a profession between the Netherlands Antilles and Aruba. It follows from this that the refusal at issue to extend the residence permit of a person with a profession and to order this person to leave the country constitute unlawful actions on the part of the country concerned, since they are at odds with the aforementioned principle.

Languages:

Dutch.

NED-1994-2-011

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 17-09-1993 / **e)** 8261 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1994, 373; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

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.
3.20 **General Principles** − Reasonableness.
5.1.1.4.1 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Minors.
5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.

Keywords of the alphabetical index:

Paternity, contested.

Summary:

A mother wished to repudiate the paternity of her former husband in respect of a child born within 306 days of the dissolution of their marriage; the biological father, who lived with the mother and child, wished to acknowledge paternity of the child. Pursuant to a provision of the Civil Code, such acknowledgment could be of legal consequence only if the mother and the man who has acknowledged paternity marry within one year of the child's birth. As the parents made it known that they would not be marrying within one year's time, the official of the Municipal Registry of Births, Marriages and Deaths refused to draw up a deed of repudiation and acknowledgment.

The relationship that exists between the biological father and the child must be classified as "family life" within the meaning of Article 8.1 ECHR. This means that they are both entitled to legal recognition of their relationship under family law. The aforementioned provision of the Civil Code impedes the father from acknowledging his child and thus constitutes an interference in their family life. The father and mother could have removed this impediment by marrying within one year, but in this respect too the provision constituted an interference as to accept it would be to oblige them to enter into a marriage against their will. Given the fact that the distinction between legitimate and natural children is gradually disappearing, the original

weighing of interests on which the provision of the Civil Code was based (the status of legitimate child versus a legal relationship under family law with the biological father) can no longer be regarded, in cases such as this one, as a sufficient justification within the meaning of Article 8.2 ECHR for the interference engendered by the provision of the Civil Code. A reasonable application of the law would ensure that a statement of acknowledgement by the parents will have legal consequence.

Languages:

Dutch.

NED-1994-2-010

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 17-09-1993 / **e)** 8280 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1993, 738; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

4.7.15.1 **Institutions** − Judicial bodies − Legal assistance and representation of parties − The Bar.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.
5.3.13.27.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to counsel − Right to paid legal assistance.

Summary:

The District Court withdrew the allocation of legal aid to a person without giving him an opportunity to be heard.

The fundamental principle whereby both sides to a dispute must be heard demands that a court should not withdraw the allocation of legal aid of its own will before having informed interested parties − including the legal counsel who has been dealing with the case subsequent to such allocation − and giving them the opportunity to express their views.

Languages:

Dutch.

NED-1994-2-009

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 25-06-1993 / **e)** 15.049 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1994, 140; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.17 **General Principles** − Weighing of interests.
5.1.1.4.1 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Minors.
5.3.24 **Fundamental Rights** − Civil and political rights − Right to information.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Authority, parental, limitation.

Summary:

A father demanded to see the report of an interview with his minor daughter in which use had been made of anatomically correct dolls. The defendants were in principle obliged on the one hand to refrain from giving third parties the opportunity to consult a record such as that at issue here, or to provide a copy, without the permission of the person interviewed, the daughter, and on the other hand to permit such consultation, or to provide a copy, upon her father's request since the rights and powers of the minor child are exercised by the father.

The defendants did not have to comply with the father's request to see the records to the extent that such action would be incompatible with their duty of care in relation to the child. In this regard the father's interest in respect of the child's upbringing must be weighed against the child's interest in the protection of her personal life, the latter meriting a high level of protection. The information in question was of a highly intimate nature, and the child's interests were adjudged to be decisive.

Languages:

Dutch.

NED-1994-2-008

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 18-06-1993 / **e)** 15.015 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1994, 347; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.17 **General Principles** − Weighing of interests.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.4 **Fundamental Rights** − Civil and political rights − Right to physical and psychological integrity.
5.3.15 **Fundamental Rights** − Civil and political rights − Rights of victims of crime.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.
Keywords of the alphabetical index:

Rape / HIV (AIDS) / Right of the inviolability of the body.

Summary:

The plaintiff, a victim of rape, requested that the rapist be tested for HIV.

