

Bulletin

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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, 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*
3. *Keywords of the alphabetical index*
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:

7 March 1994 – 31 August 1994

Statistical Data

June/July 1994 session

- Disputes between state bodies and the Auditor General's Department (Article 126a B.VG): 1
- Financial claims (Article 137 B.VG): 4
- Conflicts of jurisdiction (Article 138 (1) B.VG): 1
- Review of regulations (Article 139 B.VG): 29
- Review of laws (Article 140 B.VG): 42
- Review of elections (Article 141 B.VG): 6
- Appeals against decisions of administrative authorities (Article 144 B.VG): 621 (449 appeals dismissed)

August 1994 session

- Review of laws (Article 140 B.VG): 1
 - Review of elections (Article 141 (3) B.VG. referendum): 3
 - Appeals against decisions of administrative authorities (Article 144 B.VG): 34 (11 appeals dismissed)
-

Important decisions

Identification:

a) Austria / b) Constitutional Court / c) / d) 7 March 1994 / e) B 115/93 / f) / g).

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 – Administrative acts.

Institutions – Army and police forces – Army – Functions.

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Arrest / Army / Personal liberty / Aliens / Body search / Border checks.

Summary:

Arrest and body search by the army, under its powers to assist the gendarmerie, of aliens suspected of crossing the border illegally. The Court held that this was in accordance with the Constitution, since the actions concerned were attributable to the competent administrative services. Personal liberty had not been contravened by the challenged finding of an independent administrative tribunal (competent to review the legality of the arrest) and only serious interferences with the right to personal liberty were reviewable by the Constitutional Court. The body search, which only resulted from the arrest, did not affect personal liberty; where essential and justified, it was not an interference with the right to private life.



Identification:

a) Austria / b) Constitutional Court / c) / d) 1 July 1994 / e) G 92, 93/94 / 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 – Annulment.

Institutions – Principles of State organisation – Rule of law.

Keywords of the alphabetical index:

Rule of law / Principle of legality / Administrative appeal / Administrative Court / Right of asylum.

Summary:

Annulment of a provision in the Act governing the right of asylum according to which the supervisory power of the appeal authority (an administrative body) was limited to manifest defects in the investigation procedure, thus preventing review of the administrative process by the public-law courts (the Constitutional Court or Supreme Administrative Court). Violation of the principle of the rule of law.



Identification:

a) Austria / b) Constitutional Court / c) / d) 2 July 1994 / e) B 2233/93 / f) / g).

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 – Administrative acts.

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

Institutions – Courts – Administrative courts – Jurisdiction.

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

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

Keywords of the alphabetical index:

Aliens / Administrative Court / Effective remedy / Appeal against administrative measures / Expulsion / Fair trial / Prohibition of torture and inhuman or degrading treatment.

Summary:

Admissibility of an appeal – by an expelled alien – against an administrative decision concerning determination of the question whether expulsion to a specific country was permissible. The decision of the administrative authority interfered with the rights of the plaintiff, who had an objective interest in the

annulment of the decision, even after the expulsion had been carried out. Access to the Constitutional Court corresponds to the system of the protection of rights guaranteed by the Constitution and the right to an effective remedy as laid down in Article 13 ECHR: all decisions of administrative authorities were reviewable by the public-law courts (the Constitutional Court and the Supreme Administrative Court).

As to the substance of the decision, the Court dismissed the appeal: the administrative measure had not contravened the legal prohibition on torture and inhuman or degrading treatment.



Identification:

a) Austria / b) Constitutional Court / c) / d) 30 August 1994 / e) W I-6/94 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums.

Keywords of the alphabetical index:

Compulsory referendum / Electoral rights / Electoral propaganda / Total reform of the Constitution.

Summary:

The Court dismissed an objection to the result of a referendum concerning Austria's joining the European Union. The Court's powers of review confined it to dealing with procedural alleged illegalities in the referendum. The adopted (but as yet unpromulgated) law which had been the subject of the referendum was not reviewable by the Court. In view of the constitutional rights relating to political activity, there was no legal ground for disallowing propaganda for a particular referendum result. The rights in question were a matter of free expression of popular opinion and were exercised through the right to vote. The activities of state bodies (most representatives of government parties had sought to obtain a yes vote) had not overstepped the authorised boundaries.



Belgium

Arbitration Court

Reference period:

1 May 1994 – 31 August 1994

Statistical data

- 33 judgments
 - 40 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension or interlocutory orders)
 - 61 new cases
 - average length of proceedings: 10 months
 - 13 judgments concerning proceedings for annulment
 - 11 judgments concerning preliminary points of law
 - 3 judgments concerning applications for suspension
 - 4 cases settled by summary procedure
-

Important decisions

- a. Judgment No. 35/94 of 10 May 1994
Constitutional justice – Constitutional proceedings – Procedure – Interlocutory proceedings – Challenging of judge – Challenge at the instance of a party.
- b. Judgment No. 51/94 of 29 June 1994
Fundamental rights – Governing principles – Entitlement to rights – Nationals and foreigners.
Fundamental rights – Economic, social and cultural rights – Right to a sufficient standard of living.
- c. Judgment No. 61/94 of 14 July 1994
Fundamental rights – Governing principles – Entitlement to rights – Natural and legal persons.
Fundamental rights – Civil and political rights – Right of asylum.

Identification:

a) Belgium / b) Arbitration Court / c) / d) 10 May 1994 / e) Judgment No. 35/94 / f) / g) Moniteur belge, 31 May 1994.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Composition, recruitment and structure – Appointment of members.

Constitutional justice – Constitutional proceedings – Procedure – Interlocutory proceedings – Challenging of judge – Challenge at the instance of a party.

Institutions – Principles of State organisation – Separation of powers.

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

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

Keywords of the alphabetical index:

Impartiality / Challenging of judge / Constitutional judge.

Summary:

The Arbitration Court is a judicial body and as such required to comply with the general legal principle relating to the subjective and objective impartiality of judges. (B.2.1)

Participation by a member of Parliament in the drafting of a law does not suffice to cast doubt on the impartiality he will be required to observe in circumstances where, in his capacity as an independent judge appointed for life and subject to strict rules governing incompatibility of office with other functions, he is called upon to review the constitutionality of the law in question on the bench of a judicial body to which an action for annulment has been referred.

Article 101 paragraph 2 of the special law of 6 January 1989 on the Arbitration Court, which provides that the participation of a judge in the elaboration of a legislative norm which is the subject of an action for annulment does not in itself constitute grounds for challenging the judge concerned, is to be interpreted having regard to the standards developed by the European Court of Human Rights in connection with the requirement of impartiality laid down in Article 6.1 of the European Convention on Human Rights.

The participation by a member of Parliament in the elaboration of the law complained of before the Court, which consisted in supporting the majority to which his political group belonged by voting in favour of the law and against amendments tabled by the opposition, is not sufficient objective justification for the applicants' misgivings regarding his subsequent ability, as a judge, to review impartially the constitutionality of the law at issue. (B.4)

Supplementary information:

Idem, Judgment No. 36/94 of the same date. Under the terms of the Institutional Act on the Arbitration Court, half the twelve judges on the Court are required to have served as members of a legislative assembly for a period of at least five years.



Identification:

a) Belgium / b) Arbitration Court / c) / d) 19 May 1994 / e) Judgment No. 40/94 / f) / g) Moniteur belge, 10 June 1994.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Education / International Covenant on Economic, Social and Cultural Rights.

Summary:

Article 13.2, sub-paragraphs b and c of the International Covenant on Economic, Social and Cultural Rights has no direct effect in the domestic legal system and does not per se give rise to a right of free access to education other than primary education. These provisions, however, like sub-paragraph a of the same article, do not allow Belgium, after the entry into force of the

Covenant on its territory on 6 July 1983, to take measures in conflict with the aim of free education which must be made immediately available in the case of primary education and progressively introduced in the case of secondary and higher education. (B.2.2 to B.2.4)

Under the definition of the right to education set out in Article 13.1 of the Covenant, the notion of education referred to in the whole of Article 13 must be understood in the broad sense of the term. This interpretation is confirmed by Article 13.2 (b) which, with regard to secondary education, stipulates that the latter is covered "in its different forms". It follows that arts education cannot be considered to be excluded from the different forms of education protected by the Covenant. (B.2.5)



Identification:

a) Belgium / b) Arbitration Court / c) / d) 29 June 1994 / e) Judgment No. 51/94 / f) / g) Moniteur belge, 14 July 1994.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Equality.

Fundamental rights – Civil and political rights – Right of asylum.

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

Keywords of the alphabetical index:

Equality / Foreigners / Refugees / Medical aid.

Summary:

It is not unreasonable for a State which ascertains the ineffectiveness of measures to restrict immigration not to accept the same obligations regarding, on the one hand, persons lawfully resident on its territory (nationals and certain categories of foreigners), and on the other hand, foreigners who remain on its territory after having been ordered to leave. By making it clear to anyone who has received a final order to leave the territory by a specific date that, if the person concerned fails to comply, he/she will receive no further aid from the public social welfare centres as from one month after that date, apart from emergency medical assistance, the law being challenged introduced a measure aimed at encouraging the person concerned to comply with the order received, the effects of which

serve to achieve the objective pursued. This measure is not disproportionate to the objective so long as the person concerned is guaranteed the necessary material aid to leave the territory, for a period of one month, as well as prompt emergency medical assistance. (B.4.3)



Identification:

a) Belgium / b) Arbitration Court / c) / d) 29 June 1994 / e) Judgment No. 51/94 / f) / g) Moniteur belge, 14 July 1994.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Right of asylum.

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:

International Covenant on Civil and Political Rights / Foreigners / Refugees.

Summary:

The restriction of the right to social aid provided to foreigners who have received a final order to leave the territory constitutes neither torture nor inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights or Article 7 of the International Covenant on Civil and Political Rights. (B.5.3 and B.5.4)



Identification:

a) Belgium / b) Arbitration Court / c) / d) 29 June 1994 / e) Judgment No. 51/94 / f) / g) Moniteur belge, 14 July 1994.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right of asylum.

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

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

Keywords of the alphabetical index:

International Covenant on Economic, Social and Cultural Rights / Foreigners / Refugees.

Summary:

The right to an adequate standard of living and to the continuous improvement of living conditions, as recognised for “everyone” in Article 11.1 of the International Covenant on Economic, Social and Cultural Rights, taken in conjunction with Article 2.1 of the same Covenant, cannot reasonably be construed as unrestricted. It can only apply, with regard to each State, to the persons for which the State is responsible. The latter cannot be held to include foreigners who, although present on the territory, have been ordered to leave, after it has been established that the conditions of their residence were not or were no longer complied with. (B.5.5)



Identification:

a) Belgium / b) Arbitration Court / c) / d) 14 July 1994 / e) Judgment No. 59/94 / f) / g) Moniteur belge, 30 July 1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Federal State.

Institutions – Legislative bodies – Law-making procedure.

Institutions – Federalism and Regionalism – Basic principles.

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

Fundamental rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Official language / Publication of laws.

Summary:

The provision requiring the translation of legislation into German “within the limits of budgetary allocations”

does not infringe constitutional rules concerning equality and non-discrimination. The requirement of an authentic German version of federal laws, decrees and regulations would make it necessary to reorganise the structures and functioning of the Belgian federal system. The discrepancy is therefore based upon and reasonably justified by an objective criterion. (B.4)

If the provision under which German translations of federal statutes and regulations may be produced only "within the limits of budgetary allocations" were interpreted as authorising the arbitrary restriction of the number of translations on the basis of refusal to allocate the necessary funds, this would constitute a breach of Articles 10 and 11 of the Constitution, which guarantee the principles of equality and non-discrimination, since access to federal statutes and regulations by the inhabitants of the German-speaking region would be unreasonably restricted thereby. (B.5.1)

Supplementary information:

It has been stipulated since 1991 that the text of the Constitution shall be drafted in French, Dutch and German. A German-speaking Community has been recognised since 1970, and since 1983 it has had its own law-making powers, particularly in the cultural field. Some 60,000 Belgians are German-speakers, out of a total population of 10 million.



Identification:

a) Belgium / b) Arbitration Court / c) / d) 14 July 1994 / e) Judgment No. 61/94 / f) / g) Moniteur belge, 9 August 1994.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional proceedings – Types of claim – Claim by a private body or individual – Non-profit-making corporate body.

Constitutional justice – Constitutional proceedings – Procedure – Parties – Interest.

Keywords of the alphabetical index:

Plaintiff / Collective interest / Non-profit-making corporate body.

Summary:

When a non-profit association claiming to represent a collective interest wishes to have access to the Court, the requirement is that its social purpose should be of a particular nature and, hence, distinct from the public

interest. After checking the organisational objectives and activities of the associations' "Movement against racism, antisemitism and xenophobia" and "Lawyers' union for democracy", the Court allowed the applications by those associations for the annulment of legislative provisions concerning the admission, residence, establishment and removal of foreigners. On the other hand, the appeal lodged by the association "*Droit des gens*" against the same provisions was declared inadmissible, since the definition of its social purpose in its statutes (inter alia: "to promote the peaceful and harmonious coexistence of states, encourage universal respect for the rights of individuals and peoples (...)") was deemed so broad as not to be distinct from the public interest. (B.1.1 – B.1.5)

Supplementary information:

See also Judgment No. 20/93 of 4 March 1994 (Bulletin No. 93/1, p. 11).



Identification:

a) Belgium / b) Arbitration Court / c) / d) 14 July 1994 / e) Judgment No. 61/94 / f) / g) Moniteur belge, 9 August 1994.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Equality and non-discrimination / Foreigners / Refugees.

Summary:

It follows from Article 191 of the Constitution that a difference of treatment which penalises a foreigner can only be established by the legislature. The purpose of Article 191 is not to exempt the legislature, when it establishes such a distinction, from having due regard to the fundamental principles enshrined in the Constitution. Moreover, the article expressly draws attention to this point by laying down the rule at the outset that a foreigner who is present on the territory "enjoys the protection afforded to persons and to property". Article 191 does not therefore in any way authorise the legislature, when it establishes a difference of treatment to the detriment of foreigners, not to ensure that this difference is not discriminatory, regardless of the nature of the principles involved. (B.2)

Supplementary information:

See also Judgment No. 20/93 of 4 March 1993 (Bulletin No. 93/1, p. 12).



Identification:

a) Belgium / b) Arbitration Court / c) / d) 14 July 1994 / e) Judgment No. 61/94 / f) / g) Moniteur belge, 9 August 1994.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Right of asylum.

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:

Foreigners / Refugees / Convention of 1951 relating to the Status of Refugees / International Covenant on Civil and Political Rights.

Summary:

Article 31 of the Convention of 28 July 1951 relating to the Status of Refugees, Article 2 of Protocol No. 4 to the European Convention on Human Rights and Article 12 of the International Covenant on Civil and Political Rights have in common the fact that, subject to restrictions specified in those instruments, they guarantee freedom of movement for the persons covered as well as, in the case of the latter two provisions, freedom to choose their residence. However, these provisions authorise restrictions within the limits which they stipulate. The legislation at issue, which provides for registration in the administrative register of a specific locality during the conduct of the proceedings concerning an application for the recognition of refugee status, in the case of foreigners who may obtain permission to reside in Belgium only on the basis of such an application, complies with the requirement of necessity laid down by the above-mentioned provisions of international law. (B.4.3 – B.4.8)



Identification:

a) Belgium / b) Arbitration Court / c) / d) 14 July 1994 / e) Judgment No. 61/94 / f) / g) Moniteur belge, 9 August 1994.

Keywords of the systematic thesaurus:

Institutions – Courts – Administrative courts – Jurisdiction.

Fundamental rights – Civil and political rights – Equality.

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

Fundamental rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Foreigners / Refugees / Suspension / Access to courts.

Summary:

No provision of the Constitution or of an international convention places a general obligation on the legislator to introduce an urgent administrative procedure. However, when the legislator considers it desirable to provide for the possibility of an application for a suspension of administrative measures, he may not deny the right to such an application to certain categories of legal persons – in this case, certain categories of foreigners claiming refugee status – if there is no reasonable justification for doing so. (B.5.5 to B.5.7)

The denial of the right to apply to the *Conseil d'Etat*, the highest administrative court, for the suspension of a purely confirmatory measure by the Minister or his deputy, in the specific case where the foreigner makes a new statement identical to a previous statement which was not taken into account at the end of an inquiry, whereas this refusal could have been the subject of an appeal, cannot be considered manifestly unreasonable or disproportionate. (B.5.8)

On the other hand, a legislative measure which provides that the Commissioner for Refugees and Stateless Persons may render enforceable his decision rejecting an urgent appeal against a decision declaring the application for admission from a would-be refugee manifestly inadmissible or unfounded and at the same time provides that, in such a case, the decision in question cannot be the subject of an application for suspension, is disproportionate, especially since the measure in question enables the administrative authority itself to determine which decisions may not give rise to an application for suspension to the *Conseil d'Etat*. (B.5.9)



Identification:

a) Belgium / b) Arbitration Court / c) / d) 14 July 1993 / e) Judgment No. 61/94 / f) / g) Moniteur belge, 9 August 1994.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Personal liberty.

Fundamental rights – Civil and political rights – Right of asylum.

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:

Equality / Foreigners / Refugees / Convention of 1951 relating to the Status of Refugees.

Summary:

Article 12 of the Constitution guarantees respect for individual liberty. With regard to foreigners who apply for refugee status, this liberty is reaffirmed by Article 31 of the Geneva Convention of 28 July 1951. Finally, under Article 5.1 of the European Convention on Human Rights, everyone has the right to liberty. The law may, however, depart from this principle in the cases provided for in this article.

The statutory measure authorising deprivation of liberty – for a maximum of two months – in respect of persons whose application for refugee status has been rejected as inadmissible or manifestly ill-founded, is designed to prevent such persons from remaining in concealment. The provision complained of is one of a set of measures designed to cope with the increasing number of applications which are seen right away to be completely unfounded. A foreigner to whom a custodial measure is applied may seek a remedy at law.

The Court found that the persons concerned were not subjected to a discriminatory infringement of their personal liberty. (B.7)



Bulgaria

Constitutional Court

Reference period:

1 January 1994 – 30 June 1994

Statistical data

Number of decisions published in the State Gazette: 5

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

Constitutional justice – Types of litigation – Electoral disputes – Parliamentary elections: one case

Constitutional justice – The subject of review – Laws and other rules having the force of law: one case

Institutions – Principles of State organisation – Separation of powers: one case

Institutions – Principles of State organisation – Social State: one case

Fundamental rights – Civil and political rights – Rights of access to courts: one case

Important decisions

Summaries of important decisions will be published in the next Edition of the Bulletin.



Canada

Supreme Court

Reference period:

4 March 1993 – 31 August 1994

Important decisions

Identification:

a) Canada / b) Supreme Court of Canada / c) / d) 4 March 1993 / e) File No.: 21836 / f) Reference re *Public Schools Act* (Manitoba), s. 79(3), (4) and (7) / g) Published in the Canada Supreme Court Reports, [1993] 1 S.C.R. 839.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Education / Language rights / Minority language educational rights / Canadian Charter of Rights and Freedoms.

