КОНСТИТУЦИОННОЕ ПРАВОСУДИЕ

ВЕСТНИК КОНФЕРЕНЦИИ ОРГАНОВ КОНСТИТУЦИОННОГО КОНТРОЛЯ СТРАН МОЛОДОЙ ДЕМОКРАТИИ

ВЫПУСК 4 (18) 2002 – 1 (19) 2003

ИЗДАЕТСЯ ЦЕНТРОМ КОНСТИТУЦИОННОГО ПРАВА РЕСПУБЛИКИ АРМЕНИЯ

ЕРЕВАН 2002-2003

Вышел в свет международный альманах “Конституционное правосудие в новом тысячелетии” за 2002 год

На Конференции органов конституционного контроля стран молодой демократии, состоявшейся в ноябре 2001г. в Москве, при обсуждении перспектив развития конституционного правосудия в переходных странах было принято решение об издании специального ежегодника “Конституционное правосудие в новом тысячелетии”.

18 декабря 2002г. в Конституционном Суде РА состоялась презентация альманаха “Конституционное правосудие в новом тысячелетии”.

В первом выпуске ежегодника представлены взгляды 16 авторов по проблемам конституционного правосудия в новом тысячелетии: Председателя Конституционного Суда Австрии Л. Адамовича, Председателя Конституционного Суда Республики Армения Г. Арутюняна, Председателя Европейского суда по правам человека Л. Валдхабера, Председателя Конституционного Совета Франции И. Гены, судьи Конституционного Суда Болгарии Д. Готчева, профессора Бременского университета Германии Р. Книпера, профессора юридического факультета Гамбургского университета Германии О. Люхтерхандта, Председателя Конституционного Суда Словацкой Республики Я. Мазака и советника Конституционного Суда Словацкой Республики Г. Добровичовой, члена Конституционного Суда Республики Армения Р. Папаяна, Председателя Верховного Суда Кипра Г. Пикиса, профессора университета Монпелье 1 Д. Руссо, Председателя Конституционного Трибунала Польши М. Сафяна, начальника управления Конституционного Суда Российской Федерации Б. Страшуна, Экс-Председателя Конституционного Суда Российской Федерации В. Туманова, экспертной группы Конституционного Суда Венгрии, судьи Конституционного Суда Кыргызской Республики К. Эсенканова.

Первый выпуск альманаха разослан в конституционные суды и другие правовые институты более чем 100 стран мира, а также восьми международным организациям.

Издание такого альманаха особенно важно на пороге нового тысячелетия, которое человечество переступило с необходимостью переосмысления многих фундаментальных ценностей общественного сознания и серьезных поисков гарантий устойчивого развития и правовой регламентации общественного бытия.

В предисловии первого номера Председатель Конституционного Суда РА, руководитель данного проекта Г.Г. Арутюнян выразил уверенность, что ежегодник вызовет большой интерес среди специалистов и будет издаваться каждый год, становясь кафедрой активного диалога всех интересующихся вопросами теории и практики конституционного правосудия.

С первым выпуском альманаха можно познакомиться в Интернет сайте Конституционного Суда Республики Армения /www. concourt.am/, а также можно приобрести в Конституционном Суде Республики Армения (РА, г. Ереван, пр. М. Баграмяна 10).

Содержание

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- **Валдхабер Л**. Аспекты свободы выражения и свободы объединений по Европейской конвенции о правах человека: статьи 10 и 11. (на английском)
  Wildhaber L. Aspects of the freedoms of expression and association under the European Convention on Human Rights: Articles 10 and 11.
- **Лангер С.** Защита фундаментальных прав в Федеральном Конституционном Суде Республики Германия, в частности, путем конституционной жалобы. (на английском)
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- **Прапиестис Дж.** Защита прав и свобод обвиняемого в юриспруденции Конституционного Суда Литовской Республики.
- **Prapiestis J.** Protection of rights and freedoms of an accused in the jurisprudence of the Constitutional Court of the Republic of Lithuania.
- **Оганесян В.** Некоторые вопросы имплементации Европейской конвенции о правах человека в Республике Армения.
- **Hovhannisyan V.** Several issues on the implementation of the European Convention on Human Rights in the Republic of Armenia.
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- **Готчев Д.** Правовое равенство по закону и практике Конституционного Суда. (на французском)
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- **Эбзеев Б.** Защита прав человека в Конститу ционном Суде Российской Федерации.
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- **Добрик Л.** Место Конституционного Суда Словацкой Республики после поправки к Конституции Словацкой Республики законом N 90/2001 Свода законов. (на английском).
  Dobrik L. Position of the Constitutional Court of the Slovak Republic under the Amendment to the Constitution of the Slovak Republic No. 90/2001.
- **Марини А.** Конституционный Суд Италии и защита прав человека. (на английском)
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- **Салихов М.** Защита прав человека в Конституционном Суде Республики Таджикистан.
  Salikhov M. Human Rights protection in the Constitutional Court of the Republic of Tajikistan.

- **Пикис Г.** Судебная защита прав человека в Кипре. (на английском) **Pikis G.** Judicial protection of Human Rights in Cyprus.
- **Чубарь Л.** Конституционный контроль и судебная защита прав человека. **Chubar L.** Constitutional Control and Judicial protection of Human Rights.
- **Педедзе Дз.** Конституционная жалоба в Республике Латвия: основные проблемы и тенденции развития. **Pededze D.** Constitutional complaint in Latvia: Main problems and tendencies of development.
- **Мавчич А.** Экономические и социальные права, регулирование и практика в Словении. (на английском) **Mavcic A.** Economical and social rights, regulation and practice in Slovenia.

Новые книги о конституционном правосудии

- **Митюков М.А.** "К истории конституционного правосудия России". Москва, 2002г. **Mityukov M.A.** "To the history of constitutional justice of Russia". Moscow, 2002.

- Вышел в свет международный альманах "Конституционное правосудие в новом тысячелетии". It was published the first volume of the International Almanac "Constitutional Justice in the new millennium" .

Информации, факты, сообщения

- Председателем Конституционного Суда Украины избран Селивон Н.Ф. N.F. Selivon is selected as the President of the Constitutional Court of the Ukraine.

