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The Bulletin

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe and North America and the European Court of Human Rights. The bulletin is published three times a year, each issue reporting the most important case-law during one trimester.

Its aim is to allow judges and constitutional law specialists in the academic world to be informed quickly about the most important judgments in this field. The exchange of information and ideas among old and new democracies in the field of judge-made law is of vital importance. Such an exchange and such cooperation, it is hoped, will not only be of benefit to the newly established constitutional jurisdictions of Central and Eastern Europe, but will also enrich the case-law of the existing courts in Western Europe and North America. The main purpose of the Bulletin on Constitutional Case-law is to foster such an exchange and to assist national judges in solving critical questions of law which often arise simultaneously in different countries.

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

The decisions are presented in the following way:

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

G. BUQUICCHIO

Secretary of The Venice Commission

The Venice Commission

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

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

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

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

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Austria

Constitutional Court

Reference period:

1 January 1994 – 30 April 1994

Statistical data

The Court's December 1993 session

- Pecuniary claims (Article 137 B-VG): 2
- Disputes over jurisdiction (Article 138 paragraph 1 B-VG): 2
- Reviews of regulations (Article 139 B-VG): 128
- Reviews of legislation (Article 140 B-VG): 50
- Reviews of elections (Article 141 B-VG): 11
- Appeals against administrative authorities' decisions (Article 144 B-VG): 691 (366 not admitted)

The Court's March 1994 session

- Differences of opinion with the Audit Court (Article 126 a B-VG): 1
 - Pecuniary claims (Article 137 B-VG): 8
 - Reviews of regulations (Article 139 B-VG): 25
 - Reviews of legislation (Article 140 B-VG): 112
 - Reviews of elections (Article 141 B-VG): 3
 - Appeals against administrative authorities' decisions (Article 144 B-VG): 496 (338 not admitted)
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Important decisions

Identification:

a) Austria / b) Constitutional Court / c) / d) 13 December 1993 / e) B629/93 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Parliamentary rules.

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

Institutions – Legislative bodies – Parliaments.

Keywords of the alphabetical index:

Jurisdiction of the Constitutional Court / Political parties / National Council / Administrative decision / Financing of political parties.

Summary:

Dismissal of an appeal from a parliamentary group (*Parlamentsklub*) on the grounds that the Constitutional Court clearly had no jurisdiction. The memorandum from the President of the National Council concerning the level of the grant to be paid to a party in accordance with the legislation on the financing of political parties could not be considered as an administrative decision within the meaning of Article 144 of the Constitution. There was the possibility of lodging a pecuniary claim, in accordance with Article 137 of the Constitution.



Identification:

a) Austria / b) Constitutional Court / c) / d) 13 December 1993 / e) A 10/93 / f) / g).

Keywords of the systematic thesaurus:

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

Institutions – Legislative bodies – Parliaments.

Institutions – Legislative bodies – Political parties.

Keywords of the alphabetical index:

National Council / Financing of political parties / Political parties.

Summary:

Pecuniary claim against the Federation lodged by a parliamentary group of the National Council in connection with the level of the grant to be paid to a parliamentary group under the legislation on the financing of political parties, following the departure of five of its members during the lifetime of the parliament.

The Court did not allow the claim, since the fact of a member of parliament leaving a political party during the Parliament's lifetime did not infringe the National Council's rules of procedure. A reduction in the grant corresponding to the resulting reduction in the parliamentary group's expenses was justified – whether or not the departing members formed a new parliamentary grouping.



Identification:

a) Austria / b) Constitutional Court / c) / d) 13 December 1993 / e) B563/93 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Parliamentary rules.

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

Institutions – Legislative bodies – Parliaments.

Keywords of the alphabetical index:

Jurisdiction of the Constitutional Court / Political parties / National Council / Administrative decision.

Summary:

Dismissal of an appeal from a political party on the grounds that the Constitutional Court clearly had no jurisdiction. The finding of the President of the National Council that the formation of a parliamentary group (*Parlamentsklub*) by five members of parliament was in accordance with the National Council's rules of procedure could not be considered as an administrative decision within the meaning of Article 144 of the Constitution. (The five members of the National Council had left the parliamentary group of the applicant political party).



Identification:

a) Austria / b) Constitutional Court / c) / d) 18 December 1993 / e) G 227/92 / f) / g).

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.

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Individual appeal – Individualantrag / Right to respect for private and family life / Name acquired through marriage / Equality.

Summary:

The Court refused to nullify a provision of the Civil Code relating to the effects of marriage on the spouses' names. The applicant argued that the statutory presumption that, in the absence of agreement between the fiancés, the husband's name was to be treated as the spouses' common name was unconstitutional. The Court recognised that there was a relationship between the name and the right to respect for private life but also found that Parliament could regulate the use of names, since this related to the maintenance of public order. The legislation at issue met the requirements of the equality principle and of the right to private and family life; it did not treat men more favourably. Parliament, which had taken existing customs into account, should not seek to change habits in order to oblige married persons to exercise their right to choose the spouses' common name.



Identification:

a) Austria / b) Constitutional Court / c) / d) 16 December 1993 / e) B 893/93 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Administrative acts.

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

Keywords of the alphabetical index:

Freedom of association / Job placement.

Summary:

The dissolution of an association by administrative authority did not infringe the principle of freedom of association, within the meaning of Article 11 of the European Convention of Human Rights, if the activity carried out under the auspices of the association – placing people in employment – did not comply with the legislation governing the organisation of associations or with the association's own statute.



Identification:

a) Austria / b) Constitutional Court / c) / d) 2 December 1993 / e) G 134/93 / f) / g).

Keywords of the systematic thesaurus:

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

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

Institutions – Courts – Legal assistance – The Bar.

Fundamental Rights – Civil and political rights – Confidentiality of correspondence.

Keywords of the alphabetical index:

Confidentiality of correspondence / Prisoners.

Summary:

Annulment of a provision of the legislation on the execution of sentences empowering prison staff to carry out random inspections of correspondence between prisoners and their lawyers when there were no grounds for suspicion to justify such an inspection. According to the Court, the provision did not comply with the right to respect for correspondence safeguarded in Article 8 paragraph 1 of the European Convention on Human Rights.



Identification:

a) Austria / b) Constitutional Court / c) / d) 3 March 1994 / e) G 116/93 / f) / g).

Keywords of the systematic thesaurus:

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

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

Institutions – Principles of State organisation – Rule of law.

Keywords of the alphabetical index:

Equality between the sexes / Right to work / Rule of Law / Principle of Legality / Legal protection.

Summary:

Annulment of a provision of the legislation on equal pay between the sexes. The provision only allowed Federal grants for the promotion of projects to be paid to undertakings which were in compliance with the rules laid down by the commission provided for in the legislation. Under the legislation, the grounds for the refusal of a grant could not be checked or examined since the refusal was based solely on an expert opinion, against which there was no appeal. Under these circumstances, the provision in question infringed the principle of legality.



Belgium

Court of Arbitration

Reference period:

1 January 1994 – 30 April 1994

Statistic data

- 34 judgments
 - 79 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
 - 78 new cases
 - average length of proceedings: 10 months
 - 17 judgments concerning proceedings for annulment
 - 14 rulings on preliminary points of law
 - 3 judgments concerning applications for suspension.
-

Important decisions

- a. Judgment No. 12/94 of 3 February 1994
Constitutional Justice – The subject of review – International treaties.
Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources.
Sources of constitutional law – Hierarchy – Treaties and constitutions.
- b. Judgment No. 33/94 of 26 April 1994
Institutions – Courts – Ordinary courts – Registry.
Institutions – Courts – Ordinary courts – Discipline.
Fundamental Rights – Civil and political rights – Equality.
Fundamental Rights – Civil and political rights – Right of access to courts.
Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.

General observation

The Moniteur belge of 17 February 1994, second edition, published a new co-ordinated text of the Belgian Constitution in Dutch, French and German. The numbering of the articles has undergone radical revision but there are no substantive amendments.

The text of the co-ordinated Constitution may be ordered (in Dutch or French) from the following address:

Direction du Moniteur Belge
rue de Louvain 40/42
1000 BRUXELLES
Tel.: 00.32.2.512.00.26

Identification:

a) Belgium / b) Court of Arbitration / c) / d) 20 January 1994 / e) Judgment No. 5/94 / f) / g) Moniteur belge, 10 February 1994.

Keywords of the systematic thesaurus:

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

Constitutional Justice – The subject of review – Rules issued by the executive.

Institutions – Legislative bodies – Relations with the courts.

Institutions – Courts – Procedural safeguards – Legal provisions for access to courts.

Keywords of the alphabetical index:

Certainty of law / Constitutional principle of division of powers / Judicial safeguards applicable to control of constitutionality.

Summary:

The case concerns an application for annulment of a legislative act embodying the provisions of an administrative act whose lawfulness was contested by court decisions. The legislator may rightly assume that the certainty of the law is imperilled where the validity of a given rule is subject to concurrent conflicting appraisals. By issuing a new act, which is itself subject to censure by the Court of Arbitration, the legislator in no way overrides the fundamental principle of the Belgian legal system that court decisions can be altered solely by recourse to legal remedies. The fact that different judicial safeguards apply to royal orders – whose constitutionality is reviewable by all courts – and to laws – whose constitutionality reviewable by the Court of Arbitration alone – is objectively justified in that it arises from the distinction drawn by the constitution-making body between legislative acts and administrative acts for the purposes of reviewing their validity. (B.7 and B.8).



Identification:

a) Belgium / b) Court of Arbitration / c) / d) 20 January 1994 / e) Judgment No. 5/94 / f) / g) Moniteur belge, 10 February 1994.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Commercial and industrial freedom / Freedom of association.

Summary:

Commercial and industrial freedom cannot be conceived as an unlimited right. It raises no impediment to control of individual and corporate economic activity by law. The legislator would nevertheless infringe the principle of freedom and non-discrimination by limiting commercial and industrial freedom in a discriminatory manner. (B.18)

Article 27 of the Constitution (former Article 20) recognises the right of association and prohibits preventive measures in respect thereof. However, it does not imply

that the legislator is required to provide citizens forming an association with the means to engage in a specific economic activity. The provisions made by the legislator to reform compulsory sickness and disability insurance by restricting its action in no way affect freedom of association. (B.29)

Supplementary information:

See also Judgment No. 10/93 of 11 February 1993 (Bulletin No. 93/1, p. 7).

On 17 February 1994 a new co-ordinated Constitution was published in the Moniteur belge

(See general observation above).



Identification:

a) Belgium / b) Court of Arbitration / c) / d) 20 January 1994 / e) Judgment No. 6/94 / f) / g) Moniteur belge, 17 February 1994.

Keywords of the systematic thesaurus:

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

Institutions – Courts – Administrative courts – Procedure.

Institutions – Courts – Legal assistance.

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

Sources of constitutional law – Categories – Unwritten rules – General principles.

Keywords of the alphabetical index:

Lawyer / Rights of the defence.

Summary:

Proceedings before the national service review boards – bodies which rule on appeals by conscripts regarding their physical fitness to perform military service – must comply with the rights of the defence because these constitute a general legal principle.

The rights of the defence embody the right to be assisted by a lawyer. By denying the assistance of a lawyer at hearings before the review board, the legislator infringes the defence rights of a category of citizens. (B.4.1).

While the right to be assisted by a lawyer pertains to the actual exercise of these rights, on the other hand the right to be represented by a lawyer before a court is not secured by any general legal principle. (B.4.2).

Supplementary information :

Idem, Judgment No. 27/94 of 22 March 1994.



Identification :

a) Belgium / b) Court of Arbitration / c) / d) 27 January 1994 / e) Judgment No. 9/94 / f) / g) Moniteur belge, 23 March 1994.

Keywords of the systematic thesaurus :

Fundamental Rights – Civil and political rights – Equality.

Sources of constitutional law – Categories – Unwritten rules – General principles.

Keywords of the alphabetical index :

Equality / Positive discrimination.

Summary :

Certain inequalities which are introduced in order to redress an existing state of inequality need not be irreconcilable with the principle of equality and the prohibition of discrimination. However, this is subject to the following provisos: any such corrective inequalities must be applied only to those cases where blatant inequality is found; the removal of the inequality in question must be identified by the legislator as a goal to be furthered; the measures taken must be of a temporary nature and be intended to lapse once the legislator's aim is achieved; they must not needlessly restrict the rights of others. It rests with the courts and tribunals, the Council of State or the Court of Arbitration, depending whether the measures are regulatory or legislative, to verify their compliance with the aforementioned conditions. (B.6.2).



Identification :

a) Belgium / b) Court of Arbitration / c) / d) 3 February 1994 / e) Judgment No. 12/94 / f) / g) Moniteur belge, 11 March 1994.

Keywords of the systematic thesaurus :

Constitutional Justice – The subject of review – International treaties.

Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources.

Sources of constitutional law – Hierarchy – Treaties and constitutions.

Keyword of the alphabetical index :

European schools.

Summary :

The Court of Arbitration has jurisdiction to review the constitutionality of acts of domestic legislation assenting to a treaty. Such review entails scrutiny of the substance of the provisions of the international instruments. (B.1 – B.3).

The Court must carry out its review with due regard to the fact that the point at issue is not a unilateral act of sovereignty but a treaty provision also having legal effects outside the national legal sphere. (B.6).

The constitution-making body, which forbids the legislator to pass domestic legislation conflicting with the constitutional standards of which the Court of Arbitration has oversight, cannot be deemed to authorise the legislator to pass such legislation by the indirect expedient of assent to an international treaty.

International law – brought into being by States – makes no provision, even in Article 27 of the Vienna Convention on the Law of Treaties, authorising States to enter into treaties which are at variance with their Constitutions. (B.4).

Supplementary information :

The case concerned agreements on the European Schools.



Identification :

a) Belgium / b) Court of Arbitration / c) / d) 9 February 1994 / e) Judgment No. 16/94 / f) / g) Moniteur belge, 2 March 1994.

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 – Constitution.

Summary :

In promulgating a constitutional provision, the Crown validly and finally recognises that it has been adopted in accordance with the requirements of Article 131 of the Constitution.

Neither Section 1 of the special Act of 6 January 1989 nor any other constitutional or legislative provision empowers the Court to verify whether an article of the Constitution has been adopted in accordance with the requirements laid down in Article 131 thereof, or to hear and decide an application to set aside a constitutional provision. (B).

Supplementary information:

Article 131 of the Constitution has become Article 195 of the co-ordinated Constitution (see general observation above).



Identification:

a) Belgium / b) Court of Arbitration / c) / d) 3 March 1994 / e) Judgment No. 17/94 / f) / g) Moniteur belge, 13 April 1994.

Keywords of the systematic thesaurus:

Institutions – Federalism and regionalism – Distribution of powers – Co-operation.

Summary:

Section 92 bis (1) of the special Act on institutional reforms of 8 August 1980 authorises the central government, the communities and the regions to conclude co-operation agreements on matters within their respective spheres of competence; co-operation agreements form an extension of the principle that a given power is allocated exclusively to one body. (B.5.2).

Although any form of co-operation necessarily entails limitation of the independence of the authorities concerned, the conclusion of a co-operation agreement under Section 92 bis cannot result in any exchange, relinquishment or recovery of powers, as this would infringe the rules laid down by the Constitution, or in accordance therewith, to determine the respective powers of the Federal Government, the communities and the regions. (B.5.3).



Identification:

a) Belgium / b) Court of Arbitration / c) / d) 8 March 1994 / e) Judgment No. 22/94 / f) / g) Moniteur belge, 25 March 1994.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

Sources of constitutional law – Categories – Written rules – Constitution.

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:

Jurisdiction of the Constitutional Court / European Convention on Human Rights / First Protocol to the ECHR / International Covenant on Civil and Political Rights / International Covenant on Economic, Social and Cultural Rights / Universal Declaration of Human Rights / Equality.

Summary:

The rights and freedoms secured by Articles 10 and 11 of the Constitution (former Articles 6 and 6 bis) establishing the principles of equality and non-discrimination include the rights and freedoms arising out of international treaty provisions with direct effect, these being rendered enforceable under the domestic legal system by an act of assent. This is true at least of the rights and freedoms established by provisions having direct effect, which is the case with Articles 8, 11 and 14 of the European Convention on Human Rights, Article 1 of the First Protocol thereto, Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966 and Article 6 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966.

On the other hand, the Universal Declaration of Human Rights adopted on 10 December 1948 by the United Nations General Assembly does not have direct effect.

Supplementary information:

See also Judgment No. 1/93 of 18 February 1993 (Bulletin 1993/1, p. 9).



Identification:

a) Belgium / b) Court of Arbitration / c) / d) 26 April 1993 / e) Judgment No. 33/94 / f) / g) Moniteur belge.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Discipline.

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

Keyword of the alphabetical index:

Discipline.

Summary:

Where a legislative provision is interpreted to the effect that a court registrar cannot of his own motion introduce an appeal against a disciplinary sanction imposed on him, and furthermore that no other remedy before the Council of State is available to him, it affords no remedy at law against such sanction. Thus interpreted, the provision in question is contrary to Articles 10 and 11 of the Constitution (former Articles 6 and 6bis) establishing the principles of equality and non-discrimination.



Identification:

a) Belgium / b) Court of Arbitration / c) / d) 26 April 1994 / e) Judgment No. 33/94 / f) / g) Moniteur belge.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Registry.

Institutions – Courts – Ordinary courts – Discipline.

Fundamental Rights – Civil and political rights – Equality.

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

Sources of constitutional law – Categories – Written rules – European Convention on Human Rights.

Keywords of the alphabetical index:

Discipline / Registrars of the judiciary.

Summary:

It follows from Article 60 of the Convention for the Protection of Human Rights and Fundamental Freedoms that, irrespective of its scope, Article 6.1 of the Convention and consequently the Act of 13 May 1955 approving the Convention do not infringe Articles 10 and 11 of the Constitution (former Articles 6 and 6 bis) establishing the principles of equality and non-discrimination, since the aforesaid Article 6.1 must necessarily be interpreted in such a way as not to restrict or infringe the rights in respect of discipline which are secured by domestic law to the registrars serving the judiciary. (B.8).



Croatia

Constitutional Court

Reference period :

1 January 1994 – 30 April 1994

Statistical data

- Cases concerning the conformity of laws with the Constitution :
 - received 76, resolved 52 : in 4 cases the law was repealed ; in 9 cases the motion to review the constitutionality of laws was not accepted ; in 39 cases the procedure was terminated because the laws under review were no longer in force – the amending of laws and other regulations to conform with the Constitution of 1990 still continues.
- Cases concerning the conformity of other regulations with the Constitution and laws :
 - received 47, resolved 50 : in 7 cases the motion to review the constitutionality and legality of regulations was not accepted ; in 1 case the regulations were annulled ; 25 cases were terminated ; in 17 cases the motion to review was rejected.
- Cases concerning the protection of constitutional rights :
 - received 351, resolved 86 : in 10 cases the constitutional action was accepted, in 27 cases refused, in 43 cases rejected ; in 6 cases procedure was terminated.
- Cases concerning jurisdictional disputes among legislative, executive and judicial branches :
 - received 3, resolved none.

New Rules of Procedure of the Constitutional Court of the Republic of Croatia entered into force on 19 April 1994, published in Narodne novine, No. 29/1994.

Important decisions

Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 5 January 1994 / e) U-I-144/1993 / f) / g) Narodne novine, No. 6/1994.

Keywords of the systematic thesaurus:

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

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

Fundamental Rights – Governing principles – Limits and restrictions.

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

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

Sources of constitutional law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Right of ownership / Freedom of entrepreneurs / Auditing firms.

Summary:

According to the Audit Act, which regulates the procedure in which the financial side of business transactions is audited, the founder's participation in the capital of the auditing firm may not exceed 25% of the total capital of the firm if he is a legal or natural person lacking authority to perform revision.

The motion to review the constitutionality of this Act claimed that it restricts the freedom of entrepreneurs and the right of ownership. The Court did not accept the proposal because it found that according to the Constitution entrepreneurial freedom and property rights may exceptionally be restricted for the purposes of protecting the interests of the Republic. The Court considered this restriction to be in harmony with the rule of law, which comprises legal certainty and business morals.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 5 January 1994 / e) U-III-236/1993 / f) / g) Narodne novine, No. 6/1994.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Constitutional action.

Summary:

The constitutional action was rejected on the grounds that the notice by which the State Attorney informs a person that it was not justified to lodge an extraordinary legal remedy (claim for protection of legality in a private litigation) is not a judgment of a judicial authority in connection with which constitutional action may be submitted.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 5 January 1994 / e) U-III-375/1993 / f) / g) not published.

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 to property.

Keywords of the alphabetical index:

Constitutional action / Land registers / Ownership.