Summary:

The general right of instruction in the minority language conferred by s. 23 of the *Canadian Charter of Rights and Freedoms* includes the right to distinct educational facilities. Pedagogical and financial considerations determine the requirements, which will vary from region to region. Section 23 of the Charter also confers upon minority language parents a right to manage and control the educational facilities in which their children are taught. The degree of management and control varies and depends on the number of actual and potential children concerned. The Court should be loath to detail the institutional means by which the s. 23 constitutional requirements are to be met by the governments.



Identification:

a) Canada / b) Supreme Court of Canada / c) / d) 30 September 1993 / e) File No.: 23476 / f) *Rodriguez v. British Columbia (Attorney General)* / g) Published in the Canada Supreme Court Reports, [1993] 3 S.C.R. 519.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Fundamental justice / Life, liberty and security of the person / Cruel and unusual treatment or punishment / Equality / Canadian Charter of Rights and Freedoms / Prohibition against assisted suicide.

Summary:

A terminally ill patient applied for an order that s. 241(b) of the Canadian *Criminal Code*, which prohibits aiding a person to commit suicide, be declared invalid on the ground that it violates her rights under ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, and is therefore, to the extent it precludes a terminally ill person from committing "physician-assisted" suicide, of no force and effect by virtue of s. 52(1) of the *Constitution Act, 1982*.

The Court ruled, with four out of nine judges dissenting, that s. 241(b) is constitutional.

1. Section 241(b) does not infringe s. 7 of the *Canadian Charter of Rights and Freedoms*. Even though the prohibition in s. 241(b) deprives a terminally ill patient of autonomy over her person (at least with respect to the right to make choices concerning her own body) and causes her physical pain and psychological stress in a manner which impinges on the security of her person, any resulting deprivation is not contrary to the principles of fundamental justice. The same conclusion is applicable with respect to any liberty interest which may be involved. The long-standing blanket prohibition on assisted suicide, which fulfils the government's objective of protecting the vulnerable, is grounded in the state interest in protecting life and is reflective of fundamental values at play in our society. A blanket prohibition on assisted suicide similar to that in s. 241(b) also seems to be the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights.
2. The prohibition against assisted suicide does not constitute a cruel and unusual treatment or punishment and therefore does not infringe s. 12 of the Charter.
3. Even assuming that s. 241(b) infringes the right to equality provided for in s. 15 of the Charter, such an infringement is clearly justifiable in a free and democratic society.



Croatia

Constitutional Court

Reference period:
1 May 1994 – 31 August 1994

Statistical data

- Cases concerning the conformity of laws with the Constitution:

received 36, resolved 9:

in 3 cases the motion to review the constitutionality of laws was not accepted; in 5 cases the procedure was terminated because the laws under review were no longer in force or petitioner withdrew his/her proposal; in 1 case the motion to review was rejected. In 6 pending cases the motion to review the constitutionality of laws was accepted.

- Cases concerning the conformity of other regulations with the Constitution and laws:

received 28, resolved 14:

in 3 cases regulations were repealed; in 1 case the motion to review the constitutionality and legality of regulations was not accepted; in 3 cases the motion to review was rejected, and in 5 cases terminated; in 2 cases the petitioners were instructed about the right to propose to the Court to review constitutionality and legality.

- Cases concerning the protection of constitutional rights:

received 215, resolved 237: in 36 cases constitutional action was accepted, in 22 cases dismissed, in 175 cases rejected, in 2 cases the procedure was terminated, in 2 cases petitioners were instructed about conditions under which constitutional action for protection of constitutional freedoms and rights may be submitted.

Among 237 cases 46 dealt with acquisition of citizenship.

- Cases concerning jurisdictional disputes among legislative, executive and judicial branches:

received 1, resolved 1.

- Cases concerning the constitutionality and legality of elections, referenda and electoral disputes which do not fall within the jurisdiction of other courts:

received none; resolved 1.

Important decisions

Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 10 May 1994 / e) U-II-67/1994 / f) / g) Narodne novine, No. 45/1994.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Rules issued by independent state bodies.

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

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

Keywords of the alphabetical index:

Competence / Salary / Health service.

Summary:

The governing body of the organisation for health insurance determined the amount of salaries to be paid to employees of health services. The Constitutional Court annulled the decision because it considered that the governing body had not been empowered by any law to regulate salaries. According to the Constitution the rights of workers, namely the right to remuneration, shall be regulated only by the law and by collective agreements.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 1 June 1994 / e) U-III-361/1994 / f) / g) Narodne novine, No. 45/1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – Constitutional proceedings – Decisions – Types – Annulment.

Fundamental rights – Civil and political rights – Equality.

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

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

Keywords of the alphabetical index:

Privatisation.

Summary:

An enterprise was sold by public auction after its bankruptcy. The buyer was obliged to pay part of the price to the Croatian Development Fund. He concluded a contract with the Fund which allowed him to pay the amount due in 5 instalments.

A constitutional action was submitted claiming protection of equality before the law. The petitioner stated that the contract between the buyer and the Fund changed the conditions under which the sale of the bankrupt enterprise had been realised.

The Constitutional Court accepted the claim holding that although the contract between the buyer and the Fund had been concluded after the sale, in its essence it was closely connected with the conditions under which the enterprise was sold. Since the possibility to pay part of the price by instalments was not known to all potential buyers interested in purchasing the same enterprise, the buyer who did know was in an advantageous position. Thus the principles of equality of all before the law and of equal status of all entrepreneurs on the market were violated. The Court annulled the rulings of two commercial courts and ordered the renewal of the procedure of sale by public auction of the enterprise.

Supplementary information:

The dissenting opinion of one judge held that the contract between the buyer and the Fund should not be connected to the sale by public auction of the enterprise. The Fund as a creditor freely decided which contract to conclude with its debtor.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 1 June 1994 / e) U-III-490/1994 / f) / g) Narodne novine, No. 49/1994.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Right to property

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

Keywords of the alphabetical index:

Ownership.

Summary:

The property rights of the owner of one flat in a building are not violated by decisions of courts according

to which such owner has to pay for maintenance of common parts of building and for management of the building, together with other owners of units in the same building and with tenants in it.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 7 June 1994 / e) U-VII-54/1993 / f) / g) Narodne novine, No. 51/1994.

Keywords of the systematic thesaurus:

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

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

Fundamental rights – Collective rights – Other.

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

Keywords of the alphabetical index:

Right to proportional representation / Omission of the legislator.

Summary:

According to the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia (Art. 18 (1)) national and ethnic communities or minorities who represents more than 8% of the population of the Republic of Croatia are entitled to be proportionally represented in the Croatian Parliament and in its Government, as well as in the supreme judicial bodies. The procedure of election and recall of the representatives of the said communities and minorities is regulated by electoral laws and other provisions regulating elections in the Republic of Croatia.

The Constitutional Court was asked to appoint representatives of the Serbian National Party to the Chamber of Županije of the Croatian Parliament.

The claim was not accepted because the existing laws on elections regulate representation of ethnic and national communities and minorities in the Chamber of Representatives, but not in the Chamber of Županije. The decision of the Court stressed the duty of Parliament to provide for relevant legislation in order to implement

constitutional norms on representation of ethnic and national communities which have no elected representative.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 17 June 1994 / e) U-III-45/1994 / f) / g) Narodne novine, No. 49/1994.

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.

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

Keywords of the alphabetical index:

Right of appeal.

Summary:

The Ministry of administration stated in its act (in registration of political parties) that other person, not the one who was until then the president of the political party, shall in future represent this party, acting as its new president. The acting president challenged this act of the Ministry before the Administrative court asserting that in the proceedings before the Ministry he had not been given the status of a party so he did not have a chance to defend his rights. The Administrative court rejected the action holding that as a result of the act of the Ministry only a person authorized to represent the political party was entitled to bring an action in its name.

The Constitutional Court upheld the constitutional challenge. The Court held that the ruling of the Administrative court, which rejected the action, violated the right to judicial review of the legality of individual acts of administrative authorities and bodies vested with public powers and also violated the right of appeal. Since the acting president of the party entered his action not only in representation of his party, but also representing himself, the Administrative Court was bound to hear him clarify his position.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 5 July 1994 / e) U-III-407/1994 / f) / g) Narodne novine, No. 55/1994.

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 property – Privatisation

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

Keywords of the alphabetical index:

Privatisation / Judicial review of administrative acts.

Summary:

The Administrative Court rejected the claim against a ruling of the Croatian Fund for Privatisation which had annulled the purchase of shares by private persons. The Court held that the ruling of the Fund is not an administrative act which decides about rights or legally protected interests of private persons who buy shares, but that it decides about rights and obligations of enterprises which undergo privatisation. Following this reasoning the Administrative Court came to the conclusion that actions against the ruling of the Fund may be entered by an enterprise, but not by private persons willing to buy shares.

The Constitutional Court upheld the constitutional action holding that the ruling in question, which annulled the purchase of shares, may violate rights and interests of those persons who, like the petitioner herself, had already signed a contract to buy shares. Therefore the petitioner is entitled to the protection of the right to judicial review of the legality of individual acts of administrative authorities and bodies vested with public powers.



Identification:

a) Croatia / b) Constitutional Court of the Republic of Croatia / c) / d) 5 July 1994 / e) U-I-370/1994 / f) / g) Narodne novine, No. 56/1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – 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 – Other.

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

Keywords of the alphabetical index:

"Ne bis in idem".

Summary:

According to the Constitution no one may be tried twice for an act for which he was already condemned and for which a final court judgment was passed. The decision of the Constitutional Court held that "final court judgment" means judgment of a domestic court, this interpretation following from the notion of sovereignty of the State, which includes the full jurisdiction and application of laws of that State in its territory. This interpretation was given in a case in which the petitioner challenged the constitutionality of the provision of the Basic Criminal Law according to which, if in specified cases criminal proceedings were commenced or terminated in a foreign State, prosecution in Croatia shall be undertaken only if approved by the State public prosecutor. In the opinion of the petitioner this provision violates the constitutional principle of "*ne bis in idem*".

The Court dismissed the claim holding that the disputed provision is an exception to the rule that Croatian criminal law shall be applied to all criminal offenses committed within the territory of Croatia. The alleged exception confirms the principle of "*ne bis in idem*" since it provides that when criminal proceedings for offenses committed within the territory of Croatia are commenced or terminated in a foreign State, prosecution in Croatia may be undertaken only exceptionally and with the approval of the State public prosecutor.



Denmark

Supreme Court

Reference period:

1 May 1994 – 31 August 1994

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



Estonia

Constitutional Review Court

Reference period:

1 May 1994 – 31 August 1994

Statistical data

Number of decisions: 1

Important decisions

Identification:

a) Estonia / b) Constitutional Review Court / c) / d) Decision of 13 June 1994 / e) III-4/A-4/94 / f) Publications: RT I 1994, No 45 Art / g).

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Quasi-constitutional legislation.

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 – Legislative bodies – Relations with Head of State.

Keywords of the alphabetical index:

Conflict of power / Division of powers / Legislature / President of the Republic / Government / Parliament.

Summary:

According to the Constitution, the President of the Republic has the power to issue decrees having force of law. The Constitution provides two conditions for the exercise of this power: firstly, that Parliament cannot convene and secondly the existence of urgent matters of national interest. The Law on the President of the Republic formulated two additional prerequisites for the adoption of presidential decrees. According to the first one, the decision that Parliament cannot convene should be taken by the Chairman of Parliament after it appears that the Parliament, having convened in extraordinary session, is unable to act. The second condition is that the decision as to what constitutes an urgent matter of national interest is taken by the Prime Minister alone.

The President of the Republic contested these conditions and brought an action before the National Court (Constitutional Review Chamber) claiming the unconstitutionality of the Law on the President. The National Court ruled in favour of the President, finding *inter alia*, that according to the Constitution, a presidential decree requires the joint signatures of the Chairman of Parliament and the Prime Minister. By co-signing the document, the Chairman of Parliament and the Prime Minister determine whether the constitutional pre-requisites for issuing the presidential decree have been met and can evaluate the legality and purpose of the law. The conditions formulated by the law on the President were therefore incompatible with the Constitution.



France

Constitutional Council

Reference period:

1 May 1994 – 30 August 1994

Statistical data

11 decisions, including:

- 7 substantive reviews of legislation referred to the Council by members of Parliament under Article 61 (2) of the Constitution;
 - 2 compulsory substantive reviews of legislation referred by members of Parliament under Articles 46 and 61 (2) of the Constitution;
 - 2 decisions on electoral matters under Article 59 of the Constitution.
-

Important decisions

Identification:

a) France / b) Constitutional Council / c) / d) 27 July 1994 / e) Decision No.94 – 343/344 DC / f) Law on respect for the human body and law on donation and use of parts or products of the human body, medically assisted procreation and prenatal diagnosis / g).

Keywords of the systematic thesaurus:

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

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

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

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

Fundamental rights – Civil and political rights – Equality.

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

Fundamental rights – Economic, social and cultural rights – Scientific freedom.

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

Keywords of the alphabetical index:

Fundamental rights / Equality / Relationship by descent / Maternity / Tracing the father / Family life.

Summary:

This bioethics decision mainly establishes the constitutional importance of the principle of preserving the dignity of the human person from all subservience or degradation. Parliament had established that principle in the above two laws and had safeguarded it with a further set of principles including primacy of the human person, respect for human life from its outset, the inviolability of the human body, the principle that the human body was not a commodity, and the inviolability of the human species.

The provisions on donation and use of parts or products of the human body, on medically assisted procreation and on prenatal diagnosis were therefore in accordance with the Constitution.

Since it was not the legislator's view that all fertilised embryos required to be conserved indefinitely and regardless of circumstances and since the Constitutional Council's powers of assessment in the matter were not the same as those of Parliament, the provisions on implantation and storage of embryos fertilised *in vitro* were in accordance with the Constitution.



Identification:

a) France / b) Constitutional Council / c) / d) 29 July 1994 / e) Decision No. 94-345 DC / f) Law on use of the French language / 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.

Fundamental rights – Governing principles – Entitlement to rights – Private law bodies.

Fundamental rights – Governing principles – Entitlement to rights – Public law bodies.

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 – Linguistic freedom.

Fundamental rights – Economic, social and cultural rights – Scientific freedom.

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

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

Keywords of the alphabetical index:

General review / Right to information / Right to state subsidies / Right freely to communicate information / Cultural rights / Fundamental rights / Equality / Freedom of expression / Freedom of communication.

Summary:

Under Article 2 of the French Constitution the language of the French Republic is French. Parliament is required to reconcile that provision of the Constitution with the freedom of communication and expression as proclaimed in Article 11 of the 1789 Declaration of Rights of Man and the Citizen. That freedom entailed everyone's right to decide what words they considered most appropriate to expressing their or her thought. It also had to be taken into account that the French language was evolving, like all living languages, and introduced into everyday usage words from various sources such as regional languages, popular usage and foreign languages.

Parliament could require that French be used. With regard to the content of the language, it was even open to it to make it compulsory for public institutions to use official terminology in the provision of public services.

What Parliament could not do, however, given the fundamental freedom of thought and expression proclaimed in Article 11 of the 1789 Declaration of Rights of Man and the Citizen, was place such an obligation on private individuals (except in the performance of public duties) or on radio or television broadcasting bodies or services, whether public or private, and make it a punishable offence for them not to comply. The obligation on such persons and bodies to use official terminology was therefore unconstitutional. Lastly, the provisions making state aid to academic or scientific research conditional on publication or dissemination of the findings in French or on translation of publications into French were likewise unconstitutional.



Identification:

a) France / b) Constitutional Council / c) / d) 3 August 1994 / e) Decision No. 94-348 DC / f) Law on supplementary welfare protection for wage earners, transposing into French law Directives Nos. 92/49 and 92/96 of 18 June and 10 November 1992 of the Council of the European Communities / 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 – Legislative bodies.

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

Fundamental rights – Civil and political rights – Equality.

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

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

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

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

Keywords of the alphabetical index:

Collective agreements / Labour law / Fundamental rights / Equality / Freedom of enterprise / Commercial and industrial freedom / Pensions / Social security.

Summary:

The purpose of the law referred to the Constitutional Council was to transpose into domestic law the above

two directives of the Council of the European Communities. The Constitutional Council did not consider that maintaining existing supplementary pension schemes while abolishing them for the future was with rare exceptions contrary to the principle of equality since that principle was incompatible neither with legislation's treating different sets of circumstances differently nor with making exceptions to the principle on grounds of general interest provided that, in both cases, the resultant difference in treatment was related to the purpose of the law which introduced it.

Doing away with supplementary pension schemes in future did not contravene the principle of worker participation in collective determination of working conditions since Parliament had maintained other types of provident or retirement scheme which provided for such participation.

However the Constitutional Council held that the equality principle was contravened by the exception whereby some supplementary pension schemes were allowed not to set aside funds in respect of their social obligations.



Germany

Constitutional Court

Reference period :

1 May 1994 – 31 August 1994

Statistical data

8 judgments of a chamber (Senat), among them 4 judgments concerning individual constitutional claims, 1 judgment concerning conflicts between organs, 2 judgments concerning preliminary points of law, 1 preliminary review, 15 cases dealt with (taking into account the joinder of cases)

1267 judgments of a section (Kammer)

1271 new cases

Important decisions

Identification :

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 3 May 1994 / e) Judgments No. 2 BvR 2760/93 ; 2 BvQ 3/94 ; 2 BvR 707/94 ; 2 BvR 741/94 / f) / g) to be published in the Digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus :

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 – Preliminary review.

Institutions – Executive bodies – Territorial administrative decentralisation.

Keywords of the alphabetical index :

Preliminary review / Municipalities, unification of.

Summary :

The Land of Thuringia adopted a law which reorganised the municipality system, unifying small municipalities with greater ones. Some of these small municipalities introduced a constitutional complaint and asked the Court to make an interlocutory judgment in order to suspend the application of the contested law pending a judgment on the merits.

On the basis of its previous case law, the Constitutional Court declared that the application of the impugned legislation may only be suspended if the disadvantages caused to the complaining municipalities by the execution of the law which may later be declared unconstitutional outweigh the disadvantages caused by a provisional suspension of the law. While rejecting the main request for a suspension of the law, the Court nevertheless adopted some provisional measures which will guarantee to the small municipalities a certain degree of independence.



Identification :

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 10 May 1994 / e) Judgment No. 1 BvR 1534/92 / f) / g) to be published in the 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:

Preliminary review / Broadcasting / Distribution of frequencies.

Summary:

The Constitutional Court refused to make an interlocutory decision on the provisional attribution to a public broadcasting company of frequencies previously used by a private broadcasting company which had gone bankrupt. The Court held that the public company would not suffer any serious disadvantages pending the delivery of the judgment on the merits.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 14 June 1994 / e) Judgment No. 1 BvR 1022/88 / f) / g) to be published in the Digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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 family life.