УКРАИНА

Л.П.Чубарь

судья Конституционного Суда Украины,
заслуженный юрист Украины

Конституционный контроль и судебная защита прав человека

Господин Председатель!
Уважаемые судьи!
Участники семинара!

Прежде чем представить на ваш суд доклад, посвященный проблеме места и роли конституционных судов (основываясь на примере Украины) в судебном механизме защиты прав и свобод человека и гражданина, не могу не выразить свою искреннюю благодарность принимающей стороне – нашим армянским коллегам – за радушный прием на этой священной земле, созданной Богом средь гор, восхищения теплой и дружеской атмосферой, царящей в этом зале, которая так естественно подчеркивается и очаровательной погодой, частичку которой привезли и ваши гости.

В ряду новых независимых государств, образованных на бывшем пространстве 1/6 суши, Украина провозгласила, равняясь на международные стандарты, примат прав человека. Права и свободы человека и их гарантии определяют содержание и направление функционирования государства. Конституционный принцип соблюдения прав человека юридически связывает и положительно ограничивает действия государства, его органов и должностных лиц.

Основной юридической гарантией прав и свобод человека является судебная защита. Согласно Конституции Украины судебная защита прав и свобод возложена на систему судов общей юрисдикции и специализированные суды (статьи 124, 125 Конституции Украины).

Статья 55 Конституции Украины гарантирует каждому право на обжалование в суде решений, действий или бездействия органов государственной власти, органов местного самоуправления, должностных и служебных лиц. И хотя этой же статьей конституированы право на обращение к Уполномоченному Верховной Рады Украины по правам человека, а также право после использования всех национальных средств правовой защиты обращаться за защитой своих прав и свобод в соответствующие международные судебные учреждения или в соответствующие органы международных организаций, несомненно, что именно защита прав национальными судами является доминирующей и обязана быть действенной, обеспеченной достаточными конституционными гарантиями.

В сфере этой судебной защиты Конституционный Суд Украины не может заменить суд общей юрисдикции.

Юрисдикция Конституционного Суда Украины специфична и среди средств защиты субъективных прав и свобод человека и гражданина особо ответственна и эффективна. Конституционный Суд Украины – единственный орган конституционной юрисдикции в государстве, специфика деятельности которого заключается в том, что именно правосудие, в полном смысле этого

слова, он не осуществляет. Предметом рассмотрения Конституционного Суда являются конституционные вопросы.

Компетенция Конституционного Суда Украины по охране прав граждан реализуется почти во всех его процедурах: он решает вопросы о соответствии Конституции (конституционности) законов и иных правовых актов (в том числе тех, которые регулируют права гражданина). Именно вопросы соответствия Конституции Украины (конституционности) законов и иных правовых актов занимают центральное место в деятельности Конституционного Суда Украины.

Результатом деятельности Конституционного Суда Украины по реализации этих полномочий является фактическая отмена "подконтрольных" правовых актов и тем самым отрицательное, по существу, воздействие на осуществляемое указанными органами правотворчество.

В таком случае повышается роль Конституционного Суда Украины как корректора законодателя, если последний нарушает основные права. Таким образом, одновременно с функцией охраны Конституции, Конституционный Суд Украины исполняет и функцию охраны прав человека.

Цель такой деятельности заключается в том, чтобы обнаружить, не проигнорированы ли законодателем и иными органами закрепленные в Конституции Украины принципы, провозглашенные ею права и свободы граждан, а обнаружив такие факты, принять соответствующие меры по их устранению. Осуществление таких полномочий способствует предупреждению злоупотреблений власти, ликвидации конфликтов между исполнительной и законодательной властями, которые, к сожалению, в последнее время все чаще возникают при осуществлении нормотворческих функций.

Так, решением Конституционного Суда Украины в деле по конституционным представлениям народных депутатов Украины относительно соответствия Конституции Украины (конституционности) Закона Украины "О выборах народных депутатов Украины" признаны неконституционными ряд положений этого Закона, которыми ограничивалось осуществление избирательных прав широкого круга граждан Украины.

Конституция Украины категорически запрещает внесение в нее изменений, что нарушает права и свободы человека и гражданина (статья 157 Конституции Украины). Поданный в Верховную Раду Украины законопроект о внесении изменений в Конституцию перед его рассмотрением обязательно должен быть рассмотрен Конституционным Судом, который проверяет, соответствует ли законопроект требованиям статей 157 и 158 Конституции Украины. В случае отсутствия положительного заключения Конституционного Суда Украины законопроект отклоняется (статья 159 Конституции Украины). В данном случае Конституционный Суд Украины осуществляет предварительный (превентивный) конституционный контроль. Верховная Рада Украины имеет уже 9 таких заключений Конституционного Суда Украины.

Конституционное условие рассмотрения законопроекта о внесении изменений в Конституцию Украины Верховной Радой Украины при наличии заключения Конституционного Суда Украины – это дополнительная гарантия верховенства прав и свобод человека и гражданина и стабильности правовой системы государства.

Конституционный Суд Украины защищает гражданина и в процессе правоприменения от нарушения неконституционным законом его основных прав и свобод. Процедура, связанная с конкретным фактом нарушения прав гражданина, в Конституционном Суде Украины может быть инициирована по конституционному представлению Верховного Суда Украины, который согласно статье 150 Конституции Украины может обращаться в Конституционный Суд Украины с вопросом о соответствии Конституции Украины законов и иных нормативно-правовых актов.

В процедуре, связанной с проверкой именно конституционности законов, которые применены или применяются по конкретным делам, более всего проявляется связь между судебной защитой прав граждан в общих судах и Конституционном Суде. Тут гражданин – сторона в судебном деле, общие суды, которые рассматривают дела, могут выступать инициаторами, а Верховный Суд Украины – и активным участником конституционного судопроизводства. Специфическая роль Конституционного Суда Украины состоит в том, что в конституционном судопроизводстве защищаются права граждан от неконституционного закона (самого по себе).

Рассмотрение в Конституционном Суде Украины конституционных представлений Верховного Суда Украины о конституционности нормы закона, которая была применена или применяется в процессе общего судопроизводства, при решении конкретного дела служит выработке согласованных позиций в толковании права. Вообще, Конституционный Суд Украины ориентирует судебную практику на конституционное толкование Конституции и законов Украины.