Summary:

The claimant based his right of ownership on the fact that he was recorded as the owner of immovable property in the land register. The Court refused the action on the grounds that being recorded in the land register as an owner is not evidence of ownership, but only a legal presumption against which counter-evidence may be submitted.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 26 January 1994 / e) U-III-419/1993 / f) / g) Narodne novine, No. 10/1994.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Constitutional court and other courts.

Summary:

The decision of a municipal court to refer a case to the Constitutional Court as the competent authority to decide it was annulled by a ruling of the Constitutional Court on the grounds that it is not a judicial body to which the decision on the merits of a case may be referred.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 16 February 1994 / e) U-III-6/1993 / f) / g) Narodne novine, No. 15/1994.

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.

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

Sources of constitutional law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

General administrative procedure / Opinion of experts.

Summary:

The claimant maintained that his inability to work was due to an occupational disease caused by chemical substances, particularly monomers of vinyl-chloride, to which he was exposed for many years. He had to retire and his pension was fixed before it was established whether his inability to work was due to exposure to harmful chemicals.

The Court accepted the action and ordered a reopening of the procedure having found that the competent authorities had omitted to take into account a provision

of the Act regulating general administrative procedure. According to this provision, an administrative authority is obliged to obtain another expert opinion from a scientific institution if the opinions of the experts in the case are opposed on major points.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 16 February 1994 / e) U-I-231/1990 / f) / g) Narodne novine, No. 25/1994.

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 – Governing principles – Limits and restrictions.

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

Sources of constitutional law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Freedom of religion / Marriage.

Summary:

The decision of the Court annulled a provision of the Act on matrimony and family relations which had prohibited the performance of a religious matrimonial ceremony before matrimony was concluded in a way prescribed by that Act (before a municipal body). Since the Constitution guarantees freedom of religion, and a religious matrimonial ceremony is a manifestation of freedom of religion, whether concluded before or after civil marriage, the stated prohibition restricted the right guaranteed by the Constitution. Freedoms and rights may only be restricted by law to protect the freedoms and rights of other people and the public order, morality and health. In the given case, none of these values was affected by the religious matrimonial ceremony.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 25 February 1994 / e) U-II-66/1994 / f) / g) Narodne novine, No. 16/1994.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Legislative or quasi-legislative regulations.

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

Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

Sources of constitutional law – Categories – Written rules – Constitution.

Sources of constitutional law – Categories – Written rules – Other international sources.

Keywords of the alphabetical index:

Salary / Collective bargaining.

Summary:

Trade unions proposed a review of the constitutionality of a governmental decree concerning salaries, claiming that the issue of salaries was a matter of collective bargaining and that the decree changed collective agreements unilaterally. The Court did not accept the motion having found that the governmental decree did not derogate or terminate collective bargaining. The decree was based on the authority given to the Government by the legislator to regulate temporarily certain issues falling within the competence of the legislator. The decree determined the total amount of money designed for salaries and for reimbursement of costs of material rights, and amounts of basic and minimum salaries. According to the Court, the decree had the nature of an act of intervention designed to stabilise the Croatian economy. The Court also considered that the social partners in collective bargaining had not exhausted means of mediation and arbitration agreed upon in previous agreements.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 9 March 1994 / e) U-I-272/1992 / f) / g) Narodne novine, No. 25/1994.

Keywords of the systematic thesaurus:

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

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 – European Convention on Human Rights.

Sources of constitutional law – Categories – Written rules – Other international sources.

Keywords of the alphabetical order:

Criminal procedure / Right of appeal.

Summary:

The decision annulled a provision of the Criminal Procedure Act according to which the time-limit for legal remedies for the accused runs from the day on which the act was delivered or, if it could not be delivered, from the eighth day following publication of the act.

The Court held that the constitutional right to a fair trial, to a defense counsel and to appeal cannot be realised if time limits expire before the accused can communicate with his defense counsel.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 16 March 1994 e) U-I-197/1992 / f) / g) Narodne novine, No. 25/1994.

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 – 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 – European Convention on Human Rights.

Sources of constitutional law – Categories – Written rules – Other international sources.

Keywords of the alphabetical index:

Criminal procedure / Principle "*ne bis in idem*".

Summary:

The decision annulled the provisions of the Criminal Procedure Act according to which the reopening of a criminal procedure, which could be disadvantageous for the person convicted or acquitted of the charge, was not permissible if more than six months had passed since the day on which the prosecutor obtained knowledge of new facts or evidence. The Court referred to a constitutional principle according to which no criminal proceedings shall be repeated against a person acquitted by a final court judgment. From this principle it followed that a renewal of criminal proceedings against a convicted person is only permissible when in favour of the convicted person.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 16 March 1994 / e) U-III-428/1993 / f) / g) Narodne novine, No. 26/1994.

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.

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

Fundamental Rights – Civil and political rights – Equality.

Fundamental Rights – Civil and political rights – Other.

Sources of constitutional law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Citizenship / Right to appeal.

Summary:

The constitutional action was accepted and the case returned to the Ministry of Interior (the first-instance

body) for a reopening of the procedure. It concerned a case in which a petition for acquisition of citizenship was refused, and the decree on the refusal did not contain the reasons upon which the decision was based.

The Court held that the constitutional right to appeal against individual legal acts made in first-instance proceedings cannot be effective without knowing the facts on which the decision was based. According to the Court, the principle of equality before courts is violated if some persons know the reasons against which a complaint may be lodged and others do not know them.

Supplementary information:

The Court received this case before its decision to repeal a provision of the Law on Croatian Citizenship, according to which the reasons for a decision rejecting a petition for acquisition of citizenship did not have to be stated. According to the Constitutional Act on the Constitutional Court of the Republic of Croatia, following the publication of this decision, claimants have the right to request the modification of individual judgments, based on the repealed provision. Thus the actions received after the publication of this decision of the Constitutional Court were rejected. Settled case law.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 16 March 1994 / e) U-III-90/1993 / f) / g) Narodne novine, No. 27/1994.

Keywords of the systematic thesaurus:

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

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

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

Sources of constitutional law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Nationalisation.

Summary:

Decisions by ordinary courts held that the claimant had lost his right of ownership of immovable property

although ownership was recorded in the land registers. The previous owner of the property was the grandmother of the claimant, who was a citizen of Yugoslavia until 22 June 1949.

The Court refused the constitutional action having found that decisions of ordinary courts did not violate the constitutional provision which guarantees the right of ownership. The law in force in 1949 stated that a person who had lost the status of citizen of Yugoslavia had also lost the right of ownership of immovable property located in Yugoslavia. This property had become state property *ex lege*. Thus, at the moment of her death the grandmother of the claimant was not the owner of the property in question, and this property could not be inherited.

Supplementary information:

Dissenting opinion held that the property could not be lost *ex lege* but only in a procedure in which a constitutive act had to be issued, and such an act did not exist in this case.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / d) 6 April 1994 / e) U-I-385/1993 / f) /g) Narodne novine, No. 31/1994.

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 – Non-profit-making corporate body.

Fundamental Rights – Governing principles – Limits and restrictions.

Sources of constitutional law – Categories – Written rules – Constitution.

Keywords of the alphabetical index:

Private practice in health-protection.

Summary:

The Court rejected an application to declare certain provisions of the Health Protection Act unconstitutional. The Court examined the provision which specified conditions under which private practice in health-protection is performed, requiring *inter alia* an opinion by the chamber of medical professionals (physicians and specialists, stomatologists, pharmacists, medical biochemists). It was claimed that this condition violated

the right of ownership, entrepreneurial and market freedom as well as the right to free association. The Court held that according to the Constitution, freedoms and rights may be restricted only to protect the freedoms and rights of other people, the public order, morality and health. The regulation in question was necessary for the protection of the health of citizens.



Denmark

Supreme Court

Reference Period

1 January 1994 – 30 April 1994

Important decision

Identification:

a) Denmark / b) Supreme Court / c) / d) 18 April 1994 / e) II 395/1993 / f) The Attorney General against Per-Henrik Nielsen / g).

Keywords of the systematic thesaurus:

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

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

Institutions – Courts – Procedural safeguards – Independence.

Institutions – Courts – Ordinary courts – Criminal courts.

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 – European Convention on Human Rights.

Keywords of the alphabetical index:

Appearance of independence / Acting judges / Criminal proceedings.

Summary:

The Constitution was not found to preclude the exercise of judicial functions by acting judges who do not enjoy constitutional protection against dismissal and transfer, since this corresponds to a long-standing legal practice. The Supreme Court did not find a sufficient basis to state that the exercise of judicial functions by these acting judges in general would be incompatible with Article 6 of the European Convention on Human Rights, but urged the legislative power to seek a general clarification of the problem. However, the Supreme Court found that it was incompatible with Article 6 of the European Convention on Human Rights that the criminal proceedings in the case under consideration had been conducted by an acting judge who had at the same time served in the department of the Ministry of Justice dealing with the police, the prosecution and the granting of leave to appeal in criminal proceedings.



Estonia

National Court

Reference period:

1 January 1994 – 30 April 1994

Statistical data

Number of decisions:

- Total – 7 final decisions, of which 3 during the reference period;
- 1 decision on a challenge to a decision of the administrative authorities;
- 1 decision on the constitutionality of legislation prior to enactment;
- 1 decision on the constitutionality of legislation after enactment.

All the decisions of the National Court (which also acts as the Court for Constitutional Review) were published in the Estonian Official Bulletin, "Riigi Teataja" I (hereafter referred to as RT I).

Important decisions

Identification:

a) Estonia / b) National Court / c) / d) Decision of 12 January 1994 / e) Publication: RT I 1994, No. 8, Art. 130 / 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 – Executive bodies.

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

Institutions – Executive bodies – Relations with legislative bodies.

Keywords of the alphabetical index:

Extraordinary measures / Technical operations / National defence police / Constitutionally protected rights and privileges / Limitation by administrative decrees.

Summary:

The rights and privileges (freedoms) granted by the Estonian Constitution can only be circumscribed by the Constitution itself or by constitutionally valid and properly enacted laws. However, the governmental decree No. 233, dated 23 July 1993, entitled "Application of Extraordinary Measures in Technical Operations", purported to limit constitutional rights and privileges by means of subordinate legislation, ie by governmental decree. The Legal Chancellor, who is responsible for reviewing the constitutionality and legality of laws and acts passed by the national government as well as local governments, gave notice to the Government that it would have 20 days to modify the decree to conform to constitutional mandates. When the Government failed to do this, the Legal Chancellor turned to the National Court, asking it to declare the decree founding the National Defence Police Office and the "Temporary Application of Extraordinary Measures in Technical Operations Act" to be unconstitutional, and therefore null and void. The view of the Legal Chancellor was confirmed by the Constitutional Review Panel of the National Court, which ruled that the Constitution does not allow rights and privileges to be limited by administrative decree.



Identification:

a) Estonia / b) National Court / c) / d) Decision of 18 February 1994 / e) Publication: RT I 1994, No. 12, Art. 229 / 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 – Constitutional proceedings – Types of claim – Claim by a public body – Legislative bodies.

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

Institutions – Legislative bodies – Relations with the Head of State.

Institutions – Head of State.

Keywords of the alphabetical index:

Service Awards / Constitutional powers of the President / Unconstitutional enlargement of power / Exclusion of presidential power / Conflict between legislative and executive power / Separation of powers.

Summary:

When the President of Estonia refused to proclaim the "Service Award Law" passed by Parliament, Parliament re-enacted the law without any changes. Subsequently the President appealed to the National Court asking it to declare that Section 9-2 of the law was unconstitutional. After deliberation, the Constitutional Review Panel held that, according to Article 78 No. 15 of the Constitution, the granting of national awards appropriately devolves on the President. However, Section 9-2 of the Service Award Law permits the President to make Service Awards only on the basis of a recommendation made by the government-established Service Award Committee, which thereby deprives the President of his constitutional right to make such awards on his own initiative. Secondly, Section 15-1 of the law imposes on the President a duty which increases his powers beyond constitutionally granted limits. Therefore, the Constitutional Review Panel of the National Court declared that the Service Award Law was unconstitutional.

Supplementary information:

As a rule, the National Court reviews the constitutionality and legality of enacted laws and other legislation. In addition, the Court also reviews those laws which the President of Estonia has refused to proclaim under the provisions of Article 107 of the Constitution, as well

as foreign treaties which have not been ratified by the Republic of Estonia. Decisions of the National Court have no retrospective effect.



France

Constitutional Council

Reference period :

1 January 1994 – 30 April 1994

Statistical data

15 decisions consisting of:

- six decisions entailing appraisal 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 ;
 - three decisions entailing automatic appraisal of constitutional compatibility on the initiative of parliamentarians under the provisions of Articles 46 and 61, paragraph 2 of the Constitution ;
 - five decisions on electoral law under the provisions of Article 59 of the Constitution, two of which on the initiative of the National Commission on election campaign accounts ;
 - one decision to declassify a text of a legislative nature taken in pursuance of Article 37, paragraph 2 of the Constitution upon application by the Government.
-

Important decisions

Identification:

a) France/ b) Constitutional Council / c) / d) 13 January 1994 / e) Decision No. 93-329 DC / f) Law on the conditions governing investment aid for private schools granted by local authorities / g).

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 distribution of powers between central government and its subdivisions.

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

Fundamental Rights – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Unequal treatment / Equality / Education / Freedom of education / Freedom of administration of local authorities / Matters assigned to the national legislator by the Constitution / Preamble.

Summary:

Article 72 of the Constitution lays down the principle of freedom of administration of local authorities, and the provisions drawn up by the legislator must not result in the essential conditions of application of a law concerning the exercise of freedom of education being subject to local authority decisions and therefore possibly varying throughout the national territory. In the case in point, the law referred did not contain the safeguards necessary to ensure observance of the principle of equality between private schools operating on a contract basis and between these schools and state schools in respect of the investment subsidies for which they might be eligible.



Identification:

a) France/ b) Constitutional Council / c)/ d) 21 January 1994/ e) / f) Act amending act No. 86-1067 of 30 September 1986 on freedom of communication / g).

Keywords of the systematic thesaurus:

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

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

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

Fundamental Rights – Civil and political rights – Equality.

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

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

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

Sources of constitutional law – Categories – Written rules – Constitution.

Sources of constitutional law – Categories – Quasi-constitutional legislation and norms.

Keywords of the alphabetical index:

Access to media / Balance of interests / Equality / Equality before the law / Freedom of expression / Media.

Summary:

The possibility of renewing radio/television broadcasting permits issued to their holders without inviting bids for tender does not fail to comply, in view of the safeguards surrounding it, which were set up by both the Conseil Supérieur de l'audiovisuel (broadcasting authority) and administrative judges, with the principle of pluralism of socio-cultural expression, which is an objective of constitutional value.

Nor does it fail to comply with the principle of equality in so far as the different treatment reserved for permit holders reflects technical, financial and cultural needs.

Finally, the provision enabling companies holding permits to increase their share in the capital of broadcasting companies using land-based Hertzian relay systems from 25% to 49% does not fail to comply, in view of the safeguards enshrined in the Act, with the principle of pluralism.



Identification:

a) France/ b) Constitutional Council / c)/ d) 20 January 1994/ e) Decision No. 93-334 DC / f) Law instituting an "incompressible" sentence (peine incompressible) and concerning the new criminal code and certain provisions of criminal procedure / g).

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 – Common principles or techniques of interpretation – Proportionality principle.

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

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

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

Constitutional Justice – Common principles or techniques of interpretation – Author's intention.

Fundamental Rights – Civil and political rights – Equality.

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

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

Keywords of the alphabetical index:

Lawyer / Criminal conviction / Prisoners / Equality / Guarantees of criminal proceedings / Police custody / Limits on penalties / Non-retroactivity of criminal laws / Proportionality of penalties.

Summary:

Provision was made for imprisonment in the area of criminal law not merely in order to protect society and ensure that the guilty were punished, but also in order to help criminals mend their ways and prepare, if possible, for their reintegration in society. But in view of the nature of particularly serious offences covered by the new "incompressible" sentence, and the fact that the legislator enabled both the public prosecutor and convicted persons to refer to the judge who passed sentence after the safeguard period of 30 years, plus the fact that this procedure can be renewed, the prescribed provisions do not fail to comply with the principle of the necessity of sentences as enshrined in Article 8 of the Declaration of the Rights of Man and the Citizen.

Germany

Constitutional Court

Reference period:

1 January 1994 – 30 April 1994

Statistical data

19 judgments of a chamber (Senat), among them

- 11 judgments concerning individual constitutional claims
 - 4 judgments concerning proceedings for annulment
 - 2 judgments concerning federal conflicts
 - 2 judgments concerning conflicts between organs
 - 1670 judgments of a section (Kammer)
 - 29 cases dealt with (taking into account the joinder of cases)
 - 1633 new cases.
-



Important decisions

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 16 November 1993 / e) Judgment No. 2 BvR 258/86 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Equality between the sexes.

Summary:

A female applicant had applied unsuccessfully for a job as a skilled worker. Her claim, seeking an order directing the respondent company to employ her and subsidiarily for damages, was rejected.

The Constitutional Court annulled the judgment because it did not take sufficient account of the prohibition of gender-based discrimination contained in Article 3, paragraph 2, of the Constitution. The Court stressed that a person who is applying for a job must in no way be discriminated against with respect to his/her sex during the selection procedure of applicants. Ordinary courts have to construe provisions of the ordinary law in the light of this principle.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 8 December 1993 / e) Judgment No. 2 BvR 736/90 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Private life / Family life / Imprisonment.

Summary:

It does not violate the right to private and family life if an imprisoned person who has already escaped several times is separated from his wife by a window during visiting hours.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 11 January 1994 / e) Judgment No. 1 BvR 434/87 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Freedom of expression.

Summary:

Freedom of expression protects statements of facts as well as the expression of one's own opinion. This freedom is restricted by, among others, the laws which protect young persons against immoral influences. A book which declares that Hitler is not to blame for the outbreak of the Second World War without justifying nazi-ideology cannot be prohibited from being sold to minor persons. Such a prohibition would violate freedom of expression which extends also to statements on recent German history. A democratic State is based on open discussion which itself hinders the falsification of facts.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 26 January 1994 / e) Judgment No. 1 BvL 12/86 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Tax law.

Summary:

Income tax is levied according to the financial capacity of a person. Obligations to maintain one's own children and other relatives diminish this capacity and have to be taken into consideration by the legislator. To the extent that income secures the minimum standard of subsistence, it is not subject to taxation, as the Constitutional Court has already decided. The fact that the legislator does not give equal treatment to the expenditure for a child who receives a professional training in a place other than that where the person who is obliged to pay the maintenance lives does not violate the principle of equality. With respect to these expenses it is sufficient that half of them are taken into consideration when determining the financial capacity of a person subject to income tax.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 8 February 1994 / e) Judgment No. 1 BvR 1693/92 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Procedure – Interlocutory proceedings – Challenging of a judge.

Keywords of the alphabetical index:

Candidature for the Presidency of the Federal Republic of Germany.

Summary:

The candidature of a member of the Constitutional Court for the Presidency of the Federal Republic neither disqualifies him automatically from exercising his functions at the Constitutional Court, not per se constitutes a sufficient ground to challenge his impartiality.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 8 February 1994 / e) Judgment No. 1 BvR 1693/92 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Procedure – Preparation of the case for trial – Receipt by the court.

Keywords of the alphabetical index:

Docket of the Constitutional Court.

Summary:

In a case concerning a dispute between landlord and tenant, the Constitutional Court specified the conditions for the admission of a constitutional complaint. According to the Court, a case is set down for trial if it is of fundamental constitutional importance. If the question which is at stake has not yet been the subject of a decision by the Constitutional Court or cannot easily be answered by the application of the Constitution, it will be decided upon by the Court. It must have an impact which goes beyond the case pending before the Court. A case must also be admitted for trial if the alleged violation of fundamental rights proves to be serious or affects essential interests of the applicant. A serious violation is one which may be considered to be the result of a profound misunderstanding of the importance of fundamental rights.

Supplementary information:

This decision serves the construction of the amendments of the law on the Constitutional Court of 11 August 1993, which aim at controlling the docket of the Constitutional Court.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 8 February 1994 / e) Judgment No. 1 BvR 765/89, 1 BvR 766/89 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Decisions – Effects – Determination of effects by the court.

Keywords of the alphabetical index:

Restrictions of the effects of a decision by the Constitutional Court.

Summary:

If the Constitutional Court finds the judgment of an ordinary court to be unconstitutional it must, according to § 95 paragraph 2 of the Law on the Constitutional Court, quash the decision impugned and remand the case before the ordinary court. The Federal Constitutional Court declared that it may restrict the effects of its decision, if setting aside the judgment affects the rights of third persons or the public interest. In such a case the Constitutional Court can limit itself to a declaration of unconstitutionality without setting aside the judgment; it remands the case, and the effects of the unconstitutional judgment remain in force until the ordinary court has given a final decision.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 9 February 1994 / e) Judgment No. 1 BvR 1687/92 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Right to information / Satellite television.

