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The Venice Commission

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

- to help new Central and Eastern Europe democracies to set up new political and legal infrastructures;

- to reinforce existing democratic structures;
- to promote and strengthen principles and institutions which represent the bases of true democracy.

The activities of the Venice Commission comprise, inter alia, research, seminars and legal opinions on issues of constitutional reform, 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.

Editorial

The present bulletin is the third issue of the Constitutional Case-Law Bulletin published by the European Commission for Democracy through Law. During the short period of its existence, the Bulletin has already achieved considerable success throughout Europe and further afield. It is now presented in a new, more legible format.

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 be informed quickly about the most important 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 next issue of the bulletin covering the first trimester of 1994 is planned for the July 1994. A special issue which will present a description of the various Constitutional Court systems has also been prepared. It will be published in May 1994.

G. BUQUICCHIO

Secretary of The Venice Commission

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Austria

Constitutional court

Reference period:

1 September 1993 – 31 December 1993

Statistical data

- Claims of a financial nature against federal authorities, regions or communes which do not fall within the competence of civil courts or administrative authorities (Article 137 B-VG): 4
 - Conflicts of authority (Article 138 (1) B-VG): 2
 - Review of regulations (Article 139 B-VG): 30
 - Review of laws (Article 140 B-VG): 27
 - Review of elections (Article 141 B-VG): 4
 - Decisions on challenges to decisions of administrative authorities (Article 144 B-VG): 447
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Important decisions

Identification:

a) Austria / b) Constitutional Court / c) / d) 27 September 1993 / e) B 343/92 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Administrative acts.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a private body or individual – Political parties.

Fundamental Rights – Civil and political rights – Equality.

Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Broadcasting / Political parties / Freedom of expression / Equality / Arbitrary measure / Challenge to administrative decisions.

Summary:

The Court gave leave to proceed in a challenge brought by a political party and its head, questioning the validity of the decision of an administrative authority. The authority, "Kommission zur Wahrung des Rundfunkgesetzes", is charged with controlling the objectivity of broadcasted programmes. The decision related to an interview with the head of a political party in a television programme, and the Commission found that the interviewer's questions did not overstep the bounds of objectivity. The Court found that this decision was not arbitrary, nor did it violate the principle of equality. Further, the Commission had applied a law which was in conformity with freedom of expression.



Identification:

a) Austria / b) Constitutional Court / c) / d) 6 October 1993 / e) B 568/93 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance – The Bar – Discipline.

Keywords of the alphabetical index:

Lawyer / Duty of professional confidentiality / Discipline.

Summary:

The provision of the law governing the status of lawyers which regulates the duty of professional confidentiality was found to be in conformity with the Constitution.



Identification:

a) Austria / b) Constitutional Court / c) / d) 12 October 1993 / e) G 124/91 / f) / g).

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Rights to property – General.

Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Right to property / Freedom to work for remuneration / Wine / Export.

Summary:

An individual claim ("Individualantrag") by a wine producer directly attacking the provisions of the law on wine production and the classification of wines was given leave to proceed by the Court. The provisions at issue provide that wine of the class "d'appellation contrôlée" must be exported in bottles (prohibiting its export in barrels or other large containers). The Court did not accept the applicant's argument and declined to overturn these provisions, which were found to be contrary neither to the freedom to work for remuneration (the restrictions being in the public interest) nor to the right to property (the law not bearing upon the essential core of the fundamental right at issue).



Identification:

a) Austria / b) Constitutional Court / c) / d) 12 October 1993 / e) G 109/92, G 13/93 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other norms having the force of law.

Constitutional Justice – Constitutional proceedings – Decisions – Types – Finding of constitutionality or unconstitutionality.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a private body or individual.

Institutions – Legislative bodies – Parliaments.

Fundamental Rights – Civil and political rights – Freedom of expression.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Equality / Freedom of expression / Parliament / "Individualantrag".

Summary:

Leave to proceed for a claim brought directly by individuals ("Individualantrag") in circumstances where the applicants have no other means at their disposal for seizing the Constitutional Court. Nullification of a provision of the constitutional law of Land Tirol concerning access to sitting of a committee of enquiry established by the diet ("Landtag"). In allowing access for media representatives while at the same time refusing access to the general public (without reference to the number of places available), the law was in violation of the principles of equality and of freedom of expression.



Belgium

Court of arbitration

Reference period :

1 September 1993 – 31 December 1993

Statistical data

- 22 judgments
 - 55 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
 - 38 new cases
 - average length of proceedings: 10 months (shorter than in the previous reference period)
 - 11 judgments concerning proceedings for annulment
 - 8 judgments concerning preliminary points of law
 - 3 judgments concerning applications for suspension
-

Important decisions

- a. Judgment No. 75/93 of 27 October 1993.
Fundamental Rights – Civil and political rights – Right to property – Expropriation.
- b. Judgment No. 83/93 of 1 December 1993.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Right to family life.

Identification :

a) Belgium / b) Court of arbitration / c) / d) 29 September 1993 / e) Judgment No. 68/93 / f) / g) Moniteur belge, 28 October 1993.

Keywords of the systematic thesaurus :

Fundamental Rights – Civil and political rights – Rights of domicile and establishment.

Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.

Sources of Constitutional Law – Categories – Written rules – European Community Law.

Keywords of the alphabetical index :

Treaty instituting the European Economic Community / Right of establishment.

Summary :

Articles 52 and following of the Treaty instituting the European Economic Community, which guarantee the right of establishment, do not preclude the drawing up of rules, in the public interest, governing organisation, jurisdiction, professional ethics and supervision, on condition that these professional rules be applicable to all persons established on the territory of the State where this system operates. (B.8.3)



Identification :

a) Belgium / b) Court of arbitration / c) / d) 27 October 1993 / e) Judgment No. 75/93 / f) / g) Moniteur belge, 8 January 1994.

Keywords of the systematic thesaurus :

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

Constitutional Justice – Constitutional proceedings – Types of claim – Referral by a court.

Constitutional Justice – Common principles or techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.

Keywords of the alphabetical index:

Preliminary reference / Interpretation.

Summary:

Under article 26 of the special law of 6 January 1989 on the Court of Arbitration, a judge submitting a question to the Court concerning the constitutionality of a law is to consider the need for a reply to this question in handing down his decision and may even, in cases where appeal against his decision is likely, refrain from referring the matter to the Court if the question is irrelevant. It frequently happens therefore, that a judge submits, with his question to the Court, a norm for the interpretation placed by him on the case in hand. The Court then decides on the constitutionality of the norm for this interpretation, although it sometimes goes on to indicate an interpretation of the norm which would more closely comply with the Constitution. (B.1)

Supplementary information:

cf. Judgment No. 15/93 of 18 February 1993; see bulletin 1/93, p. 9.



Identification:

a) Belgium / b) Court of arbitration / c) / d) 27 October 1993 / e) Judgment No. 75/93 / f) / g) Moniteur belge, 8 January 1994.

Keywords of the systematic thesaurus:

Constitutional Justice – Common principles or techniques of interpretation – Proportionality principle.

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

Keywords of the alphabetical index:

Expropriation.

Summary:

The law of 26 July 1962 on the emergency expropriation procedure enables the expropriator to dispose of a building although a later judgment might find that the expropriated person was in fact illegally dispossessed. This situation may have irreversible consequences in cases where the expropriator undertakes demolition or

construction work in the interim, making it impossible to return the property in the state in which it was illegally expropriated.

However, these consequences cannot be considered as manifestly disproportionate to the objective pursued, particularly as there is judicial supervision of the internal and external legality of the procedure and a possibility of compensation for any damage suffered in the event of negligence or tortious intent on the part of the expropriator, either in kind or by equivalent.



Identification:

a) Belgium / b) Court of arbitration / c) / d) 9 November 1993 / e) Judgment No. 79/93 / f) / g) Moniteur belge, 15 December 1993.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Taxation.

Summary:

When assessing the flat rate for a tax, the Court must consider whether or not the legislator by decree has exceeded his discretionary powers, bearing in mind, on the one hand, the fact that taxation laws must classify the full range of situations in categories which are only a simplified and approximate reflection of reality and, on the other hand, the difficulties involved in calculating tax, in terms of both the effectiveness of criteria and the resulting administrative and infrastructure-related costs for the taxpayer and the fiscal authorities. (B.7.2)



Identification:

a) Belgium / b) Court of arbitration / c) / d) 9 November 1993 / e) Judgment No. 80/93 / f) / g) Moniteur belge, 10 December 1993.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Equal treatment of unequal situations.

Summary:

The identical treatment of real situations which are not identical can only be judged to be a breach of the constitutional principles of equality and non-discrimination in so far as certain categories of persons in totally different situations in respect of the norms under consideration receive identical treatment without there being an objective, reasonable justification. The divergence between rental value increases in different parts of the country since the last overall adjustment of cadastral revenues cannot be considered as having resulted in totally different situations which would oblige the legislator, under articles 4 and 5 of the law of 28 July 1992, to draw up several re-evaluation coefficients. (B.3.3)



Identification:

a) Belgium / b) Court of arbitration / c) / d) 1 December 1993 / e) Judgment No. 82/93 / f) / g) Moniteur belge, 16 December 1993.

Keywords of the systematic thesaurus:

Fundamental Rights – Governing principles – Nature of the list of fundamental rights.

Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Non-retrospective effect of criminal law.

Fundamental Rights – Civil and political rights – Right to a fair trial.

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.

Keywords of the alphabetical index:

Right of appeal / Reckless or vexatious appeals / Non-retrospectivity of criminal laws / Right to a fair trial.

Summary:

Although fines for reckless or vexatious appeals are of a civil nature in judicial terms, it appears that they must be considered as relating to criminal law within the meaning of article 6 of the European Convention on Human Rights. Consequently, they come under article 7 of the same Convention, which prohibits the retrospective effect of criminal law. (B.6.5)



Identification:

a) Belgium / b) Court of arbitration / c) / d) 1 December 1993 / e) Judgment No. 83/93 / f) / g) Moniteur belge, -.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

Fundamental Rights – Civil and political rights – Right to family life.

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.

Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and other domestic legal instruments.

Keywords of the alphabetical index:

Law on succession / Descent / Children born outside marriage.

Summary:

The basic objective pursued by the legislator in adopting the law of 31 March 1987 was to put an end to inequality between children, notably in respect of determining their descent and its consequences, particularly for succession; by acknowledging that the children born to a woman other than their father's spouse have, in principle, an entitlement to their father's succession which is equal to that of the other children, the legislator sought to comply with articles 8 and 14 of the Convention for the protection of human rights and fundamental freedoms, as interpreted by the European Court of Human Rights, notably in its judgments in the Marckx, Vermeire and Johnston cases. Consequently, former article 756 of the Civil Law Code violates articles 6 and 6bis of the Constitution which guarantee the principles of equality and non-discrimination, to the extent that it excludes the right of children born to a woman other than their father's spouse to succeed their father. (B.4 to B.5.1)



Identification:

a) Belgium / b) Court of arbitration / c) / d) 16 December 1993 / e) Judgment No. 85/93 / f) / g) Moniteur belge, -.

Keywords of the systematic thesaurus:

Institutions – Federalism and Regionalism – Basic principles.

Institutions – Federalism and Regionalism – Distribution of powers.

Keywords of the alphabetical index:

Expropriation.

Summary:

Under article 11 of the Constitution, the power to decide on the cases and manner in which property may be expropriated on public interest grounds lies with the federal legislator. The Communities and Regions may only intervene in this domain if the institutional reform laws have expressly given them special powers to do so. (B.1)



Bulgaria

Constitutional court

Reference period:

1 September 1992 – 31 December 1993

Statistical data

Number of decisions: 19

Important decisions

Identification:

a) Bulgaria / b) Constitutional Court / c) / d) Decision No. 13 of October 22, 1992 / e) Case No. 27/92 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Relations with legislative bodies.