Таким образом, именно судам общей юрисдикции принадлежит особая роль в механизме судебной защиты прав конкретного индивида как человека и гражданина.

Посему архиважно оградить от посягательств и защитить, по сути, неограниченную и гарантированную Конституцией юрисдикцию судов по разрешению споров о праве. Это содержательное понятие "обезличенных" прав, как то: право на жизнь, право на свободу ассоциаций (общественных объединений), право на судебную защиту, право на свободу передвижения и многие, многие другие, по поводу которых принимались решения Конституционным Судом Украины, начиная с 1997 года. (Все они с переводом на русский язык и аннотацией на английском собраны в двухтомнике, переданном мною в библиотеку наших гостеприимных коллег). В этом аспекте интересно отметить полномочие Конституционного Суда Республики Армения по разрешению споров, связанных с результатами референдумов, выборов Президента республики и депутатов.

Следующее направление конституционной защиты прав и свобод заключается в предоставлении Конституционному Суду Украины права официального толкования Конституции Украины и законов Украины. Ранее контроль за соответствием законов Конституции Украины был прерогативой Верховной Рады Украины. С принятием Конституции Украины единственным в государстве органом, который наделен такими полномочиями, является Конституционный Суд Украины.

В одном из решений Конституционный Суд Украины отметил, что "эти изменения обусловлены переходом к новому порядку осуществления государственной власти по принципу ее разделения на законодательную, исполнительную и судебную (часть первая статьи 6 Конституции Украины), органы которых взаимодействуют между собой на основании конституционно закрепленной системы сдержек и противовесов, осуществляя свои полномочия в границах, установленных Конституцией Украины, и согласно законам Украины (часть вторая статьи 6 Конституции Украины)"1.

Согласно статье 42 Закона Украины "О Конституционном Суде Украины" с целью обеспечения реализации или защиты конституционных прав в Конституционный Суд Украины может быть направлено конституционное обращение об официальном толковании Конституции и законов Украины. Субъектами такого обращения согласно статье 43 этого Закона являются не только граждане Украины, но и иностранные граждане, лица без гражданства и юридические лица.

Основанием для конституционного обращения этих лиц является наличие неоднозначного применения положений Конституции Украины или законов Украины судами Украины, иными органами государственной власти, если субъект права на конституционное обращение считает, что это может привести или привело к нарушению его конституционных прав и свобод (статья 94 Закона Украины "О Конституционном Суде Украины").

В случае, если при толковании Закона Украины (его отдельных положений) было установлено наличие признаков его несоответствия Конституции Украины, Конституционный Суд Украины в этом же производстве решает вопрос о неконституционности этого Закона (часть вторая статьи 95 Закона Украины "О Конституционном Суде Украины").

Данное положение является важным средством защиты прав и свобод именно граждан, которые не являются субъектом конституционного представления по вопросам соответствия Конституции Украины законов и иных правовых актов, но страдают от своеволия государственных органов, которые по-разному или даже если одинаково, но неправильно применяют положения Конституции и законов Украины. Конституционный Суд Украины широко пользуется этим правом.

Кроме этого, важность такого способа защиты прав и свобод заключается в том, что рассматривая такое индивидуальное обращение, Конституционный Суд Украины влияет на всю правовую практику, направляя ее в конституционное русло и обеспечивая защиту прав и свобод по вопросам, которые были предметом толкования в системе исполнительной и судебной властей, а также содействует ответственному отношению этих органов к обеспечению прав и свобод в процессе применения нормативно-правовых актов.

Сегодняшняя международная научно-практическая конференция, несомненно, будет способствовать разрешению проблем в конституционном производстве и усилению роли конституционных судов в реализации прав и свобод граждан, что, несомненно, поднимет авторитет конституционных судов в обществе.

Благодарю за внимание.

SLOVAK REPUBLIK

L.Dobrik

Judge of the Constitutional Court
of the Slovak Republic

Position of the Constitutional Court of the Slovak Republic under the Amendment to the Constitution of the Slovak Republic

No. 90/2001

I presented at similar seminar in 2000 a paper on the topic "The trends of the development of the constitutional judiciary in the Slovak Republic". Today I would

like to inform this Distinctive Audience on the extent of the changes in the position of the Constitutional Court of the Slovak Republic after entering into force of constitutional law no. 90/2001 Coll.

Before I mention the position of the Constitutional Court of the Slovak Republic itself I consider important to show some other significant changes in our Constitution which aimed at guaranteeing our further development in the democratic system.

We have to talk about the relation of the domestic law and international law, establishment of new mechanisms in presidential elections (direct election by citizens), dividing the competencies of the Head of the state in the transitional period, strengthening the self-government authorities (creating the second level of the self-government and strengthening the Supreme Audit Office).

After assessment of guarantees of the human rights protection, a new office has been founded - the public protector of rights. We are aware that our constitutional development has to reflect our international obligations and especially obligations on protecting of political, civil and social rights. The Amendment to the Constitution of the Slovak Republic (further Constitution) enables the citizen to react to the challenges, which are represented by worldwide defence alignments and European economic groups.

Under Article 7 of the Constitution the Slovak Republic may, by its own discretion, enter into a state union with other states. A constitutional law, which shall be confirmed by a referendum, shall decide on the entry into a state union, or on the secession from such union.

This article of the Constitution made it possible by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.

I think it is important to cite these provisions because they express the citizens? will by the way of a constitutional law. They expressed the further direction and endeavour to integrate into the security and economic structures, which provide our country prospects.

In this connection I would like to talk about the amendment to Art. 144, which laid down for the general courts in the performance of their function, that they shall be independent, and in their decision making shall be bound by the Constitution, by constitutional law, by international treaties and laws. This article amended the applicability of these treaties in the legal order of the Slovak Republic.

The Amendment to the Constitution deepened the competence of the Supreme Audit Office of the Slovak Republic and especially in the fields of the check of treatment of public resources or legal persons who are enterprising with resources of the state budget.

