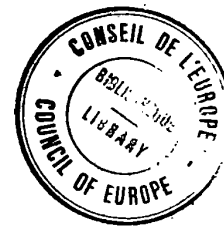




# BULLETIN

## ON CONSTITUTIONAL CASE-LAW



Date : 01/11/93

No 2

### - THE VENICE COMMISSION -

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

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

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

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### EDITORIAL

The present bulletin is the second issue of the Constitutional Case-Law Bulletin published by the European Commission for Democracy through Law.

The Commission is grateful to liaison officers of Constitutional and other equivalent Courts who regularly prepare the contributions reproduced in this publication.

Its aim is to allow constitutional law specialists to get to know quickly about the existence of judgments in their field.

The decisions are presented in the following way:

1. Identification
2. Keywords of the systematic thesaurus
3. Keywords of the alphabetical index
4. Summary
5. Supplementary information

Publication of the third issue of the bulletin is planned for the first trimester of 1994. Preparation of a special issue which will present a description of the various Constitutional Court systems is continuing and publication is envisaged for the beginning of 1994.

G. BUQUICCHIO

Secretary of The Venice Commission



AUSTRIAN CONSTITUTIONAL COURT
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Reference period: 1 April 1993 to 31 August 1993

(The Court sitting of June/July 1993)

### STATISTICAL DATA

Type and number of decisions:

- \* Claims of a financial nature against federal authorities, regions or communes which do not fall within the competence of civil courts or administrative authorities (Art. 137 B-VG):4
- \* Conflicts of authority (Art. 138 al. 1 B-VG):2
- \* Review of regulations (Art.139 B-VG):5
- \* Review of laws (Art.140 B-VG):84
- \* Review of elections (Art. 141 B-VG):3
- \* Decisions on challenges to individual administrative acts (Art. 144 B-VG):531 (325 non-acceptations)

Total: 677

### IMPORTANT DECISIONS

1. Identification: Austria - Constitutional Court - G 75/93, E v 01.07.93.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Electoral disputes - Local elections.  
CONSTITUTIONAL JUSTICE - The subject of review - Laws and other rules having the force of law.

INSTITUTIONS - Principles of State organisation - Democratic make-up of the State.

3. Keywords of the alphabetical index:

Elections / Mayor / Direct election / Representative democracy / Administrative autonomy of communes.

4. Summary:

Election of mayors; annulment of a law passed by the authorities of a Land: the federal constitutional order does not recognise the direct election of mayors by the electorate; violation of the principle of representative democracy.

1. Identification: Austria - Constitutional Court - G 226/92, E v 02.07.93.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Laws and other rules having the force of law.

FUNDAMENTAL RIGHTS - Civil and political rights - Right of access to courts.

3. Keywords of the alphabetical index:

Employment of foreigners / Rights and obligations of a civil nature / Right of access to courts / Criminal charge.

4. Summary:

The public law prohibition on the employment of foreigners does not fall within the category of "a right or obligation of a civil nature", nor within that of a "criminal charge". Provisions which establish the competence of an administrative authority do not violate the right of access to courts.

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1. Identification: Austria - Constitutional Court - B 338/93, B 445/93, E v 01.07.93.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Administrative acts.

FUNDAMENTAL RIGHTS - Civil and political rights - Right to family life.

3. Keywords of the alphabetical index:

Foreigners / Visa / Passports / Family life / Private life.

4. Summary:

Immigration; public interest; prohibition on the granting of a visa following entry into Austria as a tourist or in violation of the law ; no contradiction with the right to respect for family life.

<b>BELGIAN COURT OF ARBITRATION</b>
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Reference period: 1 April 1993 to 31 August 1993

STATISTICAL DATA

- \* 41 judgments
- \* 55 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- \* 58 new cases
- \* Average length of proceedings: 12 months (shorter than in the previous reference period)
  
- \* 13 judgments concerning proceedings for annulment
- \* 25 judgments concerning preliminary points of law
- \* 3 judgments concerning applications for suspension
  
- \* 3 cases settled by summary procedure

SUBJECT MATTER OF IMPORTANT DECISIONS

Judgment No. 37/93 of 19 May 1993

INSTITUTIONS - Courts - General organisation.

INSTITUTIONS - Courts - Ordinary courts - Courts of limited jurisdiction.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

Judgment No. 56/93 of 8 July 1993

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Historical interpretation.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

Judgment No. 62/93 of 15 July 1993

INSTITUTIONS - Army and police forces.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of expression.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of association.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to strike.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Freedom of trade unions.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - European Convention on Human Rights.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - Other international sources.



1. Identification: Belgium - Court of Arbitration - 1 April 1993 - Judgment No. 30/93 - Moniteur belge, 8 April 1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Suspension of application.

3. Keywords of the alphabetical index:

Interim suspension of a challenged law.

4. Summary:

If the immediate application of a law would have the effect of bringing about a state of affairs entailing a risk of major changes in the operation of a public institution, if these changes could cause considerable damage and if it would be extremely difficult or even impossible to restore the original situation by a decision to set aside, there is a risk of serious damage which it would be difficult to make good.

When, moreover, the grounds relied upon to support the application for setting aside are good, in other words if on initial examination they appear to be well founded, the legislative provision applied should be suspended.

1. Identification: Belgium - Court of Arbitration - 22 April 1993 - Judgment No. 33/93 - Moniteur belge, 8 June 1993.

2. Keywords of the systematic thesaurus:

INSTITUTIONS - Principles of State organisation - Separation of powers.

INSTITUTIONS - Legislative bodies - Relations with the courts.

INSTITUTIONS - Courts - Administrative courts - Jurisdiction.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Civil and political rights - Right of access to courts.

3. Keywords of the alphabetical index:

*Conseil d'Etat* / Legislative validation of a decision.

4. Summary:

A provision of law whose sole purpose is to prevent the *Conseil d'Etat* from deciding on the possible unlawfulness of a royal decree relating to dues which contribute to the financing of a public institution infringes Article 6 and 6 bis of the Constitution, which guarantee the principles of equality and non-discrimination, in that it deprives the category of citizens to which this royal decree applies of a judicial guarantee afforded to all citizens and this difference of treatment cannot be justified by the alleged objectives of expediency and certainty of the law. In the absence of exceptional circumstances, the consideration of expediency is not sufficient to justify this process of legislative confirmation. (B.1 and B.2)

5. Supplementary information:

Compare with Judgments Nos. 16/91 of 13 June 1991, 34/93 of 6 May 1993 and 46/93 of 15 June 1993.

1. Identification: Belgium - Court of Arbitration - 19 May 1993 - Judgment No. 37/93 - Moniteur belge, 9 June 1993.

2. Keywords of the systematic thesaurus:

INSTITUTIONS - Courts - General organisation.

INSTITUTIONS - Courts - Ordinary courts - Courts of limited jurisdiction.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Civil and political rights - Right of access to courts.

3. Keywords of the alphabetical index:

Industrial tribunals / Collective labour agreements.

4. Summary:

Unlike ordinary regulations, which in principle are unilaterally drawn up as well as unilateral in their effects, a collective labour agreement concluded within an equi-representative body is the result of negotiations between one or more organisations of employees and one or more organisations of employers.

Traditionally, in several European countries labour disputes are given specific judicial treatment.

A provision which prevents the interested parties from directly challenging collective labour agreements concluded within an equi-representative body by bringing proceedings for annulment before the *Conseil d'Etat* and which deprives the *Conseil d'Etat* of the jurisdiction to annul *erga omnes* such agreements would be disproportionate if the legislator had not provided for a substantive review of the lawfulness of the collective agreements.

By virtue of the existence of the review machinery provided for in the Act of 5 December 1968, which gives courts constituted in a specific, equi-representative manner, viz. industrial tribunal - which the Act of 20 July 1991 does not call into question - responsibility for setting aside collective agreements through an interlocutory review of lawfulness, the denial of the jurisdiction of the *Conseil d'Etat* does not appear to be a measure manifestly disproportionate to the objective pursued. (B.7 and B.8)

1. Identification: Belgium - Court of Arbitration - 10 June 1993 - Judgment No. 44/93 - Moniteur belge, 20 August 1993.

2. Keywords of the systematic thesaurus:

INSTITUTIONS - Federalism and regionalism - Basic principles.  
FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

3. Keywords of the alphabetical index:

Regional autonomy.

4. Summary:

Difference of treatment in matters in which the Communities and Regions have their own jurisdiction is the possible consequence of different policies permitted by the autonomy afforded to them by or pursuant to the Constitution. It cannot in itself be deemed contrary to Articles 6 and 6 bis of the Constitution which guarantee the principles of equality and non-discrimination. This autonomy would have no implications if the mere fact that there were differences of treatment between those governed by the rules applying to the same matter in each region was judged contrary to Article 6 and 6 bis of the Constitution. (B.3)

5. Supplementary information:

Settled case-law.

1. Identification: Belgium - Court of Arbitration - 15 June 1993 - Judgment No. 46/93 - Moniteur belge, 20 August 1993.

2. Keywords of the systematic thesaurus:

INSTITUTIONS - Principles of State organisation - Separation of powers.  
INSTITUTIONS - Legislative bodies - Relations with the courts.  
INSTITUTIONS - Courts - Administrative courts - Jurisdiction.  
FUNDAMENTAL RIGHTS - Civil and political rights - Equality.  
FUNDAMENTAL RIGHTS - Civil and political rights - Right of access to courts.

3. Keywords of the alphabetical index:

*Conseil d'Etat.*

4. Summary:

By legislating on the special social security contribution which was the subject of the royal decrees challenged before the *Conseil d'Etat*, the legislator's intention was to regulate by law an area of jurisdiction the delegation of which had been contested. (B.7)

However, at the same time, the statutory provisions in question prevent the *Conseil d'Etat* from taking a substantive decision on the possible unlawfulness of the said royal decrees and create a distinction, where access to the *Conseil d'Etat* is concerned, between the category of citizens to whom these royal decrees applied and other citizens. (B.4)

The fact that the provisions adopted by the legislator concerning the special social security contribution pursue a markedly different purpose from the royal decrees that were challenged before the *Conseil d'Etat* can nevertheless justify the difference of treatment. (B.8 and B.9)

5. Supplementary information:

Compare Judgments Nos. 16/91 of 13 June 1991, 33/93 of 22 April 1993 and 34/93 of 6 May 1993.