Keywords of the alphabetical index:

Summary:

The case was initiated at the request of 54 MPs for interpretation whether within six months after a no confidence motion in the Council of Ministers for its overall policy has been considered and rejected it is possible to file a new no confidence motion on any grounds, which are inevitably included in its overall policy.

According to Article 89, paragraph 3 of the Constitution of the Republic of Bulgaria "Should the National Assembly reject a vote of no confidence in the Council of Ministers, the next motion for a vote of no confidence on the same grounds shall not be made before the expiry of six months".

The Constitutional Court ruled that when the National Assembly rejects a vote of no confidence in the Council of Ministers for its overall policy, no new motion for a no confidence vote can be made within the six months period set forth in Article 89 paragraph 3 of the Constitution on any grounds other than breach of the Constitution.



Identification:

a) Bulgaria / b) Constitutional Court / c) / d) Decision No. 5 of April 6, 1993 / e) Case No. 6/93 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Relations with executive bodies.

Keywords of the alphabetical index:

Summary:

The case was initiated at the request of 52 MPs for interpretation of the Constitution as to the following:

1. Whether the imperative provision of Article 65, paragraph 2 of the Constitution that "a candidate for a National Assembly seat holding a State post shall resign upon the registration of his candidacy" applies to MPs who start work in different divisions of the state structure following their election and assumption of the duties of a member of parliament?

2. Whether the prohibitive regime of Article 68, paragraph 1 of the Constitution that "a member of the National Assembly shall not occupy another State post, nor shall engage in any other activity which the law defines as incompatible with the status of a Member of the National Assembly" applies to the following activities: paid participation in a managing, supervisory (control) board of a company with State or municipal participation; paid participation in a banking formation with State participation; paid participation in a government commission or other government formations?

The Constitutional Court ruled that MPs cannot perform the functions of: a) members of government commissions, councils, agencies, centres and other government structures; b) members of bodies of state and municipal enterprises, firms, commercial companies with state and municipal property, assigned to them with acts (instructions, orders, decisions) of bodies of the Executive and related management contracts.



Identification:

a) Bulgaria / b) Constitutional Court / c) / d) Decision No. 13 of July 22, 1993 / e) Case No. 13/93 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Relations with the courts.

Keywords of the alphabetical index:

Summary:

The case was initiated at the request of the Council of Ministers for interpretation of the Constitution with regard to the competence of the Supreme Court to exercise powers of the Supreme Administrative Court on disputes over the legality of Council of Ministers' and ministers' acts until the new laws on the structure and the procedure of the Judiciary are adopted.

Article 120, paragraph 2 of the Constitution establishes the principle of the general clause of challenging any administrative act before the courts. Article 125 designates the Supreme Administrative Court as the authority to exercise supreme judicial supervision as to

the precise and uniform application of the law in administrative justice and as the court which rules on all challenges to the legality of acts of the Council of Ministers and the individual ministers, and of other acts established by law. However, at the time when the case was filed, the Supreme Administrative Court had not yet been set up as provided for by the Constitution.

The Constitutional Court ruled that the Supreme Court has the competence to exercise powers of the Supreme Administrative Court pursuant to Article 125, paragraph 2 of the Constitution on disputes concerning the legality of acts of the Council of Ministers and of individual ministers until the new laws on the structure and the procedure of the judiciary are adopted.



Croatia

Constitutional court

Reference period :

1 September 1993 – 31 December 1993

Statistical data

- Cases concerning conformity of laws with the Constitution : received 43, resolved 10;
 - Cases concerning conformity of other regulations with the Constitution and laws : received 32, resolved 15;
 - Cases concerning protection of constitutional rights : received 109, resolved 50 (33 of them being rejected, *absolutio ab instantia*, including constitutional actions submitted later than one month after the day on which the decision deemed to violate a constitutional right was received; actions submitted before prescribed legal remedies had been exhausted; actions submitted concerning acts which are not judgments of judicial, administrative or other authorities with public competence; actions submitted by unauthorised persons etc.).
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Important decisions

Identification :

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 28 September 1993 / e) U-I-197/1992 / f) / g) Narodne novine, No. 98/1993.

Keywords of the systematic thesaurus :

Constitutional Justice – The subject of review – Laws and other rules having the force of law.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a private body or individual – Natural person.

Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Non-retrospective effect of criminal law.

Sources of Constitutional Law – Categories – Written rules – Constitution.

Sources of Constitutional Law – Categories – Written rules – Quasi-constitutional legislation and norms.

Sources of Constitutional Law – Categories – Written rules – Other international sources.

Keywords of the alphabetical index :

Principle *ne bis in idem*.

Summary :

The ruling of the Court accepts the proposal to commence proceedings in which it will review provisions of the Criminal Procedure Act – the meaning of this ruling being that the Court finds enough elements in the proposal to consider the issue, but the final decision will not necessarily accept the standpoint of the proposal and repeal the law.

The disputed provision states that renewal of criminal proceedings, which could be disadvantageous for a person convicted, or acquitted, of charge, is not admissible if more than six months have passed since the day on which prosecutor came to know of new facts or evidence.

The ruling to review the constitutionality of this provision has in view the principles by which no one may be tried twice for an offence for which he has already been sentenced, and for which a final judgment was passed, and by which no criminal proceedings shall be repeated against a person acquitted by a final court judgment.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 20 October 1993 / e) U-III-336/1992 / f) / g) Narodne novine, No. 102/1993.

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 – Natural person.

Constitutional Justice – Constitutional proceedings – Decisions – Types – Finding of constitutionality or unconstitutionality.

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

Sources of Constitutional Law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Constitutional action / Procedure / Right to health.

Summary:

A request claim was addressed to health insurance bodies to approve medical treatment abroad. Having received no reply, neither in the ordinary procedure nor in the one for urgent cases within the time in which he was advised to undergo the treatment, the claimant went abroad, had the operation and on return of costs. The request was refused by decisions of the health insurance bodies and of the administrative court on the ground that he underwent medical treatment abroad without previous approval.

The decision of the Court repealed the decisions and referred the case back to the administrative court. According to the Constitution, every citizen shall be guaranteed the right to health care. Realisation of this, or any other right, is implemented by appropriate procedures. The claimant was denied these procedures since he got no response to his requests; therefore as he undertook all the necessary steps to get this approval, he was not to be treated as a person who went abroad without previous approval to be medically treated there.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 3 November 1993 / e) U-I-111/1992 / f) / g) unpublished.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws 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 – Finding of constitutionality or unconstitutionality.

Fundamental Rights – Economic, social and cultural rights – Other.

Sources of Constitutional Law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Pensions.

Summary:

The law regulating pensions cancelled the right of those employed in the police force and in certain organs of the judiciary to have their pensions changed (in practice, increased) in three year periods according to the average salaries of those actively employed in corresponding posts during the previous year.

The ruling of the Court did not accept the proposal to commence proceedings in which it would review the constitutionality of the law, because it found no reasonable doubt concerning its constitutionality. The opinion of the Court was that the Constitution authorises the legislator to regulate the system of pensions, and to change it, respecting constitutional principles. The standpoint of the proposal – that pension related rights, once acquired, cannot be changed or cancelled – has no grounds in the Constitution.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 17 November 1993 / e) U-I-204/1992 / f) / g) Narodne novine, No. 110/1993.

Keywords of the systematic thesaurus:

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 – Natural person.

Constitutional Justice – Constitutional proceedings – Decisions – Types – Annulment.

Institutions – Executive bodies – Relations with legislative bodies.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Equality / Principle of legality / Privatisation of flats.

Summary:

In the privatisation of socially owned flats the Act on the sale of flats to persons who have tenant's rights gave authority to the Government to regulate the calculation of prices of flats and of garages. A Decree of Government provided that persons who have already bought the flats they live in, and the corresponding part of land belonging to the building, may later on cede ownership of the land; in that case, they would be reimbursed 30% of the price.

The decision of the Court annulled the provisions of the Government's Decree as violating the principle of equality, since they privileged those owners of flats who had paid less than 30% of the price in order to obtain ownership.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 24 November 1993 / e) U-I-98/1993 / f) / g) unpublished.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws and other rules having the force of law.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a private body or individual – Natural person.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Equality.

Summary:

By its ruling the Court terminated the proceedings after the challenged provision was abolished. The proceedings concerned a proposal to review the Law on the Protection of Health and Health Insurance on the ground that it contained a provision excluding dentists employed in private stomatological clinics from specialisation in the profession.

During the constitutional proceedings the law was changed; the new law states expressly that specialisation

may be granted to persons who have a private practice in the medical field and to persons employed by them. Since the law was amended in accordance with the point of the proposal, the proceedings before the Court were terminated.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 24 November 1993 / e) U-III-251/1992 / f) / g) unpublished.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Constitutional Justice – The subject of review – Court decisions.

Constitutional Justice – 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 – Economic, social and cultural rights – Other.

Sources of Constitutional Law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Right of inheritance.

Summary:

The constitutional provision which guarantees the right of inheritance guarantees primarily the existence of laws dealing with inheritance, and the possibility of protecting that right before the competent courts. Although the Inheritance Act is based on the principle that a certain part of property has to be left to certain persons, the same Act also makes possible the alienation of property by valid contract during a lifetime. Since the validity of such a contract was proven before the courts, the constitutional right of inheritance is not violated; it relates to the property which was not alienated by the said contract.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 1 December 1993 / e) U-III-299/1992 / f) / g) unpublished.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Constitutional Justice – The subject of review – Court decisions.

Constitutional Justice – 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 – Civil and political rights – Inviolability of home.

Sources of Constitutional Law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Inviolability of home.

Summary:

A special kind of property right exists in Croatian law whereby a person may be entitled to live in a certain property for their lifetime and even transmit this property on their death to someone else without ever being the owner of this property or having the right to sell it.

In this case the applicant was the daughter of a person who had this right. She requested that this special right be transmitted to her on the death of her mother, but this was refused as she did not fulfil the conditions prescribed by law. When she was threatened with eviction, she appealed on the grounds of the inviolability of home.

The Constitutional Court refused her action, stating that the constitutional right to the inviolability of the home does not protect persons who have been refused the special property right on the grounds that they do not fulfil the conditions prescribed by law.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 8 December 1993 / e) U-I-206/1992, U-I-207/1992, U-I-209/1992, U-I-222/1992 / f) / g) Narodne novine, No. 113/1993.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws 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 – Types of claim – Claim by a private body or individual – Political parties.

Constitutional Justice – Constitutional proceedings – Decisions – Types – Finding of constitutionality or unconstitutionality.

Fundamental Rights – Civil and political rights – Right to a fair trial.

Sources of Constitutional Law – Categories – Written rules – Constitution.

Sources of Constitutional Law – Categories – Written rules – Quasi-constitutional legislation and norms.

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.

Sources of Constitutional Law – Categories – Written rules – Other international sources.

Keywords of the alphabetical index:

Citizenship / Effective remedy / Equality.

Summary:

The decision of the Court repealed a provision of the Law on Croatian Citizenship according to which the reasons for rejecting an application for Croatian citizenship did not have to be stated.

The Court held that the consequence of such a regulation was that the right to appeal cannot be effective and that the principle of equality is violated because persons who know the reasons against which to appeal are in a privileged position. Moreover, according to the Constitution, freedoms and rights may be restricted by law in order to protect the freedoms and rights of other people, public order, morality and health. In this case, public order was not protected but violated.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 8 December 1993 / e) U-I-253/1993 / f) / g) unpublished.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Laws 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 – Civil and political rights – National service.

Sources of Constitutional Law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Conscientious objection.

Summary:

A proposal to commence proceedings to review the constitutionality of the Basic Criminal Law from the point of view of the constitutional provision dealing with conscientious objection was not accepted. According to the Constitution, conscientious objection is allowed for all persons who, for religious or moral beliefs, are not willing to participate in the performance of military duties in the armed forces, but such persons are obliged to perform other duties specified by law.

