Bulletin

on Constitutional Case-Law

Edition 1994 3

Venice Commission

Council of Europe
Conseil de l'Europe

Editorial

The present Bulletin is the sixth regular issue of the Constitutional Case-Law Bulletin published by the European Commission for Democracy through Law. It completes the reporting of major decisions by constitutional courts and courts of equivalent jurisdiction in Europe and North America for the year 1994.

The number of courts participating in the preparation of the Bulletin has increased dramatically during the last two years. Compared with 1993, six new countries are now regularly represented in the Bulletin (Canada, Denmark, Estonia, the Netherlands, Norway and Spain). This issue contains the first contribution from the recently created Constitutional Court of Belarus to which I extend a warm welcome. I am certain that the Constitutional Court of the Russian Federation, which is now fully operational, will follow soon. Last but not least, the participation of the European Court of Human Rights should be mentioned. With a jurisdiction now extending to thirty States, its contribution to the European legal order in the field of human rights can hardly be overestimated.

This issue presents the summaries in a new way which, it is hoped, will improve the intelligibility of the reported case law. Following thorough discussions at the last meeting of the Sub-Commission on Constitutional Justice together with liaison officers from the participating courts, it was decided to split the narrative portion into two zones: zone 5, containing a succinct summary of the main legal points of the decision, and zone 6 which gives, where appropriate, additional information on the factual background of the case, the procedure followed, the legal reasoning of the Court and its final decision. It was felt that the user of the Bulletin who often lacks direct access to the decisions should be given this additional information.

The presentation and style of the Bulletin have been considerably improved during the two years of its existence. This has resulted in a marked increase in the cost of producing the periodical. For this reason, the Sub-Commission on Constitutional Justice decided at their last meeting, held in Venice on 9-10 November 1994, to fix a subscription for the Bulletin. This will also allow for the distribution of the Bulletin by book shops and commercial sales agents. As from the next issue (No. 1/1995), which will appear in Summer 1995, the Bulletin will be made available at a price of 300,- FF, including postage and packaging for three issues annually. Any Special Editions will be distributed to all subscribers free of charge. A subscription form is included in this issue. The Sub-Commission decided, however, that certain subscribers in the New Democracies may continue to receive it free of charge.

It is hoped that in this way it will be possible to continue improving the Bulletin and to increase its dissemination.

Matthew Russell
President of the Sub-Commission on Constitutional Justice

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 a four months period.

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. As such, the summaries of decisions and opinions published in the Bulletin do not constitute an official record of court decisions and should not be considered as offering or purporting to offer an authoritative interpretation of the law.

The decisions are presented in the following way:

1. *Identification*

   a) country / b) name of the court / c) chamber (if appropriate) / d) date of decision / e) number of decision or case / f) title (if appropriate) / g) publication of the decision

2. *Keywords of the systematic thesaurus*
3. *Keywords of the alphabetical index*
4. *Headnotes*
5. *Summary*
6. *Supplementary information*
7. *Languages.*

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.

Contents

Austria

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994
September/October 1994
session of the Constitutional Court

Statistical Data

- Financial claims (Article 137 B-VG): 7
- Conflicts of jurisdiction: (Article 138.1 B-VG): 1
- Review of regulations (Article 139 B-VG): 139
- Review of laws (Article 140 B-VG): 40
- Review of elections (Article 141 B-VG): 6
- Appeals against decisions of administrative authorities (Article 144 B-VG) 554 (324 declared inadmissible)

Important decisions

Identification:

a) Austria / b) Constitutional Court / c) / d) 29.09.1994 / e) G 24/94 / f) / g) To be published in the collection of decisions and judgments of the Constitutional Court.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Compensation in respect of detention on remand / Criminal proceedings / Interpretation in conformity with the Constitution / Presumption of innocence.

Headnotes:

The provision of the law on compensation in criminal cases (*Strafrechtliches Entschädigungsgesetz*) concerning the right to compensation of a person acquitted of an alleged offence is compatible with the presumption of innocence guaranteed by Article 6.2 ECHR. In the event of final acquittal – in this case the accused was given the benefit of the doubt – the presumption of innocence is to be observed by the authorities ruling on the claim for compensation in separate proceedings.

Summary:

On application by a court called upon to decide at second instance on compensation in a criminal case, the Constitutional Court found that the provision allowing compensation where "the injured party ... is subsequently acquitted of the alleged offence or otherwise freed from prosecution and the suspicion that he committed the offence has been dispelled..." is in conformity with the Constitution. The application cited the reasoning of the European Court of Human Rights in the Sekanina v. Austria judgment of 25 August 1993, Series A No. 266-A, to the effect that owing to the irrevocable nature of the judgment in the criminal proceedings, the question put to the jury concerning the guilt of the accused should not have been raised in a decision relating to compensation. The Court held that the provision in question allows of an interpretation which is in conformity with Article 6.2 ECHR: when re-examining the assessment of the evidence, the court which is competent to decide on compensation must comply with the requirements of Article 6.2 ECHR.

Identification:

a) Austria / b) Constitutional Court / c) / d) 04.10.1994 / e) B 1847/93 / f) / g) To be published in the collection of decisions and judgments of the Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Administrative acts.

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

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Administrative measure / Aliens / Detention pending expulsion / Non-annulment of an administrative measure / Personal liberty / Time-limits.

Headnotes:

Violation of personal liberty through failure to observe a time-limit laid down in the Constitutional law on personal liberty. Following an appeal against detention pending expulsion, the administrative authority failed to give its decision within the time-limit of one week.

Summary:

Appeal against a decision of an independent administrative chamber, lodged by a foreign national alleging violation of the right constitutionally guaranteed by the law on personal liberty to obtain a decision on the lawfulness of detention within a one-week time-limit. The Court accepted the plaintiff's argument that the administrative decision was delivered too late, since the date of notification to the plaintiff and not the date of the decision is the determining factor.

According to the law on the Constitutional Court, the Court's decision must state whether a violation of constitutionally guaranteed rights has occurred and, where appropriate, annul the contested administrative measure. In the case in point, the Court did not annul the measure since such a decision would not have enabled the violation of the right to be removed (it would not have been possible to issue the administrative measure replacing the original measure within the prescribed time). The Court therefore did not allow the application for annulment of the contested decision and referred the appeal to the Administrative Court.

Identification:

a) Austria / b) Constitutional Court / c) / d) 05.10.1994 / e) G 161/94 / f) / g) To be published in the collection of decisions and judgments of the Constitutional Court.

Keywords of the systematic thesaurus:

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

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

Institutions – Courts – Legal assistance.

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

Keywords of the alphabetical index:

Fair trial / Jurisdiction in tax matters / Officially appointed defence counsel.

Headnotes:

The general limitation of the free assistance of an officially appointed defence counsel to cases falling compulsorily under the jurisdiction of a chamber (*Spruchsenat*) conflicts with the right to a fair trial; annulment of a provision of a law on the punishment of tax offences which – in the event of a choice of jurisdiction – rules out free legal assistance where this would be required in the interests of justice.

Summary:

The appeal was lodged against an administrative decision by the finance authorities refusing a request by an individual for the assistance, free of charge, of an officially appointed defence. The Constitutional Court decided to give a ruling on the constitutionality of a provision of the law on the punishment of tax offences. Confirming its own case-law, according to which the guarantees under Article 6 ECHR are applicable to all decisions of a finance authority ruling on the merits of any criminal charge, the Court annulled the contested provision.

Identification:

a) Austria / b) Constitutional Court / c) / d) 10.10.1994 / e) B 46/94 / f) / g) To be published in the collection of decisions and judgments of the Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Administrative acts.

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Aliens / Detention pending expulsion / Language / Personal liberty.

Headnotes:

Violation of personal liberty through the dismissal of an appeal lodged against the detention of an alien on the grounds of failure to inform him, as soon as possible, of the reasons for his arrest and to provide a translation in a language he understands.

Belarus

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Introduction

Having proclaimed its independence in 1991, the Republic of Belarus directed its energies towards the realisation of democratic reforms. A free civil society was created where all citizens are equal before the law. everyone has the right to equal protection of his or her rights and lawful interests without any discrimination.

Article 1 of the Belarussian Constitution which was adopted on 15 March 1994 proclaims a noble goal – the development of a democratic state based on the rule of law. For the first time in the history of the Republic, this goal is formulated on the highest normative level.

The new Constitution marked the transition of the Belarussian society from a centralised and bureaucratic system of administration to a Government in compliance with the rule of law. The state, all its organs and officials are bound to exercise their activities within the framework of the Constitution and laws adopted on its basis.

The Constitution of the Republic of Belarus declared the individual to be the highest value of society and the State (Article 2). Out of the 149 Articles of the Constitution, eighty deal with the legal status of the individual and the rights and freedoms of citizens. The rights and freedoms are not merely proclaimed, but guaranteed by adequate safeguards.

The Constitutional Court of the Republic of Belarus plays an important part in the legal framework which was set up to defend the rights of citizens. The nine Members of the Constitutional Court were elected by the Republic's Supreme Soviet from among 40 candidates nominated by Parliamentary committees. It is the main task of the Constitutional Court to guarantee the observance of the Constitution and to protect the constitutional order of the Republic. The institution of a specialised Constitutional Court opened up the possibility to develop a society where the supremacy of the Constitution is guaranteed.

The powers of the Constitutional Court as well as its composition and procedures are regulated by the Constitution and the Law "On the Constitutional Court of the Republic of Belarus" of 30 March 1994.

According to the Constitution, the term of office for judges of the Constitutional Court is eleven years. Every judge is elected separately by secret ballot.

The basic principles which govern the activities of the Constitutional Court are independence, legality, collegiality and publicity. Hearings of a case are open to visitors and the mass media.

The main powers of the Constitutional Court can be summarised as follows:

- firstly, it is empowered to examine the constitutionality of the laws adopted by the Supreme Soviet, presidential decrees, resolutions of the Government (Cabinet of Ministers), as well as of acts of the Supreme Court, the Highest Economic Court, the Republic's General Prosecutor, other state bodies and public associations, provided they are of a normative nature;
- secondly, it is empowered to consider the compliance of the Constitution with international agreements and other obligations of the Republic of Belarus;
- thirdly, on the request of at least seventy Deputies of the Republic of Belarus, it gives a judgment on the violations of the basic law by the President.

The Constitutional Court is entitled, on its own initiative, to consider the constitutionality of normative acts of any State body or public association.

The Constitutional Court reports annually to the President and to the Supreme Soviet on the state of observance of constitutional law in the Republic.

Laws and other normative acts which have been declared unconstitutional because they violate individual rights and freedoms are considered invalid from the moment of their adoption. Other acts which have been declared unconstitutional are considered invalid from the moment specified by the Court.

Judgments of the Constitutional Court are final and subject to no appeal. In accordance with the Law on the Constitutional Court, the Court may, however, review a judgment on its own initiative following the discovery of new circumstances which were unknown to the Court when the judgment was delivered.

Within the framework of its powers, the Constitutional Court has examined a number of issues relating to the perfection of the legislation in force. The Court's scrutiny focused especially on normative acts affecting the rights and lawful interests of citizens and organisations.

The Constitutional Court has considered, *inter alia*, the implementation of Article 7.3 of the Constitution which provides that enforceable enactments of State authorities shall be published or brought to general notice in a way specified by law. This requirement has not always been fulfilled, especially with regard to departmental normative acts. In its decision of 9 November 1994 the Constitutional Court asked State organs to guarantee full observance of the provisions of the Constitution and other legal acts governing the publication and coming into effect of normative acts. Acts which have been adopted in violation of these provisions should not be applied as long as all irregularities have not yet been eliminated.

On the basis of Article 61 of the Constitution, which guarantees to everyone the protection of his or her rights and liberties by competent, independent and impartial courts of law, and generally acknowledged norms of international law, the Constitutional Law advised the Supreme Soviet:

- to realise the principle of a complete reimbursement of damages (both material and moral) suffered by citizens;
- to implement a mechanism which ensures to victims a full reimbursement of injury caused by crime:
- to take measures to perfect the legislation concerning the reimbursement of the damage caused to citizens by the illegal activities of prosecuting bodies and the courts.

Since its formation, the Constitutional Court has received more than 300 individual complaints. The majority of complaints are not of a strictly personal but socially important character. They contain critical remarks with respect to the legislation in force, concerning in particular the rights and interests of citizens. They refer *inter alia* to the revision of labour legislation which has been carried out too slowly, the inadequate state of social security legislation, inadequate protection of bank deposits against devaluation caused by inflation and damages caused by radiation beyond the Republic of Belarus.

Under these conditions, the Constitutional Court considers it necessary to regulate the working procedures of State bodies and officials dealing with notices of appeal. In this respect, the Law "On notices of appeal" the adoption of which is imminent, will be of great importance. State bodies and officials would be required to consider the matters raised by citizens and to give clear answers within the terms specified by the law. The refusal to consider an application must be explained in written form. A violation of the requirements of this law would entail legal responsibility.

It is the declared objective of the Constitutional Court of the Republic of Belarus, which is only beginning its momentous task, to strengthen legality and democracy within the society and to secure the supremacy of the Constitution.

Important decisions

Identification:

a) Belarus / b) Constitutional Court / c) / d) 23.09.1994 / e) C-1/94 / f) / g) To be published in the Official Bulletin of the Constitutional Court.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.

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

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

Keywords of the alphabetical index:

Pensioners.

Headnotes:

The provisions of the Labour Code which authorised employers to dismiss employees solely on the grounds that they have reached the age of retirement are discriminatory in nature and thus unconstitutional.

Summary:

Section 5 of the Law "On the order of the coming into effect of the Constitution of the Republic of Belarus" provides that normative acts which were adopted without bringing them in compliance with the Constitution are not valid in so far as they contradict the Constitution. The Constitutional Court instituted on its own initiative proceedings to examine the constitutionality of certain provisions of the Labour Code.

Identification:

a) Belarus / b) Constitutional Court / c) / d) 10.10.1994 / e) C-3/94 / f) / g) To be published in the Official Bulletin of the Constitutional Court.

Keywords of the systematic thesaurus:

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

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

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

Keywords of the alphabetical index:

Vocational training.

Headnotes:

Restrictions on the possibility for school leavers from other regions of the Republic to receive vocational education in Minsk violate the right to education.

Summary:

The Constitutional Court examined the constitutionality and legality of the Resolution of 19 May 1994 by the Executive Committee of Minsk City Peoples' Deputies which had restricted the possibility for school leavers from other regions of the Republic to receive vocational training in Minsk. The Court concluded that the Resolution violated Article 49 of the Constitution and Section 19 of the Law "On the rights of children" which guaranteed the right to accessible and free general, secondary and vocational-technical education and the free choice of an educational establishment. The Resolution was found to be unconstitutional and invalid.

Identification:

a) Belarus / b) Constitutional Court / c) / d) 17.10.1994 / e) C-4/94 / f) / g) To be published in the Official Bulletin of the Constitutional Court.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Extra-judicial liquidation / Foreign investment.

Headnotes:

The introduction of a form of extra-judicial liquidation which would apply only to enterprises with foreign capital constitutes a discriminatory treatment and is therefore constitutionally inadmissible.

Summary:

Section 9.9 of the Law "On foreign investments on the territory of the Republic of Belarus" envisaged the extra-judicial liquidation of enterprises with foreign capital which had not set up a special fund within the amounts specified by the law or which had failed to present the documents confirming the existence of such a fund to the competent administration in due time. The Court found that this provision was discriminatory in character because enterprises without foreign capital can only be liquidated by a decision of the competent courts. The Court emphasised that equal protection of all forms of property is one of the most significant and stabilising factors in the economy of any State. All legal entities which are engaged in lawful commercial activities should enjoy equal rights and protection.

Identification:

a) Belarus / b) Constitutional Court / c) / d) 24.10.1994 / e) C-5/94 / f) / g) To be published in the Official Bulletin of the Constitutional Court.

Keywords of the systematic thesaurus:

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

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Fundamental rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Administrative Fines.

Headnotes:

Section 5 of the Code of Administrative Offences is unconstitutional insofar as it authorises local authorities to increase without restraint administrative fines.

Summary:

Section 5 of the Code of Administrative Offences empowers local authorities to increase the amounts of administrative fines beyond those which have been established by that law. According to the Constitutional Court this provision contradicts Article 22 of the Constitution which guarantees equality before the law and the right to equal protection of rights and legitimate interests. In its judgment the Constitutional Court asked the Supreme Soviet to amend also other provisions of the Code so as to allow local Soviets, executive and administrative bodies to determine administrative

offences only in exceptional cases taking into account local conditions and within the limits established by the law.

Identification:

a) Belarus / b) Constitutional Court / c) / d) 15.11.1994 / e) C-8/94 / f) / g) To be published in the Official Bulletin of the Constitutional Court.

Keywords of the systematic thesaurus:

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

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Keywords of the alphabetical index:

Local councils.

Headnotes:

The Law "On local self-government and local economy in the Republic of Belarus" of 6 October 1994 which envisages the elimination of a great number of local councils of the basic territorial level (Soviets) is incompatible with the democratic principles enshrined in the Constitution. The people who exercise power directly and *via* representative authorities are the sole source of State power in the Republic of Belarus.

Summary:

A group of Deputies of the Supreme Soviet brought a motion to review the constitutionality of the Law "On local self-government and local economy in the Republic of Belarus" which had been adopted by Parliament on 6 October 1994. The law envisages a vertical command structure and the dissolution of more than 90% of Peoples' Soviets. The Constitutional Court declared the Law unconstitutional and invalid from the moment of its adoption.

Belgium

Court of Arbitration

Reference period:
1 September 1994 – 31 December 1994

Statistical Data

- 23 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
- 8 judgments concerning applications to set aside
- 7 judgments concerning preliminary points of law
- 2 judgments concerning applications for suspension
- 6 judgments settled by summary procedure

Composition of the Court of Arbitration

At present the Court of Arbitration consists of the following members: MM. L. De Grève and M. Melchior, presidents, MM. L.P. Suetens, H. Boel, L. François, P. Martens, Mrs. J. Delruelle, MM. G. De Baets, E. Cerexhe, H. Coremans, A. Arts and R. Henneuse, judges.

Identification:

a) Belgium / b) Court of Arbitration / c) / d) 18.10.1994 / e) 76/94 / f) / g) *Moniteur belge*, 8.11.1994.

Keywords of the systematic thesaurus:

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

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

Fundamental rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Actio popularis / Municipal elections / Treaty of Maastricht.

Headnotes:

Any elector or candidate is entitled to request the setting aside of measures which may affect their vote or candidature adversely. Extension of the right to vote or stand in municipal elections to citizens of the European Union residing in a Member State of which they are not nationals violates neither the right to vote nor the right to be elected, since every individual remains entirely free to vote for the candidate of his choice and to stand for election (B.7 to B.9).

Summary:

The Court dismissed an application brought by a number of natural persons, acting in their capacity as electors, and by a municipal councillor, for setting aside of the Act of 26 November 1992 approving the Treaty on European Union (Treaty of Maastricht of 7 February 1992), particularly in so far as the Act approves the Treaty, which includes in Article G/C an Article 8.1 and 8.B.1. Article 8.1 of the Treaty states: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union." Article 8.B.1 provides that "every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State". The applicants argue that the provision they are challenging affects the scope of

their rights as electors. They claim that extension of the right to vote in municipal elections to new categories of person effectively reduces the importance of their own vote. The municipal councillor claimed to have a special interest in the application, in that the number of candidates in municipal elections would rise. There is no doubt that extension may affect the outcome of municipal elections, since its incorporation in domestic law will allow more people to vote and stand for election, but the applicants' interest in attacking it is no different from that which anyone may have in contesting the rules under which Europe is moving towards integration. Recognising the admissibility of an application based on such an interest would be tantamount to accepting an *actio popularis*, which was not the intention of the authors of the Constitution. The Belgian Constitution and the special Act of 6 January 1989 on the Court of Arbitration requires all natural or legal persons applying to have a measure set aside to show that they have an interest in the application. The Court has consistently ruled that only persons whose situation is likely to be directly and adversely affected by the provision have such an interest. The Court accordingly finds that an *actio popularis* cannot be allowed. The present application, which is tantamount to an *actio popularis*, is therefore declared inadmissible.

Identification:

a) Belgium / b) Court of Arbitration / c) / d) 22.12.1994 / e) 90/94 / f) / g) *Moniteur belge*, 12.01.1995.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Constitution.

Institutions – Legislative bodies – Parliaments – Structures.

Institutions – Federalism and regionalism – Institutional aspects – Deliberative assembly.

Fundamental rights – Civil and political rights – Electoral rights

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.

Headnotes:

The Court cannot rule on choices made by the authors of the Constitution (B. 2.3 and B.3.5).

Article 3 of Protocol No. 1 to the European Convention on Human Rights safeguards the right to vote or to be elected, but only in elections to assemblies which exercise legislative powers over electors or candidates who invoke that article (B.4.6 to B.4.15 and B.4.16).

Article 27 of the International Covenant on Civil and Political Rights concerns the protection of persons belonging to ethnic, religious and linguistic minorities, and prohibits Contracting States, *inter alia*, from denying these persons the right to their own cultural life in community with other members of their group. The constitutional rules safeguarding the principles of equality and non-discrimination covered by the aforementioned Article 27 are not violated by the legislative provision which no longer allows French-speaking inhabitants of a district in the Flemish region to sit on the Council of the French Community, which has no legislative power over the said inhabitants, but does not deprive them of the right to have their own cultural life in community with other members of their group or of the right to use the cultural amenities for which the French Community is responsible (B.4.12 to B.4.14).

In the light of the case-law of the ECHR (Mathieu-Morin and Clerfayt case, Series A No. 113, para. 57) and in view of the fact that the oath taken by elected representatives is of equal concern to those who administer and those who take it, the obligation of taking the oath in Dutch imposed on all members of the Flemish Council, including French-speaking members, by the special law under Article 115 of the Constitution, is not discriminatory. This obligation cannot be regarded as a clearly unreasonable restriction of the right secured to every person by Article 27 of the International Covenant on Civil and Political Rights to use their own language in community with other members of their group. The different systems applying in other legislative assemblies reflect their special character (B.4.18 to B.4.24).

The decision to keep the Brussels-Hal-Vilvorde constituency, comprising communes located in two separate regions (the Flemish region and the Brussels-Capital region), for elections to the federal chambers and the European Parliament was taken for the sake of arriving at a general compromise and securing the essential balance between the interests of the various communes and regions within the Belgian State. This aim may justify the distinction made by the challenged provisions between electors and candidates in the constituency of Brussels-Hal-Vilvorde and those in other constituencies, provided that the measures taken can reasonably be regarded as not disproportionate. They would be if they disregarded fundamental freedoms and rights (B.5.5 to B. 5.10).

Summary:

This judgment concerns an application for setting-aside of various provisions in the laws governing elections to the parliamentary assemblies of the federation (House

of Representatives and Senate) and the federated entities (councils of the communities and regions). One of the complaints was that, in direct elections to the Senate, there is no constituency for the German-speaking region, as there is for the Dutch-and French-speaking regions. The Constitution itself stipulates that twenty-five senators are to be directly elected by the Dutch constituency and fifteen senators by the French constituency, and that a fixed number of senators are to be nominated by the councils of the three communities (Flemish, French-speaking and German-speaking) and by the directly elected senators. Concerning the complaint that the principles of equality and non-discrimination have been violated, the Court notes that the Constitution itself regulates the nomination of directly elected senators and that it cannot rule on a claim which would involve it in assessment of a choice made by the authors of the Constitution. A similar reply was given to the complaints concerning the composition of the House of Representatives.

Another complaint was lodged by natural persons, in their capacity as members of parliament or French-speaking electors, against legislation which no longer permits French-speaking inhabitants of the administrative district of Hal-Vilvorde, which is part of the Flemish region, to sit on the Council of the French Community. The decrees of the Council of the French Community are not legally binding in the Dutch-speaking region. Having first defined the scope of Article 3 of Protocol No. 1, the Court noted that both Dutch-speaking and French-speaking inhabitants have the right to vote in elections to the legislative assembly which is responsible for community matters concerning them and that, conversely, neither group may vote in elections to a legislative assembly which is not responsible for them. There is, in this respect, no discrimination between the French-speaking electors in Hal-Vilvorde, on the one hand, and the Dutch-speaking electors in Hal-Vilvorde, the Dutch-speaking electors of Brussels-Capital and the French-speaking electors of Brussels-Capital, on the other. Nor does the Court consider that there has been a violation of the principles of equality and non-discrimination covered by Article 27 of the International Covenant on Civil and Political Rights, in view of the explanations relating to application of this provision given in the judgment.

In this same context, the Court considers that the obligation imposed on members of the Flemish Council, including French-speaking members, of taking the oath in Dutch, does not violate the principles of equality and non-discrimination covered by Article 3 of Protocol No. 1 and Article 27 of the Covenant.

As for the complaint that maintenance of a single electoral district covering two regions (Brussels-Hal-Vilvorde, situated in both the bilingual Brussels-Capital region and in the monolingual Flemish region) violates the constitutional rules on equality and non-discrimination, since it makes a distinction between electors and candidates in the same language region, region and province, by including some, but not others, in a bilingual constituency, the Court considers the measure justified by the need to secure that general compromise which opened the way to institutional reform in Belgium, and by the fact that there has been no disproportionate interference with fundamental freedoms or rights. The challenged provisions do not disproportionately affect the freedom of each person to vote for the candidate of his choice and to stand for election, and do not impair the essence or nullify the substance of the individual's electoral rights. Nor do they mean that some electors have less influence on the nomination of representatives than others, that one political party is favoured to the detriment of other parties, or that one candidate has an electoral advantage over others. The fact that the districts of Nivelles and Louvain were not brought into a single constituency with Brussels-Hal-Vilvorde can be justified by the fact that the outlying communes which have special status concerning the use of languages for administrative purposes, are all situated in the Hal-Vilvorde district.

Bulgaria

Constitutional Court

Reference period:
1 July 1994 - 31 December 1994[1]

Statistical Data

Number of Decisions: 9

Important Decisions

Identification:

a) Bulgaria / b) Constitutional Court / c) / d) 17.05.1994 / e) 3/94 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Courts – Administrative courts – Status of judges.

Keywords of the alphabetical index:

Right to a defence.

Headnotes:

The right to defence of legitimate interests is a fundamental, universal and personal right of all citizens. Judges, prosecutors and examining magistrates enjoy this right on an equal footing.

Summary:

Motion brought by members of parliament for interpretation of Article 56 of the Constitution concerning the right of magistrates to legal defence under the Supreme Judicial Council Act. The petitioners asked the Court to rule whether the absence of provisions in the Act about the magistrates' right to defence render it unconstitutional and whether the Act is in breach of Article 56 guaranteeing the right of citizens to legal defence.

The Constitutional Court ruled that the right to legal defence is a fundamental, universal and personal right of citizens. It is a remedy for their other violated or imperilled rights or legitimate interests. The provision of Article 56 is of a procedural nature. While not determining the scope of the rights, it safeguards their observance. This provision is usually applied together with other constitutional and legislative norms, though it can also be applied on its own as a remedy of last resort if no other remedies are envisaged. Article 56 of the Constitution has immediate effect. Judges, prosecutors and examining magistrates enjoy the right to defence on an equal footing. They can lodge appeals against acts of the Supreme Judicial Council, such as administrative acts, which infringe upon their rights or legitimate interests, both under the Supreme Judicial Council Act and before the Supreme Court under the Administrative Procedure Act.

Identification:

a) Bulgaria / b) Constitutional Court / c) / d) 21.06.1994 / e) 4/94 / f) / g).

[1] *The first two judgments were rendered during the previous reference period.*

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Relations with legislative bodies.

Keywords of the alphabetical index:

Vote of confidence.

Headnotes:

The Prime Minister is not constitutionally obliged to submit the Cabinet's resignation when the Parliament rejects his proposal for the establishment of new ministries.

Summary:

The Court examined a motion for interpretation of Article 112.2 of the Constitution. It had to determine whether the Prime Minister should resign following the rejection of a proposal made by him for structural changes in the Government, or whether he could instead propose a new programme as well as changes in the structure and composition of the Government and request a new vote of confidence.

The Constitutional Court ruled that tendering of resignation under Article 111.1.2 of the Constitution is an expression of the free will of the Government or its leader and not a fulfilment of a constitutional obligation. The Council of Ministers and the Prime Minister are not obliged to give reasons for their resignation. The Prime Minister is bound by the Constitution to submit the resignation of the Government following a vote of no confidence by the National Assembly or failure by the Government to get the requested confidence vote. Apart from these two options which are explicitly envisaged in the Constitution, the Prime Minister is not constitutionally obliged to hand in the resignation of the Government. No such obligation arises when the National Assembly turns down proposals made by the Prime Minister, including legislative initiatives. The Prime Minister is therefore not constitutionally obliged to submit the Government's resignation when the National Assembly rejects his proposals for the establishment of new ministries or changes in the Government.

Identification:

a) Bulgaria / b) Constitutional Court / c) / d) 07.07.1994 / e) 5/94 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Powers.

Institutions – Executive bodies – Organisation.

Keywords of the alphabetical index:

Administrative bodies.

Headnotes:

The Council of Ministers can establish administrative bodies not envisaged in the Constitution including central departments of non-ministerial rank.

Summary:

Motion for interpretation of Article 1.2, sentence two, and Article 105 of the Constitution with regard to the powers of the Council of Ministers to direct and implement the country's domestic policy and to exercise overall guidance over the state administration, as well as for interpretation of Articles 107, 109, 110 and 113.1 of the Constitution.

The Constitutional Court held that within its competence under Article 105.2 of the Constitution the Council of Ministers can establish administrative bodies not envisaged in the Constitution, including central departments of non-ministerial rank. In so far as it is not empowered to do so, the Council of Ministers cannot delegate to other bodies powers vested in it by the Constitution. The prerogative of the Council of Ministers to rescind any illegitimate or improper act issued by a minister (Article 107) covers also acts issued by heads of central departments of non-ministerial rank. The requirement to be sworn in provided for in Article 109 of the Constitution cannot be applied to non-members of the Council of Ministers. The provisions of Article 110 and Article 113.1 of the Constitution do not apply to the heads of central departments of non-ministerial rank. By a Council of Ministers' act, the same requirements can be introduced also with regard to the heads of departments of non-ministerial rank. In that case, however, these requirements will not be of a constitutional nature.