The Amendment introduced the institute of the public protector of rights, which is a new institute in our legal order. The independence of the judicial power has been enhanced by the institute of the judicial council, which consists of the President of the Supreme Court of the Slovak Republic, 8 judges elected and removed by the judges of the Slovak Republic. Three members of the judicial council are elected and removed by the National Council of Slovak Republic; another three members are elected and removed by the Government of Slovak Republic. The term of office of the members of the judicial council is five years. The competences are in personal issues (submitting of proposals for appointment, replacement and removing of judges) in disciplinary issues (founding disciplinary senates) in economy i.e. to express opinion on the draft budget for the courts in the Slovak Republic.

The amendment stipulated the number of the judges of the Constitutional Court of the Slovak Republic as 13 (before it was 10). The judges' term of office has been prolonged for 12 years without possibility of re-election. The judges of the Constitutional Court shall be appointed by the President of the Slovak Republic for a twelve-year term on a proposal of the National Council of the Slovak Republic. The National Council of the Slovak Republic shall propose double the number of candidates for judges that shall be appointed by the President of the Slovak Republic. A judge of the Constitutional Court may resign from his or her office by written notice addressed to the President of the Constitutional Court.

The President of the Slovak Republic shall recall a judge of the Constitutional Court: On the basis of a final condemning judgement for a wilful criminal offence, or on the basis of disciplinary decision made by the Constitutional Court for a conduct which is incompatible with holding the office of a judge of the Constitutional Court; further on if the Constitutional Court has announced that the judge does not participate in proceedings of the Constitutional Court for over one year, or if he or she is not eligible for the National Council of the Slovak Republic.

The judges of the Constitutional Court shall hold their offices as a profession. The performance of this profession shall be incompatible with the post in another body of public authority, with public service relationship, with employment, with the similar labour relation, with an entrepreneurial activity, with membership in governing or control body of a legal person, which pursues an entrepreneurial activity or with another economic or gainful activities apart from the administration of his or her own property, and scientific, pedagogical, literary or artistic activity.

The Constitutional Court shall decide in plenary session on the following issues: The President's office has become vacant for the reasons of health conditions of the incumbent President (Art. 105 (2)), prosecution of the President for a wilful infringement of the Constitution or for high treason (Art. 107), conformity of laws with the Constitution, constitutional laws and international treaties (Art. 125 (1a)), conformity of government regulations, generally binding legal regulations of Ministries and other central state administration bodies with the Constitution, with constitutional laws, with international treaties (Art. 125 (1b)), whether the subject of a referendum to be declared is in conformity with the Constitution or constitutional law (Art. 125b (1)), on conformity of negotiated international treaties with the Constitution and constitutional laws (Art. 125a (1)).

The plenary session of the Constitutional Court shall give an interpretation of the Constitution or constitutional law if the matter is disputable (Art. 128), before it was decided in a three-member senate.

The Constitutional Court shall decide whether the election of the President of the Slovak Republic, the elections to the National Council of the Slovak Republic, and the elections to local self-administration bodies have been held in conformity with the Constitution and the law. It shall decide on complaints against the result of a referendum and complaint against the result of a plebiscite on the recall of President of the Slovak Republic too.

The Constitutional Court shall decide whether a decision dissolving a political party or movement or suspending political activities thereof is in conformity with the constitutional laws and other laws.

The Constitutional Court shall decide on a prosecution by the National Council of the Slovak Republic against the President of the Slovak Republic in matters of wilful infringement of the Constitution or treason.

The Constitutional Court shall decide on whether a decision on declaring an exceptional state or an emergency state and other decisions connected to this decision were issued in conformity with the Constitution and constitutional law (Art. 129 subsections (2) - (6) of the Constitution).

Under these provisions the decisions of the Constitutional Court are binding for all the authorities of the public power and concerned natural and legal persons. The appropriate authority of the public power shall guarantee the execution of these decisions without any delays. Details shall be defined by law.

The judges of the Constitutional Court may be prosecuted and held in a pre-trial detention only with assent of the Plenary session of the Constitutional Court.

The Constitutional Court shall give its assent to the criminal prosecution or a pre-trial detention of a judge and of the General Prosecutor. The Constitutional Court shall convene disciplinary proceedings regarding the Chief Justice of the Slovak Republic, the Deputy Chief Justice of the Slovak Republic and the General Prosecutor (Art. 136 (2) and (3) of the Constitution).

If the Constitutional Court refuses its consent, the prosecution or the pre-trial detention shall be precluded for the duration of the function of a Constitutional Court judge, the function of a judge or the function of the General Prosecutor.

The plenary session shall decide on disciplinary measures against a judge for a conduct which is incompatible with holding the office of a judge of the Constitutional Court, and on announcement that the judge does not participate in proceedings of the Constitutional Court for over one year (Art. 138 (2) b) and c).

The plenary session shall decide on the unification of the senates? legal opinions, on regulation of internal relations and on the draft budget of the Constitutional Court.

The Constitutional Court shall decide on other matters in senates of three members. A senate shall decide by absolute majority of its members Art. 131 (2) of the Constitution.

By strengthening the self-government authorities there has been created the second level of the self-government bodies.

The elections to the higher territorial units have taken place recently so the regional parliaments have also been created. The next step will be the delegation of wide-ranged competences onto self-government authorities in all activities of the state administration.

I have shown this fact because I want to make clear the provision of Art. 127a of the Constitution under which: The Constitutional Court shall decide on complaints of the bodies of territorial self-administration against unconstitutional or unlawful decision or against other unconstitutional or unlawful action into the matters of self-administration, save another court shall decide on its protection.

If the Constitutional Court allows a complaint of a body of territorial self-administration, it shall hold:

- in what lies the unconstitutional or unlawful decision or other unconstitutional or unlawful action into the matters of self-administration;
- which constitutional law or law has been infringed;
- by which decision or action this infringement took place.

The Constitutional Court shall cancel the challenged decision, or if the infringement of the right lay in an action different than in a decision, it shall prohibit continuing of infringement of the right and shall order, if it is possible, to reinstate the status before the infringement.

The petitioners in this type of proceedings are the self-government authorities. In case of municipal corporation it is the mayor and the municipality.

The Amendment to the Constitution has introduced the preventive review of constitutionality to the legal order of the Slovak Republic. This is an abstract review of constitutionality with closely defined subject (subject of referendum) and with one possible petitioner (the President of the Slovak Republic).