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

Keywords of the alphabetical index:

Exhaustion of remedies / Tax law.

Summary:

The fact that part of parents' income as is necessary to guarantee one's children a minimum living standard is not free of all taxation is incompatible with the right to equality and the constitutional protection of family life.

On the basis of its previous case law, the Constitutional Court affirmed that the principle of exhaustion of remedies requires that before bringing a case before the Constitutional Court the petitioner should address his complaint to the last instance of ordinary jurisdiction. When an appeal is considered inadmissible and

therefore rejected by the court of appeal, the petitioner should impugn the declaration of inadmissibility.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 28 June 1994 / e) Judgment No. 1 BvL 14/88; 1 BvL 15/88 / f) / g) to be published in the Digest of the decisions of the Federal Constitutional Court.

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:

Discretionary power.

Summary:

The Constitutional Court decided that a provision of the Code of Civil Procedure which enables the treasury to appeal against the granting of legal aid to a party in a law suit is not inconsistent with the principles of reasonableness and equality, even if the cases in which the treasury exercises its right to appeal are chosen at random.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 12 July 1994 / e) Judgment No. 2 BvE 3/92; 2 BvE 5/93; 2 BvE 7/93; 2 BvE 8/93 / f) / g) to be published in the Digest of the decisions of the Federal Constitutional Court.

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 – International treaties.

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

Constitutional justice – Constitutional proceedings – Procedure – Parties – Interest.

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

Institutions – Principles of State organisation – Sovereignty.

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

Institutions – Legislative bodies – Relations with executive bodies.

Institutions – Executive bodies – Relations with legislative bodies.

Institutions – Army and police forces.

Institutions – Transfer of powers to international institutions.

Keywords of the alphabetical index:

Army / Use of the army abroad / Use of the army within the UNO / Use of the army within the NATO / Interest of a parliamentary group / Parliament and foreign politics.

Summary:

In a dispute between the Government and the Federal Parliament (*Bundestag*), the Constitutional Court had to decide on the constitutional implications of the participation of German armed forces in international peace-keeping and enforcement operations.

As a preliminary issue, the Court decided that a parliamentary group has *locus standi* to have the constitutionality of governmental measures examined by the Constitutional Court although it had not objected to their adoption in the political arena. The possibility to attack certain measures politically does not deprive a parliamentary group of its standing before the Constitutional Court.

The Court nonetheless rejected the applications brought by another parliamentary group which invoked its right as a "blocking minority" ("*Sperminorität*") of one third of the members of the *Bundestag* which is entitled to block the adoption of constitutional amendments. The measures complained of did not constitute an amendment of the constitution. Finally, the Court reaffirmed that single deputies may only bring an application to protect the rights of Parliament in cases expressly provided for by law.

Article 24 (2), of the Basic Law entitles the Federal Republic to enter a system of mutual collective security and to undertake the obligations resulting from such a system. This provision also allows German armed forces to be made available for operations of international organisations of which Germany is a member.

The United Nations as well as NATO have to be qualified as systems of mutual collective security in the sense of article 24, (2), of the Basic Law, although the latter is also an alliance of collective self-defence.

The integration of the Federal Republic of Germany into a system of mutual collective security requires the consent of Parliament. This consent also covers the conclusion of agreements between Germany and the United Nations on the use of German armed forces.

Parliament participates in foreign politics by adopting the statutes authorising the ratification of treaties which regulate the political relations of the State. All other acts concerning foreign politics fall in principle within the competence of government. If the government undertakes new international obligations without Parliament's approval, it can violate the prerogatives of the legislative body. The government is, however, entitled to give a treaty – in co-operation with the other members thereto – a new interpretation without changing the content of this treaty and without asking for Parliament's approval. This does not exclude the creation of new rights and obligations within the framework of existing treaties, either by "authentic interpretation" or by starting a new practice which may influence the content of treaty obligations. The government is, however, prevented from internally executing those obligations which require the adoption of a statute, especially those which affect the exercise of fundamental rights or have budgetary implications.

As a consequence of these considerations, the Court decided that the use of armed forces in the framework of NATO and WEU operations in the former Yugoslavia which had been authorised by the UN Security Council did not violate the treaty-making prerogatives of the Federal Parliament.

According to the Court, the government is, however, under an obligation to seek previous parliamentary approval for any use of German armed forces. This prerogative of Parliament derives from a long-standing constitutional tradition which dates back to the Weimar Constitution of 1918. The precise scope and modalities of parliamentary participation in this field will have to be determined by law.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 14 July 1994 / e) Judgment No. 1 BvR 1595/92 ; 1 BvR 1606/92 / f) / g) to be published in the Digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

Institutions – Courts – Procedural safeguards – Public hearings.

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

Keywords of the alphabetical index:

Information by mass media.

Summary:

The freedom to broadcast includes the right to collect information concerning public hearings of criminal proceedings. This freedom may, however, be limited by norms which protect general interests, including for example the keeping of order in public hearings. The extent of the restrictions must be proportionate to the objectives pursued by the norm. A general prohibition on filming what happens in a court room would violate the principle of proportionality. This is especially true if the proceeding concerns persons involved in politics.

In the present case, broadcasting companies should be allowed to film at least before the beginning of the public hearing, during the breaks and after its end.



Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 3 August 1994 / e) Judgment No. 1 BvR 1279/94 / f) / g) to be published in the Digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Rule of law.

Summary:

An American lawyer had asked to serve a law suit on a German company in Germany. The defendant objected to the service arguing that, as a consequence of the law suit, he would risk having to pay punitive damages, the imposition of which is contrary to fundamental principles of the German Constitution (principle of proportionality; State monopoly to punish).

The Court made an interlocutory judgment prohibiting temporarily the service of the lawsuit. It considered that the disadvantage of serving a lawsuit which may later be declared unconstitutional would outweigh the disadvantage of delaying the service, even if it later proves to be constitutional.



Hungary

Constitutional Court

Reference period:

1 May 1994 – 31 August 1994

Statistical Data

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 10
 - Decisions by chambers published in the Official Gazette: 9
 - Number of other decisions by the Plenary Court: 10
 - Number of other decisions by chambers: 5
 - Number of other (procedural) orders: 12
 - Total number of decisions: 46
-

Important decisions

Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 28/1994. (V.20.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 55/1994.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional proceedings – Decisions – Effects – Retrospective effect.

Fundamental rights – Collective rights – Right to environment.

Keywords of the alphabetical index:

Environment.

Summary:

Some provisions of the amended Acts I and II of 1992 on agricultural cooperatives, which established the rules for distribution of land currently held by cooperatives among their members, were challenged before the Constitutional Court. The original law excluded "national park lands, areas protected by international agreement, and other protected natural territories" from distribution, unless such lands were already under certain forms of cultivation. The Parliament proposed amendments to the existing law in order to expand the number of cultivations under which distribution would be allowed, and sought to establish that protected areas could be privately owned. The Court declared that the amendments, since they would deprive of protection parts of the environment that had already been legislatively declared to be protected, violated the constitutional rights to a healthy environment and to the highest possible level of physical and spiritual health. In the opinion of the Court these rights have a special status; therefore the State is required to give legal and institutional guarantees to environmental protection. The level of such protection must be high according to objective standards – said the Court – and once a certain level of protection has been accorded by the State, it cannot be withdrawn.

Supplementary information:

Two judges wrote a dissenting opinion.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 34/1994. (VI.24.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 68/1994.

Keywords of the systematic thesaurus:

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

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

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

Fundamental rights – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

Freedom of academic research / Freedom of information.

Summary:

The Constitutional Court ruled to be unconstitutional several provisions of legal regulations on the protection of archives dating from 1969, namely governmental decrees concerning research in public archives, as well as decrees regulating classified materials. The case concerned access to archives of documents which belonged to the Communist Party and were declared by law property of the Hungarian State. Under the 1969 legislation those documents could be consulted only with the permission of the Minister of Culture and Education.

The Court gave an interpretation of the relation existing between freedom of research and freedom of information. The Hungarian Constitution contains a provision concerning freedom of scientific research (Art. 70/G) which states that the decision of scientific issues upon merit and the determination of the scientific value of research should be the exclusive rights of qualified scholars (Art. 70/G (2)). Freedom of research is closely connected to freedom of expression and it obliges the State to respect the independence of academic life. The State must remain neutral in academic and scientific questions, but it must guarantee freedom of research and the distribution of its results. Freedom of information can be constitutionally limited only when it is justified for the protection of another fundamental right or freedom.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 29/1994. (V.20.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 55/1994.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Personal identification number / Data protection.

Summary:

The decision followed up a 1991 decision of the Constitutional Court that declared unconstitutional the unlimited, general and uniform use of personal identification number (PIN). The Court also ruled that the collection and processing of personal data in the absence of a definite purpose and for arbitrary future use are unconstitutional. In the present ruling the Court delivered its opinion with reference to the use of the PIN in specific cases. It declared that a decision in a minor offence cannot contain the PIN of the delinquent. It declared also unconstitutional the obligatory use of two different systems of personal identification for the same purpose. This part of the decision concerned the use of two different PINs in a special identity card entitling to the use of social security services.

Supplementary information:

Established case-law.



Identification:

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 35/1994. (VI.24.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 68/1994.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Land property.

Summary:

Several provisions of a new law on arable land have been challenged by the President of the Republic before the promulgation of that law. As a result of a preliminary control of constitutionality, the Constitutional Court upheld the challenged provisions. The Court has several times declared that the Constitution is neutral from the point of view of economic policy. A prohibition of economic intervention by the State cannot be derived from the Constitution. The Constitutional Court cannot adjudicate upon the economic policy of the legislative and executive.

In the specific case the Constitutional Court took into consideration that arable land is a limited good and cannot be substituted or increased. This justifies the imposition of reasonable limits on the acquisition of arable land. However, it emphasised that restrictions on the acquisition of arable land in order to promote the development of appropriate property structures must be provisional and reasonably motivated. The exclusion of foreign citizens from the acquisition of land property was found by the Court appropriate and reasonable. It upheld the constitutionality of a provision excluding Hungarian corporations from the acquisition of arable land, thus hoping to prevent any abuse of right.

Supplementary information :

Three judges wrote dissenting opinions – including the President of the Court who wrote a concurring opinion as well.



Identification :

a) Hungary / b) Constitutional Court / c) / d) / e) Decision No. 36/1994. (VI. 24.) AB határozat / f) / g) Magyar Közlöny (Official Gazette) No. 68/1994.

Keywords of the systematic thesaurus :

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

Keywords of the alphabetical index :

Defamation against public officials.

Summary :

Hungarian criminal law protects public authorities and public officials against libel, defamation and other insults. The Constitutional Court declared unconstitutional Art. 232 of the Penal Code that prohibits defamation and libel against public officials. The Court found the provision unconstitutional because it unnecessarily limited freedom of expression.

The Court emphasised that this article punished libel and defamation against public officials in the same way as those committed against private persons. It also provided punishment for value judgments, which is an unnecessary and disproportionate limitation of the fundamental right to freedom of expression. Finally, the challenged provision differentiated neither between true and false statements, nor between a malicious and an unintentional commission of the offence.

In more general terms, the Court stated that the protection granted by criminal law to the honour of public authorities and officials is unconstitutional. In the case of libel and defamation against a politician or a public official a greater degree of insult may be tolerated than in the case of private persons.

Supplementary information :

A judge wrote a dissenting opinion which was approved by another judge.



Ireland

Supreme Court

Reference period:

1 May 1994 – 31 August 1994

Important decisions

Identification:

a) Ireland / b) Supreme Court / c) / d) 14 July 1994 / e) Appeal No 105/89 / f) McMathuna v Ireland and the Attorney General / g).

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.

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

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

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

Keywords of the alphabetical index:

Constitutional validity / Social security / Tax law.

Summary:

The Supreme Court upheld the decision of the Hight Court that certain provisions of the Income Tax Act, 1967 and the Social Welfare (Consolidation) Act, 1981 were not constitutionally invalid by reason of providing smaller financial support for the Plaintiffs as married parents living together than that provided for single parents or separated married parents.



Identification:

a) Ireland / b) Supreme Court / c) / d) 26 July 1994 / e) Appeal No 338/92 / f) Touhy v Courtney and Others and the Attorney General / g).

Keywords of the systematic thesaurus:

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

Constitutional justice – Constitutional proceedings – Procedure – Parties – *Locus standi*.

Fundamental rights – Governing principles – Limits and restrictions.

Fundamental rights – Civil and political rights – Other.

Keywords of the alphabetical index:

Balance of interests / Statute of limitation.

Summary:

The Supreme Court found that Section 11 of the Statute of Limitations, 1957 (which the Plaintiff had claimed had so operated as to time-bar his action before he could reasonably be expected to appreciate that he had any significant claim) was not constitutionally invalid.



Italy

Constitutional Court

Reference period :

1 May 1994 – 31 August 1994

Statistical data

Meetings of the Constitutional Court during the period 1 May 1994 to 31 August 1994 :

5 public hearings and 9 in chambers. The Court gave 201 decisions in all ;

Decisions given in cases where constitutionality was a secondary issue : 27 judgments, 5 of them finding measures complained of unconstitutional, and 74 court orders ;

Decisions given in cases where constitutionality was the main issue : 23 judgments, 12 finding measures complained of unconstitutional, and one court order ;

Decisions given in constitutional proceedings concerning conflicts of authority between the state and the regions (over the definition of their respective powers) : 7 judgments.

Important decisions

Identification :

a) Italy / b) Constitutional Court / c) / d) 26 May – 8 June 1994 / e) Judgment no. 224 / f) / g).

Keywords of the systematic thesaurus :

Constitutional justice – Types of litigation – Litigation over the distribution of powers between central government and its subdivisions.

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

Constitutional justice – Constitutional proceedings – Types of claim – Claim by public body – Organs of regional authorities.

Sources of constitutional law – Categories – Written rules – European Community law.

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

Keywords of the alphabetical index :

Special statute regions / Autonomous provinces / European Community directives / Banks.

Summary :

The regions and provinces which lodged the appeal (special statute regions of Trentino-Alto Adige and Sardinia and autonomous provinces of Trento and Bolzano) cannot rely on the special binding force of the rules laid down in their special statute (approved under a constitutional law) to justify the continued exercise of their powers in respect of credit schemes when such powers may only be exercised insofar as their substance does not exceed the limits established by Community law and by the state's subsequent application measures. When state laws, in this case the new single text on banking, are required to apply Community directives, they can curtail the exercise of regional powers even if those powers derive from constitutional or quasi-constitutional rules, having regard to the supreme principles of the legal system.

Supplementary information :

With regard to the problems posed by the existence of Community rules in fields for which the Constitution makes the regions responsible, see Judgments nos. 339/1987 ; 632/1988 ; 349/1991 ; 306/1992 ; 437/1992 ; 117/1994.



Identification:

a) Italy / b) Constitutional Court / c) / d) 8 – 10 June 1994 / e) Judgment no. 240 / 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 – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Pensions.

Summary:

Article 38, paragraph 2 of the Constitution, which establishes the right of workers to adequate means for their requirements in cases of accident, illness, disability and old age, does not rule out the possibility of a legal measure to reduce permanently, where limits on public expenditure are necessary, the amount of the allowance to which such workers were previously entitled. Moreover, as the court has already ruled that the application of the constitutional principle requires a balance, that can be adjusted over time according to circumstances, between the personal rights inherent in social security protection and the “principles associated with the actual present availability of financial resources and means necessary to cover the related expenditure commitment” (Judgment no. 119/1991).

However, a new law modifying the amount of current pensions through a lowering of the standard of living secured by social security allowances must contain a transitional measure which, based on the solidarity principle set out in Article 38 of the Constitution, and linked to the rationality-equity principle (Article 3 of the Constitution), ensures a gradual transition from the current regime to the less favourable one.

Supplementary information:

The Court in this case adopted a “manipulatory” judgment (*sentenza manipolativa*) by declaring the rule unconstitutional and therefore invalid and replacing it with another rule conforming to the Constitution. As a result of this decision, many pensioners will be entitled to larger monetary allowances. The fact of restoring a constitutionally legitimate situation has led, in this case, to considerable expense for the biggest national social security fund and, consequently, for the Treasury. This has been criticised by some members of the current majority and the government who have accused the Court of aggravating, as a result of its decisions, the state’s already considerable budget deficit.



Identification:

a) Italy / b) Constitutional Court / c) / d) 23 June – 6 July 1994 / e) Judgment No. 281 / f) / g).

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Adoption / Common law family.

Summary:

An individual’s desire to adopt a child outside the bonds of marriage may not be considered as an inviolable human right.

Even when the common law family is recognised as a social unit, it cannot have a guaranteed right to adopt as a family constituted by marriage can.

There is no ignoring the spread, as social attitudes change, of cohabitation *more uxorio*; nor can it be denied that, for the protection of the interests of minors, the strength of marriage bonds may rest on a long period prior to marriage itself, characterised by a fully communal life, which acquires a binding character through marriage.

Where the choice of adoptive parents is concerned, a couple married for less than three years may be selected if they have lived together as man and wife for a long period before marriage. However, it is for the legislator (not the constitutional judge) to decide on criteria which will guarantee a degree of uniformity throughout the territory, so as to guard against difference of treatment with regard to both the children to be adopted and the couples.

Supplementary information:

With regard to the purpose of adoption and the protection of the child’s main interest, the Court refers, by way of precedents to its own judgments Nos. 89/1993 ; 310/1989 ; 404/1988 ; 198 and 237/1986 ; 11/1981 ; 45/1980.

As to the need, with a view to an adoption, for continued cohabitation of the couple prior to the establishment of “a stable and harmonious family environment”, reference is made to the recent Judgment No. 184/1994.



Identification:

a) Italy / b) Constitutional Court / c) / d) 6 – 15 July 1994 / e) Judgment no. 301 / f) / g).

Keywords of the systematic thesaurus:

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

Institutions – Courts – Military Courts – Procedure.

Keywords of the alphabetical index:

Accused person / Hearings.

Summary:

The inviolable right of defence in criminal proceedings, guaranteed by law, gives the accused the possibility of taking part in the hearings; however, at the same time, this possibility must not become an obligation, particularly when the presence of the accused is not necessitated by the particular requirements of the judgment; this principle shall apply equally to courts martial.

Supplementary information:

With regard to the rule that the absence of the accused from the hearings is an act of free will, the Court refers to Judgment No. 9 of 1982. As for the rule that the absence of the accused from the hearing does not obstruct the course of justice, reference is made to Judgment No. 11 of 1978. Lastly, the Court refers to Judgment No. 278 of 1987 which, inter alia, noted from the Constitution that it is impossible to continue today to consider that military justice may be applied along the same lines as military “disciplinary justice”.



Identification:

a) Italy / b) Constitutional Court / c) / d) 19 – 25 July 1994 / e) Judgment no. 341 / f) / g).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Insulting behaviour towards a public official / Ministerial officer / Proportionality of penalties.

Summary:

The legislator is responsible for determining the severity and nature of the penalty; the Court retains the

possibility of verifying, under its discretionary power, the legislator's observance of the criteria of “ragionevolezza”.