1. Identification: Belgium - Court of Arbitration - 17 June 1993 - Judgment No. 48/93 - Moniteur belge, - 1993.

2. Keywords in the systematic thesaurus:

INSTITUTIONS - Federalism and regionalism - Distribution of powers - System.

3. Keywords in the alphabetical index:

Apportionment of powers between the federal State and its components / Matters assigned to the national legislator by the Constitution.

4. Summary:

Article 3 ter, 59 bis and 107 quater of the Constitution and Sections 4 to 11 of the Special Act of 8 August 1980 on institutional reform gave the decree legislators of the communities and regions the power to regulate a number of matters by decree. Section 19, paragraph 1, of the Special Act of 8 August 1980 stipulates however that "the decree regulates the areas with which sections 4 to 11 are concerned, without prejudice to the areas of jurisdiction which the Constitution assigns to the law". Consequently, unless special, express authority is given by the special and ordinary institutional reform Acts, the decree can regulate those matters assigned to it only on condition that they do not infringe in any way on the areas of jurisdiction assigned to the law by the Constitution. (B.2)

The possibility given to the Legislative Councils of the communities and regions, by virtue of section 10 of the special Act of 8 August 1980, to adopt statutory provisions relating to matters for which they do not have jurisdiction, may not apply to areas of jurisdiction which the Constitution assigns to the law. (B.2)

5. Supplementary information:

Settled case-law. Section 19 of the above-cited Act of 8 August 1980 has been amended by the Special Act of 16 July 1993 relating to the completion of the federal structure of the State, in order to authorise Councils to use section 10 (implicit powers) for matters assigned by the Constitution to the legislator.

1. Identification: Belgium - Court of Arbitration - 1 July 1993 - Judgment No. 53/93 - Moniteur belge, 26 August 1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Principle of reasonableness.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to social security.

SOURCE OF CONSTITUTIONAL LAW - Categories - Written rules - European Community law.

3. Keywords of the alphabetical index:

Equality between sexes / Pensions.

4. Summary:

Although discrimination must be assessed in relation to Belgium's specific situation, the current state of European law, the outcome of which is that no directive on equal treatment between men and women in social security matters is applicable to the legal survivor's pension, is an indication that, by ending discrimination from 1 January 1984 between widows and widowers with regard to entitlement to a survivor's pension under the social security scheme for employees, the legislator has not taken a measure such as to maintain the effects of this discrimination beyond a reasonable length of time.

1. Identification: Belgium - Court of Arbitration - 8 July 1993 - Judgment No. 56/93 - Moniteur belge, 27 August 1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional jurisdiction - Statute and organisation - Sources - Institutional Acts.

CONSTITUTIONAL JUSTICE - The subject of review - Quasi-constitutional legislation.

3. Keywords of the alphabetical index:

Interlocutory judicial review of legislation.

4. Summary:

The Court which is competent to deal with an appeal or a preliminary point of law relating to the compatibility of legislation with Articles 6 and 6 bis of the Constitution guaranteeing the principles of equality and non-discrimination is also competent to review, on an interlocutory basis, the compatibility with these constitutional provisions of Section 87, paragraph 1, of the Special Act of 6 January 1989 on the Court of Arbitration, which provides that the possibility of intervening in preliminary proceedings is limited to persons able to show that they have an interest before the Court which raised the preliminary point of law. (B.2.4)

5. Supplementary information:

The Court thus reviewed the conformity of its own institutional act with the Constitution.

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1. Identification: Belgium - Court of Arbitration - 8 July 1993 - Judgment No. 56/93 - Moniteur belge, 27 August 1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Procedure - Parties - Locus standi.

FUNDAMENTAL RIGHTS - Civil and political rights - Right of access to courts.

3. Keywords of the alphabetical index:

Trade Union Association / Collective interest / *De facto* association.

4. Summary:

*De facto* associations have standing before the Court only if the authority recognises that these organisations, having a genuine social existence, also have certain powers. Trade union associations, which are *de facto* associations, do not in principle have standing before the Court in preliminary proceedings. No provision of law gives trade union associations such general capacity to take legal proceedings, enabling them to defend the collective and individual interests of a group of workers (here the category of employees) in objective contentious proceedings (in this case before the Court). (B.3.2)

5. Supplementary information:

See Judgments Nos. 71/92 of 18 November 1992 and 62/93 of 15 July 1993.



1. Identification: Belgium - Court of Arbitration - 8 July 1993 - Judgment No. 56/93 - Moniteur belge, 27 August 1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Historical interpretation.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

3. Keywords of the alphabetical index:

Distinction between workers and employees.

4. Summary:

By making a distinction between workers and employees on the basis on the principally manual or intellectual nature of their work, the legislator based a difference of treatment on a criterion that would be difficult to justify reasonably and objectively if it had been introduced today, but which has its origins in the beginnings of social law. However, it may not be concluded from this that by failing to remove this distinction immediately and totally from the Act of 3 July 1978 and by merely attenuating it, the legislator infringed Articles 6 and 6 bis of the Constitution. (B.6.2.1)

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1. Identification: Belgium - Court of Arbitration - 8 July 1993 - Judgment No. 57/93 - Moniteur belge, 28 August 1993.

2. Keywords of the systematic thesaurus:

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

3. Keywords of the alphabetical index:

Equality.

4. Summary:

In order to assess the compatibility of the regulations at issue with Articles 6 and 6 bis of the Constitution which guarantee the principles of equality and non-discrimination, the Court must first examine whether the categories of people between whom inequality is alleged are sufficiently comparable. (B.7 and B.10)

5. Supplementary information:

Settled case-law.

1. Identification: Belgium - Court of Arbitration - 8 July 1993 - Judgment No. 57/93 - Moniteur belge, 28 August 1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Proportionality principle.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Civil and political rights - Right of access to courts.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - European Convention on Human Rights.

3. Keywords of the alphabetical index:

Dismissal.

4. Summary:

The Companies Act provides that the dismissal of protected workers (trade union representatives) for economic or technical reasons is subject to the authorisation of an equi-representative body made up of representatives of employers and workers, which must take a unanimous decision within two months. If the said body has not taken a decision by the statutory deadline, the employers and protected workers may take the matter to the industrial tribunal. If the said body takes the decision by the statutory deadline, no legal remedy is provided for. The distinction complained of has an objective and reasonable justification; there is however a disproportion in that there is a discriminatory infringement of the right, guaranteed to everyone by virtue of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to have a decision determining his civil rights brought before a Court. (B.11 and B.13)

1. Identification: Belgium - Court of Arbitration - 15 July 1993 - Judgment No. 62/93 - Moniteur belge, 5 August 1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Proportionality principle.

INSTITUTIONS - Army and police forces.

INSTITUTIONS - Miscellaneous - Political parties.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of expression.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of association.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - European Convention on Human Rights.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - Other international sources.

3. Keywords of the alphabetical index:

International Covenant on Civil and Political Rights / Freedom of expression / Freedom of association / *Gendarmerie*.

4. Summary:

Articles 14 and 20 of the Constitution, guaranteeing freedom of expression and association, do not preclude the possible imposition of certain restrictions on civil servants in respect of those freedoms, but such restrictions must meet the requirements set out in Articles 10.2 and 11.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms and in Articles 19.3 and 22.2 of the International Covenant on Civil and Political Rights.

The statutory provision which provides that active staff members of the operational corps of the *gendarmerie* must "refrain in all circumstances from publicly manifesting their political opinions and engaging in political activities", a provision which concerns political stances and activities of a distinctly public nature, is not manifestly disproportionate to the objective pursued, which is to guarantee an efficient police service that is undeniably impartial, on behalf of the authorities and the citizens, in order to safeguard the proper functioning of democracy.

However, the statutory provision which prevents these persons from belonging to or assisting political parties, or movements, bodies, organisations or associations pursuing political objectives is, by reason of its general character, manifestly disproportionate to the objective pursued, since membership of a political party, a movement or an organisation pursuing political objectives, and other non-public forms of cooperation, are not such as to threaten the neutrality of the force or impair its preparedness. (B.3.3-B.3.6)

1. Identification: Belgium - Court of Arbitration - 15 July 1993 - Judgment No. 62/93 - Moniteur belge, 5 August 1993.

2. Keywords of the systematic thesaurus:

INSTITUTIONS - Army and police forces.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of association.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Freedom of trade unions.  
SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - European Convention on Human Rights.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - Other international sources.

3. Keywords of the alphabetical index:

International Covenant on Civil and Political Rights / International Covenant on Economic, Social and Cultural Rights / European Social Charter / Freedom of association / Civil service / *Gendarmerie*.

4. Summary:

Article 11.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22.2 of the International Covenant on Civil and Political Rights authorise lawful restrictions on the exercise, by members of the police, of the right to freedom of association, including the right to form and to join trade unions for the protection of their interests. The content of Article 8.2 of the International Covenant on Economic, Social and Cultural Rights and Article 5 of the European Social Charter is similar. Likewise, Article 20 of the Belgian Constitution, which guarantees freedom of association, does not prevent restrictions being imposed on the exercise of the right to form and belong to trade unions in the case of civil servants in general and, in particular, active staff members of the operational corps of the police, primarily by reason of the requirements imposed by the proper operation of the public service. Such restrictions are only admissible, however, in so far as they are necessary in a democratic society. (B.3.8)

1. Identification: Belgium - Court of Arbitration - 15 July 1993 - Judgment No. 62/93 - Moniteur belge, 5 August 1993.

2. Keywords in the systematic thesaurus:

INSTITUTIONS - Army and police forces.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - The right to strike.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - Other international sources.