Summary:

Foreign audiovisual media are sources of information within the meaning of the right to information (Article 5, paragraph 1, of the Constitution). The use of technical equipment necessary for the receipt of such emissions is covered by the right to information. If the owner of a house offers the possibility to receive cable-television, the tenant may be prohibited from installing a parabolic antenna for satellite-television. However, with respect to foreigners living in Germany, courts deciding on the lawfulness of a prohibition by a landlord on installing parabolic antennae have to take into account that the cable networks offer only a limited choice of foreign programmes. Therefore, the right to information may require that such foreigners be given the possibility to install their own parabolic antennae.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 22 February 1994 / e) Judgment No. 1 BvL 30/88 / f) / g) to be published in the official digest of the decisions of the Federal 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:

Assessment of fees for the users of public broadcasting.

Summary:

The Constitutional Court had to decide whether the determination of broadcasting fees by Länder parliaments was compatible with the independence of broadcasting authorities. According to the Court, freedom of broadcasting does not require broadcasting fees to be fixed by public broadcasting companies. However, the procedure for fixing these fees must secure the means necessary for the fulfilment of the tasks of public broadcasting companies and protect these companies from any influence on their programming. The fixing of the fees must not be used to influence the content of the programme. A control over the financial resources of a public broadcasting company may be exercised only by reference to the legal limitations on its tasks and to the principle of economic efficiency. The interests of the users may also be taken into consideration.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 9 March 1994 / e) Judgment No. 2 BvL 43/92, 2 BvL 51/92, 2 BvL 63/92, 2 BvL 64/92, 2 BvL 70/92, 2 BvL 80/92, 2 BvL 2031/92 1369/90 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Personal liberty.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Use of drugs.

Summary:

The use of drugs is regulated by law. There is no general right to "intoxication" ("Recht auf Rausch") which exists beyond such regulation. The Court stated that the legislator enjoys a certain margin of appreciation in the determination of the necessity and the expediency of the means used to attain a certain goal, but that these must not be out of proportion to the scope of the objective sought to be attained. If a person consumes only small quantities of drugs without endangering other persons, it is facultatively provided in the criminal code that he may not be prosecuted. The principle of equality does not require the prohibition or acceptance of all drugs in the same way. The legislator can regulate the use of cannabis products differently from the use of alcohol or nicotine.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 9 March 1994 / e) Judgment No. 1 BvR 1369/90 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Fundamental Rights – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Private school / Right to subsidies.

Summary:

It is incompatible with the constitutionally protected right to establish private schools not to take into consideration the costs of the acquisition of adequate rooms when determining the amount of subsidies to be paid to a private school.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 9 March 1994 / e) Judgment No. 1 BvR 682/88 and 1 BvR 712/88 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Fundamental Rights – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Private school / Right to subsidies.

Summary:

The fundamental right to establish a private school implies the right to subsidies by the State if it cannot be realised without such subsidies. This does not exclude that the State pays the subsidies only after a certain period within which the school has been run successfully.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 13 April 1994 / e) Judgment No. 1 BvR 23/94 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Freedom of expression.

False information is not protected by freedom of expression. It is a historically proven fact that Jews were persecuted under the Third Reich. Therefore, it does not constitute a violation of freedom of expression to prohibit an assembly at which the persecution of Jews under the Third Reich shall be denied.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 29 April 1994 / e) Judgment No. 1 BvR 661/94 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Temporary suspension of the impugned measure / Right of audiovisual corporations to frequencies.

Summary:

An individual constitutional complaint from an audiovisual corporation impugned a decision of the Bavarian Constitutional Court which prohibited the corporation from continuing to broadcast. The Federal Constitutional Court took a preliminary decision permitting the corporation to continue its activities until a final judgment was given. It declared that the disadvantage of allowing broadcasting to continue, even if the prohibition later proved to be in conformity with the constitution, outweighed the disadvantage of putting an end to all the economic activities of the corporation if the prohibition then proved to be unconstitutional. In the latter case, the only inconvenience caused would be to a rival corporation which would be deprived temporarily of the possibility to increase its broadcasting and advertising profit.

Supplementary information:

The weighing of the above criteria is consistent with case-law.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 26 April 1994 / e) Judgment No. 1 BvR 189/88 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Freedom of expression / Private life.

Summary:

Freedom of expression is limited by the requirements of the protection of the name and reputation of others. There is, however, no restriction on freedom of expression as long as it is used in private, for example between family members. A family member who writes a letter to an imprisoned relative offending a third person cannot be convicted for libel if the defamation becomes known through control of letters in the prison.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 26 April 1994 / e) Judgment No. 1 BvR 1299/89 and 1 BvL 6/90 / f) / g) to be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Decisions – Effects – Temporal effect – Postponement of temporal effect.

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

Keywords of the alphabetical index:

Constitutional challenge.

Summary:

It is incompatible with the right to the protection of one's personality ("allgemeines Persönlichkeitsrecht") that a person may contest the legitimacy of his birth only within two years after coming of age, even if at that moment he does not know the facts which may put into question the legitimacy of his birth. The legal certainty which is necessary in a State governed by the rule of law cannot justify such a limitation on the realisation of the legitimate interest in inquiring into one's own origins. The legislator has various means of repairing the unconstitutionality of the provision; he may either extend the right to contest the legitimacy to a certain period after the relevant facts have become known to the applicant, or he may confer such a right without any time-limit while ruling, however, that such an action can have no impact on existing legal relationships. For this reason, the provision cannot be nullified. The Constitutional Court declared that the legislator was obliged to amend the provision within the next legislative period.



Hungary

Constitutional Court

Reference period :

1 January 1994 - 30 April 1994

Statistical data

Number of decisions :

- Decisions by the Plenary Court published in the Official Gazette: 13
 - Decisions by chambers published in the Official Gazette: 10
 - Other decisions by the Plenary Court: 26
 - Other decisions by chambers: 9
 - Other (procedural) orders: 22
 - Total number of decisions: 80
-

Important decisions

Identification :

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 1 /1994. (I. 7.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 2 /1994.

Keywords of the systematic thesaurus :

Institutions - Courts - Ordinary courts - Public prosecutor.

Keywords of the alphabetical index :

Public prosecutor.

Summary :

Act No. 3 of 1952 on Civil Procedure, as well as Act No. 5 of 1972, contained a regulation under which a public prosecutor could institute proceedings if the person entitled to do so (obligee) was not able to defend his rights or in order to defend important government or social interests. The public prosecutor could also intervene at any stage of the process in the interest of legality. The public prosecutor had rights identical with those of the parties.

The basic role of a public prosecutor in the Hungarian legal system is the prosecution of conduct which violates or endangers the constitutional order and the security and sovereignty of the country. The Constitution also entitles the Prosecutor's Office to take measures for the protection of legality. The intervention of a public prosecutor in civil proceedings is not unknown in Hungarian legal history, though limited to a few cases. It was socialist civil procedural law that entrusted public prosecutors with the function of a "general safeguard of legality".

The Constitutional Court found that the general and unlimited right of the public prosecutor to institute civil proceedings violates the autonomy and the right of the parties to self-determination. It belongs to the individual's autonomy to decide whether to initiate civil proceedings or not. Thus the general right of the public prosecutor to intervene in civil proceedings violates the principle of the rule of law, the right to human dignity, and, indirectly, the constitutional provisions regarding judicial procedure. Therefore, the Court declared the respective regulations to be unconstitutional.



Identification :

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 2 /1994. (I. 14.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 4/1994.

Keywords of the systematic thesaurus:

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

Constitutional Justice - Constitutional proceedings - Decisions - Effects – Temporal effect – Limit on retrospective effect.

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

Sources of constitutional law - Categories – Written rules - Other international sources.

Keywords of the alphabetical index:

Non-retroactivity of criminal laws / War crimes / Crimes against humanity.

Summary:

The legal regulation subject to judicial review in this case forms a peculiar part of the Hungarian legal system. The armistice agreement between Hungary and the allied powers was signed in Moscow on 20 January 1945. On 25 January 1945, the Provisional Hungarian Government issued a decree on the establishment of the so-called People's Courts. The decree, and its subsequent amendment, was promulgated as a Law on 16 September 1945 by Act No. 7 of 1945. The task of the People's Courts was to adjudicate upon war crimes. They were abolished in 1950, but several provisions of the relevant regulation remained in force. After the transition, a Standing Committee of the Hungarian Parliament and a Member of Parliament challenged the constitutionality of the regulations still in force.

The Constitutional Court, in the above-mentioned decision, declared several provisions of the Law on People's Courts to be unconstitutional (namely Section 11, points 1-4, 6, and Section 13, points 1, 3-7). According to the Court, these provisions constitute retroactive criminal legislation, violating the principle of *nullum crimen sine lege* and *nulla poena sine lege*. The prohibition of retroactive penal legislation had already been emphasised in a former decision of the Constitutional Court (No. 11/1992. (III.5.) AB) which stressed that conviction and punishment can only proceed pursuant to a law that was in effect at the time when the offence was committed. The reasoning underlines that the remaining provisions of the Law on People's Courts constitute criminal legislation with retroactive effect. The Court also emphasised that, following the Second World War, Hungary entered into international obligations to prosecute war criminals and that the realisation of this obligation by retroactive punishment was the sovereign decision of the Hungarian State. The behaviour now considered criminal under the invalidated provisions of the Law on People's Courts does not constitute war crimes or crimes against humanity according to international law (as defined in the Statute of the Nurnberg International Military Tribunal).

The decision of the Constitutional Court does not affect sentences delivered with final effect before 23 October 1989. In a former decision (No. 10/ 1992. (II.25.) AB) the Court had elaborated its philosophy on the effects of its decisions on particular penal sentences. The Court emphasised the importance of the certainty and predictability of the law. The consequences of the unconstitutionality of a law must primarily be evaluated by reference to its impact on legal certainty. This became the guiding principle for determining the temporal effects of a decision declaring a law unconstitutional, and especially its repercussions on particular legal relationships and sentences arising from it. The Constitutional Court cannot declare a law to be materially unconstitutional during the period before the promulgation of the new Constitution. Similarly, the Constitutional Court concluded that it is not reasonable to annul sentences delivered before the enactment of the new Constitution. Since the classic principles of criminal law became part of the Hungarian Constitution on 23 October 1989, the provisions of the Law on People's Courts became unconstitutional only on that day. The Constitutional Court, taking into consideration the fundamental principle of legal certainty, ordered the review only of sentences delivered subsequent to the promulgation of the new Constitution. The Constitutional Court's judgment does not examine the merits of other sentences based on the unconstitutional provisions of the Law on People's Courts.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 16/1994. (III. 25.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 32/1994.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections / Eligibility.

Summary:

Act No. 3 of 1994 amended Act No. 34 of 1989 on the election of parliamentary representatives, adding a provision to the law providing that elected representatives of self-governing social security bodies cannot be candidates in parliamentary elections. (In the so-called self-governing social security bodies, representatives elected by the people in national elections control the work of the social security administration).

The Constitution states that all adult Hungarian citizens having their regular domicile in Hungary shall have the right to be elected in elections for Parliament. The right to vote and the right to be elected are fundamental rights guaranteed by the Constitution.

The Constitution regulates the incompatibility of parliamentary representatives. Ordinary laws determine other cases of incompatibility. Thus the law on self-governing social security bodies lists further cases of incompatibility, among them that members of self-governing social security bodies cannot be parliamentary representatives. These rules of incompatibility do not constitute a restriction on the eligibility of social security representatives. An elected member of Parliament has the possibility to discontinue the cause of incompatibility within thirty days. Any prohibition on the right to be elected which is not enumerated in the Constitution is unconstitutional.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 17/1994. (III.29.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 33/1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation - Separation of powers.

Institutions – Courts – Procedural safeguards - Other.

Keywords of the alphabetical index:

Ombudsman / Judiciary / Separation of powers.

Summary:

The statutory provisions regulating the jurisdiction of the Ombudsman do not allow the investigation by him of the functioning of the courts. The Constitutional Court has already emphasized several times the importance of judicial independence, especially the stability and neutrality of the judiciary. The role of the Ombudsman is to guarantee, through the control of the administration, the realisation of rule of law and the protection of individual rights. There is only a limited possibility of abusing judicial power in civil law countries. The independent judiciary is constitutionally protected against any external influence. Therefore the regulation, declining to confer on the Ombudsman any power of control over the judiciary, is in conformity with the principles of the separation of powers and judicial independence. Although in Sweden, and in a few countries following the Swedish model, the Ombudsman has certain powers to control the judiciary,

most countries rejected the original Swedish solution, and have implemented regulations similar to those existing in Hungarian law.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 18/1994. (III. 31.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 34/1994.

Keywords of the systematic thesaurus:

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

Fundamental Rights – Economic, social and cultural rights – Freedom to teach.

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

Keywords of the alphabetical index:

Public and denominational schools / Educational system / Freedom of conscience and creed / Neutrality of the State.

Summary:

The new Law on public education (enacted in 1993) pursues the objective of institutionally separating State-run public schools and denominational schools. Public schools shall not be committed to any denomination. The State and local governments may only establish neutral schools. However, during a transition period of five years the State or the local government may maintain already functioning religious classes or schools. These regulations are in conformity with the Constitution which provides for a separation between the State and the church.

Supplementary information:

The decision was based on the reasoning contained in a former case (Decision No. 4/1993.).

One judge wrote a concurring opinion.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 20/1994. (IV. 16.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 40/1994.

Keywords of the systematic thesaurus:

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

Fundamental Rights - Civil and political rights - Right to private life.

Keywords of the alphabetical index:

Privacy / Execution of judicial decisions.

Summary:

Under the Hungarian Law on the Execution of Judicial Decisions, courts, on a claim by a judgment creditor, may issue an order obliging an employer to withdraw from the salary of a judgment debtor the sum corresponding to the allowance for the maintenance of children. A split court with a majority of 5 judges against 4 decided that the provision does not violate the right to respect for one's honour and human dignity, but serves the constitutionally guaranteed protection of children.

Supplementary information:

One judge wrote a separate opinion, joined by three other judges.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 21/1994. (IV. 16.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 40/1994.

Keywords of the systematic thesaurus:

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

Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Freedom of competition / Market economy.

Summary:

A provision of the Act on Public Road Traffic enables local governments to limit the number of taxi-cabs. This "numerus clausus" of taxi-cab licences was challenged as unconstitutional. The consistent interpretation of the Constitutional Court is that the establishment of a market economy is a goal set by the Constitution. A free market can only be limited by State intervention for the sake of the protection of fundamental rights. On the other hand, the limitation of market freedoms may be unconstitutional if it violates fundamental

rights. The right of free enterprise is a fundamental right under the Hungarian Constitution. The regulation enabling the limitation of the number of taxi-cabs is unconstitutional because it constitutes an unnecessary and disproportionate limitation of the right to choose one's profession. State intervention aiming at regulating competition and elevating the quality of services does not constitute a constitutionally proper limitation of the right of free enterprise. Local governments may not limit fundamental rights in order to simplify their administrative tasks. Furthermore, the unconditional power of local governments to regulate the number of taxi-cabs is unconstitutional because substantial limitations of fundamental rights may only be authorised by parliamentary statute.

In the same decision, the Constitutional Court approved the constitutionality of provisions regulating the conditions necessary to attain a cab license.

Supplementary information:

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



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 22/1994. (IV. 16.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 40/1994.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Equality / Public body.

Summary:

Obligatory membership of a professional association (in this case the bar association) violates neither freedom of association, nor the principle of equality. The bar is a public body under Hungarian law which guarantees the professionalism and independence of private attorneys. The ruling of the Court is in accordance with the judgment of the European Court of Human Rights (Le Compte, Van Leuven and De Meyere case, judgment of 23 June 1981).



Ireland

Supreme Court

Reference period :

1 May 1993 – 30 April 1994

Important decisions

Identification :

a) Ireland / b) Supreme Court / c) / d) 24 May, 1993 / e) Appeal No. 247/92 / f) O'Callaghan -v- Ireland and the Attorney General and Director of Public Prosecutions / 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 – Legislative or quasi-legislative regulations.

Fundamental Rights – Governing principles – Limits and restrictions.

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

Keywords of the alphabetical index :

Constitutional validity / Drugs / Free movement of persons / Rights and guarantees of citizens.

Summary :

The Supreme Court held that powers of search and detention independent of any decision to arrest the person concerned contained in Section 23 of the Misuse of Drugs Act, 1977 as amended by Section 12 of the Misuse of Drugs Act, 1984 are not inconsistent with the provisions of the Constitution. Such persons will have all the rights appropriate to an arrested person.



Identification :

a) Ireland / b) Supreme Court / c) / d) 24 January, 1994 / e) Appeal No. 367/93 / f) In the Matter of Article 26 of the Constitution and in the Matter of the Matrimonial Home Bill, 1993 / g).

Keywords of the systematic thesaurus :

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

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

Keywords of the alphabetical index :

Declaration of unconstitutionality.

Summary :

The President of Ireland, in pursuance of the provisions of Article 26 of the Constitution, referred the Matrimonial Home Bill, 1993 to the Supreme Court for a decision as to whether the Bill or any provision contained in it was repugnant to the Constitution. The Court applied to its consideration of the Bill the presumption of constitutionality. The Court held that the provisions of the Bill which would entail in certain cases the cancelling and review between spouses of pre-existing agreed decisions freely made as part of the authority of the family about the ownership of the family home did not constitute reasonably proportionate intervention by the State with the rights of the family and constituted a failure by the State to protect the authority of the family. The Court accordingly pronounced the Bill repugnant to the provisions of Article 41 of the Constitution.



Italy

Constitutional Court

Reference period:

1 January 1994 – 30 April 1994

Statistical data

- 7 public hearings and 9 in chambers. The Court gave 168 decisions in all.
 - Decisions given in cases where constitutionality was a secondary issue: 76 judgments, 18 finding measures complained of unconstitutional, and 69 court orders;
 - Decisions given in cases where constitutionality was the main issue: 6 judgments, 6 finding measures complained of unconstitutional, and 2 court orders;
 - Decisions given in constitutional proceedings concerning conflicts of authority between the State and the Regions: 9 judgments;
 - Decisions given in constitutional proceedings concerning the admissibility of referendums for repeal of legislation: 2 judgments.
 - During the period under consideration, the Court issued 4 orders correcting substantive errors.
-

Important decisions

Identification:

a) Italy / b) Constitutional Court / c) / d) 24 January/3 February 1994 / e) Judgment No. 2 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Other litigation.

Keywords of the alphabetical index:

Budget / Finance Act / Referendums for repeal of legislation.

Summary:

Article 75 of the Constitution specifies laws which are not open to referendum aiming at their total or partial repeal. It mentions "fiscal or budgetary laws", but does not define them. Their content and status within the context of public finance therefore depend on how the basic concept is interpreted at any given time.

Present budgetary regulations comprise a wide range of parallel, complementary legislative measures, covering planning, definition and supervision of state income and expenditure: these are the Budget Regulation Act, the Pluri-Annual Budget Regulation Act and the Finance Act. As a result, the provision of Article 75 ruling out referendums on fiscal and budgetary laws must also be held to apply to these acts.

In addition to the legislative measures expressly mentioned in Article 75 of the Constitution (fiscal and budgetary laws, acts of pardon or remission of sentence, authorisations for ratification of international treaties), the Court has also ruled (Judgment No. 16 of 1978) that referendums may not be held on laws which produce effects closely allied to those produced by the aforesaid measures.

This implies that referendums may not be held on any laws which are likely to produce effects closely allied to those produced by budgetary laws. Such laws cannot in fact be assessed by the electorate in isolation, ie outside the general system of financial compatibilities collectively generated by all the laws adopted on the budget.

Any petition for a referendum aiming at repeal of provisions concerning the transfer and management of state assets must therefore be declared inadmissible, since these provisions are intended to increase the state's budget income and are thus closely linked to fiscal and budgetary laws in their effects. In accordance with the principles stated by the Court in Judgment No 16 of 1978, Article 75's express exemption of fiscal and budget laws from referendum must therefore be extended to these provisions.

In the same way, any petition for a referendum aiming at repeal of the new social security regulations for public

and private sector workers must be declared inadmissible. Being intended to reduce social security expenditure and so help to eliminate the current payments deficit in the medium term, these regulations have such an impact on fiscal and budgetary laws that they must, like these laws, be exempt from referendum.



Identification:

a) Italy / b) Constitutional Court / c) / d) 24 January / 3 February 1994 / e) Judgment No 13 / f) / g) /.

Keywords of the systematic thesaurus:

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

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

Fundamental Rights – Civil and political rights – Other.