The Article 125b of the Constitution that has introduced this competence of the Constitutional Court relates to Art. 95 under which: The President of the Slovak Republic may, before declaring a referendum, submit to the Constitutional Court of the Slovak Republic a proposal for a decision on whether the subject of a referendum which shall be declared upon a petition of citizens or a resolution of the National Council of the Slovak Republic according to paragraph 1 is in conformity with the Constitution or a constitutional law.

From the submission date of the proposal of the President of the Slovak Republic to the date of effectuality of the decision by the Constitutional Court of the Slovak Republic, the term shall not lapse. The Constitutional Court shall decide within 60 days. If the Constitutional Court decides that the subject of the referendum is not in conformity with the constitution or constitutional law, the referendum shall not be declared. A referendum may also be used to decide on all crucial issues of the public interest. However, no issues of fundamental rights, freedoms, taxes, duties or state budget may be decided by a referendum.

It is likely that in these proceedings the interpretation of the concept "fundamental right and freedom" can cause to the Constitutional Court serious trouble.

The doubts of the President on the conformity of the referendum subject with the Constitution and constitutional laws does not require a contradiction between the President and the Parliament or petitioners committee but it is the President's

individual decision. The decision could be problematic if the review of the referendum subject could not achieve either in "pro" or "contra" an absolute majority of all the judges votes (i.e. 7 judges).

In such a case the responsibility on the issue whether the referendum questions are constitutional would lay on the President of the republic. Although there is a possibility that the Constitutional Court could also hold proceedings on the referendum results in proceedings on a new motion (Art. 129 (3) of the Constitution).

Another new type of the abstract review is the one under Article 125a: The Constitutional Court shall decide on the conformity of negotiated international treaties to which the assent of the National Council of the Slovak Republic is necessary with the Constitution and constitutional law. The President of the Slovak Republic or the Government may submit a proposal for a decision to the Constitutional Court prior to the presentation of a negotiated international treaty for discussion of the National Council of the Slovak Republic. The Constitutional Court shall decide on this motion within 60 days from its delivery. If the Constitutional Court holds in its decision that the international treaty is not in conformity with the Constitution or constitutional law, such international treaty cannot be ratified. The aim of this type of proceedings is to avoid situations that a negotiated international treaty, binding for the Slovak Republic, will contradict to the Constitution and constitutional laws. It is to avoid a situation that as consequences of fulfilment of some constitutional standards a state authority could violate an international contractual liability.

This competence of the Constitutional Court of the Slovak Republic includes those negotiated international treaties, which require the consent of the National Council of the Slovak Republic. The National Council of the Slovak Republic approves prior to their ratification the validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons (Art. 7 (4) of the Constitution).

The motion is not obligatory in this type of proceedings; it depends on the discretion of the President or the Government.

The Constitutional Court of the Slovak Republic decides (abstract review of the constitutionality) on the conformity of laws with the Constitution and constitutional law and negotiated international treaties.

The Constitutional Court shall commence proceedings upon a motion submitted by: at least one-fifth of all Members of Parliament, the President of the Slovak Republic, the Government of the Slovak Republic, a court, the Attorney General. The subject of a review can be government decrees, generally binding rules of Ministries and other central authorities of the sate administration.

The Constitutional Court may review the conformity of generally binding rules (local authorities? decisions) and generally binding legal regulations issued by local authorities of the state administration.

After the Constitutional Court accepts a motion to start proceedings, it may suspend effectiveness of challenged legal regulations, their parts, or some of their provisions, provided that their further application would jeopardize the fundamental rights and freedoms, or considerable economic damage, or any other irreparable situation could result.

If the Constitutional Court holds by its decision that there is inconformity between legal regulations, the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued these legal regulations shall be obliged to harmonize them with the Constitution, with constitutional laws and with international treaties. If they fail to do so, these regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

The decision on conformity shall be promulgated as defined by law.

A significant change has occurred after amendment in the individual complaints of natural and legal persons. The Constitutional Court shall decide on complaints of natural persons or legal persons if they are pleading the infringement of their fundamental rights or freedoms, or human rights and fundamental freedoms resulting from the international treaty which has been ratified by the Slovak Republic and promulgated in the manner laid down by a law, save another court shall decide on protection of these rights and freedoms (Article 127).

The Constitutional Court competences have been strongly enlarged in a way that when the Court declares that a lawful decision, measure, or other encroachment violated some rights or freedoms it quashes such decision, measure, or other encroachment. In this case the Constitutional Court will quash the challenged ruling. If the violation of the right happened through a passivity of an authority the Constitutional Court can order to start proceedings in the concerned matter. It can also return the case for further proceedings or prohibit continued violation of this right and order, if possible, that the condition before the encroachment is reinstated.

The Constitutional Court may, by the decision by which it allows a complaint, award the one whose rights according to paragraph were infringed an adequate financial satisfaction (Art. 127 (3)).

The responsibility of the one who has infringed the rights or freedoms according to paragraph 1, for the damage or other injury shall not be affected by the judgement of the Court (Art. 127 (4)).

A complaint may be filed within a period of two months from the day of entering into force of the decision or from the day when the injunction is announced or other encroachment is communicated. This term for temporary injunction or for other encroachment shall be computed from the day when such a temporary injunction or other encroachment will be announced to the complainant knowledge.

During its proceedings the Constitutional Court follows the facts of the case found during the previous proceedings.

By running the two months period it shall be respected the decision of the courts or other state administration authority or self-government decision, which entered into force and cannot be challenged in other courts.

For counting the time it is important when the complainant got the decision or when he/she learnt about facts evoking violation of the complainant fundamental rights and freedoms.

An advocate or a commercial lawyer shall represent the petitioner.

The two months time cannot be either eliminated or prolonged under the Constitutional Court Act.

The parties to the proceedings are the petitioner (complainant) and the state administration authority or self-government authority against which the complaint is addressed.

In proceedings on natural and legal persons complaints the senates of the Constitutional Court shall decide on merits of the case.

No appeal shall take place against Constitutional Court findings.