3. Keywords of the alphabetical index:

European Social Charter / Right to strike / *Gendarmerie*.

4. Summary:

Under Article 6 of the European Social Charter, Belgium has undertaken to guarantee the "right of workers and employers to collective action in cases of conflicts of interest, including the right to strike (...)". Under Article 31 of the Charter, the effective exercise of the rights and principles, including the right to strike, may be subject to restrictions other than those specified in Part II which are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health, or morals. The statutory provision which prohibits any form of strike by active staff members of the operational corps of the *gendarmerie* meets a need in a democratic society to protect the rights and freedoms of others and to protect the public interest. (B.3.11 and B.3.12)

FRANCE - CONSTITUTIONAL COUNCIL
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Reference period: 1 April 1993 to 31 August 1993

### STATISTICS

90 decisions consisting of:

- nine decisions entailing supervision of the constitutional compatibility of legislative texts referred to the Constitutional Council on the initiative of parliamentarians under the provisions of Article 61, paragraph 2 of the Constitution;
- seventy-nine decisions taken under Article 59 of the Constitution, by which the Constitutional Council, exercising its powers to issue rulings in disputes over electoral matters, responded to 124 applications to annul electoral operations relating to 79 constituencies;
- two decisions on cases referred to it by the National Commission on election campaign accounts with a view to declaring certain candidates automatically ineligible for one year for having failed to submit their campaign accounts by the deadline prescribed under the Act of 15 January 1990 on maximum election campaign expenditure, or whose accounts were submitted out of time or whose accounts were submitted in time but were justifiably rejected by the initial Commission.

### IMPORTANT DECISIONS

1. Identification: France - Constitutional Council - Decision No. 321 DC 1993 of 20 July 1993 - Act reforming the nationality code.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Subject of review - Quasi-constitutional legislation.

CONSTITUTIONAL JUSTICE - Subject of review - Laws and other rules having the force of law.

FUNDAMENTAL RIGHTS - Civil and Political Rights - Right to a nationality.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules.

3. Keywords of the alphabetical index

Algeria / Law on aliens / Incapacity / Measures to prevent entry to French territory / Sanctions / National service / Overseas territories / Preamble.

4. Summary:

Censure for failure to take account of Article 8 of the Declaration of the Rights of Man and of the Citizen.

The following sanctions were considered to be manifestly disproportionate to the facts:

- Prohibition for foreigners of between 18 and 21 years of age, born on French soil and satisfying the legal conditions for residence, to acquire French nationality by a mere declaration to that effect, on the sole ground that they had previously been the subject of a removal order or an unrepealed or unrevoked compulsory residence order;
- Prohibition for foreigners having been the subject of these same disciplinary measures to apply for French nationality through another channel.

On the other hand, the requirements for young foreigners born in France to express their desire to acquire French nationality is not contrary to any constitutional principle enshrined in the laws of the Republic (*jus soli*).

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1. Identification: France - Constitutional Council - Decision No. 93-324 DC of 3 August 1993 - Act on the status of the Banque de France and on the activities and monitoring of credit institutions.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between state authorities.

CONSTITUTIONAL JUSTICE - Subject of review - Laws and other rules having the force of law.

INSTITUTIONS - Economic duties of the State.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - Constitution.

SOURCES OF CONSTITUTIONAL LAW - Hierarchy - Treaties and constitutions.

3. Keywords of the alphabetic index:

Government / Banking institutions / National currency / Parliament / Issuing rights / Maastricht Treaty.

4. Summary:

The Council considered that, until the Maastricht Treaty had entered into force, the legislator could not confer powers on the "Banque de France" to "define the monetary policy of France, an essential component of economic policy, without violating the provisions of Articles 20 and 21 of the Constitution which assign responsibility to the government for determining and conducting national policy. Consequently the provisions of sections 1 and 7 of the Act were partially censured.

1. Identification: France - Constitutional Council - Decision No. 93-323 DC of 5 August 1993 - Act on identity checks and verifications.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Subject of review - Laws and other rules having the force of law.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

3. Keywords of the alphabetical index

Identity checks / Schengen Convention / Personal liberty / Public order / Administrative police / Criminal police.

4. Summary:

The Council declared as unconstitutional the possibility embodied in the Act whereby permanent identity checks could be carried out at a distance of more than 20 km inside the frontiers of France with other States party to the Schengen Convention. It considered that, in the absence of appropriate justification based on political security requirements, this possibility constituted an excessive interference with individual freedom.

On the other hand, the Constitutional Council rejected all the other complaints submitted by those appealing against the identity checks carried out by the criminal police and those carried out by the administrative police, although certain reservations were expressed with regard to the latter. It reiterated that the practice of generalised discretionary identity checks would be incompatible with respect of personal freedom. In connection with this reservation, the Council considered that verification of a person's identity could be carried out irrespective of the latter's behaviour.



1. Identification: France - Constitutional Council - Decision No. 93-326 DC of 11 August 1993  
- Act amending Act No. 93-2 of 4 January 1993 reforming the code of criminal procedure.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Subject of review - Laws and other rules having the force of law.

INSTITUTIONS - Courts - Procedural safeguards - Rights of the defence.

INSTITUTIONS - Courts - Ordinary courts - Procedure.

INSTITUTIONS - Courts - Ordinary courts - Officers of the court.

3. Keywords of the alphabetical index:

Lawyer / Policy custody / Serious offences / Motivation / Criminal investigation officer / President of the Indictments Division / Procedure / Retrial on account of a procedural defect.

4. Summary:

The Constitutional Council censured two provisions of this Act, asserting that the right of persons in police custody to consult a lawyer forms part of the exercise of the rights of defence. The Council also censured the section making allowance for placing children under 13 years of age in police custody, considering that such a measure was contrary to Article 9 of the 1789 Declaration which lays down that any restriction which is not necessary to ensure the supervision of a person under arrest should be severely punished by the law.

1. Identification: France - Constitutional Council - Decision No. 93-325 DC of 13 August 1993  
- Act on curbing immigration and on conditions governing the entry, accommodation and residence of foreigners in France.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Subject of review - Laws and other rules having the force of law.

FUNDAMENTAL RIGHTS - Governing principles - Entitlement to rights - Nationals and foreigners.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of movement.

FUNDAMENTAL RIGHTS - Civil and political rights - Right to family life.

FUNDAMENTAL RIGHTS - Civil and political rights - Right of asylum.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to housing.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to social security.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - Constitution.

3. Keywords of the alphabetical index:

Schengen Convention / Immigration / Polygamy / Social protection / Family unification / Administrative confinement / Judicial confinement / Remedies / Right to marriage / Equality of penalties / Preamble.

4. Summary

With regard to personal freedom and security:

- the Council censured the section of the Act according to which any order to reject a person would automatically be accompanied by a ban on re-entry to French territory for a period of one year, without consideration being given to either the gravity of the behaviour motivating the order, or the possibility of exempting the person concerned, or even allowing for a variation in the duration of the ban;
- the Council also censured the provision making it possible to extend by three days the seven-day period already authorised for the administrative confinement of a foreigner who has been served with an order of expulsion or removal to the frontier;
- the Council censured the provision instituting a new procedure entailing judicial confinement of three months applicable to foreigners found guilty of having resided unlawfully in France, on the grounds that this procedure which totally deprives an individual of his liberty cannot be subject to fewer guarantees than those made available to persons remanded in custody.

With regard to the right to normal family life:

The Council condemned two provisions of the Act: firstly, the section prohibiting any student from taking advantage of opportunities of family unification as being contrary to the preamble of the 1946 Constitution and, secondly, the one imposing on foreigners residing in France the requirement to allow two years to elapse after a divorce or separation before they may bring a new spouse into the country.

With regard to the right of asylum:

The Council confirmed that the right to asylum recognised under the fourth sub-paragraph of the preamble of the 1946 Constitution implies that aliens claiming this right should be authorised to remain provisionally in the country to enable them to exercise their rights of defense until a final decision has been taken on their application. Consequently, several provision of sections 24, 45 and 46 of the Act which deprived certain asylum seekers of their right to apply to the OFPRA (French Office for the Protection of Refugees and Stateless Persons) were censured, irrespective of the conditions for applying the Schengen and Dublin Conventions.

With regard to freedom of marriage:

The Council considered that the provision in section 31 of the Act amending the Civil Code infringed the freedom of marriage whereby a public registrar having serious reason to believe that the proposed marriage had a purpose other than matrimonial union was obliged to refer the matter to the public prosecutor who might then decide, without such decision being open to appeal, that the marriage ceremony should be postponed for a period of three months.

With regard to the social rights of foreigners:

The Council considered that the legislator was not infringing the principle of equality by distinguishing between foreigners lawfully resident and those whose situation was unlawful, provided that certain forms of social assistance were provided to ensure the application under all circumstances of the social principles of general scope defined in the preamble to the 1946 Constitution.

5. Additional information:

On the basis of an opinion submitted by the Conseil d'Etat on 25 September 1993, the government considered that it would be necessary to revise the Constitution in order to be in a position to apply its proposed regulations on the right of asylum. This procedure is now in progress.

HUNGARY - CONSTITUTIONAL COURT
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Reference period: 1 April - 31 August 1993

NUMBER OF DECISIONS

Decisions by the plenary Court published in the official gazette (Magyar Közlöny): 13  
Decisions by chambers published in the official gazette: 14  
Number of other decisions by the plenary Court: 12  
Number of the other decisions by chambers: 15  
Number of other (procedural) orders: 45  
Total number of decisions: 99

NOTE: One member of the Court, Justice Géza HERCZEGH was elected in May 1993 to the International Court of Justice in The Hague, therefore the Court now functions with nine members.

The Court was in summer recess from 20 July to 29 August.