The disputed provision states that persons obliged to perform military service, who, without justified reason, refuse to carry arms in connection with military service, may be imprisoned for a period of 3 months to 3 years.

The ruling of the Court held that the disputed provision does not apply to persons who have expressed conscientious objection, since these persons are dealt with as persons obliged to perform civil service in military forces.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 15 December 1993 / e) U-III-40/1993 / f) / g) Narodne novine, No. 3/1994.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Constitutional Justice – The subject of review – Courts decisions.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a private body or individual – Natural person.

Fundamental Rights – Economic, social and cultural rights – Other.

Keywords of the alphabetical index:

Protection of children / Family life / Procedure.

Summary:

After a divorce, a final court decision was issued as to the alimonies the father was obliged to pay. The mother of the child never asked for enforcement of that final decision, nor an increase of the sum, but years later she sued the father for part of the amount which she had spent supporting and educating the child. Her claim was refused on the ground that it would mean a change in the previous final decision of the courts on the father's obligation.

In her constitutional action the mother claimed protection on the basis of the constitutional provision according to which parents have a duty to bring up, support and educate their children. The action was rejected. The Court found that where a claimant has not taken the necessary steps for the protection of constitutional rights, as prescribed by law he/she may not claim that constitutional rights are violated; in this case, the claimant failed to seek enforcement of the final decision of the courts and a request for the amount of alimonies to be increased.



France

Constitutional council

Reference period :

1 September 1993 – 31 December 1993

Statistical data

727 decisions consisting of :

- two 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 ;
- one decision entailing automatic supervision of constitutional compatibility, under the provisions of Articles 46 and 61, paragraph 1 of the Constitution ;
- one decision of declassification of a text of legislative nature taken in conformity with Article 37, paragraph 2 of the Constitution upon demand by the Government ;
- 80 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 99 applications to annul electoral operations relating to 78 constituencies ;
- 644 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, or who were deemed by it to have surpassed the authorised ceiling. In this last connection, the Constitutional Court may declare a candidate ineligible. If such person has been elected, he is declared to have resigned from office.

Under these various heads, 626 defeated candidates and four elected candidates were declared to be ineligible for elected office for a period of one year from the date of the election.

Important decision

Identification :

a) France / b) Constitutional Council / c) / d) 16 December 1993 / e) Decision No. 93-328 DC / f) Five-yearly law on work, employment and professional training / g).

Keywords of the systematic thesaurus :

Constitutional Justice – Types of litigations – Litigation in respect of fundamental rights and freedoms.

Constitutional Justice – Types of litigations – Litigation in respect of the distribution of powers between estate authorities.

Fundamental Rights – Economic, social and cultural rights – Rights to just and decent working conditions.

Keywords of the alphabetical index :

Right to work / Worker participation in company management.

Summary :

The Preamble to the Constitution of 27 October 1946, reaffirmed by that of the Constitution of 4 October 1958, provides in its eighth paragraph that "every worker shall participate, through the intermediary of delegates, in the collective determination of working conditions as well as of company management", and this necessarily implies that employee representatives will have access to the necessary information for assuring the effective participation of the workforce in the collective determination of working conditions and company management.



Germany

Constitutional court

Reference period:

1 September 1993 – 31 December 1993

Statistical data

- 12 judgments of a chamber (Senat), among them 2 reviews of validity of elections
 - 4 judgments concerning individual constitutional claims
 - 2 judgments concerning proceedings for annulment
 - 3 judgments concerning preliminary points of law
 - 15 cases dealt with (taking into account the joinder of cases)
 - 2053 judgments of a section (Kammer)
 - 1979 new cases
-

Important decisions

Judgment No. 2 BvR 2134/92 – and – 2 BvR 2159/92 – of 12 October 1993.

Constitutional Justice – The subject of review – International treaties.

Constitutional Justice – Constitutional proceedings – Types of Claim – Claim by a private body or individual.

Institutions – Principles of State organisation – Sovereignty.

Institutions – Principles of State organisation – Democratic make-up of the State.

Fundamental Rights – Civil and political rights – Electoral rights.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 22 September 1993 / e) Judgment No. 2 BvR 1732/93 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Procedural safeguards – Rights of the defence.

Fundamental Rights – Civil and political rights – Right to a fair trial.

Keywords of the alphabetical index:

Criminal trial *in absentia*.

Summary:

The Constitutional Court has already declared constitutional § 231 a of the Code of Criminal Procedure according to which a trial in absentia is admissible if the accused provoked his incapability to stand trial. This, however, does not imply that the accused is under an obligation to undergo the medical treatment required to restore the capability to stand trial, at least not if this treatment is not without a certain risk.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 5 October 1993 / e) Judgment – 1 BvL 35/81 / f) / g) to be published in the official digest of the decisions of the Constitutional Court.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Broadcasting company incorporated as a public institution / Bankruptcy.

Summary:

Freedom of broadcasting and the pluralism of the broadcasting programme have to be guaranteed by the State. This guarantee is currently assured by a broadcasting company, incorporated as a public institution. The State has to assure the financial means of the institution. The application of the bankruptcy statute to such a broadcasting company would violate the freedom of broadcasting.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 5 October 1993 / e) Judgment – 1 BvL 34/81 / f) / g) to be published in the official digest of the decisions of the Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional Justice – Common principles or techniques of interpretation – Principle of reasonableness.

Institutions – Principles of State organisation – Rule of law.

Keywords of the alphabetical index:

Public institutions and bankruptcy.

Summary:

The principle of reasonableness has to be applied with respect to State organisation. According to this principle, all public institutions have to be treated equally if an inequality cannot be justified. It is admissible to exempt only some special public institutions from the statute of bankruptcy.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 12 October 1993 / e) Judgment No. 2 BvR 2134/92 – and – 2 BvR 2159/92 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – International treaties.

Constitutional Justice – Constitutional Proceedings – Types of claim – Claim by a private body or individual.

Institutions – Principles of State organisation – Sovereignty.

Institutions – Principles of State organisation – Democratic make-up of the State.

Fundamental Rights – Civil and Political Rights – Electoral Rights.

Keywords of the alphabetical index:

Democracy and transfer of sovereign powers to international organisations.

Summary:

An individual claim based on the electoral right, that is to say, the right to vote and to stand for election (article 38 of the Constitution), against a treaty conferring sovereign rights to a supranational organisation is admissible. The electoral right prohibits the national Parliament from being deprived of its democratic tasks by the transfer of competences to a supranational organisation to the extent that the principle of democracy which is declared inviolable is violated.

This principle, however, permits the membership of the Federal Republic in an international organisation. The electoral right is violated if a national statute which opens up the national order to the direct application of the acts of a supranational organisation is not sufficiently clear. This also means that essential subsequent changes of the Union Treaty are not covered by the statute of ratification. The Constitutional Court reserves the right to control acts of European organs with respect to the limits of their competences. The acts of a supranational organisation may affect the fundamental rights guarantees in Germany and are therefore subject to the jurisdiction of the Constitutional Court whose tasks are not limited to protecting fundamental rights vis-à-vis organs of the German State (departure from BVerfGE 58, 1, p. 27). The Constitutional Court, however, exercises its jurisdiction on the application of secondary community law in a relationship of "cooperation" with the European Court of Justice. The Union Treaty establishes an association of States (Staatenverbund), not a State. Art. F of the Treaty does not empower the

Union to acquire financial or other means on its own. The Federal Republic of Germany is not bound to take part in an automatic formation of a monetarian union by the ratification of the treaty.

Supplementary information:

Former decisions concerning the relation between national law and the European Communities: Entscheidungen des Bundesverfassungsgerichts (BVerfGE) (decisions of the Constitutional Court), Vol. 37, p. 271; Vol. 73, p. 376.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 19 October 1993 / e) Judgment 1 BvR 567/89, 1 BvR 1044/89 / f) / g) to be published in the official digest of the decisions of the Constitutional Court – actually published in Europäische Grundrechtezeitschrift 1993, p. 577.

Keywords of the systematic thesaurus:

Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Control of private contracts, protection of a minimum standard of equality in private law relations.

Summary:

When construing general clauses which require the observance of the principles of equity in contractual relations, the courts have to take into consideration fundamental rights. The courts are therefore obliged to declare a contract null and void if it is the result of an overwhelming economic or other supremacy of one party.

In this case, the Court applied this principle to contracts of credit in which those persons who stood as guarantors for the loan took on colossal obligations, often without realising the full extent to which they were committing themselves.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 20 October 1993 / e) Judgment No. 2 BvC 2/91 / f) / g) to be published in the official digest of the decisions of the Constitutional Court.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Review of validity of elections.

Keywords of the alphabetical index:

Nomination of candidates by a party.

Summary:

Parties have to respect the requirements of a democratic nomination of candidates, established by the federal statute on elections. The violation of these principles by a party can, under certain circumstances, require the annulment of the election. However, the mere violation of the party's statute does not imply the violation of these requirements.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 21 October 1993 / e) Judgment – 7-12 BvC 2/91 / f) / g) to be published in the official digest of the decisions of the Constitutional Court.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Review of validity of elections.

Keywords of the alphabetical index:

Recognition as a party.

Summary:

Parties which are not represented in Parliament are to be admitted to the federal election if, taken into consideration their organisation and other real circumstances, they prove to have serious political goals according to §2 of the statute on parties. The electoral commission has to take into account all circumstances when deciding

if a political organisation is a party. The review of the validity of elections is only admissible if a violation of a provision concerning the elections has an impact on the distribution of the seats in the parliament.

Supplementary information:

Consistent case-law.



Hungary

Constitutional court

Reference period:

1 September 1993 – 31 December 1993

Statistical data

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette (Magyar Közlöny): 9
 - Decisions by chambers published in the Official Gazette: 6
 - Number of other decisions by the Plenary Court: 20
 - Number of other decisions by chambers: 8
 - Number of other (procedural) orders: 42
 - Total number of decisions: 85
-

Important decisions

Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 53/1993 (X. 13.) / f) / g) AB határozat, Magyar Közlöny (Official Gazette) No. 147/1993 (1956 War Crimes Case).

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Types of claim – Type of review – Preliminary review.

Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Non-retrospective effect of criminal law.

Sources of Constitutional Law – Categories – Written rules – European Convention on Human Rights.

Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.

Keywords of the alphabetical index:

Statute of limitation / War crimes / International humanitarian law / Geneva Conventions of 1949.

Summary:

The Hungarian Parliament in February 1993 passed a law on "Procedures Concerning Certain Crimes Committed During the 1956 Revolution". This law tried to make possible some form of "historical justice" in order to prosecute Communist offenders. Three previous attempts could not pass the scrutiny of judicial review. This time again the President of the Republic did not promulgate the act, but turned to the Constitutional Court for "preventive norm control".

The President asked the Court to review the law for its conformity with both the Constitution and two international agreements – Article 7(1) of the European Convention of Human Rights and Article 15 of the International Covenant on Civil and Political Rights. As for the second claim, the Court had to interpret its jurisdiction to consider questions of international law when ruling on the constitutionality of a not yet promulgated law. The Court claimed the right to judge the law's conformity with international law, because the Court is required under Article 7(1) of the Constitution to ensure harmony between domestic law and obligations assumed under international law when evaluating a law's constitutionality.

As to the merits of the case, the Court restated its former stand-point that the retroactive amendment of the statute of limitations in criminal cases is unconstitutional. The Court has found two exceptions to this principle: a) if Hungarian law in force at the time when the crime was committed provided no statute of limitations, b) if the crime is a crime against humanity or a war crime,

and the non-application of a statute of limitations is an obligation undertaken by Hungary in an international agreement.

The Court declared the first article of the law under review unconstitutional, because it referred exclusively to crimes defined by domestic law, and extended the statute of limitation retroactively for crimes committed during the revolution of 1956.