The rehabilitation aspect of the sentence must not be seen as confined to the execution phase; this implies the consistent application of the principle of proportionality between the offence and the severity and nature of the penalty.

The provision providing for six months imprisonment as a minimum penalty for “ottràgio” (editor's note: insulting behaviour towards or defamation of a person exercising public authority) is in keeping neither with Italian liberal tradition nor with European tradition; this provision is the result of the authoritarian conception of relations between persons exercising public authority and individuals, the conception that was typical during the regime under which the Criminal Code came into force in 1930. This conception is alien to the democratic ethos and to the Constitution, according to which the relationship between the administration and society is that of an instrument serving to protect the interests of the latter; therefore, the rigid severity of the minimum penalty decreed in 1930 by the legislator results from a clearly unreasonable balance between the protection of the honour and prestige of a person exercising public authority and the personal freedom of the guilty party; this has inevitably produced a sense of unease in society, and among judges in particular, which the legislator has not been able to remedy.

The nature of the offences constituting insulting behaviour towards a public official (“ottràgio”) means that the punishment is more severe than for insult (“ingiùria”), since it challenges the prestige and smooth operation of public administration; however, in cases of mild “ottràgio” those interests are affected so slightly that there is no justification for the minimum penalty being 12 times greater than the minimum penalty for “ingiùria”; moreover, once the provision relating to that minimum sentence has been superseded, the legislator will be able to provide for a penalty that is different from the penalty for “ingiùria”, on condition that the latter is reasonable and consistent with the principles set out in the reasons.

Supplementary information:

In the past, the Court had rejected constitutionality issues based on the alleged “irragionevolezza” of the difference between the penalty for “ottràgio” and the penalty for “ingiùria” (while recognising that the rule just criticised was the expression of an authoritarian conception). In this respect, see Judgments Nos. 109/1968, 165/1972 and 54/1980, in which it is stated that the proposed reform was the responsibility of the legislator, see also Judgment Nos. 323/1988 and Order Nos. 127/1989.

In Judgment Nos. 409/1969, the Court clearly stated that the principle of equality always includes the requirement that the penalty should be in proportion to the

negative value of the offence committed. Similarly, see the recent Judgement Nos. 343 and 422 of 1993. The rehabilitation aspect of the sentence should not be confined to the execution phase; this implies proportionality between, on the one hand, the nature and severity of the sentence and, on the other, the seriousness of the offence. See also Judgment No. 313 of 1990, and also Judgments Nos. 343 and 422 of 1993 cited above.



Lithuania

Constitutional Court

Reference period:

1 May 1994 – 31 August 1994

Statistical data

Total:

8 final decisions including:

- 4 rulings concerning the compliance with the Constitution;
- 3 rulings concerning the compliance of the decisions (resolutions) of the Seimas (Parliament) with the Constitution;
- 1 ruling concerning the compliance of governmental directives with the laws;
- 1 final decision was adopted to cancel judicial proceedings.

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

Important decisions

Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 27 May 1994 / e) Case No 12/93 f) / g) / f) / g) Publication Valstybes žinios 42-771 94.06.03.

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 – Legislative bodies.

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

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

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

Keywords of the alphabetical index:

Denationalisation / Fundamental rights / Private property.

Summary:

A group of deputies of the Seimas (Parliament) requested the Constitutional Court to examine whether some articles of the Law "On Appending and Amending the Law of the Republic of Lithuania, regulating Procedure and Conditions of the Restitution of the Rights of Ownership to the Existing Real Property" were consistent with the Constitution of the Republic of Lithuania. The Constitutional Court established that some provisions that set up limitations on the restitution of land in forest districts, national parks and in a rural area as well as limitations on the restitution of ownership to inland waters are not consistent with Article 23 of the Constitution.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 15 June 1994 / e) Case No 11/93 9/94 / f) / g) Publication: Valstybes žinios 42-889 94.06.22.

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 force of law.

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

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

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

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

Keywords of the alphabetical index:

Denationalisation / Fundamental rights / Private property.

Summary:

The case was initiated by a group of deputies who requested to examine the constitutionality of some articles of the law "On Amending the Law regulating the Procedure and Conditions of the Restitution of the Right of Ownership to the Existing Real Property". The Constitutional Court ruled that the condition set forth in the above mentioned law according to which residential houses shall not be returned when tenants do not agree to change the lease contract, is not in conformity with the provisions on property protection established in Article 23 of the Constitution.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 27 June 1994 / e) Case No 2/94 / f) / g) Publication Valstybes žinios 50-948 94.07.01.

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 force of law.

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

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

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

Keywords of the alphabetical index:

Fundamental rights / Private property / Privatisation of flats.

Summary:

The case was referred to the Constitutional Court by the Presidium of the Supreme Court of Lithuania who requested to examine the constitutionality of the norms of the Law on the Privatisation of Apartments which provided for the privatisation of hostel rooms of institutions of higher education. The petitioners invoked Article 40 (3) of the Constitution which grants autonomy to institutions of higher education. The Constitutional Court ruled that the principle of equality prevails over the autonomy of universities and held that the mentioned law is not inconsistent with the Constitution.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 30 June 1994 / e) Case No 13/93 / f) / g) Publication: Valstybes žinios 51-979 94.07.08.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Parliamentary rules.

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 – Review of validity of elections.

Keywords of the alphabetical index:

Competence / Elections.

Summary:

The ruling concerning the constitutionality of the Seimas Resolution "On refusal of some members of the Central Electoral Committee to abide by the Law on Elections to the Seimas, upon nullifying the unlawful resolution of the Central Electoral Committee by the Supreme Court of the Republic of Lithuania" This case was initiated by a group of Deputies who argued that the Seimas had acted beyond its powers. The

Constitutional Court ruled that the above-mentioned Seimas Resolution is not inconsistent with the Constitution.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Decision of 11 July 1994 / e) Case No 14/93 / f) / g) Publication: Valstybes žinios 54-1022 94.07.13.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Parliamentary rules.

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

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

Institutions – Legislative bodies – Parliaments – Powers.

Keywords of the alphabetical index:

Competence / Elections.

Summary:

The ruling concerns the constitutionality of the Seimas (Parliament) Resolution "On the formation of the Central Electoral Committee". A group of Deputies argued that the Seimas had infringed the Constitution because it was specified in the said Resolution that the newly formed Central Electoral Committee had to carry out the activities and resolve the issues left behind by the previous Central Electoral Committee. The Constitutional Court ruled that the above-mentioned Resolution is non inconsistent with the Constitution.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Decision of 11 July 1994 / e) Case No 5/94 / f) / g) Publication: Valstybes žinios 54-1033 94.07.15.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Presidential elections.

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

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

Institutions – Head of State.

Keywords of the alphabetical index:

Elections / President of the Republic.

Summary:

A group of deputies of the Seimas (Parliament) asked the Constitutional Court to examine whether some articles of the Law on Presidential Elections were consistent with the Constitution. The dispute concerned the main electoral institution. The said Law provided for a Presidential Electoral Committee, but the Constitution established only one electoral body - the Central Electoral Committee. According to the Court, this situation gave rise to a lacuna in the law. Therefore, the Constitutional Court decided to cancel the case.



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 15 July 1994 / e) Case No 1/94 / f) / g) Publication: Valstybes žinios 56-1103 94.07.22.

Keywords of the systematic thesaurus:

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

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

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

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

Institutions – Executive bodies – Powers.

Keywords of the alphabetical index:

Competence / Government / Private property.

Summary:

A local court asked the Constitutional Court to rule on the constitutionality of some norms of the Government Resolution partial amending the governmental Resolution "On the implementation of the Law of the Republic of Lithuania regulating the Procedure and Conditions of the Restoration of the Rights of Ownership to the

Existing Real Property". The Constitutional Court ruled that some of the above-mentioned norms are not consistent with the Constitution and the laws.



the same session which fails to adopt the submitted provisions of the law" (these norms restrict the citizens' right to initiate a referendum and distort their will).



Identification:

a) Lithuania / b) Constitutional Court / c) / d) Ruling of 22 July 1994 / e) Case No 18/94 f) / g) Publication Valstybes žinios 57-1120 94.07.27.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums.

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

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

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

Keywords of the alphabetical index:

Elections / Popular referendum.

Summary:

The case was initiated by a group of deputies who requested to examine the constitutionality of some articles of the Law on "Amending and Appending the Law on Referendums". The Constitutional Court established that the following norms are not consistent with the Constitution:

- "Provisions of Laws on economic issues may be adopted by referendum after an examination of their possible economic consequences" (because said provisions restrict sovereign powers of the People);
- "A citizen shall write himself all the data while signing for initiating a referendum" (hereby the citizen's constitutional right to participate in the government of their State is denied);
- "In cases when the Seimas holds that the draft provisions of a law submitted for a referendum is not consistent with the Constitution, the question whether the Constitution should be amended must be considered first" (because said provisions restrict sovereign powers of the People);
- "In cases when the Seimas decides to consider and adopt provisions submitted for a referendum, the announcement of a referendum may be postponed. However, the referendum must be announced in

Netherlands

Supreme Court

Reference period:

1 February 1993 – 1 July 1994

Important decisions

Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 19 February 1993 / e) No. 8112 / f) / g) AB 1993, 305.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional Jurisdiction – Relations with other institutions – Legislative bodies.

Constitutional Justice – The subject of review – Constitution.

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

Keywords of the alphabetical index:

Obligation to legislate.

Summary:

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

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 19 February 1993 / e) No. 14,917 / f) / g) NJ 1993, 624.

Keywords of the systematic thesaurus:

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

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

Fundamental Rights – Governing principles – Limits and restrictions.

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

Keywords of the alphabetical index:

Identity investigation / Fingerprints.

Summary:

An investigation into the identity of an alien, carried out by the taking and distributing of fingerprints, constituted an interference with her right to respect for her private life within the meaning of Article 8 (1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Aliens Act states that for there to be a well-founded reason to take fingerprints, there must be a well-founded reason to question the identity of the alien. On the basis of the requirement of proportionality enshrined in article 8 (2) of the ECHR, it must be assumed that if the alien is in possession of a valid passport (or similar document) that apparently establishes the person's identity, it is only in exceptional circumstances that a well-founded reason can exist for taking fingerprints; even if there is good reason to question the authenticity of a passport, or alternatively to suspect that it has been tampered with, it is in general not permissible to proceed immediately to take fingerprints when there is an alternative way of effectively resolving such doubts in the short term.



Identification:

a) The Netherlands / b) Supreme Court / c) third division / d) 10 March 1993 / e) No. 28,909 / f) / g) BNB 1993/164.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Procedure – Grounds – Other.

Institutions – Courts – Ordinary courts – Civil courts.

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

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

Keywords of the alphabetical index:

Taxes / Prompt information.

Summary:

If a taxpayer, who protests against an increased tax assessment imposed on him, is of the opinion that the tax inspector has failed in the duty of prompt notification incumbent on him pursuant to Article 6 (3) (a) of the ECHR, he should bring his case before the Court. A general observation on the applicability of Article 6 of the ECHR, without reference to the duty of prompt notification as such, is insufficient as a means of protest.



Identification:

a) The Netherlands / b) Supreme Court / c) third division / d) 21 April 1993 / e) No. 28,726 / f) / g) BNB 1993/205.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Parliaments – Powers

Institutions – Legislative bodies – Law-making procedure.

Institutions – Legislative bodies – Guarantees as to the exercise of power.

Keywords of the alphabetical index:

Superiority of the law.

Summary:

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 7 May 1993 / e) No. 8152 / f) / g) AB 1993, 440.

Keywords of the systematic thesaurus:

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

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Equality / Discrimination / Salaries.

Summary:

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 28 May 1993 / e) No. 14,988 / f) / g) NJ 1993, 625.

Keywords of the systematic thesaurus:

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

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

Fundamental Rights – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Family life.

Summary:

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

The existence of a family life within the meaning of Article 8 of the ECHR may not be assumed on the mere grounds of the blood relationship between an uncle and his nieces and nephews. Nor is there anything in

Article 8 to support the view that this article might protect the mere intention to enjoy family life, in the case of a blood relationship of this degree. Therefore, the residence permit was properly refused.



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 11 June 1993 / e) No. 8146 / f) / g) NJ 1993, 560.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Biological father / Family life.

Summary:

A biological father requested that access arrangements be made in relation to his minor child with whom he had lived for 1 years. The father had had no contact with the minor for 9 to 10 years.

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 18 June 1993 / e) No. 15,015 / f) / g) NJ 1994, 347.

Keywords of the systematic thesaurus:

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

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

Fundamental Rights – Governing principles – Limits and restrictions.

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

Sources of Constitutional Law – Written rules – Constitution.

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.

Keywords of the alphabetical index:

Rape / HIV virus.

Summary:

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

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 25 June 1993 / e) No. 15,049 / f) / g) NJ 1994, 140.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Protection of personal life of minor child.

Summary:

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

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 17 September 1993 / e) No. 8280 / f) / g) NJ 1993, 738.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Procedure – Parties – Representation – The Bar.

Institutions – Courts – Procedural safeguards – Fair trial.

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

Keywords of the alphabetical index:

Fair hearing / Legal aid.

Summary:

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

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 17 September 1993 / e) No. 8261 / f) / g) NJ 1994, 373.

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.

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

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:

Repudiation of paternity / Family life.

Summary:

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

The relationship that exists between the biological father and the child must be classified as "family life" within the meaning of Article 8 (1) of the ECHR. This means that they are both entitled to legal recognition of their relationship under family law. The aforementioned provision of the Civil Code impedes the father from acknowledging his child and thus constitutes an interference in their family life. The father and mother could have removed this impediment by marrying within one year, but in this respect too the provision constituted an interference as to accept it would be to oblige them to enter into a marriage against their will. Given the fact that the distinction between legitimate and natural children is gradually disappearing, the original weighing of interests on which the provision of the Civil Code was based (the status of legitimate child versus a legal relationship under family law with the biological father) can no longer be regarded, in cases such as this one, as a sufficient justification within the meaning of Article 8 (2) of the ECHR for the interference engendered by the provision of the Civil Code. A reasonable application

of the law would ensure that a statement of acknowledgement by the parents will have legal consequence.



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 12 November 1993 / e) No. 8213 / f) / g) RvdW 1993, 221.

Keywords of the systematic thesaurus:

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

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

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:

Free movement of persons.

Summary:

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

The right of free entry to, and establishment on, all the islands was based on a principle of Antillean constitutional law. This right is of fundamental significance, having regard to its nature and viewed in the light of the provisions of Article 2 of the Fourth Protocol to the ECHR and Article 12 (1) of the International Covenant on Civil and Political Rights.

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 19 November 1993 / e) No. 8380 / f) / g) NJ 1994, 330.

Keywords of the systematic thesaurus:

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

Fundamental Rights – Civil and political rights – Other.

Keywords of the alphabetical index:

Family life.

Summary:

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

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



Identification:

a) The Netherlands / b) Supreme Court / c) third division / d) 1 December 1993 / e) No. 243 / f) / g) BNB 1994/64, AB 1994, 55.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Equality.

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

Sources of Constitutional Law – Categories – Unwritten rules – General principles.

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

Keywords of the alphabetical index:

Discrimination on the grounds of sex / Equality.

Summary:

A married woman requested invalidity benefit as from 1 November 1982. Her application was denied on the grounds that her husband was employed in Germany and that therefore her request came within the scope

of German social security. A married man whose wife works abroad, on the other hand, is eligible for invalidity benefit on the grounds of a generally binding regulation.

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 21 January 1994 / e) No. 15,309 / f) / g) NJ 1994, 473.

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Hierarchy between fundamental rights.

Summary:

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

The Copyright Act protects the person depicted against violations of his right to respect for his private life, but this right does not possess an absolute weight that is in principle greater than the right to freedom of expression. Two freedoms are at issue here, which are

of essential importance both for the life of the individual and for democratic society as such, and there are no grounds for introducing a hierarchy between the two.

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 28 January 1994 / e) No. 15,227 / f) / g) RvdW 1994, 40.

Keywords of the systematic thesaurus:

Constitutional Justice – Constitutional proceedings – Procedure – Parties – Representation – The Bar.

Institutions – Courts – Procedural safeguards – Fair trial.

Fundamental Rights – Civil and political rights – Other.

Keywords of the alphabetical index:

Right to legal assistance.

Summary:

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

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

his lawyer will have such an unfavourable effect on that state of health that it must be deemed irresponsible.



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 25 February 1994 / e) No. 8345 / f) / g) NJ 1994, 437

Keywords of the systematic thesaurus:

Fundamental Rights – Governing principles – Limits and restrictions.

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

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:

Adoption.

Summary:

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

The family life that is protected by Article 8 (1) of the ECHR may of its nature, in principle, imply the right to adoption. The natural parent's right to veto an adoption, enshrined in the Civil Code, is not absolute, as it is restricted by the principle to be applied in this case, that powers may not be invoked in an abusive manner.



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 8 April 1994 / e) No. 8397 / f) / g) NJ 1994, 439.

Keywords of the systematic thesaurus:

Fundamental Rights – Civil and political rights – Other.

Keywords of the alphabetical index:

Maintenance obligations.

Summary:

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

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 8 April 1994 / e) No. 15,292 / f) / g) RvdW 1994, 88.

Keywords of the systematic thesaurus:

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

Fundamental Rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Equality / Unlawful distinction.

Summary:

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

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

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



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 15 April 1994 / e) No. 15,307 / f) / g) RvdW 1994, 94.

Keywords of the systematic thesaurus:

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

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

Fundamental Rights – Civil and political rights – Other.

Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.

Keywords of the alphabetical index:

Right of child to know his father.

Summary:

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

The right to know one's parentage is not absolute: it is superseded by the rights and freedoms of others when these weigh more heavily in a particular case. As far as determining priorities is concerned, between on the one hand the right of a natural child over the age of majority to know who fathered him or her and the right of the mother (encompassed by her right to respect for her private life) to conceal this matter, even from her child, the child's right must be deemed to prevail. This order of priority is justified not only by

the vital importance of this right to the child, but also because the mother, as a rule, is in part responsible for the child's existence. It should be noted here that this case does not concern artificial insemination. The same applies to the interests of the (probable) father as to those of the mother.



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 15 April 1994 / e) No. 15,493 / f) / g) RvdW 1994, 96.

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Jurisdiction.

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

Fundamental Rights – Civil and political rights – Other.

Keywords of the alphabetical index:

Family life / Right to care for the child.

Summary:

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

As both the mother and the child were resident in the Netherlands, they came within the jurisdiction of the Netherlands within the meaning of Article 1 of the ECHR. The Netherlands is therefore bound to respect the rights and freedoms of both mother and child as safeguarded by the ECHR. By virtue of the single fact of birth, the two have a "family life" within the meaning of Article 8 of the ECHR. An essential part of this family right is the right of mother and child to have the child cared for and brought up by the mother, and their right to enjoy each other's company. Preventing them from exercising these rights constitutes interference within the meaning of Article 8 (2) of the ECHR.