SUBJECT MATTER AND SUMMARY OF IMPORTANT DECISIONS

1. Identification: Hungary - Constitutional Court - Decision No. 26/1993. (IV.29.) AB határozat - Pension Case.

2. Keywords of the systematic thesaurus:

INSTITUTIONS - Social State.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to social security.

3. Keywords of the alphabetical index:

Social security.

4. Summary:

The Parliament decided to increase the amount of old-age pensions and other allowances, but fixed the maximum of the increase both in percent and in nominal sum. The petitioners claimed that this violated their right to social assistance provided by the Constitution. The Constitutional Court's ruling pointed out that the social insurance - in part inherited from socialism - still has a mixed nature: partly it is an insurance, partly a social benefit. No one has a constitutional right to the protection of the same living standard.

5. Supplementary information:

The Court is split on the issue of social rights; in this case four justices out of ten wrote dissenting opinions.

1. Identification: Hungary - Constitutional Court - Decision No. 23/1993.(IV.15.) AB határozat  
- Rules of Police Service Case.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Rules issued by the executive.  
INSTITUTIONS - Army and police forces.  
FUNDAMENTAL RIGHTS - Civil and political rights - Right to family life.

3. Keywords of the alphabetical index:

Rules of police service / Right to marriage.

4. Summary:

The rules of the police service are published in Hungary as a supplement to a ministerial decree. The service rules require policemen to request permission from the commander before marriage. The Court declared that the right to marriage is protected by the Constitution as a part of the general right to personality. The protection of marriage provided by the Constitution comprises the freedom of marriage too. This right can be restricted, especially under the special conditions of military service, but only by the legislature. The supplement of a ministerial decree is not a constitutional way to limit a basic right, therefore the Court abolished the challenged provisions.

5. Supplementary information:

Decision by a three-member chamber of the Constitutional Court.

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1. Identification: Hungary - Constitutional Court - Decision No. 29/1993. (V. 4.) AB határozat.

2. Keywords of the systematic thesaurus:

FUNDAMENTAL RIGHTS - Civil and political rights - Right to property.

3. Keywords of the alphabetical index:

Right to property.

4. Summary:

The Court declared unconstitutional and abolished Government and ministerial decrees issued in 1984 regulating the distribution of office spaces and other premises. This system was leftover from the socialist economy of shortage characterised by aggressive State intervention into property relations. The Court protects the right to property as a fundamental right.

5. Supplementary information:

Settled case-law of the Court. Two justices wrote together a dissenting opinion.

1. Identification: Hungary - Constitutional Court - 38/1993. (VI. 11.) AB határozat, Magyar Közlöny (Official Gazette) No. 75/1993.

2. Keywords of the systematic thesaurus:

INSTITUTIONS - Courts - General organisation.

INSTITUTIONS - Courts - Procedural safeguards - Independence.

3. Keywords of the alphabetical index:

Independence of judges / Organisation of the judiciary / Appointment of judges.

4. Summary:

Under Hungarian law, the Minister of Justice has several powers in appointing the presidents of the courts at different levels. The amendment to the Judiciary Act in 1991 introduced new self-governing institutions (judicial councils), but did not abrogate the Minister's powers. Therefore claimants challenged the constitutionality of the Act. The Constitutional Court upheld the validity of the law, but defined the constitutional requirements of the appointments. The appointment of judges by another branch (e.g. the executive) must be counterbalanced by the judiciary or by another branch. In the case of participation by the judiciary, their opinion should substantially determine the appointment.

5. Supplementary information:

Two justices wrote dissenting opinions, one justice attached a concurring opinion.

1. Identification: Hungary - Constitutional Court - 41/1993. (VI. 30.) AB határozat, Magyar Közlöny (Official Gazette) No. 85/1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Legislative or quasi-legislative regulations.

CONSTITUTIONAL JUSTICE - Constitutional proceedings.

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Principles of legality.

INSTITUTIONS - Principles of State organisation - Rule of law.

FUNDAMENTAL RIGHTS - Civil and political rights - Non-retrospective effect of criminal law.

3. Keywords of the alphabetical index:

Statute of limitation / Non-retroactivity of criminal laws.

4. Summary:

After the Constitutional Court turned down in March 1992 a bill that aimed to lift the statute of limitations for political crimes, the Parliament voted an authoritative resolution on the interpretation of the statute of limitations. The scope of the resolution was to exempt the period between 1944 and 1989 from the term of limitation. The Court declared the regulation unconstitutional both for formal and substantive reasons. An authoritative resolution of Parliament does not meet the requirements set for a legislative act. It cannot regulate questions concerned with the basic rights of citizens, and violates the principles of legality and legal certainty. Substantively the resolution was found to be unconstitutional too because it is *ex post facto* legislation, making retroactive criminal prosecution possible.

5. Supplementary information:

One of the justices wrote a dissenting opinion. Second ruling of the Court on the same subject.

1. Identification: Hungary - Constitutional Court - 42/1993. (VI. 30.) AB határozat, Magyar Közlöny (Official Gazette) No. /1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Type of review  
- Preliminary review.

INSTITUTIONS - Principles of State organisation - Rule of law.

FUNDAMENTAL RIGHTS - Civil and political rights - Non-retrospective effect of criminal law.

3. Keywords of the alphabetical index:

Statute of limitation / Non-retroactivity of criminal laws.

4. Summary:

Parliament enacted a bill in February 1993 amending the Criminal Procedure Act of 1973 making it obligatory for public prosecutors to level accusations in certain cases even if they had become statute-barred. The President of the Republic did not sign the bill but turned to the Constitutional Court for prior control of constitutionality. The Court turned down the bill by the same arguments that are set forth in decision No. 11/1992. (III. 5.) AB határozat. The bill violates the principle of the rule of law, legality and legal certainty.

5. Supplementary information:

One of the justices wrote a dissenting opinion. Third consecutive ruling on the same subject.

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1. Identification: Hungary - Constitutional Court - 48/1993. (VII. 2.) AB határozat, Magyar Közlöny (Official Gazette) No. 87/1993.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Type of review  
- Preliminary review.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of expression.

FUNDAMENTAL RIGHTS - Civil and political rights - Rights in respect of the audiovisual media and other means of mass communication.

3. Keywords of the alphabetical index:

Access to media.

4. Summary:

A bill regulating the distribution of radio and television broadcasting frequencies was sent to the Constitutional Court by the President of the Republic for preliminary review. The Court upheld most of the bill's provisions. It declared, however, that the Government had not fulfilled its duty to regulate the rules for the distribution of licences for local radio and TV studios.

5. Supplementary information:

One of the justices dissented, joined by another justice.



ITALY - CONSTITUTIONAL COURT
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Reference period: 1 April to 31 August 1993

1. Identification: Italy - Constitutional Court - 2/15 April 1993 - Judgment No. 163.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Regional measures.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Procedure - General characteristics - General conditions governing procedure.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality or unconstitutionality.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

3. Keywords in the alphabetical index:

Principal judgment / Procedural defects / Limits of interlocutory order / Equality between sexes / Access to employment in the public service / Identical (physical) requirements / Indirect discrimination.

4. Summary:

1. The established precedent of the Court is not to examine possible defects in the introduction of an *a quo* judgment; the autonomy of the interlocutory order concerning constitutionality vis-a-vis the principal judgement does not permit the Court to take the place of the judge who referred the case to it in assessing the conditions laid down for the proceedings which preceded the decision on constitutionality. The Court only declares inadmissible those cases where, in contrast to the case being considered, the arguments used by the *a quo* judge to declare himself competent are implausible.
2. Article 3, paragraph 1 of the Constitution lays down the fundamental and therefore inviolable principle which is designed to guarantee the equality of all citizens before the law, and to ensure that there is no discrimination in the legal treatment of persons by reason of sex or other considerations mentioned in this constitutional rule. Moreover, the second paragraph of Article 3 of the Constitution establishes a criterion for interpretation which affects the scope of the principle of technical equality, in the light of any results it produces. It is based on the primary constitutional commitment to removing the *de facto* limitations on equality to ensure ultimately the self-determination of the individual and "effective participation" in the life of the community.
3. By virtue of the principle of equality, the constitutional court is required to verify that the following criteria have not been violated: the correctness of the classification adopted by the legislator having regard to the subjects concerned; provision by the legislator to ensure the homogeneous application of the law on the basis of the fundamental characteristics of the persons to whom it applies; proportionality of the intended legal treatment in relation to the classification established by the legislator, in the light of the purpose of the rule in question.

4. Since it lays down a strict minimum height for men as well as for women as one of the conditions for participation in a competition (for senior fire brigade officer), the legislative rule challenged is applicable to a general category of citizens, irrespective of sex. The assumption on which the rule is based is in fact false, i.e. the absence of a difference in average physical stature between women and men; moreover, the rule is also based on the claim, which is also false, that differences in physical stature are irrelevant to the legal treatment in question. Because of the statistically established difference between men and women, the rule in question is a source of "indirect discrimination" and is therefore unconstitutional.

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1. Identification: Italy - Constitutional Court - 2/12 April 1993 - Judgment No. 179.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Laws and other rules having the force of law.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Referral by a court.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality or unconstitutionality.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Civil and political rights - Right to family life.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to just and decent working conditions.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to health.

3. Keywords in the alphabetical index:

New born children / Parents / Equality / Fathers / Right to paternity leave.

4. Summary:

The child is an autonomous subject with rights which legislation on protection must uphold. Therefore, he has also the right to protection where the contact and affection he needs for personal development are concerned. The father, too, should be considered as being capable of providing him with material assistance and emotional support. The arrangements which provide leave for working mothers are not confined, notwithstanding the reference in text, to nursing and providing for the other biological needs of the new-born child, but cover all forms of assistance to the child. The father, therefore, should also have the right to periods of leave to take care of his child during its first year of life, which alternate with those of the mother, provided that the mother is also employed and relinquishes her own leave.

1. Identification: Italy - Constitutional Court - 19/27 April 1993 - Judgment No. 195.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Regional measures.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Referral by a court.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality and unconstitutionality .

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of worship.