Keywords of the alphabetical index:

Civil status / Family name.

Summary:

Article 2 of the Constitution recognises and guarantees the right to identity as an inalienable personal right. Names, which are protected by Article 22 of the Constitution as a fundamental element in human personality, are the individual's first and most immediate characteristic, distinctively identifying him or her in his or her relations with other people.

Public and private interests converge in the legal concept of name, and the public interest in ensuring that civil status records are accurate thus requires, when the family name given a person is not that to which he or she is legally entitled, that the error be corrected.

This public interest may not, however, override the individual's interest in keeping a family name consistently used in his or her relations with others, which has thus become a distinctive sign of personal identity, protected as such by Article 2 of the Constitution.

Recognition of the right to keep a consistently used family name, which has become a distinctive sign of personal identity, ensures that the general interest in reliable and consistent identification of individuals does not suffer, when civil status records concerning people with children are rectified.

This means that Article 165 of Royal Decree No 1238 of 9 July 1939 on civil status must be declared unconstitutional, since it violates Article 2 of the Constitution by failing to provide that individuals may secure from courts the right to keep family names originally assigned

to them, which have become distinctive signs of their identity, when civil status registers are being corrected for reasons unconnected with themselves.



Identification:

a) Italy / b) Constitutional Court / c) d) 7 February / 17 February 1994 / e) Judgment No. 40 / 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 – Court decisions.

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

Keywords of the alphabetical index:

Region / Review / Audit Court.

Summary:

When the regulations on implementation of the Sicily Region's special Statute are applied to the setting-up of Audit Court sections to deal with Sicilian cases, as provided for in Legislative Decree No 655 of 1948, and reference is made to the "State laws governing the functions of the Audit Court", such reference must be considered "dynamic" or "mobile".

In other words, reference is made to the law as it has existed at the various stages in its development (the latest stage being Act No 20 of 14 January 1994, "Provisions concerning the jurisdiction and supervisory role of the Audit Court") and not simply to the law as it stood when the regulations on implementation of the Statute were passed (the Royal Decree of 12 July 1934, No 1214, containing the law on the Audit Court). Purely "static" reference to the latter would result in "petrification" of the system, since regulations adopted on the Audit Court after 1948 would not apply.

This would also run counter to the requirement of linear development, which is implicit in the Audit Court's supervisory function, and which is felt particularly strongly with radical reforms of the kind introduced by Legislative Decrees Nos. 143 and 323 of 1993 and, most recently and decisively, the aforementioned Act No 20 of 14 January 1994, approving reform of the Audit Court.



Identification:

a) Italy / b) Constitutional Court / c) / d) 21 February / 3 March 1994 / e) Judgment No 70 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Legislative or quasi-legislative regulations.

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

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

Fundamental Rights – Civil and political rights – Equality.

Fundamental Rights – Civil and political rights – Security of the person.

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

Keywords of the alphabetical index:

HIV/ Prisons/ Execution of sentence/ "Balancing" of constitutional values.

Summary:

To decide whether compulsory remission of sentence for HIV-positive persons is constitutionally permissible, it is necessary to determine whether the legislator has used his discretionary power correctly in striking a balance between the need to protect the public against convicted criminals who, if released under the rule complained of, may commit further offences and so imperil the basic rights of victims of crime guaranteed by Article 2 of the Constitution, and the need to protect health, one of the primary assets guaranteed by Article 32 of the Constitution, in prisons.

The legislator's choice cannot be considered arbitrary, since its purpose is to guarantee the right to health in prisons.

Nor can it be argued that the solution adopted, i.e. remission of sentence, creates dangers other than those occasioned by failure to take preventive measures to ensure that released convicts do not commit further offences. The choice of these measures is a matter for the legislator, and their absence cannot justify total subordination of the need to protect health to the protection of order and public safety.

Nor, since the syndrome has very special features, justifying special treatment in the special circumstances of prison life, can it be claimed that the rule in question violates Article 3 of the Constitution by discriminating between prisoners with "ordinary" ailments and those who are HIV-positive.



Identification:

a) Italy / b) Constitutional Court / c) / d) 23/31 March 1994 / e) Judgment No 108 / f) / g).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Entrance examinations for the public service / Police forces / Family morals / The judiciary / Unconstitutionality.

Summary:

When they left the legislator to determine the conditions for access to the public service (Article 51 of the Constitution), the authors of the Constitution did not intend to exempt him from constitutional control. In exercising his discretionary powers, he is in fact subject to the rigorous standards laid down in Article 3 of the Constitution. The requirement that candidates for the state police force must come from families of "unquestioned morality" is not a reasonable one. It refers to value-judgments and family behaviour patterns whose connections with the candidates are at most arbitrary, in today's circumstances. The rule making it possible to debar certain candidates from serving in the police bases this measure on information collected by public or police authorities; it also states that the measure itself consists of "appraisal by the ministry", whose reasonableness "is not open to review". The constitutional right of access to the public service makes it essential, however, that this measure be founded on an impartial assessment, duly communicated to the applicant in a decision giving reasons, and leaving him free to refer the matter to the courts.

This means that the rule laying down the same arbitrary condition for access to the judiciary – a rule actually referred to in the already criticised rule on admission to entrance examinations for the state police – must also be declared unconstitutional; the same applies to any rules laying down the same condition for access to other police forces.



Identification:

a) Italy / b) Constitutional Court / c) / d) 25 March-14 April 1994 / e) Judgment No 134 / 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 – Decisions – Types – Procedural decisions.

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

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

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

Keywords of the alphabetical index:

Legal aid / Social welfare and pensions.

Summary:

The remission of legal costs for unsuccessful parties on low incomes, in proceedings concerning social benefits and pensions, is – given the special value of the constitutionally protected right to those benefits (Article 38 para. 2 of the Constitution) – an instrumental measure, since it is intended to ensure effective protection of that right. Its purpose is to establish material equality between the parties and restore the balance by strengthening the wage-earner's clearly less favourable position. By indiscriminately abolishing legal aid, even for people on low incomes, the rule in question departs from this system and is therefore unconstitutional.

Supplementary information:

Reminder of previous case-law: judgments nos. 23/73; 60 and 85/79; 135/87.



Identification:

a) Italy / b) Constitutional Court / c) / d) 14/21 April 1994 / e) Judgment No 150 / f) / g).

Keywords of the systematic thesaurus:

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

Fundamental Rights – Civil and political rights – Equality.

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

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

Keywords of the alphabetical index:

Self-employed mothers / Motherhood / Wage-earning fathers / Leave.

Summary:

The special features of paid work justify the adoption of special rules on the protection of motherhood. One example is the rule which allows the father of a child to avail, instead of the mother, of certain types of leave intended to protect mothers and children, when the mother goes out to work, but not when the mother is self-employed. This rule must be recognised as constitutional. For obvious reasons, too, the father's position cannot be compared with the mother's, even when both go out to work.

Supplementary information:

Reminders of previous case-law: On the difference between self-employment and paid work a) with reference to the social security system, see judgment No. 31/86; b) with specific reference to the rules on protection of motherhood, see judgment No. 181/93.



Identification:

a) Italy / b) Constitutional Court / c) / d) 27/28 April 1994 / e) Judgment No 168 / f) / g).

Keywords of the systematic thesaurus:

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

Fundamental Rights – Civil and political rights – Other.

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:

Life imprisonment / Minors.

Summary:

International law includes no general principle or custom prohibiting life imprisonment for minors, even though several international conventions to

which Italy is party may be helpful in interpreting the constitutional principles referred to here.

Adjustment of sentence is a constitutional principle, and this principle must be regarded as being respected when life sentences are enforced in practice, since conditional release and other measures have been introduced to reward good conduct and help to bring about the convict's social rehabilitation.

In the case of minors, however, life imprisonment is not compatible with the measures included for their protection in the Constitution; the principles concerning minors laid down in the Constitution actually oblige the legislator to provide for penalties which serve various functions, and to take account, too, of the international conventions referred to above; in the case of minors, re-education must clearly be the primary, if not sole function. Regulations which allow life sentences to be passed on minors are incompatible with this function, and the introduction of measures to reward good conduct cannot be regarded as sufficient.

Supplementary information:

Reminder of earlier judgments (in the order followed in the reasons given):

- a) concerning the admissibility of a similar question, put in terms which raised the general question of the simultaneous existence of aggravating and mitigating circumstances, see judgment No. 140/1993.
- b) concerning the constitution's requirements concerning the generally recognised rules of international law, see judgments Nos. 153/87; 96/82; 188/80; 48/79; 69/76; 104/69; 48/67; 135/63; 32/60.
- c) concerning the constitutional validity of life imprisonment in general, see judgment No. 264/74.
- d) concerning the multi-purpose (and not only re-educational) nature of penalties, see judgments Nos. 306/93; 282/89; 106/80; 179/73; 12/66.
- e) concerning the exclusive authority of the courts to grant conditional release, see judgment No. 204/74.
- f) concerning a reminder to the legislator of the need to maintain the special provisions applying to minors in criminal law, and the specific aim of re-education, see judgment No. 125/92.



Lithuania

Constitutional Court

Reference period:

1 January 1994 – 30 April 1994

Statistical data

- Total: 7 final decisions including:
- 4 rulings concerning compliance of laws with the Constitution;
- 2 rulings concerning compliance of the decisions (resolutions) of the Seimas (Parliament) with the Constitution;
- 1 ruling concerning compliance of Governmental directives with the laws.

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

Important decisions

Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 19 January 1994 / e) / f) / g) Publication: Valstybės žinios" 7-116 94.01.26.

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 – Legislative bodies.

Constitutional Justice – Constitutional proceedings – Decisions – Form.

Constitutional Justice – Constitutional proceedings – Decisions – Types.

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

Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Classification decision / Parliamentary proceedings.

Summary:

The ruling of the Constitutional Court concerns the resolution of the Seimas (Parliament) "On the main directions of land reform", adopted on 17 June 1993. The Constitutional Court established that the provisions of the resolution regulate relations of private property. However, in Article 23 of the Constitution it is established that the rights of ownership shall be protected by law. Therefore, the above mentioned decision of the Seimas has been considered as contradictory to the Constitution of Lithuania.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 14 February 1994 / e) / f) / g) Publication: Valstybės žinios 13 – 221 94.02.19.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the distribution of powers between State authorities.

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

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

Institutions – Principles of State organisation – Separation of powers.

Institutions – Courts – Procedural safeguards – Legal provisions for access to courts.

Institutions – Courts – Ordinary courts – Public prosecutor.

Keywords of the alphabetical index:

Access to courts / Independence of courts / Infringement of principle of equality / Public prosecutor.

Summary:

The ruling of the Constitutional Court concerns the Law on the Prosecutor's Office and some norms of the Code of Civil Procedure. The Constitutional Court has established certain powers conferred upon prosecutors such as the power to join a case at any stage to carry out prosecutorial supervision in civil proceedings and to supervise the lawfulness of executive acts, are incompatible with the Constitution of the Republic of Lithuania.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 24 February 1994 / e) / f) / g) Publication: Valstybės žinios 16 – 271 94.03.02.

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 – Concept of constitutionality dependent on a specified interpretation.

Institutions – Legislative bodies – Parliaments – Organisation.

Keywords of the alphabetical index:

Parliament / Parliamentary proceedings.

Summary:

The case was initiated by a group of MPS who requested to examine the constitutionality of norms of the Statute of the Seimas (Parliament), which regulated the number of the Deputy Chairpersons of the Seimas. The

Constitutional Court ruled that the norms were compatible with the Constitution, because the right to determine the structure and procedure of activities of the Seimas was vested in it by the Constitution of the Republic of Lithuania.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 16 March 1994 / e) / f) / g) Publication: Valstybės žinios 22 – 366 94.03.23.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the distribution of powers between State authorities.

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

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

Institutions – Executive bodies – Powers.

Institutions – Public finances – Taxation.

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

Keywords of the alphabetical index:

Government / Non-retrospective effect of laws / Taxation.

Summary:

A group of Seimas members requested the Constitutional Court to examine whether some Governmental directives regulating taxation were in compliance with the laws on taxes. The Constitutional Court established that some provisions of the Governmental directives had retrospective effect and changed the basis of taxation. Therefore, they were held to be unlawful.



Identification:

a) Lithuania / b) Constitutional court / c) / d) Ruling of 31 March 1994 / e) / f) / g) Publication: Valstybės žinios 26 – 450 94.04.08.

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 – Historical interpretation.

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

Keywords of the alphabetical index:

Civil law / Control of private contracts / Fundamental Rights / Private property.

Summary:

The ruling of the Constitutional Court concerns certain norms of the Civil Code (adopted during the Soviet period) which regulated leases. The Constitutional Court established that such restrictions as the prohibition to raise interest contradict common principles of civil law and infringe the rights of ownership. The Constitutional Court held that the above-mentioned norms of the Civil Code were incompatible with the Constitution of the Republic of Lithuania.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 13 April 1994 / e) / f) / g) Publication: Valstybės žinios 29 – 524 94.04.20.

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 – Principles of legality.

Fundamental Rights – Governing principles – Limits and restrictions.

Keywords of the alphabetical index:

Citizenship / Fundamental Rights / Passports.

Summary:

The ruling of the Constitutional Court concerns a decision of the Seimas which extends the possibilities of gaining citizenship of the Republic of Lithuania. The

Constitutional Court established that, under the Constitution, the procedure for the acquisition of citizenship shall be established by law. Therefore, the above-mentioned decision of the Seimas was considered to contradict the Constitution of the Republic of Lithuania.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 21 April 1994 / e) / f) / g) Publication: Valstybės žinios 31 – 562 94.04.27.

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 – Principles of legality.

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

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

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

Keywords of the alphabetical index:

Civil law / Freedom of conscience and belief / Non-retrospective effect of laws / Separation of the Church and the State.

Summary:

This case which was referred to the Constitutional Court by a lower Court concerned certain provisions of the Matrimonial and Family Code (adopted during the Soviet period) prohibiting marriages registered in church. Article 38 of the Constitution (1992) declares that “the State shall also recognise marriages registered in church”. Therefore, the Constitutional Court ruled that the above-mentioned norms contradict the Constitution of the Republic of Lithuania.



Norway

Supreme Court

Supreme Administrative Court

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



Poland

Constitutional Tribunal

Reference period :

1 January – 30 April 1994

Statistical data

Types of review :

- Ex post facto review : 6
- Preliminary review : -
- Abstract review (Art. 22 of the Constitutional Tribunal Act) : 6
- Courts' referrals ("legal questions", Art. 25 of the Constitutional Tribunal Act) : -

Challenged normative acts :

- Cases concerning the constitutionality of statutes : 6
- Cases on the legality of other normative acts under the Constitution and statutes : 2

Decisions :

- Cases decided on their merits : 6
- Cases discontinued pursuant to Art. 4 of the Constitutional Tribunal Act on the ground that the legal provisions in question were no longer in force : -

Rulings :

- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution) : 5
- Upholding the constitutionality of the provisions in question : 1

Resolutions containing universally binding interpretations of laws (Art. 13 of the Constitutional Tribunal Act) :

- Binding interpretations of laws issued : 7
- Motions requesting such interpretations rejected : 1

Subject matter of important decisions :

Local self-government

(case No. K 9/93 – 18 January 1994)

(case No. W 6/94 – 16 March 1994)

(case No. W 9/93 – 23 March 1994)

(case No. W 2/94 – 13 April 1994).

Principle of social justice.

Principle of equality

(case No. K 15/93 – 15 February 1994).

Taxation – governing principles

(case No. K 13/93 – 29 March 1994)

(case No. K 10/93 – 11 April 1994).

Prohibition of *ex post facto* laws

(case No. K 13/93 – 29 March 1994).

Legal status of persons performing public duties

(case No. W 2/94 – 13 April 1994).

Other information :

Within the reference period the Sejm upheld some of the recent Tribunal's rulings on the unconstitutionality of statutes :

- on the 10th sitting (20-21 January 1994) :
 - decision of 29 January 1992 (case No. K 15/91), concerning the 1991 State Budget,
 - decision of 20 October 1992 (case No. K 1/92), regarding the provisions of the Act on Foreigners,
- on the 11th sitting (3-4 February 1994) :
 - decision of 23 February 1993 (case No. K 10/92), regarding the Law on Farmers' Social Security,
 - decision of 19 October 1993 (case No. K 14/92), concerning the revision of the Pensions Act (postponing the valorization of the pensions),
 - three decisions concerning the Employment and Unemployment Act : of 6 April 1993 (case No. K 7/92), of 1 June 1993 (case No. P 2/92), of 13 July 1993 (case No. P 7/92).

On its 13th sitting (3-5 March 1994) the Sejm recalled Judge Mieczysław Tyczka from the Tribunal after his resignation.

On the 15th sitting of the Sejm (17-18 March 1994) the President of the Tribunal, Judge Andrzej Zoll, presented to the House the report on the Tribunal's activity in 1993. He suggested to urge the enactment of the draft law revising the Constitutional Tribunal Act in order to confer on the Tribunal's rulings on the unconstitutionality of statutes binding authority.

Important decisions

Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 18 January 1994 / e) Case No. K 9/93 / 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 – 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 – The subject of review – Rules issued by the executive.

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

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

Keywords of the alphabetical index:

Local self-government.

Summary:

Pursuant to Article 74 of the Constitutional Act of 17 October 1992 ("Small Constitution") the activity of local self-government (commune) units is subject to supervision. The scope and the rules of the supervision as well as the competence of the supervisory authorities shall be specified by law.

In order to provide communes and their associations with finance control, the Regional Accounting Chambers were established by the law of 7 October 1992. The act creating the Chambers complies with the provisions of the Constitutional Act. The regulation (decree) of the Prime Minister on particular aspects of the organisation of the Chambers and their competences does not infringe the Constitutional Act nor the law on the Regional Accounting Chambers.

Supplementary information:

See also the decision of 12 October 1993 (case No. K 4/93).



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 15 February 1994 / e) Case No. K 15/93 / 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 public body – Other.

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

Institutions – Principles of State organisation – Other.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Combatants.

Summary:

One of the provisions of the 1991 Act on Combatants, War and Post-War Repression Victims excludes the possibility that combatants' rights specified by the Act may be acquired by persons who were employed by the machine of repression. According to the provision in question, this prohibition covers, *inter alia*, all persons irrespective of the posts occupied who were employed by organs of the ministry of internal affairs during the years of communist government.

Granting particular rights and privileges on the ground of combatants' activities should be – in the Tribunal's opinion – motivated by the principles of justice. Therefore the Tribunal has not objected to the fact that all persons who collaborated with the organs of repression, the main purpose of which was to liquidate independence movements, have been excluded from the group entitled to veterans' privileges. However, the Tribunal declared it contrary to the constitutional principles of justice and equality that persons who had carried out their duties in order to protect public interests (i.e. maintaining public safety, preventing crimes) were also covered by the prohibition. The provision in question was also found contrary to Article 26 of the International Covenant of Civil and Political Rights.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Resolution of 16 March 1994 / e) Case No. W 6/94 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Other litigation.

Constitutional Justice – The subject of review – Legislative or quasi-legislative regulations.

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

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

Keywords of the alphabetical index:

Local self-government.

Summary:

In compliance with the 1990 Act on Local Self-Government, commune councils are elected for a period of four years beginning on the day of elections. The Act, however, has not specified the expiry date of the term of a council elected ahead of the scheduled time (e.g. after recall of a council in a local referendum). The Tribunal holds that in order to guarantee that municipal elections are held on the same day in the whole country, the term of a council elected ahead of time (for less than four years) should expire four years after the removed council had been elected.

Supplementary information:

See also the resolution of 7 July 1993 (case No. W 1/93).



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 29 March 1994 / e) Case No. K 13/93 / 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 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 – Public finances – Taxation – Governing principles.

Keywords of the alphabetical index:

Personal income tax / Prohibition against *ex post facto* laws (*lex retro non agit*).

Summary:

Under the 1991 Personal Income Tax Act (which came into force on 1 January 1992) the tax rate increases according to the amount of taxable income (progressive taxation). The Act laid down the rule that taxable income brackets should be subject to valorisation in order to follow the inflation rate. The provisions of a law enacted in March 1993 withdrew this rule and maintained the 1992 brackets.

The Tribunal considered that the provisions in doubt infringed upon the prohibition of laws with retrospective effect (*lex retro non agit*). Moreover, they were found to be in contradiction with the rule that tax regulations should be modified and published before the beginning of the tax year. Having considered the above, the Tribunal declared the provisions in question to be inconsistent with the constitutional rule of law principle.

Supplementary information:

See also the decision of 29 January 1992 (case No. K 15/91).



Identification:

a) Poland / b) Constitutional Tribunal / c) Resolution of 23 March 1994 / e) Case No. W 9/93 / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Other litigation.