Identification:

a) Bulgaria / b) Constitutional Court / c) / d) 15.09.1994 / e) 8/94 / f) / g).

Keywords of the systematic thesaurus:

Institutions – Courts – General organisation.

Keywords of the alphabetical index:

Supreme Judicial Council / Irrevocability of judges.

Headnotes:

The elected members of the Supreme Judicial Council serve terms of five years. They must not be removed until completion of their term of office.

Summary:

Motion to establish the unconstitutionality of Section 16.1 of the Judiciary Act and of Sections 8 and 11 of its Transitional and Concluding Provisions.

The Constitutional Court ruled that Section 16.1 of the Judiciary Act is not unconstitutional. The requirement that the members of the Supreme Judicial Council should have special legal practical experience (as judges, prosecutors, examining magistrates or researchers in law) only specifies on a constitutional basis the requirement for high professionalism. Article 6.2 of the Constitution specifies in detail the grounds on which no restriction of rights may be based. Professionalism is not mentioned therein. The requirement of certain professional qualities and the imposition of restrictions where they are lacking are therefore admissible.

The Constitutional Court held that Sections 8 and 11 of the Transitional and Concluding Provisions of the Judiciary Act are unconstitutional. Section 8 fails to recognise the irrevocability guaranteed by Article 129.3 of the Constitution to incumbent judges and prosecutors who do not meet the new requirements set forth in the Judiciary Act concerning the duration of their general and specialised legal service. It was held that the Supreme Judicial Council has not one term of office as a whole. Only individual members of the Supreme Judicial Council can be dismissed prior to the expiration of their term of office, whereas no grounds for early dissolution of the Council itself are envisaged. Termination of its activities by a law is inadmissible even in the event of altered requirements for its elected members. As a body it can be dissolved only by a constitutional amendment.

Canada

Supreme Court

Reference period:
1 September 1994 – 31 December 1994

Important decisions

Identification:

a) Canada / b) Supreme Court / c) / d) 01.09.1994 / e) 23321 / f) / R.v. Tran g) Canada Supreme Court Reports, [1994] 2 S.C.R. 951.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Languages.

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

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Court proceedings / Legal rights / Right to the assistance of an interpreter.

Headnotes:

A party or witness who does not understand or speak the language of the proceedings has the right to obtain the assistance of an interpreter, under Section 14 of the "Canadian Charter of Rights and Freedoms". The failure to provide an accused with full and contemporaneous translation of all the evidence at his trial constituted a breach of that right. While the interpretation provided need not be perfect, it must be continuous, precise, impartial, competent and contemporaneous. Not every deviation from the protected standard of interpretation will violate Section 14: the lapse must have been in respect of the proceedings themselves, thereby involving the vital interests of the accused.

Identification:

a) Canada / b) Supreme Court / c) / d) 30.09.1994 / e) 23623, 23178, 23642, 23312, 23160, 23585 / f) / R. v. Bartle, R. v. Prosper, R. v. Pozniak, R. v. Matheson, R. v. Harper, R. v. Cobham / g) Canada Supreme Court Reports, [1994] 3 S.C.R. 173, [1994] 3 S.C.R. 236, [1994] 3 S.C.R. 310, [1994] 3 S.C.R. 328, [1994] 3 S.C.R. 343, [1994] 3 S.C.R. 360.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Canadian Charter of Rights and Freedoms / Legal rights / Right to be informed of right to lawyer / Right to assistance of a counsel.

Headnotes:

The "Canadian Charter of Rights and Freedoms" (Section 10.b) provides that everyone on arrest or detention has the right to retain and instruct counsel without delay and to be informed of that right. This provision does not impose a substantive constitutional obligation on governments to provide free and immediate preliminary legal advice upon request (R. v. Prosper). Where such advice is available, however, the person under arrest or detention has the right to be informed without delay of that service and of how to access it (R. V. Bartle, R. v. Pozniak, R. v. Cobham). The right to be informed extends only to existing services (R. v. Matheson). Section 24.2 of the Charter provides that, where a court concludes evidence was obtained in a manner infringing a Charter right, that evidence may be excluded if its admission would bring the administration of justice into disrepute. Breathalyser evidence given under legal compulsion but obtained in violation of the right to counsel was not admitted (R. v. Bartle, R. v. Prosper, R. v. Pozniak, R. v. Cobham) but an inculpatory statement with respect to wife-battering, which was made after arrest and before being informed of right to counsel, was admitted into evidence where it appeared the accused would not have acted differently even if informed of the right to counsel (R. v. Harper).

Croatia

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Statistical Data

- Cases concerning the conformity of laws with the Constitution:

received 42, resolved 22: in 3 cases the provisions of laws were repealed; in 17 cases the motion to review the constitutionality of laws was not accepted; in 1 case the motion to review was rejected; in 1 case the petitioner was instructed about the right to ask the Court to review the constitutionality and legality.

The Court also started by its own motion the procedure to review the constitutionality of the tenancy law, having in view primarily the constitutionality of the procedure by which forced evictions are carried out (in an urgent administrative procedure) in cases in which tenants have impugnable tenancy title – in contrast to cases in which persons occupying flats have no title at all.

In 35 cases the Court was asked to stop temporarily the execution of individual acts based on a provision the constitutionality of which was under review. In 21 cases the execution was suspended, in 4 cases the motion was dismissed or rejected, 10 cases were undecided before 31 December 1994.

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

received 19, resolved 10: in 4 cases the motion to review the constitutionality and legality of regulations was not accepted; in 3 cases the motion was rejected, and in 3 cases the procedure was terminated because the regulations under review were no longer in force or the petitioner withdrew his/her proposal.

- Cases concerning the protection of constitutional rights:

received 297, resolved 59: in 5 cases the constitutional action was accepted, in 24 cases dismissed, in 25 cases rejected, in 3 cases the action was withdrawn, in 2 cases the petitioners were instructed on the right to submit a constitutional action.

In 34 cases in which constitutional action concerned the procedure in which forced evictions are carried out, the Court was asked to suspend the implementation of individual acts before the case was finally decided. The petitioners claimed that the implementation would cause them hardly reparable damage. In the reference period, in 17 cases the implementation was suspended, in 6 cases the claim for suspension was dismissed and 11 cases were not yet decided upon.

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

received 2, resolved 3: 1 case was decided upon, 1 claim was dismissed and 1 rejected.

Important Decisions

Identification:

a) Croatia / b) Constitutional Court / c) / 05.10.1994 / e) U-I-348/1993 / f) / g) *Narodne novine*, 72/1994.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Accused person / Competence of courts / Freedom of conscience / Victims of war.

Headnotes:

The identification of persons who had committed war crimes is a subject-matter to be decided only by the courts, which make their decisions applying the principles of criminal procedure. These principles are also constitutional principles, namely: everyone shall be presumed innocent and considered not guilty of a penal offence until his/her guilt has been proved by a court judgement, which has become final after exhaustion of all legal remedies; anyone suspected or accused of a penal offence shall have the right to a fair trial before a competent court.

The freedom of conscience of citizens is violated by their obligation to come before the commission which is given investigative powers without the guarantees of court procedure. Freedom of conscience includes the right of citizens to behave in accordance with their conscience and not to be forced to perform acts which might imply beliefs that are not their own.

Summary:

The decision of the Court repealed three provisions in the act regulating the status of victims of the Second World War and of the time after the Second World War. The purpose of the act also was the ascertainment of a number of persons who had lost their life during and after the war, of places and circumstances of their death and of ways to mark such places. The act entrusted the conduction of the activities of the commission appointed by Parliament. The impugned provisions stated that the task of the commission was, if possible, to identify those persons who have committed war crimes, and to call before it citizens who could give it the data relevant for its activities.

Identification:

a) Croatia / b) Constitutional Court / c) / d) 12.10.1994 / e) U-III-71/1992 / f) / g) *Narodne novine*, 76/1994.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Equality.

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

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

Keywords of the alphabetical index:

Capacity to bring legal proceedings.

Headnotes:

The notion of "everyone" in the provision allowing everyone to submit a constitutional action includes also persons deprived of the capacity to bring legal proceedings by decision of a court when constitutional action aims at the protection of rights violated in a procedure which led to the deprivation of that capacity.

Summary:

The constitutional action was submitted by a person who was found incapable of bringing legal proceedings in a procedure determined by an act regulating marriage and family relations. The Court held that the action is permissible since constitutional rights might have been violated in the procedure which led to the deprivation of the said capacity.

Identification:

a) Croatia / b) Constitutional Court / c) / d) 17.10.1994 / e) U-III-418/1994 / f) / g) *Narodne novine*, 76/1994.

Keywords of the systematic thesaurus:

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

Institutions – Principles of State organisation – Rule of law.

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

Keywords of the alphabetical index:

Political prisoner / Rule of law.

Headnotes:

The allegation that a law will provoke partiality in its application is not relevant in proceedings in which the Constitutional Court reviews the constitutionality of a legislative act. In such proceedings, the Court does not deal with the application of a law, but decides on the conformity of a law with the Constitution.

A legal definition, if precise enough, does not violate the rule of law principle.

Summary:

The ruling of the Court did not accept the motions to review the constitutionality of a provision in the act on the rights of former political prisoners. The provision in question determines who is to be considered a former political prisoner and under which conditions the status of former political prisoners is to be obtained.

Identification:

a) Croatia / b) Constitutional Court / c) / d) 18.11.1994 / e) U-III-362/1992 / f) / g) *Narodne novine*, 86/1994.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Retroactive effect.

Headnotes:

The Constitution forbids retroactive effect of entire laws but permits that individual provisions of a law may have retroactive effect.

Summary:

The decision of the Court repealed part of a provision in the law regulating salaries, which gave retroactive effect to the whole law. The law in question was published on 15 November 1992, and according to the impugned – and repealed – provision was to be applied since 9 October 1992.

Identification:

a) Croatia / b) Constitutional Court / c) / d) 30.11.1994 / e) U-I-46/1994 / f) / g) *Narodne novine*, 92/1994.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Land property / Ownership / Privatisation.

Headnotes:

The Constitution makes it possible to deprive an owner of ownership only under these conditions: the deprivation must be effected by an Act of the Republic's Parliament; must be in the interest of the Republic and be accompanied by an indemnity equal to the market value of the object of ownership. The legislator is not authorised to prescribe other conditions under which ownership may be terminated.

Summary:

In the process of turning social ownership of land into private ownership a provision of the act regulating ownership stated that the land on which a house stands and the land which serves to regular usage of the house which were previously socially owned becomes private property of the owner of the house (if the house was built in a legal way) and remains private property as long as the house exists. The motion to review the constitutionality of the provision referred in particular to the position of people who lost houses due to the war and acts of terror, or generally against their will. The decision of the court repealed that part of the provision which reads "as long as the house exists", having found that it introduces a deprivation of ownership which does not fulfil the constitutional conditions for it.

Identification:

a) Croatia / b) Constitutional Court / c) / d) 30.11.1994 / e) U-I-328/1994 / f) / g) *Narodne novine*, 93/1994.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Fishing boat / Foreigners before the Constitutional Court.

Headnotes:

The deprivation of an instrument which was used to commit an offence does not violate the constitutional protection of property. The Constitution not only guarantees the right of ownership, but prescribes that ownership implies obligations, one of them being the respect of the legal order of the Republic. The notion of restrictions of constitutional freedoms and rights on the grounds of the protection of public order justifies such a deprivation.

Summary:

The provision of the act regulating fishing in sea waters prescribes penalties for offences committed by the captain of a foreign fishing boat (fishing without licence or in a way incompatible with international treaties). The act also requires the deprivation of the fishing boat, regardless of whom it belongs to.

Identification:

a) Croatia / b) Constitutional Court / c) / 14.12.1994 / e) U-I-693/1994 / f) / g) *Narodne novine*, 96/1994.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Parliaments – Structures.

Institutions – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Telecommunications / Minorities.

Headnotes:

Unless it is otherwise specified by the Constitution, Parliament adopts laws by majority vote, provided that a majority of representatives are present at the session.

Summary:

The motion to review the act regulating telecommunications questioned the procedure in which the act was adopted, alleging that it was adopted when the representatives of national communities and minorities were not present. The Court found the procedure constitutional since the act was adopted by a majority vote.

Czech Republic

Constitutional Court

Reference period:
10 October 1994 – 31 December 1994[1]

Statistical Data

- Decisions by the plenary Court: 5
- Decisions by chambers: 14
- Number of other decisions by the plenary Court: 2
- Number of other decisions by chambers: 128
- Number of other procedural orders: 66
- Total number of decisions: 215

Important Decisions

Identification:

a) Czech Republic / b) Constitutional Court / c) / d) 12.07.1994 / e) Pl.ÚS 3/94 / f) Prohibition of discrimination and establishing equality of rights / g).

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.

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

Sources of constitutional law – Hierarchy – Hierarchy between national and non national sources – Treaties and other domestic legal instruments.

Keywords of the alphabetical index:

Expropriation under the communist regime / Property restitution.

Headnotes:

The inclusion of the requirement of permanent residence in the Czech Republic for Czech citizens by the legislator as precondition for property restitution is not justified by the Constitution.

Summary:

The Charter of Fundamental Rights and Freedoms states in Section 12.2 that "laws may also determine that a specific property can be owned only by nationals or by legal persons resident in the Czech Republic". However, it gives no authorization to the legislator to set other conditions for acquiring property (whether by an act of restitution or in general), in concrete, the condition of a permanent residence within the territory of the Czech Republic. Such an authorization can not even be deducted from other constitutional laws of the Czech Republic. The institute of "permanent residence" as laid down by the Act on Evidence and Notification of Residence of Nationals, No. 135/1982 of the Gazette, is an institute of public law for matters of police evidence; it has thus no relevance for a norm that provides for legal relations of private law as it is the case of the Act on Extra-Court Property Restitution, No. 87/1991 of the Gazette. Moreover, with respect to the provisions of international treaties on human rights and fundamental freedoms binding the Czech Republic, the condition of a permanent residence is an inadmissible condition as it sets inadequate limits to "applications" for property rights. The right of restitution of ownership can be seen as the essence of litigations concerning injuries inflicted in the past. As a consequence of such limits, the original owners of properties who were expropriated in the past and/or their legal successors would be divided into categories of more equal and less equal persons.

[1] *The first two judgments were rendered during the previous reference period.*

Identification:

a) Czech Republic / b) Constitutional Court / c) / d) 13.09.1994 / e) Pl.ÚS 9/94 / f) Acquisition of nationality of the Czech Republic / g).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Acquisition of nationality / Organs granting nationality.

Headnotes:

Except for some binding international obligations the granting of nationality lies within the discretion of each state.

Summary:

From a general point of view nationality can be defined as a permanent legal relation of a natural person to a state of that a person can not be deprived against its will. Details as to the terms of the nationality are specified by the legislation of each state. It lies within the exclusive powers of a state to determine the conditions under which nationality can be acquired and deprived of. The consequences of the legal relations to nationals can nevertheless affect the international relations between states as the principles of nationality guarantee a natural person protection on the territory of other states as well. International application and recognition of the nationality has to be based in each case on national legislation of the given state although a decision of a state on granting its nationality may be questioned internationally. It can be nevertheless ascertained from the point of view of public international law that except for some binding international obligations the granting of nationality lies within the discretion of each state.

Supplementary information:

The Court dismissed an application to declare unconstitutional provisions of an act of parliament that grants Czech nationality to nationals of the former Czech and Slovak Federal Republic if some preconditions are fulfilled. It further specifies under which circumstances the fulfilment of the above preconditions can be waived by the competent bodies.

Identification:

a) Czech Republic / b) Constitutional Court / c) / d) 12.10.1994 / e) Pl.ÚS 4/94 / f) Anonymous witness as evidence in criminal trial / g).

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Procedure.

Institutions – Courts – Ordinary courts – Criminal courts.

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Anonymous witness / Criminal procedure.

Headnotes:

The admission of anonymous witnesses in criminal cases conflicts with the right to a fair trial.

Summary:

The opportunity for the accused to verify all pieces of evidence against him in face of the public together with the right to make a statement on any evidence presented to the court can be understood as the essence of the right to public proceedings. This verification includes two components – to examine the truthfulness of the facts of a case and to examine the credibility of a witness. The admission of anonymous witnesses sets limits for the accused to verify the truthfulness of a testimony made against him as it prevents him from commenting about the personality of the witness and his credibility. Therefore it limits rights of defence of the accused which is contrary to the principle of equality of the parties in trial as the same limits do not apply to the prosecution; it conflicts thus with the principle of fair trial.

Identification:

a) Czech Republic / b) Constitutional Court / c) / d) 30.11.1994 / e) Pl.ÚS 5/94 / f) Decisions made in the course of execution of the prison sentence / 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:

Assignment to a specific type of prison / Criminal procedure / Execution of a prison sentence.

Headnotes:

Decisions on the assignment of a convicted to a specific type of prison fall into the exclusive competence of courts.

Summary:

Decisions made on the assignment of a convicted to another type of prison – without taking into account the gravity of the conditions there – are part of decisions on the sentence for criminal acts which fall into the exclusive competence of courts, in no case into the competence of an administrative body. A sentence of imprisonment has to contain also the verdict on the way of execution of the sentence in specified a type of prison. This verdict being the original penal sentence, the decision on assignment to another type of prison can be regarded as a secondary penal sentence. The institute of penalty contains – together with its quantitative aspect – also a qualitative dimension that specifies to what extent and in which way the personal liberty and human dignity can be infringed upon. The decision on assignment to a specific type of prison is by its nature a verdict on the penalty specifying its quantitative and qualitative dimensions. Such a decision determines the intensity of the interference into fundamental rights and freedoms of the convicted.

Identification:

a) Czech Republic / b) Constitutional Court / c) Chamber No. 4 / d) 15.12.1994 / e) IV.ÚS 57/94 / f) Right of defence before court and right to a fair trial / g).

Keywords of the systematic thesaurus:

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

Institutions – Courts – Ordinary courts – Supreme court.

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

Keywords of the alphabetical index:

Politically motivated trials / Verification of evidence.

Headnotes:

The right to a fair trial includes the right of the appellant to be heard also by the Supreme Court.

Summary:

The Supreme Court passed the decision in question in a public hearing in that – although properly invited – the appellant had not taken part, having excused his absence with a bad state of health. After the hearings in the presence of a lawyer appointed by the Court in favour of the appellant a decision had been passed on the basis of facts established in the original trial. The subject-matter of the decision had been a claim raised by the former General Prosecutor of the Czech Republic for violation of Section 30.2 of the Act on Court Rehabilitations, No. 119/1990 of the Gazette; the General Prosecutor held that the court had not payed due respect to the defence of the accused not having examined the case in detail and having drawn conclusions unilaterally based on partial evidence without taking into account the principle *in dubio pro reo*. The appeal was directed against a decision passed in the course of a political trial during the fifties directed against the intelligence and its position in the totalitarian regime, claiming a "misuse" of powers of a physician by rendering expert opinions in military proceedings. This trail has been characterized by the Supreme Court itself in its statement of reasons as a "giant political trial paying respect to points of view that are far from an unprejudiced and independent jurisdiction of a democratic state ruled by law". With respect to this nature of the original trial it cannot be excluded that the evidence was made in pursuance of specific purposes and that the confessions were enforced. The Court should have payed increased attention to the right of defence – not only by a lawyer appointed by the Court but also by insisting on the personal presence of the appellant who should have been given a real chance to make statements on the evidence found in the original trial thus creating conditions for an effective right of defence. By not doing so the Supreme Court had violated the right of the appellant to a fair trial.

Denmark

Supreme Court

Reference period:
1 September 1994 – 31 December 1994

Important decisions

Identification:

a) Denmark / b) Supreme Court / c) / d) 12.10.1994 / e) II 50/1994 / f) / g) *Ugeskrift for Retsvaesen* (weekly periodical) 1994, 953.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Labour law.

Headnotes:

A collective agreement cannot preclude an employee from bringing an action regarding his discharge before the ordinary courts in cases where the trade association does not take steps to deal with the case before a special court or arbitration.

Summary:

An employee in a building society – who had been discharged – wanted to bring an action against the building society before the ordinary court regarding his salary. A collective agreement provided right to take proceedings before a special court of arbitration for the trade union and not for the individual employee. The trade union, however, did not wish to take any legal action in connection with the case. The building society asserted that according to the collective agreement the case should be dismissed by the ordinary courts. The Supreme Court stated that in the light of Article 6.1 ECHR the employee was not precluded from bringing an action regarding a civil claim relating to a discharge before the ordinary courts in cases where the trade union does not bring the claim before a special court of arbitration.

Identification:

a) Denmark / b) Supreme Court / c) / d) 28.10.1994 / e) I 91/1994 / f) / g) *Ugeskrift for Retsvaesen* (weekly periodical) 1994, 988.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Audiovisual / Freedom of information.

Headnotes:

The media's right to news coverage (the right to freedom of information) was in a particular case given priority to the right to private life.

Summary:

A journalist working for a local television channel was charged with unlawfully entering the private garden of a well-known politician and member of parliament during a demonstration that took place in the garden. The demonstrators had previously been convicted of the same offence. The journalist had tried to contact the politician by knocking on the door. However, the door remained closed and the journalist remained in the garden where he spoke to the demonstrators and made an interview which was broadcast the same evening. The journalist was convicted by the District Court as well as by the High Court, but acquitted by the Supreme Court.

The Supreme Court held that by remaining in the garden the journalist had entered a private property that was not "freely accessible" as prohibited by Section 264.1 of the Danish Criminal Code. However, the right to private life must in such cases be balanced against the interest of news coverage (right to freedom of information). In the present case, priority was given to the media's right to news coverage.

Supplementary information:

In this balancing of interests the Court made specific reference to Article 10 of the ECHR and to the judgment of 23.09.1994 of the European Court of Human Rights in the case "Jersild vs. Denmark".

Estonia

National Court

Reference period:
1 September 1994 – 31 December 1994

Statistical data

Number of decisions: 7

Types of claim:

- petition of the President of the Republic: 1
- petition of the Legal Chancellor: 4
- *ex post facto* referral by courts: 2

Types of review:

- preliminary review: 1
- *ex post facto* review: 6

Nature of decisions:

- petition denied: 0
- decisions declaring a statute or other legal act null and void: 6
- decisions declaring a statute or a foreign treaty unconstitutional: 1

Subject matter of decisions:

- individual's constitutional rights with respect of taxation: 1
- distribution of powers: 2
- local government rights in tax revenues: 1
- question of legality of ownership of real property by Soviet military authorities on the territory of the Republic of Estonia: 1
- powers of local governments: 2

All the decisions of the National Court on constitutional review were published in the Estonian Official Journal *Riigi Teataja* (hereinafter referred to as RT I).

Important decisions

Identification:

a) Estonia / b) National Court / c) Constitutional Review Chamber / d) 30.09.1994 / e) III-4/A-5/94 / f) Review of the Property Law Enforcement Act §25.3 to the extent that it sought to nullity the Estonian SSR Farm Act §30.2 / g) RT I 1994, No. 66, 1159.

Keywords of the systematic thesaurus:

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

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

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

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

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

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

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

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

Institutions – Principles of State organisation – Rule of law.

Institutions – Legislative bodies – Parliaments.

Institutions – Public finances – Taxation – Governing principles.

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

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

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

Keywords of the alphabetical index:

Fundamental rights / Rule of law / Taxes.

Headnotes:

The legislative repeal of an Act which provided a tax exemption for a certain period of time violates the constitutionally established principle of justice as well as general principles of law, e.g. the principle of legal certainty.

Summary:

This was the first case which the Constitutional Review Chamber of the National Court decided on a referral

from a court, which in its decision ruled that §25.3 of the Property Law Enforcement Act 1994 was unconstitutional to the extent that it nullifies §30.2 of the Estonian SSR Farm Act, 1989. The court notified the National Court and the Legal Chancellor of its decision, which set in motion the constitutional review proceeding in the National Court. §30.2 of the Farm Act established that those farms created pursuant to the Act would be exempted from taxation for a period of five years, beginning the first day of the month following the creation of the farm. The Property Law Enforcement Act, however, annulled that benefit and the founders of the farms had to begin paying taxes immediately on real property. The National Court found that the legislature on this occasion had not followed the constitutionally established principles of justice and social and democratic rule of law, including the principle of legal certainty, as well as the general principles of law recognised within European legal systems. As a consequence, the National Court declared §25.3 of the Property Law Enforcement Act null and void to the extent that it sought to nullify §30.2 of the Estonian SSR Farm Act.

Identification:

a) Estonia / b) National Court / c) Constitutional Review Chamber / d) 07.12.1994 / e) III-4/A-9/94 / f) Review of the order of the Minister of Finance No. 20 dated January 20, 1994, approving the "Directive Regarding Application of the Income Tax Act" / g) RT I 1994, No. 91, 1567.

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Other litigation.

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

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

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

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

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

Institutions – Federalism and regionalism – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

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

Institutions – Public finances – Budget.

Keywords of the alphabetical index:

Budget / Delegated legislation / Local government / Taxes.

Headnotes:

Under the Constitution a Minister is authorised to make only those orders which are based on statutes and for the purpose of executing statutes. All orders of a Minister exceeding this authority are in violation of the Constitution.

Summary:

Until 1 January 1994, Estonia had a taxation system which provided that personal income tax payment would go 100% into the budget of the local government. Pursuant to the statute, the sums due in 1993 but paid after 1 January 1994, were also to be distributed according to the same scheme. The new statute and the distribution of tax revenue plan were to be applied beginning on 1 January 1994.

By his directive of 21 January 1994 the Minister of Finance established a new procedure for the application of the old statute, distributing the income tax payments from individuals in a manner detrimental to the local government in that 48% of such revenues went into the national budget. In this manner, the Minister exceeded his authority since under Article 94.2 of the Constitution a Minister can give orders based only on statutes and for the purpose of executing statutes. The legal rights and interests of local governments were also violated by this. The directive was contrary §20 of the Parish and City Finance Act as well as to §3.1.1 of the National Finance Act. The National Court declared §1.5.3 of the Directive Regarding Application of the Income Tax Act null and void.

Identification:

a) Estonia / b) National Court / c) Constitutional Review Chamber / d) 21.12.1994 / e) III-4/A-11/94 / f) Review of the National Defense in Time of Peace Act passed November 8, 1994 / g) RT I 1995, No. 2/3, 35.

Keywords of the systematic thesaurus:

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

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

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

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

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

Institutions – Executive bodies – Powers.

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

Fundamental rights – Governing principles – Emergency situations.

Keywords of the alphabetical index:

Competence / Conflict of power / Conflict between legislative and executive power / Division of powers / Exclusion of presidential power / Powers of the President.

Headnotes:

It is not consistent with the spirit of the Constitution that the President of the Republic gives orders to the Commander of the Defence Forces, thereby by-passing the Government which is properly charged with executing the internal and foreign policy of the State and which bears political responsibility before the National Assembly.

Summary:

After the President of the Republic had refused to promulgate the National Defence in Time of Peace Act, the National Assembly again passed the Act without modification. The President petitioned the National Court seeking to declare the Act unconstitutional on the basis that only the President has the right to regulate defence forces. §14.2 of the National Defence in Time of Peace Act gave the Government of the Republic the right to give orders to the Commander of the Defence Forces regarding the use of the armed forces and the National Guard in the event of a natural disaster or catastrophe or to prevent the spread of an epidemic, or to eliminate armed terrorist groups.

The Court declared the National Defence in Time of Peace Act to be unconstitutional. Emphasising that Estonia is a democratic Republic according to Article 1 of the Constitution, the Court found that decisions concerning the basic rights and freedoms of citizens must be made on the basis of the law and on the basis of co-ordination. If the Act permits the use of defence forces in cases of natural disasters or catastrophes or in order to prevent the spread of an epidemic without the Government's prior declaration of a state of emergency, this would be in violation of Article 87.8 of the Constitution. Similarly, the Act allows the use of defence forces and of the National Guard in military activities for the purpose of guaranteeing internal security without a state of emergency being declared or without establishing statutory restrictions on basic rights and freedoms. This possibility was considered unconstitutional, independent of who gives the orders to use the defence forces.

France

Constitutional Council

Reference period:
1 September 1994 – 31 December 1994

Statistical Data

10 decisions, as follows:

- 2 decisions on the normative review of laws submitted to the Constitutional Council pursuant to Article 61.1 of the Constitution
- 1 decision on automatic normative review pursuant to Articles 46 and 61.1 of the Constitution
- 6 decisions on electoral matters pursuant to Article 59 of the Constitution
- 1 decision on the dismissal of a member of parliament pursuant to core provisions of the Electoral Code

Important decisions

Identification:

a) France / b) Constitutional Council / c) / d) 29.12.1994 / e) 94-351 DC / f) Law on the budget for 1995 / g).

Keywords of the systematic thesaurus:

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

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

Institutions – Public finances – Budget.

Keywords of the alphabetical index:

Accuracy of budget presentation / Budget balance / Budgetary unity and universality / Permanent charge on the State / Supplementary budget.

Headnotes:

This case concerned the question of the annulment of a provision which had transferred monies from State funds (from a supplementary budget) to a pension fund and which had provided that the reimbursement of such monies was forfeited by the State. Although located in the first part of the law on the budget, these provisions did not put into question the general position of the budget balance.

The rules of unity and universality deriving from Sections 1, 6, 16 and 18 of the applicable law of 2 January 1959 apply to supplementary budgets, whose operating expenditure is subject to the same rules as ordinary budget expenditure under the terms of Section 21 of the same law. In the event, the provision whereby permanent expenditure deriving from the supplementary budget for social benefits is taken into account in the expenditure of the pension fund is contrary to the principle of universality.

The fundamental rules on unity and universality prevent State expenditure which, relating to public employees, is inherently of a permanent nature and which is not covered by the budget or is otherwise financed from resources which it does not control. This applies in particular to the financing of increases to pensions, pensions being a legal and social benefit due by the State to its retired employees.

Summary:

The Constitutional Council was seized by the parliamentary opposition on the question of the entire law on the budget for 1995, on the eve of presidential elections.

The Constitutional Council rejected the claims advanced by the applicants as to the accuracy of the general

presentation of the law on the budget, but was moved to recall its constitutional case law on the three fiscal points set out above, namely:

1. the annulment of provisions relating to budgetary receipts need not necessarily put into question the general position of the budget balance;
2. the rules of unity and universality apply to supplementary budgets;
3. legal and social benefits due by the State to its employees have the character of permanent expenditure and as such must be chargeable to the budget or financed from resources which it controls.