3. Keywords in the alphabetical index:

Religious denominations / Advantages / Town planning / Agreements between religious denominations and the State.

4. Summary:

1. The intervention of public authorities in religious activities designed to facilitate the exercise of the right to worship - which are an expression of the fundamental and inviolable right to religious freedom explicitly guaranteed by Article 19 of the Constitution - must respect the supreme principle of the secular nature of the State, which is one of the characteristics of the form of State established by the Constitution of the Republic. (see Judgment No. 203/1989).

2. All religious denominations are equally free before the law, including denominations which display no desire to establish an agreement with the State (Article 8, paragraph 3 of the Constitution) or which have not succeeded in doing so, as well as denominations which take the form of simple communities of believers which are not regulated by special statutes.

Where the State intervenes in town planning matters to put up buildings or provide facilities intended for worship by allocating funds from urban taxes, the exclusion of a religious denomination from these advantages because it fails to meet the conditions laid down in paragraphs 2 and 3 of Article 8 of the Constitution, violates the first paragraph of the article in question. It is nonetheless clear that religious denominations do not automatically qualify for these advantages. Qualification can result simply from common regard, from public recognition or from the fact that a denomination qualifies by virtue of its status.

1. Identification: Italy, Constitutional Court - 5/19 May 1993 - Order No. 247.

2. Keywords in the systematic thesaurus:

INSTITUTIONS - Courts - Ordinary courts - Criminal courts.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

3. Keywords in the alphabetical index:

Discretionary power of the legislator / Inadmissibility of the question of constitutionality.

4. Summary:

1. When Act No. 689/1981 (changes in the penal system) came into force, the initial stipulation (contained in Section 54 of Act 689 of 24 November 1981) that alternative penalties would only be imposed in place of imprisonment for offences tried in the district courts was justified by the fact that these courts dealt with offences which could generally be regarded as minor in comparison with those dealt with by other criminal courts.
2. Following the qualitative and quantitative extension of the competence of the district courts, to continue to restrict alternative penalties to offences which come under the jurisdiction of the district courts could lead to discrimination, which would violate the principle of equality (Article 3 of the Constitution), between those subject to the jurisdiction of the district courts and those subject to the jurisdiction of the criminal courts.
3. However, a declaration of unconstitutionality would nullify the criterion on which the system of alternative penalties is based, without the Court being able to substitute another criterion set out in the Constitution. The legislator is therefore required, by virtue of his discretionary power, to establish a system of rules for alternative penalties and eliminate the imbalances which have arisen and which compromise the principle of equality. The case submitted to the Court must therefore be declared to be clearly inadmissible.

1. Identification: Italy - Constitutional Court - 24/27 May 1993 - Judgment No. 250.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Regional measures.

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Principle of reasonableness.

3. Keywords in the alphabetical index:

Regional staff / Recruitment examinations / Principle of sound administration.

4. Summary:

1. The examination of the constitutionality of laws pursuant to an alleged violation of the principles of impartiality and the proper functioning of the public administration laid down in Article 97 of the Constitution involves the verification of the "reasonableness" and "impartiality" of the rule whose constitutionality is being tested (2).
2. The clause of a regional act that provides for the permanent establishment of staff who were hired on a fixed-term contract following a normal competition and who passed the tests to evaluate their skills and general ability cannot be regarded as the result of an unreasonable choice. The provision respects the principle of public competition and, moreover, by stipulating that the number of permanent staff must not exceed the number allocated to the administration, complies with the principle of the proper functioning of public administrations set out in Article 97 of the Constitution (2).
3. However, the provision which takes as the basis for calculating seniority the starting date of the temporary contract rather than the date of establishment must be declared unconstitutional. The provision is detrimental to the interests of persons who joined the administration by way of competition after the starting date of those hired on temporary contracts but before the latter were established, and fails to respect fully the principle of the proper functioning of the administration laid down in Article 97 of the Constitution (5).

1. Identification: Italy - Constitutional Court - 24/27 May 1993 - Judgment No. 251.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between central government and its subdivisions.

CONSTITUTIONAL JUSTICE - The subject of review - Regional measures.

INSTITUTIONS - Federalism and regionalism - Distribution of powers - System.

3. Keywords in the alphabetical index:

Regions / Emigration.

4. Summary:

1. The provision of funds by a region to associations established in Italy or abroad for the organisation of activities, particularly for emigrants from that region and their families, does not fall within the sphere of international relations reserved for the State and for which the regions are not competent (2).
2. The measure which provides subsidies from the regions for emigrant associations and organisations which are located exclusively outside Italy does not violate the territorial limits of the powers of the region. The adoption of social and cultural support measures for emigrant groups constitutes a regional interest, even where these measures are applied outside the territorial boundaries of the region (2).
3. As a political body representing the regional community, the region can provide funds for any affairs which are of interest to the regional community, even if these affairs are not part of the sectors for which the regions are competent under Article 117 of the Constitution (2).

1. Identification: Italy - Constitutional Court - 26 May/1 June 1993 - Judgement No. 260.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between central government and its subdivisions.

INSTITUTIONS - Federalism and regionalism - Basic principles.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Commercial and industrial freedom.

3. Keywords in the alphabetical index:

Trentino-Alto Adige region / Ethnic proportionality / Civil service.

4. Summary:

1. The principles of ethnic proportionality in the organisation of public services and bilingualism in public service employment and in the public services, as set out in Articles 89 and 100 of the Statutes of Trentino-Alto Adige, which have constitutional force, do not limit the power of Parliament to undertake reforms of the public administration, including privatisation of what were hitherto public services and therefore subject to the principle of ethnic proportionality within the confines of the Trentino-Alto Adige region (2).
2. When a government act removes a public service from direct or indirect State administration and contracts it out to private companies, the staff of these companies, whose freedom to organise their work is guaranteed by Article 41 of the Constitution, are no longer covered by Article 89 of the special Statutes of the Trentino-Alto Adige region which applies only to staff employed by State administrations (2).

NORWAY - SUPREME COURT
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1. Identification: Norway - The Supreme Court - Judgment 31 March 1993 - Lnr 53/1993, nr 342/1991.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Other.

3. Keywords of the alphabetical index:

Fundamental rights / Economic rights / Right to compensation in case of expropriation.

4. Summary:

An area was preserved in accordance with the nature conservation act, section 5, in order to save a characteristic landscape. The preservation implied that the landowners were not allowed to build houses intended for sale or rent. The landowners demanded compensation. The Supreme Court decided unanimously that these limitations in the exercise of property rights render no right to compensation according to the Constitution's provision No. 105 stating the right to full compensation in case of expropriation.



<b>POLAND - CONSTITUTIONAL COURT</b>
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Reference period 1 April - 31 August 1993

STATISTICAL DATA

- Number of decisions concerning the conformity of legislative acts with the Constitution: 5
- Number of provisions concerning the discontinuance of legal proceedings because a normative act has lost its binding force before the Constitutional Tribunal adjudication, as well as when a case is left pending or without cognizance: 8
- Number of resolutions of the Constitutional Tribunal on the establishment of the generally binding interpretation of laws: 5

SUBJECT MATTER OF IMPORTANT DECISIONS

P 7/92/13 July 1993 / - Social justice, Sufficient standard of living.  
K 7/92/20 April 1993 / U 12/92/20 April 1993 / - Freedom of conscience and creed.

OTHER INFORMATION

By the virtue of the order of the President of the Republic of Poland of 29 May 1993, the Parliament (the Sejm and the Senat) was legally dissolved and new elections were announced for 19 September 1993. Since the specified categories of the decisions of the Tribunal must also be considered by the Sejm (decisions relating to the laws and other rules having the force of law), they are still ineffective and not executed.

1. Identification: Poland - Constitutional Court - Decision of 23 February 1993 (Case No. K 10/92).

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Legislative or quasi-legislative regulations.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body - Other.

INSTITUTIONS - Principles of State organisation.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to social security.

3. Keywords of the alphabetical index:

Legislative regulations / Ombudsman / Social security / Principle of social justice.

4. Summary:

The Law on Farmers' Social Security entitled "relatives" of farmers, who are not subject to paying social security as a person who farms, to one-time compensation for permanent bodily injury which occurs as a result of occasional work with the family's farm.

The law granting the right to compensation to all "relatives" of farmers except the farmer's spouse has been declared contrary to the constitutional principles of equality and social justice.

The fact that the voluntary social security of farmers depends not only on the farmer's payments but also on the continuous income from a farm cannot be declared as inconsistent with the constitutional principle of social justice, especially, as the difference between farmers' payments and the total amount of compensations is covered by donations from the State budget. The law on social security should be modified with respect to the level of economic development of the State.

1. Identification: Poland - Constitutional Court - Decision of 6 April 1993 (Case No. K 7/92).
2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Legislative or quasi-legislative regulations.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body - Other.

INSTITUTIONS - Principles of State organisation.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

3. Keywords of the alphabetical index:

Legislative regulations / Ombudsman / Principle of social justice.

4. Summary:

The provisions of the Law on Employment and Unemployment restricting the rights of an unemployed person due to his/her marital status and income of his/her spouse has been declared to be inconsistent with the Constitution. The provisions in question waived the right to unemployment benefits of any unemployed person who lives with a spouse whose income is more than double the average monthly salary. Differentiation of the social and legal status of unemployed persons has been made on the basis of features unconnected with the chance of finding employment. This cannot be declared as consistent with the principle of social justice and the principle of equality.

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1. Identification: Poland - Constitutional Court - Decision of 20 April 1993 (Case No. P 6/92).
2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - The subject of review - Legislative or quasi-legislative regulations.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body - Other.

INSTITUTIONS - Principles of State organisation - Rule of law.

INSTITUTIONS - Principles of State organisation - Other.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Civil and political rights - Right to property.

3. Keywords of the alphabetical index:

President of the Chief Administrative Court / Principle of social justice.