The new type of natural or legal persons complaint has enhanced the protection of fundamental rights and freedoms through the possibility to file a complaint not only against central and local state administration bodies and territorial self-government authorities but against state power bodies and natural and legal persons too upon which the state delegated some of its functions. The extent of the protection has been enlarged as well while to the fundamental rights and freedoms have been added rights and freedoms following from international treaties.

If the complainants withdraw their complaint the Constitutional Court shall stop its proceedings. If the proceedings however deal with especially serious violation of a fundamental right the Constitutional Court may decide that it does not allow the withdrawal of the complaint.

For decisions on merit it is important:

- to show which fundamental right or freedom has been violated;
- to quash a decision or measure which caused the violation;
- if the violation was caused by passivity, order to start proceedings;
- return the matter for further proceedings;
- prohibit continued violation of the fundamental right or freedom;
- order that the condition before the encroachment is reinstated;
- recognize reasonable financial redress if requested as non-material damage.

The concerned authority is bound by the Constitutional Court legal opinion.

As for a summary of the enhancement of the natural and legal persons' right to file individual complaints and their raised efficiency I would like to show some statistical data on the Constitutional Court agenda in 1st half of 2001 and 2002.

CZECH REPUBLIC

F. Duchon
Judge of the Constitutional Court
of Czech Republic

Human Rights Protection before the Constitutional Court

1. The concept of human rights protection under the Constitution of the Czech Republic
2. Human rights protection in the proceedings before the Constitutional Court
3. Some statistical data

Ad 1. The concept of human rights protection under the Constitution of the Czech Republic

The Constitution of the Czech Republic was enacted as the fundamental law of the newly arising Czech Republic by the Czech National Council on 16 December, 1992, and came into effect as Act No. 1/1993 Coll. on 1 January, 1993.

In the Czech Republic, the concept of human rights protection is based on the principle that the Constitution itself does not enumerate any particular human

rights and freedoms. Under Article 3 of the Constitution, the Charter of Fundamental Rights and Basic Freedoms forms part of the constitutional order of the Czech Republic (hereinafter "the Charter"). On December 16, 1992, the Charter was pronounced as part of the constitutional order as Act No. 2/1993 by a resolution of the presidium of the Czech National Council.

Under Article 4 of the Constitution of the Czech Republic (hereinafter "the Constitution"), judicial bodies were entrusted with the protection of fundamental rights and freedoms. Chapter Four of the Constitution regulates judicial power. This power is formed by the Constitutional Court, which is not part of the ordinary judiciary, and the system of ordinary courts comprised by the Supreme Court, the Supreme Administrative Court, and superior, regional and district courts (Article 91).

Chapter Five of the Charter refers to the judicial power and regulates the right to judicial and other legal protection in Articles 36 – 40.

Under Article 36, everybody may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body. Unless a law provides otherwise, a person who claims that his/her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in the Charter may not be removed from the jurisdiction of the courts. Everybody is entitled to compensation for damage caused him or her by an unlawful decision of a court, other state bodies, or public administrative authorities, or as a result of an incorrect official procedure; conditions therefore and detailed provisions shall be provided for by the law.

Article 37 regulates the basic rights in a judicial proceeding and stipulates that everyone has the right to refuse to give testimony if they would thereby incriminate themselves or a person close to them. In proceedings before courts, other state bodies, or public administrative authorities, everyone shall have the right to legal assistance from the very beginning of such proceedings. All parties to such proceedings are equal. Anyone who declares that he/she does not speak the language in which a proceeding is being conducted has the right to the services of an interpreter.

Article 38 reacted to the deformed practise in the judiciary during the communist regime and introduced the concept of the "lawful judge". It stipulates that no one may be removed from the jurisdiction of his lawful judge. The jurisdiction of courts and competence of judges shall be provided for by law. Under par a. 2 of this Article, everyone has the right to have their case considered in public, without unnecessary delay, and in their presence, as well as to express their views on all of the admitted evidence. The public may be excluded only in cases specified by law.

Articles 39 and 40 concern the criminal judiciary and include the principles "Nullum crimen, nulla poena sine lege", the presumption of innocence and the right to defense. Only law may designate the acts which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them. Only a court may determine a person's guilt and designate the

punishment for criminal acts. A person against whom a criminal proceeding has been brought shall be considered innocent until his/her guilt is declared in a court's final judgement of conviction.

An accused has the right to be given the time and opportunity to prepare a defense and to be able to defend himself or herself, either pro se or with the assistance of counsel. If he/she fails to choose a counsel even though the law requires him or her to have one, he/she shall be appointed a counsel by the court. The law shall set down the cases in which an accused is entitled to a counsel free of charge. An accused has the right to refuse to give testimony; he may not be deprived of this right in any manner whatsoever.

No one may be criminally prosecuted for an act which he/she has already been finally convicted or acquitted of the charges. This rule shall not preclude the application, in conformity with law, of extraordinary procedures for legal redress. The question whether an act is punishable or not shall be considered, and penalties shall be imposed, in accordance with the law in effect at the time the act was committed. A subsequent law shall be applied if it is more favourable to the offender.

Chapter One of the Charter contains general provisions relating to all rights and freedoms (Articles 1 – 4) and Chapter Two defines:

A. Human Rights and Fundamental Freedoms divided into

- fundamental human rights and freedoms (Articles 5 – 16)
- political rights (Articles 17 – 23)

B. The Rights of National and Ethnic Minorities (Articles 24 – 25)

C. Economic, Social and Cultural Rights (Articles 26 – 35)

D. The right to Judicial and other Legal Protection, see above.

Ad 2. Human Rights Protection in the Proceedings before the Constitutional Court

Under Article 83 of the Constitution, the Constitutional Court is the judicial body responsible for the protection of the constitutionality. The subject matter jurisdiction of the Constitutional Court is regulated by the Article 87 of the Constitution, which stipulates the full list of spheres in which the Constitutional Court decides. These competencies of the Constitutional Court could be divided into three groups:

1. Abstract constitutional review (i.e., review of compliance of the legal regulations with the constitutional regulation).

2. Concrete constitutional review (i.e. protection of constitutionally guaranteed rights and freedoms against concrete infringement by public authorities).

3. Other matters relating to the application of the Constitution (e.g. the certification of the election of a deputy or a senator, the loss of the seat of a senator or a deputy due to the loss of eligibility, a constitutional charge brought against the President of the republic, the constitutional review of a decision on dissolution of the political party or some other decisions relating to its activities, jurisdictional disputes between state bodies and self-governing regions etc.).