It follows from the Civil Code rules on tort that the consequences of rape should be limited as much as possible, or that the victim should be compensated in the most appropriate form. One such consequence is the uncertainty surrounding infection with the HIV virus. The plaintiff had a weighty interest in procuring as swift as possible a resolution of this uncertainty, which was having a profound effect on her personal life. The plaintiff was therefore entitled to expect the rapist's cooperation in the form of his submitting to a blood test. The rapist was not entitled to invoke the fundamental right enshrined in the Constitution of the inviolability of his body, as this right is limited by restrictions imposed by or pursuant to the law. Between members of the public, in any case, a restriction of this kind can in principle be based on the applicable rules on tort in the Civil Code, including the standards of conduct it encompasses for human interaction in society. When the relative interests are weighed against each other, a restriction of this kind must be accepted. This is true regardless of whether the victim too has justifiably invoked a fundamental right, or could do so.

Languages:

Dutch.

NED-1994-2-007

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 11-06-1993 / **e)** 8146 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1993, 560; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Father, biological.

Summary:

A biological father requested that access arrangements be made in relation to his minor child with whom he had lived for 1¼ years. The father had had no contact with the minor for 9 to 10 years.

A relationship between two persons that can be described as "family life" may be severed as a result of subsequent events. However, if Article 8 ECHR is applied in a way consistent with its intention, the mere circumstance of cessation of contact between these two persons for a certain period may not be regarded as such an event. Only when considered in combination with other, more weighty circumstances, can such a period of time be a factor in answering the question of whether a former "family life" has ceased to exist.
Languages:

Dutch.

NED-1994-2-006

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 28-05-1993 / **e)** 14.988 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1993, 625; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
5.3.9 **Fundamental Rights** − Civil and political rights − Right of residence.
5.3.11 **Fundamental Rights** − Civil and political rights − Right of asylum.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Residence permit.

Summary:

An asylum-seeker endeavouring to obtain a residence permit invoked Article 8 ECHR to support his request since he was staying with his sister and her children while waiting for the permit to be granted.

The existence of a family life within the meaning of Article 8 ECHR may not be assumed on the mere grounds of the blood relationship between an uncle and his nieces and nephews. Nor is there anything in Article 8 ECHR to support the view that this Article might protect the mere intention to enjoy family life, in the case of a blood relationship of this degree. Therefore, the residence permit was properly refused.

Languages:

Dutch.

NED-1994-2-005

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 07-05-1993 / **e)** 8152 / **f)** / **g)** / **h)** *Administratiefrechtelijke Beslissingen*, 1993, 440 *Nederlandse Jurisprudentie*, 1995, 259; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.20 **General Principles** − Reasonableness.
5.2 **Fundamental Rights** − Equality.
5.4.17 **Fundamental Rights** − Economic, social and cultural rights − Right to just and decent working conditions.
5.4.18 **Fundamental Rights** − Economic, social and cultural rights − Right to a sufficient standard of living.

Keywords of the alphabetical index:

Salary.

Summary:

Equal pay for equal work is an objective that should be pursued. However, it should not be assumed too readily that where a difference in salary exists, that is at odds with the principle of equal pay for equal work. One must first consider whether there is a reasonable and objective justification for it. Whether or not a person is married is too unreliable an indication of the existence of maintenance obligations, and the mere fact that an employee is married is therefore not a sufficient ground for paying a higher salary for the same work.

Languages:

Dutch.

NED-1994-2-004

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 21-04-1993 / **e)** 28.726 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1993/205; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.4 **General Principles** − Separation of powers.
4.5.2 **Institutions** − Legislative bodies − Powers.
4.5.6 **Institutions** − Legislative bodies − Law-making procedure.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Superiority, law.

Summary:

It is not legitimate for a taxpayer to justify himself to the tax inspector by invoking statements made by Ministers or State secretaries and arguing that they did not anticipate drastic changes in the investment allowance system. Such statements were superseded by later legislation, and the legislature was not bound by principles of proper administration to enact the disputed order in manner consistent with such statements. If a statutory provision is at odds with previous statements made by a Minister or State secretary, any reliance on such statements can no longer be protected in law.

Languages:

Dutch.

NED-1994-2-003

a) The Netherlands / **b)** Supreme Court / **c)** Third Division / **d)** 10-03-1993 / **e)** 28.909 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1993/164; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

4.7.8.1 **Institutions** − Judicial bodies − Ordinary courts − Civil courts.

5.3.13.12 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to be informed about the decision.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Tax / Notification, prompt.