4. Summary:

The decision relates to the provisions of the law on the administration of State/public lands designated for building. The disposing of land divided into separated plots due to construction reasons has been subject to certain administrative limitations. In the Tribunal's opinion, this has infringed the real estate owner's rights protected by the Constitution.

1. Identification: Poland - Constitutional Court - Decision of 20 April 1993 (Case No. U 12/92).

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the formal validity of normative measures.

CONSTITUTIONAL JUSTICE - The subject of review - Rules issued by the executive.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body - Other.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Type of review - *Ex post facto* review.

INSTITUTIONS - Principles of State organisation - Relations between the State and bodies of a religious or ideological nature.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of conscience.

3. Keywords of the alphabetical index:

Educational system / Freedom of conscience and creed / Separation of the Church and the State / Secularity and neutrality of the State / Right to keep silent in matters of religion and convictions / Ombudsman.

4. Summary:

The decision thereof relates to the conformity of the order of the Minister for National Education on rules of organisation of religious classes in public schools with the Constitution and other laws (above all the Educational System Act, ensuring the organisation of religious education in public schools upon the request made by parents or school-children, as well as the Freedom of Conscience and Creed Guarantees Act). Declaring most of the provisions of the order in question legal and constitutional, the Tribunal observes that:

- the payment of wages to teachers of religion by the State is not prohibited by the Constitution and laws;
- putting the religion (or ethics) marks in official school reports is consistent with the constitutional principle of the separation of the churches and the State and legal principles of secularity and neutrality of the State;
- the possibility of placing religious symbols in class-rooms (e.g. to hang the cross) and to say prayer there does not violate the constitutional provision prohibiting (the forced participation of school-children) in religious activities or rites (in so far as it is done upon the explicit request of school-children);
- the obligation (imposed on the parents or school-children) to declare the wish not to attend religion classes at public schools infringes the limits of law-making competence granted to the Minister of National Education by the Educational System Act.

According to the Tribunal's opinion, the provisions in question are consistent also with international regulations concerning human rights. Two (of 11) justices dissent in part.

1. Identification: Poland - Constitutional Court - Decision of 1 June 1993 (Case No. P 2/92).

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Laws and other rules having the force of law.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Referral by a court.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Type of review - *Ex post facto* review.

INSTITUTIONS - Principles of State organisation - Rule of law.

INSTITUTIONS - Principles of State organisation - Other.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to work.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Other.

3. Keywords of the alphabetical index:

Motherhood and family protection / Social security / Sufficient standard of living / Unemployment benefit / Chief Administrative Court / Principle of social justice.

4. Summary:

The decision thereof relates to the provisions of the Employment and Unemployment Act of 1991, restricting the terms under which the unemployment benefit may be granted to:

1. unemployed persons who are the only family support;
2. unemployed persons who can prove a specified period of employment (20 years - male, 15 years - female employees).

The provisions in question - contrary to regulations previously in force (the Employment Act of 1989, as amended in 1990) - do not entitle those two categories of unemployed to receive benefit for longer than 12 months. Moreover, (3) the privileges of an extended period of welfare, obtained by unemployed persons under the previous regulations, expires within 3 months of the new law coming into force.

Provision (1), which violates the rules of just distribution of goods necessary to meet elementary human needs, has been declared inconsistent with the constitutional principle of social justice. It also has infringed the constitutional duty of the State to protect and care for motherhood and the family as well as State duties with regard to unemployed persons who are ready to work, implied in the constitutional right to work.

With regard to provision (2), the Tribunal has declared the legislator's decision to modify the right to the benefit consistent with the constitutional principle of the rule of law.

Provision (3) has entered into force without the adequate period after promulgation ("*vacatio legis*") and has caused the limitation of the rights acquired by unemployed persons under the regulations previously in force; therefore the provision in question has been declared inconsistent with the constitutional principle of state ruled by law.

1. Identification: Poland - Constitutional Court - Decision of 13 July 1993 (Case No. P 7/92).
2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Laws and other rules having the force of law.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Referral by a court.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Type of review - *Ex post facto* review.

INSTITUTIONS - Principles of State organisation - Other.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

3. Keywords of the alphabetical index:

Equality / Social security / Sufficient standard of living / Unemployment benefit / Chief Administrative Court / Principle of social justice.

4. Summary:

1. The provision of the Employment and Unemployment Act of 1991, determining (with exceptions) the maximum period for receiving unemployment benefit as 12 months, has been declared consistent with the constitutional principle of social justice. However, the responsibility to provide persons whose benefit period has already expired and who still remain unemployed and do not have other maintenance with minimum social support rests with the State. Due to this reason the Tribunal - on its own initiative - has reviewed the constitutionality of the provisions of the Social Aid Act of 1990.
2. The provision of the Employment and Unemployment Act of 1991 prolonging the duration of unemployment welfare for persons of a certain age who are able to prove a specified period of employment (35 years - male, 30 years - female employees) is silent about persons who carried on their own business during their employment period (e.g. taxi drivers) and on that ground were subject to social security and contributed to the unemployment benefit fund (the persons mentioned above are entitled to receive unemployment benefit as long as they obtain the pension and other rights connected with the pension). The provision in question has been declared inconsistent with the constitutional principle of equality and - due to infringement of criteria of just differentiation of citizens - with the constitutional principle of social justice.

<b>PORTUGAL - CONSTITUTIONAL TRIBUNAL</b>
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Reference period: 1 April - 31 August 1993

STATISTICAL DATA

- A.1. Total: 153 decisions, including:
- A.2. Prior review: 7 decisions;
- A.3. Ex post factum abstract review: 12 decisions;
- A.4. Appeals: 115 decisions, including:
  - Questions of merit: 82;
  - Applications: 4;
  - Procedural questions: 29;
- A.5. Claims: 14 decisions;
- A.6. Political parties and coalitions: 3 decisions;
- A.7. Declarations concerning assets and income: 1 decision.

IMPORTANT DECISIONS:

1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 28/4/93 - Decision No. 311/93 - Right to housing - Official Gazette of 22/7/93.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between State authorities.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Type of claim - Claim by a public body - Legislative bodies.

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - The social dimension of the rule of law.

FUNDAMENTAL RIGHTS - Civil and political rights - Right to property.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to housing.

3. Keywords in the alphabetical index:

*Ex post facto* review / Legislative delegation / Right to housing / Private property / Conflict of rights.

4. Summary:

1. The act delegating legislative power to the Government must define the purpose of the delegation, i.e., the goal to be achieved, the area of application and the general principles or policy to be pursued by the Government.

2. The extent to which the right to housing can be exercised depends on options chosen by the State where housing is concerned and is a conditional right corresponding to a political objective which can only be achieved gradually.

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1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 13/7/93 - Decision No. 432/93 - Public housing - Official Gazette of 18/8/93.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between the central government and its subdivisions.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Type of claim - Claim by a public body.

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - The social dimension of the rule of law.

INSTITUTIONS - Principles of State organisation.

INSTITUTIONS - Executive bodies - Territorial administrative decentralisation.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to housing.

3. Keywords in the alphabetical index:

Preventive scrutiny / Right to housing / Local authority / Local authority finances / President of the Republic.

4. Summary:

Housing, regional planning, urbanisation and environment are policy areas where central and local government can act concurrently.



1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 14/7/93 - Decision No. 444/93 - Privatisation - Not yet published.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Type of claim - Claim by a public body - Legislative bodies.

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - The social dimension of the rule of law.

3. Keywords in the alphabetical index:

*Ex post facto* review / Economic organisation / Sectors of ownership of the means of production / Privatisation.

4. Summary:

1. The decision declared unconstitutional an act of the Assembly of the Republic authorising the Government to amend the "act defining the public and private sectors of the economy".

2. It is for the legislator to define the (constitutional) notion of fundamental sectors of the economy from which private undertakings are excluded. Although the legislator enjoys wide-ranging powers in this area, they are not absolute. He must respect the constitutional provisions regulating the organisation of the economy.

5. Supplementary information:

Settled case-law since the 1989 revision of the Constitution.

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1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 14/7/93 - Decision No. 445/93 - Journalists - Official Gazette of 13/8/93.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Type of claim - Claim by a public body.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Freedom of trade unions.

3. Keywords in the alphabetical index:

Journalists / Rights of trade unions / Professional permits / Attorney General of the Republic.

4. Summary:

The rules of the journalists' statutes which empower the journalists' trade union to issue professional permits are unconstitutional because they violate the freedom to form and join trade unions.

1. Identification: Portugal - Constitutional Tribunal - 1st Chamber - 15/7/93 - Decision No. 447/73 - Recourse to the courts - Not yet published.

2. Keywords in the systematic thesaurus:

INSTITUTIONS - Courts - Administrative courts - Procedure.

FUNDAMENTAL RIGHTS - Civil and political rights - Right to a fair trial.

3. Keywords in the alphabetical index:

Litigation / Right of access to courts / Right of appeal.

4. Summary:

1. The right of access to the courts does not necessarily guarantee the right of appeal in all circumstances.

2. Except in criminal proceedings, the right of appeal is not guaranteed by the Constitution and the legislator enjoys a wide margin of discretion in establishing the conditions governing the admissibility of appeals.

5. Supplementary information:

Settled case-law.

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1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 12/8/93 - Decision No. 456/93 - Fight against corruption - Official Gazette of 9/9/93.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body.

CONSTITUTIONAL JUSTICE - Common principles or techniques of interpretation - Proportionality principle.

INSTITUTIONS - Principles of State organisation - Rule of law.

INSTITUTIONS - Courts - Ordinary courts - Public prosecutor.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

3. Keywords in the alphabetical index:

Preventive scrutiny / Fight against corruption / Criminal police / Public prosecutor / Crime prevention / Guarantees of criminal proceedings / Right to protection of privacy / President of the Republic.

4. Summary:

The decision declared unconstitutional the rule (emanating from parliament and dealt with by preliminary review) giving the criminal police, in the fight against economic and financial corruption and crime, the authority to undertake preventive action on its own initiative and without effective court supervision or review, for the purpose of obtaining information or evidence which could justify initiating criminal proceedings.