Germany

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

The first two judgments were rendered during the previous reference period.

Statistical data

11 judgments of a chamber (*Senat*), 5 cases dealt with (taking into account the joinder of cases) among them:

- 7 judgments concerning individual constitutional claims
- 2 judgments concerning proceedings for annulment
- 2 judgments concerning federal disputes

1598 judgments by sections (*Kammer*) (1514 granting, 84 rejecting); 40 cases dealt with (taking into account the joinder of cases)

1587 new cases

Important decisions

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 16.03.1994 / e) 2 BvL 3/90; 2 BvL 4/91; 2 BvR 1537/88; 2 BvR 400/90; 2 BR 349/91; 2 BvR 387/92 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Criminal law / Measures of rehabilitation and security.

Headnotes:

Drug addicts may only be placed in drug rehabilitation centres when it can reasonably be expected that they will be cured. Imprisonment and measures of rehabilitation and security may be imposed at the same time. However, the fundamental right to personal liberty requires that both are integrated in such a way so as not to interfere with the liberty of a person to any greater degree than necessary. The right to personal freedom does not require that the full duration of a measure of rehabilitation and security must be deducted from the length of imprisonment to which a person was sentenced. However, the principle of proportionality must still be respected.

Summary:

Under German law, a criminal court may sentence a person to imprisonment and, at the same time, to measures of rehabilitation and security, such as his/her placement in a drug rehabilitation centre. The Constitutional Court did not object to this possibility in principle. Respect for the principle of proportionality requires, however, that a person may only be placed in a drug rehabilitation centre if it can be expected that he/she will be cured. As the imprisonment and the placement have different scopes, they are compatible with each other. Thus, in order for the placement to be considered as part of the punishment, its duration has to be deducted from the length of the imprisonment.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 25.08.1994 / e) 1 BvR 1423/92 / f) / g) [*Europäische Grundrechtezeitschrift* 1994, p. 463].

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Libel.

Headnotes:

It is a violation of freedom of expression for a court to convict a person for libel because of behaviour which has several meanings, not all of which constitute libel.

Summary:

A person had a sticker on his car which read: "All soldiers are murderers. Kurt Tucholsky". He was convicted for libel and insult to a social group, comprising members of the armed forces. The Constitutional Court decided that in common language "murderer" does not always mean a person who has committed a crime in the sense of the criminal law. The criminal court had construed the meaning of the sticker incorrectly by stating that it offended members of the national armed forces (*Bundeswehr*), because the term "murderer" designates a person who has committed this crime, whereas all reasonable men know that the *Bundeswehr* never took part in a war and no member of it could have killed another person in belligerent action.

Supplementary information:

Judgment by a section composed of three justices.

Decision concerning a similar case: Decisions of the Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*) Vol. 85, p. 1.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 11.10.1994 / e) 1 BvR 337/92 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Organisation.

Keywords of the alphabetical index:

Rules issued by the executive, procedural requirements.

Headnotes:

If Parliament transfers normative powers to the Federal Government as a whole, decrees based on this transfer of powers must be adopted in a way that they may be attributed to the Federal Government as the real author of these decrees. The Federal Government is the real author if all of its members had the possibility to take part in the decision, a sufficient number of them actually participated in it, and if a majority of the members gave their consent to the decision.

Summary:

It was common practice in the Federal Government that many decrees to be issued by the Federal Government were adopted in the following way: A draft was sent to the members of the Government and it was considered adopted if there were no objections by a majority of the members of the Government. The Constitutional Court qualified this procedure as unconstitutional. However, it did not consider the decree in question null and void, as it was adopted in a practice which had never been put into question. The rules established by the Constitutional Court will, however, entail the unconstitutionality of such decrees in the future.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 11.10.1994 / e) 1 BvR 1398/93 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court; [*Neue Juristische Wochenschrift* 1995, p. 40].

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

Keywords of the alphabetical index:

Evidence and fair trial.

Headnotes:

It is a violation of personal liberty, and of the principle of a State governed by the rule of law if the factual basis for an expert opinion in judicial proceedings cannot be questioned by the parties and the court.

Summary:

House rents may be increased according to the general level of rents in the respective area for comparable houses or apartments. The general level of rents must often be determined by an expert who has to receive the relevant information from the owners or tenants of comparable houses in the area. In many cases these

persons require that they should not be named, in order to protect their privacy. This means that in proceedings in which such an expert opinion is relied on, the parties and the court do not know the factual basis for the opinion. The Constitutional Court decided that the principle of fair trail requires that the factual basis for an expert opinion can be questioned in court. Only a few exceptions to this rule might be admitted in cases where it would otherwise be impossible to give an opinion if all the data upon which it was based were to be published. In the case under consideration, there was not sufficient evidence that it would not have been possible to write an expert opinion on the level of local house rents if the respective data were to be published. The Constitutional Court quashed a decision of the civil court which was based on an expert opinion and the factual basis of which had not been questioned.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 11.10.1994 / e) 2 BvR 633/86 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court; [*Neue Juristische Wochenschrift* 1995, p. 381; *Deutsche Verwaltungsblätter* 1995, p. 100].

Keywords of the systematic thesaurus:

Institutions – Public finances – Budget.

Institutions – Public finances – Taxation.

Fundamental rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Equality and taxation / Special contributions and tax law.

Headnotes:

The imposition of a special charge is only compatible with the Constitution in exceptional cases, because it jeopardises parliamentary sovereignty in respect of the budget and of the equality of taxpayers.

Summary:

Electricity consumers have to pay an extra charge for the electricity they consume. The income thus generated is used to support the German mining industry. The Constitutional Court declared unconstitutional the statute on which the extra charge is based. The principle that the budget contains the State's revenue and expenditure in their entirety does not permit the legislator to levy charges which are dedicated to special purposes. This may entail the loss of control by Parliament over the State's revenue and it may infringe the equality of taxpayers in financing the tasks of the State.

Supplementary information:

Case-law concerning special charges: *Entscheidungen des Bundesverfassungsgerichts* (decisions of the Federal Constitutional Court) Vol. 67, p. 256 and p. 275; Vol. 82, p. 159, and p. 179.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 12.10.1994 / e) 2 BvR 1851 and 1853 / f) / g).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Former activity of a judge as Minister of Justice.

Headnotes:

The request by the President of the Constitutional Court to be declared disqualified to decide on cases concerning the punishment of politicians from the former GDR was granted.

Summary:

The President of the Constitutional Court declared herself disqualified to take part in decisions concerning the punishment of four politicians from the former GDR because, as a former Minister of Justice, she had several times advocated that these persons be held responsible for killings at the German border. She had always declared that she considered such proceedings to be in conformity with the Constitution. The Constitutional Court held that the President was disqualified to take part in a decision of the above-mentioned type.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 14.10.1994 / e) 2 BvR 1851 and 1853 and 1875/94 / f) / g).

Keywords of the systematic thesaurus:

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

Institutions – Principles of State organisation – Rule of law.

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

Keywords of the alphabetical index:

German Democratic Republic / Interim injunction / Punishment of politicians of the former GDR.

Headnotes:

Before, the Constitutional Court has not reviewed the constitutionality of judgments of a criminal court against which convicted persons have brought individual complaints, the criminal sanctions imposed by these judgments must not be executed.

Summary:

The appellants were convicted for homicide because they took part in decisions on establishing and maintaining the regime at the border between the two Germanies which aimed at hindering refugees trying to leave the German Democratic Republic even to the extent of killing them. In their individual complaint, they claimed that they should have been judged according to the then law of the GDR, which justified their acts. By way of interim injunction, they asked for the execution of their sentences to be delayed until the Constitutional Court has decided on the merits of their individual complaint. The disadvantage to the plaintiffs if the sentences were to be immediately executed in the event that the judgments of the ordinary courts later proved to be unconstitutional was held to outweigh the disadvantage to the public interest if the execution of the sentences were to be delayed in the event that the decision of the ordinary court later proved to be constitutional.

Supplementary information:

Proceedings before the Constitutional Court have no suspensive effect. Therefore, the execution of a decision of an ordinary court may be suspended only by an interim injunction. The test, i.e. what will happen if it is denied, which the Constitutional Court applied also in the above-mentioned cases, is generally applied when a decision is taken in preliminary proceedings.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 26.10.1994 / e) 2 BvR 445/91 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

Institutions – Principles of State organisation – Territorial principles.

Keywords of the alphabetical index:

Local self-government.

Headnotes:

The guarantee of local self-government in Article 28.2 of the Constitution includes the power of local organs to establish their own organisation. This does not, however, preclude the establishment of prerequisites for this organisation by State legislation. The legislator must not adopt norms which would "suffocate" the capability of local authorities to establish their own organisation. He has to leave sufficient leeway to the local authorities to organise themselves.

It does not violate the right to local self-government if a State law requires that a local municipality nominates an ombudswoman to survey the respect for the equality between men and women.

Summary:

A law of the region of Schleswig-Holstein requires self-governed local entities to nominate an ombudswoman to survey the respect for equality between men and women. Two local entities brought a complaint against this law before the Constitutional Court, which declared it constitutional on the basis that the norm leaves enough leeway to the local entities to decide on their internal organisation.

Supplementary information:

Former decisions concerning the local self-government: *Entscheidungen des Bundesverfassungsgerichts* (decisions of the Federal Constitutional Court) (BVerfGE) Vol. 59, p. 216; Vol. 76, p. 107, and Vol. 79.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 22.11.1994 / e) 1 BvR 351/91 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional proceedings – Procedure.

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

Keywords of the alphabetical index:

Exhaustion of remedies / Limitations of rents by law.

Headnotes:

The actual limitation of the rents to be paid by tenants in the eastern *Länder* (regions) does not violate the right to property of the owners of houses.

Summary:

In the former GDR house-rents were very cheap compared to the level of rent in the western part of the country. A law was adopted which limited the amount of house-rent a house-owner could demand. Many houses became private property only after the change of the economic system in the GDR following the unification. The owners could dispose of their property only under strict conditions.

The Constitutional Court decided that property in the former GDR enjoys the full protection of the Basic Law. As far as this property is limited in a way incompatible with the Basic Law, the legislator has to take measures to guarantee adequate constitutional protection. With respect to the actual situation in the Eastern part of Germany, the legislator could limit the rents for houses. Since there are two opposing fundamental rights at stake, i.e. the right of the owner and the right of the tenant who finds him/herself also protected under the Constitution, the legislator enjoys wide discretion in regulating this question.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 07.12.1994 / e) 1 BvR 1279/94 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.

Institutions – Principles of State organisation – Rule of law.

Fundamental rights – Civil and political rights – Personal liberty.

Keywords of the alphabetical index:

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters / International treaty and fundamental rights / Punitive damages and the rule of law.

Headnotes:

The service of a foreign law-suit in which punitive damages are claimed does not violate general personal liberty and the rule of law.

Summary:

A German enterprise was sued for product liability in the United States. German authorities should serve the American law suit in Germany according to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The enterprise filed an individual complaint based on the argument that the punitive damages to which it might be sentenced violate general personal liberty and the rule of law. The Constitutional Court rejected the complaint. It stated that the Hague Convention does not violate constitutional rights. The principle of proportionality is not infringed by the Convention, although it provides that the service of a law suit may only be rejected if the sovereignty or the security of the State is jeopardised or, from general principle, if the subject of the law suit is incompatible with the Constitution. The sense of this regulation is that the State parties to the Convention shall only be allowed to reject the service of a foreign law suit on a limited number of grounds. This enhances the efficiency of the service. Besides, the Convention guarantees to all persons involved in a law suit the right to be heard before a court.

The service of a law suit which aims at punitive damages does not violate the Constitution. Punitive damages are unknown under German law. They fulfil purposes which in German law are obtained by other means. The service of such a law suit does not mean that the enterprise will be sentenced to punitive damages. In any case, the enterprise can defend itself against the execution of such a sentence, if it should be unconstitutional under German law, as far as it is directed against the property of this enterprise situated in Germany.

Identification:

a) Federal Republic of Germany / b) Federal Constitutional Court / c) / d) 14.12.1994 / e) 1 BvR 720/90 / f) / g) To be published in the official digest of the decisions of the Federal Constitutional Court.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Right to inherit / Succession to farm property.

Headnotes:

It violates neither the principle of equality nor the constitutional guarantee of succession, if a law provides that in cases of intestate succession the farm will be assigned to one particular heir, whereas other heirs are compensated with a relatively small part of the inheritance, based on the profit yielded by the farm.

Summary:

In the case of an intestate succession, a farm may be assigned to only one of the heirs, whereas the other heirs will be compensated with a small part of the inheritance, based on the profit yielded by the farm. The Constitutional Court considered this law to be constitutional. It stated that the constitutional guarantee of the right to succession protects above all the will of the testator. In the case of an intestate succession, the legislator has to establish a succession which comes close to the presumed will of the testator. A regulation which aims at the preservation of the farm corresponds to the presumed will of the testator. The impugned provision does not violate the principle of equality, although it applies only to farms whereas commercial and other enterprises are subject to the general law of succession. The difference is justified by the different character of the objects of succession.

Hungary

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Statistical data

Number of decisions

- Decisions by the Plenary Court published in the Official Gazette: 12
- Decisions by chambers published in the Official Gazette: 7
- Number of other decisions by the Plenary Court: 23
- Number of other decisions by chambers: 56
- Number of other (procedural) orders: 2
- Total number of decisions: 100

Note:

On 22 November 1994, Parliament amended the Constitution by Act No. LXXIV of 1994. The ameyndment changed the number of the judges sitting on the Court from fifteen to eleven. ("The eleven members of the Constitutional Court are elected by the National Assembly.") The Act on the Constitutional Court was amended by Act No. LXXVIII of 1994 accordingly. The number of the judges during the reference period was nine; the new members have not been elected yet.

Important decisions

Identification:

a) Hungary / b) Constitutional Court / c) / d) 13.09.1994 / e) 1814/B/1994 AB *határozat* / f) / g) *Alkotmánybíróság Határozatai* (official digest of the Constitutional Court) No. 9/1994.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Economic competition / Market economy / State monopoly.

Headnotes:

The State, under the Hungarian Constitution, has wide discretion in defining the range of the exclusive property of the State.

The State has similar freedom in deciding whether the State itself exercises the activity declared to be a State monopoly or gives concessions to others.

It is the discretionary right of the State to define the conditions for the exercise of the State monopoly or the conditions of the concession. The economic activities within the range of a State monopoly are not part of the sphere of economic competition.

Summary:

In this case, the claimant challenged a provision of the Law on the Organisation of Gambling which provides for one regulation for certain games (e.g. lottery, bingo, horse-races) and a different one for others. He also challenged a provision of the Law on Personal Income Tax that favoured incomes from selling lottery tickets. These provisions were attacked on the grounds that they favoured the organiser of these games, namely the State.

The question to be decided by the Constitutional Court was whether the exclusive economic activity of the State was part of the sphere of economic competition or not. According to the Constitution, "the range of the exclusive State property and the exclusive economic activities of the State shall be determined by a Law". The Constitutional Court decided that activities within the range of State monopoly are not part of market competition. The essence of a monopoly is that the State excludes competition from certain economic areas.

Supplementary information:

Settled case-law, see especially Decision No. 59/1991. (XI. 19.) AB *határozat*.

Identification:

a) Hungary / b) Constitutional Court / c) / d) 17.10.1994 / e) 46/1994 (X. 21.) AB *határozat* / f) / g) *Magyar Közlöny* (Official Gazette) No. 103/1994.

Keywords of the systematic thesaurus:

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

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

Fundamental rights – Civil and political rights – Equality.

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

Fundamental rights – Civil and political rights – National service.

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

Keywords of the alphabetical index:

Conscientious objection / Military service.

Headnotes:

The text of the military oath, and its reference to the sacrifice of one's life, does not violate the constitutional right to life because the Constitution allows for objections to military service.

Provisions restricting the right of association of soldiers are constitutional to the extent that they only prohibit persons during the time of their military service joining those associations whose aims are contrary to the tasks of the armed forces.

It is not unconstitutional discrimination that women are not subjects of universal conscription.

Conscience as the reason for the objection to military service is a sufficiently wide concept because it is connected to an important interior conviction, irrespective of whether this springs from religious, moral, or other considerations.

The obligation to fill out an objector notification form is not unconstitutional because it is necessary to verify one's conscientious conviction.

It is an unconstitutional limitation on the right of conscience to exclude those who possess firearms from the possibility of alternative service.

Summary:

The Hungarian Constitution is among the few constitutions that provide for alternative civilian service. Under Article 70/H of the Constitution "The defence of the country shall be the duty of every citizen of the Republic of Hungary. Under the general obligation of defence service the citizens shall perform armed or unarmed military service or, in conformity with conditions provided by an Act of Parliament, civilian service." The details of military and civilian service are regulated by the Act on National Defence (Act No. CX of 1993) that substituted an older law dating from 1976. In this case, several provisions of the law and of a government decree executing the law were challenged before the Constitutional Court.

The Court found unconstitutional only a single provision of the government decree which excluded those who possessed firearms during the year before the objector notification from the possibility of alternative service. The Court considered this provision to be an unnecessary limitation on the right of conscience. Conscientious objectors can possess firearms for hunting or sports purposes.

The Court relied on the Constitution to give an extended interpretation to a provision of the Law. The provision in question exempted from military service priests and certain performing artists (musicians and dancers). The Court found the exemption of priests justified because it serves the constitutional purpose of the exercise of freedom of religion. In the case of artists the Court emphasised the necessity of the continuous exercise of certain performing arts. The Act listed those three specific art schools, the graduates of which were entitled to exemption from military service. The Court interpreted this provision widely by extending the exemption to graduates of all equivalent (e.g. foreign) art schools.

Some petitioners also challenged the constitutionality of those provisions of the Penal Code that punish certain objections to military service. Certain denominations do not accept even alternative civilian service. In their case the penal regulation undoubtedly restricts their freedom of religion and conscience, but this restriction on a fundamental right is justified by a constitutional value, namely the defence of the country, which is the constitutional duty of every citizen.

Identification:

a) Hungary / b) Constitutional Court / c) / d) 18.10.1994 / e) 45/1994 (X. 21.) AB *határozat* / f) / g) *Magyar Közlöny* (Official Gazette) No. 103/1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Separation of powers.

Institutions – Executive bodies – Relations with the courts.

Institutions – Courts – Procedural safeguards – Independence.

Keywords of the alphabetical index:

Evaluation of judicial decisions / Judicial independence / Reward honours to judges.

Headnotes:

It is contrary to the constitutional principle of judicial independence if any member of the Government can award honours to judges or recommend judges for honours without the real participation of the judicial branch.

Summary:

A provision of a decree issued by the Minister of Justice was challenged because it made it possible for the Minister of Justice, a member of the executive branch, to award or recommend judges for honours for their judicial activity. This was found to violate the constitutional principle of judicial independence.

The reasoning of the Court recalled previous decisions on the independence of the judiciary. In decision No. 38/1993 (VI. 11.) [see Bulletin 2/1993] the Constitutional Court presented its detailed opinion on the constitutional requirements of judicial independence with regard to the appointment of the presidents of the different courts. The ruling emphasised that the appointment of judges by another branch must be counterbalanced by the judiciary or by a different other branch. In the case of participation by the judiciary, their opinion should substantially determine the appointment.

In the present case, the Court declared the unconstitutionality of a single provision that entitles the Minister of Justice to award specific honours without the substantial participation of the judicial branch. The discretional recognition of the judges' judicial work by a representative of the executive branch jeopardises the impartiality of the judiciary.

The President of the Constitutional Court wrote a dissenting opinion in which two other justices concurred. The dissenting opinion considers any reward that is based upon the evaluation of the judicial activity of the judge unconstitutional because it is incompatible with the principle of judicial independence.

Supplementary information:

Settled case-law.

Identification:

a) Hungary / b) Constitutional Court / c) / d) 08.11.1994 / e) 55/1994 (X. 10.) AB *határozat* / f) / g) *Magyar Közlöny* (Official Gazette) No. 111/1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Separation of powers.

Institutions – Principles of State organisation – Rule of law.

Keywords of the alphabetical index:

Incompatibility of the offices of Member of Parliament and Mayor.

Headnotes:

Compulsory rules of incompatibility cannot be drawn from the principle of separation of powers. The principle of separation of powers finds expression historically and in every country in different institutional systems. The most important cases of incompatibility of the office of Member of Parliament are listed in the Constitution, which also entitles the legislature to determine further cases of incompatibility. This includes the right to abolish cases of incompatibility.

The incompatibility of the offices of Member of Parliament and Mayor is not regulated by the Constitution. Therefore, its abolition does not violate the Constitution.

Summary:

Act No. LXVII of 1990 on specific questions of the office of mayors declared the incompatibility of the office of mayor and Member of Parliament. After the elections in spring 1994, Parliament amended the law by abolishing the incompatibility of the two offices (several mayors became Members of Parliament as a result of the elections). Claims stating the unconstitutionality of the amending provision focused on two points: first, it violates the principle of separation of powers that public officers, members of the executive, can become members of the legislature. Second, it offends the principle of legal certainty that the respective rules were amended after the parliamentary elections.

The Court rejected the claims, and upheld the constitutionality of the law. Besides the above cited interpretation of the separation of powers principle, the Court stated that the mayor is not a member of the administrative branch or a public servant; mayors exercise those functions only exceptionally. As the law became valid on the day of its promulgation, it did not have retroactive effect, thus it did not violate the principle of legal certainty.

The decision was achieved by a slim majority. Four out of the nine judges wrote a strong dissent. The dissent cited previous decisions of the Court, and determined that the incompatibility can be derived from the constitutional text itself.

Identification:

a) Hungary / b) Constitutional Court / c) / d) 14.11.1994 / e) 57/1994 (XI. 17.) AB *határozat* / f) / g) *Magyar Közlöny* (Official Gazette) No. 113/1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Rule of law.

Institutions – Executive bodies – Territorial administrative decentralisation – Municipalities.

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

Fundamental rights – Governing principles – Limits and restrictions.

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

Keywords of the alphabetical index:

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

Headnotes:

Local governments are free to dispose of their own property within the limits determined by law; the appropriation of their incomes resulting from the sale of flats can be determined by reference to the public interest.

Intervention by the legislature in the budget of local governments during the fiscal year, without compensation, constitutes retroactive legislation that violates the constitutional principles of the rule of law and legal certainty.

Summary:

In 1993 the Constitutional Court declared unconstitutional several provisions of the law on the leasing and the alienation of living accommodation (flats) and other premises. (See Bulletin 3/1993 p. 22). Thus, Parliament amended the Act in 1994. The amended law was challenged in several petitions. The Constitutional Court declared unconstitutional and annulled two provisions of the amended law. These provisions regulated the utilisation of income of the local governments stemming from the sale of flats and other premises. (Real estate went from being State property to local governments' property in 1990.) Under the law, the appropriation of the incomes in question is strictly limited; furthermore, in the capital, the districts are obliged to deposit fifty percent of the income to the account of the municipality. The Court found constitutional the intervention in the appropriation of the local governments' income in the public interest in the case of flats. However, the Court declared a violation of legal certainty, and consequently of the rule of law, in the retroactive interference in the budget of the local governments, so it suspended the applicability of the respective provisions of the law until the end of the fiscal year. Moreover, the Court did not accept the same argument in the case of other premises, and annulled the respective provisions.

The other challenged provisions of the law were upheld by the Court.

One judge wrote a dissenting opinion.

Identification:

a) Hungary / b) Constitutional Court / c) / d) 22.12.1994 / e) 60/1994 (XII. 24.) AB *határozat* / f) / g) *Magyar Közlöny* (Official Gazette) No. 124/1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Rule of law.

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

Keywords of the alphabetical index:

Historical justice / Lustration laws / Political crimes / Secret agent.

Headnotes:

Data and records on individuals in positions of public authority and on those who partake in political life which reveal that they at one time carried out activities contrary to the principles of a constitutional State, or belonged to State organs that pursued activities contrary to same, count as information of public interest. But even the secrecy of the records established by political police in a system that did not adhere to the principles of a constitutional State may limit the right to information of affected persons.

Summary:

On 8 March 1994, Parliament passed a law on mandating background checks on individuals holding certain key offices. The Constitutional Court subsequently received a number of petitions contending that particular provisions of the Act were unconstitutional.

The law requires screening of certain public officials and others occupying key positions in public life. The screening aims to determine whether these individuals carried out activities on behalf of State security organs, or obtained data from State security agencies to assist them in making decisions, or whether they were members of the Nazi Arrow Cross Party. If, in the course of the screening, an individual is found to fall under one of these categories, the results are to be published unless the given individual first resigns from his post. The screening is carried out by a special committee whose members are judges. The individual

under scrutiny may file a claim with the Municipal Court. The court reviews the committee decision. Both proceedings are conducted behind closed doors.

The Hungarian Act is different from earlier "lustration" laws. It does not declare incompatibility between personnel in past and present offices, nor does it propose to unveil the whole of the previous system of political informing. The Court therefore examined the case in view of the fact that in a constitutional State, the fundamental right to freedom of information presumes that the functioning of the State is "transparent" to its citizens.

The Court found that the petitions are in part justified, and declared unconstitutional several provisions of the law. The justification for the annulment was that the violations of the right to information require clarification of who may gain access to secret service files which concern themselves, so that they may understand the true extent to which the past regime influenced their personal fate. This can be resolved only if the secrecy of one-time secret service records is not further maintained. The unconditional secrecy of the data in the records listed in the law was declared unconstitutional.

The other reason for the unconstitutionality was the range of information and of the persons affected by the law. The Act in this respect went beyond the legislature's jurisdiction, and failed even within those limits to apply consistently the same criterion for distinguishing between information of private and public interest.

One judge wrote a concurring opinion.

Supplementary information:

Settled case-law on the right to information.

Ireland

Supreme Court

Reference period:
1 September 1994 – 31 December 1994

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

Italy

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994[1]

Statistical data

Meetings of the Constitutional Court during the period 1 September to 31 December 1994: 17 public hearings and 19 in chambers. The Court gave 122 decisions in all

Decisions given in cases where constitutionality was a secondary issue: 46 decisions, 13 finding measures complained of unconstitutional, and 55 court orders

Decisions given in cases where constitutionality was the main issue: 13 decisions, 4 finding measures complained of unconstitutional

Decisions given in constitutional proceedings concerning conflicts of authority (a) between the State and the regions (or the autonomous provinces of Trento and Bolzano) over the definition of their respective powers: 6 decisions; (b) between State authorities in a dispute between public bodies over the exercise of powers: 1 decision

Decisions correcting material errors: 2 court orders

Corrigendum
Bulletin No. 2/1994

Statistical Data

During the period 1 May to 31 August 1994, in cases where constitutionality was a secondary issue the Court gave 95 decisions, 27 finding measures complained of unconstitutional, and 74 court orders

[1] *The first judgment was rendered during the previous reference period.*

Important decisions

Identification:

a) Italy / b) Constitutional Court / c) / d) 23.05.1994 / e) 218/1994 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale*.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

HIV (AIDS) / Health checks.

Headnotes:

Under Article 32 of the Constitution, health safeguards are provided for as a basic right of the individual and in the interests of the community. The right to health applies in both public law and private law relations. In particular, health protection entitles the individual to living, environmental and working conditions which do not endanger health, which is an essential asset, and at the same time requires public bodies to provide, in accordance with general rules, the services and care required for the maintenance and recovery of a state of well-being. Safeguarding health also imposes on individuals the duty to refrain from injuring or endangering by their behaviour the health of another person. In the presence of infectious and contagious diseases such as AIDS, compliance with these obligations may require – with all due respect for the dignity of the individual, which includes the right to confidentiality regarding one's personal state of health – submission to health checks required by law for the exercise of specific activities where a serious risk of contamination exists.

Identification:

a) Italy / b) Constitutional Court / c) / d) 07.11.1994 / e) 384/1994 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale*.

Keywords of the systematic thesaurus:

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

Sources of constitutional law – Hierarchy – Hierarchy as between national and non-national sources – Subordinate Community law and other domestic legal instruments.

Keywords of the alphabetical index:

Community regulation / Regional standard-setting measure.

Headnotes:

1. The appeal to the Court by the State against a legislative decision of the Umbria Region, under Article 11 of the Constitution – which provides a constitutional guarantee of the implementation of European Community rules by the State – on the grounds of incompatibility with a Community regulation, cannot be declared inadmissible on the basis of the Court's previous case law, which began with Decision No. 170/1984, in cases where a conflict arises between domestic rules and directly applicable Community rules.

   Although, in similar cases, the Court has declared inadmissible questions of constitutionality based on Article 11 of the Constitution and ordered the referring judge to apply the Community rule rather than the contested domestic rule in the case in question, the point at issue in the present case is different.

   The conflict between a directly applicable Community rule and a domestic rule is not the same as a conflict between a Community rule and a legislative decision of a region which has not been promulgated by its President and therefore has not yet been incorporated into the legal system because it has been referred to the Court to ascertain whether it is in conformity with the Constitution (2)[1].

2. The State is responsible *vis-à-vis* the European Community for violations of European Community law, even where they are the result of the exercise of the legislative power of the regions.

   It is therefore inadmissible that the introduction into the legal system of regional legislation which objectively conflicts with pre-existing Community law should be determined solely by the completion of the regional legislative procedure, as would be the case if the question of the constitutionality of a regional legislative decision, raised as the main issue, were declared inadmissible (2).

3. Compliance with Article 11 of the Constitution cannot be ensured by a declaration of inadmissibility accompanied by a statement of reasons to the effect that where regional legislation which has entered into force conflicts with Community rules, it should not be applied by the public authorities (judges and administrative bodies). By giving rise to a legal

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1 *The numbers in brackets indicate the paragraphs of the explanation of the reason for the decision.*

instrument declared inapplicable from its inception, this solution would lead to serious inconsistency and uncertainty in the application of the law. This would constitute a breach of the principle of legal certainty and circumvent the obligations which devolve on the State by virtue of its membership of the European Community under Article 11 of the Constitution (2).