The subject of this conference is thus the powers of the Constitutional Court in the sphere of a concrete constitutional review, i.e. deciding over constitutional

complaints against final decisions or other actions of infringement of constitutionally guaranteed rights and freedoms by public authorities under Article 87 par. 1 letter d) of the Constitution. Under this Article, the Constitutional Court decides over constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms.

The Constitutional Court defined the concept of "public power" in its resolution file No. II. US 75/93 of 25 November, 1993, as "the power which decides authoritatively on the rights and obligations of parties (persons), both directly and indirectly. The parties (persons), whose rights and obligations are decided by a public authority, are not in equal position with this body and the content of such decision does not depend on the will of this person".

Infringement by a public authority can be defined not only as decisions of the courts, administrative bodies and self-governing regions and possibly of other bodies entitled to decide on rights and obligations by means of the law, but also as the actual activity (or possibly inactivity) of the above mentioned bodies.

The Act on the Constitutional Court No. 182/1993 Coll., regulating among others proceedings before the Constitutional Court, was passed on the basis of the Constitution. A proceeding on a constitutional complaint is regulated in Sections 72 – 84 of this act.

A constitutional complaint may be submitted by a natural or legal person, if he/she alleges that their fundamental rights and basic freedoms guaranteed by a constitutional act have been infringed as a result of the final decision in a proceeding to which he/she was a party. A constitutional complaint may be submitted within a period of 60 days which starts to run on the day when the decision in the final available remedy was delivered to the party or, if there is no such remedy, on the day when the events which are the subject of the constitutional complaint took place.

Therefore, the proceeding before the Constitutional Court is based on the subsidiary principle (i.e., it can only take effect after all procedural remedies which the complainant could assert in relevant proceedings (judicial, administration) have been exhausted. A constitutional complaint is inadmissible if the complainant failed to exhaust all procedural remedies afforded him by law for the protection of his rights. Nevertheless, there are two exceptions in force under which the Constitutional Court shall not reject the complaint and shall deal with the complaint's merit:

- the significance of the complaint extends substantially beyond the personal interests of the complainant, so long as it was submitted within one year of the day when the events which are the subject of the constitutional complaint took place, or;

- the proceeding in an already filed remedial procedure is being considerably delayed, which gives rise to or may give rise to serious and unavoidable detriment to the complainant.

A complainant may submit, together with his constitutional complaint, a proposal to annul a statute or some other enactment, or individual provision thereof, the application of which resulted in the situation, which is the subject of

the constitutional complaint, if the complainant alleges it to be inconsistent with a constitutional act, or with a statute, if the complaint concerns some other enactment. In such a case, it is the Plenum that decides on the complaint.

Parties to the proceeding before the Constitutional Court are the complainant and the state body or another public authority, against the action of which the constitutional complaint is directed; the secondary parties are all parties to a prior proceeding.

The proceeding before the Constitutional Court is governed by the principle of obligatory representation of the parties to the proceeding by the counsel whose expenses are paid by the relevant parties. Should the personal situation or financial means of the complainant justify it, especially if he/she has insufficient financial means to pay the costs connected with his or her representation, the Judge – Reporter shall rule that the complainant's attorney's fees shall be paid by the state (i.e., by the Constitutional Court from its budget).

The Constitutional Court decides on the constitutional complaint lodged under Article 87 in four three-member panels (if the Plenum's jurisdiction is not given) which are composed of the Chairman and two judges. The function of the Chairman of the Panel is not permanent, the individual members of the panel rotate after a year.

The Act stipulates the conditions under which the petition can be rejected by the Judge – Reporter or by the Panel. The constitutional complaint shall be rejected without holding an oral hearing and without the parties being present, by means of a resolution, which must present reasons justifying the reasons. No appeal is permitted against the decision of the Constitutional Court.

Provided the constitutional complaint was not rejected, an oral hearing shall be held before the Constitutional Court; the oral hearing before the Court shall be public. With the consent of the parties, the Court may dispense with an oral hearing if further clarification of the matter cannot be expected from such a hearing.

The Constitutional Court decides on the merit of the constitutional complaint in its judgement, which shall either grant the constitutional complaint in its entirety, reject it in its entirety, or grant it in part and reject it in part. If the Constitutional Court grants the constitutional complaint lodged under Section 87 par.1 letter d) of the Constitution (see above), it annuls the contested decision of the public authority and it pronounces in its judgement which of the constitutionally guaranteed rights or freedoms was infringed and which action of public authority resulted in the infringement.

If a constitutionally guaranteed fundamental right or basic freedom was infringed as the result of an action by a public authority other than a decision, the Court enjoins the authority from continuing to infringe on this right or freedom and order it, to the extent possible, to restore the situation that existed prior to the infringement.

The Panel's judgements shall always be announced publicly by the Chairman of the Panel, in the name of the Republic. Judgements are enforceable upon the personal delivery of a copy of their final written version to each party.

Every judgement adopted by the Court shall be published in the Collection of Judgements and Resolutions of the Constitutional Court which the Court shall issue

annually, for use by the public, after the end of each calendar year. The Court shall publish the statement of the judgement and such part of the reasoning that makes clear the legal principle relied on by the Court.

Ad 3. Some statistic data:

Year	total number of cases	plenary cases	review of admin. decisions1	constitutional complains	criminal	restitutions
1999	**2576**	**24**	**378**	**2174**	**364**	**115**
2000	**3140**	**59**	**528**	**2553**	**697**	**189**
2001	**3049**	**39**	**528**	**2482**	**674**	**251**

РОССИЯ

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Судья Конституционного Суда
Российской Федерации

Защита прав человека в Конституционном Суде Российской Федерации

Уважаемый Председатель!

Дорогие армянские коллеги!

Прежде всего хочу выразить вам самую искреннюю признательность за то, что в очередной раз вы собрали нас в этом замечательном городе, в этой замечательной стране и мы имеем возможность еще и еще раз обменяться своими соображениями о том, чего достигло конституционное правосудие на сегодняшний день, каковы стоящие перед нами проблемы и каковы пути и способы их решения.