Constitutional Justice – The subject of review – Legislative or quasi-legislative regulations.

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.

Keywords of the alphabetical index:

Local self-government / Educational system.

Summary:

The Educational System Act of 1991 provides that candidates for the post of director of a school (or other educational institution) shall be selected by obligatory open competition. In the case of a school run by a unit of local self-government (commune), the competence to elect the selection committee and to establish the rules of competition shall be vested in the commune council. Unless the provisions of law state otherwise,

the competences of a commune council cover all the tasks reserved for a commune by law.



Identification :

a) Poland / b) Constitutional Tribunal / c) / d) Resolution of 13 april 1994 / e) Case No. W 2/94) / f) / g).

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Other litigation.

Constitutional Justice – The subject of review – Legislative or quasi-legislative regulations.

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.

Keywords of the alphabetical index:

Local self-government / Legal status of persons performing public duties.

Summary:

Under the "Small Constitution" of 17 October 1992, deputies, senators, and members of local self-government authorities are forbidden to engage in any activity inconsistent with exercising a mandate, office or function. In particular, according to the 1992 law, the aforementioned persons cannot be members of a management board, a supervisory board or an audit board of a company in which the State Treasury is a shareholder. The Tribunal has decided that this prohibition also covers membership in organisations in which the State Treasury is the only shareholder.

The members of local self-government authorities cannot perform any functions in the organs of a company set up with the participation of a commune (or an association of communes). It has been ascertained by the Tribunal that this prohibition applies to the members of the local council of both the commune where the company has its seat and the commune within the territory of which the company carries out its commercial activity.

Supplementary information:

See also the resolution of 2 June 1993 (case No. W 17/92).



Portugal

Constitutional Court

Reference period :

1 September 1993 – 30 April 1994

Statistical data

- Total of 772 judgments, of which :
 - Prior scrutiny: 3 judgments
 - Subsequent scrutiny *in abstracto*: 17 judgments
 - Appeals: 583 judgments, of which :
 - Substantive issues: 423
 - Applications: 54
 - Procedural issues: 106
 - Complaints: 37 judgments
 - Political parties and coalitions: 13 judgments
 - Electoral disputes: 114 judgments
 - Election of the European Parliament: 3 judgments
 - Assets and income declarations: 1 judgment.
 - Disbandment of fascist organisations: 1 judgment.
-

Important decisions

Identification:

a) Portugal / b) Constitutional Court / c) 2nd Chamber / d) 4 November 1993 / e) Judgment No. 634/93 / f) Desertion as an offence (Merchant Navy) / g) Official Gazette (II), 31 March 1994.

Keywords of the systematic thesaurus:

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

Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Factual scrutiny / Fishing / Forced labour / Criminal law / Principle of proportionality.

Summary:

The provision of the Criminal and Disciplinary Code of the Merchant Navy under which a member of the ship's crew who fails to board ship without a valid excuse is punished as a deserter, even if his duties are not directly linked to the operation and maintenance of the ship, violates the constitutional principles of justice and proportionality resulting from the principle of the democratic rule of law.



Identification:

a) Portugal / b) Constitutional Court / c) Plenary Assembly / d) 9 November 1993 / e) Judgment No. 703/93 / f) Eligibility / g) Official Gazette (II), 20 January 1994.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Local elections.

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Eligibility / Local authorities / Access to public office.

Summary:

In an appeal case pertaining to candidatures in local authority elections, a court of first instance had ruled that certain candidates were not eligible on the grounds

that they were not resident in the locality in question. The Constitutional Court ruled that, in accordance with legislation and case-law, all electors were eligible to stand in local authority elections even if they were not registered as electors in the electoral constituency where they intended to stand.

Supplementary information:

The power to pass judgment in the case of appeals pertaining to candidatures in elections is one of the powers belonging to the Portuguese Constitutional Court in respect of electoral disputes.



Identification:

a) Portugal / b) Constitutional Court / c) 2nd Chamber / d) 10 November 1993 / e) Judgment No. 703/93 / f) Legislative authorisation / g) Official Gazette (II), 31 March 1994.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of the distribution of powers between State authorities.

Fundamental Rights – Governing principles – Limits and restrictions.

Keywords of the alphabetical index:

Legislative powers / Rights, freedom and safeguards / Duration of legislative authorisation / Extradition.

Summary:

Legislation on international legal co-operation in criminal matters and, in particular, on extradition concerns fundamental rights; the Assembly of the Republic therefore has exclusive powers unless it grants the Government a legislative authorisation in this respect.

The question of whether the executive has passed legislative measures in accordance with the authorisation granted to it by the Assembly of the Republic and, in particular, within the time-limit set in respect of that authorisation, raises, in turn, the question of at what moment the executive passes the authorised legislative measures (a debate which is as old as the Portuguese Constitution itself).

The Constitutional Court has ruled that the decisive moment is that when the legislative measure is passed by the Cabinet.

Supplementary information:

Case-law unchanged since Judgment No. 150/92.



Identification:

a) Portugal / b) Constitutional Court / c) Plenary Assembly / d) 23 November 1993 / e) Judgment No. 748/93 / f) Disqualification from elections / g) Official Gazette (I-A), 23 December 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 public body.

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Subsequent scrutiny / Right to vote / Participation in public life / Disqualification from elections / Limits on sentences/ Automatic effect of sentences.

Summary:

The constitutional provision according to which "no sentence shall automatically entail loss of civil, professional or political rights" results from the fundamental principle of respect for human dignity and respect for fundamental rights; under this provision no sentence may lead automatically to the loss of civil, professional or political rights.

It follows that the rules contained in various electoral acts, under which persons given custodial sentences for deliberate offences lose their right to vote, are unconstitutional.

Supplementary information:

Established case-law.



Identification:

a) Portugal / b) Constitutional Court / c) Plenary Assembly / d) 18 January 1994 / e) Judgment No. 17/94 / f) Fascist organisation / g) Official Gazette (II), 31 March 1994.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Restrictive proceedings – The banning of political parties.

Constitutional Justice – Constitutional proceedings – Procedure – Special procedures.

Institutions – Miscellaneous – Political parties.

Fundamental Rights – Governing principles – Limits and restrictions.

Keywords of the alphabetical index:

Political parties / Disbandment of a political party / Fascist ideology / Freedom of association.

Summary:

Act No. 64/78 – a legislative measure required to implement the constitutional rule prohibiting organisations which espouse fascist ideology – differentiates, from a procedural point of view between, on the one hand, the legal identification of an organisation as espousing this ideology and the call for its disbandment and, on the other hand, the criminal consequences connected with forming organisations of this type.

Despite the inevitable inter-dependence and complementarity of this identification and the criminal consequences, the powers of the Constitutional Court are limited to the issue of whether the organisation in question adopts a fascist ideology and whether, consequently, it must be compulsorily disbanded.

The Constitution and the law prohibit neither individual espousal of fascist ideology nor the public expression, the defence or the propagation of this ideology; they do, however, prohibit the existence of organisations which are set up for those purposes.

Since the legislative concept of “organisation” is a very broad one, and given that this is a matter of restricting fundamental rights, freedoms and guarantees, special care must be taken when putting Act No. 64/78 into practice.

The concept of an organisation espousing fascist ideology is determined, *prima facie*, by its very *raison d'être*, and by its constitutional justification; it must be gauged according to present day circumstances and not only in historical terms.

Supplementary information:

Although, in the Court's opinion, the organisation concerned was apparently liable for prosecution, the Court did not in the event have to decide since, before a case could be brought, the organisation had already voluntarily and permanently disbanded.



Identification:

a) Portugal / b) Constitutional Court / c) Plenary Assembly / d) 8 February 1994 / e) Judgment No. 148/94 f) Enrolment charges / g) Official Gazette (I-A), 3 May 1994.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Subsequent scrutiny / Registration charges / State higher education / Principle of equality / Cultural rights.

Summary:

The Court was called upon to give its opinion on the constitutionality of certain provisions amending the system for fixing registration and enrolment charges at State higher education establishments. The Court ruled that these provisions were unconstitutional since they failed to fix a ceiling on these charges.



Identification:

a) Portugal / b) Constitutional Court / c) Plenary Assembly / d) 8 February 1994 / e) Judgment No. 150/94 / f) Tax offences / g) Official Gazette (I-A), 30 March 1994.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Decisions – Effects – Influence of judgments on the functioning of State organs and on everyday conduct.

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

Keywords of the alphabetical index:

Abstract scrutiny / Non-retrospective effect of criminal law / Tax offences.

Summary:

Since under the new criminal law on non-customs related tax offences types of conduct which were previously considered to be criminal offences are no longer considered as such, the law could be interpreted as being more lenient on the accused.

Although expressly mentioned in the Constitution solely in the context of criminal laws, the principle of retrospective application of more lenient criminal laws must also apply in matters of "contra-ordenação" (a type of offence inspired by German law and sanctioned by an administrative fine, but the decisions of which may be appealed against before the law courts).

Supplementary information:

This is a generally binding declaration of unconstitutionality, delivered following several hundred appeals concerning decisions by courts which had held that the rules in question were unconstitutional.



Identification:

a) Portugal / b) Constitutional Court / c) 2nd Chamber / d) 1 March 1994 / e) Judgment No. 195/94 / f) Parliamentary committees of enquiry / g) Official Gazette (II), 12 May 1994.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Litigation in respect of jurisdictional conflict.

Constitutional Justice – The subject of review – Parliamentary rules.

Institutions – Principles of State organisation – Separation of powers.

Keywords of the alphabetical index:

Practical scrutiny / Parliamentary committees of enquiry / Assembly resolutions / Government measures / Judicial functions / Conflicting powers.

Summary:

Resolutions of the Assembly of the Republic are the main form of political measure taken by this sovereign body.

The concept of "rule", however, in terms of monitoring constitutionality, includes not only general and abstract provisions but also any measure taken by public authorities which provides for a rule of conduct for individuals or governments, a criterion for decisions by governments, a criterion for decisions by governments or judges or, in general, a model for the value of types of behaviour. This functional and formal concept of rules includes all provisions contained in legal texts, even in the case of individual and concrete types of provision, even if an administrative measure is incorporated – but not administrative measures *stricto sensu* (that is, those not incorporated in legal texts), judicial decisions and political or governmental measures.

Under Portuguese law, parliamentary enquiries are not a judicial function – all they do is to entitle the Assembly, by means of the information they provide, to take (legislative or other) measures; they are therefore an important instrument for the political supervision exercised by the Assembly, especially in connection with the assessment of governmental and administrative measures.



Identification:

a) Portugal / b) Constitutional Court / c) 1st Chamber / d) 2 March 1994 / e) Judgment No. 204/94 f) Emigration / g) Not yet published.

Keywords of the systematic thesaurus:

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

Fundamental Rights – Governing principles – Limits and restrictions.

Fundamental Rights – Civil and political rights – Other.

Sources of constitutional law – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.

Keywords of the alphabetical index:

Practical scrutiny / Clandestine emigration / Conspiracy / Previous ordinary law.

Summary:

The right to emigrate, one of the "rights, freedoms and guarantees" enshrined in the Constitution, is legally covered by a special set of conditions set out in Article 18 of the Constitution.

This right is not, however, an absolute right and it is constitutionally legitimate to establish conditions for its exercise by ordinary legislation, although these conditions are limited to this particular right.

Supplementary information:

Case-law already defined by the Constitutional Commission (the body monitoring constitutionality, prior to the establishment of the Constitutional Court).



Romania

Constitutional Court

Reference period:

1 January 1994 – 30 April 1994

Statistical data

Types and number of decisions

- 2 decisions to review the constitutionality of laws prior to promulgation
 - Average length of proceedings – 20 days
 - 36 decisions on objections of unconstitutionality, including:
 - 30 decisions by chambers on the merits
 - Average length of proceedings – 90 days
 - 6 decisions by chambers on appeals
 - Average length of proceedings – 20 days
 - 2 decisions on interpretation by the plenary court.
-

Important decision

Identification:

a) Romania / b) Constitutional court / c) / d) / e) Decision no. 30/6.04.1994 / f) / g) Monitorul Oficial no. 100/18.04.1994.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Right to domicile / Right to property / Non-retrospective effect.

Summary:

The *de jure* extension of current leasing agreements on rented premises does not infringe the owner's right to dispose of his property, since it complies with Art. 43 of the Constitution and Art. 11 of the International Covenant on Economic, Social and Cultural Rights.

The law does not, as alleged in the objection of unconstitutionality, retrospectively give new effect to agreements which have already expired, but allows certain existing contractual relationships, previously formally or tacitly renewed, to continue for a certain future period.

Supplementary information:

French and German case law on property rental.



Russia

Constitutional Court

Reference period:

4 February 1992 – 1 October 1993

Important decisions

Identification:

a) Russia / b) Constitutional Court / c) / d) 4 February 1992 / e) / f) / g) Bulletin of the Congress of the People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, No. 13, Art. 669.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

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

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

Sources of constitutional law – Categories – Quasi-constitutional legislation and norms.

Sources of constitutional law – Categories – Other international sources.

Keywords of the alphabetical index:

Employment contract / Dismissal.

Summary:

A judgment of the Constitutional Court found unconstitutional the practice of dismissing workers entitled to a full old-age pension upon attainment of retirement age, without taking other circumstances into account.

This practice was based on the provisions of the Labour Code which granted the management of a company (institution or organisation) the right to dismiss workers. The Court found these provisions incompatible with the Constitution and with the 1991 Declaration of the Rights and Freedoms of the Individual and the Citizen; they also run counter to international texts on individual rights and freedoms, by bringing about discrimination and compromising equality of opportunity and promotion in the field of labour and human activities.

Supplementary information:

The Russian Federation Act of 12 March 1992 repealed the provisions at issue. The persons concerned were reinstated and received back payment of their average wage for the period of enforced unemployment.



Identification:

a) Russia / b) Constitutional Court / c) / d) 23 June 1992 / e) / f) / g) Bulletin of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, No. 30, Art. 1809.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.

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

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

Sources of constitutional law – Categories – Quasi-constitutional legislation and norms.

Sources of constitutional law – Categories – Other international sources.

Keywords of the alphabetical index:

Right of appeal.

Summary:

The Code of Civil Procedure of the Russian Federation is contravened by Article 211 paragraph 5 of the Labour Code of the RSFSR, Section 90 paragraph 4 of the Basic Labour Laws, and point 27 of the plenary session decree of the Supreme Court of the USSR, interpreting the above-mentioned provisions; the latter laid down excessively short time limits for appeals against decisions by courts or higher authorities which refused reinstatement, thereby infringing the right of citizens to judicial protection of their rights and freedoms: no exception to this constitutional right is tolerable. Nor were they compatible with the corresponding provisions of the Declaration of the Rights and Freedoms of the Individual and Citizen of the RSFSR.

The judicial practices based on the application of the norms in question are incompatible with the Constitution and with international standards and norms concerning human rights.

Supplementary information:

The provision in question (Article 211 of the Labour Code of the RSFSR) was amended in September 1992.



Identification:

a) Russia / b) Constitutional Court / c) / d) 27 January 1993 / e) / f) / g) Bulletin of the Congress of the People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993 No. 14, Art. 608.

Keywords of the systematic thesaurus:

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

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

Constitutional Justice – The subject of review – Court decisions.

Constitutional Justice – The subject of review – Administrative acts.

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

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

Constitutional Justice – Constitutional proceedings – Decisions – effects.

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

Keywords of the alphabetical index:

Unemployment / Compensation for damage.

Summary:

Authorities which had dealt with a number of labour disputes acted on citizens' requests for reinstatement after unlawful dismissal and ordered compensation for the period of non-employment (three months or one year, as appropriate), without however taking account of the actual length of the period of enforced unemployment for the persons concerned. In their decisions, they conformed to a number of rules contained in labour legislation.

The Constitutional Court found these practices to be in violation of the general principles of fairness, equality before the law and the state's duty to guarantee the rights and freedoms of individuals and citizens and to make amends for any damage caused to the individual by unlawful acts of public entities or agents, this set of principles being defined in the Constitution of the Russian Federation.

The judgment of the Constitutional Court restored the infringed rights of citizens. In its capacity as the supervisory authority, the Supreme Court of the Russian Federation in turn reviewed all court decisions challenged by the complainants.



Identification:

a) Russia / b) Constitutional Court / c) / d) 5 February 1993 / e) / f) / g) Bulletin of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993, No. 12, Art. 445.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Administrative acts.

Fundamental Rights – Civil and political rights – Equality.

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

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

Keywords of the alphabetical index:

Unlawful occupation of buildings / Eviction.

Summary:

A judgment of the Constitutional Court deemed constitutional the customary practice of referring to the ordinary courts disputes concerning the assignment of housing only in cases where the application is based on civil law obligations. However, if the dispute goes beyond the sphere of civil law, the application is not amenable to judicial review.

The same Court judgment describes as unconstitutional the practice of administrative eviction of citizens spontaneously occupying residential premises: these were evictions sanctioned solely by the public prosecutor, with no right of judicial appeal for the persons evicted, and the Constitutional Court considered that such practices violate the principle of equality for all before the law and before the courts and restricted the right on citizens to judicial protection.



Identification:

a) Russia / b) Constitutional Court / c) / d) 26 February 1993 / e) / f) / g) Bulletin of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993, No. 19, Art. 702.

Keywords of the systematic thesaurus:

Constitutional Justice – Types of litigation – Electoral disputes – Parliamentary elections.

Institutions – Principles of State organisation – Separation of powers.

Institutions – Legislative bodies.

Fundamental Rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Incompatibility.

Summary:

By virtue of the separation of powers, if a people's deputy of the Russian Federation is appointed to exercise a function incompatible with the fulfilment of the duties of a people's deputy of the Russian Federation (particularly in the case of federal ministerial posts), his term of office as a deputy must be cut short. The disputed practice of revoking a deputy's right to sit in parliament is compatible with the Constitution.



Identification:

a) Russia / b) Constitutional Court / c) / d) 16 April 1993 / e) / f) / g) Bulletin of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993, No. 29, Art. 1141.

Keywords of the systematic thesaurus:

Constitutional Justice – The subject of review – Court decisions.

Fundamental Rights – Civil and political rights – Equality.

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

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

Sources of constitutional law – Categories – Written rules – Other international sources.

Keywords of the alphabetical index:

Members of the public prosecution department.

Summary:

The People's Courts of the Russian Federation refused to consider applications for the reinstatement of former staff members of the public prosecutor's office, relying on certain rules relating to in the existing legislation in respect of the public prosecution department of the Russian Federation and to labour law, by virtue of which labour disputes involving certain categories of workers could not be determined by courts. In other words, the regulations applicable to prosecutors and to investigative agents in particular departed from the ordinary law relating to labour disputes.

The Constitutional Court found that these practices were unconstitutional, infringed the constitutional right of all citizens to the legal protection of their rights and freedoms, interfered with equality in respect of the right to work and ignored internationally accepted norms and standards.

Supplementary information:

A presidential decree has laid down regulations concerning the federal public service, which give civil servants the right of appeal in labour disputes.



Identification:

a) Russia / b) Constitutional Court / c) / d) 19 May 1993 / e) / f) / g) Russian Gazette, 25 May 1993.

Keywords of the systematic thesaurus:

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

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

Fundamental Rights – Civil and political rights – Freedom of the written press.

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

Keywords of the alphabetical index:

Summary:

In delivering a judgment concerning the property, the founding and the registration of the newspaper "Izvestia", the Supreme Soviet encroached on the field of judicial power, as it lies solely with civil or arbitration courts to deal with disputes concerning the status of persons who establish firms, the contractual obligations of such firms, the disposal of their assets, etc. The Supreme Soviet infringed the constitutional provisions on the right to judicial protection and the administration of justice on the basis of equality of the parties before the law and before the courts in all judicial disputes.

By its decision, the Supreme Soviet had restricted the rights of a newspaper as a major medium of information and the possibilities of its publication, as well as the right of its staff to seek, obtain and freely disseminate information.

Following an individual complaint by the members of the team of journalists belonging to the newspaper's editorial staff, the Constitutional Court declared the decision in question to be incompatible with the Constitution of the Russian Federation. The legal position subsequent to the application of the decision was restored to its previous state.



Identification:

a) Russia / b) Constitutional Court / c) / d) 1 October 1993 / e) / f) / g).

Keywords of the systematic thesaurus:

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

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

Sources of constitutional law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – In general.

Keywords of the alphabetical index:

Transitory law.

Summary:

Article 63 of the Constitution, in its wording of 21 April 1992, guarantees everyone the judicial protection of his or her rights and freedoms without any exception. However, the practice of appeals against dismissal to the superior administrative authority and the consideration of such appeals by the said authority was in keeping with the pre-existing constitutional provisions on this subject.