The single circumstance that the mother does not have parental authority over the child in accordance with Brazilian law, and that she is unlikely to acquire this authority in the near future, cannot be regarded as circumstances that may justify restrictions on the right to family life, according to the standards of Article 8 (2) of the ECHR. If the child's interests are at odds with

the granting of the mother's application, this does constitute grounds that are admissible under Article 8 (2) of the ECHR for denial of the application.



Identification:

a) The Netherlands / b) Supreme Court / c) first division / d) 22 April 1994 / e) No. 15,322 / f) / g) RvdW 1994, 100.

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 – Inviolability of the home.

Keywords of the alphabetical index:

Taxes / Seizure.

Summary:

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

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

Inasmuch as the seizure of moveable property in the marital home may be regarded as interference in the wife's exercise of her right to respect for her private life within the meaning of Article 8 (1) of the ECHR, this interference is nevertheless admissible under the terms of Article 8 (2). It derives sufficient justification from the government's need to ensure payment of taxation in situations in which such payment could easily be frustrated. Furthermore, there is a clear and sufficient statutory basis for such action, within the meaning of Article 8 (2) of the ECHR, in the policy regulations that have been drawn up and published by the Tax Department.

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



Norway

Supreme Court

Reference period:

1 May 1994 – 31 August 1994

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



Poland

Constitutional Tribunal

Reference period:

1 May 1994 – 31 August 1994

Statistical data

Types of review:

Ex post facto review: 5

Preliminary review: -

Abstract review (Art. 22 of the Constitutional Tribunal Act): 5

Courts' referrals ("legal questions", Art. 25 of the Constitutional Tribunal Act): -

Challenged normative acts:

Cases concerning the constitutionality of statutes: 4

Cases on the legality of other normative acts under the Constitution and statutes: 1

Decisions:

Cases decided on their merits: 5

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: 1

Holdings:

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): 1

Upholding the constitutionality of the provisions in question: 3

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

Binding interpretations of laws issued: 5

Motions requesting such interpretations rejected: -

Subject matter of important decisions

Audiovisual media

(case No. W 7/94 – May 10, 1994)

(case No. K 17/93 – June 7, 1994)

Local self-government

(case No. W 14/93 – June 28, 1994)

Environmental protection

(case No. W 14/93 – June 28, 1994)

Freedom of conscience / Freedom of opinion

(case No. K 17/93 – June 7, 1994)

State secrets./ Secret services

(case No. W 3/94 – June 13, 1994)

Taxation – governing principles

(case No. K 1/94 – May 24, 1994)

Other information:

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

– on the 20th sitting (May 11-13, 1994):

- decision of December 7, 1993 (case No. K 7/93), concerning the 1992 amendment to the Excess Wages Tax Act;

- decision of December 14, 1993 (case No. K 8/93), regarding the 1993 amendment to the Personal Income Tax Act;

– on the 22nd sitting (June 9-11, 1994):

- decision of November 9, 1993 (case No. K 11/93) regarding the 1993 amendment to the Act on Courts of General Jurisdiction.

On its 21st sitting (May 26-28, 1994) the Sejm elected the former Supreme Court judge Krzysztof Kolasinski the Judge of the Tribunal (his term will expire in 1997).

Important decisions

Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Resolution of 10 May 1994 / e) Case No. W 7/94 / f) / g).

Keywords of the systematic thesaurus:

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

Constitutional justice – Types of litigation – Other litigation.

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

Constitutional justice – Constitutional proceedings – Types of claim – Claim by a 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 – Principles of State organisation – Other.

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:

Audiovisual media / Legality of the activities of the State bodies.

Summary:

According to Art.36 "b" of the Constitutional Provisions Continued in Force and pursuant to the relevant provisions of the 1992 Law on Radio and Television Broadcasting, the National Council of Radio and Television is an independent State agency, the task of which is to safeguard the pluralism of audiovisual media and freedom of speech in radio and television in order to ensure the citizens' right to information. The members of the Council (nine in number) are appointed by the Sejm, the Senate and the President of the Republic of Poland. They may be removed only under circumstances strictly listed in the 1992 Law (e.g. a flagrant violation of the Law on Radio and Television Broadcasting or a conviction for an intentional crime. The President of the Council is appointed from among its members by the President of the Republic. The 1992 Law is silent on the question as to whether the removal of the President of the Council from his post is possible without removing him at the same time from the Council.

The Tribunal holds that pursuant to the principles deriving from a State governed by the rule of law (Art. 1 of the Constitutional Provisions Continued in

Force) and to the principle of legality (Art. 3 sec. 2 of the Constitutional Provisions Continued in Force), if a provision of a statute does not expressly grant certain competences to a State body, such competences cannot be presumed. In this case it means that the President of the Council may be removed only if at the same time he steps down as a member of the Council. As already mentioned, it is possible only under the circumstances as specified in the 1992 Law.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 24 May 1994 / e) Case No. K 1/94 / 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 public body – Other.

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

Institutions – Principles of State organisation – Rule of law.

Institutions – Principles of State organisation – Other.

Keywords of the alphabetical index:

Law-making / Personal income tax / Non-retrospective effect of laws / Inviolability of acquired rights / Rules of taxation.

Summary:

The subject of the Tribunal's control was a March 1993 amendment to the Personal Income Tax Act, which repealed a prior tax exemption in respect of the income from certain companies, provided it was subsequently expended to purchase shares from the State Treasury or bonds issued by Polish entities. The Legislator decided to give the provision in doubt retroactive effect; it entered into force on the day of its publication on 16 April 1993, but had become effective on 1 January 1993.

The Tribunal declared the said provision unconstitutional as far as it covered the period before its publication in the Official Journal. The way it was enacted violates the constitutional law-making rules (first of all the constitutional prohibition against *ex post facto* laws – *lex retro non agit* principle). The Tribunal holds that the provision in question is not consistent with other constitutional principles e.g. the principle of the protection

of rights justly acquired and the principle of citizens' confidence in the State and in the law enacted by State bodies.

The Tribunal confirms its earlier opinion that the Parliament – within constitutional limits – may regulate the system of taxation and formulate tax policy at its discretion.

Supplementary information:

See also similar cases: K 7/93, K 8/93, K 13/93.



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 7 June 1994 / e) Case No. K 17/93 / 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.

Constitutional justice – Common principles or techniques of interpretation – Other.

Institutions – Principles of State organisation – Rule of law.

Fundamental rights – Civil and political rights – Equality.

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

Fundamental rights – Civil and political rights – Freedom of opinion.

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

Keywords of the alphabetical index:

Audiovisual media.

Summary:

The subject of the Tribunal's control are two provisions of the 1992 Law on Radio and Television Broadcasting: (i) forbidding radio and television broadcasters from infringing the religious feelings of receivers; (ii) obliging public broadcasting organisations to respect the Christian values which correspond with universal ethical rules. In the applicants' opinion, attributing a normative

character to "Christian values" results in giving a privileged position to one system of values. That appears to be contrary to the constitutional principle of equality and infringes the constitutional freedom of expressing and spreading opinions. That would mean that the provisions in question were enacted in contradiction to the basic principle of a State ruled by law.

In March 1994 the provisions in doubt had been the subject of a universally binding interpretation set up by the Tribunal (case no. W 3/93). The Tribunal decided that the said provisions cannot become the basis for the implementation of any kind of preventive censorship for radio and television programming. In the Tribunal's opinion, freedom of expression, regardless of its constitutional character, cannot be perceived as absolute. It may be subject to necessary limitations, provided that those limitations do not infringe the essence of this freedom, that they enter into force pursuant to the Constitution (or in compliance with the Constitution), and that they are established as an exception.

Currently, the Tribunal is supporting this view. The provision (i) does not discriminate against any religion since it secures protection of religious feelings regardless of differences of creed. Such protection constitutes one of the basic guarantees of freedom of conscience and creed. The provision (ii) when construed in compliance with the principles of the Constitution leads to the conclusion that the obligation to respect Christian values does not constitute an obligation to promote them. Any other interpretation would be in contradiction to the principle of equality and moral neutrality of the State. Besides, the provision in question represents only one of many other programming directives regarding public radio and television and refers only to those Christian values that concur with universal ethical principles.

Supplementary information:

See also the resolution of March 2, 1994 (case No. W 3/93).



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Resolution of 13 June 1994 / e) Case No. W 3/94 / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Other litigation.

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

Constitutional justice – Constitutional proceedings – Types of claim – Claim by a 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.
Fundamental rights – Civil and political rights – Right of access to courts.

Keywords of the alphabetical index:

State secret / Secret services / Right of access to court / *Nullum crimen sine lege*.

Summary:

The 1982 State Secrets Protection Act provides that data which may allow identification of police officers and persons cooperating with them constitute a State secret, provided that the persons involved perform "intelligence or counter-espionage duties".

The Tribunal clarified the contents and the scope of the provision in question, rejecting an overly wide interpretation. In particular, data on former police officers should be considered a State secret only if its disclosure might expose to danger the external and internal security of the State or other important State interests.

In the interpretation of the provision in doubt, the Tribunal pointed out a number of legislative infringements resulting from the incoherence of the State Secrets Protection Act with the Polish legal system. As stressed by the Tribunal, the balance between the duty to protect State secrets and the principles of the administration of justice had not been properly struck. E.g. the Act was silent as to the procedure on the basis of which persons testifying before courts could be exempted from the duty to protect a State secret.

Under the Polish Criminal Code the disclosure of a State secret constitutes a crime. One of the provisions of the State Secrets Protection Act provides that information concerning external or internal State security and the armed forces which are considered State secrets are not subject to publication. It means that a person who discloses such information may be criminally liable even if he/she could not recognize the consequences of his/her act. According to the Tribunal this provision does not comply with the principle *nullum crimen sine lege*. Thus it is inconsistent with the constitutional principle of the rule of law.

Supplementary information:

The Tribunal submitted the above mentioned infringements to the Sejm (decision of June 13, 1994 – case No. S 1/94).



Identification:

a) Poland / b) Constitutional Tribunal / c) / d) Decision of 28 June 1994 / e) Case No. W 14/93 / f) / g).

Keywords of the systematic thesaurus:

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

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

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

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

Fundamental rights – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Forests / Environment / Local authorities / Budget.

Summary:

Forest-administration in Poland is subject to restrictive regulation and therefore the rights of forest owners (including owners other than the State Treasury) are limited. The 1991 Forest Act set forth a separate category of forests eligible for special protection (so called "protected forests"). The decision to assign a certain forest to this category is reserved for the Minister of Environmental Protection, Natural Sources and Forestry. The decision is made after consultation with the executive board of the relevant local authority. However, such an opinion is not binding. A forest classified as "protected" is i.a. exempted from forest tax. The Assembly of the Communes of Zielona Góra Province argued that this silence results in a reduction in income of local authorities where the protected forests are located. The fact that local authorities have no influence on decisions classifying forests as protected is – in the applicant's opinion – contrary to the constitutional principle of communes' participation in the exercise of the executive power.

The Tribunal held that the principle of communes' participation in the exercise of the executive power was not of an absolute character. Pursuant to the 1992 Constitutional Act ("Small Constitution") local self-governments perform a substantial part of public tasks, except those which are reserved exclusively to the competence of governmental administration. The provision in question reserves the competence on forest administration to the government administration because questions connected to this special aspect of environmental protection require national solutions. Therefore, the said provision was not inconsistent with the Constitution. Moreover, according to the Tribunal, it was intended to implement the constitutional right to benefit from the natural environment.



Portugal

Constitutional Tribunal

Reference period :

1 May 1994 – 31 August 1994

Statistical data

- Total of 153 judgments, which :
 - Prior scrutiny: 2 judgments
 - Subsequent scrutiny *in abstracto*: 8 judgments (4 of them on procedural matters);
 - Appeals: 131 judgments, of which :
 - substantive issues: 64
 - applications for findings of unconstitutionality: 19
 - procedural matters: 48
 - Complaints: 8 judgments
 - Election of the European Parliament: 2 judgments
 - Referenda and direct consultation of electors at local level: 1 judgment
 - Funding of political parties and electoral campaigns: 1 judgment.
-

Important decisions

Identification :

a) Portugal / b) Constitutional Tribunal / c) 1st Chamber / d) 28 June 1994 / e) Judgment No. 473/94 / f) Evidence / g) Not yet 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 of access to courts.

Keywords of the alphabetical index :

Factual scrutiny / Evidence / Civil procedural measure / Time-limit / Access to the law and to courts.

Summary :

From the standpoint of access to courts the Tribunal examined the constitutionality of various provisions of the Code of Civil Procedure governing time-limits for the submission of evidence substantiating a claim.

Supplementary information :

Further development of established case-law on the general principle of access to the law and to courts.



Identification :

a) Portugal / b) Constitutional Tribunal / c) 2nd Chamber / d) 12 July 1994 / e) Judgment No. 492/94 / f) Income tax / g) Not yet published.

Keywords of the systematic thesaurus :

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

Institutions – Public finances – Taxation.

Keywords of the alphabetical index :

Ex post facto review / Legislative delegation / Taxes.

Summary :

The Assembly of the Republic has sole responsibility for creating new taxes, except where legislation assigns tax-raising powers to the Government. The legislation concerned must state the purpose, extent and duration of such powers, and where the Government exceeds

those powers as so delimited the legal provision under challenge must be regarded as unconstitutional.

Supplementary information:

Established case-law on legislative grant of powers (see Judgment No. 311/93, Bulletin on Constitutional Case-law, No.2, p. 44).

Under the Tribunal's established case-law there is no need to look into substantive unconstitutionality where there is unconstitutionality by virtue of lack of jurisdiction.



Identification:

a) Portugal / b) Constitutional Tribunal / c) 1st Chamber / d) 14 July 1944 / e) Judgment No. 507/94 / f) Inviolability of the home / g) Not yet 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 – Inviolability of the home.

Keywords of the alphabetical index:

Factual scrutiny / Entry and search / House search / Evidence / Criminal procedural guarantees.

Summary:

The Tribunal held it to be unconstitutional to interpret provisions of the Code of Criminal procedure to mean that a house search (in the present case a search of the room of a person suspected of rape) and subsequent removal of evidence could be effected by police officers with the permission of a third party who was not suspected of any offence but owned the premises (in the present case the bedroom concerned).

Supplementary information:

The judgment also raised procedural issues (on which two of the judges delivered a dissenting opinion).



Identification:

a) Portugal / b) Constitutional Tribunal / c) Full court / d) 7 August 1994 / e) Judgment No. 479/94 / f) Identity card / g) Official Gazette (I-A) of 24 August 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 public body.

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

Institutions – Army and police forces – Police forces – Functions.

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Preventive scrutiny / Identity documents / Identity check / Internal security / Public safety / Police measures.

Summary:

The judgment ruled to be unconstitutional provisions whereby, in a place not frequented by criminals, a citizen not suspected of having committed any crime could be subjected to a police identity check and, as a result, detained for up to six hours on grounds of internal security.

Supplementary information:

The judgment also looks at regulations governing identity documents and police checking of identity documents in various European countries.



Romania

Constitutional Court

Reference period :

13 April 1994 – 31 August 1994

Statistical data

Subject and number of decisions

- 8 decisions on the constitutionality of legislation before its enactment
 - 3 decisions on the constitutionality of the rules of procedure of the two chambers of Parliament
 - 59 decisions on objections alleging unconstitutionality, ie:
 - 47 decisions by the trial divisions
 - 12 decisions by the appeal divisions
 - 1 advisory opinion.
-

Important decisions

Identification :

a) Romania / b) Constitutional Court / c) / d) 13 April 1994 / e) Decision No 30 / f) / g) Monitorul Oficial, No.259, 15 September 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 – Right to work.

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

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

Keywords of the alphabetical index :

Lawyer / Pension / International Covenant on Economic, Social and Cultural Rights.

Summary :

The Constitutional Court upheld an objection to Article 5.1.II of Decree 251/1978 on admission to the Bar of persons retiring from other sectors of activity. The provisions concerned were null under Article 150 (1) of the Constitution in that they restricted the right to work as laid down in Article 38 (1) of the Constitution, the right to a retirement pension as laid down in Article 43 (2) of the Constitution, and the right freely to choose an occupation as laid down in Article 38 (1) of the Constitution and Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights, ratified by Romania in Decree 212/1974.



Identification :

a) Romania / b) Constitutional Court / c) / d) 18 May 1994 / e) Decision No 59 / f) / g) Monitorul Oficial No. 259, 15 September 1994.

Keywords of the systematic thesaurus :

Constitutional justice – Type 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.

Institutions – Courts – Administrative courts – Jurisdiction.

Fundamental rights – Civil and political rights – Equality.

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

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

Summary:

The Constitutional Court upheld an objection to Article 175 (1) b of the Labour Code. The provisions were discriminatory in the jurisdiction which they vested in the administrative authorities, contravened the principle of equality of citizens before the law as laid down in Article 16 of the Constitution, and restricted both the right to a court as laid down in Article 21 of the Constitution and the right to a fair trial as laid down in Article 6 (1) of the European Convention on Human Rights, which Romania had ratified by Law 30 of 18 May 1994.

Supplementary information:

In Decision 1 of 2 February 1994 the Plenary Assembly of the Constitutional Court decided that setting up an administrative tribunal was not contrary to the principle laid down in Article 21 of the Constitution provided that the tribunal's decisions could be challenged in a court of law.



Slovakia

Constitutional Court

Reference period:

1 May 1994 – 31 August 1994

Statistical data

Number of decisions taken:

Decisions on the merits by the Plenum of the Court: 3

Decisions on the merits by the Panels of the Court: 3

Number of other decisions by the Plenum: 1

Number of other decisions by the Panels: 20

Total number of cases brought to the Court: 195

Important decisions

Identification:

a) Slovak Republic / b) Constitutional Court / c) / d) 31 May 1994 / e) Decision I. US 20/94 / f) Case of movables belonging to the property of communist parties established in Czechoslovakia / g).

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Quasi constitutional legislation.

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

Institutions – Executive bodies – Powers.

Institutions – Miscellaneous – Political parties.

Keywords of the alphabetical index:

Obligation to restitute the property.

Summary:

In 1990, the Federal Assembly of the Czech and Slovak Federal Republic adopted the constitutional statute No 496/1990 on the Restitution of the Property of the Communist Party of Czechoslovakia to the People of the Czech and Slovak People Federal Republic. According to this constitutional statute, the Communist Party of Czechia and Bohemia, the Communist Party of Slovakia – the Party of left-wing Democrats – and the Communist Party of Czechoslovakia were obliged to restitute to the government of the Czech and Slovak Federal Republic all real and movable property within 30 days from the entry into force of the constitutional statute No 496/1990 they owned. Movable property in the sense of the law did not cover office assets if they had been bought for less than 5.000 Czechoslovak Crowns. The courts applied the provisions of the constitutional statute in very different ways. The Government of the Czech and Slovak Federal Republic in a supplement to its ruling of 30 September 1991 gave its own interpretation of the constitutional statute in order “to unify the application of the constitutional statute.” This interpretation extended the application of the statute to movable office assets valued at less than 5.000 Czechoslovak Crowns.