Supplementary information:

With regard to the new approach of the Court to the question of the relationship between Community law and domestic law initiated by Decision No. 170/1984 (which no longer declares the domestic law unconstitutional under Article 11 of the Constitution on the grounds that it conflicts with Community legislation, but rather instructs the referring judge not to apply it), see also Decision No. 113/1985, Orders No. 47, No. 48 and No. 81/1985; Decisions No. 286/1986; No. 232 and No. 389/1989; No. 168/1991; Order No. 391/1992; Decision No. 115/1993.

Identification:

a) Italy / b) Constitutional Court / c) / d) 10-23.11.1994 / e) 397/1994 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale*.

Keywords of the systematic thesaurus:

Institutions – Legislative bodies – Relations with the courts.

Keywords of the alphabetical index:

Interpretative act / Retroactive effect.

Headnotes:

1. The legislator may not have recourse to genuine interpretative acts to conceal what are in fact novel rules with retroactive effect. Used in this way, an interpretative act cannot fulfil its proper function, which is to make explicit the meaning of existing rules, i.e., impose one of the possible interpretations compatible with its literal meaning so as to eliminate any doubts regarding its interpretation or to put a stop to case law interpretations which conflict with the legal intention of the legislator (3).
2. Under the Constitution, the right of interpretation is not confined exclusively to the judge. Still less is it separable from the power of legislative bodies to make rules. Each activity is carried out at a different level: the legislator operates in general and abstract terms, interpreting the meaning of the sources of such rules, whereas the judge considers a particular case as a prerequisite for the concrete application of the rule to the case submitted to him or her for examination. It is clear that the application of interpretation rules can enable the judge to reach conclusions relevant to the judicial proceedings taking place. However, in such cases the interpretative act does not affect the principle of the separation of powers since, as already pointed out, this principle concerns the abstract level of the sources of the rules and has an indirect general impact on all present and future judgments. It does not call into question the *potestas judicandi*, but simply redefines the guidelines to be followed in the exercise of this power (7 and 3).
3. When the legislator enacts interpretation rules with retroactive effect, there is a series of constraints which involve the protection not only of constitutional principles but also of other fundamental principles, which include: respect for the general principle of *ragionevolezza*, which, in practice, prohibits the introduction of unjustified inequalities of treatment; the protection of the legitimate certainty acquired by subjects of the law as a result of the reinforcement of a particular trend in case law; the consistency and certainty of the legal system; respect for the functions reserved by Articles 101, 103 and 108 of the Constitution for the judicial authority (4).

Identification:

a) Italy / b) Constitutional Court / c) / d) 24.11.1994 / e) 419/1994 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale*.

Keywords of the systematic thesaurus:

Institutions – Courts – Special courts – Prosecutor / State counsel.

Fundamental rights – Civil and political rights – Personal liberty.

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

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

Keywords of the alphabetical index:

Mafia crime / National anti-Mafia prosecutor / Prohibition against residing in certain areas / Personal liberty / Preventive measures.

Headnotes:

"The prohibition against residing in certain areas" (provided by the law in force on the suppression of

Mafia crime) is a genuine preventive measure and, as currently applied, limits personal liberty and not simply freedom of movement in that it involves "loss of legal rights" by the individual, something which the Court has always regarded as the determining factor in the restriction of personal liberty. This loss of rights basically involves a *vulnus* (breach) of the principle of *habeas corpus*.

Because they limit personal liberty, the constitutional justification for preventive measures must be based on respect for the principle of legality, even though the provisions on "security measures" in Article 25.3 of the Constitution must also be taken into account since both types of measures, which are based on the assumption that the individual is a danger to society, have one and the same aim.

The assessment by the national anti-Mafia prosecutor which precedes the adoption of the restrictive measure in question must be founded on facts or behaviour regarded as causally linked to the criminal acts formally cited.

According to the previous case law of the Court, not only can the prosecution propose the measure in question but the legislator can place it at the prosecution's disposal on condition that it remains a provisional measure and that it forms part of a procedure leading to a court decision and that the rights of the defence are respected. Hence, rules which provide for the definitive adoption of these measures by the national anti-Mafia prosecutor must be considered incompatible with the constitutional provisions for the protection of personal liberty and the rights of the defence.

Nonetheless, the "prohibition against residing in certain areas" cannot be entirely abolished, but must be applied within the framework of constitutional justice and therefore within the context of the normal rules governing the system of preventive measures, on the basis of the criterion for extending general rules in the absence of special rules. In fact, the Court ruled that the adoption of the provisional measure by the National Prosecutor must be followed, within thirty days, by a court decision confirming the restrictive measure; otherwise the measure lapsed.

Supplementary information:

The Court noted that freedom of movement and freedom to reside in a certain area do not constitute a single aspect of personal liberty, as legal situations can arise which affect the former without affecting the latter. See Decisions Nos. 2/1956, 45/1960, 68/1964 and Order No. 384/1967.

Regarding the strict conditions which the legislator must observe in adopting preventive measures, the Court referred to Decisions Nos. 23/1964 and 177/1980.

The subject of respect for the principle of legality when preventive measures or measures placing restrictions on personal liberty are adopted and the requirement that such measures should be adopted on the basis of a court decision at the conclusion of a normal judicial procedure, see Decision No. 11/1956.

On the subject of preventive measures, other decisions of the Court should also be consulted: Nos. 36 and 113/1975, 53/1968, 76/1970 and 168/1972.

Finally, it should be noted that, by Decision No. 91/1995, the Court has declared admissible the request under Article 75 of the Constitution for a referendum to be held to repeal the legislation on the "prohibition against residing in certain areas" which had been held partially unconstitutional by the Court.

Identification:

a) Italy / b) Constitutional Court / c) / d) 05.12.1994 / e) 420/1994 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale*.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Anti-trust / Audiovisual.

Headnotes:

1. The basic condition for enabling the State to relinquish its monopoly on broadcasting is the existence of legislation capable of preventing the formation of dominant positions which, in this sector, would not only alter the rules of competition but also lead to oligopoly and would in turn threaten the fundamental value of the plurality of sources of information, which is essential to the free expression of thought guaranteed under Article 21 of the Constitution. The citizen's right to receive information from several competing sources, which is also protected by Article 21 of the Constitution, is not ensured by the mere existence within the broadcasting system of a public licensed company alongside private licensed companies (mixed system). As the Court stated in Decision No. 826/1988 (14.2 and 14.3), such a company cannot on its own offset a dominant position in the private sector.
2. The rule, challenged in the Court, which permits the same operator to hold several television broadcasting licences provided they do not account for more than 25% of the total number of national channels provided for in the frequency band allocation plan and do not account for more than three channels in all, thereby making it possible for the same operator to control three of the twelve channels provided for

in the national plan (nine private and three public channels), is not sufficient to prevent the concentration of televised broadcasting and therefore conflicts with Article 21 of the Constitution since it fails to guarantee the plurality of sources of information (14.4).

3. Compliance with Article 21 of the Constitution would have required the legislator to gradually reduce the existing concentration rather than upholding it by law, as was in fact the case, given that the dominant position which results from ownership of three of the nine private television channels confers a grossly unfair advantage where the use of resources and the concentration of advertising are concerned (14.4).
4. The declaration that the rule is unconstitutional requires the legislator to use discretionary power either to reduce the number of television networks allocated to a single operator, or to maintain the same number of channels while simultaneously increasing the number of wave bands for private operators, whichever seems more appropriate. In any event, the legislator cannot allow one quarter of the total number of national channels (of which there are currently twelve) to be run by a single operator. Pending the passage of reform legislation by the Parliament but, in any event, for a period of less than three years, the current licensees can continue nationwide television broadcasting (15).

Summary:

The questions which led to this decision were raised during a series of actions brought before the regional administrative court by broadcasting companies which had been placed after the three channels controlled by the Fininvest Group (Canale 5, Italia 1 and Retequattro), owned by Silvio Berlusconi, on the list of applicants for licences approved by the Ministry of Posts and Telecommunications and which had been allocated television networks with smaller territorial coverage than the three above-mentioned channels, which were placed at the top of the list. The specific question raised by the administrative court concerned the constitutionality, under Article 21 of the Constitution, of the provision of Act 223/1990 whereby a single operator was permitted to hold three nationwide television broadcasting licences, subject to a limit of 25% of the national channels, laid down in the frequency band allocation plan.

Identification:

a) Italy / b) Constitutional Court / c) / d) 15-30.12.1994 / e) 454/1994 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale*.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Primary education / Private school / State school / School books.

Headnotes:

Since it is not necessary for compulsory schooling to take place in state schools or State – approved private schools, it is discriminatory to exclude pupils attending a private school from such benefits as the provision, free of charge, of textbooks in primary school. Because the provision of books free of charge is intended by law to benefit the pupils directly, rather than the schools, it is exclusively related to the actual obligation to attend school.

The fact that these benefits are directly intended for the pupils rules out the possibility of justifying this exclusion by reference to the constitutional provision which recognises the right of legal entities and individuals to establish institutes of education, but exempts the State from any financial contribution.

Supplementary information:

As the Court pointed out, legislative responsibility for providing assistance with education, which expressly includes the supply, free of charge, of the textbooks in question, has been transferred to the regions since 1977. Hence State rules are only applicable in those regions which have not yet passed their own legislation to deal with the matter.

Identification:

a) Italy / b) Constitutional Court / c) / d) 15-30.12.1994 / e) 456/1994 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale*.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Concessionaire / Compensation for a telephone subscriber / Telephone subscriber's contract.

Headnotes:

The inadmissibility of questions concerning a rule lacking the force of law cannot render inadmissible, on the grounds of irrelevance, a question concerning a rule with the force of law, where the latter is applied in practice by means of a regulation.

Total exoneration of a service concessionaire (in this case, the telephone service) from liability for errors or omissions involving failure to list a subscriber in the telephone directories, contrary to the provisions of the civil code, has no rational justification and, by ruling out any form of compensation, unjustly upsets the balanced regulation of the interests of the parties to a telephone subscriber's contract. The rules censured by the Court do not exempt the concessionaire from liability in the extreme case of total omission from the directories in question of a subscriber entry on the contrary.

Supplementary information:

With regard to the procedural problem described in the summary, the Court cited Decision No. 1104/1988 as a specific precedent. On the illegality of the rule censured, which conflicted with the provisions of the Civil Code, the Court cited Decisions Nos. 132/1985 and 303 and 1104/1988.

Lithuania

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Statistical data

Total: 6 final decisions including:

- 4 rulings concerning the compliance of laws with the Constitution
- 2 rulings concerning the compliance of Governmental directives with the laws
- 1 final decision was adopted to cancel judicial proceedings
- 1 supplementary decision was adopted to interpret some provision of the ruling passed by the Constitutional Court

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

Important decisions

Identification:

a) Lithuania / b) Constitutional Court / c) / d) 29.09.1994 / e) 13/94 / f) Property of Religious Communities / g) *Valstybes zinios*: 77-1454 of 05.10.1994.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Church / Denationalisation / Private Property.

Headnotes:

Dismissal of legal proceedings following the abrogation of the measure in dispute.

Summary:

It was established by law that houses of prayer and other buildings of religious communities which had been nationalised during the occupation period of Lithuania, should be restored to the previous owners. The Constitutional Court has dealt with the case, initiated by a group of Members of Parliament, concerning the constitutionality and legality of the Government Resolution establishing the order of restoration of such buildings. During the legal proceedings the Government recognised that the Resolution in dispute was null and void. Therefore the Constitutional Court dismissed the initiated legal proceedings of the case.

Identification:

a) Lithuania / b) Constitutional Court / c) / d) 19.10.1994 / e) 10/94 / f) Restoration of the rights of ownership / g) *Valstybes zinios*: 83-1574 of 26.10.1994.

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 – Types of claim – Referral by a court.

Institutions – Economic duties of the State.

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

Keywords of the alphabetical index:

Denationalisation / Restitution of private property.

Headnotes:

When restoring ownership rights, not only the rights of former owners but also those of natural persons who have acquired residential houses or portions thereof under lawful contracts shall be protected. This is in conformity with the constitutional provision that "all people shall be equal before the law, the court, and other state institutions and officers". Civil conflicts concerning the restoration of ownership rights of buildings which have been transferred into the ownership of other natural persons, should therefore be resolved by the ordinary courts applying the rules of civil procedure.

Summary:

The case was referred to the Constitutional Court by a local court which requested that the constitutionality of some provisions of the Law "On Amending and Appending 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" be examined.

One of the main questions in dispute was that the restitution of ownership rights did not only apply to the real property owned by the State, public and cooperative organisations (enterprises), or collective farms, but also to property which has been transferred by the said organisations into the ownership of natural persons. The Constitutional Court has recognised that this provision does not contradict the Constitution.

Identification:

a) Lithuania / b) Constitutional Court / c) / d) 03.11.1994 / e) 16/94 / f) Privatisation of apartments / g) *Valstybes zinios*: 86-1640 of 09.11.1994.

Keywords of the systematic thesaurus:

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

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

Institutions – Economic duties of the State.

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

Keywords of the alphabetical index:

Apartments / Privatisation.

Headnotes:

When implementing the policy of privatisation of state and public housing funds, the Government must not set different conditions for privatisation with regard to different individual groups.

Summary:

Following the reintroduction of the constitutional principle of the right of private ownership into the legal system of the Republic of Lithuania, laws on the privatisation of State and public housing funds were adopted. Upon request by a local court, the Constitutional Court examined the Governmental Resolution which had established different conditions for the privatisation of apartments and rooms in hostels. The Constitutional Court held that such different conditions with regard to individual groups were not provided for in the Law on the Privatisation of Apartments. The Governmental Resolution was thus incompatible with the said Law.

Identification:

a) Lithuania / b) Constitutional Court / c) / d) 18.11.1994 / e) 17/94 / f) The principle of the privacy of legal consultations / g) *Valstybes zinios*: 91-1789 of 25.11. 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 – Types of claim – Referral by a court.

Institutions – Courts – Legal assistance.

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

Keywords of the alphabetical index:

Guarantees of criminal proceedings / Privacy / Rights of the defence.

Headnotes:

The confidentiality of meetings between a defendant and his or her lawyer shall be restricted only in those cases when the suspicion arises that such meetings will have a negative influence on the thorough and impartial investigation of the circumstances of the case. The following requirements have to be observed: restrictions may be established only by law, and within reasonable limits. When establishing such restrictions, the criminality rate on the whole and especially the presence of organised crime shall be taken into account. Such legal norms are aimed at preventing the participants of criminal proceedings from realising their goals by unlawful measures.

Summary:

As a rule the laws guarantee the confidentiality of the conversations between a person suspected or accused of having committed a crime and his lawyers. A local court asked the Constitutional Court to rule on the constitutionality of some of the Code of Criminal Procedure providing for the participation of the interrogator and investigator during conversations between a counsel and his/her defendant, as well as for the control of correspondence with the suspect or the accused. The Constitutional Court held that this provision shall not restrict the right to defence of a person suspected or accused of having committed a crime provided that only measures and ways of lawful defence are used.

Identification:

a) Lithuania / b) Constitutional Court / c) / d) 01.12. 1994 / e) 23/94 / f) A referendum organisation / g) *Valstybes zinios*: 94-1852 of 07.12.1994.

Keywords of the systematic thesaurus:

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

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

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

Fundamental rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Elections / Referendum.

Headnotes:

Parliament shall have the right to establish the procedure for the enforcement of a law adopted by it. The *Seimas* (parliament), when deleting the word "constitutional" from the title of the draft law proposed for referendum, acted within its powers. According to the Constitution, only the *Seimas* shall establish a list of constitutional laws.

Summary:

The case was initiated by a group of *Seimas* members who requested the examination of the Law and the *Seimas* Resolution concerning some organisation issues of the referendum. Some provisions had already been examined by the Constitutional Court. Other acts in dispute have been found in conformity with the Constitution.

Identification:

a) Lithuania / b) Constitutional Court / c) / d) 22.12. 1994 / e) 27/94 / f) The reform of the courts' system / g) *Valstybes zinios*: 101-2045 of 30.12.1994.

Keywords of the systematic thesaurus:

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

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

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

Institutions – Principles of State organisation – Separation of powers.

Institutions – Courts – General organisation.

Keywords of the alphabetical index:

Judiciary.

Headnotes:

Since neither the Constitution nor the laws have determined the ways and methods to be used to implement the reform of the judiciary, the *Seimas* acted within its prerogatives when enacting laws provided by the Constitution.

The independence of judges as well as of courts is one of the most significant principles of democracy and of a State governed by the rule of law. The independence of judges includes guarantees for the judges' tenure. The termination of the powers of judges in Lithuania is possible only on the grounds established by the Constitution.

Summary:

A group of *Seimas* members asked the Constitutional Court to examine whether some provisions of the Law on the reform of the judiciary were consistent with the Constitution. The petitioners contested in particular the following provision: "The present Supreme Court of Lithuania shall be abolished, and its functions as well as the powers of the judges of the Court terminated on 31 December 1994. The Supreme Court of Lithuania shall be established on 1 January 1995 for the implementation of other functions prescribed by law".

The Constitutional Court recognised that the *Seimas* had the right to determine the way in which the reform of the judiciary should be implemented. However, the provision of the Law in dispute regarding the termination of the powers of judges was held to be in contradiction with the Constitution.

Supplementary information:

On 30 December 1994 the Constitutional Court made a decision concerning the interpretation of the above-mentioned ruling. It held that the part of the ruling regarding the impossibility to dismiss court judges from offices except in cases established by the Constitution, should be applied only to court judges and not to heads of courts.

The Netherlands

Supreme Court

Reference period:
1 July 1994 – 31 December 1994

Important decisions

Identification:

a) The Netherlands / b) Supreme Court / c) Third division / d) 22.07.1994 / e) 29.632 / f) / g) VN 11.8.1994, p. 2465, nr. 5.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Principle of protection of legitimate expectations.

Headnotes:

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

Summary:

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

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

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

Identification:

a) The Netherlands / b) Supreme Court / c) Second division / d) 18.10.1994 / e) 97.537 / f) / g) DD 95.052.

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.

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

Keywords of the alphabetical index:

Inviolability of correspondence.

Headnotes:

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

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

Summary:

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

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

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

Identification:

a) The Netherlands / b) Supreme Court / c) Second division / d) 18.10.1994 / e) 97.852 / f) / g) DD 95.063.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Respect for private life.

Headnotes:

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

Summary:

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

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

Identification:

a) The Netherlands / b) Supreme Court / c) First division / d) 21.10.1994 / e) 15.480 / f) / g) RvdW 1994, 211.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – International treaties.

Constitutional justice – The subject of review – Constitution.

Fundamental rights – Governing principles – Limits and restrictions.

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:

Freedom of speech, photo reportage.

Headnotes:

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

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

Summary:

This case concerned the publication in RAILS, a magazine that is available to train passengers free of charge, of a photo reportage that the plaintiff claimed was unlawful. The publication in question consisted of a set of photographs displaying the latest fashion in clothing, advertised on the cover under the title of "Dressed to Kill". The photographs, which were placed amid serious articles on theatres, ballet, forthcoming events etc., were in colour and took up eight entire pages. The first photograph showed a man with a nylon stocking over his head threatening a woman with a firearm and abducting her. The second and third photographs showed the woman tied up and blindfolded. In the

fourth photograph, the man was carrying away the woman's dead body. The final photograph showed the body discarded among refuse and rubble. In each photograph the man and the woman were wearing different clothes, and each photograph gave the name of the shop where they could be bought and what they cost.

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

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

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

Identification:

a) The Netherlands / b) Supreme Court / c) First division / d) 04.11.1994 / e) 8493 / f) / g) RvdW 1994, 226.

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.

Headnotes:

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

Summary:

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

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

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

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

Supplementary information:

See in this connection also the ruling by the European Court of Human Rights of 27-10-1994, No. 29/1993/424/503, CEDH A 297-C, of K et al. against the Kingdom

of the Netherlands. In this judgment, the European Court of Human Rights considered that the fact that it is impossible for a mother to deny the paternity of her ex-husband in respect of a child born during the marriage, with the consequence that no legal family ties may be created between the child and its biological father by his acknowledgment of paternity, means that the Netherlands has failed to assure the applicants of the respect for their family life to which they are entitled under Article 8 of the Convention.

In a judgment of the Supreme Court of 17-9-1993 (see *Bulletin* 2/1994, p. 143), the Court did grant the mother the possibility of repudiating the paternity of a child born within 306 days after her marriage had been dissolved.

Identification:

a) The Netherlands / b) Supreme Court / c) First division / d) 11.11.1994 / e) 8465 / f) / g) RvdW 1994, 237.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Separation of powers.

Institutions – Courts – Ordinary courts – Civil courts.

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

Keywords of the alphabetical index:

Principle of legality.

Headnotes:

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

Summary:

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

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

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

Identification:

a) The Netherlands / b) Supreme Court / c) Third division / d) 23.11.1994 / e) 29.392 / f) / g) VN 15.12.1994, p. 3829, nr. 3.

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.

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

Keywords of the alphabetical index:

Audit.

Headnotes:

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

Summary:

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

The point at issue was whether the Court of Appeal violated the "fair trial" principle of Article 6 ECHR, from

which may be inferred the right of any person charged with a criminal offence to remain silent and not to incriminate himself, and/or Article 14.3.g of the International Covenant on Civil and Political Rights, by using evidence obtained during the audit in arriving at its decision to impose the fine.

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

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

Norway

Supreme Court

Reference period:
1 September 1994 – 31 December 1994

Important decisions

Identification:

a) Norway / b) Supreme Court / c) / d) 02.09.1994 / e) 1nr 78/1994 / f) / g) RT 1994, p. 1036.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional proceedings – Procedure – Hearing.

Keywords of the alphabetical index:

Cabinet conferences / Members of the Government / Obligation to give evidence / Secrecy.

Headnotes:

Members of the Government are exempted from the obligation to give evidence about the contents of discussions in Cabinet conferences due to their confidentiality.

Summary:

A group of whalers had filed a civil case against the State as represented by the Ministry of Fisheries. The whalers claimed compensation asserting that the Government's administrative decisions on the quotas of the catching of minke whales in the years 1984-1987 and the decisions to stop the catching of minke whales as from the year 1988 were invalid.

The whalers demanded that members of the Government should give evidence about the discussions and standpoints that had been exchanged in a Cabinet conference on 3 July 1986.

The Supreme Court decided that Government members were exempted from the obligation to give evidence about the discussions and exchanging of standpoints that had taken place in a Cabinet conference because these discussions were considered confidential. Members of the Government were therefore bound to secrecy.

However, the Minister of Fisheries would have an obligation to give evidence on the procedures and grounds that had led to the administrative decisions.

Poland

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Statistical Data

Types of review:

- Ex post facto review: 10
- Preliminary review: 1
- Abstract review (Article 22 of the Constitutional Court Act): 8
- Courts' referrals ("legal questions", Section 25 of the Constitutional Court Act): 3

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 6
- Cases on the legality of other normative acts under the Constitution and statutes: 5

Decisions:

- Cases decided on their merits: 7
- Cases discontinued: 4

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): 3
- Upholding the constitutionality of the provisions in question: 4

Resolutions containing universally binding interpretations of laws (Section 13 of the Constitutional Court Act):

- Binding interpretations of laws issued: 5

Subject matter of important decisions:

Local self-government

(Case No. W 5/94 – resolution of 14 September 1994)
(Case No. W 10/93 – resolution of 27 September 1994)
(Case No. W 1/94 – resolution of 5 October 1994)

Ratification of international treaties

(Case No. W 10/94 – resolution of 30 November 1994)
(Case No. U 5/94 – ruling of 6 December 1994)

State Budget

(Case No. P 1/94 – decision of 8 November 1994)
(Case No. K 6/94 – decision of 21 November 1994)

Taxation – governing principles

(Case No. K 2/94 – decision of 18 October 1994)

Other information

On the 28th sitting (2 September 1994) the *Sejm* rejected the Court's decision of 25 March 1994 (Case No. K 13/93) on the unconstitutionality of the 1993 law amending the Personal Income Tax Act (see the Bulletin, No. 1/1994 p. 44). According to the Constitution and the Constitutional Court Act (Section 7), judgments on the unconstitutionality of statutes are not final and are subject to examination by the *Sejm*. The House may reject such a decision by a majority of at least two-thirds of the votes. So far, however, the *Sejm* did not abuse its power to reject the Court's decision – in the years 1986 -1993 resolutions disapproving the decisions on the unconstitutionality of statutes were adopted only three times.

In September 1994 the *Sejm* upheld the decision of 11 April 1994 (Case No. K 10/93) on the unconstitutionality of a provision of the Personal Income Tax Act refusing single parents to file tax reports together with their children if the taxable income *per capita* of their families exceeded a certain amount specified by law (decision unreported). However, the relevant amendments to the Personal Income Tax Act have not been enacted by the *Sejm* until November and the six-months period specified in Section 7 of the Constitutional Court Act for the execution of the Court's decision has expired. At this stage, in compliance with the Court's resolution dated 20 October 1993 (Case No. W 6/93), the President of the Court announced in the Journal of Laws (No. 126, item 626) the rescindment of the unconstitutional provision of the Act. For the same reason the President of the Court announced (Journal of Laws No. 99, item 482) the rescindment of a respective provision of the Act of Combatants, War and Post-War Repression Victims covered by the decision of 15 February 1994 (Case No. K 15/93 – see the Bulletin No. 1/1994, p. 43).

Some of 1994 decisions referred to the Commission were already published in the official collection of the Court's decisions of 1994, part 1 (OTK 1994, t. 1):

- decision of 18 January 1994 (Case No. K 9/93) – pp. 9-20
- decision of 15 February 1994 (Case No. K 15/93) – pp. 21-27
- decision of 29 March 1994 (Case No. K 13/93) – pp. 45-50
- decision of 24 May 1994 (Case No. K 1/94) – pp. 71-83
- decision of 7 June 1994 (Case No. K 17/93) – pp. 84-96
- decision of 28 June 1994 (Case No. K 14/93) – pp. 99-105
- resolution of 16 March 1994 (Case No. W 6/94) – pp. 173-180; the resolution was published also in Journal of Laws No. 39, item 149

- resolution of 23 March 1994 (Case No. W 9/93) – pp. 181-187; published also in Journal of Laws No. 45, item 184
- resolution of 13 April 1994 (Case No. W 2/94) – pp. 188-195; published also in Journal of Laws No. 54, item 223
- resolution of 10 May 1994 (Case No. W 7/94) – pp. 204-214; published also in Journal of Laws No. 62, item 264
- resolution of 13 June 1994 (Case No. W 3/94) – pp. 239-255; published also in Journal of Laws No. 74, item 336.

Important decisions

Identification:

a) Poland / b) Constitutional Court / c) / d) 13.09. 1994 / e) P 2/94 / f) / g) To be published in the collection of the Court's decisions of 1994, vol. 2.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Official language / Birth, marriage and death certificates.

Headnotes:

The copies of birth, marriage and death certificates shall be issued by the registry offices in the Polish language with Polish place-names, regardless of the fact when, in which language and by which authorities the original certificates were drawn up.

Summary:

The question submitted to the Court concerned the Minister of Internal Affairs' regulation on the terms and conditions of issuing "complete" copies of birth, marriage and death certificates. The regulation thereof imposes upon registry offices the duty to issue such copies in specified form, in the Polish language with Polish place-names, regardless of the fact when, in which language and by which authorities the original certificates were drawn up.

In the Court's opinion the regulation does not go beyond the limits of the law-making competence granted to the Minister by the 1986 Act on Birth, Marriage and Death Certificates. According to the Act, a "complete" copy should literally present the content of a certificate. However, only those data which comply with laws being currently in force may be reflected in a copy (therefore, it is not possible to include such data as nationality or religion). The language of an original certificate – in the Court's opinion – is irrelevant with regard to the content of a certificate. In addition, according to the provisions of the 1945 decree on the official language, all public agencies perform their duties in the Polish language. Moreover, the provisions of the 1934 decree regarding official place-names are still in force. Therefore, the official "complete" copies of birth, marriage and death certificates must be issued in the Polish language with currently binding place-names.

Under the Act on Birth, Marriage and Death Certificates an interested person may request a photocopy of an original certificate. However, under the Polish legal system such a photocopy is not considered as an official document and cannot serve as evidence.

Identification:

a) Poland / b) Constitutional Court / c) / d) 14.09. 1994 / e) W 5/94 / f) / g) Journal of Laws, No. 109, item 527; to be published in the collection of the Court's decisions of 1994, vol. 2.

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.

Keywords of the alphabetical index:

Local self-government.

Headnotes:

In compliance with the Act on Local Self-Government of 1990, each person whose legal interests or rights have been affected by a resolution of a local council, may appeal against this resolution to the administrative court, provided that the resolution covers public administration issues.

Summary:

The Court decided that a legal action may be brought also in the case when such resolution has been changed or revoked but it is still applied to the situations which occurred before the resolution has been revoked. During proceedings before the administrative court – regardless of the fact whether the resolution has been changed or revoked – the court is fully authorised to decide upon facts.

Identification:

a) Poland / b) Constitutional Court / c) / d) 27.09. 1994 / e) W 10/93 / f) / g) Journal of Laws, No. 113, item 550; to be published in the collection of the Court's decisions of 1994, vol. 2.

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.

Keywords of the alphabetical index:

Local self-government.

Headnotes:

The "municipal activity" which is subject to State supervision comprises all the activities performed by municipalities and other local self-government units.

Summary:

One of the provisions of the 1952 Constitution which is still in force guarantees the participation of local self-government in the exercise of power. The specification of the scope and the forms of the exercise of power by the units of local self-government is imposed upon state organs. The legislative is free to establish the powers of local self-government. However, under the Constitution they should constitute a "substantial part" of public tasks performed by the State. Pursuant to the Constitutional Act, the activity of local self-government units is subject to control. The scope, criteria and rules of the supervision as well as the power of the supervisory authorities shall be specified by law. In the resolution, the Court decided that the "municipal activity" being subject to control (by the Prime Minister, the provincial governors, the provincial association of local self-governments and others), has to be understood, in compliance with the Act on Local Self-Government of 1990, as comprising all the activities performed by municipalities and other local self-government units.

Supplementary information:

See also the decision of 18 January 1994 (Case No. K 9/93).

Identification:

a) Poland / b) Constitutional Court / c) / d) 04.10.1994 / e) U 1/94 / f) / g) To be published in the collection of the Court's decisions of 1994, vol. 2.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Real Estate.