The instruments of international law concerning human rights contain no mandatory provisions on the exercise of judicial protection solely by the courts. The State is obliged to guarantee the right of all persons to receive legal protection not only from the judicial authorities, but from the administrative authorities or any other competent authority.

The Constitutional Court took as its starting point the fact that the settlement of this question was bound up with the problem of the retroactive effect to be given to constitutional provisions and the rules of labour legislation, as there was no possible legislative solution. Indeed, a former worker's application for reinstatement indirectly harms the interests of the person replacing him in the disputed post. With this in mind, the Court acknowledged that the handling of the disputed dismissals by the higher administrative authorities, in accordance with the labour legislation in force prior to 21 June 1990, was in conformity with Article 56 of the Russian Constitution, in its wording of 12 April 1978.



Slovenia

Constitutional Court

Reference Period :

1 January – 30 April 1994

Statistical data

Number of decisions

The Constitutional Court held 13 sessions during this period, in which it dealt with 102 cases in the field of the protection of constitutionality and legality (cases denoted U- in the Constitutional Court register). There were 108 unresolved cases from the previous year at the start of the period (1 January 1994). The Constitutional Court accepted 83 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 :

- 38 cases, of which there were
 - 13 Decisions and
 - 25 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 rule published in an official bulletin, but only handed over to the participants in the proceedings. However, all decisions and resolutions are published in an official collection.

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

- organisation of the National Assembly (1) ;
- parliamentary enquiry (1) ;
- local self-government (1) ;
- electoral system (2) ;
- military courts (1)
- regional planning, or the regime of building land (6) ;
- public utility services (2) ;
- taxes, fees and duties (6) ;
- privatisation of former social property (2) ;
- state control of prices (1)
- transformation of the status of the enterprises (2) ;
- housing administration (5) ;
- marriage and family relations (1) ;
- citizenship (1) ;
- status of foreigners (1) ;
- pension insurance (2) ;
- education (2) ;
- registration of sports club members (1) ;

In the reference period the new Law on the Constitutional Court of the Republic of Slovenia was adopted (Official Gazette RS, No. 15/1994). New rules of procedure are currently in the process of adoption by the Constitutional Court.

Important decisions

Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 21 January 1994 / e) U-I-13/94 / f) / g) Official gazette of the Republic of Slovenia, No. 6/94.

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 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 – 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 journal/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 – Influence of judgments on the functioning of State organs and on everyday conduct.

Constitutional Justice – Common principles or techniques of interpretation – The social dimension of the rule of law.

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

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

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Fundamental Rights – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Assessment of the affected constitutionally protected values in the process of assessing constitutionality / Conflict of constitutional values / Equality before the law / European Charter on local self-government /

Extension of the term of office of the bodies of the existing municipalities / Implementation of local self-government / Principle of legal protection / Principle of a state governed by the rule of law / Separate opinion of a judge at the Constitutional Court / Transformation of the existing municipalities into new local self-governing communities / Deadlines, referendum, dynamics / Warning decision of the Constitutional Court / New techniques in decision-making.

Summary:

The transitional provision of the Law on Local Self-Government (Official Gazette of the Republic of Slovenia, No. 72/93), introducing a dual (parallel) system (old and new) of local self-government and defining the deadlines for referendums and elections, which cannot be implemented, is not in accordance with Articles 2, 9, 14 and 139 of the Constitution.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 3 February 1994 / e) U-I-9/92 / f) / g) Official Gazette of the Republic of Slovenia, No. 9/94.

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 – Natural person.

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

Constitutional Justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official journal/gazette.

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

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

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

Keywords of the alphabetical index:

Property's economic, social and ecological function / Management of multi-apartment buildings – caretaker – registration / Restricting of property rights in the public interest.

Summary:

The provision of Article 30 of the Housing Law (Official Gazette of the Republic of Slovenia, No. 18/91-I) preventing the owners of apartments in multi-apartment buildings from appointing as caretaker a natural person who is not an entrepreneur, is not in accordance with the Constitution, since other provisions already guarantee the preservation of the economic and social function of apartments.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 17 March 1994 / e) U-I-145/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 18/94.

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 – The subject of review – Rules issued by the executive.

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

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

Constitutional Justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official journal/gazette.

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

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

Institutions – Executive bodies – Powers.

Institutions – Economic duties of the State.

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

Keywords of the alphabetical index:

Local self-government / Local affairs / Price control competence.

Summary:

The Price Act (Official Gazette of the Republic of Slovenia, No. 1/91-I) and the regulations of the Government of Slovenia based thereof, whose constitutionality and legality was contested by the applicant, do not contravene the constitutional provisions on local self-government. The constitutionally determined system of local self-government has not yet been implemented. In the period of transition from the previous communal system to a system of local self-government based on the separation of government commitments and local affairs, the allegation that the transfer of total price control competence onto government bodies in the event of serious market and price-movement distortions or with the object of forestalling monopolistic price formation contravenes the constitution, is unsubstantiated. It is not justified to classify the injunction of such measures among local responsibilities which solely concern the population of a given municipality, as provided for by the first paragraph of Article 140 of the Constitution.

Furthermore, the regulations of the Government of Slovenia which the applicant contested do not contradict the Price Act, since they comply with the conditions for the imposition of price control measures provided by that Act, considering the economic and social circumstances in which they were adopted.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 17 March 1994 / e) U-I-217/93 / 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 – 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*.

Fundamental Rights – Civil and political rights – Right to a nationality.

Fundamental Rights – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Second pronouncement by the Constitutional Court in the same matter.

Summary:

The provision of the second clause of the first paragraph of Article 10 of the Law on Citizenship of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, Nos. 1/91-I, 30/91-I, 38/92 and 61/92), which excludes dual citizenship, does not contravene the Constitution. The non-fulfilment of legal conditions stipulated by that provision does not entail a loss of citizenship.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 17 March 1994 / e) U-I-10/94 / 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 – 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.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Citizenship / Incompetence of the Constitutional Court / Status of citizens from other republics of the former Socialist Federative Republic of Yugoslavia.

Summary:

The allegation that the Law on Foreigners (Official Gazette of the Republic of Slovenia, No. 1/91-I) does not conform with the Constitution is unfounded, since the status of foreigners is also enjoyed by the citizens of other republics of the former Socialist Federative Republic of Yugoslavia who have settled in Slovenia. They were granted the right to obtain Slovenian citizenship if they so chose within six months from the entry into force of the Law on Citizenship of the Republic of Slovenia and if they had their permanent residence in Slovenia. The acquisition of citizenship, and consequently of citizenship rights, therefore depended on the persons concerned themselves.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 31 March 1994 / e) U-I-153/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 21/94.

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 – Non-profit-making corporate body.

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

Constitutional Justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official journal/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 – Limit on retrospective effect.

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

Fundamental Rights – Civil and political rights – Equality.

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

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

Keywords of the alphabetical index:

Constitutional right to social security / Equal protection of rights /

Principle of equality before the law / Civilian war invalidity / Restricting evidence.

Summary:

Legislation on the status and rights of civilian war invalids which restricts the administering of proofs by one group of claimants and enables other claimants to furnish evidence by whatever means, is in conflict with article 22 of the Constitution.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 7 April 1994 / e) U-I-212/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 22/94.

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 – Organs of decentralised authorities.

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

Constitutional Justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official journal/gazette.

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 – Influence of judgments on the functioning of State organs and on everyday conduct.

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

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

Keywords of the alphabetical index:

Housing / Interpretative character of the decision of the Constitutional Court / Definition / Principle of equality before the law / Rule of law / Principle of rationality and legal security.

Summary:

The first paragraph of article 113 of the Housing Law (Official Gazette of the Republic of Slovenia, No. 18/91-I) is not in conflict with the Constitution, insofar as the concept of municipality also embraces a particular socio-political community – the city. On the day that the Law took effect, the city became owner of social housing and accommodation blocks obtained with the solidarity and mutual funds of the housing economy.



Spain

Constitutional Court

Reference period:

1 January 1994 – 30 April 1994

Statistical data

Type and number of decisions

- Judgements: 129
- Decisions: 153
- Procedural Decisions: 1,373

Cases submitted: 1,423

Important decisions

Identification:

a) Spain / b) Constitutional Court / c) / d) 17 January 1994 / e) Judgment 7/1994 / f) / g) Published in the Official State Bulletin of 17 February 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 – Court decisions.

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

Keywords of the alphabetical index:

Paternity search / Biological examination / Violation of the rights of the defence / Right to a trial without delay / Duty to co-operate with the judiciary / Descent.

Summary:

Administering a blood test, to which the defendant has refused to give his consent, in order to determine the descent of a minor, in no way constitutes a violation of the right to physical integrity or privacy. Against the fundamental rights invoked should be set the duty to protect the interests of the children and their right to know their descent (Article 39 of the Constitution).

When the judicial authority holds that such an examination is necessary, the defendant has a duty to co-operate, not only pursuant to his duty to co-operate with the judiciary, but also pursuant to his duty to care for his children.

In the case in point, the judicial authority accepted the refusal of the person concerned to consent to a blood test, even though the other evidence, while sufficient to demonstrate that the paternity claim was not unreasonable, was nevertheless insufficient on its own to prove paternity. The disputed court decision therefore constitutes a violation of the procedural rights of the applicant (Article 24.1 of the Constitution), given that the burden of proof falls to her.

In order to avoid causing delays which would have imposed further restrictions on the appellant's means of defence, the court decisions violating her rights were set aside. On the other hand, the decision given by the court of second instance, which took into account the additional descent claim, was upheld.

Supplementary information:

The opinion of one Constitutional Court Judge was partly dissenting and partly in agreement.



Identification:

a) Spain / b) Constitutional Court / c) / d) 31 January 1994 / e) Judgment 31/1994 / f) / g) Official State Bulletin of 2 March 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 – Other. **Institutions** – Legislative bodies.

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 – Right to information.

Keywords of the alphabetical index:

Cable television / Public utilities / Administrative concession / Freedom of communication / Legislative omission / Unconstitutionality through omission.

Summary:

The Court ordered the appellant company to cease broadcasting cable television programmes locally, on the grounds that it did not have the prior administrative authorisation required, the Law considering television as a public utility belonging to the State.

However, at the time, the legislator had still not drawn up the rules governing the indirect management of cable television. Such an omission in the legal rules results in a de facto prohibition of this activity and therefore violates the freedom of communication guaranteed by Article 201 a) and d) of the Constitution.



Identification:

a) Spain / b) Constitutional Court / c) / d) 15 February 1994 / e) Judgment 41/1994 / f) / g) Official State Bulletin of 17 March 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 – Court decisions.

Fundamental Rights – Governing principles – Effects.

Fundamental Rights – Governing principles – Limits and restrictions.

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

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

Keywords of the alphabetical index:

Right to communicate information freely / Accuracy of information / Honour / Right to rectification.

Summary:

According to the case-law of the Constitutional Court, in order to determine whether the disclosure of facts concerning an individual and liable to damage their reputation may be considered the legitimate exercise of the right to broadcast information, two factors must be considered, namely a) the interest and importance of the information disclosed and b) the accuracy of this information, not in the sense of unquestionable accuracy of the facts, but in so far as the source and purpose of the information has been checked. Thus, before announcing a "news item" (in this case a complaint about the illegal hunting of a wild boar, lodged by a group of individuals) all media must, while not being obliged to check the foundation of the information supplied, identify the source. In doing so, they must take a minimum number of steps to confirm that the content of the information contributes to public debate and that the information disclosed is devoid of all reasonably apparent inaccuracy.

Although the media may not be considered to be the authors of a news item, and therefore cannot be deemed to have authorial responsibility for such an item, all media have a duty to be accessible to the person whom the content of the news item concerns and to allow that person to make statements which he or she considers relevant.



Identification:

a) Spain / b) Constitutional Court / c) / d) 16 February 1994 / e) Judgment 49/1994 / f) / g) Official State Bulletin of 17 March 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 – Court decisions.

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Equality before the law / Pensions / Discriminatory interpretation / Social security / Domestic service / Statutory presumptions.

Summary:

The Constitutional Court held that the interpretation whereby certain provisions in respect of social security are considered to prohibit the affiliation of the immediate family of the head of a household to the Special Domestic Service Social Security Scheme is contrary to the principle of equality (Article 14 of the Spanish Constitution) and is therefore discriminatory, since this prohibition is based on the *juris tentum* presumption that the relative in question does not work.

This interpretation does not take account of the fact that the general legal system recognises that such a professional relationship may exist between relatives. Consequently, it is discriminatory since it does not give the person concerned the chance to prove their employed status and because it in no way requires the Social Security Office to prove that this person does not meet this requirement before denying them the Social Security protection afforded to workers.



Identification:

a) Spain / b) Constitutional Court / c) / d) 28 February 1994 / e) Judgment 57/1994 / f) / g) Official State Bulletin of 24 March 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 – Administrative acts.

Fundamental Rights – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Fundamental Rights – Civil and political rights – Other.

Keywords of the alphabetical thesaurus:

Prison administration / Disciplinary sanction / Prisoners / Right to personal privacy.

Summary:

The appellant invoking constitutional protection – a prisoner – disputed the decisions of the prison administration upheld by the judicial authority to impose disciplinary sanctions on him for disobeying the orders of

a prison officer. These orders consisted of performing exercises while completely naked during a body search. The appellant having invoked the right not to be subjected to inhuman or degrading treatment and the right to personal privacy, the Constitutional Court examined the circumstances of the case and held that the first right had not been violated but that the second, the right to the protection of bodily privacy, had been violated. The prison administration's action could be justified neither by a situation threatening the security and order of the prison nor by the well-founded suspicion that the prisoner was trying to bring in dangerous objects or substances. The Court therefore held that the disputed measures were not in conformity with the guarantee of the right to personal privacy established in Article 18.1 of the Constitution.



Identification:

a) Spain / b) Constitutional Court / c) / d) 28 February 1994 / e) Judgment 58/1994 / f) / g) Official State Bulletin of 24 March 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 – Court decisions.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Salary discrimination / Occupational categories / Equality between the sexes.

Summary:

All differences in salary between occupational categories which are mainly composed of men and women, respectively, which derive from management practice based on a formal agreement must be considered discriminatory.

Pursuant to the rules drawn up by the Court of Justice of the European Communities in respect of salary discrimination, the Constitutional Court held that the evaluation of tasks on the basis of sexual characteristics, rather than on the basis of attributes common to both sexes, is unconstitutional since it violates equality of treatment in respect of salaries (Articles 14 and 35.2 of the Constitution).



Identification:

a) Spain / b) Constitutional Court / c) / d) 28 February 1994 / e) Judgment 66/1994 / f) / g) Official State Bulletin of 24 March 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 – Court decisions.

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Social security / Widow's pension / Marriage.

Summary:

As the Constitutional Court has consistently held, the requirement of association by marriage as a pre-condition of eligibility for a widow's pension is not contrary to the principle of equality (Article 14 of the Constitution), given that the legislator may, in principle, provide for different treatment for married couples and co-habiting couples, provided that the latter are not prevented from exercising their right to marry. This Constitutional Court ruling is not affected by the case-law in respect of the legal extension of a lease in favour of the co-habitee "more uxorio".



Identification:

a) Spain / b) Constitutional Court / c) / d) 3 March 1994 / e) Judgment 71/1994 / f) / g) Official State Bulletin of 24 March 1994.

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 public body – Organs of regional authorities.

Institutions – Legislative bodies.

Fundamental Rights – Governing principles – Limits and restrictions.

Fundamental Rights – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Terrorism / Suspension of fundamental rights.

Summary:

The guarantee established by Article 55.2 of the Spanish Constitution in the form of "appropriate parliamentary scrutiny" of any decision to suspend certain fundamental rights of persons implicated in terrorist activities need not necessarily appear in the Institutional Act which elaborates on the above-mentioned constitutional principle. This guarantee may also be secured through other standard-setting instruments, whether by specific legislative provisions or, of course, by the Parliamentary Ruling itself.

The provision allowing for the automatic suspension from public office of any person tried for terrorist offences in no way violates the Constitution. The legitimacy and proportionality of this measure are in no way contrary to the fundamental rights set out in Article 23.2 of the Spanish Constitution (right to participate in public affairs).

On the other hand, the automatic suspension of a judge's decision to release such a person, when the Director of Public Prosecutions lodges an appeal, is contrary to Article 17 of the Spanish Constitution (right to freedom). Any person detained or imprisoned has the right to a court ruling on his or her release. The Law may neither deny the court the authority to give a ruling on the situation of a detainee or a prisoner nor replace it with that of the Director of Public Prosecutions.

Supplementary information:

In the first dissenting opinion (written by 5 judges), it was contended that the Constitution had provided for and prescribed the simultaneous and indivisible application of the specific provisions appearing in Article 55.2 of the Spanish Constitution. The provision of the Institutional Act to which Article 55.2 refers when it talks of "appropriate parliamentary scrutiny" must necessarily appear in the legal text setting out that constitutional provision. The Institutional Act 4/1988, lacking this provision, was therefore in breach of the Constitution.

In the second dissenting opinion (written by one judge), it was contended that there had been no grounds for introducing the question of constitutionality, which the applicant had not disputed, either directly or indirectly. Moreover, the dissenting Judge considered that the provision declared unconstitutional in no way violated Article 17 of the Spanish Constitution.



Identification:

a) Spain / b) Constitutional Court / c) / d) 14 March 1994 / e) Judgment 76/1994 / f) / g) Official State Bulletin of 14 April 1994.

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.

Institutions – Legislative bodies – Law-making procedure.

Fundamental Rights – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Popular legislative initiative / Right of citizens to participate in public affairs.

Summary:

Entrusting a parliamentary body, such as the Bureau of the Chamber of Deputies, with the power to determine the admissibility of private members' bills on the basis of rules which are strictly normative and both non-political and non-governmental cannot be considered as being contrary to the Constitution.

There are no grounds for considering that the fact that certain issues are excluded from the Law governing popular legislative initiative is contrary to the Constitution. The public have no rights of political participation other than those which are recognised by the legal system in force.

As a result, to rule out a reform of the rules governing popular legislative initiative is in no way contrary to Article 23.1 of the Spanish Constitution and this is the case whatever the nature of the reform in question, i.e. whether it is proposed by the public, by parliament, by the government or through one of the various existing legislative procedures.

Although the Constitution (Article 166) expressly rules out the possibility of constitutional reform being initiated by popular initiative, it is quite clear that using such a citizens' initiative to promote the exercise of a parliamentary initiative – which in contrast is a completely legitimate way of undertaking reform – constitutes a departure from the aim sought by the constituent authority in the above-mentioned exclusion.



Identification:

a) Spain / b) Constitutional Court / c) / d) 14 March 1994 / e) Judgment 78/1994 / f) / g) Official State Bulletin of 14 April 1994.

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 to a fair trial.

Keywords of the alphabetical index:

Right to the presumption of innocence / Circumstantial evidence / Absence of prosecution evidence.

Summary:

Pursuant to the principle of the presumption of innocence, any conviction must be based on real evidence, which is generally submitted under the supervision of the trial court, with due regard for the principles of adversarial procedure and a public hearing, and concerns not only the reality of the facts, but also the participation and responsibility of the accused. The burden is on those making the accusation to prove the facts constituting a criminal offence, while it is not constitutionally possible to require the defence to provide the probatio diabolica that the facts did not occur.

In the case in point, the conviction of a person of four rapes was based mainly on the complaint lodged by the victim and the report of the medical examination, which did not adduce any injury sustained by the complainant, but of pain when the rectum was examined. In their statements at the trial the accused denied, once more, having had any part in the events. Moreover, neither the complainant nor the persons who carried out the medical examination of the victim attended the trial. The taking of evidence was therefore limited to an examination of documents produced, without their even being read out.

The fundamental right of the plaintiff to the presumption of innocence was violated. The total absence of evidence at the hearing cannot be compensated for by a mere reference to so-called circumstantial evidence which, furthermore, although it has a connection with the facts as stated, is totally lacking in logical inference as regards the perpetrator of these facts.



Identification:

a) Spain / b) Constitutional Court / c) / d) 14 March 1994 / e) Judgment 85/1994 / f) / g) Official State Bulletin of 14 April 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 – Court decisions.

Fundamental Rights – Civil and political rights – Confidentiality of telephonic communications.

Keywords of the alphabetical index:

Telephone tapping / Confidentiality of communications / Illegally obtained evidence.

Summary:

Any court decision which, without giving grounds, authorises the tapping of a telephone constitutes a violation of the right to the confidentiality of communications. Any interference in communications must be in keeping with the principles of lawfulness and proportionality. The latter principle concerns not only the seriousness of the offence considered to justify a measure of this nature, but also the guarantees provided by a specific and reasoned judicial authorisation.