According to Article 130, (1), (a) of the Constitution of the Slovak Republic: “The Constitutional Court shall commence proceedings upon a petition submitted by not less than one-fifth of all members of the National Council of the Slovak Republic”. According to Article 73, (1) of the Constitution, the National Council of the Slovak Republic consists of 150 members. On 11 February 1994, a group of 30 members of the National Council had submitted its petition to the Constitutional Court asking for an interpretation of Article 1 of constitutional statute No 496/1990.

The Constitutional Court rule that the Government is vested neither with power to pass rulings for the implementation of laws exceeding the limits defined by generally binding rules, nor with the power to give interpretations on such rules. The Constitutional Court then decided that the obligation provided by the constitutional statute No 496 of 1990 does not extend to the restitution movable office assets owned before December 31, 1989, if they had cost less than 5.000 Czechoslovak Crowns.



Identification:

a) Slovak Republic / b) Constitutional Court / c) / d) 15 June 1994 / e) Decision I. US 76/93 / f) Local referendum case / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes – Referendums.

Constitutional justice – The subject of review – Regional measures.

Institutions – Executive bodies – Territorial Administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Local popular referendum.

Summary:

Article 30, paragraph 1 of the Constitution of the Slovak Republic provides as follows: “Citizens shall have the right to participate in the administration of public affairs directly or by freely elected representatives.” The citizens of the small town Tatranská Lomnica that is considered to be a part of the town Starý Smokovec, had exercised their right “to participate in the administration of public affairs” directly, via a petition. Through this petition local government authority of Starý Smokovec was asked to announce a referendum at Tatranská Lomnica on its probable separation from the town of Starý Smokovec. This demand was refused by the members of the local government authority. The refusal was adopted in the form of a ruling of the local government authority “uznesenie” in Slovak. The citizens of Tatranská Lomnica asked the Constitutional Court to review this decision.

Under Law No 369/1990 on Local Self-Government, local government authorities are empowered to regulate life in their district by means of generally binding rules “všeobecne záväzné nariadenia” in Slovak, and by means of regulations. Under Article 127 of the

Constitution, the Constitutional Court is vested with the power to review the final decisions of local government authorities. The Constitution does not explicitly provide for either a right or a prohibition on the issue of reviewing regulations passed by local government authorities. Accordingly, the central issue in this case was whether the Constitutional Court is vested with the power to review regulations of a self-government body. The Constitutional Court had previously ruled that no legal obstacle could prevent citizens from claiming their constitutional right even if the violation had been committed by a local government authority. Therefore, in the case of the inhabitants of Tatranská Lomnica, the Constitutional Court concluded that the right to participate in the administration of public affairs has been violated.



Slovenia

Constitutional Court

Reference period :

13 January 1994 – 31 August 1994

Statistical data

Number of decisions :

There were 10 sessions of the Constitutional Court during this period, in which it dealt with 118 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court register). There were 66 unresolved cases from the previous year at the beginning of the period (1 May 1994). The Constitutional Court accepted 83 new cases during the period of this report, confirming the trend of a steady increase in the number of new cases over the last five years.

In the same period, the Constitutional Court resolved :

- 54 cases, of which there were
- 21 Decisions and
- 33 Resolutions.

All Decisions (21) have been published in the Official Gazette of the Republic of Slovenia, while the Resolutions of the Constitutional Court are not to be published in an official bulletin, but rather handed over to 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 :

- local self-government (7) ;
- regional planning, or the regime of building land (11) ;
- public utility services (3) ;
- taxes, fees and duties (6) ;
- privatisation of former social property (3) ;
- housing administration (3) ;
- citizenship (1) ;
- status of foreigners (1) ;
- social insurance (3) ;
- budget (1) ;
- labour relations (1) ;
- salaries of state office holders and public servants (2) ;
- right to strike (1) ;
- practising lawyers (1) ;
- banking (1) ;
- criminal law (5) ;
- inheritance (1) ;
- judiciary (2) ;
- organisation of radio/television (1).

The new (internal) rules of procedure of the Constitutional Court are still in the process of being adopted by the Constitutional Court.

Important decisions

Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 13 January 1994 / e) U-I-6/93/f)/g) Official Gazette of the Republic of Slovenia, No. 23/94.

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 public body – Other.

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

Constitutional justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

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

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

Constitutional justice – Constitutional proceedings – Decisions – Effects – Influence of judgements on the functioning of state organs and on everyday conduct.

Constitutional justice – Constitutional proceedings – Common principles or techniques of interpretation – Principle of legality.

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

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Military court – Procedure.

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:

Criminal proceedings / Validity of preconstitutional decree.

Summary:

All the elements of the provisions of the Decree on Military Courts of 24 May 1944 are contrary to the Constitution and even at the time of their issuing and use they conflicted with the general legal principles recognised by civilised nations as well as with the Constitution of the Republic of Slovenia. In particular:

a) all those elements of the provisions which were, and insofar as they were, used in specific criminal proceedings to incriminate persons without reference to clearly defined acts of the accused;

b) all those elements of the provisions whose lack of clarity served, and insofar as it served, in specific criminal proceedings as grounds for arbitrary decisions by the courts of that time;

c) all those elements of the provisions which enabled trials for actions carried out prior to the enactment of the decree, and which were not punishable according to general legal principles recognised by civilized nations. The existing regulations for raising objections in criminal proceedings are in contrast with the Constitution since they enable neither the removal of all decrees that are procedurally and substantively wrong and which were issued on the basis of regulations of the revolutionary war and postwar authorities, nor the removal of the consequences of these decrees by means of an extraordinary legal remedy.

Supplementary information:

Dissenting / Concurring opinion of a constitutional judge.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 31 March 1994 / e) U-I-115/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 25/94.

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 – Profit-making corporate body.

Constitutional justice – Constitutional proceedings – Decisions – Types – Annulment.

Constitutional justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

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

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

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

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

Keywords of the alphabetical index:

Interfering with the rights of third parties / Retroactive (retrospective) effect / Third parties' liability / Rule of law.

Summary:

The Law on Protection of Claims in the Processes of Ownership Transformation of Companies and Other Legal Persons is not in accordance with the Constitution because it introduces unlimited liability of third parties for debtor's obligations and thus enables direct and unlimited

interference with their property rights (Constitution, Article 33); because it defines legal relations which have already been legally set out by various civil law provisions, and introduces damage

liability for damage without taking into consideration the causal relation between harmful actions and damage to creditors, which is an infringement of the constitutional principle of a State governed by the rule of law (Constitution, Article 2), and because it retroactively affects legal relations already existing without establishing any public interest, and interferes with the accrued rights of third parties (Constitution, Article 155).



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 31 March 1994 / e) U-I-133/94 / f) / g) Official Gazette of the Republic of Slovenia, No. 32/94.

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 – Profit-making corporate body.

Constitutional justice – Constitutional proceedings – Decisions – Types – Annulment.

Constitutional justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

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

Constitutional justice – Constitutional proceedings – Decisions – Effects – *Erga omnes* effect.

Fundamental rights – Civil and political rights – Right of petition.

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

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

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

Keywords of the alphabetical index:

Rights of third parties, Infringement / Right to appeal and other legal remedies.

Summary:

The third paragraph of Article 51 of the Companies Ownership Transformation Act (Official Gazette of the Republic of Slovenia, nos. 55/92, 7/93 and 31/93) is not in conformity with the

Constitution of the Republic of Slovenia for having retrospective effect on legally concluded and implemented legal transactions and also for infringing the accrued rights of third parties (Article 155 of the Constitution). The provisions of Article 48 (a) of the Companies Ownership Transformation Act (Official Gazette of the Republic of Slovenia, nos. 55/92, 7/93 and 31/93) only make operational the previously prescribed principles of management of socially-owned assets and of business morality; for this reason they do not have retrospective effect on legally established legal relations, and are thus not in conflict with the Constitution of the Republic of Slovenia (Article 155).

Legal entities under any obligation arising from a decision of an auditing agency are entitled to judicial protection of full jurisdiction. For this reason, the provisions of Articles 48 (b) and 48 (c) of the Companies Ownership Transformation Act are not in conflict with Articles 2, 8, 22, 23, 25 and 157 of the Constitution of the Republic of Slovenia.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 7 April 1994 / e) U-I-193/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 35/94.

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 – Political parties.

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

Constitutional justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

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

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

Constitutional justice – Common principles or techniques of interpretation – Literal interpretation.

Institutions – Executive bodies – Powers.

Fundamental rights – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Right to strike and the role of Trade unions in organising a strike.

Summary:

The provisions of Article 98 (b) of the Internal Affairs Act, of Article 122 (a) of the Punitive Sanctions Enforcement Act, of Article 35 (a) of the Customs Service Act and of Article 147 (a) of the Air Services Act, which provide for the right to strike and define the role of Trade Unions in organising a strike, are not in conflict with the Constitution and ratified international agreements.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 12 May 1994 / e) U-I-44/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 32/94.

Keywords of the systematic thesaurus:

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

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

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

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

Constitutional justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

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

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

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Institutions – Public Finances – Budget.

Keywords of the alphabetical index:

Prohibition against *ex post facto* law / Responsibility of the Municipality.

Summary:

The regulation which provides for a time limit (beginning in 1993) for loans stipulated by Municipalities and which prohibits Municipalities from contracting fresh loans beyond such limits is not in conflict with the Constitution.

The regulation according to which the Republic of Slovenia shall not be obliged to provide a guarantee for financial obligations of Municipalities is not in conflict with the Constitution.

The regulation according to which funds provided to ensure financial settlement in respect of Municipalities which fail to repay long-term debts upon their maturity may be used to finance minimum wages of employees and officials of bodies financed by the Municipal budget, is not in conflict with the Constitution.



Identification:

a) Slovenia / b) Constitutional Court of the Republic of Slovenia / c) / d) 12 May 1994 / e) U-I-81/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 32/94.

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 – 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 – Annulment.

Constitutional justice – Constitutional proceedings – Decisions – Pronouncement and publication – Publication – Publication in the official gazette.

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

Constitutional justice – Constitutional proceedings – Decisions – Effects – *Erga omnes* effect.

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

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

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Fundamental rights – Economic, social and cultural rights.

Fundamental rights – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Rule of law / Protection of natural and cultural heritage.

Summary:

The municipal Ordinance which modifies the Ordinance on the proclamation of cultural and historical monuments and natural sites and which reduces the legally prescribed scope of the obligation to obtain prior opinion or proposal from organisation responsible for the preservation of natural and cultural heritage is not in conformity with Article 18 of the Natural and Cultural Heritage Preservation Act and Article 2 and Article 73, (2) of the Constitution.



Spain

Constitutional Court

Reference period :

1 May 1994 – 31 August 1994

Statistical data

Type of decision and number of decisions :

– Judgments : 117

– Decisions : 88

– Procedural decisions : 1099

Cases submitted : 1643

Important decisions

Identification:

a) Spain / b) Constitutional Court / c) / d) 11 April 1994 / e) Judgment 99/1994 / f) / g) Published in the Official Gazette of 17 May 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 – Other.

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

Keywords of the alphabetical index:

Right to personal reputation / Wrongful dismissal / Employers' instructions restricting fundamental rights.

Summary:

The right to personal reputation (Article 18 (1) of the Spanish Constitution) justified an employee's refusal to carry out his employer's instructions. He had been instructed to cut up ham and show it to the authorities in order to advertise the product. The employee's dismissal for refusing to obey the instructions was void *ab initio*.

The employee's having entered into a contract of employment did not justify restrictions on his fundamental rights. However, the fact of working for another had some bearing on his rights. It was in this context that the scope of the right to personal reputation, on which the employee relied in justifying his refusal to obey his employer's instructions, had to be assessed.

It could not be inferred from Article 18 of the Spanish Constitution that the right to personal reputation entailed an absolute right to anonymity. At the same time the right to anonymity, which covered a huge area of privacy, was sufficiently important that a person seeking to protect his anonymity and prevent his picture being taken and disseminated must not be deprived of legal protection.

Promoting the product had not involved the employee's performing, explicitly or implicitly, any task which exhibited his skills. Further, product promotion was not an essential – or even normal – part of his duties. He had therefore had good reason to object to a restriction on the right to personal reputation that was not strictly warranted by the requirements of productivity.

It was not sufficient that an employer's instruction restricting a fundamental right of an employee be *prima facie* legitimate; it also had to be shown that it was the only means of meeting the employer's legitimate interests.



Identification:

a) Spain / b) Constitutional Court / c) / d) 14 April 1994 / e) Judgment 113/1994 / f) / g) Published in the Official Gazette of 17 May 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 – Laws and other rules having the force of law.

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

Keywords of the alphabetical index:

Right of association / Chamber of Urban Property Ownership / Compulsory membership of a public law association / Unconstitutionality of a rule predating the Constitution.

Summary:

Compulsory membership of a sectoral association was a restriction on individual freedom (Articles 1(1) and 22 of the Spanish Constitution) which was permissible only if justified by the importance of the public interest it sought to promote and by the impossibility, or at least difficulty, of promoting that interest without making membership of the association compulsory.

There were three criteria governing the question as to whether compulsory membership of a lawfully established association was constitutionally acceptable:

1. compulsory membership of a body representing sectoral or professional interests must not entail a prohibition on or impediment to freedom of association;
2. a compulsory membership requirement must be the exception, not the rule; and
3. compulsory membership of a public association representing sectoral or professional interests must be justified either by constitutional provisions or by the nature of the public interests which the association served.

The legal rules governing Chamber of Urban Property Ownership did not meet those conditions, firstly because they established a monopoly of representation in that sector; secondly because enforced membership of public law sectoral associations such as this, which were now very common, must be regarded as symptomatic of the spread of a type of association which could only be compatible with the Constitution in the occasional isolated case; and lastly because, on the one hand, it was impossible to identify any constitutional basis for such an association and, on the other, the interests it promoted could not be described as public or even general interests.

For that reason the rule making membership of Chamber of Urban Property Ownership compulsory and, by extension, the decision introducing compulsory payment of dues were annulled on the ground of unconstitutionality.



Identification:

a) Spain / b) Constitutional Court / c) / d) 18 April 1994 / e) Judgment 116/1994 / f) / g) Published in the Official Gazette of 17 May 1994.

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 – Regional measures.

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

Institutions – Federalism and regionalism – Budgetary and financial aspects – Budget.

Keywords of the alphabetical index:

National Budget Act / Tax changes / Constitutional rules applicable to the regions.

Summary:

The Court examined the constitutionality of a provision in the 1985 Budget Act of the historic ("foral") community of Navarre which lowered the residence tax reduction in respect of subsidised housing in Navarre.

The rules laid down in Article 134 of the Spanish Constitution concerned a strictly national mechanism, namely the National Budget Act, and were not applicable to the Autonomous Communities. Specifically, it could not be inferred from the second sentence of Article 134 (7) of the Constitution that there was a general prohibition in the Autonomous Communities Act on making tax changes by means of budgetary legislation unless a substantive tax law already provided for doing so.

Having found that the second sentence of Article 134 (7) of the Spanish Constitution (prohibition on making tax changes in the National Budget Act) did not apply to the Autonomous Communities, the Court concluded that no such prohibition applying to them was to be found in the Constitution, in the Statute of Autonomy of Navarre or in any other law on constitutional matters.

Supplementary information:

Dissenting opinions were delivered by four judges, who opposed the judgment on the ground that the Article 134 restrictions on budget legislation were applicable both to central government and to the Autonomous Communities in as much as they involved a revenue-raising rule based on principles of budgetary and fiscal legality. On the substance of the matter, the dissenting judges took the view that the Navarre budgetary legislation was unconstitutional since it had made an actual tax change.



Identification:

a) Spain / b) Constitutional Court / c) Full court / d) 5 May 1994 / e) Judgment 127/1994 / f) / g) Published in the Official Gazette, No. 129.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Television / Public service / Freedom of expression / Institutional law.

Summary:

Freedom of information now almost always involves the right to use particular media, with the result that, to some extent, the possibility of creating modes of social communication is bound up with fundamental rights. However, in deciding what approach to adopt in regulating communication technology and modes of communication, Parliament had more options open to it than in the case of legislation directly concerning fundamental rights – for the most part freedoms – laid down in Article 20 (1) of the Constitution, despite the obvious interconnection between the two aspects of the matter.

Designating television as a public service was not in itself contrary to the Constitution. There was no constitutional rule which expressly or implicitly prevented such a course. It was thus one of a number of constitutionally acceptable options open to the legislator.

Whether or not public service status was regarded as a reliable guarantee of the provision of essential services, the designation of television as a public service did not necessarily threaten the rights laid down in Article 20 (1) of the Constitution to the extent of restricting the exercise of them. Nor did it prevent advantage being taken of technical advances in broadcasting and so hold back the social and technological developments with which those fundamental rights came into play.

The selection of a franchise holder, as designation as a public service required, must be done in accordance with general and objective criteria that ensured equal and unrestricted access and permitted judicial review of the administrative decision. It must be stressed that the holder of a broadcasting franchise enjoyed something of a privilege in that he had exclusive use of a valuable and scarce facility enabling him to convey his views to a wide audience. In this, the franchisee is unlike other citizens who have neither the organisational nor the financial resources necessary for obtaining use of this powerful means of exercising the basic rights laid down in Article 20 (1) of the Constitution.

Regulation of private television did not require an Institutional Act in so far as there was no constitutional requirement that regulations affecting basic rights be enacted in institutional legislation. Such a requirement existed only where Parliament developed actual components of the Constitution having a crucial bearing on the definition of a basic right.

Supplementary information:

Four judges delivered dissenting opinions.



Identification:

a) Spain / b) Constitutional Court / c) Full court / d) 12 May 1994 / e) Judgment 148/1994 / f) / g) Published in the Official Gazette, No. 140.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

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

Keywords of the alphabetical index:

Right to a fair trial within a reasonable time / Right to the execution of judgments / Non-execution of a sentence / Possession of basic rights / Prosecuting authorities.

Summary:

The prosecuting authorities had appealed against a number of judgments in which the courts had found the accused guilty of criminal offences but had decided, on the ground of procedural delays, that the sentences were not to be executed. The appellants sought a ruling on whether the judgments contravened any of the basic rights protected by Article 24 (1) of the Constitution, in particular the right – on which the public prosecutor relied – to the proper execution of the sentence as imposed.

The Court dismissed the appeals. Although it was possible that substantive legal provisions governing the courts had been contravened by the decisions in question, the constitutional provision relied upon did not cover misinterpretation of the law except where a court's decision was arbitrary or manifestly unreasonable. However, the reasons given in the challenged judgments, although in error as to the scope of the basic right (the right to a fair trial within a reasonable time) from which they inferred that the sentences could not be executed, were not to be regarded as arbitrary or manifestly unreasonable.

Supplementary information:

Partially dissenting opinion of one of the judges, holding that the prosecuting authorities did not enjoy the right on which they had relied.