The constitutionality of the second article, referring to war crimes and crimes against humanity as defined by the Geneva Conventions of 1949 for the Protection of War Victims, was upheld. The Court referred also to the New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968, signed and ratified by Hungary. The New York Convention declares that "no statutory limitation shall apply to several categories of war crimes and crimes against humanity irrespective of the date of their commission". By signing this convention, Hungary undertook an obligation not to apply its own statute of limitations in cases involving war crimes and crimes against humanity.

Supplementary information:

This is the fourth decision of the Constitutional Court regarding the question of retroactive extension of statute of limitations in criminal cases related to crimes committed under the former Communist regime. It is the first time that the Court upheld the constitutionality of an act passed by the Parliament regarding this issue.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 59/1993 (XI. 29.) / f) / g) AB határozat, Magyar Közlöny (Official Gazette) No. 172/1993.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary Courts – Civil Courts.

Fundamental Rights – Civil and political rights – Right of access to Courts.

Keywords of the alphabetical index:

Right of access to Courts.

Summary:

Under Hungarian civil procedural law, courts could reject a complaint without issuing a summons if the claim was evidently unfounded or impossible. This general clause had been introduced to the Civil Procedural Code in 1952, and it was abolished in 1957. Legislature

re-established the clause in 1972 in order to speed up procedures. According to the Constitutional Court, this provision violated the citizens' rights to a fair trial by an independent court as provided by the Constitution. The Court emphasised that citizens had a right to have their claim judged by a court, and access to the courts could not be rejected by a simple reference to practical needs. It annulled the related provision of the Civil Procedural Code.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 64/1993 (XII. 22.) / f) / g) AB határozat, Magyar Közlöny (Official Gazette) No. 184/1993.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Fundamental Rights – Governing principles – Entitlement to rights – Natural and legal persons.

Fundamental Rights – Governing principles – Limits and restrictions.

Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Private property / Property of local governments / Alienation of local governments' property.

Summary:

The Hungarian legislature in July 1993 passed a law on the lease and the alienation of living accommodation (flats) and other premises. These premises became the property of the local governments by force of law (ex lege) in 1990, in the process of the transformation of the former state property. The most questioned part of the new law was the entire chapter on the option to purchase the flats and other premises by the tenants. Under the law local governments are obliged to sell the flats to the tenants at a reduced price specified by the law.

This option to purchase is valid for five years. The option is obviously a serious restriction on the right to property. The Court declared in several decisions that the right to property is a fundamental right, but it can be restricted for necessary public goals. These restrictions must meet a strict constitutional scrutiny. The five year term open to the tenants for the option to purchase the flats is disproportionately long, creating a deeply uncertain situation for the local governments. The other source of

unconstitutionality is the lack of guarantee for maintaining the value of the wealth given to the local governments. If they are obliged to sell the flats and other premises for a special reduced price, the value of their property will be significantly diminished. Local governments should be compensated for the losses suffered because of the option.

In the case of other premises that are not used as living accommodation (but as shops, e.g.) there is no social reason to put burdens on the property of the local governments.

Therefore the Court declared the rules related to the option to purchase flats and other premises unconstitutional.

Supplementary information:

One judge wrote a dissenting opinion, joined by another judge.



Italy

Constitutional court

Reference period :

1 September 1993 – 31 December 1993

Important decisions

Identification :

a) Italy / b) Constitutional Court / c) / d) 5/23 November 1993 / e) Judgment No. 406 / f) / g).

Keywords of the systematic thesaurus :

Constitutional justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Fundamental rights – Civil and political rights – Right of access to courts.

Keywords of the alphabetical index :

Administrative appeal / Appeal in respect of litigation.

Summary :

It is to be inferred neither from the right of defence set forth in Article 24 of the Constitution nor from the legal protection before the courts against acts of the state administration which is secured by Article 113 of the Constitution that a strict correlation exists between the origin of a right and its exercise before the courts. Its exercise may be deferred in the presence of general imperatives and higher aims of justice. However, even in such cases the legislator must consistently refrain from creating undue impediments to the exercise of the right of defence in order that the guarantee established by the aforementioned constitutional rules may be fully secured.

On this basis, certain legislative provisions which restricted the right to institute proceedings and the exercise of that right, in particular by prescribing its forfeiture as a sanction for failure to make use of administrative remedies, have been declared unconstitutional.

In the case in point, the Court finds a taxation rule contrary to Article 24 of the Constitution in respect of tax refunds, did not provide for the possibility of legal action even without prior appeal to the administrative authorities is not provided in respect of tax refunds.

Supplementary information :

Specific precedents: decisions No 15 of 1991 and No 530 of 1989.



Identification :

a) Italy / b) Constitutional Court / c) / d) 5/23 November 1993 / e) Judgment No. 408 / f) / g).

Keywords of the systematic thesaurus :

Constitutional justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Institutions – Executive bodies – The civil service.

Fundamental rights – Economic, social and cultural rights – Right of access to the civil service.

Keywords of the alphabetical index :

Criminal conviction / Civil service entrance competition.

Summary :

There is a principle guaranteed by the Constitution that entrance to and continuation in civil service employment cannot be refused on the sole ground of criminal conviction for specific offences. Denial of access to employment, dismissal or suspension must in each instance be the subject of a separate and individual prior assessment by the administration, taking into account the effect of the conviction on the ability of the person concerned to perform the duties required of him in his capacity as a state employee.

A rule is to be considered unconstitutional on the ground of "irragionevolezza" (Article 3 of the Constitution) and with reference to Article 27 of the Constitution, the end of the third paragraph of which refers to the social rehabilitation of convicted persons, if it excludes from competitions for recruitment of staff to the administration of the Interior Ministry all those who have served prison sentences for deliberate offences, in so far as it does not envisage the discretion of the relevant administrative department to assess, for the purpose of admission to the competitions, the degree of rehabilitation achieved by the candidate.

Supplementary information :

By decisions Nos 97/1988 and 197/1993 the Court found unconstitutional those rules prescribing automatic dismissal of state employees as a consequence of specific criminal convictions.



Identification :

a) Italy / b) Constitutional Court / c) / d) 5/23 November 1993 / e) Judgment No. 410 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Fundamental rights – Civil and political rights – Right of access to courts.

Fundamental rights – Governing principles – Entitlement to rights – Natural and legal persons.

Keywords of the alphabetical index:

Prisoner/Fundamental rights.

Summary:

Vis-à-vis the prison administration, prisoners retain a certain legal status which, owing to its close association with the human person, comprises constitutionally guaranteed subjective rights. The legal protection of such rights is stipulated by the Constitution under Article 24 and rests exclusively with the ordinary courts, even in the absence of explicit provisions.

Supplementary information:

In decision No. 394/1993 the Court held that the prison administration may take measures regarding the conditions under which the prison sentence is served. Such measures are nevertheless subject to the limitations and guarantees prescribed by the Constitution concerning the right of defence (Article 24 of the Constitution), prohibition of all physical and moral violence (Article 13, paragraph 4, of the Constitution) or treatment contrary to humane precepts (Article 27, paragraph 3, of the Constitution).



Identification:

a) Italy / b) Constitutional Court / c) / d) 15/25 November 1993 / e) Judgment No. 416 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional proceedings – Procedure – General characteristics – General conditions governing procedure.

Institutions – Principles of State organisation – Other.

Keywords of the alphabetical index:

Selection board for civil service entrance.

Summary:

A question as to the constitutional legitimacy of the rule governing the membership of a selection board is

to be regarded as preliminary and relevant to the ruling in litigation on the main issue where the question arises in the course of proceedings concerning the legitimacy of that board's decisions. The well-foundedness of the question would indeed have the effect of nullifying the entire procedure carried out by the board, including acts which were the subject of a specific censure in the proceedings a quo.

The principle of impartiality set forth in Article 97 of the Constitution must guide the organisation and action of state administrative departments in all spheres, and hence also in relation to competitions for civil service appointment and promotion. Such a principle requires that the sole purpose of competitions should be to select the persons deemed best fitted to perform civil service functions, irrespective of any consideration regarding candidates' political tendencies or personal and social circumstances.

It follows that these boards should be so constituted as to safeguard the strictly technical validity of their decisions against any risk of bias due to personal interests, and to ensure that the proportion of experts holding professional diplomas and qualifications in the subjects tested outweighs that of members holding a political or trade union appointment.

Supplementary information:

The decision confirms the principles already stated in judgments Nos. 453/1990 and 333/1993.



Identification:

a) Italy / b) Constitutional Court / c) / d) 13/14 December 1993 / e) Judgment No. 438 / f) / g).

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 public body – Organs of regional authorities.

Constitutional justice – Constitutional proceedings – Decisions – Types – Procedural decisions.

Institutions – Legislative bodies.

Fundamental rights – Governing principles – Entitlement to right – Protection of minorities or of persons belonging to minorities.

Keywords of the alphabetical index:

Chamber of Deputies / Electoral system / Proportional representation system / Quorum / Political parties / Ethnic minorities / Trentino-Alto Adige Region / International agreement / Regional status.

Summary:

Protection of the linguistic minorities in the Trentino-Alto Adige Region is expressly placed among the national interests under the provisions of the region's Statute of Autonomy. The relevant principle, stated in general terms in Article 6 of the Constitution, takes on a particular significance in the aforementioned region; its special force in respect of the minorities present in the region derives chiefly from the origin of their protection in an international treaty between the Italian and Austrian Governments, whose application coincided with the initial version of the regional Statute of Autonomy in 1948 and was further strengthened under the 1971 revision of the statute.

The ability of the ethnic minorities present in Trentino-Alto Adige to elect their own political representatives under conditions of genuine parity, which have furthermore been secured from 1948 to the present day, is of indubitable value to the national interest and to the principle of national unity itself.

The authorities of Bolzano Province as applicant, objecting to State regulations which they consider detrimental to the guarantee secured to the minorities in question, challenge the constitutionality of the legislative provisions concerning the new election arrangements for the Chamber of Deputies, particularly where a minimum of 4% of votes at national level is stipulated in respect of the two seats allocated to the region and filled by proportional representation, and they submit that this is at variance with the principle of equality and protection for the minorities concerned. On this point the Court considers it necessary first of all to determine the consequences which would ensue if the appeal were to be allowed. It seems that the infringements of constitutionality challenged by the applicant Province could be overcome by many possible means. Consequently, in accordance with the Court's established constitutional case-law, there being no solution which is mandatory under the Constitution, the application is declared inadmissible.

Supplementary information:

Concerning the special protection secured to the ethnic minorities of the Trentino-Alto Adige Region (primarily the German-speaking minority, which forms a majority in the Province of Bolzano), see decision 242 of 1989. On the inadmissibility of pleas of unconstitutionality, the admission of which might entail a large number of solutions on the legislative level, see judgments 194/1984, 1107/88 and 207/92.



Identification:

a) Italy / b) Constitutional Court / c) / d) 2/16 December 1993 / e) Judgment No. 440 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Rule of law.

Keywords of the alphabetical index:

Authorisations granted by an administrative authority / Requirement of "good conduct and morality" / Discretionary power of an administrative authority.

Summary:

Wherever the requirement of "good conduct and morality" constitutes the basis for an administrative authority's decision on a request for an authorisation or a certificate of good character, this requirement is not to be regarded as contrary in itself to the principles of "ragionevolezza" with which all acts of the state authorities must comply. Nevertheless, in order to prevent the margin of appreciation associated with this requirement from conflicting with requirements of objectiveness, and to guard against its abuse, its purpose must be specified with reference to the special needs which an evaluation of "good conduct and morality" is intended to meet, having regard to the purpose of the type of authorisation or certificate of good character requested.