Headnotes:

The provisions of the regulation of the Council of Ministers of 1991, as amended in 1994, are not inconsistent with the authorisation contained in the Law on the Administration of the Land and Expropriation of Real Estate.

Summary:

Having assumed that previously binding provisions of this regulation, which was amended in 1994, could still be applied to relations established in the past, the Court considered the consistency of those provisions with the superior law and the Constitution. As far as the period before the entry into the force of the amendment of 1994 is concerned, those provisions were found in contradiction with the authorisation of the Law on the Administration of the Land and Expropriation of Real Estate.

Supplementary information:

The Court recalled its previous decisions regarding the rules governing the implementation of secondary legislation.

Identification:

a) Poland / b) Constitutional Court / c) / d) 05.10.1994 / e) W 1/94 / f) / g) Journal of Laws, No. 113, item 551; to be published in the collection of the Court's decisions of 1994, vol. 2.

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.

Keywords of the alphabetical index:

Local self-government.

Headnotes:

The interpretation given in this resolution of some provisions of the Act on Local Self-Government of 1990 referring to different forms of supervision over the activities of Provincial Assemblies (common representation of all municipalities within a province) is universally binding.

Supplementary information:

See also the resolution of 23 September 1994 (Case No. W 10/93).

Identification:

a) Poland / b) Constitutional Court / c) / d) 18.10. 1994 / e) K 2/94 / f) / g) To be published in the collection of the Court's decisions of 1994, vol. 2.

Keywords of the systematic thesaurus:

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

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

Constitutional justice – Constitutional proceedings – Types of claim – 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 – Concept of constitutionality dependent on a specified interpretation.

Institutions – Principles of State organisation – Rule of law.

Institutions – Public finances – Taxation – Governing principles.

Keywords of the alphabetical index:

Constitutional law-making rules / Ombudsman / Rules of taxation.

Headnotes:

The Court is not empowered to decide upon a conflict between legal norms of the same rank (e. g. between the provisions of statutes).

In the Polish legal system codes (e. g. the Commercial Code of 1934) do not enjoy a higher rank than other statutes.

Summary:

The 1992 statute amending *inter alia* the Law on Tax Obligations introduced the rule that shareholders in a limited liability company or limited partnership are liable for tax obligations of the company with all their property, in a *prorata* part, according to their participation in the company's assets. According to the Ombudsman, this provision violated the essence of the commercial companies' system contained in the Commercial Code of 1934.

The Court concluded that it has no power to decide upon a conflict between legal norms of the same rank. In the Polish legal system codes (e. g. the Commercial Code of 1934) are given a privileged position since they consist of coherent and long lasting regulations applicable in a specific field. However, codes do not enjoy a higher rank then other statutes. When a conflict arises between a code and another statute, it is subject to the general principles of interpretation governing relations between laws of the same rank (*e. g. lex posterior derogat legi priori*).

The Court held that the provision in question must be construed in compliance with the Constitution to the effect that the new law may only be applied to those tax obligations which became due after the new law had entered into force.

Supplementary information:

The decision was reached by a 3 :2 vote.

Identification:

a) Poland / b) Constitutional Court / c) / d) 08.11.1994 / e) P 1/94 / f) / g) To be published in the collection of the Court's decisions of 1994, vol. 2.

Keywords of the systematic thesaurus:

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

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

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

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

Institutions – Public finances – Budget.

Keywords of the alphabetical index:

State Budget / Rules of taxation.

Headnotes:

The legislative must comply with the scope of the Budget Act specified by the Constitution and neither allow the Budget Act to regulate issues other than revenues and expenditures of the State, nor enact budgetary provisions in separate statutes.

Summary:

In the Polish system of law sources all statutes passed by Parliament enjoy the same rank. This rule also refers to the Budget Act. As of the date of entry into force of the provisions of the "Small Constitution" of 1992, the Constitution regulates in detail the scope of the Budget Act (according to Section 20 of the Constitutional Act, it should specify the State's revenues and expenditures for a calendar year). Therefore, the Court concludes that the legislative should comply with the scope of the Budget Act and not allow the Budget Act to regulate issues other than the State's revenues and expenditures (e.g. to withdraw or suspend provisions of other statutes being in force). It is also inadmissible to include budgetary provisions in other statutes (so-called "acts associated with the Budget Act").

The fact that the legislator did not expressly revoke provisions previously being in force, but simply replaced them with new ones, cannot be construed as an infringement of the constitutional principle of a State governed by the rule of law.

Supplementary information:

See also the decision of 21 November 1994 (Case No. K 6/94).

Identification:

a) Poland / b) Constitutional Court / c) / d) 21.11.1994 / e) K 6/94 / f) / g) To be published in the collection of the Court's decisions of 1994, vol. 2.

Keywords of the systematic thesaurus:

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

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

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

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

Institutions – Principles of State organisation – Separation of powers.

Institutions – Legislative bodies – Law-making procedure.

Institutions – Public finances – Budget.

Keywords of the alphabetical index:

Constitutional law-making rules / State Budget.

Headnotes:

Under the Constitution it is inadmissible that Parliament unconditionally orders the executive in the Budget Act to spend certain amounts on particular purposes.

Summary:

The constitutional principle of a democratic State governed by the rule of law (see Section 1 of the constitutional provisions of 1952 which are still in force) includes the rule that the legislative is entrusted to decide upon the expenditure of the State. The executive authorities, on the other hand, should enforce the budget passed by Parliament, via the rule that the Budget Act specifies the maximum expenditure in a particular field, giving the executive the autonomy to manage reserved funds and make savings. The Council of Ministers (as the body constitutionally assigned with the task of enforcing the budget) enjoys – within the limits specified by law – the exclusive power to decide upon forms and methods of the budget's implementation. Although Parliament retains the authority to specify particular provisions of the Budget Act (e.g. by prohibiting expenditures for other purposes than those determined in the Act), it is not acceptable that Parliament would unconditionally order the executive to spend certain amounts on particular purposes.

The subject of the control was one of the provisions of the 1994 Budget Act (reserving certain funds to be spent only to purchase home produced military equipment and ordering 8% of the above mentioned amount to be used to acquire fighting-training aircrafts of a certain type manufactured in a particular factory).

In the Court's opinion, the prohibition to use the funds to purchase military equipment from abroad is justified in the light of a need to promote home products, which in a longer perspective should give the country a favourable balance of trade. Since the prohibition was made within the constitutionally established powers of Parliament, it cannot be found inconsistent with the constitutional rules of powers and the enforcement relating to the State Budget, even though it limits the autonomy of the executive to implement the Budget Act. With regard to the second provision in doubt, the Court concluded that separation of Parliament very strictly defined the way of spending the funds, disposing the Council of Ministers of its constitutional right to manage the implementation of the budget.

Supplementary information:

The Court specified the conditions upon which the President may dissolve Parliament in the case it has not passed the State Budget within a period of three months following the submission of a draft (Section 21.4 of the Constitutional Act of 17 October 1992).

One dissenting opinion was filed (the decision was made by a bench of five judges).

See also the decision of 8 November 1994 (Case No. P 1/94).

Identification:

a) Poland / b) Constitutional Court / c) / d) 30.11.1994 / e) W 10/94 / f) / g) Journal of Laws, No. 132, item 684; to be published in the collection of the Court's decisions of 1994, vol. 2.

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.

Keywords of the alphabetical index:

Ombudsman / Ratification of international treaties.

Headnotes:

A statute authorising the President to ratify an international treaty is a normative act being subject to the Court's control.

Summary:

According to Section 33 of the Constitutional Act of 17 October 1992, the ratification and denunciation of international treaties is reserved for the President. The ratification and denunciation of international treaties relating to the State borders and defensive alliances, as well as of treaties imposing upon the State financial obligations or requiring legislative changes should previously be authorised by Parliament in a statute.

Neither the Constitution nor the Constitutional Court Act explicitly authorise the Court to review the constitutionality of an international treaty. According to the Constitutional Court Act, however, the Court is empowered to decide upon the constitutionality of any "legislative act" (statute or act having the force of a statute).

Accordingly, a statute authorising the President to ratify an international treaty is subject to the Court's control.

The Court is also competent to declare a statute authorising the President to ratify an international treaty unconstitutional when the treaty contains self-executing provisions inconsistent with the Constitution.

The Court may not declare such a statute unconstitutional having regard only to the fact that it entitles the President to ratify a treaty that is inconsistent with previous international obligations of the State. Neither may such a statute be declared contrary to the Constitution solely on the ground that it entitles the President to ratify a treaty imposing upon the State a duty to implement legislation, or might affect the coherence of the Polish legal system.

Supplementary information:

See also the decision of 6 December 1994 (Case No. U 5/94).

Identification:

a) Poland / b) Constitutional Court / c) / d) 06.12. 1994 / e) U 5/94 / f) / g) To be published in the collection of the Court's decisions of 1994, vol. 2.

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 – Parliamentary rules.

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

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

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

Keywords of the alphabetical index:

International treaties.

Headnotes:

A parliamentary resolution is an individual and procedural act which is not subject to the Court's control.

Summary:

In this decision, the Court was expected to decide upon the consistency with the Constitution of the resolution regulating the *Sejm*'s works on a statute authorising the President to ratify the 1993 Concordat between Poland and the Holy See.

By virtue of the resolution in doubt, an extraordinary committee was established, which was assigned with the task of determining the potential consequences of the Concordat for the internal legal order as well as its consistency with the drafted new Constitution. The committee should carry out its functions before the *Sejm* approves the Concordat for ratification.

In the applicants' opinion, the resolution meant in practice that the ratification would be considerably delayed. They argued that the resolution infringed the principle of separation of powers, by limiting the President's authority as a body empowered to ratify and denunciate international treaties. Some objections were also raised with regard to the fact that the basis for approval was to be the consistency of the Concordat with the provisions of the new Constitution which is not yet in force.

Referring to its previous decisions, the Court concluded that the resolution in doubt is an individual and procedural act addressed to a specified parliamentary committee, which imposes on the body concerned a duty to proceed in a certain way in a certain situation. Since the resolution does not constitute a normative act (does not contain general and abstract rules), it is not subject to the Court's control. Therefore, the proceedings have been discontinued.

Supplementary information:

See also the resolution of 30 November 1994 (Case No. W 10/94).

Portugal

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Statistical data

Total of 168 judgments, of which:

- Subsequent scrutiny *in abstracto*: 1 judgment
- Appeals: 144 judgments, of which:
  - substantive issues: 48
  - applications for findings of unconstitutionality: 1
  - procedural matters: 95
- Complaints: 21 judgments
- Declarations of assets and of income: 2 judgments

Important decisions

Identification:

a) Portugal / b) Constitutional Court / c) Plenary court / d) 22.09.1994 / e) 514/94 / f) / g) To be published in the Court series.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Other.

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

Keywords of the alphabetical index:

Assets and income / Corruption / Journalists / Public declarations of assets / Responsibilities of public office holders.

Headnotes:

The Court refused to authorise the examination of the declaration of assets and income produced by the President of the Republic, even though the applicant (in the present case the editor of a weekly newspaper) had secured the latter's consent, as the request was based mainly on that consent.

The duty of the Court in granting authorisation to consult declarations of assets is, in each case, to settle potential conflicts of interest between the person making the declaration (i.e. the public office holder) and the third party (public body or private citizen) that wishes to examine the declaration in question. The Court's intervention (and authorisation) are no longer meaningful or justified if a potential conflict of interests does not exist: for example in cases where the public office holder himself allows the third party to have access to the said declaration (which he can always hand over to the interested party).

Summary:

Under Act 4/83 of 2 April persons holding public office are required to submit a declaration of assets and income to the Constitutional Court at the beginning and end of their term of office (Article 120 of the Constitution).

The competence of the Court in such matters is not judicial but administrative (the filing of documents) and is determined by law (not by the Constitution, according to which its competence is "open", as the Constitutional Court has other duties attributed to it by law).

Access to declarations is limited as third parties must prove to the Court that their reason for wishing to consult the declaration is legitimate. The Court will then take into account the need to safeguard the right to private and family life.

Supplementary information:

The Court's case-law demands that the legitimate interest in consulting such declarations be clearly justified.

In the present case, it was the first time the Court had been required to rule upon the value of the authorisation granted by the public office holder himself.

Judgment No. 515/94 confirms the case-law as it refuses journalists the right to use the person's consent as justification for consulting the declarations. The request was similar: it was submitted by the editor of another weekly newspaper and concerned approximately ten holders of various public offices (who, either in writing or in public declarations, had also authorised access to the declarations they had submitted to the Court).

Identification:

a) Portugal / b) Constitutional Court / c) 2nd Chamber / d) 28.09.1994 / e) 529/94 / f) / g) Official Gazette (Series II) of 20 December 1994.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards.

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

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

Keywords of the alphabetical index:

Equality of arms / *Inter partes* principle / Public prosecutor / Proof.

Headnotes:

The right of access to the law and to the courts laid down in the Constitution requires efficient and effective judicial protection.

The right of access to the courts derives from the principle of a democratic State governed by the rule of law (and consequently also from the principle of equality) and entails in order to guarantee a fair trial the principles of the equality of the parties and of the *inter partes* procedure.

Summary:

A constitutional appeal was referred to the Court by a member of the public who submitted that the provision of the Code of Civil Procedure establishing a difference of position between the "party" represented by the public prosecutor (i.e. the State) and the other "party" in respect of *ónus impugnação especificada* (the facts not contested by one party are considered to be proven, unless the party in question is public prosecutor) violated the Article of the Constitution on the right of access to the law and to the courts as well as the principle of equality of the parties in civil proceedings and Article 6 of the European Convention on Human Rights.

The Court maintained that the duties and the status of the prosecuting authorities justified their exemption from the rule that uncontested facts were considered to be proven. The aforementioned discrimination was therefore neither arbitrary nor unjustified.

Supplementary information:

Most of the Court's huge body of case-law on procedural safeguards concerns criminal procedure.

Identification:

a) Portugal / b) Constitutional Court / c) 2nd Chamber / d) 18.10.1994 / e) 549/94 / f) / g) Official Gazette (Series II) of 20 December 1994.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Alcoholism / Drugs / Habitual offender / Human dignity / Maximum penalties.

Headnotes:

The provision of Article 30.1 of the Constitution, prohibiting sentences and security measures of unlimited or unspecified duration, means that sentences must be fixed and determinate so as to safeguard the right to freedom and security.

"Relatively indeterminate sentences", fixing a minimum and a maximum limit, are not sentences of unspecified duration.

Summary:

The point at issue was the constitutionality of the provisions of the criminal Code which laid down a

"relatively indeterminate sentence" for alcoholic or drug-addicted offenders, and for alcohol – or drug-related crimes (incurring a prison sentence).

The "relatively indeterminate sentence" provided for in the 1982 criminal Code is designed to take account of the principles of culpability and social rehabilitation of the offender. By fixing a clearly defined minimum and maximum limit, the Code provides for the possibility of socially rehabilitating offenders without undermining their human dignity.

Supplementary information:

The Court upholds the case-law of judgment No. 43/86 and confirms the trend in Portuguese legal theory.

Identification:

a) Portugal / b) Constitutional Court / c) 1st Chamber / d) 22.11.1994 / e) 609/94 / f) / g) Official Gazette (Series II) of 4 January 1995.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Discrimination on grounds of sex / Industrial accident / Reversionary pension.

Headnotes:

If the literal interpretation of the law reveals that legal rules differ according to the sex of the persons to whom they apply, the principle of equality has not necessarily been violated.

According to the Court's case-law the principle of equality is sufficiently well-established to permit discrimination on grounds of sex, if this is justified by objective and reasonable causes, i.e. if it is based on the nature of the circumstances.

Summary:

The decision not to award a social pension to a woman whose son was killed in an industrial accident (on the grounds that to do so would violate the principle of equality since, if the beneficiary had been the father, rather than the mother, of the victim, he would not yet have been entitled to the pension on account of the statutory minimum age limit) has unwarranted consequences since the presumed beneficiary is being refused the pension on the grounds of alleged discrimination against someone who is not (yet) entitled to such a pension.

In this particular case (where a difference in age limit was considered to be an unacceptable privilege because it was based on sex), the principle of equality does not simply mean parity because it is important to take positive action to offset the social, economic and sexual disadvantages from which women suffer.

Romania

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994[1]

Statistical data

- 2 decisions on the constitutionality of legislation prior to its enactment
- 1 decision on the constitutionality of the rules of procedure of the two houses of Parliament
- 67 decisions on objections alleging unconstitutionality

Important decisions

Identification:

a) Romania / b) Constitutional Court / c) / d) 15.07.1994 / e) 81 / f) / g) *Monitorul Oficial* No. 14/15.01.1995.

Keywords of the systematic thesaurus:

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

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

Fundamental rights – Civil and political rights – Right to private 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:

Homosexuality / Public scandal.

Headnotes:

It is contrary to the constitutional and international provisions safeguarding the right to a private life to consider sexual intercourse between two consenting adults of the same sex an offence, if the act was not performed in public and did not cause a public scandal.

Summary:

The Court held that Section 200.1 of the Criminal Code is unconstitutional if applied to sexual intercourse between two consenting adults of the same sex, if the act was not performed in public and did not cause a public scandal. Before so ruling the Court took into consideration Article 26 of the Constitution, relating to the protection and enjoyment of private and family life, and to the fact that this Article concurred with Article 8 ECHR and the Council of Europe Parliamentary Assembly's amendment No. 8 to the report on the application by Romania for membership of the Council of Europe.

Having regard to the principle of the primacy of international law provided for in Article 20 of the Constitution and the interpretation given to Article 8 ECHR by the European Court of Human rights, the Court found that all homosexual relations with minors or even between adults, where one of the two parties had not consented, or causing a public scandal, are not covered by this article of the European Convention on Human Rights, to which Romania acceded under law No. 30 of 31 May 1994.

Supplementary information:

In its decision No. 136 of 7 December 1994 (*Monitorul Oficial* No. 14 of 15 January 1995), the Court dismissed

[1] *The first judgment was rendered during the previous reference period.*

the applicant's appeal and took note of the public prosecutor's decision to withdraw the application. Decision No. 81/1994 therefore became final.

Identification:

a) Romania / b) Constitutional Court / c) / d) 30.09.1994 / e) 87 / f) / g) *Monitorul Oficial* No. 292/14.10.1994.

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 the review – Parliamentary rules.

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

Keywords of the alphabetical index:

Obligatory debate / Parliamentary rules.

Headnotes:

The provision of the Rules of Procedure for joint meetings of the House of Representatives and the Senate relating to the presentation of and debate on messages from the President is unconstitutional in that it provides for an obligatory debate on messages from the President of Romania, except in cases of attack.

Summary:

The President of Romania's right to communicate to the Parliament, by means of messages, his opinion on the nation's political problems, as laid down in Article 88 of the Constitution, entails the obligation for the joint chambers to receive the message, in accordance with Article 62.2.a of the Constitution.

The Constitutional court considered that the receiving of messages by the joint chambers constituted a means of co-operation between the two directly elected authorities, i.e. the Parliament and the President of Romania, as the latter's opinions on the nation's principal problems were thereby made known to the members of Parliament. This was also the reason why certain aspects of the message could become the subject-matter of a separate debate. Nothing can prevent the Parliament, the supreme representative body of the Romanian people, as stipulated in Article 58.1 of the Constitution, from discussing a problem arising from the message it has just received and possibly even taking appropriate measures at the end of the debate. However, this constitutes a separate and quite distinct debate, subsequent to the President's message and does not require his attendance since such debates, unlike the receiving of messages, as laid down in Article 62.2.a of the Constitution, no longer constitutes a constitutional obligation. They do, however, fall within the scope of parliamentary activities.

The purpose and the aim of such debates cannot be to reject the message, since "receiving" a message, as laid down in the Article 62.2.a of the Constitution, must not be confused with "rejecting" a message.

The debate can, therefore, only serve to allow members of Parliament to express their opinions on the problem in question and, depending on the case, adopt, if necessary, one or more measures.

Section 7.1 of the Rules of Procedure for joint meetings of the House of Representatives and the Senate, relating to the "presentation of and debate on the message", is considered by the Constitutional Court to be unconstitutional as regards the obligatory nature of the debate on the messages addressed by the President of Romania to the Parliament, with the exception of the situations referred to in Article 92.3 of the Constitution i.e. when notice is given to the Parliament of measures taken with a view to warding off an attack.

Slovakia

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Statistical Data

Number of Decisions taken:

- Decisions on the merits by the Plenum of the Court: 9
- Decisions on the merits by Panels of the Court: 16
- Number of other decisions by the Plenum: 12
- Number of other decisions by Panels: 27
- Total number of cases brought to the Court: 264

Important Decisions

Identification:

a) Slovak Republic / b) Constitutional Court / c) / d) 19.10.1994 / e) PL.ÚS 5/94 / f) Case of unconstitutional restriction of the right to have one's health protected through the medical insurance / g).

Keywords of the systematic thesaurus:

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

Institutions – Executive bodies – Powers.

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

Keywords of the alphabetical index:

Declaration of unconstitutionality.

Headnotes:

The right to health protection may only be restricted by an Act of Parliament, and not by means of subordinate legislation.

Summary:

The National Council of the Slovak Republic adopted Act No. 7/1993 establishing the National Health Insurance System. According to Section 4.4 of this Act, Treatment Orders are regulated by a decree passed by the Government of the Slovak Republic. The Attorney General of the Slovak Republic brought to the Constitutional Court a petition asking the Court to declare this provision unconstitutional because, according to Governmental Decree No. 220/1993 on Treatment Orders, some medical interventions are supposed to be paid by the patients in person. According to the Constitution, however, "every person shall have the right to have his/her health protected through medical insurance". In the petitioner's view, the constitutional right to health protection free of costs was unconstitutionally restricted through the secondary legislation adopted by the executive body – the Government of the Slovak Republic.

According to the Constitution no obligations shall be imposed on individuals unless such obligations are in accordance with the law and respect fundamental rights and freedoms (Article 13.1), limitation of fundamental rights and freedoms shall be imposed only under conditions set forth in the Constitution (Article 13.2). The Constitutional Court accordingly ruled Section 4.4 unconstitutional as the restrictions on medical care paid through the system of national insurance may be imposed solely by an Act of Parliament, and not by the executive power by means of subordinate legislation.

Identification:

a) Slovak Republic / b) Constitutional Court / c) / d) 27.10.1994 / e) PL.ÚS 16/94 / f) Case of electoral dispute/Parliamentary election / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes.

Keywords of the alphabetical index:

Electoral system.

Headnotes:

Petitions which seek to nullify the result of elections can only be well-founded if the alleged violations of the electoral law have a direct bearing on the result of the poll.

A decision annulling an election result only in respect of one candidate is contrary to the constitutional guarantee of equal, universal and direct suffrage by secret ballot.

Summary:

On 30 September 1994 and 1 October 1994, elections were held in the Slovak Republic to the National Council of the Slovak Republic (the Slovak Parliament). On 11 October 1994 a petition was submitted to the Constitutional Court of the Slovak Republic from the political party HZDS – the winner of the election. The petition was joined by another party – SNS.

The Constitutional Court is vested with the power to decide whether the election to the National Council has been held in conformity with the Constitution and the law according to Article 129.2 of the Slovak Constitution. Petitions in electoral matters, according to the Act on Procedures at the Constitutional Court (Act No. 38 of 1993), are of two sorts: firstly by persons claiming to have their rights violated through the results of an election; secondly by persons claiming to have their rights violated through an unjust course of events in the conduct of the election. According to Act No. 38/1993, the Constitutional Court can decide:

a) that the election is void;

b) that the result of the poll is nullified;

c) that the decision adopted by the Electoral Commission is nullified and declare that the candidate who had been otherwise lawfully elected to be so elected;

d) to dismiss the petition.

The petition here at issue was directed against the results of the election, and it sought the exclusion of the members of Parliament who had been elected from the political party *Demokratická únia*. This decision was sought on the ground that *Demokratická únia* was not supported by the signatures of ten thousand citizens when entering the roll of candidate parties; and that its participation in the parliamentary election was therefore not in accordance with the electoral law. The Constitutional Court ruled that this infringement of the electoral law was not the sort of infringement which fell within the scope of the petition against the results of an election, because such a petition serves solely for situations in which the violation of the law had a direct bearing upon the result of the poll. Another significant reason for the decision adopted by the Constitutional Court was that a decision annulling the election result solely in respect of one participant in the election would be contrary to the Constitution, whereby the citizens' right to vote must be exercised through equal, universal and direct suffrage by secret ballot. This right would be denied to a group of citizens if their votes would be of no meaning while the votes of some other citizens would be effective. To guarantee equal opportunity in the election, the Constitutional Court is vested with the power to nullify the votes given to all political parties and to nullify the election in general or, alternatively, to decline to nullify the election at all.

Identification:

a) Slovak Republic / b) Constitutional Court / c) / d) 27.10.1994 / e) PL.ÚS 17/94 / f) Case of petition against the results of election brought to the Court by the political party *Demokratická únia* / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes.

Keywords of the alphabetical index:

Electoral system.

Headnotes:

A petition which seeks to increase or decrease the constitutionally fixed number of members of Parliament is inadmissible.

Summary:

On 14 October 1994, a petition by the *Demokratická únia* was submitted to the Constitutional Court. This petition was directed against the results of the election, and it sought the exclusion of those members of Parliament who had been elected from the political party HZDS. This decision was sought on the ground that, contrary to the electoral law, the HZDS leader Mr Meciar has made a public appearance on television

on the first day of polling. Activity of this sort is prohibited by Section 23.6 of the electoral law, and the Slovak Electoral Commission ruled that Section 23.6 had been infringed by this public appearance.

The Constitutional Court dismissed the petition on the same grounds as the petition from the HZDS against the *Demokratická únia*. The legal opinion of the Court was supported by the observation that under the Constitution, the Slovak Parliament consists of 150 members precisely, and the Constitutional Court consequently had no power either to increase or decrease this number.

Identification:

a) Slovak Republic / b) Constitutional Court / c) 02.11. 1994 / d) PL.ÚS 19/94 / e) Case of petition for unjust course of events at election brought to the Court by the political party *Hnutie za prosperujúce Cesko + Slovensko* / f) / g).

Keywords of the systematic thesaurus:

Constitutional justice – Types of litigation – Electoral disputes.

Keywords of the alphabetical index:

Electoral system.

Headnotes:

Not every infringement of the electoral law justifies the annulment of elections. Only gross, consequential or recurrent infringements constitute a legal ground for the Constitutional Court to declare an election null and void.

Summary:

On 14 October 1994, an electoral petition was submitted to the Constitutional Court. It was brought by the political party *Hnutie za prosperujúce Cesko + Slovensko* and it was directed against an allegedly unjust course of events in the conduct of the election. It was based on the alleged inequality of opportunity for public discussions offered by the Slovak Television to "big" and "small" political parties, thereby infringing Section 23 of the electoral law. The petitioner asked the Constitutional Court to declare the election void.

The Constitutional Court ruled that its power to declare elections void does not extend to all infringements of the electoral law. If every infringement of the law could result in the nullity of the election, the election could easily be indefinitely postponed and parliamentary democracy could be shaken or even destroyed. That is why negligible infringements of the electoral law are not a ground for declaring the election void. Solely gross, consequential or recurrent infringements of the law constitute a legal ground for exercising the power to declare an election void. After examining the arguments advanced by the *Hnutie za prosperujúce Cesko + Slovensko*, the Constitutional Court ruled that the infringement of the electoral law invoked by the petitioner had none of the qualities of the above-mentioned criteria. The petition was dismissed accordingly.

Slovenia

Constitutional Court

Reference period:
1 September 1994 – 31 December 1994

Statistical data

Number of decisions:

The Constitutional Court had 12 sessions and 1 public hearing during this period, in which it dealt with 178 cases in the field of protection of constitutionality and legality (cases denoted U- in the Constitutional Court Register) and with 6 cases in the field of protection of human rights and basic freedoms (cases denoted Up- in the Constitutional Court Register and submitted to the plenary session of the Court; other Up- cases were processed by a panel of three judges at sessions closed to the public). There were 109 U- and 136 Up-unresolved cases from the previous year at the start of the period (1 September 1994). The Constitutional Court accepted 179 U- and 38 Up- new cases in 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:

- 42 cases (U-) in the field of protection of constitutionality and legality, of which there were (taken by Plenary Court):
- 18 decisions and
- 24 resolutions
- 86 cases (U-) were joined to the above mentioned cases because of common treatment and decision; accordingly the total number of resolved cases (U-) is 128.

In the same period, the Constitutional Court resolved 17 cases (Up-) in the field of protection of human rights and basic freedoms (2 decisions taken by Plenary Court, 15 decisions taken by a Panel of Three Judges).

All decisions (18) have been published in the Official Gazette of the Republic of Slovenia, while the Resolutions of the Constitutional Court are not as a rule published in an official bulletin, and only handed over to participants in the proceedings.

However, all decisions and resolutions:

- are published in an official yearly collection (Slovene full text version with English abstracts) and
- have been submitted to the users:
  - since 1 January 1987 via on-line available STAIRS, ATLAS and TRIP database (Slovene and English full text version);
  - since 1 January 1995 on Internet (Slovene and English full text language version - "www.sigov.si");
  - since 1 January 1995 via Slovenian Interactive Legal Information System (electronic publishing software for windows, running local and over network) (Slovene and English full text version).

Important decisions

Identification:

a) Slovenia / b) Constitutional Court / c) / d) 06.10.1994 / e) U-I-49/94 / f) / g) To be published in the official digest of the Constitutional Court, III 1994.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Free enterprise / Principle of legal certainty / Retroactive effect.

Headnotes:

New types of economic entities can be specified by law, and appropriate requirements and time periods may be set for adjusting existing economic entities to new legislation; ultimately, liquidation may also be prescribed in respect of legal persons who fail to adjust their form of organisation within the set period to the new system and form of organisation of industrial corporations.

This law does not have retroactive effect and does not encroach upon the accrued rights of existing corporations, because it only prescribes the procedure and time periods for harmonisation of the legal status and organisation of existing companies with the new system.

The legal provision which only prescribes the adjustment of national currency amounts in the event of any change in the national currency/ECU ratio is in conformity with the task of the State to ensure legal security in legal transactions; thus, such provision does not interfere with the principle of legal certainty.