1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 12/8/93 - Decision No. 457/93 - Statutes governing criminal judges - Official Gazette of 13/9/93.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body.

INSTITUTIONS - Courts - Ordinary courts - Status of judges.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

3. Keywords in the alphabetical index:

Preventive scrutiny / Composition of the Supreme Council of the Judiciary / Proportional representation / Independence of the judiciary / Prohibition on serving judges from exercising other functions / President of the Republic.

4. Summary:

1. The legislative choice of three electoral colleges (one each for Supreme Court judges, Appeal Court judges and ordinary court judges) for the election of a number of judges to the Supreme Council of the Judiciary (one by the first college, two by the second and four by the third) violates the constitutional principle of proportional representation.

2. The constitutional provisions regarding the prohibition on serving judges from exercising other functions and the principles of need, suitability and proportionality where rights, freedoms and guarantees are concerned do not permit the law to give the Supreme Council of the Judiciary, which is an administrative body, wide-ranging powers to curtail the fundamental rights which judges enjoy as citizens.

5. Supplementary information:

In Decision No. 459/93 of 16/8/93, also by preventive scrutiny, the Constitutional Court declared unconstitutional another parliamentary act on the prohibition regarding Audit Court judges.

1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 12/7/93 - Decision No. 458/93 - State secrecy - Official Gazette of 17/9/93.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between State authorities.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body.

INSTITUTIONS - Principles of State organisation - Separation of powers.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

3. Keywords in the alphabetical index:

Preventive scrutiny / State secrecy / President of the Republic.

4. Summary:

A long decision in which the Court analysed the following issues relating to the State secrecy act passed by the Assembly:

- the (exceptional) nature of State secrets;
- State secrecy as a curtailment of the exercise of fundamental rights and freedoms, e.g., the right of access to computerised files, freedom of information, freedom of the press and the right of the citizen to information on acts of the State and other public bodies, the right to be informed by the government or other authorities about the administration of public affairs;
- the procedure and competent bodies for classifying information and documents as State secrets;
- access systems and rules governing State secrets;
- appeals against classification or to obtain access to classified documents and information.

1. Identification: Portugal - Constitutional Tribunal - 2nd Chamber - 14/7/93 - Decision No. 442/93 - Expulsion of foreigners - Not yet published.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

FUNDAMENTAL RIGHTS - Governing principles - Entitlement to rights - Nationals and foreigners.

3. Keywords in the alphabetical index:

Factual scrutiny / Foreigners / Expulsion from the country / Limits on penalties / Drugs.

4. Summary:

The provision whereby conviction for drug trafficking (and other illicit activities) necessarily results, in the case of a foreigner, in expulsion from the country, is not unconstitutional, provided the expulsion does not involve loss of civil, professional or political rights.

5. Supplementary information:

Extension to the case-law of Decisions Nos. 359/93 and 442/93, whereby a regulation of this sort is unconstitutional if applied to citizens of Portuguese-speaking countries or nationals of Member States of the European Union.

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1. Identification: Portugal - Constitutional Tribunal - Plenary Court - 16/6/93 - Decision No. 394/93 - Citizens' rights - Not yet published.

2. Keywords in the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a public body.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Procedure - General characteristics.

FUNDAMENTAL RIGHTS - Governing principles - Limits and restrictions.

3. Keywords in the alphabetical index:

Rights and guarantees of citizens / Archives / Attorney General of the Republic / Abstract review following three decisions of unconstitutionality based on factual review.

4. Summary:

1. The provision limiting the right of access of civil service competition candidates to part of the recruitment panel's report violates the right of citizens to be informed by the administrative authorities and the right of access to archives and administrative files.
2. Although the right of citizens to be informed by the administrative authorities is not absolute, limitations and restrictions should be confined to those which are necessary to protect other rights or interests guaranteed by the Constitution, on the basis of principles of need, suitability and proportionality.

<b>SLOVENIA - CONSTITUTIONAL COURT</b>
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Reference period: 1 April 1993 to 31 August 1993

NUMBER OF DECISIONS

In the period under discussion, the Slovenian Constitutional Court operated in complete composition; from 1 May 1993 all 9 places on the Constitutional Court were filled.

The Constitutional Court had 13 sessions during this period, in which it dealt with 126 cases in the field of protection of constitutionality and legality (cases bearing reference "U-" in the constitutional court register). There were 109 unresolved cases from the previous year at the start of the period (31/3-1993). The Constitutional Court accepted 88 new cases in the period of this report, confirming the trend of a steady increase in the number of new cases over the last four years.

In the same period, the Constitutional Court resolved:

- \* 28 cases, of which there were
- \* 12 Decisions and
- \* 16 Resolutions.

All Decisions (12) have been published in the Official Gazette of the Republic of Slovenia, while the Resolutions of the Constitutional Court are not as a rule published in an official bulletin, and only handed over to the participants in the proceedings.

The content of the cases resolved in this period was the following:

- budget (1);
- regional planning, or the regime of building land (3);
- the price of public utility services (water supply) (5);
- salaries of State office holders and public servants (3);
- citizen's contributions in the form of their own resources for the construction of communal infrastructure facilities (1);
- payment of tax on trade in goods and services (1);
- security of personal property (2);
- freedom to perform commercial activities (5);
- privatisation of former social property (4);
- purchase of insurance period in pension insurance (1);
- right of petition (1);
- election of candidates as delegates to the Council of State (1).

SUBJECT MATTER AND SUMMARY OF IMPORTANT DECISIONS/RESOLUTIONS

1. Identification: Slovenia - Constitutional Court of the Republic of Slovenia - Date: 1/4-1993 - Decision No. U-I-29/93 - Publication: Official Gazette of the Republic of Slovenia: unpublished - Languages: Slovene and English.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Electoral disputes - Referendums.

CONSTITUTIONAL JUSTICE - The subject of review - Regional measures.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Natural person.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality or unconstitutionality.

INSTITUTIONS - Public finances - Taxation.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to a sufficient standard of living.

3. Keywords of the alphabetical index:

Level of self-imposed contribution / Majority in voting in a referendum on a self-imposed contribution (voting of citizens who do not pay the contribution) / Procedure for carrying out a referendum / Non-competence of the Constitutional Court to evaluate the procedure.

4. Summary:

A decision by a local council on the implementation of a local self-imposed contribution, which has been adopted on the basis of a referendum in which the legally prescribed circle of those entitled to vote, and the appropriate result of voting, which has all the legally prescribed elements, including an exemption from payment of the contribution for citizens who meet conditions under article 12 of the law on self-imposed contributions, is not in violation of the law.

The Constitutional Court is not competent under article 160 of the Constitution to assess the procedure for implementing the referendum.

5. Supplementary information:

Settled case-law.

1. Identification: Slovenia - Constitutional Court of the Republic of Slovenia - Date: 8/4-1993 - Decision No. U-I-107/91 - Publication: Official Gazette of the Republic of Slovenia, No. 21/93 - Languages: Slovene and English.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between state authorities.

CONSTITUTIONAL JUSTICE - The subject of review - Acts of government.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Profit-making corporate body.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality or unconstitutionality.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Pronouncement and publication - Publication - Publication in the official journal/gazette.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Commercial and industrial freedom.

3. Keywords of the alphabetical index:

Privatisation / Registration of companies and other corporations.

4. Summary:

With the validation of the law on transfer of ownership of companies, a legal basis was provided for the agreement of the Agency of the Republic of Slovenia for Restructuring and Privatisation, which is prescribed by the orders supplementing the order on the inscription of companies and other legal entities who perform economic activities, in the Court register (Off. Gaz. RS, No. 20/91-I and 33/92).

5. Supplementary information:

By resolution of the Constitutional Court of 17 September 1992, the matter herein dealt with was joined to case U-I-100/92, because of common treatment and decision.



1. Identification: Slovenia - Constitutional Court of the Republic of Slovenia - Date: 8/4-1993 - Decision No. U-I-140/92 - Publication: Official Gazette of the Republic of Slovenia: unpublished - Languages: Slovene and English.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Electoral disputes - Referendums.

CONSTITUTIONAL JUSTICE - The subject of review - Regional measures.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Natural person.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality or unconstitutionality.

INSTITUTIONS - Executive bodies - Territorial administrative decentralisation - Municipalities.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of opinion.

3. Keywords of the alphabetical index:

Changing the name of a district / Procedure.

4. Summary:

A decree of a municipal assembly on naming and renaming streets is not in violation of the Constitution and law if citizens were given an opportunity before the adoption of the decree, in their councils and bodies of the local council, to provide initiatives and make suggestions on the naming and renaming, or if they were enabled to promulgate such proposals submitted.

5. Supplementary information:

Settled case-law.

1. Identification: Slovenia - Constitutional Court of the Republic of Slovenia - Date: 8/4-1993 - Decision No. U-I-137/92 - Publication: Official Gazette of the Republic of Slovenia: unpublished - Languages: Slovene and English.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Acts of government.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Natural person.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality or unconstitutionality.

INSTITUTIONS - Army and police forces - Army - In general.

FUNDAMENTAL RIGHTS - Civil and political rights - Equality.

FUNDAMENTAL RIGHTS - Economic, social and cultural rights - Right to social security.

3. Keywords of the alphabetical index:

Equality before the law / Military pensions of former members of the Yugoslav Federal Army.

4. Summary:

The impugned decree does not make a distinction among persons who were in the same position, so it does not violate the constitutional principle of equality before the law. The decree only defines more precisely who should receive payment of an advance on military pensions or other benefits obtained on the basis of regulations on retirement and invalidity insurance of military pensioners on the basis of article 18 of the constitutional law for implementing the Basic Founding Charter on the sovereignty and independence of the Republic of Slovenia, and does not govern the rights of soldiers entitled to pension or covered by an insurance, which must be regulated by law.