The maintenance of provisions which subject the grant of certain individual legal claims to the requirement of "good conduct and morality" entails an interpretation of the requirement in accordance with constitutional values and with due distinction between the civil, moral and political connotations of "good conduct and morality". Such provisions are not invalidated by the entry into force of the Constitution because Article 113 thereof provides legal safeguards in respect of claims made by individuals before administrative authorities, safeguards which have been extensively applied by the administrative courts in their substantive review of administrative action.

Rules which, for purposes of licensing by an administrative authority, particularly in respect of firearms, stipulate "good conduct and morality" on the applicant's part and place the onus of proof on the applicant, cannot be considered in keeping with the Constitution. Indeed, it is unreasonable and contrary to Article 3 of the Constitution to expect the applicant to bear a burden which the administration itself may be in no position to assume, precisely because of the varied reference criteria applying to the requirement. Even where there is judicial review of refusals of authorisations by the administrative authority, the nature of the "good conduct and morality" in question is actually determined by the authority itself in the absence of any established criteria. As a result, in order to contest the assessments made by the administration, the applicant is compelled to adduce evidence so difficult as to constitute a "probatio diabolica".

Since the administrative authority is not required to apply specific standards of interpretation when determining

whether the applicant for a firearm licence has in fact given evidence of "good conduct and morality", there is a definite risk that its decisions may be influenced by the personal convictions of those who hold decisional power, with implications for the principle of impartiality in administrative action laid down by Article 97 of the Constitution.



Identification:

a) Italy / b) Constitutional Court / c) / d) 2/16 December 1993 / e) Judgment No. 443 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of distribution of powers between state authorities.

Institutions – Legislative bodies – Relations with the courts.

Fundamental rights – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Parliamentary immunity / Opinions expressed in the performance of one's functions / Parliamentary proceedings.

Summary:

Parliamentary immunity is to be considered applicable – as the Senate declared in the resolution which caused the dispute between state authorities referred by the Rome District Court – to a Senator's declarations at a congress if, as in the present case, they convey opinions and plainly refer to facts and circumstances which became known to him in the performance of his parliamentary functions and which furthermore can be verified in official parliamentary documents.

In cases – like the present one – where the Chamber to which the Member of Parliament belongs has exercised its power to determine the conditions of immunity (with reference to the member's acts or conduct) – a power subject to review by the Constitutional Court alone – any attempt by a judicial body to couple judge-made standards with those applied by the Chamber in question is to be regarded as interfering with the prerogatives of Parliament.

Supplementary information:

This judgment relies on judgment 1150 of 1988, being the Court's ruling on a similar dispute.



Identification:

a) Italy / b) Constitutional Court / c) / d) 17/28 December 1993 / e) Judgment No. 466 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Litigation in respect of distribution of powers between state authorities.

Institutions – Courts – Administrative courts – Competence.

Keywords of the alphabetical index:

State undertaking converted into a joint stock company / Audit Court / Control.

Summary:

The conversion of state undertakings – IRI, ENI, INA, ENEL – into joint stock companies does not suffice to terminate the control hitherto exercised over such undertakings in accordance with the law on the Audit Court and in pursuance of a constitutional rule, for as long as the state remains the sole or majority shareholder in the registered capital.

Control by the Audit Court ceases once the current process of "privatisation", i.e. sale of assets held by the public sector to individuals in the form of shares, is completed and the company thereby ceases to be state property.



Identification:

a) Italy / b) Constitutional Court / c) / d) 22/30 December 1993 / e) Judgment No. 473 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Laws and other rules having force of law.

Constitutional justice – Constitutional proceedings – Types of claim – Referral by a court.

Constitutional justice – Constitutional proceedings – Judgments – Finding of constitutionality or unconstitutionality.

Institutions – Courts – Procedural safeguards – Impartiality.

Keywords of the alphabetical index:

Magistrate / Association by marriage / Incompatibility.

Summary:

The legislator intended to safeguard judges against the bias created where persons with whom they have ties of close kinship or affinity are involved in the same proceedings, even where such persons are vested with unrelated or different functions. Thus it must be considered unreasonable and therefore unconstitutional that the law should cease to prohibit the performance of judicial functions by two spouses in the same case.

That the rules for verifying the impartiality of judges must be enforced by the expedient of incurable nullity is not to be inferred from the principle that judges are bound only by the law.



Identification:

a) Italy / b) Constitutional Court / c) / d) 29/31 December 1993 / e) Judgment No. 498 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Regional measures.

Constitutional justice – Constitutional proceedings – Types of claim – Referral by a court.

Constitutional justice – Constitutional proceedings – Judgments – Types – Procedural decisions.

Institutions – Federalism and regionalism – Basic principles.

Keywords of the alphabetical index:

Building / Change in object of use / Regional regulations / National framework regulations / Incompatibility / Tacit repeal of regional regulations.

Summary:

Under a national law still in force, regional regulations which are incompatible with subsequent national framework regulations are to be regarded as tacitly repealed. Consequently, any questions of constitutionality relating to such regulations must be declared inadmissible.



Lithuania

Constitutional court

Reference period:

1 September 1993 – 31 December 1993

Statistical data

- Total: 7 final decisions including:
- 3 rulings concerning compliance of laws with the Constitution;
- 2 rulings concerning compliance of the decisions of the Seimas (Parliament) with the Constitution of the Republic of Lithuania;
- 2 decisions to dismiss the initiated legal proceedings of the case.

All the decisions of the Constitutional Court were published in the Lithuanian Official Gazette ("Valstybes zinios").

Important decisions

Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 17 September 1993 / e) / f) / g) Publication: Valstybes zinios 47-949 93.09.22.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the distribution of powers between central government and its subdivisions.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a public body – Legislative bodies.

Constitutional Justice – Constitutional proceedings – Decisions – Types – Finding of constitutionality or unconstitutionality.

Constitutional Justice – Common principles or techniques of interpretation – Principle of reasonableness.

Institutions – Principles of State organisation – Rule of Law.

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Local self-Government / Dissolution of City Council.

Summary:

The ruling of the Constitutional Court concerns the decision of the Seimas of the Republic of Lithuania "On the dissolution of Vilnius City Council and some measures necessary to improve the activities in local governments", adopted on April 15, 1993. The Constitutional Court established that the above mentioned Seimas decision had been adopted in violation of procedures provided by law and the guarantee of local autonomy. Therefore, the above mentioned decision of the Seimas has been considered to contradict the Constitution of the Republic of Lithuania.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 8 November 1993 / e) / f) / g) Publication: Valstybes zinios 61-1166 93.11.17.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the formal validity of normative measures.

Constitutional Justice – The subject of review – Laws and other rules having the force of law.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a public body – Legislative bodies.

Constitutional Justice – Common principles or techniques of interpretation – Concept of manifest error in assessing evidence or exercising discretion.

Institutions – Principles of State organisation – Rule of law.

Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Elections / Law on Elections to the Seimas.

Summary:

A group of the Seimas members requested the Constitutional Court to investigate if the Law "On Partially Amending the Law of the Republic of Lithuania on Elections to the Seimas", 16 March 1993, is in compliance with the Constitution of Republic of Lithuania. As the petitioner's request was grounded on a mistaken interpretation of constitutional norms, the constitutional Court gave the ruling that the disputed law does not contradict the Constitution.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 26 November 1993 / e) / f) / g) Publication: Valstybes žinios 66-1260 93.12.03.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the formal validity of normative measures.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a public body – Legislative bodies.

Constitutional Justice – Common principles or techniques of interpretation – Principle of equality.

Institutions – Principles of State organisation – Democratic make-up of the State.

Institutions – Legislative bodies – Parliaments – Organisation.

Keywords of the alphabetical index:

Infringement of principle of equality / Parliament.

Summary:

The ruling of the Constitutional Court concerns the articles of the Statute of the Seimas on the principles of establishing parliamentary groups (factions). In the public court hearing the Constitutional Court established that the articles under discussion violate the principles of equality for Seimas members. Therefore, they are recognised as contradicting the Constitution of the Republic of Lithuania.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 13 December 1993 / e) / f) / g) Publication: Valstybes žinios 70-1320 93.12.18.

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 – Referral by a court.

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.

Keywords of the alphabetical index:

Fundamental rights / Private property / Confiscation.

Summary:

The Constitutional Court in its public court hearing conducted the investigation of Case No. 7 on the conformity of the norms of the Criminal Code providing for the confiscation of property with the Constitution. Despite the provision of Article 23 of the Constitution of the Republic of Lithuania which establishes: "Property shall be inviolable", the Constitutional Court drew the conclusion that a criminal penalty – seizure of property – does not contradict the constitutional norms when it is applied in the cases set forth in the Criminal Code, i.e. if that property was an instrument or provision to commit a crime, or if the property was obtained while committing a crime.



Norway

Supreme court

There was no relevant constitutional case-law during the reference period.



Poland

Constitutional court

Reference period :

1 September 1993 – 31 December 1993

Statistical data

- 12 motions submitted
 - 9 decisions concerning the establishment of conformity of legislative acts with the Constitution.
 - 4 provisions not to carry on further action
 - 1 provision on discontinuance of legal proceedings
 - 3 resolutions of the Constitutional Tribunal on the establishment of the generally binding interpretation of laws
 - 1 advisory decision to the Parliament of Republic of Poland and other law proclaiming institutions concerning ascertained law transgressions and the lacunae for which elimination is indispensable to secure the homogeneity of the legal system in the Republic of Poland
-

Important decisions

K 18/93/ 30 November 1993/ – Principle of the protection of rights acquired.

K 7/93/ 7 December 1993/; K 8/93/ 14 December 1993/ – Lex retro non agit.

Other information

The year 1993 marked the eighth anniversary of the founding of the Constitutional Tribunal. The terms of five judges and the Vice-President, who in 1985 were elected the members of the first bench, expired in 1993, and new members were elected by the Sejm (the Polish Parliament) in November 1993. Prof. Janusz Trzcinski was appointed to the post of Vice-President and the following persons were elected judges: Prof. Zdzislaw Czeszejko-Sochacki, Prof. Leszek Garlicki, Dr Stefan Jaworski, Prof. Wojciech Sokolewicz and Prof. Blazej Wierzbowski, Prof. Andrzej Zoll was appointed to replace Prof. Mieczyslaw Tyczka as President of the Constitutional Tribunal, after Prof. Tyczka resigned from the post. In August 1993, Judge Remigiusz Orzechowski died.

Identification :

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 28 September 1993 / e) Case No. P2/93 / f) / g).

Keywords of the systematic thesaurus:

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 – Referral by a Court.

Constitutional Justice – Constitutional proceedings – Types of claim – Type of review – *Ex post facto* review.

Keywords of the alphabetical index:

Chief Administrative Court.

Summary:

Provisions of the order of the Minister of Internal Affairs that (1) determine the maximum period for which a license for carrying arms may be granted, and (2) declare that licenses which had been issued before the new regulation became effective shall expire, infringe the limits of law-making competence granted to the Minister by the laws. Therefore, the provisions in question have been found to be inconsistent with the constitutional rules of issuing regulations implementing statutes.

It has been stressed by the Tribunal that the Law on arms, munitions and explosives of 1961 does not meet Polish current realities.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 29 September 1993 / e) Case No. K17/92 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental freedoms and rights.

Constitutional Justice – The subject of review – Laws and other rules having the force of law.

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 – Rule of law.

Institutions – Courts – Administrative courts – Jurisdiction.

Fundamental Rights – Civil and political rights – Equality.

Fundamental Rights – Civil and political rights – Right of access to courts.

Keywords of the alphabetical index:

Administrative procedure / President of the Chief Administrative Court / Social aid.

Summary:

Pursuant to the provision of the Social Aid Act of 1990 (as amended in 1992) a non-pecuniary relief in the form of covering public transportation charges may be granted to a person in need. The grant lies within the discretion of the competent administrative authority and does not require an administrative decision. The said relief, as an administrative act unilaterally determining an individual case, should – according to the basic principles of administrative procedure – be issued in the form of an administrative decision that may be appealed to the court. The constitutional principle of democratic state ruled by law and the principle of legality do not allow any decisions of administrative authorities which do not comply with law or are not subject to any review.