When it is established that telephone tapping has been undertaken pursuant to a court decision without reasons being given, and is therefore in violation of the appellant's right to confidential communications (Article 18.3 of the Spanish Constitution), all evidence acquired through tapped telephone conversations must be eliminated from the case file. This means that during a trial, no evidence may be used which has been obtained in violation of a fundamental right.



Sweden

Supreme Court

Supreme Administrative Court

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



Switzerland

Federal Court

Reference period :

1 July 1993 – 31 December 1993

Statistical data for the year 1993

- 2156 decisions of a constitutional nature, including :
 - 118 based on Article 4 of the Constitution
 - 53 on personal liberty
 - 45 concerning political rights
 - 225 based on Article 22ter of the Constitution (enjoyment of property)
 - 287 concerning civil procedure
 - 362 concerning criminal procedure
 - 29 based on the guarantee of a lawful judge
 - 112 concerning taxation
 - 54 concerning commercial and industrial freedom and the freedom to choose one's profession
 - 473 concerning civil law
 - 148 concerning criminal law.
-

Important decisions

Identification :

a) Switzerland / b) Swiss Federal Court / c) 1st Public Law Court / d) 17/11/1993 / e) 1P.654/1992 / f) Chambre Genevoise Immobilière and associates against the canton of Geneva / g) ATF 119 Ia 348 / Decision : F / Summaries: F, D, I.

Keywords of the systematic thesaurus :

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

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

Institutions – Federalism and Regionalism – Distribution of powers – System.

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

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

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

Keywords of the alphabetical index :

Housing / Shortage / Housing left unreasonably vacant / Public interest / Compensation of the owner.

Summary :

Article 22ter of the Constitution (enjoyment of property), Article 31 of the Constitution (commercial and industrial freedom), Article 2 transitional provision of the Constitution (overriding force of federal law); constitutionality of a law providing for the expropriation of housing left unreasonably vacant, when there is a shortage of rented accommodation.

1. Protection conferred by Art. 22ter and Art. 31 of the Constitution and Art. 2 trans. prov. of the Constitution (recital 1).
2. The expropriation of housing left unreasonably vacant is justified on grounds of sufficient public interest (recital 3b).
3. A shortage is deemed to exist in the rented housing market when the proportion of vacant housing is lower than 2% (recital 4a).
4. The criteria defining housing left unreasonably vacant (recitals 4b to 4d) and the expropriation procedure (recital 4f) entailing an order to re-let the housing in question are in accordance with the guarantees invoked.
5. Compensation paid to the owner, amounting to the rent and other dues which the landlord may claim

in accordance with federal civil law, are consistent with Art. 22ter para. 3 of the Constitution (recital 4h).



Identification:

a) Switzerland / b) Swiss Federal Court / c) 2nd Public Law Court / d) 14/12/1993 / e) 2A.385/1993 / f) S.C. against the Federal Office for Refugees / g) ATF 119 Ib ... / Decision: F / Summaries: F, D, I.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Personal liberty.

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

Keywords of the alphabetical index:

Foreigner / Delinquent / Expulsion procedure / Illegal entry into Switzerland / Detention.

Summary:

Detention of a foreigner.

1. Conditions of detention in accordance with Sections 14a and 14d of the Federal Act on residence and settlement of foreigners (recital 3).
2. Compatibility with Article 5 para. 1 sub-para. f ECHR (recital 4).
3. The fact that the foreigner entered Switzerland illegally is not in itself sufficient to justify detention (recital 5).



Identification:

a) Switzerland / b) Swiss Federal Court / c) 1st Public Law Court / d) 17/12/1993 / e) 1P.419/1993 / f) S.X. AG against L., Commune of Retschwil, Lucerne cantonal government and Administrative Court / g) ATF 119 Ia 362 / Decision: D / Summaries: D, F, I.

Keywords of the systematic thesaurus:

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.

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

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

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Public law appeal / Capacity to take legal proceedings and to appeal / Federal Court / Authority to investigate / Regional planning / Development scheme / Delimitation of land for construction.

Summary:

Section 88 of the Federal Act on the organisation of the judiciary; capacity of the landowner to challenge planning permission for another plot of land.

The owner is entitled to appeal against planning measures concerning another plot of land when such measures impact on those relating to his/her own land (recitals 1a and b).

Article 22ter of the Federal Constitution; Sections 8 and 9 of the Federal Act on regional planning; commune land use plan; binding force of the cantonal development plan; balancing of interests.

Federal Court's authority to investigate land use plans (recital 3).

Conditions under which subordinate planning authorities may depart from the development plan (recital 4a). In the case in point, differences between the communal land use plan and the cantonal development plan are acceptable (recitals 4b and c).

When delimiting land for construction, communes must base their decisions on objective criteria. They may take into account the need to build low-cost housing (recital 5).



Identification:

a) Switzerland / b) Swiss Federal Court / c) 2nd Public Law Court / d) 05/11/1993 / e) 2P.80/1992 / f) X, Y, and Z against the Ticino cantonal government / g) ATF 119 Ia 378 / Decision: I / Summaries: I, D, F.

Keywords of the systematic thesaurus:

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

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

Institutions – Federalism and Regionalism – Distribution of powers – System.

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Commercial and industrial freedom / Overriding force of federal law / Petrol stations / Limiting opening times / Noise control / Pollution control.

Summary:

Constitutionality of a decree limiting the opening hours of petrol stations to limit the problems caused by motor vehicles crossing the border to obtain petrol.

The above-mentioned decree does not violate commercial and industrial freedom (recitals 4 -7) nor the principle of equal treatment (recital 8).

Neither is there a violation of Article 2 trans. prov. of the Constitution (overriding force of federal law); moreover, it is immaterial whether the disputed decree is to be considered as an implementing measure under the Federal Environment Protection Act, ordered provisionally pending a ruling from the Federal Council, or as an independent cantonal law (recital 9).



Turkey

Constitutional Court

Reference period :

1 January 1994 – 30 April 1994¹

Statistical data

Number of decisions: 43

Only 1 decision given between 1 January and 30 April 1994 was published in the Official Gazette. However, 10 other decisions given previously were also published during the reference period.

Important decisions

Identification:

a) Turkey / b) Constitutional Court / c) / d) 23 November 1993 / e) 1993/1 / f) / g) published in the Official Gazette, 14 February 1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Sovereignty.

Institutions – Principles of State organisation – Territorial principles.

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

Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.

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

Keywords of the alphabetical index:

Indivisible integrity of the State with its territory and nation.

Summary:

According to Articles 78 and 81 of the Law on Political Parties, the Freedom and Democracy Party (ÖZDEP) was dissolved. The main reason for the dissolution was that the programme of the Party attempted to divide Turkey and the Turkish nation into two groups, "Turkish" and "Kurdish". The ÖZDEP presented the Kurdish people as an oppressed minority and recognised the principle of their right to self-determination. However, according to the Constitution, the Turkish Republic is a unitary State; that is to say, that the Turkish State, with its territory and nation, is an indivisible entity. For this reason, the Turkish Republic cannot consider ethnic differences as fundamental. The Constitutional Court added that contemporary international law recognises the legitimacy of the fact that various ethnic groups may form a unitary State only in a united way. According to the Court, there is no valid reason not to apply this principle of international law to the case of Turkey. Both the division of the nation into different parts and the appropriation of a specific land to a specific ethnic group are neither contemporary nor legal. There is no doubt that the most important characteristic of the Turkish State is its "integrity". The Constitutional Court stated that if a political party is committed to totalitarian values or tries to divide Turkey, as measured by its programme, official declaration, ideological literature, it is *ipso facto* unconstitutional. Turkey cannot maintain an attitude

1. Dates of publication of the Constitutional Court decisions in the Official Gazette.

of neutrality towards parties which reject the principle of the indivisible integrity of the State. The Court has made it clear that the above principle is an absolute value which the State is bound to defend.

Supplementary Information:

The case exposes important political and constitutional problems in Turkey. It is settled case law (see Bulletin No.2, pages 59-60).



Identification:

a) Turkey / b) Constitutional Court / c) / d) 22 October 1993 / e) 1992/43 / f) / g) / Published in the Official Gazette, 6 January 1994.

Keywords of the systematic thesaurus:

Institutions – Principle of State organisation – Rule of law.

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Due process / Criminal procedure / Conditional release.

Summary:

According to the Provisional First Article of the Law Concerning the Struggle Against Terrorism, death penalties which have been imposed for certain crimes will not be carried out. Instead, it is provided that a prisoner may be granted conditional release until 8 April 1991. However, for those crimes enumerated in sub-paragraph (a), (b) and (d) of the first paragraph of Provisional Article 4, the period of a sentence which has to be completed before a person may benefit from conditional release has been prolonged. Thus there is a discrepancy between Articles 1 and 4. The good behaviour and wishes of the prisoner are not taken into account in the consideration of conditional release. Sub-paragraph (b) of Provisional Article 4 states that Provisional Article 1 of the Law Concerning the Struggle Against Terrorism cannot be applied to persons who have committed the crimes enumerated in Articles 125, 146, (except for the last paragraph), 403, 404/1, 405, 406, 407, 414/first and 418 of the Turkish Criminal Code.

By way of an incidental proceeding, the High Criminal Court of Kirsehir requested the annulment of the first paragraph of sub-paragraph (b) of Provisional Article

4 by the Constitutional Court. According to the Constitutional Court, the most important elements of a conditional release are the completion of a sentence of a certain period of time, the obligation for a prisoner to behave well during this period and to be under surveillance after release has been granted, and, if the prisoner does not comply with the requirements imposed by a release, the suspension of the decision concerning release. According to the Court, the nature of the crime and the importance society attaches to it are the bases for the nature and extent of the penalty. However, the execution of a punishment should aim at the reintegration of an offender into society and to do this a special programme which does not take into account the nature of the offence is applied. If the time which has to be spent in prison before a conditional release becomes possible were to depend on the nature of the crime committed, this would result in a differentiated application of penalties, thereby constituting an inequality between prisoners. Such a different treatment of convicts, as seen from the aspect of execution of penalties, which cannot be justified by valid reasons, would not be considered in harmony with the principle of equality before the law, which is guaranteed in Article 10 of the Constitution.

In addition to these reasons, the Court stressed that a reduction of penalties in line with the concept of equality should be applied regardless of the personality of the convict or the crime committed. Applying the legislation differently according to the nature of the offence and the personality of the convict and with regard to the period before a sentence has been fixed by the legislator is incompatible with the legal character of the concept of "conditional release". In this way, the rule which applies to past events by imposing on some convicts heavier and different conditions is in contradiction with the rule of law principle as defined in the Constitution. However, the Constitutional Court held that it was not possible to give another decision because the subparagraph (b) of Provisional Article 4 had already been annulled by the Court on 31 March 1992, carrying the number E.1991/18.



United States of America

Supreme Court

Reference period :

1 January 1994 – 30 April 1994

Important decisions

Identification:

a) United States of America / b) Supreme Court / c) / d) 19 January 1994 / e) No. 92-896 / f) Thunder Basin Coal Co. v Reich, Secretary of Labour and Others / g).

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Jurisdiction.

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

Keywords of the alphabetical index:

Due Process Clause / Administrative review scheme.

Summary:

In a dispute between the appellant company and its nonunion workforce, the appellant sought and obtained a District Court injunction preventing enforcement of a statute which provided for the appointment of non-union workers' representatives. The Court of Appeals reversed this decision on the ground that District Court jurisdiction was precluded by the administrative review scheme provided for under a separate statute whereby such disputes are considered first by the Federal Mine Safety and Health Review Commission and then by the appropriate Court of Appeals. The appellant argued that this interpretation violated its rights under the Due Process Clause of the Fifth Amendment.

The Court held, in rejecting the appeal, that as a matter of interpretation deriving from the language, structure and purpose of the statute, as well as from its legislative history, Congress had intended that the comprehensive enforcement scheme would operate to oust District Court jurisdiction. As for the due process claim, the general rule against the consideration of constitutional issues by administrative agencies was not a mandatory one, and is of less consequence where, as here, the reviewing body is an independent commission established for the purpose of considering particular types of dispute. The Commission already had a practice of addressing constitutional questions as part of its deliberations and, even if it had not, the appellant's claims could be meaningfully addressed in the Court of Appeals.

The appellant had also argued that due process required strict District Court jurisdiction in order to guarantee interlocutory relief in appropriate cases against serious and irreparable harm resulting from enforcement of the statutory scheme. The Court found that there was no evidence of such a threat in the instant case and, further, that the appellant had failed to demonstrate that the statutory remedies were inadequate in this respect. In addition, should the appellant refuse to comply with the statute pending consideration of the matter by the Court of Appeals, full judicial review is available to it prior to the payment of any penalty for such refusal. Hence, although such penalties could be onerous, as a practical matter the appellant is not put to a constitutionally intolerable choice between compliance and coercive penalties without access to review by a court.



Identification:

a) United States of America / b) Supreme Court / c) / d) 19 January 1994 / e) No. 92-1482 / f) Weiss v United States, Hernandez v United States / g).

Keywords of the systematic thesaurus:

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

Institutions – Courts – Procedural safeguards – Independence.

Institutions – Courts – Military courts – Status of judges.

Institutions – Army and police forces – Army – In general.

Keywords of the alphabetical index:

Appointments Clause.

Summary:

Following their conviction for certain offenses under the Uniform Code of Military Justice (UCMJ), the appellants argued that the military trial and appellate judges had no authority to convict them because the method of their appointment by the various Judges Advocates General under the UCMJ violated the Appointments Clause of the Federal Constitution, which, *inter alia*, requires the President to appoint "Officers of the United States" with the advice and consent of the Senate, and, further, because their lack of a fixed term of office violated the Fifth Amendment's Due Process Clause.

The Court rejected the first argument on the ground that all of the military judges involved in these cases

were already commissioned military officers at the time of their appointment to judicial office, and thus had already been appointed pursuant to the Appointments Clause. The Court found that the clause did not itself require a second appointment of military judges. In this connection, the Court applied a test of "germaneness" applied in previous cases to distinguish military judges, having a less distinct position from nonjudicial military officers in the administration of military justice, from their full-time civilian counterparts. Nor did the evidence support the contention that Congress, in providing that military officers possessing certain qualifications, including membership in a State or federal bar, could be "assigned" to judicial office by a superior officer, had implicitly intended such a formal second appointment.

As regards the second argument, the Court recalled its case law whereby the appropriate test of judicial independence in the context of the administration of military justice is whether the factors militating in favour of fixed terms of office are so extraordinarily weighty as to overcome the balance struck by Congress. The historical fact that military judges in the Anglo-American legal tradition have never had tenure was a factor to be weighed in this calculation. In addition, the applicable statutes and regulations sufficiently insulated military judges from the effects of command influence. In the instant case, the appellants had therefore fallen far short of demonstrating that the military judges lacked the independence necessary to ensure their impartiality.



Identification:

a) United States of America / b) Supreme Court / c) / d) 24 January 1994 / e) No. 92-97 / f) Northwest Airlines Inc. and Others v County of Kent, Michigan and Others / g).

Keywords of the systematic thesaurus:

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

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Commerce Clause.

Summary:

The respondents' owner and operators of an international airport, were under a statutory duty to avoid collecting fees other than in respect of "reasonable

rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities". The appellant Airlines alleged that the pricing structure for the respondent's services discriminated unreasonably, and therefore unlawfully, against commercial airlines. They also argued that the scheme favoured primarily local traffic and was thereby in breach of the interstate Commerce Clause of the Constitution.

The Court held, in accepting for the purposes of this case that the above statutory obligation can give rise to a private right of action, that the airport's fees had not been shown to be unreasonable within the meaning of the statute, the test for such unreasonableness in the absence of legislative guidelines being the same as that developed by the courts in the context of the Commerce Clause. Hence, the levy is reasonable if it i) is based on some fair approximation of the facilities' use, ii) is not excessive in relation to the benefits conferred, and iii) does not discriminate against interstate commerce. On the evidence properly before the court, these three criteria were satisfied in the present case. In particular, there was no evidence of discrimination in favour of local traffic and, in relation to the first two parts of the test, account could only be taken under the statute of the fees charged to aircraft operators, those chargeable to other users of the airport being governed by a separate regulatory framework which had not been put in issue before the Court.



Identification:

a) United States of America / b) Supreme Court / c) / d) 24 January 1994 / e) No. 92-97 / f) Albright v Oliver and Others / g).

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Personal liberty.

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

Keywords of the alphabetical index:

Due Process Clause / Freedom from arbitrary prosecution.

Summary:

The appellant had been bound over for trial in a prosecution which was ultimately dismissed on the ground that the charge as stated against him, the sale of a substance which looked like an illegal drug, did not disclose an offence known to State law. He subsequently sued the respondent, the officer to whom

he had originally submitted on learning that a warrant had been issued for his arrest, for having committed a constitutional tort, namely interference with his freedom from prosecution without probable cause under the due process clause of the Fourteenth Amendment. The action was dismissed by the trial court and, on appeal, by the Court of Appeals, on the grounds that the tort was actionable only if accompanied by incarceration, loss of employment or other "palpable consequence".

The Supreme Court agreed, holding that the appellant's claimed freedom from prosecution without probable cause was to be addressed under the specific constitutional guarantees of personal liberty under the Fourth Amendment, and not under the due process provisions of the Fourteenth Amendment. The due process requirements for criminal proceedings do not include a standard for the initiation of prosecutions, and even if they were held to stretch that far, the resort to constitutional torts is precluded by the existence of adequate remedies under the ordinary tort of malicious prosecution (*per* Kennedy and Thomas JJ).

The Court declined to decide on the question of deprivation of liberty under the Fourth Amendment in the instant case (where the fact that the appellant had been bound over having surrendered voluntarily was a factor of some significance), because it had not been raised by the appellant.



Identification :

a) United States of America / b) Supreme Court / c) / d) 22 March 1994 / e) No. 92-8894 and No. 92-9049 / f) Victor v Nebraska, Sandoval v California / g).

Keywords of the systematic thesaurus :

Institutions – Courts – Ordinary courts – Criminal courts.

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

Keywords of the alphabetical index :

Jury trial.

Summary :

These two cases, on appeal from decisions of the Supreme Courts of Nebraska and California, respectively, upholding their convictions for first degree murder and their sentences of death, were concerned with the constitutional validity of the trial judge's instructions to the jury on the burden of proof required of the prosecution at their respective trials. In reviewing the words

used by the trial judges in the context of their respective charges to the jury, the Court rejected both appeals and found that the instructions given in both cases on the meaning of "reasonable doubt" correctly conveyed its meaning, and that there was no reasonable likelihood that the jurors understood the instructions to allow convictions based on proof insufficient to meet the standard required by the Constitution.

In this last connection, the Court recalled that whereas the Constitution requires the prosecution to prove beyond a reasonable doubt every element of a charged offence (*In Re Winship*, 397 US 358), it did not dictate that any particular form of words be used in advising the jury in explaining the meaning of this burden, provided that "taken as a whole, the instructions correctly convey the concept of reasonable doubt" (*Holland v US*, 348 US 121). However, the proper inquiry is not whether the instruction "could have" been applied unconstitutionally, but whether there is a reasonable likelihood that the jury did so apply it (*Estelle v McGuire*, 502 US).

The judgment contains a detailed examination of the particular words used and of their particular context, as well as a lengthy examination of the Court's previous case law on this question.



Identification :

a) United States of America / b) Supreme Court / c) / d) 4 April 1994 / e) No. 93-70 and No. 93-108 / f) Oregon Waste Systems Inc. v Department of Environmental Quality of the State of Oregon and Others, Columbia Resource Co. v Environmental Quality Commission of the State of Oregon / g).

Keywords of the systematic thesaurus :

Institutions – Federalism and Regionalism – Basic principles.

Fundamental Rights – Civil and political rights – Equality.

Keywords of the alphabetical index :

Commerce Clause.

Summary :

Oregon imposes a \$ 2.50 per ton surcharge on the in-state disposal of solid waste generated in other States and an \$ 0.85 per ton fee on the disposal of waste generated within Oregon. The regulations and enabling statutes governing the out-of-state surcharge were challenged by the appellants in these two cases as violating the interstate Commerce Clause. Despite the

statutes' explicit geographical reference to out-of-state waste, the Supreme Court of Oregon reasoned that its express nexus to actual costs incurred by state and local government rendered it facially constitutional.

The Supreme Court reversed this decision on appeal, recalling that the first step in scrutinising a law under the Commerce Clause was to determine whether it discriminates against interstate commerce or merely regulates some matter evenhandedly with only incidental effects on such commerce. If the restriction favours in-state economic interests over their out-of-state counterparts, it is virtually *per se* invalid. By contrast, regulations which do not discriminate on their face are valid unless the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits" (*Pike v Bruce Church Inc.*, 397 US 137).