5. Supplementary information:

By resolution of the Constitutional Court, the matter herein dealt with is joined to case U-I-14/93, of 11 February 1993, and U-I-70/93, of 25 March 1993, because of common treatment and decision.

1. Identification: Slovenia - Constitutional Court of the Republic of Slovenia - Date: 6/5-1993 - Decision No. U-I-6/92 - Publication: Official Gazette of the Republic of Slovenia, No. 25/93 - Languages: Slovene and English.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the distribution of powers between state authorities.

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of the formal validity of normative measures.

CONSTITUTIONAL JUSTICE - The subject of review - Rules issued by the executive.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Profit-making corporate body.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Procedure - Interlocutory proceedings - Discontinuance of proceedings.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Annulment.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Pronouncement and publication - Publication - Publication in the official journal/gazette.

INSTITUTIONS - Executive bodies - Relations with legislative bodies.

INSTITUTIONS - Public finances - Taxation - Other.

3. Keywords of the alphabetical index:

Annuling regulations with a deferred time limit / Constitutional principle of the division of powers / Data on personal income / Data protection / Non-competence of the Constitutional Court to assess the constitutionality and legality of regulations no longer in force / Conflict of authority / Partial procedural decision.

4. Summary:

The order determining that companies and other legal entities and bodies of socio-political associations are obliged to communicate to tax bodies data for assessing income tax, for which the body issuing the order had not legal authority, is not in accordance with the Constitution.

5. Supplementary information:

Settled case-law.

1. Identification: Slovenia - Constitutional Court of the Republic of Slovenia - Date: 6/5-1993 - Decision No. U-I-7/93 - Publication: Official Gazette of the Republic of Slovenia, No. 25/93 - Languages: Slovene and English.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Regional measures.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Natural person.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Annulment.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Pronouncement and publication - Publication - Publication in the official journal/gazette.

INSTITUTIONS - Executive bodies - Territorial administrative decentralisation - Municipalities.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of opinion.

3. Keywords of the alphabetical index:

Consultation of citizens by a local council / Renaming streets.

4. Summary:

A procedure for adopting the resolution on naming and renaming streets and districts in which it was not possible for citizens of the local council to cooperate by providing initiatives and suggestions in the envisaged renaming of streets is not in accordance with the law.

5. Supplementary information:

In the resolution dealt with, the Constitutional Court refers to their Resolution No. U-I-51/92 of 19 November 1992 and decree No. U-I-74/92 of 19 November 1992.

1. Identification: Slovenia - Constitutional Court of the Republic of Slovenia - Date: 6/5-1993 - Decision No. U-I-147/92 - Publication: Official Gazette of the Republic of Slovenia: unpublished - Languages: Slovene and English.

2. Keywords of the systematic thesaurus:

CONSTITUTIONAL JUSTICE - Types of litigation - Litigation in respect of fundamental rights and freedoms.

CONSTITUTIONAL JUSTICE - The subject of review - Law and other rules having the force of law.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Natural person.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Decisions - Types - Finding of constitutionality or unconstitutionality.

FUNDAMENTAL RIGHTS - Governing principles - Entitlement to rights - Nationals and foreigners.

3. Keywords of the alphabetical index:

Retroactive effect of a law.

4. Summary:

The legal provisions, according to which, irrespective of meeting the conditions of para. 1 of article 40 of the law on citizenship, an application for citizenship by a citizen of another republic can be rejected if reasons are appended under point 8 of para. 1 of article 10, which determines as a condition for obtaining citizenship by naturalisation that granting of citizenship does not represent a threat to the public order, security or defence of the State, does not with retroactive effect encroach on the initiator's rights, since the plaintiff became a citizen only on the day of the disputed decision on obtaining citizenship.

5. Supplementary information:

Settled case-law.

**SWEDEN - SUPREME COURT****NUMBER OF DECISIONS TAKEN: 1**

1. **Identification:** Sweden - Supreme Court - Högsta domstolens beslut June 11, 1993, SÖ 339 (O 991/93).

2. **Keywords of the systematic thesaurus:**

CONSTITUTIONAL JUSTICE - The subject of review - Legislative or quasi-legislative regulations.

CONSTITUTIONAL JUSTICE - Constitutional proceedings - Types of claim - Claim by a private body or individual - Profit-making corporate body.

INSTITUTIONS - Legislative bodies.

INSTITUTIONS - Legislative bodies - Law-making procedure.

INSTITUTIONS - Legislative bodies - Relations with the courts.

SOURCES OF CONSTITUTIONAL LAW - Categories - Written rules - Constitution.

3. **Keywords in the alphabetical index:**

Act of the executive power / Rule of law.

4. **Summary:**

According to Chapter II Article 14 of the Swedish Constitution a provision adopted by the parliament or by the Government may be set aside by a court or any other public organ if there is a conflict with a provision of the Constitution or with a provision of any other superior statute and the inaccuracy is obvious and apparent.

In this case there was a question as to whether a regulation adopted by the Government concerning fees for public defense counsels was in conflict with a provision of the Code of Judicial Procedure, according to which the counsel is entitled to a reasonable fee. The Supreme Court (the majority) held that there was no obvious and apparent inaccuracy.

**TURKEY - CONSTITUTIONAL COURT**

Reference period: 1 April 1993 - 31 August 1993

**NUMBER AND TYPES OF DECISIONS: 11**

Only two decisions were published in the Official Gazette. Three decisions were sent back to trial courts on procedural grounds. The preceding 14 more decisions were published in the Official Gazette between 1 April 1993 and 31 August 1993.

**SUBJECT MATTER OF THE MOST IMPORTANT DECISION**

1. **Identification:** Turkey - Constitutional Court - 14 July 1993 , 1992/1 - published in the Official Gazette, 18 August 1993.

2. **Keywords in the systematic thesaurus:**

INSTITUTIONS - Principles of State organisation - Sovereignty.

INSTITUTIONS - Principles of State organisation - Territorial principles.

FUNDAMENTAL RIGHTS - Civil and political rights - Freedom of expression.

SOURCES OF CONSTITUTIONAL LAW - Hierarchy - Hierarchy as between national and non-national sources - European Convention on Human Rights and constitutions.

SOURCES OF CONSTITUTIONAL LAW - Hierarchy - Hierarchy as between national and non-national sources - European Convention on Human Rights and other domestic legal instruments.

3. **Keywords in the alphabetical index:**

Indivisible integrity of the State.

4. **Summary:**

According to Articles 78 and 83 of the Political Parties Law the People's Labour Party (HEP) was dissolved. The main reason for the dissolution was that the party attempted to divide the Turkish Nation into two groups as "Turkish" and "Kurdish". In this way, the "HEP" introduced the Kurdish people as an oppressed minority and recognized the principle of the right to self-determination for them. However, according to the Constitutional Court the Turkish Republic is a unitary State; that is to say that the Turkish State, with its own territory and nation, is an indivisible entity. For that reason the Turkish Republic cannot consider ethnic differences as fundamental. Also contemporary international law recognizes the legitimacy of the fact that various ethnic groups may form a unitary State only in a united way. The Constitutional Court says that there is no valid reason not to apply the above principle of international law to the case of Turkey. Both the division of the nation into different parts and the appropriation of a specific land to a specific ethnic group are neither contemporary nor humanitarian. There is no doubt that the most important characteristic of the Turkish State is its integrity. In relation to this, politically the most important element in the Constitution is "nationality", but not "race".

As the Court stated that the relationship between "State" and its territory and nation shows various dissimilarities from one place to another, it can be drawn from the above statement that in the world some States are federal and others are unitary. With regard to this distinction, the Turkish Republic made its decision in favour of "unitary State". This concludes that every Turkish citizen, in this way or another, should obey this constitutional preference. Due to the regulation of the Constitution in consistency with the "unitary State principle" and the sanctions brought by the Political Parties Law which concerns the "principle of State integrity" in this respect, federalism was excluded from the Constitution. Thus, political parties cannot advocate a federal system in Turkey. Accordingly, the Constitutional Court says that the Turkish State is an indivisible entity with its territory and nation. In this case, the basic principle of the State, i.e. the integration of "Nation" and "State" entails the fact that there cannot be more than one nation within the boundaries of the Turkish Republic. This does not mean to say that individuals from different ethnic origins cannot exist within the nation, but all are to be essentially considered as citizens of the Turkish Republic. Although the Constitutional Court considers the plurality of political parties as contemporary democracy, it follows that the protection of democracy against any anti-democratic tendencies has to be ensured. For that reason, the Constitutional Court dissolved the "HEP".

5. Supplementary information:

Although the main function of the Constitutional Court is the judicial review of legislative acts, the Court also performs the other functions given to it by the Constitution. The above judgement concerns the dissolution of a political party (HEP). It is summarized because the case exposes very important constitutional problems in Turkey, and also because it is settled case law.



SYSTEMATIC THESAURUS
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<sup>1</sup> Including the conditions and manner of such appointment (election, nomination, etc).<sup>2</sup> Including the conditions and manner of such appointment (election, nomination, etc).<sup>3</sup> Vice-presidents, presidents of chambers or of sections, etc.<sup>4</sup> Persons or bodies vested with authority to prepare the case, e.g. Ministère public, auditorat, parquet, etc.<sup>5</sup> Registrars, assistants, auditors, general secretaries, researchers, other personnel, etc.

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<sup>6</sup> E.g., assessors.

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<sup>8</sup> Horizontal distribution of powers.

<sup>9</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>10</sup> Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (that questions relating to the distribution of powers as between the State and its constituent organs are the subject of another keyword).

<sup>11</sup> E.g., validity of the petition for a referendum in Italy.

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**Secretariat of the Venice Commission  
Council of Europe  
F-67075 STRASBOURG CEDEX  
Tel: (33) 88.41.20.00  
Fax: (33) 88.41.27.94/64**

**Editor:** R. Brillat.

**Editorial board:** A. Elhenicky, R. Ryckeboer, P. Vandernoot, D. Rémy-Granger, P. Paczolay,  
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