Identification:

a) Spain / b) Constitutional Court / c) Full court / d) 26 May 1994 / e) Judgment 165/1994 / f) / g) Published in the Official Gazette, No. 1.

Keywords of the systematic thesaurus:

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

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

Institutions – Federalism and regionalism – Distribution of powers.

Keywords of the alphabetical index:

International relations / Autonomous Communities / European Community.

Summary:

It was not out of the question for the Autonomous Communities to engage in activities giving rise to links

or relations with public bodies external to the State, provided that such links or relations in no way encroached on areas reserved to the State under Article 19 (1) (3) of the Constitution and did not interfere with central government activities.

The Autonomous Communities' scope for engaging in activities with an external dimension must be regarded as confined to activities which, as well as being necessary or at least highly relevant to the performance of their responsibilities, did not involve entering into any agreements, did not create any immediate or present obligations towards foreign public authorities, had no effect on national foreign policy, and did not generate any national liability towards foreign states or international or supra-national organisations.

The possession of an office in Brussels by the government of the Basque Country was in no way indicative of the type of activity that would be engaged in or that there would necessarily be any encroachment on the State's responsibility for international relations. The public nature of the office in no way implied and could not be taken to imply any action other than that derived from the strict apportionment of responsibilities. The office had a purely instrumental function.



Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 7 June 1994 / e) Judgment 173/1994 / f) / g) Published in the Official Gazette, No. 163.

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:

Dismissal / Sexual equality.

Summary:

The impugned decision had quashed the decision of a lower court annulling the dismissal of the appellant, whose fixed-term contract had not been renewed, on the sole ground that the employer (the Ministry of Culture) had not destroyed evidence of sex discrimination relating to her pregnancy. The decision of the higher court had been based on a finding that a series of fixed-term contracts did not give her the status of a permanent employee. Non-renewal of the contract

could not therefore be construed as dismissal and it therefore followed that there had not been a dismissal involving sex discrimination.

The Constitutional Court held that since, as the lower court had established, the pregnancy was the decisive factor in the employer's decision not to renew the contract, the employer's conduct, which the challenged decision had endorsed, was discriminatory and in breach of Article 14 of the Constitution.



Identification:

a) Spain / b) Constitutional Court / c) Full court / d) 16 June 1994 / e) Judgment 179/1994 / f) / g) Published in the Official Gazette, No. 163.

Keywords of the systematic thesaurus:

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

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

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

Institutions – Miscellaneous.

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

Keywords of the alphabetical index:

Freedom of association / Official Chambers of Commerce.

Summary:

The legal rules governing chambers of commerce, industry and navigation, the subject of the case, were consistent with the criteria for constitutionality which the Constitutional Court had laid down for professional bodies of this kind under Article 22 (1) of the Constitution. The purpose of such chambers was to promote and represent the interests of commerce, industry and navigation. Those functions were of course important but could be performed without requiring all businessmen, industrialists and seamen to join the chambers. The work of representing those professional and economic sectors, although it clearly affected the general public interest, was concerned with the specific interests of the relevant sections of the community.

The advisory functions, those relating to the issue of certificates or to industrial management and even those to do with promotion of exports, could easily

be performed without resort to compulsory membership of a public law professional association. Any of them could be performed by private associations or even by the authorities themselves without any requirement for businessmen, industrialists or seamen to belong to a public-law professional association and to support it financially. The Court accordingly concluded that the rules making it compulsory to join the chambers were contrary to the basic freedom of association laid down in Article 22 (1) of the Constitution.

Supplementary information:

Four of the judges delivered dissenting opinions.



Identification:

a) Spain / b) Constitutional Court / c) Second Chamber / d) 20 June 1994 / e) Judgment 183/1994 / f) / g) Published in the Official Gazette, No. 177.

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.

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

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Right to a defence / Prison administration / Interception of communications / Principle of legality.

Summary:

This appeal was against the decision of a prison governor, approved by the prison board, to intercept the spoken and written communications of the appellant, who was being held on remand at the prison on suspicion of being a member of a terrorist organisation.

Having held that the decision complained of did not infringe the right to presumption of innocence since, being a preventive measure, it was not capable of interfering with that fundamental right, the Constitutional Court looked at the adequacy of the legal basis for the decision (Article 51 (2) of the General Prisons Act) and considered whether, from the standpoint of defence rights, the decision satisfied Article 25 (2) of the Constitution and Article 8 (2) of the European Convention on Human Rights, which required that there be a clear and unequivocal legal provision authorising a restrictive measure of that kind.

After scrutinising Article 51 of the Act, in particular paragraph 2 dealing specifically with communications between prisoners and their defence counsel, the Court came to the conclusion that Article 51 permitted only judicial authorities, for given reasons and to the extent required, to suspend or intercept a prisoner's communications with his lawyer, and did not allow the prison authorities to do so. Consequently the decision complained of lacked the necessary legal authority and therefore contravened the defence rights established in Article 24 (2) of the Constitution.



Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 20 June 1994 / e) Judgment 184/1994 / f) / g) Published in the Official Gazette, No. 177.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Right to a lawyer.

Summary:

The Supreme Court had decided to hear the appeals on points of law lodged by the appellant and the prosecuting authorities. The hearing had been held in the absence – wholly attributable to the registry – of the appellant's lawyer. The court had subsequently dismissed the appellant's application to have the judgment declared null, on the ground that the appeal has been unsound in the first place.

On a careful reading of the record of the hearing complained of and having regard to the relevant legal provision (Article 893 (2) of the Criminal Procedure Act) the Constitutional Court reached the conclusion that holding the hearing in the absence of the appellant's lawyer – who had warned the court of his unavailability and had given good reason for it – was not only a serious procedural irregularity but also contravened the requirement to defer a hearing if there were good grounds for a defence counsel's being unable to attend. Such a defect assumed constitutional significance when it resulted in the appellant's not having any defence counsel, contrary to Article 24 (1) of the Constitution.



Identification:

a) Spain / b) Constitutional Court / c) Full court / d) 28 June 1994 / e) Judgment 195/1994 / f) / g) Published in the Official Gazette, No. 177.

Keywords of the systematic thesaurus:

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

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

Institutions – Public finances – Budget.

Keywords of the alphabetical index:

National Budget Act / Budget legislation, scope of / Tax information.

Summary:

The rules challenged, which concerned information requests from the tax authorities, were not permissible in budget legislation.

The rules concerned dealt with general procedure for the assessment and recovery of taxes, and therefore had only indirect relevance to estimates of national revenue and expenditure. All tax regulations were of course to some extent connected with such estimates but tax regulations could only be included in budget legislation if the connection was a direct one, since the distinction between budget legislation and tax legislation would otherwise be lost and the specific functions of the former as laid down in Article 134 (2) of the Constitution would be exceeded.

The powers and attendant obligations of the tax authorities determined the rights and duties of the taxpayer, which, in view of the unusually unequal relationship created by the constitutional obligation to pay taxes, counterbalanced the constitutionally permitted limitations on the exercise of individual rights.

The investigative powers regulated by the Act were not directly related to the proper content of budget legislation and were not an essential adjunct to such legislation. The challenged rules accordingly infringed Article 134 (2) of the Constitution.

Supplementary information:

Three of the judges delivered dissenting opinions.



Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 11 July 1994 / e) Judgment 203/1994 / f) / g) Published in the Official Gazette, No. 185.

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:

Judicial error / Arbitrary statement of reasons.

Summary:

In seeking to apply the provision most advantageous to the appellant, the court had mistakenly applied a provision predating reform of the law and laying down a given penalty. It had failed to realise that under the rules in force when the judgment was delivered, the matter it was dealing with had been decriminalised and no fine could be imposed.

This mistake created discrepancies between what the court had intended, what Article 24 of the Criminal Code and Article 9 (3) of the Constitution compelled it to do (apply the subsequent most advantageous law) and what it had actually done (apply a provision which, at the time of the judgment, had been repealed and moreover had been unfavourable to the accused). This mistake, which was the ratio decidendi of the decision, made the court's choice of provision unreasonable, with the result that the decision was not a well-founded one capable of surviving a challenge in judicial review as laid down in Article 24 (1) of the Constitution.

Supplementary information:

Two of the judges delivered dissenting opinions.



Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 11 July 1994 / e) Judgment 204/1994 / f) / g) Published in the Official Gazette, No. 185.

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.

Institutions – Courts – Military courts – Status of judges.

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

Keywords of the alphabetical index:

Military court / Due process / Right to a lawfully established court.

Summary:

The appeals concerned were from decisions of military courts in proceedings which the military authorities had instituted against the appellants for presumed desertion during military service. The appeals sought the annulment of the decisions on the ground that they contravened rights established in Article 24 (2) of the Constitution (right to a court established by law and to a trial with full safeguards).

Pointing out that these rights applied fully in military proceedings, the Constitutional Court nonetheless dismissed the appeals, ruling in particular that, in their organisation and mode of operation, the military courts which had dealt with the case met the constitutional requirement of independence from the executive as laid down in Institutional Act 4/1987 on the jurisdiction and organisation of the military courts. In addition, judicial independence was a question not of the origins of those required to perform judicial functions but of the rights and duties which the law vested in them in the performance of their function.

Supplementary information:

Dissenting opinion of two of the judges, who expressed the view that the Court should have refrained from dealing with the case until it had ruled on a pending constitutionality issue concerning provisions of the same Act.



Identification:

a) Spain / b) Constitutional Court / c) Full court / d) 14 July 1994 / e) Judgment 215/1994 / f) / g) Published in the Official Gazette, No. 197.

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.

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

Keywords of the alphabetical index:

Sterilisation of the mentally handicapped / Right to life and to physical and psychological integrity / Inhuman or degrading treatment.

Summary:

A judicial permission which, in the case of the mentally handicapped, replaced the consent given by persons possessing legal capacity, adequately met the requirements and safeguards necessary to produce a decision which was in the sole interests of those lacking legal capacity and was calculated to improve their lives.

The safeguards were as follows: the courts were the only authority which could give permission for sterilisation; the sterilisation had to be requested by the legal representatives of the person concerned; the mental handicap had to be serious, rendering it impossible for that person to understand the essential implications of sexual behaviour or the operation which the legal representative was requesting; the courts must satisfy themselves that there was serious mental handicap not only by taking expert evidence but by examining the person concerned; lastly, the State legal department had to be a party to the proceedings.

The justification for replacing consent in such cases by judicial permission was that sterilisation removed the requirement to keep the mentally handicapped under permanent supervision which at times subjected them to indignities and caused psychological harm. It also allowed them to engage in sexual behaviour relieved of the risk of reproduction, whose consequences they were incapable of foreseeing or taking responsibility for. There was even greater justification in the case of a woman since it averted the physiological consequences of pregnancy, which she was incapable of understanding and which might cause her even worse mental damage.

The contemplated means of achieving the aim of the legislation was clearly not disproportionate to that aim since although the result was a serious matter for the person concerned, it was not excessive from the point of view of making sure the aim was safely achieved.

The contention was rejected that sterilisation of persons with serious mental handicap who lacked legal capacity constituted inhuman and degrading treatment prohibited by Article 15 of the Constitution.



Sweden

Supreme Court

Supreme Administrative Court

Reference period:

1 May 1994 – 31 August 1994

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



Switzerland

Swiss Federal Tribunal

Reference period:

16 December 1993 – 30 April 1994

Statistical data

Important decisions

Identification:

a) Switzerland / b) Swiss Federal Tribunal / c) First public law court / d) 16 December 1993 / e) 1P.493/1991 / f) X against the prison director and the Department of Justice of the Canton of Ticino / g) ATF 119 Ia 505 / 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 – Balancing of interests.

Fundamental rights – Civil and political rights – Personal liberty.

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

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

Keywords of the alphabetical index:

Enforcement of sentences / Conditions of detention / Monitoring of correspondence / Proportionality / Public interest.

Summary:

Articles 8 and 10 of the European Convention on Human Rights (ECHR); refusal to transmit letters addressed by a prisoner to third parties and to a lawyer.

Restriction on the right of correspondence and freedom of expression. Refusal to transmit letters addressed by a prisoner to third parties, containing unseemly and insulting remarks concerning the authorities (recitals 3b and c).

The refusal to transmit a letter addressed by a prisoner to a lawyer is in this case a violation of Article 8 ECHR, a provision which makes such correspondence a privileged means of communication. Respect for confidentiality takes precedence in principle over the mere possibility of an abuse (recitals 3d and 4a).



Identification:

a) Switzerland / b) Swiss Federal Tribunal / c) First public law court / d) 22 December 1993 / e) 1P.741/1990 / f) L and associates against the Canton of Basel-Urban / g) ATF 119 Ia 460 / Decision: D / Summaries: D, F, I.

Keywords of the systematic thesaurus:

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

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

Fundamental rights – Civil and political rights – Personal liberty.

Fundamental rights – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

Medically assisted procreation / Personal liberty / Freedom of research.

Summary:

Medically assisted procreation (artificial insemination, in vitro fertilisation and embryo transfer, gamete intra-fallopian transfer; law of the Canton of Basel-Urban on the medicine of human reproduction (German abbreviation: GRM); personal liberty, Articles 8 and 12 ECHR.

1. General considerations on assisted procreation; information about developments since 1989; origin of Article 24 (9) of the Constitution (recital 4).
2. The restriction of access to artificial procreation poses a threat to personal liberty; scope of Article 24 (9) of the Constitution; question left open from the standpoint of the guarantees afforded by Article 8 ECHR, in relation to Article 12 ECHR (recital 5).
3. Personal liberty rules out a general prohibition of heterologous artificial insemination, as provided for in Section 4, paragraph 2 (a), GRM (recitals 6a-6d); limitations of heterologous artificial insemination (recital 6e).
4. The general prohibition of in vitro fertilisation and embryo transfer (IVFET), as provided for in Section 4, paragraph 2 (d) and (e) GRM, is incompatible with personal liberty (recitals 7a-7d); limitations in the use of the IVFET method (recital 7e).
5. Cancellation of the ban on the method of gamete intra-fallopian transfer (GIFT) provided for in Section 4, paragraph 2 (c), GRM (recital 8).
6. The rule contained in Section 5, paragraph 1 of the GRM, which makes it unlawful to conserve sperm for a period of treatment exceeding seven days, is incompatible with personal liberty; restrictions in respect of storage (recital 9).
7. Inasmuch as it provides for a general prohibition of the storage of ova, Section 5, paragraph 2, GRM is incompatible with personal liberty (recital 10).

8. Section 5, paragraph 2 GRM, which prohibits the storage of embryos, may – with regard to the requirements concerning the use of the IVFET method – be interpreted as compatible with the Constitution (recital 11).

9. Should freedom of research be recognised as an unwritten constitutional right? The question is left open. The ban on the use of live embryos or foetuses, as well as parts thereof, for research purposes may be interpreted as compatible consistent with the Constitution inasmuch as the observation of such embryos and foetuses and study of their development are admissible (recital 12).



Identification:

a) Switzerland / b) Swiss Federal Tribunal / c) Second public law court / d) 4 February 1994 / e) 1A.16/1993 / f) X against the municipality of Küttigen and the Aargau Canton Administrative Court / g) ATF 120 Ib 64 / Decision: D / Summaries: D, F, I.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Constitutional right to information / Television / Roof aerial / Legal basis / Balance of interests / Proportionality.

Summary:

Freedom of information; Section 52 (s) of the Federal Radio and Television Act of 21 June 1991 (LRTV; RS 784.40); rule forbidding the installation of roof aerials.

Provisions of municipal law constitute a sufficient legal basis to limit freedom of information. Article 66 of the building regulations of the municipality of Küttigen may be interpreted as in keeping with the Constitution (recital 4).

The appearance of the centre of the village of Küttigen, at least in the district where the applicant lives, satisfies the conditions of Section 53, paragraph 1 (a) LRTV, which enables cantons to protect built-on sites by prohibiting outside aerials (recital 5).

The requirements of Section 53, paragraph 1 (b) LRTV in respect of programme reception are satisfied when connection to a cable network allows reception of 21 television channels (recital 6).



Identification:

a) Switzerland / b) Swiss Federal Tribunal / c) First public law court / d) 22 February 1994 / e) 1P.667/1993 / f) X against State Counsel's Department, cantonal court and Zurich Canton Court of Cassation / g) ATF 120 Ia 48 / Decision: D / Summaries: D, F, I.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

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

Institutions – Courts – Ordinary courts – Criminal courts.

Institutions – Courts – Legal assistance – Role of members of the Bar.

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

Keywords of the alphabetical index:

Criminal procedure / Untried prisoner / Confrontations / Right to the assistance of a counsel / Officially appointed defence counsel / Professional obligations of counsel.

Summary:

Article 4 of the Constitution, Article 6, paragraph 3 (c) and (d) ECHR; right to be assisted by counsel, particularly in connection with confrontations.

The legal interests of the accused must be adequately and effectively defended, even by an officially appointed defence lawyer. Inactivity on the part of the authorities, involving tolerance of a gross breach of professional duty by a lawyer, to the detriment of the accused, may constitute a violation of the rights of the defence (recitals 2b-d).

The accused or his lawyer must take timely and appropriate action to ensure respect for the rights of the defence. This principle applies in particular to requests for renewed confrontations. The decision by the authorities to forego repeating such confrontations does not in this case violate the rights of the defence (recitals 2e-f).



Turkey

Constitutional Court

Reference period:

1 May 1994 – 31 August 1994

Statistical data

Number of decisions: 31

Only 17 decisions given between 1 May and 31 August 1994 were not published in the Official Gazette. 2 decisions are on the dissolution of political parties, and 1 decision is on the reprimand given to a political party.

Important decisions

Identification:

a) Turkey / b) Constitutional Court / c) / d) 16 June 1994 / e) 1994/2 / f) / g) Published in the Official Gazette, 30 June 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.

Keywords of the alphabetical index:

Indivisible integrity of the State with its territory and nation.

Summary:

Because of speeches given by Yasar Kaya, Chairman of the Democracy Party (DEP), in Bonn (Germany) and in Erbil (Iraq) and the Declaration published by the Central Executive Committee of the Party which allegedly violated the Constitution and the Political Parties Act, the dissolution of the DEP was decided.

The Constitutional Court held that political parties which are indispensable elements of a democratic system should not engage in activities which are contrary to democracy and destroy social peace. Any kind of activity aiming at the destruction of the Nation and of the unity of the territory, at the incitement of citizens to armed rebellion by exacerbating ethnic difference, and at causing quarrel among individuals of the same nation cannot be considered as a proposal or a solution but the application of a plan directed towards the destruction of the State. No solution can be found by creating problems. Disintegrating the structure of a nation into ethnic minorities destroys the social peace. This way, minorities will be incited and the strength of terrorism will be increased. The application of international rules cannot be invoked if rights are claimed by means of arms and violence. The Democracy Party incited citizens coming from different ethnic groups to public disorder and civil war by unfounded and untrue declarations and accusations, forcing therefore the limits of democratic tolerance. Democracy shall not be undermined by means of abuse of democratic rights and freedoms. It is a duty of the State to prevent the abuse of rights and freedoms. A political party wishing to realise a secret mission through inciting violence and terror cannot be permitted. Political parties cannot be involved in activities aimed at the destruction

of the integrity of the State and of its territory and nation. According to the Constitution, a political party which gives and takes support from terror cannot continue to exist.