Summary:

If a taxpayer, who protests against an increased tax assessment imposed on him, is of the opinion that the tax inspector has failed in the duty of prompt notification incumbent on him pursuant to Article 6.3.a ECHR, he should bring his case before the Court. A general observation on the applicability of Article 6 ECHR, without reference to the duty of prompt notification as such, is insufficient as a means of protest.

Languages:

Dutch.

NED-1994-2-002

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19-02-1993 / **e)** 14.917 / **f)** / **g)** / **h)** *Nederlandse Jurisprudentie*, 1993, 624; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** − Proportionality.
5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Identity check / Fingerprint.

Summary:

An investigation into the identity of an alien, carried out by the taking and distributing of fingerprints, constituted an interference with her right to respect for her private life within the meaning of Article 8.1 ECHR. The Aliens Act states that for there to be a well-founded reason to take fingerprints, there must be a well-founded reason to question the identity of the alien. On the basis of the requirement of proportionality enshrined in Article 8.2 ECHR, it must be assumed that if the alien is in possession of a valid passport (or similar document) that apparently establishes the person's identity, it is only in exceptional circumstances that a well-founded reason can exist for taking fingerprints; even if there is good reason to question the authenticity of a passport, or alternatively to suspect that it has been tampered with, it is in general not permissible to proceed immediately to take fingerprints when there is an alternative way of effectively resolving such doubts in the short term.

Languages:

Dutch.

NED-1994-2-001

a) The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19-02-1993 / **e)** 8112 / **f)** / **g)** / **h)** *Administratiefrechtelijke Beslissingen*, 1993, 305; *Nederlandse Jurisprudentie*, 1995, 704; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.3.5.3 **Constitutional Justice** − Jurisdiction − The subject of review − Constitution.
1.3.5.10 **Constitutional Justice** − Jurisdiction − The subject of review − Rules issued by the executive.
5.3.17 **Fundamental Rights** − Civil and political rights − Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Obligation to legislate.

Summary:

Article VI.4 of the Constitution of Aruba states that ordinary courts cannot examine country ordinances to establish their consistency with the Constitution of Aruba.

That provision, which only forbids the courts from declaring a country ordinance invalid on grounds of inconsistency with the Constitution of Aruba, did not prevent the Appeal Court from ruling that the absence of a national ordinance was unlawful. The freedom of the State to change a particular policy does not imply that the State is free to decline to pay a compensation for damage caused by a failure to comply with an unconditional undertaking.

Languages:

Dutch.

NED-1993-1-003

a) The Netherlands / **b)** Supreme Court / **c)** First Division (Civil Law) / **d)** 22-01-1993 / **e)** 14.926 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1993, 39; *Administratiefrechtelijke Beslissingen*, 1993, 198; *Nederlandse Jurisprudentie*, 1994, 734; CODICES (Dutch).
Keywords of the Systematic Thesaurus:

5.1.1.5.2 **Fundamental Rights** − General questions − Entitlement to rights − Legal persons − Public law.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.

Keywords of the alphabetical index:

Body, public, injury / Freedom of expression, holder of rights.

Headnotes:

The injunction cannot be imposed on the ground that the State has acted unlawfully in respect of the members of the former resistance and their organisations, it being a basic assumption in an open parliamentary debate that these decisions were in accordance with the law. What is at issue is an opinion on a legal question, namely the question as to whether decisions were made in accordance with the law, in which question the claimants are not immediately involved. The government has expressed this opinion in a public debate on a public matter. The right of freedom of expression, laid down in the Constitution as well as in international treaties, to which right the government too is entitled, prevents the State from being sued on the grounds that its opinion is wrong.

The right of freedom of expression, especially in a public debate such as this, in principle extends to opinions which may offend or shock others. The European Court of Human Rights has repeatedly emphasised this aspect of the right (see for example the Decision in *Castells v Spain*, 23 April 1992, Series A no. 236, 22, § 42, *Special Bulletin ECHR* [ECH-1992-S-003]).

Summary:

In civil proceedings, World War II resistance organisations and their members claimed:

1. a declaration that decisions made shortly after the war concerning the pension of the widow of a member of parliament whose party collaborated in the occupation are contrary to law;

2. an injunction prohibiting the State from declaring in public that these decisions were in accordance with the law.

Languages:

Dutch.