The lack of procedure granting citizens the right to appeal against the decision on relief to a court was declared to be in contradiction with the right of access to courts, a basic element of the rule of law. The provision in question was also found to be inconsistent with the constitutional principle of equality, since other administrative decisions on the granting of social aid for certain purposes are subject to judicial review.

Supplementary information:

See recent decisions: K 8/91 ; K 3/92 (right of access to courts) ; P 2/92 ; P 7/92 (social security, social aid).



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 12 October 1993 / e) Case No. K4/93 / f) / g).

Keywords of 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 – Laws and other rules having the force of law.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a public body – Organs of decentralised authorities.

Constitutional Justice – Constitutional proceedings – Types of claim – Types of review – *Ex post facto* review.

Constitutional Justice – Common principles or techniques of interpretation – Proportionality principle.

Institutions – Principles of State organisation – Other.

Institutions – Courts – Administrative courts – Jurisdiction.

Keywords of the alphabetical index:

Local self-government / Municipal Councils of some towns / Public finances / Principle of social justice.

Summary:

The decision relates to the provision of the 1990 law concerning the division of assets and liabilities of previously existing local state administrative authorities between State Treasury and local self-government (municipalities) authorities.

After the provision in question became effective, the budgets of many municipalities were remarkably encumbered with redemption of the debts contracted (under the Council of Ministers' resolution of 1982) by the former local state administrative authorities for supporting housing investments.

The criteria of the division of the debts between State Treasury and municipalities, considered by the legislator, do not comply with the rule of proportionality of advantages and liabilities. Consequently, the communes were arbitrarily burdened with the taxes. Accordingly, the provision in doubt – construed with regard to the above-mentioned resolution of 1982 – was found to contradict the constitutional principle of justice.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 26 October 1993 / e) Case No. U15/92 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental freedoms and rights.

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 – Non-profit making corporate body.

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.

Institutions – Courts – Ordinary Courts – Officers of the Court.

Fundamental Rights – Economic, social and cultural rights – Freedom to work for remuneration.

Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Principle of social justice / Commercial and industrial freedom / Freedom to work for equivalent remuneration / Officers of the courts of general jurisdiction.

Summary:

Orders of the Minister of Justice and the Minister of Labour and Social Politics have limited the maximum amount of court executive officer's commission and lump-sums for managing his office. This limitation infringes neither the constitutional principle of social justice nor the principle of the rule of law. The provisions in question which are consistent with the provisions of several laws, in particular with the provisions of the Act on Courts of General Jurisdiction, the Code of Civil Procedure and the Labour Code, cannot then be considered to be in contradiction with the constitutional freedom of economic activity or the constitutional right to work for equivalent remuneration or the constitutional rules of administration of justice.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 9 November 1993 / e) Case No. K11/93 / f) / g).

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 – Laws and other rules having the force of law.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a public body – Other.

Constitutional Justice – Constitutional proceedings – Types of claim – Types of review – *Ex post facto* review.

Institutions – Principles of State organisation – Separation of powers.

Institutions – Principles of State organisation – Rule of law.

Institutions – Courts – Ordinary courts – Organisation.

Institutions – Courts – Ordinary courts – Status of judges.

Keywords of the alphabetical index:

Independence of judges / Irremovability of judges / Independence of courts / Disciplinary proceedings / Ombudsman.

Summary:

In the case thereof the Constitutional Tribunal decided upon the constitutionality of some provisions of the Act on Courts of General Jurisdiction, as amended in 1993:

1. Provisions upon which the executive may recall a judge who holding the office "had departed from the principle of independence", have been declared inconsistent with the constitutional principles of the independence and irremovability of judges.

Moreover, the provisions in question have violated the principle of the separation of powers and the principle of democratic state ruled by law.

2. The rules on appointing presidents and vice-presidents of courts of general jurisdiction (amended by the provisions in doubt) have been found to be contrary to the principle of the independence of the courts, which is one of the components of the constitutional principle of the separation of powers (the provisions in question have diminished the powers of judges' self-government and expanded the position of the Minister of Justice in appointing the presidents of the courts).



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 22 November 1993 / e) Case No. U7/92 / f) / g).

Keywords of the systematic thesaurus:

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 – Non-profit-making corporate body.

Constitutional Justice – Constitutional proceedings – Types of claim – Type of review – *Ex post facto* review.

Keywords of the alphabetical index:

Summary:

The decision relates to the provisions of the order of the Minister of Agriculture and Food Economy, determining the types of treatment that may be performed by auxiliary veterinary staff – independently or under the control of a veterinary doctor. According to the Tribunal's opinion, the provisions in doubt infringed the limits of law-making competence granted to the Minister by the relevant law.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 23 November 1993 / e) Case No. K5/93 / f) / g).

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 – laws and other rules having the force of law.

Constitutional Justice – Constitutional proceedings – Types of claim – Claim by a public body – Legislative bodies.

Constitutional Justice – Constitutional proceedings – Types of claim – Type of review – *Ex post facto* review.

Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Presidium of the Senate.

Summary:

The two Chambers of the Parliament have different functions in the process of enacting statutes. As implied by the provisions of the Constitutional Act (art. 17), the Senate is empowered to introduce amendments only

to "the text" of the statute adopted by the Chamber of Deputies (Sejm) and submitted to the Senate.

The Sejm (in February 1993) was authorised to refuse the consideration of the Senate's amendments to the law revising the Veterans Act, since those amendments exceeded the contents ("the text") of the law passed by the Sejm and submitted to the Senate. Therefore, the law revising the Veterans Act was enacted in compliance with the procedure set forth in the Constitution.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 30 November 1993 / e) Case No. K18/93 / f) / g).

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 – Claim by a private body or individual – Other.

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.

Keywords of the alphabetical index:

Non-retrospective effect of laws / Inviolability of rights acquired justly / Trade unions.

Summary:

The decision thereof refers to the provisions of the 1992 Budget (of June 1992) and two other laws regulating the State's finances in 1992 (of January 1992). The provisions in doubt entered into force with retroactive effect as from the beginning of the year and inter alia, suspended the evaluation of the remunerations of the employees paid from the State budget.

To the extent that the provisions in question refer to the period before they were announced in the Official Gazette, they have been declared inconsistent with the constitutional prohibition against *ex post facto* laws (*lex retro non agit* principle) and with the principle of the protection of rights justly acquired, which are considered inherent to the principle of the state ruled by law.

The Constitutional Tribunal has emphasised that the constitutional principle of the protection of rights justly acquired is not of absolute character and under certain circumstances it may be derogated from. Therefore, as far as the period after the provisions in question were announced is concerned, the application of these provisions has not been found to be unconstitutional since it was justified by the difficult situation of state finances and the aim of decreasing the budget deficit.

Supplementary information:

See also : decision of January 29, 1992 (case no. K15/91).



Romania

Constitutional court

Reference period:

1 June 1993 – 31 December 1993

Statistical data

- 15 decisions on the constitutionality of legislation prior to enactment

Average time taken – 20 days;

- 2 decisions on the constitutionality of the rules of procedure of the Chambers of Parliament;
- 59 decisions on claims of constitutional incompatibility;

– 41 decisions by the trial divisions, of which 14 were final as no appeal was lodged

Average time taken – 90 days;

– 18 decisions by the appeal divisions

Average time taken – 20 days;

- 1 interpretation decision by the plenary Court;
- 43 decisions on disputes relating to the presidential elections

Average time taken – 5 days.

Important decisions

Identification:

a) Romania / b) Constitutional Court / c) / d) 24 June 1993 / e) Judgment No. 34/1993 / f) / g) Monitorul Oficial No. 144.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right of access to courts.

Keywords of the alphabetical index:

Access to courts / Jurisdictional competences of the administration / Statute of limitation.

Summary:

Fixing special time-limits for the prescription of taxes and duties is not contrary to the Constitution, since taxes and duties are not the private property of the country and do not fall within the ambit of the provisions of Article 41 of the Constitution concerning equal protection of private property.

The solution of a dispute by an administrative authority is compatible with the Constitution insofar as it does not infringe Article 22 of the Constitution which secures free access to courts. Pursuant to Article 125 of the Constitution, justice is rendered by judicial bodies established by law. The jurisdictional competence of the administration must not set aside this competence of the judiciary. Therefore, Article 4 of the Law on administrative disputes No 29/1991, prohibiting access to judicial review procedures in cases where the administration exercises jurisdictional competence, must be abolished, in accordance with Article 150 (1) of the Constitution.

Supplementary information:

Constant case-law.



Identification:

a) Romania / b) Constitutional Court / c) Appeals Division / d) 19 October 1993 / e) No. 61 / f) / g) Monitorul Oficial No. 256/93.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Procedure – Interlocutory proceedings.

Constitutional Justice – Constitutional proceedings – Procedure – Special procedures.

Keywords in the alphabetical index:

Incompatibility / Exceptional review procedures / Inadmissibility.

Summary:

Incompatibility can only exist in cases of review procedures for altering a previous judgment, such as an appeal, and not in the case of revocation. In proceedings on claims of constitutional incompatibility, according to Romanian law, there is only one review procedure, i.e. appeal. Extraordinary review procedures, covered by the Code of Civil Procedure, are therefore inadmissible.



Identification:

a) Romania / b) Constitutional Court / c) Plenary sitting of the Court / d) 15 December 1993 / e) m.71 / f) Constitutionality of home heating grants for the winter 1993-1994 and of the tax levied on private trips abroad / g) Monitorul Oficial No. 305/23.XII.1993.

Keywords of the systematic thesaurus:

Constitutional Justice – Common principles or techniques of interpretation – Principle of reasonableness.

Constitutional Justice – Common principles or techniques of interpretation – Concept of constitutionality dependent on a specified interpretation.

Fundamental Rights – Civil and political rights – Equality.

Fundamental Rights – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords in the alphabetical index:

Social protection / Equality / Tax / Reasonableness.

Summary:

The legislative body has a discretionary right to define the underprivileged social classes for which it introduces social protection measures. The tax levied to raise the necessary financial resources to implement the social protection measure is justified only for the period in which the social protection measure is applied.



Slovenia

Constitutional court

Reference period:

1 September – 31 December 1993

Statistical data

Number of decisions

The Constitutional Court had 13 sessions during this period, in which it dealt with 121 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court register). There were 128 unresolved cases from the previous year at the start of the period (1 September 1993). The Constitutional Court accepted 52 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:

- 57 cases, of which there were
- 13 Decisions and
- 44 Resolutions.

All Decisions (13) 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 proceeding. However, all decisions and resolutions are published in an official collection.

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

- budget (2);
- regional planning, or the regime of building land (11);
- public utility services (water supply etc.) (4);
- salaries of state office holders and public servants (5);
- payment of tax on trade in goods and services (3);
- freedom to perform commercial activities (2);
- privatisation of former social property (7);
- pension insurance (3);
- health insurance (1);
- burdening of prisoners pay (1);
- organisation of the National Assembly (1);
- organisation of a municipality (1);
- jurisdictional disputes between the courts and other State bodies (1);
- employment (2);
- practising lawyers (1);
- citizenship (1);
- banking (3);
- state control of prices (2);
- government enterprises and instrumentalities (4);
- protection of the natural heritage (1);
- national defence (1);

Important decisions

Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 13 July 1993 / e) U-I-108/91 / f) / g).

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 – Claim by a public body – Executive bodies.

Constitutional Justice – Constitutional Proceedings – Decisions – Types – Finding of constitutionality or unconstitutionality.

Constitutional Justice – Constitutional Proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

Constitutional Justice – Constitutional Proceedings – Decisions – Pronouncement and publication – Publication – Publication in an official collection.