In this case, the Oregon surcharge is patently discriminatory on its face, and the alleged compensatory aim of the surcharge, relied upon by the Oregon Supreme Court in a manner similar to the *Pike* balancing test, is not the appropriate test for the virtually *per se* rule of invalidity which applies. Instead, the surcharge must be invalidated unless it can be shown that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

In this case, no equivalent levies are imposed on substantially similar intrastate activity and comparisons with other local taxes are inapt. Hence, the compensatory justification, that the surcharge is necessary to ensure that shippers of out-of-state waste pay their fair share of disposal costs, could not be supported. Nor could it be justified as a measure designed to discourage the importation of out-of-state waste in order to conserve landfill space for in-state waste, because it is established that a State may not accord its own inhabitants a preferred right of access over consumers in other States to its natural resources.



Identification:

a) United States of America / b) Supreme Court / c) /
d) 19 April 1994 / e) No. 92-1239 / f) J.E.B. v
Alabama, ex rel. T.B. / g).

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Criminal courts.

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

Keywords of the alphabetical index:

Jury trial / Gender-based challenge to jurors.

Summary:

In a former case, the Supreme Court had held that the Equal Protection Clause of the Fourteenth Amendment prohibits peremptory challenges to jurors based solely on race (*Batson v Kentucky*, 476 US 79). In this case, the respondent State had used 9 of its 10 peremptory challenges to remove male jurors in a paternity action against the appellant. The trial court empanelled an all-female jury, which found against the appellant. The appellant argued that the logic and reasoning of *Batson* extended to gender-based peremptory challenges.

The Court held, in upholding the appeal, that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man. The rationale of the respondent State in the instant case, that men otherwise totally qualified to serve as jurors might be more sympathetic and receptive to the arguments of a man charged in a paternity action while women equally qualified might be more sympathetic and receptive to the arguments of the child's mother, is virtually unsupported by history and is based on the very stereotypes that the law condemns.

The Court added that this conclusion did not imply the elimination of all peremptory challenges. Provided gender does not serve as a proxy for bias, unacceptable jurors may still be removed, including those who are members of a group or class that is normally subject to "rational basis" review and those who exhibit characteristics that are disproportionately associated with one gender.



European Court of Human Rights

Reference period:

1 January 1994 – 30 April 1994

Important decisions

Identification:

a) / b) European Court of Human Rights / c) / d) 22 February 1994 / e) 49/1992/394/472 / f) *Burghartz v. Switzerland* / g) to be published in volume 280-B of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

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

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

Summary:

The applicants, Susanna Burghartz and Albert Schnyder, were married in the Federal Republic of Germany. In accordance with that country's law, the wife kept the name of "Burghartz", which had been chosen as the family name, and the husband took the name of "Schnyder Burghartz". In Switzerland the husband was refused permission to put his own surname in front of his wife's, taken as the family name, and to take thus the name of "Schnyder Burghartz". The applicants complained that the Swiss authorities had withheld from Mr Burghartz this right, although Swiss law granted this right to married women who had chosen their husband's name as the family name. They claimed that this situation amounted to a discrimination on the ground of sex, contrary to Article 14 of the European Convention on Human Rights, as regards their right to respect for their family life, enshrined in Article 8 of this Convention.

The Court noted that Article 8 of the Convention did not contain any explicit provisions on names, unlike some other international instruments. As a means of personal identification and of connection to a family, a person's name nonetheless concerned his or her private and family life. The fact that society and the State had an interest in regulating the use of names did not exclude this, since these public-law aspects were compatible with private life conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others. In the present case, the applicant's retention of the surname by which, according to him, he had become known in academic circles could significantly affect his career. Article 8 therefore applied.

The Court reiterated that the advancement of equality of the sexes was today a major goal in the member States of the Council of Europe; this meant that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention.

In support of the system complained of, the Government had relied, firstly, on the Swiss legislature's concern that family unity should be reflected in a single joint surname. The Court was not persuaded by that argument, since family unity would be no less reflected if the husband added his own surname to his wife's, adopted as the joint family name, than it was by the converse arrangement allowed by the Civil Code.

Secondly, it could not, so the Court held, be said that a genuine tradition was at issue in the case. Women who married had enjoyed the right from which the applicant sought to benefit only since 1984. In any event, the Convention had to be interpreted in the light of present-day conditions, especially the importance of the principle of non-discrimination.

Nor was there any distinction to be derived from the spouses' choice of one of their surnames as the family name in preference to the other. Contrary to what the Government had contended, it could not be said to represent greater deliberateness on the part of the husband than on the part of the wife. It was therefore unjustified to provide for different consequences in each case.

In sum, the difference of treatment complained of lacked an objective and reasonable justification and accordingly contravened Article 14 taken together with Article 8.



Identification:

a) / b) European Court of Human Rights / c) / d) 22 February 1994 / e) 1/1993/396/474 / f) *Raimondo v. Italy* / g) to be published in volume 281-A of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

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

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

Summary:

Criminal proceedings, commenced on 24 July 1984, were brought against the applicant on the ground of

his suspected membership of a mafia-type organisation; in connection with these proceedings he was held in detention on remand (from 7 November 1984 to 24 July 1985) and then placed under house arrest. By a judgment of 30 January 1986 the Catanzaro District Court acquitted him on the ground of insufficient evidence and revoked the measure depriving him of his liberty. On appeals by the Public Prosecutor and Mr Raimondo the Catanzaro Court of Appeal acquitted the latter, on 16 January 1987, on the ground that the material facts of the offence had not been established.

In the meantime and on the strength of the same suspicion, proceedings were also instituted against him with a view to the imposition of preventive measures. On 13 May 1985 the Catanzaro District Court ordered the seizure of certain of his assets (buildings and vehicles). On 16 October 1985 the same court ordered the confiscation of the possessions whose lawful origin could not be established. It further directed that he be placed under special police supervision and required him to pay a sum by way of security.

By a decision ("decreto") of 4 July 1986 (which was filed with the registry on 2 December and became final on 31 December 1986), the Catanzaro Court of Appeal, on appeal by the applicant, revoked these measures. On 5 December 1986 the competent authorities of Catanzaro informed the local "carabinieri" that the supervision order had been lifted; the latter notified the applicant on 20 December 1986. The revocation of the orders for the seizure of certain buildings and for the confiscation of four vehicles was entered in the relevant public registers on 2 February, 10 February and 10 July 1987; as regards the nine buildings which had been confiscated, on 9 August 1991 the authorities requested that the revocation of the measure in question be entered in the register. The security had been returned on 24 April 1987.

The applicant complained, *inter alia*, that the application of preventive measures against him concerning property and the fact that these measures remained entered in the public registers violated his right to peaceful enjoyment of his possessions enshrined in Article 1 of Protocol No. 1 to the European Convention on Human Rights. He further submitted that the police supervision measure violated his right to liberty of movement guaranteed in Article 2 of Protocol No. 4 to this Convention.

As regards the application of the preventive measures concerning property, the Court found that the seizure, provided for in the Act of 31 May 1965, had not purported to deprive the applicant of his possessions but only to prevent him from using them. It was clearly a provisional measure intended to ensure that property which appeared to be the fruit of unlawful activities carried out to the detriment of the community could subsequently be confiscated. The measure as such had therefore been justified in the general interest and, in view of the extremely dangerous economic power of an "organisation" like the mafia, it could not be said that

taking it at that stage of the proceedings had been disproportionate to the aim pursued. Accordingly, on that point no violation of Article 1 of Protocol No.1 had been established.

Moreover, although it involved a deprivation of possessions, the confiscation of property – also provided for in the 1965 Act – had pursued an aim that was in the general interest, namely it had sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community. The Court fully recognised the difficulties encountered by the Italian State in the fight against the mafia. Confiscation, which was designed to block the movements of suspect capital, was an effective and necessary weapon in the combat against that cancer. It therefore appeared proportionate to the aim pursued. Finally, the preventive purpose of confiscation justified its immediate application notwithstanding any appeal. In conclusion, the respondent State had not overstepped the margin of appreciation left to it under the second paragraph of Article 1.

As regards the fact that the contested measures remained entered in the public registers, the Court found it hard to see why it had been necessary to wait respectively more than seven months (2 December 1986 – 10 July 1987) and four years and eight months (2 December 1986 – 9 August 1991) before regularising the legal status of some of Mr Raimondo's possessions. This interference had been neither "provided for by law" nor necessary "to control the use of property in accordance with the general interest" within the meaning of Article 1 of Protocol No. 1. Accordingly, there had been a violation of that provision.

As far the police supervision was concerned the Court considered that, in view of the threat posed by the mafia to "democratic society", the measure had been necessary "for the maintenance of ordre public" and "for the prevention of crime". It had in particular been proportionate to the aim pursued, up to the moment at which the Catanzaro Court of Appeal decided, on 4 July 1986, to revoke it.

It remained to consider the period between 4 July 1986 and the notification of the decision to the applicant on 20 December 1986. Even if it was accepted that this decision could not acquire legal force until it was filed with the registry on 2 December, the Court found it hard to understand why there should have been a delay of nearly five months in drafting the grounds for a decision which was immediately enforceable and concerned one of the applicant's fundamental rights. The Court concluded that at least from 2 to 20 December 1986 the interference in issue had been neither provided for by law nor necessary. There had therefore been a violation of Article 2 of Protocol No. 4.



Identification:

a) / b) European Court of Human Rights / c) / d) 23 February 1994 / e) 20/1993/415/494 / f) *Fredin v. Sweden* (No. 2) / g) to be published in volume 208-A of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Administrative courts.

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

Summary:

The applicant and his wife own land on which there is a gravel pit. They held a permit to extract gravel from the pit until 1 December 1988, when the permit was revoked. Following the revocation, the applicant applied to the County Administrative Board ("länsstyrelsen") for a special extraction permit but the application was rejected by the Government. The applicant challenged the lawfulness of the Government's decision in the Supreme Administrative Court ("regeringsrätten") under the 1988 Act on Judicial Review of Certain Administrative Decisions. He also asked for a hearing. The Court refused to hold one, however, and on 13 December 1990 found that the Government's decision was not unlawful.

The Court noted that, according to established case-law, in proceedings before a court of first and only instance the right to a "public hearing" in the sense of Article 6 paragraph 1 may entail an entitlement to an oral hearing. In this regard, the Court observed that the Supreme Administrative Court acted as the first and only judicial instance in the contested proceedings. Furthermore, the latter's jurisdiction was not limited to matters of law, but extended also to factual issues. Moreover the applicant's appeal was capable of raising issues of both fact and law in relation to the Government's decision.

The Court was of the view that, in such circumstances at least, Article 6 paragraph 1 of the Convention guaranteed a right to an oral hearing. Accordingly the refusal by the Supreme Administrative Court to hold one constituted a violation in this case.



Identification:

a) / b) European Court of Human Rights / c) / d) 24 February 1994 / e) 3/1993/398/476 / f) *Bendenoun v. France* / g) to be published in volume 284 of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Administrative courts.

Institutions – Public finances – Taxation.

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

Summary:

In September 1976, at the request of the customs authorities, the Revenue audited the accounts of a company of which the applicant was chairman and managing director and principal shareholder. The Revenue found that a number of transactions for the sale of old coins had not been entered in the accounts, and made a supplementary tax assessment. The customs proceedings ended with a composition and the transmission to the Revenue of the entire file of 24 reports and 352 documents. Mr Bendenoun challenged the amount of the supplementary assessment and brought proceedings in the Administrative Court. He asked the President of that court to request the public prosecutor to produce the entire case file assembled by the customs, including documents on which the accusation did not rely, but the prosecutor refused to do so. The Administrative Court dismissed Mr Bendenoun's applications and the Conseil d'Etat ruled against him.

The applicant complained that the proceedings were not adversarial and that consequently his right to a fair trial (Article 6 paragraph 1 of the European Convention on Human Rights) had been violated.

The Court considered that, having regard to the large number of tax offences, Contracting States had to be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty were large ones. Such a system was not incompatible with Article 6 of the Convention so long as the taxpayer could bring any such decision affecting him before a court that afforded the safeguards of that provision.

The Court did not underestimate the importance of several factors pointing to the administrative nature of the tax penalty. It noted, however, in the light of its case-law, the predominance of four others which made the "charge" a "criminal" one. Firstly, the offences with which Mr Bendenoun was charged came under the General Tax Code, which covered all citizens in their capacity as taxpayers – and not a given group with a particular status – and laid down certain requirements, to which penalties were attached. Secondly, the tax surcharges were intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending. Thirdly, they were imposed under a general rule, whose purpose was both deterrent and punitive. Lastly, in the present case the surcharges had been very substantial (422,534 French francs in respect of Mr Bendenoun personally and 570,398 francs in respect of his company), and if the applicant failed to pay, he was liable to be committed to prison.

by the criminal courts. In short, the proceedings concerned could be regarded as criminal proceedings against the applicant and his company within the meaning of Article 6 paragraph 1 of the Convention.

The Court did not rule out that the concept of a fair trial might entail an obligation on the Revenue to agree to supply the litigant with certain documents from the file on him or even with the file in its entirety. However, it was necessary, at the very least, that the person concerned should have given, even if only briefly, specific reasons for his request. In this case the applicant had not done that. Since the failure to produce documents had not infringed the rights of the defence or the principle of equality of arms, there had not been a violation of Article 6 paragraph 1.



Identification:

a) / b) European Court of Human Rights / c) / d) 24 February 1994 / e) 8/1993/403/481/ f) Casado Coca v. Spain / g) to be published in volume 285 of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

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

Summary:

In 1979 the applicant started a legal practice in Barcelona; he then regularly placed notices advertising his practice in a number of local newspapers and sent letters to various businesses offering his services. The Barcelona Bar Council took disciplinary proceedings against him on several charges; these ended in 1981 with his being given a number of reprimands and warnings. The applicant submitted that these sanctions violated his right to freedom of expression (Article 10 of the European Convention on Human Rights).

The Court pointed out that Article 10 guaranteed freedom of expression to everyone, without making any distinction according to whether the type of aim pursued was profit-making or not. It did not apply solely to certain types of information, ideas or forms of expression, in particular those of a political nature, but also encompassed artistic expression, information of a commercial nature and even light music and commercials transmitted by cable.

It noted that the impugned notices had merely given the applicant's name, profession, address and telephone

number. They had clearly been published with the aim of advertising, but they had provided persons requiring legal assistance with information that was of definite use and likely to facilitate their access to justice. Article 10 was therefore applicable.

The Bar rules complained of had been designed to protect the interests of the public while ensuring respect for members of the Bar. In that connection, the special nature of the profession practised by members of the Bar had to be considered; in their capacity as officers of the court, their conduct had to be discreet, honest and dignified. The restrictions on advertising were justified by reference to those special features. In the case of the decision in issue, there was nothing to show that the Barcelona Bar Council's intention had not corresponded to the acknowledged aim of the legislation.

The States parties to the Convention had a certain margin of appreciation in assessing the necessity of an interference, but it was subject to European supervision as regards both the relevant rules and the decisions applying them. Such a margin of appreciation was essential in respect of advertising. In the present instance the Court's task was therefore confined to ascertaining whether the measures taken were justifiable in principle and proportionate.

For the citizen advertising was a means of discovering the characteristics of services and goods offered to him. Nevertheless, it might sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. The Court had to weigh the requirements of those particular features against the advertising in question.

The Court pointed out that a member of the Bar in independent practice could not be compared to commercial undertakings such as insurance companies, which were not subject to restrictions on advertising their legal consulting services. The former's central position in the administration of justice as an intermediary between the public and the courts explained the usual restrictions on the conduct of members of the Bar. It also noted that the rules governing advertising by members of the Bar varied from one country to another according to cultural tradition, and that in most of the States parties to the Convention, including Spain, there had for some time been a tendency to relax them. The wide range of regulations and the different rates of change in the Council of Europe's member States indicated the complexity of the issue. Because of their direct, continuous contact with their members, the Bar authorities and the country's courts were in a better position than an international court to determine how, at a given time, the right balance could be struck between the various interests involved, namely the requirements of the proper administration

of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices.

The Court held that at the material time (1982/83) the relevant authorities' reaction could not be considered disproportionate to the aim pursued, and that consequently there had been no breach of Article 10.



Identification:

a) / b) European Court of Human Rights / c) / d) 22 April 1994 / e) 14/1993/409/488/ f) *Saraiva de Carvalho v. Portugal* / g) to be published in volume 286-B of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Procedural safeguards – Impartiality.

Institutions – Courts – Ordinary courts – Criminal courts.

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

Summary:

On 10 June 1984 the applicant, who was suspected of having been a founder member and leader of an organisation known as "FP 25 de Abril" (Popular Forces 25 April), was arrested and held in pre-trial detention on a charge of founding and leading a terrorist organisation (Article 288 of the Criminal Code). Judge S. of the Lisbon Criminal Investigation Court issued a "despacho de pronúncia" partly accepting the charges, in particular those relating to Mr Saraiva de Carvalho. The trial took place before the Fourth Division of the Lisbon Criminal Court, which was composed of three judges and was presided over by judge S. This Court convicted the applicant of leading a terrorist organisation and sentenced him to 15 years imprisonment.

The applicant complained that the Criminal Court was not impartial as Mr S., in issuing the "despacho de pronúncia", had already formed in advance a view of the applicant's guilt that was likely to influence him when giving judgment on the merits. He appealed to the Constitutional Court, relying, *inter alia*, on Article 6 paragraph 1 of the European Convention on Human Rights in respect of Mr S.'s alleged lack of impartiality. The Constitutional Court, however, dismissed this part of the appeal, holding that a "despacho de pronúncia"

was distinguishable from the criminal charge preferred by the prosecution and was designed to avoid trying persons against whom no *prima facie* case existed. At the request of the public prosecutor's office, the Constitutional Court clarified its judgment in a separate decision of 12 April 1989.

The Court recalled that the existence of impartiality for the purposes of Article 6 paragraph 1 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. Mr S.'s personal impartiality was not contested. Under the second test, the mere fact that a judge had already taken decisions before the trial could not in itself be regarded as justifying anxieties about his impartiality. What mattered was the scope and nature of the measures taken by the judge before the trial.

The Court accepted that the "despacho de pronúncia" amounted to an intermediate decision that was not equivalent to a committal for trial. In producing the "despacho", Mr S. had acted in his capacity as a judge of the Fourth Division; he had taken no steps in the investigation or in the prosecution. His detailed knowledge of the case had not meant that he was prejudiced in a way that prevented him from being impartial when the case came to trial. His function in the initial phase of the proceedings had been to satisfy himself not that there was a "particularly confirmed suspicion" but that there was *prima facie* evidence. Nor could Mr S.'s preliminary assessment of the available evidence be regarded as a formal finding of guilt.

A decision to leave an accused in pre-trial detention could only justify fears concerning a judge's impartiality in special circumstances. In the case under consideration, Mr S. did not make any fresh assessment capable of having a decisive influence on his opinion of the merits; he did no more than make a cursory examination, which disclosed no factors telling in favour of the applicant's release.

In conclusion, Mr S.'s participation in the adoption of the judgment convicting the applicant did not undermine the impartiality of the Criminal Court's Fourth Division, since the applicant's fears could not be regarded as having been objectively justified. There had therefore been no breach of Article 6 paragraph 1.



Identification:

a) / b) European Court of Human Rights / c) / d) 26 April 1994 / e) 2/1994/449/528 / f) *Vallée v. France* / g) to be published in volume 289 of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Trial within reasonable time.

Institutions – Courts – Administrative courts.

Summary:

The applicant, who was a severe haemophiliac, had received frequent blood transfusions. He was infected with the human immunodeficiency virus (HIV) between November 1984 and June 1985. Since December 1989 he introduced proceedings with a view to obtaining compensation. In a judgment of 5 January 1994, served on 4 March 1994, the Administrative Court ordered the State to pay compensation to the applicant. The applicant complained of the excessive length of the proceedings in question.

In the Court's view, the period to be taken into consideration had already lasted more than four years. Even if the case was of some complexity, the information needed to determine the State's liability had been available for a long time. What was at stake in the contested proceedings was of crucial importance for the applicant, in view of the incurable disease from which he was suffering and his reduced life expectancy. Exceptional diligence was called for in the circumstances, in particular as it was a controversy the facts of which had been known to the Government and the seriousness of which must have been obvious to them. Yet, although it was aware of Mr Vallée's state of health, the Administrative Court did not use its powers to order the speeding up of the proceedings. In such a case a period of more than four years to obtain a judgment in first-instance proceedings far exceeded a reasonable time. There had been, therefore, a violation of Article 6 paragraph 1.



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

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

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4. Persons or bodies vested with authority to prepare the case, e.g. Ministère public, audiorat, parquet, etc.

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9. Vertical distribution of powers, particularly in respect of States of a federal or regionalised nature.

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

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