Summary:

Free enterprise is guaranteed; the Act specifies the conditions applying to the establishment of economic organisations; any business activity in conflict with the public interest may not be pursued (Article 74 of the Constitution). Section 1.5 of the Industrial Corporations Act provides, in accordance with the relevant constitutional principle, that any foreign or domestic natural or legal person may establish a company, that is, a legal person who will independently engage in the market in a profit-making activity as its exclusive activity. A company shall only be deemed to be an industrial corporation when organised as one of the legally recognized organisational forms specified by statute (numerous clauses, Section 1.3 of the Industrial Corporation Act). The specifying of conditions for the establishment of an industrial corporation does not imply any interference with the right to free enterprise, or any restriction of the right of any person to establish such a company. In accordance with Article 74 of the Constitution, the forms of businesses and the conditions for their establishment shall be regulated by statute. The regulation of the permissible types of economic entities by statute is essential for the purpose of having a market regulated on the basis of law, thereby assuring unhindered legal transactions and consequent legal security.

Neither the Industrial Corporation Act as a whole nor any of its individual provisions has retroactive effect. In Section 577 it is expressly provided that, with the entry into force of the Act, all the existing economic organisations will continue to perform their activities in a manner and under the conditions specified in reference to them in the companies' register, regardless of their legally recognised form of organisation: and this also applies to privately owned limited liability companies. The Act does not interfere with the capital and management structures of existing companies; it only requires that, over a period of time, adjustments to certain provisions be made. Section 585 of the Act also specifically provides that existing companies shall pass such resolutions as are necessary to make appropriate adjustments in line with the Act. Reorganisation or adjustment to the new conditions specified by statute, or liquidation of an economic entity which may ultimately occur, then, is not implemented directly by statute, but is left to the discretion of existing economic entities. In this connection, the provisions of Section 580 of the Act do not interfere with the right of property of existing limited liability companies and their founders or partners.

Neither do the disputed provisions of the Industrial Corporation Act violate the principle of legal certainty. The existence of economic organisations and companies established in accordance with former legislation has been guaranteed; however, it is prescribed that their legally recognized status and organisation should be adjusted to the new system. The ensuring of equal conditions for the business operations of corporations and the need to protect legal transactions and creditors are evidently in the public interest. Since it is the duty of the State to ensure legal security in legal transactions, in reference to which it may lawfully react, in the general interest, to changes in price trends in domestic and foreign currency relations etc, and since Section 11 of the Industrial Corporation Act only requires adjustment of Slovenia Tolar amounts in the case of a major change in the Slovenia Tolar/ECU ratio, the Constitutional Court did not have any doubts concerning the provisions of Section 11 of the Industrial Corporation Act.

Supplementary information:

For reasons of joint consideration and adjudication, the Constitutional Court had decided with its resolution of 12 May 1994 to attach to the case under consideration case U-I-80/94.

Languages:

a) official decision: Slovene.

b) translation: English.

Identification:

a) Slovenia / b) Constitutional Court / c) / d) 06.10.1994 / e) U-I-3/94 / f) / g) Official Gazette of the Republic of Slovenia, No. 69/94; to be published in the official digest of the Constitutional Court, III 1994.

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Social State.

Fundamental rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Collective agreements / Equality / Minimum wage.

Headnotes:

The difference between the position of employees and workers whose wage is determined in accordance with a collective agreement, on the one hand, and of management staff and the staff vested with special authorisations, on the other, is due to a difference in actual and contractual bases, and is thus not in conflict with the Constitution.

Summary:

A benefit has been provided by statute by the legislator in favour of employees and workers who were employed between 1 September 1990 and 1 January 1993 by employers who, due to liquidity problems, were not able to ensure the payment even of such minimum wages as were guaranteed by collective agreements. Such persons have been allowed to take part in the process of ownership transformation at a discount on the basis of their claims against the company. The law, then, has granted such benefits only to those categories of employees and workers whose social security was most severely affected in the said period, thus giving them the material satisfaction which would alleviate their social position in the future. Such differentiation between management staff and those workers and employees who did not even receive the minimum wage guaranteed under collective agreements is in the opinion of the Constitutional Court in conformity with the principle of the Social State (Article 2 of the Constitution) and does not imply any violation of the principle of equality before the law under Article 14 of the Constitution.

Identification:

a) Slovenia / b) Constitutional Court / c) / d) 06.10.1994 / e) U-I-42/94 / f) / g) Official Gazette of the Republic of Slovenia, No. 67/94; to be published in the official digest of the Constitutional Court, III 1994.

Keywords of the systematic thesaurus:

Fundamental rights – Civil and political rights – Equality.

Keywords of the alphabetical index:

Old-age pension bureau / Pensioners.

Headnotes:

The principle of equality before the law does not allow the law to deny pensioners the right to appoint their representatives in the Assembly of the Bureau through their interest groups or associations in circumstances where this is allowed to all other persons.

Summary:

In contrast to the constitutional principle of equality before the law (Article 14 of the Constitution), the disputed provision of the Old-Age Pension and Disability Insurance Act provides that, unlike all other persons, representatives of pensioners in the Assembly of the Bureau shall be appointed by the National Assembly, and not by pensioners themselves through their own interest groups or associations. In the opinion of the Constitutional Court there are no justified reasons for such a difference in treatment. At issue was the appointment of representatives of individual interests to the managing body of a public institution.

The Constitutional Court did not decide to abrogate the disputed statutory provision, but only to declare it to be in conflict with the Constitution, and enjoined the National Assembly to remedy the identified unconstitutionality within the specified period.

Formal abrogation of the disputed provision would have deprived the pensioners of their more favourable representation in the Assembly, which had been accorded to them by statute.

From the viewpoint of protection of pensioners' interests, the way in which representatives of pensioners

are appointed is less important than the continuation of majority representation of insured persons and insurance beneficiaries in the Assembly.

Identification:

a) Slovenia / b) Constitutional Court / c) / d) 06.10.1994 / e) U-I-202/93 / f) / g) Official Gazette of the Republic of Slovenia, No. 74/94; to be published in the official digest of the Constitutional Court, III 1994.

Keywords of the systematic thesaurus:

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

Institutions – Principles of State organisation – Social State.

Institutions – Principles of State organisation – Rule of law.

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Autonomy / Contractual interests / Equality / Freedom of regulation of bonded relations / Interpretative decision of the Constitutional Court / Legal persons / Natural persons / Rule of Law / Social State.

Headnotes:

Provisions regulating the maximum upper limit of contractual interests differently for individuals than for other persons are not in conflict with the Constitution. The restricting of contractual intent in this field is justified in a State governed by rule of law and a social State, the difference of treatment being based on a difference in actual status as represented by the different position of these persons in the market.

Summary:

The admissibility of imposing restrictions on contractual autonomy in the field of interest rates is justified by public interest, by the need to ensure social security, to ensure social and economic functions of property, and to provide for the principle of Slovenia being a State governed by the rule of law and a social State. Having regard to these considerations, the legislator could impose different restrictions on these freedoms to take account of different statuses and legal characteristics of individual participants in legal transactions. The peculiarities in the statuses and legal characteristics of natural and legal persons thus justify different legal regulation of the limits of contractual autonomy of legal and natural persons.

The Constitutional Court established that in the field of credit institutions, there existed a practice which was not in conformity with the principle of Slovenia as a State governed by the rule of law and a social State. Crediting and granting of loans is engaged in both by natural and legal persons, irrespective of their registration. They make agreements concerning interest rates and other credit conditions without any restrictions and control. It would be constitutionally admissible for the legislator to interfere with this field by prescribing in more detail which persons may act as credit institutions and what conditions they have to fulfil in this respect. Furthermore, it is only for the legislator to judge whether the situation in this domain requires that the contractual intent of other persons should additionally be restricted by other instruments, not only by general provisions of civil law. Also, only the legislator can judge whether it is justified that, in conditions of a fairly stable domestic currency, our civil law should no longer include a restriction whereby contractual interest would cease accruing when its sum has reached the principal amount.

Supplementary information:

For reasons of joint consideration and adjudication, the Constitutional Court decided with its resolution of 9 June 1994 to attach to the case under consideration case U-I-15/94.

Languages:

a) official decision: Slovene.

b) translation: English.

Identification:

a) Slovenia / b) Constitutional Court / c) / d) 13.10.1994 / e) U-I-17/94 / f) / g) Official Gazette of the Republic of Slovenia, No. 74/94; to be published in the official digest of the Constitutional Court, III 1994.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Bankruptcy / Company reorganisation / Principle of legal certainty / Redundancy / Rule of law / Technological improvement / Termination of employment.

Headnotes:

If the legislator has proclaimed by a statute that he will regulate a particular matter by a special law, but has failed to do so, then the said statute, or particular provisions thereof whose subject matter should be complemented by the special law, are not in conformity with the principle of legal certainty, one of the principles of a State governed by the rule of law.

Summary:

The Constitutional Court considered that the disputed provision was in conflict with the Constitution, because the Act on Composition, Bankruptcy and Liquidation had failed to regulate the rights of the employees whose employment is terminated in a specific way in the context of financial reorganisation procedures due to company insolvency.

The implementation of the disputed provision is subject to the provision of a mechanism for the protection of the position of employees under labour legislation, and to the protection of the social conditions of persons made redundant in the process of financial reorganisation.

The legal position of employees whose employment relation has been terminated as a legal consequence of the institution of bankruptcy proceedings cannot be equated with the legal position of so-called redundant individual employees and workers whose employment relation is terminated and who are a financial burden to the insolvent company. The provision of Section 51 of the said Act defines such workers and employees as permanently redundant labour, and even refers in such definition to relevant provisions of labour legislation. At the same time, it denies them the rights arising from their being permanently redundant labour and provides that a special statute shall be passed with a view to regulating their legal status.

In the Act under consideration, then, the legislator has undertaken the obligation of passing a statute. This promise, however, has not been fulfilled, with the result that a legal vacuum has been created in respect of the rights of certain categories of employee, contrary to the principle of legal certainty.

Languages:

a) official decision: Slovene.

b) translation: English.

Identification:

a) Slovenia / b) Constitutional Court / c) / d) 03.11.1994 / e) U-I-57/92 / f) / g) Official Gazette of the Republic of Slovenia, No. 76/94; to be published in the official digest of the Constitutional Court, III 1994.

Keywords of the systematic thesaurus:

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

Institutions – Principles of State organisation – Social State.

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Equality before the law / Farmland / Inheritance / Protected private farms / Social State.

Headnotes:

It is not contrary to the Constitution for special rules concerning the inheritance of farmland and private farms to be prescribed by statute, because the commitment of Slovenia to the social State is observed, and in addition, special social and economic functions of medium-sized farms are defined.

The restricting of the freedom of the testator and the right to inherit farmland by statute does not infringe the principle of equality before the law, because the differentiation is introduced by statute on the basis of generally acknowledged factual circumstances. The restricting of disposal by bequeathal, of the right to inherit and of the right to property is contrary to the principles of a State governed by the rule of law if relevant measures and criteria are not prescribed explicitly, or at least in an ascertainable manner, by statute.

Summary:

It is contrary to the Constitution to restrict inheritance in too broad a manner, for the Act on Inheritance of Farmland and Private Farms among other things provides in Section 1 that the purpose of passing the law has to restrict the passing of farmland to the possession of those who will not cultivate the land. Such restrictions on property rights exceed the scope defined by Article 67.2 of the Constitution, according to which the manner in which property may be inherited, as well as the conditions under which it may be inherited, shall be determined by statute. For by such regulation the possibility for a particular category of citizens to inherit farmland or a farm under equal conditions is completely denied to such citizens. The said restriction fails to contribute to such exploitation of property as is provided for by the Constitution. Land maximums have been abolished. Now, the essential aim of the Act is to define farms under protection. At the same time, the

heir to a medium-sized farm is protected by having his livelihood ensured and by not allowing the land to be broken into pieces (social function of the farm). Such protection is not needed in the case of big farms (large estates), which is why the National Assembly will have to redefine the upper and lower limits applying to a farm under protection. As the law is constructed so that its restricting aim is interspersed among a number of provisions, and since such provisions could not be severed so as to retain the applicability of the law, the Act had to be abrogated as a whole.

The Constitution provides in Article 67.2 that the manner in which property may be inherited, as well as the conditions under which it may be inherited, shall be determined by statute, while the basic criteria are specified in Paragraph 1 of the same Article and enjoin the legislator to regulate the manner in which property is acquired and enjoyed so as to ensure the economic, social and environmental functions of such property. In the Act under consideration, the economic and social functions are in the foreground, and this also connects with the provision of Article 2 of the Constitution in which Slovenia is defined as a social State. The Act on Inheritance of Farmland and Private Farms stresses the social function of property, which means that the latter represents an essential means of livelihood for some categories of persons. Such a livelihood is safeguarded by the prohibition of the division of land and by the proportionate relief offered to the person who will take over the farm with respect to birthright portions of other heirs. In line with this, the right to bequeath is in such cases restricted. Such differentiation and stressing of the social function of property is justified, because property rights and disposal by bequeathal are exercised in accordance with the nature and purpose of the matter, and in line with the general interest as defined in the agricultural policy of the State. A special legal regime applying to medium-sized farms results also from historical developments. Protection of medium-sized farms was stressed, because the problems relating to the social function of property did not come into question as far as large estates were concerned. A review of comparative law shows that protection of medium sized farms is subject to special regulation in modern States.

Such regulation does not violate the constitutional principle of equality before the law (Article 14 of the Constitution). This principle prohibits the introduction, direct or indirect, of unjustified differentiation between legal and/or natural persons independently of the nature of the matter and the definition of the persons involved. The principle of equality implies that a law must be permeated by the principle of reasonableness and by the aim of the law (*rationabilitas* and *causa legis*). Extreme understanding of equality, without taking into consideration the specific attributes or circumstances which are in issue, may lead to inequality. The Constitution itself has introduced inequality of legal status on the bases of social, economic and environmental functions of property (Article 67), with respect to natural resources and national assets (Article 70), with respect to the protection of land (Article 71) and with respect to the protection of the natural and cultural heritage (Article 73). In this way, the relativity of rights has been recognised with regard to the nature and purpose of the matter being regulated, or with respect to the specific position of persons who claim certain rights. In this connection, the legislator is not entirely free and may differentiate only for justified reasons, based upon differences of legal status and/or of experience from daily life. In the instant case, the legislation is justified because the threat to the livelihood of the heir who will take over the farm is reduced, and also because the economic function of property is stressed in that medium-sized farms are not allowed to be divided in a manner which would make their efficient operation impossible.

Supplementary information:

For reasons of joint consideration and adjudication, the Constitutional Court decided with its resolutions of 9 June 1994, 31 March 1994 and 30 June 1994 to attach to the case under consideration cases U-I-74/94, U-I-43/94 and U-I- 79/94.

Languages:

a) official decision: Slovene.

b) translation: English.

Identification:

a) Slovenia / b) Constitutional Court / c) / d) 09.11.1994 / e) U-I-172/94 / f) / g) Official Gazette of the Republic of Slovenia, No. 73/94; to be published in the official digest of the Constitutional Court, III 1994.

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Dissenting opinions / Freedom of the press and communications / Principle of a democratic State / Radio and Television Company / Retroactive effect.

Headnotes:

A provision which, in addition to the method of appointment and removal from office of the director of a public institution, introduces an indefinite and legally undefined concept of approval of appointment, is not in conformity with the principle of a State governed by the rule of law.

Such regulation does not allow for the legality of the relevant procedure and circumstances to be examined, nor for the application of substantive law. It allows for arbitrary decisions, and does not provide the injured party with minimum procedural rights.

Such regulation also fails to provide the director-general of Radio and Television with the necessary autonomy and independence *vis-à-vis* the holders of social and political power such as to protect against interferences with the constitutional right to freedom of the press.

Summary:

The principle of a State governed by the rule of law demands that statutory solutions be general and abstract. In connection with statutory provisions which refer, due to the nature of the matter which they regulate, to a preselected circle of persons, or to a single person even, it is all the more important that their effect on the position of such persons be limited and, consequently, measurable and foreseeable. The aim of a statutory provision must be clearly evident, and the measures should be specified in detail. The legislator must adopt clear standards and prescribe their content: it is inadmissible for the legislator to leave the definition of the content of a standard to another body. Standards should be foreseeable and should allow for their testing. When a standard is not clearly defined, this makes possible the different application of the law and leads to arbitrariness on the part of State authorities. A statute is in conformity with the Constitution when grammatical and teleological interpretations yield the content of the legislative measure, and in this way the conduct of the bodies responsible for its enforcement is determined.

The Constitutional Court recalled the duty of authorities of all branches in a democratic State, and in particular to the duty of the legislator in the process of the development of a democratic State, to especially ensure freedom of the press and the freedoms of each individual journalist. For this purpose it is necessary to ensure freedom of expression of individual persons, as well as the protection of freedom of the press as an institution. The responsibility of the State in ensuring and developing freedom of the press, including radio and television, is especially important at a time when democratic institutions in the new Slovenian State are being rebuilt, in the face of numerous inherited and strong elements of a non-democratic political culture which formed the constitutional and factual basis for the single-party authorities in former Yugoslavia. This is why feelings of anxiety and fear may still exist with regard to the authorities and may in the case of journalists find their expression in (self-)censorship, and in the case of the public in political apathy and alienation.

Section 21 of the Radio and Television Slovenia Act prescribes the duties of the director-general of RTV Slovenia. Among other things, he shall organise and direct the activities and business operations of RTV, appoint heads of organisational units, coordinate the work of programme managers and heads of organisational units and decide any disputes between them, and shall also perform such other tasks as may be prescribed by statute. The director of RTV must also give a prior opinion on proposals for the appointment of directors of radio and television programmes and programmes for minorities. The realisation of statutory principles, on which the activities of public media are based, and, consequently, the respect for the fundamental constitutional right to freedom of the press, are therefore dependant in part upon his work. It is for this reason impossible to conceive of freedom of the press and of the freedoms of journalists in RTV without the existence of a degree of relative autonomy and professional independence in the director of RTV *vis-à-vis* the holders of social, economic and political power and to those who at any particular time are represented in the Council governing the administrative body. This required independence is of course legitimately limited by the manner of election of the director of RTV and by his public responsibility to exercise his functions in the public interest. But his autonomy and independence must be transparent and foreseeable. Such requirements are not fulfilled if the position of the director depends on the composition of the administrative body at any particular time, the distribution of political power in the State at any particular time, or on formal changes which the latter may adopt at any time concerning the status of the institution.

Languages:

a) official decision: Slovene.

b) translation: English.

Spain

Constitutional Court

Reference Period:
1 September 1994 – 31 December 1994

Statistical Data

Type and number of decisions:

- Judgments: 94
- Decisions: 100
- Procedural decisions: 1245

Cases submitted: 2599

Important decisions

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 10.09.1994 / e) 252/1994 / f) / g) Official Gazette of 21 October 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

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

Keywords of the alphabetical index:

Blood-alcohol level / Presumption of innocence / Right to assistance of a counsel.

Headnotes:

When a test is carried out to determine an individual's blood-alcohol level, the provisions guaranteeing personal liberty in no way require that a lawyer's assistance should be provided as it is in criminal proceedings: the test is merely a technical check during which the detainee makes no statement as to his guilt and to which he may refuse to submit.

Summary:

The appeal in question was lodged against the appellant's conviction for an offence against road safety regulations, which led to his detention by the authorities. While in custody, the appellant was subjected to a blood-alcohol test which proved positive. The appellant claimed that his right to be presumed innocent had been violated through the carrying out of a test to determine his blood-alcohol level while he was being unlawfully detained and that the right referred to above had been violated by the fact that the test was carried out while he was deprived of his liberty and did not have the assistance of a lawyer.

Under the legislation regulating its proceedings, the Constitutional Court cannot review the facts of the case and must confine itself to examining whether, as alleged by the appellant, a violation of the fundamental right relied on has occurred, by virtue of the fact that the judge based his conviction on a single piece of incriminating evidence – the blood-alcohol level test - thereby violating the provisions of Article 17.3 of the Spanish Constitution guaranteeing the personal liberty of the plaintiff, who, moreover, did not have the assistance of a lawyer.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 19.09.1994 / e) 247/1994 / f) / g) Official Gazette of 21 October 1994.

Keywords of the systematic thesaurus:

Constitutional justice – The subject of review – Court decisions.

Constitutional justice – Constitutional proceedings – Procedure – General characteristics.

Institutions – Courts – Ordinary courts – Criminal courts.

Keywords of the alphabetical index:

Constitutional protection, subsidiarity / Criminal procedure / Preliminary decision.

Headnotes:

Infringement of a fundamental right guaranteed by the Constitution can only be alleged after all possibilities offered by the system of actions and appeals have been exhausted, and never directly, except where full recourse to all the prior judicial procedures leads to an additional burden or to the extension or intensification of the violation of the right.

Summary:

Because constitutional protection has a subsidiary function, it can only be applied for in respect of a final decision, in whatever form, terminating the judicial proceedings. An interlocutory decision cannot constitute grounds for an application for constitutional protection unless the violation or injury it causes cannot be the subject of a judicial appeal, something which it is difficult to imagine under the Spanish legal system. Consequently, where shortened criminal procedure is concerned, the initiating order cannot itself be the subject of an ordinary or extraordinary appeal, although it can be contested in the context of an appeal against the judgment. There are, however, a few cases in which it is possible to appeal to the Constitutional Court against an interlocutory decision, for example when the time taken to exhaust all the stages and instances of the prior legal proceedings results in an additional burden or an extension or intensification of the violation of the right in question – something which is possible where personal liberty is concerned.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 03.10.1994 / e) 269/1994 / f) / g) Official Gazette of 8 November 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Administrative acts.

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

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

Keywords of the alphabetical index:

Physically disabled persons / Right to access to public office.

Headnotes:

Far from being discriminatory, reserving a percentage of places for physically disabled persons is in line with the current general trend to promote the substantial equality of disadvantaged persons. The reservation of places cannot be regarded as attributing merit to disability – which would be contrary to the right of access under equal conditions to public functions and offices, but as a way of respecting the principles of merit and ability, which does not, however, dispense candidates for the reserved places from meeting these criteria.

Summary:

The appellant challenged the administrative decision, subsequently confirmed by the courts, whereby one of the vacant posts in public administration was given to a candidate who received a lower mark than the appellant in an entrance competition, although the mark in question met the conditions for appointment. The reason for the decision was that the successful candidate suffered from a 33% disability, a circumstance provided for in the competition rules, which reserved a certain number of places for candidates with this degree of disability having passed the competition. The decision was challenged on the grounds of an alleged infringement of the principle of equality (Article 14 of the Spanish Constitution) and the right to access to public office under equal conditions (Article 23.2 of the Spanish Constitution).

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 17.10.1994 / e) 270/1994 / f) / g) Official Gazette of 22 November 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

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

Keywords of the alphabetical index:

Ne bis in idem.

Headnotes:

It is a violation of the principle of *ne bis in idem* to use military disciplinary measures to punish a member of the Guardia Civil three times for the same act.

In a State governed by the rule of law, leading a particular lifestyle, however open to criticism it may be, does not of itself justify the imposition of disciplinary sanctions.

Summary:

The appellant, a member of the Guardia Civil, appealed to the Constitutional Court against the judgment of the Supreme Court upholding a decision of the Ministry of Defence imposing an extraordinary sanction of dismissal. The judgment held that the requirements for such action set out in the law governing the discipline of the armed forces had been met ("the accumulation in his personal file of unfavourable reports or notes which cast doubt on his qualifications or professional ability" and "conduct gravely prejudicial to the discipline of the service or to military dignity, constituting an offence") following a press conference given by the appellant without the authorisation of his superiors. This action led to the opening of three disciplinary files: two ordinary files for serious misconduct (using the media to make statements contrary to military discipline) and one extraordinary file which formed the basis for the decision appealed against. Before the press conference, the appellant had been disciplined for three minor offences which, at his request, had finally been deleted from his file. However, the deletion did not cover punishment for serious misconduct imposed for having committed a minor offence when three minor offences for which he had been placed under arrest had already been entered in his file and had not been deleted (i.e. the three minor offences subsequently deleted). It should be noted that the minor offence and the serious misconduct mentioned above were both taken into account in the decision to dismiss him.

Identification:

a) Spain / b) Constitutional Court / c) Second Chamber / d) 17.10.1994 / e) 273/1994 / f) / g) Official Gazette of 22 November 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Administrative acts.

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

Keywords of the alphabetical index:

Freedom of trade unions.

Headnotes:

The restrictions placed on fundamental rights by the special nature of the public service cannot totally remove the freedom of members of the local police to join a trade union. At least a minimum right in this regard must be recognised. The imposition of disciplinary sanctions for conduct which constitutes neither an offence under the law nor incitement to indiscipline and which is not deliberately aimed at placing the safety of citizens in jeopardy is an infringement of the freedom to form and join trade unions.

Summary:

The person seeking constitutional protection, a member of the local municipal police, appealed against an administrative sanction by the municipality following the dispatch of two letters to colleagues in the service of a different municipality. The letters informed them, on behalf of the trade union committee of which he was chairman, of negotiations taking place with his local authority and the pressure he intended to exert, and calling for their support.

The Constitutional Court considered whether the plaintiff's conduct was liable to sanction for breach of discipline or whether he was protected by his right to trade union freedom. It concluded on the basis of the text of the letters that they represented a legitimate exercise of the fundamental right referred to. Although Organic Law 2/1986 on the security forces and bodies places certain legitimate restrictions on the exercise of this right on the grounds of the special nature of the police force, these limits cannot extend to the removal of the trade union rights of members of the local police whose right to exercise this freedom to a minimum degree must be recognised.

Identification:

a) Spain / b) Constitutional Court / c) Second Chamber / d) 17.10.1994 / e) 277/1994 / f) / g) Official Gazette of 22 November 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

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

Keywords of the alphabetical index:

Criminal procedure / Defendant / Right to information on the charges.

Headnotes:

The constitutionally guaranteed right of defence in shortened criminal procedure consists of three elements: 1. no one may be accused without first being judicially charged; 2. no one may be accused without having been heard by an investigating judge before the conclusion of the preliminary investigation; 3. the person charged may not be called to testify if the investigation concludes that there is reason to suspect that he participated in the perpetration of an act punishable by law.

Summary:

The facts established in the contested judgment show that the court had not granted the appellant the judicial status of "person charged" at any time prior to the decision to close the investigation and that the appellant was aware that he was suspected of having committed a punishable offence since he had been informed of the opening of the hearing and the prosecution's accusation. Moreover, in the light of the doctrine set out above, it must be concluded that the appellant's right to a trial with all the appropriate guarantees, the right to be informed of the charges and the right of defence had been violated. Hence, as the appellant had not been given the status of "person charged" up to the time in question, the investigation had been carried out "behind his back", thereby violating the rights set out in Article 24.2 of the Spanish Constitution.

Identification:

a) Spain / b) Constitutional Court / c) Second Chamber / d) 24.10.1994 / e) 283/1994 / f) / g) Official Gazette of 29 November 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

Keywords of the alphabetical index:

Criminal procedure / Identification of suspects / Presumption of innocence.

Headnotes:

The presumption of innocence can only be overturned where sufficient evidence has been produced that the offence has been committed and that the accused is implicated in the offence. Only evidence produced during the hearing or previously established in the event of a reconstruction of the crime can be regarded as genuinely incriminating evidence. An oral statement made during the investigation by persons who have taken part in the identification of the suspects must be ratified in court. Although it is not for the Constitutional Court to weigh the evidence produced, it is competent, as the final guarantor of fundamental rights, to establish whether the evidence produced in the *a quo* proceedings was sufficiently incriminating to overturn the presumption of innocence.

Summary:

The case concerned the appellant's conviction for theft with intimidation against a bank on the basis of identification by a witness who subsequently failed to appear in court. The Court ruled that the failure to ratify the oral evidence at the hearing should be considered as a violation of the presumption of innocence.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 27.10.1994 / e) 286/1994 / f) / g) Official Gazette of 29 November 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

Fundamental rights – Civil and political rights – Equality.

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

Keywords of the alphabetical index:

Differences in wages / Equality between the sexes.

Headnotes:

The principle of non-discrimination in the matter of salaries demands that the principle of strict equality should be respected, not only where the work performed is identical, but also where different types of work are regarded as equal in value. In this case it is necessary to establish whether any differences which exists are the result of attributing greater value to work carried out by men. The evaluation must take account of criteria which are not in themselves discriminatory.

Summary:

The case concerned the difference in wages paid by an undertaking specialising in biscuit manufacture to workers employed in the production branch, the majority of whom were men, and those paid to workers employed in packing, most of whom were women. The constitutional issue in the case was whether the wage differential constituted discrimination on grounds of sex and was therefore an infringement of the right to equality.

Supplementary information:

One judge delivered a dissenting opinion.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 27.10.1994 / e) 288/1994 / f) / g) Official Gazette of 28 December 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Administrative acts.

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

Keywords of the alphabetical index:

Right to a defence.

Headnotes:

Where the offending expressions have been used in the context of administrative proceedings, the criteria for judging conduct and the restrictions on freedom of expression within the armed forces should also take account of the right to defend one's rights and legitimate interests.

The duty of members of the armed forces to "behave properly" towards their immediate superiors cannot be interpreted as authorising undue restrictions on the exercise of freedom of expression for the purpose of controlling the right to put forward arguments during administrative proceedings. Bringing a case and defending one's views involves criticising the act in question, and discussing and challenging the basis and reasonableness of the act itself or its effects.

Summary:

This constitutional protection case concerns the sanction imposed by the Ministry of Defense on the appellant, a member of the armed forces, for expressions used in an application to re-open proceedings on the grounds of error, prior to an appeal to an administrative court, against a particular appointment within the Ministry of Defence which he regarded as unlawful. The Ministry imposed the sanction in question on the grounds that the words used were disrespectful towards the government of the country and were contrary to the "proper behaviour" which should be observed by members of the armed forces when addressing their superiors. Having restated the legal doctrine contained in previous decisions on the possibility of permitting the legislator to impose specific limits on the right to freedom of expression of members of the armed forces (Article 20.1.a of the Spanish Constitution), the Constitutional Court ruled that, because of the context – application to re-open a case on the grounds of error – within which the statements complained of had been made, the case not only concerned the right to freedom of expression but also the right of defence of legitimate rights and interests (Article 24.1 of the Spanish Constitution). This meant that the same criteria could not be used in judging conduct and the restrictions on freedom of expression within the armed forces when the expressions regarded as constituting a breach of discipline were made in the context of the exercise of the right to challenge an administrative decision.