Constitutional Justice – Constitutional Proceedings – Decisions – Effects – Effect *erga omnes*.

Constitutional Justice – Constitutional Proceedings – Decisions – Effects – Temporal effect – Retrospective effect.

Constitutional Justice – Common principles or techniques of interpretation – Historical interpretation.

Constitutional Justice – Common principles or techniques of interpretation – Teleological interpretation.

Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Ex officio to expand the proceedings / Principle of connexity.

Transfer of capital of a company to another company without acquiring the right of control / Holding / Logical interpretation / Systematic interpretation.

Summary:

The Constitutional Court gave an interpretative decision of Article 146.b, paragraph 2, of the Companies Act (Official Gazette of the Socialist Federative Republic of Yugoslavia, No. 46/90) which allowed the transfer of capital between companies. It held that this provision was not in conflict with the constitutional regulation of socially-owned property as far as it was applied to a certain type of transfer of socially-owned capital between legal persons which, at the time of the coming into force of the Companies Act (1 January 1989), had

been organised into composite organisations of associated labour or work organisations. The transfer in question was one by which a socially-owned holding company became permanent owner, in another incorporated, socially owned company, of a portion of capital or shares proportionate to the amount of transferred capital, and effected with the intention of pooling, on the basis of an agreed transfer, socially-owned capital and of allowing capital-based linkages possible within the framework of composite entities in the sense of Section V.a of the Companies Act.

Supplementary information:

First judgment as a interpretative decision of the Constitutional Court.

Dissenting/concurring opinion of a constitutional judge.

Modification of a temporary injunction.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 7 October 1993 / e) U-I-165/93 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Other litigation.

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 – Decisions – Types – Finding of constitutionality or unconstitutionality.

Constitutional Justice – Constitutional Proceedings – Decisions – Pronouncement and publication – Publication – Publication in an official collection.

Constitutional Justice – Constitutional Proceedings – Decisions – Effects – Effect *erga omnes*.

Institutions – Executive bodies – Powers.

Institutions – Economic duties of the State.

Fundamental Rights – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Conditions for determining maximum prices / Serious market disturbance.

Retroactive legal regulations / Executive general act
Dissenting / Concurring opinion of a constitutional judge.

Summary:

It is the considered view of the Government of the Republic of Slovenia that the current circumstances of an excessive and general increase in prices through an increase in the price of flour and bread meet the conditions of serious disturbance in the movement of prices of the most important products, for which it takes measures for determining prices by regulations defined in article 5 of the law on prices (Off. Gaz. RS, No. 1/91-I). The decree of the Government of the Republic of Slovenia determining the maximum price of flour and bread (Off. Gaz. RS No. 34/93) is thus not in conflict with the law and the Constitution.

Supplementary information:

Consistent case-law.

By Resolution of 7.10.1993, cases U-I-175/93 and U-I-176/93 have been joined to the case under consideration because of their common treatment and decision.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 4 November 1993 / e) U-I-167/92 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Other litigation.

Constitutional Justice – The subject of review – Laws 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.

Constitutional Justice – Constitutional Proceedings – Decisions – Pronouncement and publication – Publication – Publication in an official collection.

Constitutional Justice – Constitutional Proceedings – Decisions – Effects – Effect *erga omnes*.

Institutions – Economic duties of the State.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Tax relief for vehicles which use unleaded petrol.

Summary:

The impugned provision which introduces a tax relief on the sale of private cars with built-in catalysers for using unleaded petrol, the intention of which is to encourage the purchase of vehicles which use unleaded petrol and thus to reduce the burden on the environment, is not in conflict with the Constitution. The same kinds of car are taxed at the same tax level, and the decision on what kind of car to buy is a matter for the buyer him/herself.

Supplementary information:

Consistent case-law.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 11 November 1993 / e) U-I-109/92 / f) / g) Official Gazette of the Republic of Slovenia, No. 65/93.

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 – Rules issued by independent state bodies.

Constitutional Justice – Constitutional Proceedings – Types of claim – Claim by a public body – Other.

Constitutional Justice – Constitutional Proceedings – Decisions – Types – Finding of constitutionality or unconstitutionality.

Constitutional Justice – Constitutional Proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

Constitutional Justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in an official collection.

Constitutional Justice – Constitutional Proceedings – Decisions – Effects – Effect *erga omnes*.

Institutions – Economic duties of the State.

Keywords of the alphabetical index:

Adopting acts under the exceptional circumstances of the monetary independence of the Republic of Slovenia.

Competence of the Bank of Slovenia to annul decrees of the governors of the National Bank of Yugoslavia.

Summary:

A Decree terminating the validity of decrees issued by the governors of the National Bank of Yugoslavia on

conditions and ways of providing credit to banks and other financial organisations for maintaining daily liquidity is not in conflict with the Constitution or the Law because the Bank of Slovenia adopted it as a competent body on the basis of the provisions of the second paragraph of article 4 of the Constitutional Law for the implementation of the Basic Constitutional Charter on the sovereignty and independence of the Republic of Slovenia.

An establishing decree of the Council of the Bank of Slovenia on taking over specified debts and obligations of the National Bank of Yugoslavia which did not regulate matters relating to disbursements to the economy from the bank and from the National Bank of Yugoslavia to banks of unrefunded foreign exchange savings and exchange differences is not in conflict with the Constitution or the Law. The decree of the Council of the Bank of Slovenia could not regulate these matters since they are within the competence of the Republic of Slovenia.

Supplementary information:

First judgment after such modification of the Constitution.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 11 November 1993 / e) U-I-82/92 / f) / g) Official Gazette of the Republic of Slovenia, No. 65/93.

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 – Administrative acts.

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 – Types – Finding of constitutionality or unconstitutionality.

Constitutional Justice – Constitutional Proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

Constitutional Justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in an official collection.

Constitutional Justice – Constitutional Proceedings – Decisions – Effects – Effect erga omnes.

Constitutional Justice – Constitutional Proceedings – Decisions – Effects – Temporal effect – Retrospective effect.

Constitutional Justice – Common principles or techniques of interpretation – Principles of legality.

Institutions – Executive bodies – Relation with legislative bodies.

Institutions – Economic duties of the State.

Fundamental Rights – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Denationalisation [Criteria – Competence of ministry (administrative) to determine criteria].

Denationalisation [Valuing assets on denationalisation procedures].

Principle of the division of power.

Principle of legality.

Valuation of building land [Farmland].

Summary:

The judgment concerned the instructions on criteria for assessing the value of expropriated property, during the process of denationalisation. The Court objected that these provisions of a statutory regulation, in addition to determining the criteria by which the value of building land should be assessed, actually defined what building land was. This determination not only supplemented legal standards, but regulated specific social relations and thereby exceeded the limits of administrative competence.

Supplementary information:

Consistent case-law.

By Resolution of the Constitutional Court cases U-I-152/92 (Resolution of 17.12.1992) and U-I-4/93 (Resolution of 18.2.1993) were joined to the case herein dealt with because of common treatment and decision.



Sweden

Supreme court

There was no relevant constitutional case-law during the reference period.



Switzerland

Federal court

Reference period :

1 January 1993 – 30 June 1993

Important decisions

Identification :

a) Switzerland / b) Swiss Federal Court / c) 2nd Public Law Court / d) 29 January 1993 / e) 2P.187/1992 / f) Dr S against the Zurich Canton Supreme Court / g) ATF 119 Ia 35 / Decision : D / Summaries: D, F, I.

Keywords of the systematic thesaurus :

Institutions – Courts – Legal assistance – The Bar – In general.

Fundamental Rights – Governing principles – Entitlement to rights – Nationals and foreigners.

Fundamental Rights – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords in the alphabetical index :

Free movement of persons / Profession / Lawyer / Foreigners / Permission to settle / Nationality / Commercial and industrial freedom.

Summary :

Admission to the profession of solicitor; commercial and professional freedom; free movement of professionals.

1. Scope of the guarantee of free movement of professionals as stipulated in Article 5 trans. prov. of the Constitution (recital 1).
2. Foreigners resident in Switzerland requesting admission to the profession of solicitor may invoke the guarantee of commercial and industrial freedom (recital 2, confirmation of the new case-law).
3. The requirement of a residence qualification in Switzerland is compatible with commercial and industrial freedom insofar as it ensures sufficient knowledge of the political and social conditions in the country (clarification of case-law); a foreign national can also possess this knowledge, in which case the requirement of Swiss nationality is disproportionate (recitals 3 – 5).



Identification :

a) Switzerland / b) Swiss Federal Court / c) 1st Public Law Court / d) 24 February 1993 / e) 1P.575/1992 / f) La Genevoise, Life Assurance Company against the Vaud cantonal government / g) ATF 119 Ia 88 / Decision : F / Summaries: F, D, I.

Keywords of the systematic thesaurus :

Constitutional Justice – Constitutional proceedings – Procedure – General characteristics – General conditions governing procedure.

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Procedural safeguards – Independence

Fundamental Rights – Civil and political rights – Right of access to courts.

Fundamental Rights – Civil and political rights – Right to a fair trial.

Fundamental Rights – Civil and political rights – Right to property – Other.

Keywords in the alphabetical index :

Public law appeal / Federal court / Exhaustion of available remedies / New point of law / Fair trial / Civil law / Protection of monuments / Classification decision.

Summary :

Article 6 paragraph 1 ECHR, Article 4 and 22 ter of the Constitution; Article 33 LAT; classification of a cinema/theatre auditorium.

1. Article 86 OJ; admissibility of fresh complaints (recital 1).
2. Scope of the concept of "civil rights and obligations" within the meaning of Article 6 paragraph 1 ECHR; reference to previous case-law (recital 3).
3. The decision by the Vaud cantonal government, in accordance with Article 52 of the Vaud LPNMS, to classify a cinema/theatre auditorium, annexes and foyer is, given the particular circumstances, a matter of civil rights covered by Article 6 paragraph 1 ECHR.
4. The appellant, contesting the existence and substance of this decision, was unable to bring the matter before an independent and impartial court as specified by Article 6 paragraph 1 ECHR. Violation of this constitutional provision (recital 5).
5. Cantonal proceedings furthermore do not fulfil the requirements of Article 33 LAT (recital 6).
6. Consequences of the appeal being allowed (recital 7).



Identification:

a) Switzerland / b) Swiss Federal Court / c) 1st Public Law Court / d) 17 March 1993 / e) 1P.741/1992 / f) X against the State Counsel's Department and the Zug Canton criminal court / g) ATF 119 Ia 99 / Decision: D / Summaries: D, F, I.

Keywords of the systematic thesaurus:

Constitutional Justice – Common principles or techniques of interpretation – Balancing of interests.

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Procedural safeguards – Public hearings.

Institutions – Courts – Ordinary Courts – Criminal courts.

Fundamental Rights – Civil and political rights – Personal liberty.

Keywords in the alphabetical index:

Personal liberty / Criminal procedure / Public hearings / Balance of interests.

Summary:

Personal liberty, paragraph 59 Zug Constitution and Article 6 paragraph 1 ECHR: non-public nature of hearings in criminal proceedings.

1. In requesting non-public hearings in criminal proceedings, the accused may, in principle, invoke the right to personal liberty in the sense of unwritten constitutional law and the guarantees of Article 8 ECHR (recital 2b).
2. Significance and scope of the principle of public hearings (recital 4a).
3. Weighing up the interests of all parties. Private hearings are not justified in casu. Consequences for accredited journalists in particular (recitals 4b-4f).



Identification:

a) Switzerland / b) Swiss Federal Court / c) 2nd Public Law Court / d) 26 March 1993 / e) 2A.333/1991 / f) Egger and Legital Association against the Federal Department of Transport, Communications and Energy and the Swiss Radio and Television Broadcasting Corporation / g) ATF 119 Ib ... / Decision: F / Summaries: F, D, I.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Fundamental Rights – Civil and political rights – Freedom of expression.