The Constitutional Court held that the speeches made by the Chairman of the Democracy Party and the Declaration published by the Central Executive Committees of the Party are in conflict with the Constitution and with Articles 78 and 81 of the Political Parties Act.

The Constitutional Court also held that in accordance with Article 84 of the Constitution, the mandate of deputies who belonged to the Party on the date when the action for dissolution was brought should end when the Speaker of the Turkish Grand National Assembly is notified of the dissolution order.



Identification:

a) Turkey / b) Constitutional Court / c) / d) 4 July 1994 / e) 1994/51 / f) / g) Published in the Official Gazette, 13 September 1994.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Other.

Constitutional justice – Constitutional proceedings – Decisions – Effects.

Keywords of the alphabetical index:

Restriction of constitutional interpretation.

Summary:

Article 352/a of the Code of Execution Bankruptcy Law No 2004, dated June 19, 1932, states that "Penalties given according to this law shall not be suspended and penalties restricting liberty shall not be converted into fines according to the Law of Execution of Penalties, Law No 647". The judge of Terme (Criminal Court), charged with reviewing the penalty, claimed that this provision is in contradiction with the principles relating to criminal offences and penalties and the principle of equality before the law as laid down in the Constitution.

The Constitutional Court has dismissed a claim about the same provision on substantive grounds and its decision was published in the Official Gazette on May 9, 1986. According to Article 152 of the Constitution, "no allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after the publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits". For this reason, the Constitutional Court also dismissed the application of the Criminal Court concerning the same Article.

Supplementary information :

The framers of the Constitution defended the above innovation of the Constitution as contributing to "legal stability". However, in doctrine it is regarded as a serious limitation upon defendant's rights.



Identification :

a) Turkey / b) Constitutional Court / c) / d) 7 July 1994 / e) 1994 / 49 / f) / g) published in the Official Gazette, 10 September 1994.

Keywords of the systematic thesaurus :

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

Institutions – Legislative bodies – Powers.

Institutions – Legislative bodies – Law-making procedure

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

Keywords of the alphabetical index :

Delegated legislation / Decrees having force of law.

Summary :

According to Article 91 of the Constitution, the Grand National Assembly of Turkey may empower the Council of Ministers to issue decrees having force of law. However, fundamental rights (individual political rights and duties) cannot be regulated by decrees as such. In order to issue decrees having force of law, the Council of Ministers requires an enabling law which must define the purpose, scope, principles and operative period of the decree having force of law, and whether more than one decree can be issued within the same period.

In order to implement the privatisation of public economic enterprises, the Grand National Assembly of Turkey enacted a law empowering the Council of Ministers to issue decrees concerning privatisation. In Turkey, there are two types of public economic enterprises whose total capital belongs to the State: State economic corporations established in order to operate in the economic field according to commercial rules and public economic organisations which are established for the purpose of producing and marketing essentially monopolised goods and services and which function as public service organisations. Public economic organisations were created in the 1930's by direct intervention of the State acting as an entrepreneur

in the economic, industrial, financial and commercial fields in order to regulate and contribute to the development of the country.

By evaluating Articles 7, 87 and 91 of the Constitution together, the Constitutional Court has held that the power to issue decrees having force of law, delegated to the Council of Ministers, is exceptional and *sui generis* because the legislative power is an original power and cannot be delegated. The Turkish Grand National Assembly may empower the Council of Ministers to issue decrees having force of law only in urgent and indispensable conditions with specifically limited scope and for concrete purposes.

The Constitutional Court held that privatisation is not regulated by the Constitution but this does not mean that it is prohibited. On the contrary, nationalisation is regulated by Article 47 of the Constitution. Interpreting this article a contrario, the Court could deduce principles governing the privatisation of public economic enterprises: States enterprises may be privatised when this is required by exigencies of public interest and the privatisation of public economic enterprises can be realised only by Parliament through a law. In other words, privatisation may be authorised only by the Grand National Assembly.

According to the Court, privatisation is closely related to the right to property. Article 35 of the Constitution provides that "everyone has the right to own and inherit property". According to the Constitutional Court, this provision is valid also for public possessions. This means that privatisation of State enterprises, must be carried out on the basis of their real commercial value. In addition to this, the Constitution affirms that the right to property may be limited by law only for the protection of the public interest. Therefore it cannot be regulated by decrees having force of law, but only by law.

The Court added that there must be some restrictions on the participation of foreigners in the privatisation of public economic enterprises. The Court based its opinion on the preamble of the Constitution which states that "no protection shall be afforded to thoughts or opinions contrary to Turkish national interests". The Court cited the example of public services in the field of telecommunications and electricity which, it considered, were very important to the independence and integrity of the Turkish nation.

Moreover, on the basis of Articles 167 and 172 of the Constitution, which concern the regulation of the economy and monopolies imperatively, the Court affirmed that the law on privatisation should include provisions preventing the formation of monopolies, and also include measures to protect consumers.

The Court held that the auditing of the Privatisation Fund should be carried out by the Grand National Assembly of Turkey. On the contrary, the empowering law gave power to control the accounts of the Privatisation Fund to the High Auditing Committee

which is connected with the Office of the Prime Minister. This is in conflict with Article 165 of the Constitution. For all the above reasons, the enabling law on privatisation was found to be in contradiction with the Constitution, and was annulled accordingly.

Supplementary information:

Five members of the Constitutional Court wrote separate opinions concerning the right to property as regulated in Article 35 of the Constitution. They said that the right to property does not extend to public possessions. However, they concurred in the judgment annulling the enabling law.



Identification:

a) Turkey / b) Constitutional Court / c) / d) 21 July 1994 / e) 1994/65 / f) / g) Published in the Official Gazette, 5 August 1994.

Keywords of the systematic thesaurus:

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

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

Institutions – Legislative bodies – Powers.

Keywords of the alphabetical index:

Delegated legislation / Suspension of legislation / Suspension of the enforcement of a decree having force of law.

Summary:

The main opposition party asked the Constitutional Court to annul the decree having force of law No 532, concerning "privatisation" because the empowering act (Law No 3987) had been annulled. And before the final decision, the main opposition party also requested the suspension of the enforcement of the decree because damages resulting from its application would be difficult to compensate.

Under Article 91 of the Constitution the Grand National Assembly of Turkey may empower the Council of Ministers to issue decrees having force of law. However, the enabling act must define the purpose, scope and principles of such decrees and prescribe the period during which they can be issued. According to the case law of the Constitutional Court, the legal validity of decrees depends on the validity of their enabling act. If the enabling act is annulled, the decree issued according to that enabling act must also be annulled.

The Constitutional Court decided the annulment of the said decree because its enabling act had been annulled by the Court on July 7, 1994. However, the Court dismissed the request for suspension of the decree.



United States of America

Supreme Court

Reference period :

1 May 1994 – 31 August 1994

Important decisions

Identification :

a) United States of America / b) Supreme Court / c) / d) 13 June 1994 / e) No. 92-1856 / f) City of Ladue v Margaret P. Gilleo / g).

Keywords of the systematic thesaurus :

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

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

Keywords of the alphabetical index :

Right to free speech / Residential signs.

Summary :

As a consequence of an ordinance of the City of Ladue banning all residential signs, a resident was prohibited from displaying a sign stating "For Peace in the Gulf" from her home. She claimed before the District Court that the ordinance violated her right to free speech. Both the District Court and the Court of Appeals found the ordinance unconstitutional, holding that it was a "content based" regulation and that the town's interests in enacting it were not sufficiently compelling to support such a restriction.

The Supreme Court affirmed the decision of the state courts, holding that the ordinance violated residents' right to free speech. Although the town had a valid interest in minimising visual signs, it had foreclosed an important medium of expression to political, religious, or personal messages.

The alternatives proposed by the town in order to justify its ordinance, such as handbills and newspaper advertisements, are inadequate substitutes for the important medium that the town had closed off. Displaying a sign from ones' own residence carries a message quite distinct from placing the same sign some place else, or conveying the same text or picture by other means, for it provides information about the speaker's identity. Residential signs are also an unusually cheap and convenient form of communication. Furthermore, the audience intended to be reached by a residential sign could not be reached nearly as well by other means.



Identification :

a) United States of America / b) Supreme Court / c) / d) 17 June 1994 / e) No. 92-9059 / f) Jonathan Dale Simmons v South Carolina / 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 / Death penalty.

Summary :

During the penalty phase of petitioner's South Carolina trial, the State argued that his future dangerousness was a factor for the jury to consider when deciding whether to sentence him to death or life imprisonment for the murder of an elderly woman. In rebuttal, petitioner presented evidence that his future dangerousness was limited to elderly women and thus there was no reason to expect violent acts from him in prison. However the court refused to give the jury petitioner's proposed instruction that under state law he was ineligible for parole. The jury returned a death sentence. On appeal, the State Supreme Court affirmed the decision.

The Supreme Court reversed the judgment, holding that where a defendant's future dangerousness is at issue, and the state law prohibits his release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. An individual cannot be executed on the basis of information which he had no opportunity to deny or explain.



Identification :

a) United States of America / b) Supreme Court / c) / d) 24 June 1994 / e) No. 93-518 / f) Florence Dolan v City of Tigard / g).

Keywords of the systematic thesaurus :

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

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

Keywords of the alphabetical index :

Property taking.

Summary:

The case concerned a dispute between a store keeper willing to expand her store and pave her parking lot and the City Planning Commission which conditioned approval of her development plan upon her compliance with the dedication of part of her land for a public green way and a pedestrian/bicycle pathway in order to alleviate the proposed development's impact on the area. The petitioner appealed the Commission's decision to the Land Use Board of Appeals and subsequently to the State Court of Appeals and the State Supreme Court, alleging that the dedication requirements constituted an uncompensated taking of her property under the Fifth Amendment. All the said judicial bodies affirmed the Commission's decision.

The Supreme Court held that the City's dedication requirements constituted an uncompensated taking of property and it consequently reversed the decision of the State Supreme Court. Although it found that an essential nexus existed between the permit conditions required by the City Planning Commission's decision and the legitimate State interest to alleviate the development's impact, the Court did not consider the city's findings constitutionally sufficient to justify the conditions imposed on petitioner's permit.



Identification:

a) United States of America / b) Supreme Court / c) / d) 27 June 1994 / e) No. 93-517 / f) Board of Education of Kiryas Joel Village School District v Louis Grumet et al. / g).

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Establishment clause.

Summary:

The New York village of Kiryas Joel is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. Its boundaries were drawn in order to exclude all but Satmars. Moreover, a special state statute carved out a separate school district that follows

village lines. Before the new district became operational, respondents brought an action, claiming that the state statute violates the Establishment Clause of the First Amendment. The state trial court granted summary judgment for respondents and both the intermediate appellate court and the New York Court of Appeals affirmed, ruling that the statute primary effect was impermissibly to advance religion.

The Supreme Court affirmed the judgment, holding that the anomalously creation of a specific school district for a religious community violates the Establishment Clause of the First amendment. Although the Constitution allows the state to accommodate religions needs by alleviating special burdens, the contested state statute crosses the line from permissible accommodation to impermissible establishment. There are several alternatives for providing bilingual and bicultural special education to Satmar children that do not implicate the Establishment Clause, as for instance an educationally appropriate program at a public school or at a neutral site near one of the village's parochial schools run by the School District to which the village had previously belonged. By delegating the State's discretionary authority over public schools to a group defined by its common religion brings about an impermissible fusion of governmental and religious functions.



European Court of Human Rights

Reference period :

1 May 1994 – 31 August 1994

Important decisions

Identification :

a) / b) European Court of Human Rights / c) Chamber / d) 26 May 1994 / e) 16/1993/411/490 f) Keegan v. Ireland / g) to be published in volume 291 of Series A of the Publications of the 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.

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

Summary :

This judgment concerns a decision of the High Court of Ireland, rejecting a request by the applicant, father of a child born out of wedlock which was placed for adoption by her mother, to be appointed guardian of the child and be awarded custody. In rejecting the request the High Court took into consideration the fact that with the additional passage of time in the course of the proceedings the child's attachment to the prospective adopters had grown stronger and, accordingly, the likely traumatic effect on the child of any move would be greater. The applicant complained that there had been a violation of his right to respect for family life (Article 8 of the European Convention on Human Rights), in that his child had been placed for adoption without his knowledge or consent and that national law did not even afford him a defeasible right to be appointed guardian. He further complained of a denial of his right of access to court (Article 6, paragraph 1, of the European Convention on Human Rights) in that he had no standing in the proceedings for the adoption.

The Court recalled that the notion of the "family" in Article 8 of the Convention is not confined solely to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together outside of marriage. A child born out of such a relationship is *ipso iure* part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended.

According to the principles developed by the Court in its case-law, where the existence of a family tie with a

child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth the child's integration in his family. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down. In the present case, the fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life. Such interference is permissible only if the conditions set out in paragraph 2 of Article 8 are satisfied.

The Court found that the decision to place the child for adoption without the father's knowledge or consent was in accordance with Irish law. Moreover, the decisions taken by the national courts pursued the legitimate aim of protecting the rights and freedoms of the child. The Court also noted that the applicant's interests were fairly weighed in the balance by the High Court.

However, the essential problem in the present case was the fact that Irish law permitted the child to have been placed for adoption shortly after her birth without the father's knowledge or consent. Where a child is placed with alternative carers, he or she may in the course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care. Such a state of affairs not only jeopardised the proper development of the applicant's ties with his daughter but also set in motion a process which was likely to prove to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child.

There had thus been a violation of the applicant's right to respect for his family life.

Moreover, the applicant had no rights under Irish law to challenge the decision to place the child for adoption. His only recourse to impede the adoption of his daughter was to bring guardianship and custody proceedings. By the time these proceedings had terminated the scales concerning the child's welfare had tilted inevitably in favour of the prospective adopters. The applicant had thus been deprived of an effective access to court, in breach of Article 6, paragraph 1, of the Convention.



Identification :

a) / b) European Court of Human Rights / c) Chamber / d) 23 June 1994 / e) 7/1993/402/480 / f) Jacubowski v. Germany / g) to be published in volume 291 of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

Summary:

The applicant, former director of a news agency and director of a public-relations agency, complained of an injunction from the German courts issued upon request of his former employer. By the challenged injunction the applicant was ordered to desist from distributing his reply to a press release in which his former employer had openly put his professional abilities in question. The domestic courts had found that the applicant had acted for the purposes of competition in the context of business dealings.

The Court noted that the impugned measure had been an interference with the applicant's freedom of expression. The interference had been "prescribed by law" and had pursued a legitimate aim under the Convention, namely "the protection of the reputation or rights of others". It consequently remained to be ascertained whether the interference could be regarded as having been "necessary in a democratic society".

In the instant case the requirements of protecting the reputation and rights of others had to be weighed against the applicant's freedom to distribute his reply.

The Court pointed out that the national courts that had considered the merits of the applicant's course of action had been unanimous in regarding it as an act of unfair competition in breach of "accepted moral standards", as in their view it had been mainly designed to draw his former employer's clients away to his own agency. Their judgments had been based principally on the reply's wording, especially its last paragraph, in which the applicant had clearly expressed his wish to establish personal business contacts with the addressees. The domestic courts had taken into account the fact that the applicant had been personally attacked in a press release issued by his former employer, but had attached more importance to the essentially competitive purpose of the exercise.

Accordingly, it could not be said that the German courts had overstepped the margin of appreciation left to national authorities and no breach of the applicant's right to freedom of expression had been made out.



Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 23 June 1994 / e) 18/1993/413/492 / f) *De Moor v. Belgium* / g) to be published in volume 292-A of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

Institutions – Courts – Legal assistance – The Bar – Status of members of the Bar.

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

Summary:

This judgment relates to the procedure concerning an application for enrolment on the list of pupil advocates (*avocats stagiaires*) of the Bar of Hasselt (Belgium) made by the applicant, a retired army officer who had gained a law degree. The Hasselt Bar Council rejected the application and the *Conseil d'Etat* dismissed the appeal, finding that it lacked jurisdiction to review the decisions of the Bar Council. The applicant complained *inter alia* that he did not have a fair and public hearing by tribunal, as required by Article 6, paragraph 1, of the European Convention on Human Rights.

The Court first observed that where legislation laid down conditions for the admission to a profession and a candidate for admission satisfied those conditions, he had a right to be admitted to that profession. In the present case, the applicant could claim a right under Belgian law to enrolment on the list of pupil advocates. Moreover, this right was a "civil right" within the meaning of Article 6, paragraph 1, of the Convention.

The Court observed that the applicant was refused enrolment by the Bar Council on the ground that he had previously completed a full carrier outside the Bar, without indicating the reasons why this circumstance would amount to unfitness or to professional incompetence. In the absence of such an indication, the contested decision had no legal justification. Therefore, the Court held that the Bar Council had not given the applicant's case a fair hearing inasmuch as the reason it had given had not been a legally valid one. There had been therefore a breach of the applicant's right to a fair trial (Article 6, paragraph 1, of the Convention).

The Court then noted that no public hearing had been held to examine the applicant's application and the Bar Council's decision had not been delivered in public. Yet the applicant had been entitled to public proceedings, as there had been no reason justifying their being held in private. There had therefore been a violation of Article 6, paragraph 1 on this point too.



Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 18 July 1994 / e) 12/1993/407/486 / f) *Karlheinz Schmidt v. Germany* / g) to be published in volume 291-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 – Other [Prohibition of forced labour].

Summary:

This judgment concerns the payment of a fire service levy, obligation of a compensatory character for fire service prescribed by the Fire Brigades Act of the *Land* of Baden-Württemberg. The applicant complained that this obligation amounted to a discrimination since it only concerned men.

The Court recalled that Article 14 of the Convention requires that the enjoyment of the rights and freedoms set forth in the Convention be secured without discrimination. It considered that compulsory fire service was one of the “normal civic obligations” and thus constitutes a restriction to the right not to be required to perform forced or compulsory labour, guaranteed in Article 4 of the Convention. It concluded that, on account of its close links with the obligation to serve, the obligation to pay also fell within the scope of the above mentioned provision.

The Court noted that some German *Länder* did not impose different obligations for the two sexes in this field and that even in Baden-Württemberg women were accepted for voluntary service in the fire brigade. Irrespective of whether or not there could nowadays exist any justification for treating men and women differently as regards compulsory service in the fire brigade, what was finally decisive in the case before the Court was that the obligation to perform such service was exclusively one of law and theory. In view of the continuing existence of a sufficient number of volunteers, no male person was in practice obliged to serve in a fire brigade. The financial contribution had – not in law but in fact – lost its compensatory character and had become the only effective duty. In the imposition of a financial burden such as this, a difference of treatment on the ground of sex could hardly be justified.

There had accordingly been a discrimination in breach of Article 14 taken in conjunction with Article 4 of the Convention.



Systematic thesaurus

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

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

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