NED-1993-1-002

a) The Netherlands / **b)** Supreme Court / **c)** First Division (Civil Law) / **d)** 05-02-1993 / **e)** 14.823 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1993, 49; *Nederlandse Jurisprudentie*, 1995, 716; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.3.4.4 **Constitutional Justice** − Jurisdiction − Types of litigation − Powers of local authorities.
1.3.5.11.1 **Constitutional Justice** − Jurisdiction − The subject of review − Acts issued by decentralised bodies − Territorial decentralisation.
4.7.8.1 **Institutions** − Judicial bodies − Ordinary courts − Civil courts.
5.1.1.5.2 **Fundamental Rights** − General questions − Entitlement to rights − Legal persons − Public law.
5.3.13.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope.

Keywords of the alphabetical index:

Court, civil, jurisdiction / Contract, public law / Body, public, injury.

Headnotes:

The municipality has based its claim on breach of contract, thus on an obligation as in Article 2 of the Judicial Organisation Act (Ro) and Article 112 of the Constitution (Gr.w.). In consequence, it falls within the jurisdiction of the civil court, having regard also to the fact that the matter for resolution is not exclusive jurisdiction of another court.

This civil court jurisdiction − and the admissibility of the claim − is not affected by the fact that the civil court is thereby called upon to judge the way in which the Government exercises its power under Article 185.1 of the Municipality Act (Gem.w.) to reverse decisions of municipalities. Thus, as long as there is no special and sufficiently safeguarded judicial procedure in these matters, a result is achieved which complies with the requirements of a constitutional State. As a matter of legal protection (which is not to be withheld from municipalities in disputes with the State), this interpretation is clearly to be preferred over one in which municipalities have no legal remedies at all in such disputes.

This civil court jurisdiction − and the admissibility of the claim − is also not affected by the fact that this dispute arises from a public law contract.

Parties to such a contract may agree to exclude civil court jurisdiction. Such an agreement must be explicit.

Summary:

The State entered into an agreement on decentralisation with the four largest municipalities. In compliance with this agreement the State issued a financial regulation by which the municipalities were, in respect of certain activities and facilities, in principle free to spend State funds in a way most suited to the local circumstances. This regulation also provided for certain restrictions. The Government reversed decisions of one of these municipalities, stating they were contrary to such restrictions. Basing the claim on those terms of the agreement which governed liability for injury to third parties, the municipality sought a court order annulling the decisions and awarding compensation in the amount of one million Guilders. The question arose as to whether the civil court had jurisdiction.

Languages:

Dutch.

NED-1993-1-001

a) The Netherlands / **b)** Supreme Court / **c)** Third Division (Tax law) / **d)** 07-10-1992 / **e)** 26.974 / **f)** / **g)** / **h)** *Beslissingen in Belastingzaken*, 1993, 4; *Administratiefrechtelijke Beslissingen*, 1993, 13; CODICES (Dutch).

Keywords of the Systematic Thesaurus:

1.3.5.11.1 **Constitutional Justice** − Jurisdiction − The subject of review − Acts issued by decentralised bodies − Territorial decentralisation.

2.1.2.2 **Sources of Constitutional Law** − Categories − Unwritten rules − General principles of law.
3.10 **General Principles** − Certainty of the law.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Legitimate expectation / Regulation, sublegislative / Transitory law.

Headnotes:

The Supreme Court ruled, first, that a municipal taxing regulation, as a sublegislative regulation, may be tested against general principles of law.

In consequence, the Supreme Court ruled that the principle of legal security is, together with the rule against retroactive effect, concerned with respecting legitimate expectations. The municipal legislature infringed these expectations by applying the new regulation to all requests made, irrespective of the time the change was made public. This may be different in circumstances where the change does not relate to an exemption, but to an increase in existing taxes or to a new tax; but with an exemption the legislature has made a positive declaration of intent which cannot reasonably be expected to be subject to unilateral changes at any time.

In the instant case the change in the regulations was not binding and the exemption was found to apply.

Summary:

A municipality may, in return for services rendered, impose taxes (leges) whose rates and other features are laid down in municipal (sublegislative) regulations. In the instant case, an exemption from taxation was extended by the regulation to a certain group of persons and institutions. The municipality changed the regulations by abolishing this exemption. Before this change took place, a request for rendering such a service, namely the granting of a building permit, had been made by the plaintiff, a person belonging to the said group. The building permit was granted, and the municipality sought to impose the tax. The plaintiff contested his liability to the tax, invoking the principle of legal security.

Languages:

Dutch.