In the present case, the Court took the view that the link between the plaintiff's statements and the legal arguments on which his case was based was clear and that they could not be regard as insulting the organisation but merely as attacking the act appealed against. It therefore concluded that there were no grounds for considering that the limits on the freedom of expression associated with the plaintiff's right to defend his legitimate interests had been overstepped.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 27.10.1994 / e) 292/1994 / f) / g) Official Gazette of 29 November 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

Keywords of the alphabetical index:

Immunity from execution / Right to the execution of judicial decisions.

Headnotes:

The immunity from execution of judicial decisions enjoyed by foreign States does not conflict with the right to effective judicial protection, although the unwarranted extension or widening by the courts of the areas in which this immunity should apply within the current international judicial system involves a violation of the fundamental right in question. Under the rules of public international law, which are referred to by domestic legislation, the definition of the effective scope of immunity from execution of foreign States should, as a general rule, be based on the fact that where a certain activity or a particular form of use of certain goods does not affect the sovereignty of the foreign State, there are no grounds for declaring a judgment unenforceable. Hence this decision not to execute a judgment violated Article 24.1 of the Spanish Constitution. It is for the executing judge to determine in each case which of the assets held by a foreign State within our territory, and which do not specifically belong to diplomatic or consular missions, are intended for activities in which the State in question is not exercising its *ius imperii* but is simply acting in the same way as a private individual.

Summary:

This application for constitutional protection contested, on the grounds of violation of the right to the execution of judicial decisions guaranteed by the constitutional right to the protection of the judges and the courts (Article 24.1 of the Spanish Constitution), a judicial decision to the effect that the immunity from execution enjoyed by foreign States prevented the seizure of any of the assets of a diplomatic mission and therefore rendered unenforceable a ruling requiring a foreign embassy to pay a retirement pension.

Applying the doctrine set out above, the Constitutional Court ruled that, as the disputed decision to reject the application for execution had been reached without any attempt to ascertain the existence of assets belonging to the foreign State clearly intended for the exercise of economic activities and therefore not protected by the special immunity of diplomatic missions, it violated the right to the effective protection of the courts (Article 24.1 of the Spanish Constitution).

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 14.11.1994 / e) 303/1994 / f) / g) Official Gazette of 14 December 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

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

Keywords of the alphabetical index:

Deprivation of the right of defence / Judicial publication.

Headnotes:

The right to effective judicial protection requires that personal notification be used to ensure that the defendant has the opportunity to appear before the court to defend his case against the plaintiff. The duty of ensuring the effectiveness of this measure falls to the judge, who must use whatever means of communication can be reasonably demanded by the circumstances of the individual case. Hence the use of judicial publication to issue notice to appear is only admissible if, after reasonable means have been used to notify the defendant, his address or location is still unknown.

Summary:

The complaint lodged by the applicant in this constitutional case on the grounds of deprivation of the right of defence was based on the use of notification by judicial publication to summon the applicant to appear in court to answer a case brought against him.

The Court ruled that in the case in question the measures adopted by the court were inappropriate as it had chosen to use notification by publication when it was

fully aware of the new personal and business addresses of the applicant, who did not learn of the proceedings by other means.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 28.11.1994 / e) 320/1994 / f) / g) Official Gazette of 28 December 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

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

Keywords of the alphabetical index:

Right to freely communicate information / Right to honour.

Headnotes:

The legitimate exercise of the right to communicate accurate information takes precedence over the right to honour, provided the facts have implications in the public forum, constitute an item of news and that the information is accurate, i.e. that the journalist or informant has used reasonable means to verify the news he disseminates, in writing or by any other means, by checking it against the facts.

Summary:

The issue in this constitutional protection case is the conflict between the right to disseminate accurate information (Article 20.1.d of the Spanish Constitution) and the right to honour (Article 18.1 of the Spanish Constitution) resulting from the publication by a journalist of information to the effect that three pupils in a technical school had been subjected to sexual harassment by an instructor and that the school had failed to intervene, even though the victims had complained to other bodies and to the school itself.

The Court ruled that in the case in question the right to disseminate accurate information deserved constitutional protection and took precedence over the right to honour of the person referred to in the report, as neither the importance or public impact of the information nor its accuracy could be doubted given that it was a matter of objective fact which had been documented by the complaints; nor could the way the news was presented be described as excessive as no word or expression which was justified by the facts or which was superfluous or offensive had been used in the report.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 28.11.1994 / e) 321/1994 / f) / g) Official Gazette of 28 December 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

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

Keywords of the alphabetical index:

Freedom of conscience / Insubordination / Military service / Substitute community service.

Headnotes:

The right to be exempted from military service does not directly follow from the exercise of the right to freedom of ideology but only from the fact that the Constitution expressly recognises the right to conscientious objection, which only applies to military service. The exercise of this right implies recognition of the duty to perform substitute community service. This system enables the objector to comply with the objectives of the community service rule while safeguarding his personal convictions.

Summary:

The judgments challenged in this application for constitutional protection imposed a prison sentence of two years four months and one day on the applicant for failure to perform military service (Section 135.a of the Criminal Code) and suspended his active and passive electoral rights for the same period of time.

In response to the applicant's contention that his fundamental right to freedom of ideology (Article 16 of the Constitution) had been violated since his pacifist convictions were not only opposed to military service but also to the performance of substitute community service, the Constitutional Court ruled that the right

to freedom of ideology was not a sufficient ground for dispensing citizens, for reasons of conscience, from performing duties prescribed by law.

The Court concluded that in the case in question refusal to perform military service could not be justified on the ground of freedom of ideology or by claiming conscientious objection.

Identification:

a) Spain / b) Constitutional Court / c) Second Chamber / d) 01.12.1994 / e) 324/1994 / f) / g) Official Gazette of 28 December 1994.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

Institutions – Courts – Procedural safeguards – Trial within reasonable time.

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

Keywords of the alphabetical index:

Undue delay.

Headnotes:

The right to a trial without undue delay requires that the procedure for reaching and implementing a decision be completed in a reasonable period of time, which means that it is necessary to maintain a balance between carrying out all the activities essential for the administration of justice and keeping the time required for their completion as short as possible. "Undue delay" is an imprecise and open-ended concept which denotes a certain disturbance of the balance referred to above, although it is not simply the result of failure to observe the time-limits. Time-limits should be fixed in the light of the special circumstances of each case, on the basis of the criteria laid down by the case-law of the Court, which include the complexity of the case, the normal latitude permitted in other cases of a similar kind, the interests of the person applying for constitutional protection, his conduct during the proceedings, the conduct of the authorities and the means available.

Summary:

This constitutional case reviewed a judicial decision given in criminal proceedings which had lasted for twelve years and had been brought following an incident in which a dam had collapsed, affecting tens of thousands of individuals. The decision in question annulled the termination of the investigation and re-opened the investigation stage of the case to enable new statements to be taken and offer all the victims the opportunity to enter claims. This court decision designed to ensure that the persons affected did not go undefended, meant that the investigation had to be prolonged by more than seven-hundred working days.

The Constitutional Court ruled that in the case in question no conflict existed between the right to obtain the effective protection of the judges and the courts (Article 24.1 of the Spanish Constitution) and the right to judicial proceedings without undue delay, in view of the fact that the catastrophic effects of the incident, involving thousands of unidentified victims and thousands of abandoned dwellings, clearly justified notification by judicial publication of the opening of criminal proceedings and of the right of the injured parties to appear in court. Moreover, given the extraordinary social impact of the facts and of the criminal proceedings initiated, any possible lack of judicial communication had to a great extent been offset by the fact that the victims knew from extrajudicial sources of the presumption that an offence had been committed. New victims who had not appeared in court and were not on the prosecution's list could in any case enter claims in separate proceedings.

Moreover, the Constitutional Court ruled that the judicial decision adopted was disproportionate to the objective sought and, more particularly, that it upset the balance which should exist between the period of time needed to dispense justice and provide all the necessary guarantees, and the right of the parties concerned to have the investigation completed as rapidly as was consistent with the circumstances of the case. Consequently, the re-opening of the investigation was unjustified from the point of view of the right to proceedings without undue delay.

Identification:

a) Spain / b) Constitutional Court / c) First Chamber / d) 12.12.1994 / e) 326/1994 / f) / g) Official Gazette of 18 January 1995.

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 of access to courts.

Keywords of the alphabetical index:

Access to courts / Right of appeal / Surety.

Headnotes:

Demanding a surety as a precondition for suing for damages is not in itself an infringement of the right to effective legal protection, even though the question of the reasonableness of the amount of the surety demanded can have constitutional implications. To demand a surety being disproportionately high in relation to the financial means of the person lodging the appeal would constitute a grave obstacle to the exercise of this fundamental right. It is not for the Constitutional Court – whose role is confined to reviewing the arbitrary nature or the reasonableness of the judicial decision – to replace the ordinary courts in fixing the amount of the surety.

Summary:

This constitutional protection case involves the alleged infringement of two fundamental rights which derive from the constitutional right to the effective protection by the courts (Article 24.1 of the Spanish Constitution). The first concerns the right of access to the courts, in the light of a judicial decision requiring, as a precondition for the introduction of a group action, the payment of a surety which the body making the appeal – the Spanish Consumers' Union – claimed was excessive. The second is the right to appeal against court decisions, the appeal lodged against this decision having been declared inadmissible on the grounds that due to the failure by the body making the appeal to deposit the surety it had not acquired the status of party to the proceedings.

However, it was unnecessary to review the arbitrary nature or reasonableness of the court's decision in the present case, as the Constitutional Court considered that the failure of the court to admit the appeals against the judicial decision fixing the amount of the surety constituted a violation of the right of appeal since payment of the surety demanded cannot constitute a precondition for challenging the amount of the surety.

Identification:

a) Spain / b) Constitutional Court / c) Second Chamber / d) 19.12.1994 / e) 332/1994 / f) / g) Official Gazette of 23 January 1995.

Keywords of the systematic thesaurus:

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

Constitutional justice – The subject of review – Court decisions.

Fundamental rights – Governing principles – Limits and restrictions.

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

Keywords of the alphabetical index:

Illegal strike.

Headnotes:

It cannot be regarded as contrary to the essence of the right to strike either to exclude, as lawful purpose of striking, the possibility of making changes during the strike to what has been laid down in a collective agreement, or to impose a statutory period of strike notice. On the other hand, the right to strike comprises the right to disseminate information on the strike, but can in no circumstance justify the use of coercion, threats or acts of violence to achieve its aims. Consequently, it includes neither the right to use moral violence to intimidate a third party, nor recourse to psychological or moral coercion to limit the capacity of other persons to make decisions.

Summary:

The right to strike (Article 38.2 of the Spanish Constitution) essentially consists of the right to cease work in any one of its manifestations or forms. Nonetheless, like all rights, it is limited and is subject to and requires regulation by law. The right to strike is regulated by Royal Legislative Decree 17/1977.

The Court dismissed the application for protection against judgments upholding the dismissal of the defendants for taking part in a strike which was inherently unlawful and for conduct incompatible with the legitimate exercise of the right to strike.

Identification:

a) Spain / b) Constitutional Court / c) Plenary / d) 23.12.1994 / e) 337/1994 / f) / g) Official Gazette of 23 January 1995.

Keywords of the systematic thesaurus:

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

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

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

Institutions – Federalism and Regionalism.

Fundamental rights – Civil and political rights – Linguistic freedom.

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

Keywords of the alphabetical index:

Co-official languages.

Headnotes:

The constitutional requirement to know Castilian (Article 3 of the Constitution) cannot justify a claim to the right to receive instruction exclusively in Castilian. The constitutional right to use as the medium of instruction the specific language of an Autonomous Community on whose territory the language in question is, with Castilian, the co-official language, cannot be challenged.

The right to education (Article 27.2 of the Spanish Constitution) does not give parents or, where applicable, children the right to choose to receive instruction in only one of the two co-official languages of an Autonomous Community.

Summary:

The Constitution establishes a system of co-official languages between Castilian, the official language of the State, and other Spanish languages, which have equal status as official languages in the different Autonomous Communities. This arrangement establishes a system of "co-existence" between the two official languages for the purpose of preserving the bilingualism already existing in Communities which have their own language. The system requires all public authorities to promote knowledge and guarantee protection of the two official languages spoken on the territory of the Autonomous Community and to protect the right of each individual not to suffer discrimination as a result of using one of the official languages in the Autonomous Community.

Autonomous Communities with two co-official languages are entitled to take any political measure or administrative action which they deem necessary to guarantee the effective exercise of citizens' rights in respect of the co-official languages. They can, in particular, enact provisions laying down linguistic standards for their territories to ensure the use of their own language and to actively correct a situation of historical inequality *vis-à-vis* Castilian.

More specifically, the Constitutional Court considered that the model of linguistic co-existence in which the main emphasis is on the language of the Autonomous Community does not conflict with the Constitution, provided it does not lead to the exclusion of Castilian as a language of instruction and that knowledge and use of Castilian are guaranteed on the territory of the Autonomous Community. The duty to learn Castilian will be guaranteed if pupils are required to have an adequate knowledge of both co-official languages and to be able to use them correctly by the end of primary education.

However, in deciding that the language of the Autonomous Community is to be used as a language of instruction, the authorities of the Autonomous Community must provide suitable pedagogical support measures to help students to acquire sufficient knowledge of the co-official language of the Autonomous Community other than Castilian to enable them adjust to and be fully integrated into the system of education. Moreover, the authorities must also adopt measures to ensure that the system of education established by law is sufficiently flexible to meet the special individual needs of pupils who have begun their education in an Autonomous Community where Castilian is the only compulsory language and subsequently enter educational establishments in another Autonomous Community with a system of co-official languages.

The recognition of the co-official status of Castilian and the specific language of an Autonomous Community also requires the public authorities of the State and of the Autonomous Community to guarantee the right to use both official languages by including them as compulsory subjects on the curriculum. By virtue of this duty, the requirement of "sufficient knowledge" of the language of the Autonomous Community for awarding or receiving the general certificate of primary education cannot be waived.

Supplementary information:

Two judges delivered dissenting opinions.

Sweden

Supreme Court

Supreme Administrative Court

Reference period:
1 September 1994 – 31 December 1994

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

Switzerland

Federal Court

Reference period:
26 January 1994 – 15 June 1994

Important decisions

Identification:

a) Switzerland / b) Federal Court / c) Federal Insurance Court / d) 26.01.1994 / e) H 115/93 / f) B. against the Vaud cantonal compensation fund for old-age and survivor's insurance and the Vaud Cantonal Insurance Court / g) ATF 120 V 1.

Keywords of the systematic thesaurus:

Institutions – Courts – Procedural safeguards – Fair trial.

Institutions – Courts – Procedural safeguards – Public hearings.

Fundamental rights – Civil and political rights – Equality.

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

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

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

Keywords of the alphabetical index:

Cohabitation / Equality of treatment / Marriage / Married couple's pension / Old-age and survivor's insurance / Public hearings / Single person's pension.

Headnotes:

The loss of rights or advantages derived from social insurance legislation following marriage does not constitute a violation of either the right to respect for family life enshrined in Article 8.1 ECHR or of the right to marriage guaranteed by Article 12 ECHR (recital 2).

Public hearings in social insurance cases. Requirements of Article 6.1 ECHR in this regard. In the present case, the cantonal authorities were not obliged to order a hearing (recital 3).

Summary:

Replacement, following marriage, of two single person's pensions by a married couple's pension.

Section 22 of the federal law on old-age and survivor's insurance (LAVS) provides for a married couple's pension replacing the single person's pensions previously paid to the spouses (Section 21.2, LAVS). The pension was calculated, in accordance with the law, on the basis

of the husband's average annual earnings, taking into account earnings from employment in respect of which the wife had paid contributions. It is, however, the period during which the husband paid contributions which is decisive for this calculation.

The plaintiffs did not claim that the disputed decisions were at variance with the LAVS but that the rules brought about an inequality of treatment between married couples and cohabiting couples. Having regard to the legal rules, the authorities were justified in replacing the single person's pensions by a married couple's pension, which was calculated in the manner prescribed by law. The judge is not empowered to assess the constitutionality of a federal law.

Nor did the decision violate Article 8 ECHR, which does not confer any right to state social insurance benefits.

The cantonal authorities, which handed down their decision without a public hearing, did not violate the principle of public hearings laid down in Article 6.1 ECHR. Regarding the applicability of this article to social insurance disputes in general, the Federal Insurance Court held that disputes concerning social insurance benefits, particularly under cantonal procedures, must satisfy the requirements of Article 6.1 ECHR. However, as the dispute in the present case concerned a purely legal question, the written procedure was the most appropriate. The systematic holding of hearings would merely delay proceedings unnecessarily.

Language:

French.

Identification:

a) Switzerland / b) Federal Court / c) 2nd public law court / d) 11.03.1994 / e) 2A.141/1992 / f) Obersee Nachrichten AG against the Post Office / g) ATF 120 Ib 142.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Commercial and industrial freedom / Free publication / Freedom of expression / Freedom of the press and communications / Newspaper / Postal charges.

Headnotes:

Freedom of the press (Article 55 of the Federal Constitution), commercial and industrial freedom (Article 31 of the Federal Constitution), freedom of expression (Article 10 ECHR) in connection with the order relating to the law on postal services.

A reduction in postal charges is an indirect means of promoting the press. A free publication does not, however, meet the requirements for a reduction in postal charges. The refusal to grant reduced rates does not constitute a violation of either the Constitution or of the European Convention on Human Rights.

Summary:

A quarter of the *Obersee Nachrichten* newspaper's circulation of 41 000 is distributed by the Post Office. In view of the fact that the newspaper is free of charge, the Post Office refused to grant the reduced rates normally applied to newspapers. In an administrative-law appeal brought before the Federal Court the publisher pleaded that there had been a violation of the freedom of the press (Article 55 of the Federal Constitution), of commercial and industrial freedom (Article 31 of the Federal Constitution) and of Articles 10 and 14 ECHR. The Federal Court dismissed the appeal.

Since the publisher was not prevented from circulating the newspaper, the case must be examined under Article 31 of the Constitution. This article does not prohibit measures to promote the written press, provided such measures are neutral. The written press deserves to be indirectly promoted on account of the role it plays in a democratic society. This is, however, not the case if the newspaper is entirely financed by advertising and distributed free of charge. The requirement of a subscription binding the publisher and the readers is an appropriate criterion on which to base the decision whether to apply reduced postal rates. This manner of assessing the circumstances is also justified under Articles 10 and 14 ECHR in view of the difference between a newspaper sold by subscription and a newspaper distributed free of charge.

Language:

German.

Identification:

a) Switzerland / b) Federal Court / c) Federal Insurance Court / d) 24.03.1994 / e) I 336/93 / f) S. against *Ausgleichskasse der Schweizer Maschinenindustrie* (Swiss engineering industry compensation fund) / g) ATF 120 V 150.

Keywords of the systematic thesaurus:

Constitutional justice – Constitutional proceedings – Decisions – Effects – Effect as between the parties.

Constitutional justice – Constitutional proceedings – Procedure – Re-opening of hearing.

Keywords of the alphabetical index:

Disability insurance / European Court of Human Rights / Final judgment / Grounds for review / Pension / Review of judgment.

Headnotes:

Review of a domestic decision following a judgment delivered by the European Court of Human Rights, in which it was found that there had been a violation of the European Convention on Human Rights: application of the new provisions of the federal law on the administration of justice (OJ) relating to review (Section 139.a).

Summary:

A full disability pension had been awarded to Mrs. S. The authorities, objecting to the amount of the pension, reduced the disability rate to 30% and this was approved in administrative-law proceedings brought before the Federal Insurance Court on 21 June 1988. Subsequently, Mrs. S. brought her case before the Court in Strasbourg. In a judgment delivered down on 24 June 1993, the European Court of Human Rights held that the evidence on which the Federal Insurance Court's judgment was based had been taken and assessed in a manner which discriminated against the applicant on grounds of sex and was therefore incompatible with the European Convention on Human Rights (publications of the European Court of Human Rights, Series A. Vol. 263). On 1 November 1993, Mrs. S. asked the Federal Insurance Court to review its judgment of 21 June 1988.

The Federal Insurance Court for the first time applied the new provision of Section 139.a OJ, under which, inter alia, a request for review of a judgment handed down by the Federal Insurance Court may be declared admissible if the European Court of Human Rights has allowed an individual application alleging a violation of the European Convention on Human Rights. It declared the request admissible in the present case and considered the formal conditions of the review procedure. As the violation of the European Convention on Human Rights could only be redressed by means of a new substantive decision, the Federal Insurance Court set aside its judgment of 21 June 1988, re-examined the merits of the case and acknowledged Mrs. S's right to a full pension.

Language:

German.

Supplementary information:

On 31 January 1995, the European Court of Human Rights ordered, in application of Article 50 ECHR, the respondent State to pay 25 000 Swiss francs to the applicant in respect of pecuniary damage.

The Court took note of rehearing proceedings which, following its principal judgment, had taken place in the Federal Insurance Court and had culminated in applicant's being awarded a full invalidity pension. However, having regard to the passing of time (about eight years) which had not been taken into account by that court, the Strasbourg Court awarded some interest for the period in question.

Identification:

a) Switzerland / b) Federal Court / c) 1st public law court / d) 15.06.1994 / e) 1P.556/1993 / f) B. against the State Counsel's Department of the canton of Basel-Urban / g) ATF 120 Ia 147.

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.

Institutions – Courts – Ordinary courts – Criminal courts.

Fundamental rights – Civil and political rights – Personal Liberty.

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

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

Keywords of the alphabetical index:

Anthropometric data / Criminal proceedings / Data processing / Legal basis / Personal liberty / Presumption of innocence / Proportionality.

Headnotes:

Personal liberty (unwritten constitutional right), Article 8 ECHR, and presumption of innocence (Article 6.2 ECHR). Keeping of anthropometric data.

Is it an infringement of personal liberty to compile and keep anthropometric data (recital 2a)?

Does the legal basis in the law of the canton of Basel-Urban allow such data to be kept after the closing of the criminal investigation (recital 2c)? The question was left open.

Anthropometric records are in the public interest (recital 2d).

The proportionality principle should be observed in decisions relating to the keeping of anthropometric data (recital 2e-g).

In some circumstances the keeping of anthropometric data may constitute a violation of the presumption of innocence (recital 3).

Summary:

Criminal proceedings brought against Mrs. B. in 1986 were discontinued.

In 1993 criminal proceedings were instituted following a bank robbery. After comparing a photograph taken on the scene of the crime with the anthropometric data previously compiled, the authorities first took Mrs. B. into custody then later released her. Mrs. B. subsequently asked for the data to be destroyed, but her request was turned down by the Principal State Counsel of the canton of Basel-Urban. She lodged a public-law appeal with the Federal Court for infringement of the personal liberty secured by Article 8 ECHR and violation of the presumption of innocence. The Federal Court allowed her appeal in part.

The compilation and keeping of anthropometric data represented an infringement of personal liberty (unwritten constitutional right) and violated the guarantees contained in Article 8 ECHR. It is only permissible to compile and keep anthropometric data if there is an adequate legal basis for so doing, if such acts are in the public interest, if the proportionality principle is observed and if there is no infringement of the inviolable central principles of personal liberty.

The question as to whether Section 63 of the Code of Criminal Procedure of the canton of Basel-Urban (concerning the conditions under which a remand prisoner may be searched) constitutes an adequate legal basis for the keeping of anthropometric data may be left open.

Per se, such measures are in the public interest.

However, the proportionality principle was not observed in the present case: in 1986, no suspicion remained which would have justified the keeping of personal data; the length of time for which the data was kept was greater than is usually the case with less serious offences. The data should therefore have been destroyed.

In the present case, the complaint relating to violation of the presumption of innocence is unjustified.

Language:

German.

Turkey

Constitutional Court

Reference period:
1 September 1994 – 31 January 1995

Statistical Data

10 decisions were given between 1 September 1994 and 31 January 1995. Five of them were found inadmissible: three appeals were dismissed and only some provisions of two laws were annulled. Three decisions are published in the Official Gazette.

Important decisions

Identification:

a) Turkey / b) Constitutional Court / c) / d) 20.09.1994 / e) 1994/68 / f) / g) Official Gazette, 19.10.1994.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Application for annulment / Loss of membership / Parliamentary immunity.

Headnotes:

The Constitutional Court examines the constitutionality in respect of both form and substance of laws, decrees having force of law, and the Rules of Procedure of the Grand National Assembly. In addition to these functions and powers of the Constitutional Court, the waiver of the parliamentary immunity of a member or his/her disqualification is examined by the Court if the member concerned or any number of the Grand National Assembly appeals to the Constitutional Court within one week seeking the annulment of the decision on the grounds that is contrary to the Constitution or to the Rules of Procedure of the Assembly.

Summary:

The case was brought as a result of an appeal by one of the Member of Parliament against the decision of the Bureau of the Assembly of the Turkish Grand National Assembly concerning the automatic loss of membership of Melih Gökçek. It was argued that according to Article 84 of the Constitution and the Rules of the Assembly, the loss of membership and the removing of the parliamentary immunity of a member must be decided by an absolute majority of the total members of the Grand National Assembly.

The Constitutional Court held that the decisions of the Turkish Grand National Assembly could be examined if it could be qualified as an amendment of the Rules of Procedure of the Assembly. In order to examine the loss of the membership, the Turkish Grand National Assembly must give a decision on the issue. According to the Court, there was no such decision and the decision of the Bureau of the Assembly could not be accepted as a decision of the Assembly. For that reason, the request of annulment was dismissed.

The decision was given unanimously. However, three members of the Court wrote separate concurring opinions.

Supplementary information:

When Melih Gökçek was elected to the mayorship of the Ankara Metropolitan Municipality, he was a member of the Assembly. According to Article 84 of the Constitution it is not possible to assume a function incompatible with membership or to exercise activities incompatible with membership as stipulated in Article 82. According to this provision, members of the Turkish Grand National Assembly cannot hold office in state departments or other public corporate bodies.

The Law No. 3959, which amended Section 17 of the Law No. 2972, gives an option to elected mayors. If they prefer mayorship, their memberships of the Assembly automatically end on the date when they express their preference. For that reason, the decision of the Bureau of the Assembly stipulated that there was no need to have a decision from the Assembly in this situation.

Identification:

a) Turkey / b) Constitutional Court / c) / d) 16.11.1994 / e) 1994/78 / f) / g) Official Gazette, 18.11.1994.

Keywords of the systematic thesaurus:

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

Fundamental rights – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Right to vote / Right to be elected / Right to engage in political activity / Universal suffrage.

Headnotes:

In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, and to engage in political activities independently, or in a political party, and to take part in a referendum. Elections and referendums should be held according to universal suffrage. The constitutionally protected principle of universal suffrage shall not be restricted contrary this principle.

The principle of free and competitive elections requires universal suffrage. In the definition of universal suffrage, the term "universal" means that all individuals who have the right to vote can exercise this right in elections. The conditions set for the right to vote by the constitutions and the laws, do not violate the principle of universal suffrage, because these conditions are stipulated for

in the public interest. When electoral rolls are brought up to date, all individuals who have the right to vote shall be included in the rolls.

Summary:

The case was brought by one-fifth of the total number of members of the Grand National Assembly who asked for the annulment of the Law No. 4044 of 28 September 1994. This law brought new regulations concerning by-elections for the Grand National Assembly and local administrations, which had to be held in December 1994. According to Section 2 of the Law No. 4044, only discharged soldiers and new civil servants who are appointed to electoral constituencies were to be included in the electoral rolls as voters in order to bring the rolls up to date.

The Court found that electoral rolls should be brought up to date in accordance with Article 67 of the Constitution. In other words, the limitations brought by the new law were found unconstitutional, because it contained unreasonable restrictions to the principle of universal suffrage.

The decision was given unanimously.

United States of America

Supreme Court

Reference period:
1 September 1994 – 31 December 1994

Important decisions

Identification:

a) United States of America / b) Supreme Court / c) / d) 01.11.1994 / e) 93-981 / f) United States v. Shabani / g) .

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Supreme court.

Keywords of the alphabetical index:

Criminal law.

Headnotes:

In order to establish criminal liability for conspiracy to distribute cocaine, it is not necessary to prove any overt act in furtherance of the conspiracy.

Summary:

The respondent Shabani, was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. §846 after the District Court refused to instruct the jury that proof of an overt act in furtherance of a narcotics conspiracy is required for conviction under §846. The Court of Appeals reversed, holding that, under its precedent, the Government must prove at trial that a defendant has committed such an overt act.

Held: In order to establish a violation of §846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy. The statute's plain language does not require an overt act, and such a requirement has not been inferred from congressional silence in other conspiracy statutes, see, e.g. *Nash v. United States*, 229 U.S. 373. Thus, absent contrary to indications, it is presumed that Congress intended to adopt the common law definition of conspiracy, which "does not make the doing of any act other than the act of conspiring a condition of liability," *id.*, at 378. Moreover, since the general conspiracy statute and the conspiracy provision of the Organized Crime Control Act of 1970 both require an overt act, it appears that Congress' choice in §846 was quite deliberate. *United States v. Felix*, 503 U.S. distinguished. While Shabani correctly asserts that the law does not punish criminal thoughts, in a criminal conspiracy the criminal agreement itself is the *actus reus*. The rule of lenity cannot be invoked here, since the statute is not ambiguous.

Identification:

a) United States of America / b) Supreme Court / c) / d) 29.12.1994 / e) 93-723 / f) / United States v. X-Citement Video, Inc., et al g).

Keywords of the systematic thesaurus:

Institutions – Courts – Ordinary courts – Supreme court.

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.

Keywords of the alphabetical index:

Criminal law.

Headnotes:

When construing criminal statutes, the standard presumption in favour of a scienter requirement should apply to each of the statutory elements which criminalise otherwise innocent conduct.

Summary:

The respondents were convicted under the Protection of Children Against Sexual Exploitation Act of 1977, which prohibits "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual depiction, 18 U.S.C. §§2252.a.1 and 2252.a.2, if such depiction "involves the use of a minor engaging in sexually explicit conduct," §§2252.a.1.A and 2252.a.2.A. In reversing, the Ninth Circuit held, *inter alia*, that §2252 was facially unconstitutional under the First Amendment because it did not require a showing that the defendant knew that one of the performers was a minor.