Keywords in the alphabetical index:

Constitutional right to information / Media / Television / Elections.

Summary:

Participation of a political movement in television programmes concerning federal elections.

The appellants considered the conditions governing permission to make election broadcasts to be unconstitutional. The refusal to grant air time to one or more groups of people may cause problems with regard to the Constitution and/or the European Convention on Human Rights. The directives take into account the interests of the smaller political parties. However, these are not in a position to claim the same air time and time-slots as the larger political groupings.



Identification:

a) Switzerland / b) Swiss Federal Court / c) 1st Public Law Court / d) 6 May 1993 / e) 4P.212/1992 / f) A. against the Valais cantonal arbitration board for labour disputes / g) ATF 119 Ia 81 / Decision: F / Summaries: F, D, I.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Procedure – General characteristics – General conditions governing procedure.

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Procedural safeguards – Independence.

Institutions – Courts – Procedural safeguards – Impartiality.

Institutions – Courts – Ordinary courts – Civil courts.

Fundamental Rights – Civil and political rights – Right to a fair trial.

Keywords in the alphabetical index:

Public law appeal / Exhaustion of available remedies / Arbitration board / Employment law / Guarantee of lawful judge.

Summary:

Article 6 paragraph 1 ECHR; article 29 et seq of the Valais employment law (LTr).

1. Admissibility of public law appeal for violation of constitutional and convention rights (recital 1a).
2. Notion of "independent and impartial tribunal" within the meaning of Article 6 paragraph 1 ECHR (recital 3).
3. The arbitration board is a special tribunal which satisfies the requirements of Article 6 paragraph 1 ECHR with regard to its composition, the appointment of its members and its organisation (recital 4a).
4. In the case in point, the procedure followed did not violate Article 6 paragraph 1 ECHR; in particular, the role played by the clerk of the court did not amount to a breach of the independence and impartiality of the arbitration board (recital 4b).



Identification:

a) Switzerland / b) Swiss Federal Court / c) 1st Public Law Court / d) 26 May 1993 / e) 1P.147/1993 / f) H against the State Counsel's Department and the Grisons cantonal court / g) ATF 119 Ia 221 / Decision: D / Summaries: D, F, I.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Procedural safeguards – Public hearings.

Institutions – Courts – Procedural safeguards – Impartiality.

Institutions – Courts – Ordinary courts – Criminal courts.

Fundamental Rights – Civil and political rights – Personal liberty.

Fundamental Rights – Civil and political rights – Freedom of movement.

Fundamental Rights – Civil and political rights – Right to a fair trial.

Keywords in the alphabetical index:

Personal liberty / Arrest / Unlawfulness / Compensation for detention / Guarantee of lawful judge.

Summary:

Compensation procedure for wrongful detention: personal liberty and Article 5 paragraph 3 ECHR; Article 5 paragraph 5, Article 6 paragraph 1 ECHR and Article 58 paragraph 1 of the Constitution.

1. Payment of compensation for wrongful detention as specified in Article 5 paragraph 5 of the ECHR is covered by Article 6 paragraph 1 ECHR (recital 2). The procedure must therefore respect the guarantees provided by Article 6 paragraph 1 ECHR.

2. There is no violation of the right to an impartial tribunal in accordance with Article 58 paragraph 1 of the Constitution and Article 6 paragraph 1 ECHR if the trial judge subsequently hears and examines the claim for compensation for wrongful detention (recital 3).
3. The right to invoke the principle of public hearings in such a trial lapses for proceedings before the Federal Court; principles relating to the lapsing of procedural safeguards (recital 5).
4. The right of the individual arrested to be brought promptly before a judge or judicial official in accordance with Article 5 paragraph 3 ECHR was in fact respected. Does this requirement stem from personal liberty as provided for by unwritten constitutional guarantees? (recital 7).
5. In view of the specific circumstances of the case, the duration of detention was disproportionate and thus unconstitutional. Appeal allowed (recital 8).



Identification:

a) Switzerland / b) Swiss Federal Court / c) 2nd Public Law Court / d) 18 June 1993 / e) 2P.292/1992 / f) M against the Zurich cantonal government / g) ATF 119 Ia 178 / Decision: D / Summaries: D, F, I.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of fundamental rights and freedoms.

Constitutional Justice – Constitutional proceedings – Procedure – Parties – Locus standi.

Constitutional Justice – Constitutional proceedings – Procedure – Parties – Interest.

Constitutional Justice – Common principles or techniques of interpretation – Proportionality principle.

Institutions – Principles of State organisation – Relations between the State and bodies of a religious or ideological nature.

Fundamental Rights – Civil and political rights – Personal liberty.

Fundamental Rights – Civil and political rights – Freedom of conscience.

Fundamental Rights – Civil and political rights – Freedom of worship.

Keywords in the alphabetical index:

Freedom of conscience and belief / Personal liberty / Public law appeal / Appeal to a superior administrative

authority / Federal court / Federal council / Competence
/ Capacity to take legal proceedings and to appeal /
Public education / Swimming lessons / Dispensation /
Religion / Islam.

Summary:

Article 49 of the Constitution and Article 9 ECHR;
dispensation from swimming lessons on religious grounds.

1. Competence of the Federal Court on matters concerning religious constitutional rights (recital 1).
2. Capacity for parents and children to lodge a public law appeal in matters of freedom of conscience and belief (recital 2).
3. The precept adopted by devout Muslims of prohibiting children of both sexes from swimming together is covered by the protection of religious freedom guaranteed by Article 49 of the Constitution and Article 9 ECHR (recitals 3 and 4).
4. Conditions under which a refusal to grant a dispensation from swimming lessons is compatible with the Constitution. Appeal allowed and dispensation from swimming lessons granted (recitals 6-8).



Turkey

Constitutional court

Reference period :

1 September 1993 – 31 December 1993

Statistical data

- Number and types of decisions : 33
 - Only 21 decisions published in the Official Gazette and 6 more previous decisions also published in the Official Gazette between 1 September 1993 and 31 December 1993.
-

Important decision

Identification :

a) Turkey / b) Constitutional Court / c) / d) 21 October 1993 / e) 1993/33 / f) / g) published in the Official Gazette, 6 November 1993.

Keywords in the systematic thesaurus :

Constitutional Justice – Constitutional proceedings – Decisions – Types – Procedural decisions.

Constitutional Justice – Constitutional proceedings – Decisions – Effects – Temporal effect – Retrospective effect.

Constitutional Justice – Common principles or techniques of interpretation – Teleological interpretation.

Sources of Constitutional Law – Categories – Unwritten Rules – General Principles.

Keywords in the alphabetical index :

Stay of execution of legislation / Power to temporarily suspend the act under attack from being enforced / Filling the lacunae of the Constitution.

Summary :

According to the Turkish Constitution annulment decisions cannot have retroactive effect and the decisions of the Constitutional Court cannot be made public without a written statement of reasons. Also laws shall cease to have effect from the date of publication of the annulment decision in the Official Gazette. All these provisions reduce the efficiency of constitutional jurisdiction and the decisions of the Court are generally surpassed by the course of events and the application of the contested law.

For the above reasons the Constitutional Court in the action for annulment of the decree having the force of law concerning the establishment of the Turkish Telecommunication Joint Stock Company accepted, without any written provision in the Constitution, that the Constitutional Court has the power to suspend the application of the law or decree having the force of law which is the subject of constitutional review. The Constitutional Court reached this conclusion by using a teleological interpretation of the Constitution. The Court deemed that if the implementation of a law or decree having the force of law were to result in damages which are difficult or impossible to compensate, and if this law or decree is clearly unconstitutional, then the challenged law can be suspended. This power is needed for the efficiency of the constitutional jurisdiction.

Supplementary information:

The Constitutional Court for the first time accepted the power to temporarily suspend the enforcement of the law under consideration. This power is stated neither in the Constitution nor the Law on the Constitutional Court.



United States of America

Supreme court

Reference period:

1 September 1993 – 31 December 1993

Important decision

Identification:

a) United States of America / b) Supreme Court / c) / d) 13 December 1993 / e) No. 92-1180 / f) United States v. James Daniel Good Real Property et al. / g).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.

Institutions – Courts – Ordinary courts.

Fundamental Rights – Civil and political rights – Right to property.

Fundamental Rights – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Due process / *Forfeiture* / *Criminal procedure*.

Summary:

Four and one-half years after police found drugs and drug paraphernalia in claimant Good's home and he pleaded guilty to promoting a harmful drug in violation of Hawaii law, the United States filed an *in rem* action in the Federal District Court, seeking forfeiture of his house and land, under 21 U.S.C. § 881(a)(7), on the ground that the property had been used to commit or facilitate the commission of a federal drug offense. Following an *ex parte* proceeding, a Magistrate Judge issued a warrant authorizing the property's seizure, and the Government seized the property without prior notice to Good or an adversary proceeding.

The Court held:

1. Absent exigent circumstances, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. Pp. 4-19.

a. The seizure of Good's property implicates two "'explicit textual source[s] of constitutional protection,'" the Fourth Amendment and the Fifth. *Soldal v. Cook County*, 506 U.S. __, __.

While the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not provide the sole

measure of constitutional protection that must be afforded property owners in forfeiture proceedings. *Gerstein v. Pugh*, 420 U.S. 103; *Graham v. Connor*, 490 U.S. 386, distinguished. Where the Government seizes property not to preserve evidence of criminal wrongdoing but to assert ownership and control over the property, its action must also comply with the Due Process Clause. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663; *Fuentes v. Shevin*, 407 U.S. 67. Pp. 4-8.

b. An exception to the general rule requiring pre-deprivation notice and hearing is justified only in extraordinary situations. *Id.*, at 82. Using the three-part inquiry set forth in *Mathews v. Eldridge*, 424 U.S. 319 – consideration of the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose, *id.*, at 335 – the seizure of real property for purposes of civil forfeiture does not justify such an exception. Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance, cf., e.g., *United States v. Karo*, 468 U.S. 705, 714-715, that weighs heavily in the *Mathews* balance. Moreover, the practice of *ex parte* seizure creates an unacceptable risk of error, since the proceeding affords little or no protection to an innocent owner, who may not be deprived of property under § 881(a)(7). Nor does the governmental interest at stake here present a pressing need for prompt action. Because real property cannot abscond, a court's jurisdiction can be preserved without prior seizure simply by posting notice on the property and leaving a copy of the process with the occupant. In addition, the Government's legitimate interests at the inception of a forfeiture proceeding – preventing the property from being sold, destroyed, or used for further illegal activity before the forfeiture judgment – can be secured through measures less intrusive than seizure: a *lis pendens* notice to prevent the property's sale, a restraining order to prevent its destruction, and search and arrest warrants to forestall further illegal activity. Since a claimant is already entitled to a hearing before final judgment, requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden, and any harm from the delay is minimal compared to the injury occasioned by erroneous seizure. Pp. 8-16.

c. No plausible claim of executive urgency, including the Government's reliance on forfeitures as a means of defraying law enforcement expenses, justifies the summary seizure of real property under

§ 881(a) (7). Cf. *Phillips v. Commissioner*, 283 U.S. 589. Pp. 16-18.

2. Courts may not dismiss a forfeiture action filed within the five-year statute of limitations for non-compliance with the timing requirements of §§ 1602-1604. Congress' failure to specify a consequence for noncompliance implies that it intended the responsible officials administering the Act to have discretion to determine what disciplinary measures are appropriate when their subordinates fail to discharge their statutory duties, and the federal courts should not in the ordinary course impose their own coercive sanction, see, e.g., *United States v. Montalvo-Murillo*, 495 U.S. 711, 717-721. Pp. 19-22.



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2. Including the conditions and manner of such appointment (election, nomination, etc).

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28. This keyword allows for the inclusion of norms and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (Declarations of rights, Basic Charters, etc.).

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