Held: Because the term "knowingly" in §§2252.1 and 2252.2 modifies the phrase "the use of a minor " in subsections 1.A and 2.A, the Act is properly read to include a scienter requirement for age of minority. This Court rejects the most natural grammatical reading, adopted by the Ninth Circuit, under which "knowingly" modifies only the relevant verbs in subsections 1 and 2, and does not extend to the elements of the minority of the performers, or the sexually explicit nature of the material; because they are set forth in independent clauses separated by interruptive punctuation. Some applications of that reading would sweep within the statute's ambit actors who had no idea that they were even dealing with sexually explicit material, an anomalous result that the Court will not assume Congress to have intended. Moreover, *Morissette v. United States*, 342 U.S. 246, 271, reinforced by *Staples v. United States*, 511 U.S. instructs that the standard presumption in favour of a scienter requirement should apply to each of the statutory elements which criminalise otherwise innocent conduct; and the minority statutes of the performers is the crucial element separating legal innocence from wrongful conduct under §2252. The legislative history, although unclear as to whether Congress intended "knowingly" to extend to performer age, persuasively indicates that the word applies to the sexually explicit conduct depicted, and thereby demonstrates that "knowingly" is emancipated from merely modifying the verbs in subsections 1 and 2. As a matter of grammar, it is difficult to conclude that the word modifies one of the elements in 1.A and 2.A, but not the other. This interpretation is supported by the canon that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.

European Court of Human Rights

Reference period:
1 September 1994 – 31 December 1994

Important decisions

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 20.09.1994 / e) 11/1993/406/485 / f) Otto Preminger Institut v. Austria / g) to be published in volume 295-A of Series A of the Publications of the Court; [*Revue universelle des droits de l'homme* 6 (1994), p. 463].

Keywords of the systematic thesaurus:

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

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

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

Headnotes:

Seizure and forfeiture of a film considered blasphemous is an interference with the exercise of the right to freedom of expression; this interference is justified when it is provided for by law and aims at the protection of the right of citizens not to be insulted in their religious beliefs; the national authorities are better placed than the international judge to assess the need for such a measure.

Summary:

The applicant association *Otto-Preminger-Institut für audiovisuelle Mediengestaltung* is based in Innsbruck, where it runs a licenced cinema. It was in this cinema that it intended to screen Werner Schroeter's film *Das Liebeskonzil* (Council in Heaven). Following a request by the Innsbruck diocese of the Roman Catholic Church, the public prosecutor instituted criminal proceedings aiming at the forfeiture of the film on suspicion of the attempted criminal offence of "disparaging religious precepts" (Section 188 of the Austrian Penal Code). The day before the scheduled screening, the Innsbruck Regional Court ordered seizure of the film, which could therefore not be shown to the public. The Court further ordered forfeiture of the film, considering that the gross interference with religious feelings caused by the provocative attitude taken in it outweighed the freedom of art guaranteed under the Austrian Constitution. In its application, the applicant association complained of a breach of its freedom of expression guaranteed under Article 10 ECHR because of the seizure of the film and its subsequent forfeiture.

The Court recalled that freedom of thought, conscience and religion (Article 9 ECHR) was one of the foundations of a "democratic society" within the meaning of the Convention. Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied might engage the responsibility of the State, notably to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. In this case, the purpose of the measures complained of was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons. The Court thus accepted that the impugned measures pursued a legitimate aim under Article 10.2 ECHR, namely "the protection of the rights of others".

The Court recalled its consistent case-law and, in particular, that freedom of expression was applicable not only to "information" or "ideas" that were favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shocked, offended or disturbed the State or any sector of the population. Such were the demands of that pluralism, tolerance and broadmindedness without which there was no "democratic society". Whoever exercised the rights and freedoms enshrined in Article 10 undertook "duties and responsibilities". Amongst them, in the context of religious opinions and beliefs, might legitimately be included an obligation to avoid as far as possible expressions that were gratuitously offensive to others and thus an infringement of their rights. It might therefore be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the legitimate aim pursued.

The Court noted that the film had been widely advertised. There had been sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature; for these reasons, its proposed screening must be considered to have been an expression sufficiently "public" to cause offence. The Court could not disregard the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans. In seizing the film the authorities had acted to ensure religious peace in that region and to prevent some people from feeling the object of attacks on their religious beliefs in an unwarranted and offensive manner. It was in the first place for the national authorities, who were better placed than the international judge, to assess the need for such a measure in the light of the situation prevailing locally at a

given time. In the circumstances of the present case, the Court did not consider that the Austrian authorities had overstepped their margin of appreciation in this respect. No violation of Article 10 ECHR could therefore be found.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 22.09.1994 / e) 23/1993/418/496 / f) Hentrich v. France / g) to be published in volume 296-A of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

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

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

Headnotes:

States have a certain margin of appreciation to frame and organise their fiscal policies and make arrangements to ensure that taxes are paid; however, the Revenue's pre-emption of real property purchased by individuals amounts to a deprivation of property contrary to Protocol No. 1 ECHR where the use of this measure is discretionary and the procedure unfair.

Summary:

Mrs Hentrich and her husband bought agricultural land in Strasbourg. The Commissioner of Revenue informed them that because of the insufficient price paid he intended to exercise the right of pre-emption provided for in Article 668 of the General Tax Code over the property they had acquired and take over the ownership of it against payment of the purchase price increased by 10% by way of indemnity. The applicant and her husband brought an action to have the pre-emption decision quashed for misuse of powers. They also proposed proving that the price paid was genuine and corresponded to the market value. The French courts rejected their actions.

Mrs Hentrich considered that she had been arbitrarily expropriated by the Revenue; she submitted that the pre-emption had not been in the public interest and had been disproportionate.

The Court reiterated that the notion of public interest was necessarily extensive and that the States had a certain margin of appreciation to frame and organise their fiscal policies and make arrangements to ensure that taxes were paid. It recognised that preventing non-payment of higher registration fees was a legitimate objective in the public interest. However, while the system of the right of pre-emption did not lend itself to criticism, the same was not true where the use of it was discretionary and the procedure unfair. The Court noted that in the instant case the arbitrary, selective and scarcely foreseeable exercise of the right of pre-emption had not been attended by the basic procedural safeguards. Mrs Hentrich had not had the benefit of adversarial proceedings that complied with the principle of equality of arms, and Article 668 of the General Tax Code on which the exercise of the right of pre-emption was based lacked precision and foreseeability. The Court pointed out that a fair balance had to be struck between the protection of the right to property and the requirements of the general interest. It noted that the right of pre-emption was exercised only rarely and scarcely foreseeably; that the Revenue had other suitable methods at its disposal for discouraging tax evasion; and that the applicant had not had the possibility of effectively challenging the pre-emption, which had imposed an individual and excessive burden on her. Having regard to all these factors, the Court held that there had been a violation of Article 1 of Protocol No. 1 ECHR, guaranteeing the right to property.

The Court noted that the proceedings in issue had not enabled the applicant to challenge the Revenue's position and to defend herself, whereas the principle of equality of arms entailed an obligation not to place one of the parties at a substantial disadvantage vis-à-vis his opponent. There had therefore been a violation of Article 6.1 ECHR which guarantees the right to a fair trial.

Identification:

a) / b) European Court of Human Rights / c) Grand Chamber / d) 23.09.1994 / e) 36/1993/431/510 / f) Jersild v. Denmark / g) to be published in volume 298 of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

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

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

Headnotes:

The conviction of a television journalist who prepared a documentary film for aiding and abetting the dissemination of racist statements made by others during an interview shown in the film constitutes a violation of his right to freedom of expression.

Summary:

Mr Jens Olaf Jersild, a journalist, contacted a group of young people and invited three of them to take part in a television interview. During the interview, the three young persons made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. The applicant subsequently edited and cut the film of the interview down to a few minutes containing crude remarks. On 21 July 1985 this was broadcast by the Danish Broadcasting Corporation. Subsequently, criminal proceedings were brought, under the Penal Code, against the three young people for their racist statements and against the applicant and the head of the Danish Broadcasting Corporation's news section for aiding and abetting their dissemination. The applicant was found guilty.

The Court emphasised at the outset that it was of the vital importance to combat racial discrimination in all its forms and manifestations.

A significant feature of the case was that the applicant had not made the objectionable statements himself but had assisted in their dissemination in his capacity of television journalist. Regard was therefore had to the principles established in the case-law relating to the role of the press. In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that audio-visual media have often a much more immediate and powerful effect than the print media. At the same time, the methods of objective and balanced reporting may vary considerably depending among other things on the media in question. It is neither for the European Court, nor for national courts, to substitute their views for those of the press as to what technique of reporting should be adopted by journalists.

Admittedly the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and of ideas of superiority of one race. However, in view of certain counter-balancing elements in the programme and the natural limitations on spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the absence of such precautionary reminders were not relevant. News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussions of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. Although the purpose of the applicant in compiling the broadcast was not racist it did not appear from the relevant judgments that the national courts took such a factor into account. The reasons adduced in support of the applicant's conviction and sentence were therefore not sufficient to establish convincingly that the interference was "necessary" ; in particular the means employed were disproportionate to the aim of protecting "the rights and reputation of others". The Court therefore held that there had been a violation of the applicant's right to freedom of expression.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 23.09.1994 / e) 50/1993/445/524 / f) Hokkanen v. Finland / g) to be published in volume 299-A of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

Headnotes:

The non-enforcement of a father's right of access in respect of his daughter staying with her maternal grandparents violates the father's right to respect for his family life.

Summary:

In 1985, following the death of the applicant's wife, the latter's parents took care of the applicant's one year old daughter. Later on they informed the applicant that they did not intend to return her. His attempts to have her returned failed. In May 1990 the National Social Welfare Board recommended that the applicant's custody of the child be transferred to the maternal grandparents and a request to this effect was made to the Finnish Courts. Pending the issue of the proceedings the courts provisionally ordered that the child should stay with her grandparents but that the applicant should be allowed to have access to her. However, the grandparents persisted in disobeying. In 1991, the courts transferred the child's custody to the grandparents but maintained the applicant's access rights. In 1993, the Finnish courts decided that, in view of the child's maturity, access should not take place against

her own wishes. The applicant complained that the Finnish authorities attitude violated his right to respect for his family life.

The Court noted that until 1993, the prevailing view of the Finnish authorities was that it was in the child's best interest to develop contacts with the applicant, even if she might not wish to meet him. However, the grandparents persistently refused to comply with access arrangements specified in court decisions and with orders of enforcement. The authorities could not be said to have made reasonable efforts to facilitate reunion. On the contrary, their inaction placed the burden on the applicant to have constant recourse to time-consuming and ultimately ineffectual remedies to enforce his rights. Accordingly, the Court considered that the non-enforcement of the applicant's right of access until 1993 constituted a breach of his right to respect for family life.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 27.10.1994/ e) 29/1993/424/503 / f) Kroon and Others v. the Netherlands / g) to be published in volume 297-C of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

Headnotes:

The legal impossibility for a married woman to deny her husband's paternity of her child and thereby enable recognition by the biological father is contrary to the right to family life.

Summary:

Mrs Kroon had married in 1979. Her husband subsequently disappeared and his whereabouts remain unknown. Mrs Kroon established a permanent relationship with Mr Zerrouk and their son was born in 1987. Mrs Kroon remained, however, legally married until the marriage was dissolved in July 1988 following divorce proceedings. A request to enable Mrs Kroon to declare that her husband was not the father of her son and have this biological reality recognised was refused by the Dutch authorities.

According to the Court's case-law, where the existence of a family tie with a child had 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 the child's integration in his family as from the moment of birth or as soon as practicable thereafter. There was a positive obligation on the part of the competent authorities to allow complete legal family ties to be formed between Mr Zerrouk and his son as expeditiously as possible. In the Court's opinion, "respect" for "family life" required that biological and social reality prevail over a legal presumption which, as in the present case, flew in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, even having regard to the margin of appreciation left to the State, the Netherlands had failed to secure to the applicants the "respect" for their family life to which they are entitled under the Convention. There had accordingly been a violation of Article 8 ECHR.

Identification:

a) / b) European Court of Human Rights / c) Grand Chamber / d) 28.10.1994 / e) 13/1993/408/487 / f) Murray v. the United Kingdom / g) to be published in volume 300-A of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

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

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

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

Headnotes:

The arrest and detention in Northern Ireland of a person suspected of being a terrorist is not contrary to the right to personal liberty if the suspicion is reasonable; notwithstanding difficulties inherent in dealing with terrorist crime, the European Court of Human Rights must be furnished with at least some facts capable of satisfying it that the arrested person was reasonably suspected.

The entry and search of an individual's home by the Army, the recording and retaining of personal details, including a photograph of this individual, can be necessary in a democratic society, having regard to the responsibilities of an elected government to protect citizens and institutions against organised terrorism.

Summary:

The applicant, Mrs Murray was arrested by the Army at the family home in Belfast at 7.00 a.m., under Section 14 of the Northern Ireland (Emergency Provisions) Act 1978. This provision, as construed by the domestic courts, empowered the Army to arrest and detain for up to four hours a person suspected of the commission of a criminal offence, provided that the suspicion of the arresting officer was honestly and genuinely held. According to the Army, Mrs Murray was arrested on suspicion of involvement in the collection of money for the purchase of arms for the Provisional IRA in the USA. Her husband and children were roused and asked to assemble in the living room. The soldiers in the meantime recorded details concerning the applicants and their home. Mrs Murray was then taken to an Army Centre and detained two hours for questioning. At some stage during her stay at the centre she was photographed without her knowledge or consent. She was released at 9.45 a.m. without charge. In her application, Mrs Murray complained that her arrest and detention for questioning had given rise to a violation of her right to liberty, since it was not in accordance with Article 5.1.c ECHR. This provision permits the "lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". The applicant argued that, contrary to Article 5.1.c ECHR she had not been arrested on "reasonable suspicion" of having committed a criminal offence and that the purpose of her arrest and subsequent detention had not been to bring her before a competent legal authority but to interrogate her with a view to gathering general intelligence. She further complained that the taking and keeping of a photograph and personal details about her had been in breach of her right to respect for private life under Article 8 ECHR.

The Court held that a "reasonable suspicion" presupposed the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence. What could be regarded as "reasonable" in relation to a suspicion depended on all the circumstances of the particular case. In view of the difficulties inherent in the investigation and prosecution of terrorist offences in Northern Ireland, the "reasonableness" of the suspicion justifying such arrests could not always be judged according to the same standards that were applied when dealing with conventional crime. Although Contracting States could not be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing information or facts leading to confidential sources, thereby placing the lives and safety of others in danger, the Court had to be furnished with at least some facts or information capable of satisfying it that the arrested person was reasonably suspected of having committed the alleged offence. In that connection, the Court had regard to relevant findings of fact made by the domestic courts in the proceedings brought by Mrs Murray, to the recent conviction of her brothers in the USA of offences connected with the purchase of arms for the Provisional IRA, to her visits to the USA and her contacts with her brothers there, and to the collaboration with "trustworthy" persons residing in Northern Ireland which were implied in the offences of which her brothers were convicted. The Court concluded that there did exist sufficient facts or information which would provide a plausible and objective basis for a suspicion that Mrs Murray may have committed the offence of involvement in the collection of funds for the Provisional IRA. Her arrest and detention had therefore been effected for the purpose specified in Article 5.1.c ECHR.

The Court further considered the entry into and search of the applicant's family home by the Army, the recording (at the Army centre) of personal details concerning the applicant and her family, as well as the photograph which was taken of her without her knowledge or consent.

It found that these measures, which pursued the legitimate aim of the prevention of crime were "necessary in a democratic society". In striking the balance between the exercise by the individual of the right guaranteed to him or her under Article 8.1 ECHR and the necessity for the State to take effective measures for the prevention of terrorist crime, regard had to be had to the responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threats posed by organised terrorism and to the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences. The domestic courts had rightly adverted to the conditions of extreme tension under which such arrests in Northern Ireland had to be carried out. The measures complained of could not be considered to have been disproportionate to the legitimate aim pursued. No violation of the applicant's right to respect for privacy and home.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 24.11.1994/ e) 35/1993/430/509 / f) Beaumartin v. France / g) to be published in volume 296-B of Series A of the Publications of the Court; [*Revue universelle des droits de l'homme* 6(1994), p. 405].

Keywords of the systematic thesaurus:

Institutions – Executive bodies – Relations with the courts.

Institutions – Courts – Procedural safeguards – Independence.

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

Headnotes:

A tribunal which considers itself bound by the Minister of Foreign Affairs' interpretation of an international agreement cannot be regarded as independent.

Summary:

The applicants who had been expropriated in Morocco brought an action against the French State claiming compensation on the basis of a Franco-Moroccan treaty. The *Conseil d'Etat* stayed the proceedings until the Minister for Foreign Affairs had given his opinion on the interpretation of the international treaty invoked by the applicants. The Minister interpreted the treaty and the *Conseil d'Etat* held that it was bound by the Minister's decision and found against the applicants.

The Court observed that the *Conseil d'Etat* had referred to a representative of the executive for a solution to the legal problem before it. It had dismissed the application filed by the applicant on the basis of the interpretation adopted by the executive. In addition, the Minister's involvement, which had been decisive for the outcome of the legal proceedings, had not been open to challenge by the applicants, who had moreover not been afforded any possibility of giving their opinion on the use of the referral procedure and the wording of the question. Only an institution that had full jurisdiction and satisfied a number of requirements, such as independence of the executive and also of the parties, merited the designation "tribunal" within the meaning of Article 6.1 ECHR which guarantees the right of access to an independent tribunal in civil matters. The *Conseil d'Etat* had not met these requirements in the instant case.

Supplementary information:

Change in French law: The power to interpret treaties is no longer vested exclusively in the Minister for Foreign Affairs.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 25.11.1994/ e) 38/1993/433/512 / f) Stjerna v. Finland / g) to be published in volume 299-B of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

Headnotes:

The refusal to grant a request for a change of surname does not amount to a failure to respect for private life.

Summary:

The applicant applied to the County Administrative Board for permission to change his surname. His application was rejected. The applicant complained that the refusal to allow him to change his surname to Tavaststjerna amounted to a breach of Article 8 ECHR (right to respect for private life).

The Court observed that an individual's name did concern his or her private life, being a means of personal identification and a link to a family. This was not altered by the fact that there could exist a public interest in regulating the use of names.

Despite the increased use of personal identity numbers in Contracting States, names retained a crucial role in the identification of people. Whilst there could be genuine reasons prompting an individual to wish to change his or her name, legal restrictions on such a possibility could be justified in the public interest. The Contracting States enjoy a wide margin of appreciation in this area. The Court found that it had not been shown that the difficulties in spelling and pronunciation of his current name were very frequent or any more significant than those experienced by a large number of people in Europe today. The sources of inconvenience were not sufficient to raise an issue of failure to respect private life.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 09.12.1994/ e) 10/1993/405/483-484 / f) The Holy Monasteries v. Greece / g) to be published in volume 301-A of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

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

Headnotes:

The provisions whereby the State would become the owner, without paying compensation, of all monastery property unless the monasteries could prove their ownership by producing either a duly registered title deed or a final court decision against the State, amount to a deprivation of property prohibited by Protocol No. 1 ECHR.

Depriving the monasteries of any possibility of bringing before courts any complaint they might make in relation to their rights of property impairs the very essence of the right of access to a court.

Summary:

Law No. 1700/1987, changed the rules on the management and representation of Greek orthodox monasteries' property; these responsibilities were given to the Church of Greece. The Law also provided that within six months of its publication the State would become the owner of all monastery property unless the monasteries could prove their ownership by producing either a duly registered title deed or a final court decision against the State.

The Court considered that by creating a presumption of State ownership, the Law No. 1700/1987 shifted the burden of proof so that it now fell on the applicant monasteries, which could only assert their ownership of the land in issue if it derived from a duly registered title deed, from a statutory provision or from a final court decision against the State and not from adverse possession or even a final court decision against a private individual. The State, deemed to be the owner of such agricultural and forest property, was automatically given the use and the possession of it. In the Court's opinion, that was not merely a procedural rule relating to the burden of proof but a substantive provision whose effect was to transfer full ownership of the land in question to the State. That being so, there had been an interference with the applicant monasteries' right to the peaceful enjoyment of their possessions which amounted to a "deprivation" of possessions.

In 1952 the Greek legislature had taken measures to expropriate a large portion of monastery agricultural property. The legislature had nevertheless provided for compensation of one-third of the real value of the expropriated land. However, there was no similar provision in Law No. 1700/1987. By thus imposing a considerable burden on the applicant monasteries deprived of their property, Law No. 1700/1987 did not preserve a fair balance between the various interests in question as required by Article 1 of Protocol No. 1 ECHR. There was therefore a violation of monasteries' right to property.

The Court noted that by depriving the monasteries of any further possibility of bringing before the appropriate courts any complaint they might make against the Greek State, third parties or the Greek Church itself in relation to their rights of property, or even of intervening in such proceedings, Law No. 1700/1987 impaired the very essence of their "right to a court".

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 09.12.1994/ e) 22/1993/417/496 / f) Stran Greek Refineries and Stratis Andreadis v. Greece / g) to be published in volume 301-B of Series A of the Publications of the Court; [Human Rights Law Journal 15(1994), p. 432].

Keywords of the systematic thesaurus:

Institutions – Principles of State organisation – Rule of law.

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

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

Headnotes:

The principle of the rule of law and the notion of fair trial preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute.

The annulment by legislative measure of an arbitration award establishing the existence of a debt owed by the State violates the right to property.

Summary:

Under a contract concluded in 1972 between the Greek State and Mr Andreadis, the latter undertook to build and, through a company to be set up subsequently (Stran company), operate an oil refinery. In 1977 the Government terminated the contract under a Law No. 141/1975 on the termination of preferential contracts concluded under the military regime. The Stran company brought an action in the Athens Court of First Instance for repayment of the costs it had incurred up to that time. The State challenged the court's jurisdiction and referred the case to arbitration, which concluded with an award in favour of the applicants. Subsequently, the State challenged the award in the ordinary courts on the ground that the arbitration clause in the contract had been annulled and that the award was consequently null and void. The Court of First Instance and subsequently the Athens Court of Appeal found against the State. On 25 May 1987, when the case was pending before the Court of Cassation and after the judge-rapporteur had already sent to the parties his opinion, which was favourable to the applicants, Parliament passed a Law (No. 1701/1987) which provided that all clauses, including arbitration clauses, in preferential contracts concluded under the military regime were revoked and that any arbitration award was null and void; it also provided that all claims arising from the termination of these contracts were statute-barred.

The Court observed that the enactment of Law No. 1701/1987 had indisputably represented a turning point in the proceedings concerning the validity of the arbitration clause, which up to that point had gone against the State. By rejoining the Council of Europe on 28 November 1974 and ratifying the Convention, Greece had undertaken to respect the principle of the

rule of law, which finds expression, *inter alia*, in Article 6 ECHR. In litigation involving opposing private interests, equality of arms, which was inherent in the right to a fair trial, implied that parties must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage *vis-à-vis* their opponent. In this connection, the Court had regard to the timing and manner of the adoption of Law No. 1701/1987. It observed that the legislature's intervention had taken place when judicial proceedings in which the State was a party were pending. The principle of the rule of law and the notion of fair trial precluded any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. By intervening in a manner that was decisive to ensure that the – imminent – outcome of proceedings in which it was a party was favourable to it, the State had infringed the applicants' rights under Article 6.1 ECHR. There had therefore been a violation of that provision.

The Court found that it had been impossible for the applicants to secure enforcement of an arbitration award having final effect, under which the State was required to pay specified sums in respect of expenditure that the applicants had incurred in seeking to fulfil their contractual obligations or even for them to take further action to recover the sums in question through the courts. The State had been under a duty to pay the applicants the sums awarded against it at the conclusion of the arbitration procedure, a procedure for which it had itself opted and the validity of which had been accepted until the day of the hearing in the Court of Cassation. By choosing to intervene at that stage of the proceedings in the Court of Cassation by a law which invoked the termination of the contract in question in order to declare void the arbitration clause and to annul the arbitration award, the legislature had upset, to the detriment of the applicants, the balance which must be struck between the protection of the right of property and the requirements of public interest. There had therefore been a violation of Article 1 of Protocol No. 1 ECHR.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 09.12.1994/ e) 41/1993/436/515 / f) Lopez Ostra v. Spain / g) to be published in volume 303-C of Series A of the Publications of the Court; [Human Rights Law Journal 15(1994), p. 444].

Keywords of the systematic thesaurus:

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

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

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

Fundamental rights – Collective rights – Right to the environment.

Headnotes:

Severe environmental pollution may affect the individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life.

Summary:

In July 1988 a plant for the treatment of liquid and solid waste from tanneries began to operate a few metres away from the applicant's home. As soon as it started up, the fumes from it caused health problems and nuisance to many local people, including the applicant. The domestic courts accepted that the nuisances in issue impaired the quality of life of those living in the plant's vicinity, but it had held that the impairment was not serious enough to infringe the fundamental rights recognised in the Constitution. In February 1992 the applicant and her family moved into a flat in the town centre, paid for by the municipality.

The Court considered that severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. At all events, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In the instant case the waste-treatment plant as issue had been built to solve a serious pollution problem but as soon as it had started up, it had caused nuisance and health problems to many local people. The municipal authorities had failed to take steps to protect the applicant's right to respect for her home and for her private and family life. Despite the margin of appreciation left to it, the respondent State had not succeeded in striking a fair balance between the interest of the town's economic well-being (that of having a waste-treatment plant) and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

Identification:

a) / b) European Court of Human Rights / c) Chamber / d) 19.12.1994/ e) 34/1993/429/508 / f) *Vereinigung*

Demokratischer Soldaten Österreichs and Gubi v. Austria / g) to be published in volume 302 of Series A of the Publications of the Court.

Keywords of the systematic thesaurus:

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

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

Headnotes:

The refusal of the Minister for Defense to have a magazine distributed to servicemen and prohibition of distribution of this magazine in the barracks is an interference with the exercise of the right to freedom of expression and to impart information. Freedom of expression applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. Since the publication concerned had not called into question the duty of obedience or the purpose of service in the armed forces the measure in question had been disproportionate to the aim pursued and was in breach of the European Convention on Human Rights.

Summary:

The *Vereinigung demokratischer Soldaten Österreichs* (Association of the democratic soldiers of Austria, "VDSÖ") published a journal called *der Igel* ("The Hedgehog"). The journal was aimed at soldiers in particular and discussed questions relating to the armed forces – usually in a critical manner. The VDSÖ requested the Federal Minister for Defence to have *der Igel* distributed by the army in barracks in the same way as other military magazines. No reply was forthcoming. Mr Gubi was completing his national service and was a member of the VDSÖ. Mr Gubi distributed copies of an issue of *der Igel* inside the barracks and was ordered by an officer to stop doing so. He was later informed by another officer of the content of regulations prohibiting the distribution and despatching of publications inside barracks without the permission of the commanding officer. The association and Mr Gubi argued that non distribution of the *Igel* in the barracks was a breach of their right to freedom of expression and to impart information.

The Court reiterated that freedom of expression was also applicable to "information" or "ideas" that offended, shocked or disturbed the State or any section of the population. The same was true when the persons concerned were servicemen. However, the proper functioning of an army was hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings. The Government argued that the periodical, which was critical and satirical, had represented a threat to discipline and to the effectiveness of the army. The Court took the view that such an assertion had to be illustrated and substantiated by specific examples. None of the issues of *der Igel* submitted in evidence had recommended disobedience or violence, or even questioned the usefulness of the army. Admittedly, most of the issues had set out complaints, put forward proposals for reforms or encouraged the readers to institute legal complaints or appeals proceedings. However, despite their often polemical tenor, it did not appear that they had overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves. In conclusion, the measures complained of had been disproportionate to the legitimate aim pursued and violated the applicants' freedom of expression.

Systematic thesaurus

1. Constitutional Justice

Pages (*)

1.1 Constitutional jurisdiction

1.1.1 Statute and organisation
- Sources
  - * Constitution
  - * Institutional Acts
  - * Other legislation
  - * Other
  - * Rules of procedure
- Autonomy
  - * Statutory autonomy
  - * Administrative autonomy
  - * Financial autonomy
- Other

1.1.2 Composition, recruitment and structure
- Number of members
- The appointing authority
- Appointment of members [1] 109
- Appointment of the President [2]
- Subdivision into chambers or sections
- Relative position of members [3]
- "*Standi* Organes d'instruction" [4]
- Staff [5]
- Auxiliary services
- Administrative personnel
- Other

1.1.3 Status of the members of the court
- Sources
  - * Constitution
  - * Institutional Acts
  - * Other legislation
  - * Other
- Term of office of Members
- Term of office of President
- Privileges and immunities
- Professional disqualifications
- Disciplinary measures
- Remuneration
- Resignation
- Members having a particular status [6]
- Staff [7]
- Other

(*) *Pages of Bulletin No.1 (1-105), Bulletin No.2 (106-200) or Bulletin No.3 (201-334)*

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

1.2 *Types of litigation*

1.3 *The subject of review*

8. Horizontal distribution of powers.
9. Vertical distribution of powers, particularly in respect of States of a federal or regionalised nature.
10. Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (that questions relating to the distribution of powers as between the State and its constituent organs are the subject of another keyword).
11. E.g., validity of the petition for a referendum in Italy.

12. Political questions.
13. Preliminary references in particular.

14. Pleadings, final submissions, notes, etc.

1.5 Common principles or techniques of interpretation

2. Institutions

2.1 Principles of State organisation

15. Presumption of constitutionality, double construction rule.
16. Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc...

17. Bicameral, monocameral, special competence of each assembly, etc.
18. Presidency, bureau, sections, committees, etc.
19. State budgetary contribution, other sources, etc.
20. Local authorities.
21. The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.
22. Civil servants, administrators, etc.

Pages

2.5 Courts

23. Ombudsman, etc.

3. Fundamental rights

3.1 Governing principles

3.2 Civil and political rights

24. Open-ended or finite.
25. The question of "Drittwirkung".

26. Militia, conscientious objection, etc.
27. Including in particular the legal provision for a right of access to a judge.

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.).

Keywords of the alphabetical index

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Layout: *Graphic Design Studio – SEDDOC*

Cover design: *A. Staebel, S. Reading*