Конституционный Суд Российской Федерации в ноябре 2001 года отмечал свое 10-летие и подводил итоги: за десять лет принято около 200 постановлений и около 1500 определений. Хотел бы назвать еще одну цифру: ежегодно в Конституционный Суд обращается не менее 10-13 тысяч человек. Не называю точную цифру, поскольку ежегодно число обращений в Конституционный Суд становится на 1000 больше. В связи с этим хочу обратить внимание и на следующее обстоятельство: на первом этапе деятельности Конституционного Суда Российской Федерации половину обращений составляли запросы органов государственной власти, а другую половину – конституционные жалобы граждан. По мере того как политические и правовые институты России приобретали необходимую устойчивость, обращений граждан

становилось все больше, и сегодня 98% поступающих в Суд обращений составляют жалобы граждан на нарушение их конституционных прав и свобод.

Хотел бы сделать еще одну оговорку: в 1991 году, когда мы начинали работать, действовавший тогда Закон о Конституционном Суде Российской Федерации не знал института конституционной жалобы, как не знала этого института и действовавшая в тот период с многочисленными изменениями и дополнениями Конституция Российской Федерации. В число полномочий Конституционного Суда входила проверка так называемого обыкновения правоприменительной практики (если кто-то из участников этого семинара спросит меня, а что же такое «обыкновение правоприменительной практики», он поставит меня в серьезное затруднение). Но воспользовавшись именно этим положением, Конституционный Суд практически в первые месяцы своей деятельности легализовал институт конституционной жалобы.

Уникальность организации и функционирования конституционного правосудия в России заключается в том, что только Конституционный Суд вправе интерпретировать собственный закон и это толкование предписывать в качестве единственно возможного варианта любому правоприменителю, любому органу государственной власти. И мы воспользовались этим обстоятельством в пользу человека, права и свободы которого действующей Конституцией признаны доминантой социального, экономического и политического развития и составляют основу существующего правопорядка.

И если после октября 1993 года общество однозначно выступило за сохранение Конституционного Суда России в качестве самостоятельного института, то только потому, что Конституционный Суд с первого дня своего существования основной задачей своей деятельности считал защиту прав и свобод человека и гражданина. Может быть, самое главное, что удалось сделать Конституционному Суду в течение 11 лет своего существования, заключается в том, что удалось убедить общество в том, что государство и право не цель, а средство для развития личности и обеспечения ее свободы, в том числе путем установления правовых пределов государственной власти и ограничения самого государства, которое в данном контексте имеет именно инструментальное значение. В этом исходная посылка деятельности Конституционного Суда Российской Федерации, в этом, полагаю, и причина того, что 98% заявителей, обращающихся в Конституционный Суд России, – граждане.

Действующая Конституция Российской Федерации закрепляет весьма широкий круг прав и свобод, включая социальные, экономические и культурные, а также политические и гражданские. При этом в Конституции содержится весьма важное положение: в Российской Федерации признаются и гарантируются права и свободы человека и гражданина согласно общепризнанным принципам и нормам международного права и в соответствии с Конституцией Российской Федерации. Мы, по существу, уже в 1993 году разрешили ту коллизию, о которой применительно к Армении говорил наш уважаемый коллега Владимир Оганесян. В связи с этим возможно привлечь внимание также к следующему обстоятельству: для Конституционного Суда не должно быть прав более важных или менее важных. В отличие от некоторых

наших коллег (я имею в виду и ученых, и практиков), я с большим скепсисом отношусь к попыткам отнести экономические, социальные и культурные права к числу так называемых мнимых прав. Убежден, что все права, включая как гражданские и политические, так и экономические, социальные и культурные, в равной мере важны для развития человека и обеспечения его свободы. Отсюда – все права и свободы подлежат равной правовой защите со стороны Конституционного Суда.

Разумеется, экономические, социальные и культурные права неразрывно связаны с государственным бюджетом, с государственным финансированием. Нельзя не учитывать и того факта, что в течение многих десятилетий государство носило патерналистский характер, и в этой связи в обществе достаточно сильна психология социального иждивенчества. В связи с этим Суд, весьма последовательный в защите гражданских и политических прав, осторожен в интерпретации принципа социального государства, который является одним из основополагающих принципов конституционного строя Российской Федерации.

В деятельности Конституционного Суда Российской Федерации четко прослеживается деление прав и свобод граждан на абсолютные, к числу которых мы относим права и свободы, которые никогда и ни при каких условиях не могут быть ограничены, и такие права и свободы, которые могут быть ограничены, могут быть объектами соразмерного (или пропорционального) государственного вмешательства, разумеется, при наличии условий, предусмотренных в статье 55 действующей Конституции Российской Федерации.

Далее, уважаемые коллеги, хотел бы высказать гипотезу, что перечень прав и свобод, зафиксированный в действующей Конституции Российской Федерации, не является исчерпывающим. Мы признаем общепризнанные принципы и нормы международного права обязательными и считаем их частью своей национально-правовой системы. Частью нашей национально-правовой системы мы считаем и те международные договоры, которые подписала и ратифицировала Россия. Следовательно, даже если то или иное право текстуально не воплощено в действующей Конституции Российской Федерации, мы имеем возможность отнести его к числу основных и обеспечить ему должную конституционно-правовую защиту.

Полагаю возможным, уважаемые коллеги, обратить внимание еще на одно обстоятельство: в действующей Конституции Российской Федерации правам и свободам посвящена глава 2. Отсюда, однако, не следует, что основные права и свободы человека и гражданина закрепляются только в главе 2, они могут закрепляться и закрепляются и в иных главах действующей Конституции Российской Федерации. Я имею в виду местное самоуправление, интерпретированное Судом в том числе как конституционное право граждан, осуществляемое в условиях коллективности.

Возможно, в этом причина того широкого использования в решениях Конституционного Суда Российской Федерации международно-правовых актов: Пакта о правах человека 1966 года, Всеобщей декларации прав человека 1948 года, иных универсальных международно-правовых документов.

Конституционный Суд придает большое значение Европейской конвенции о правах человека и актам Европейского суда по правам человека. Полагаю, уважаемые коллеги, что сегодня толкование, которое не учитывает позицию Европейского суда по правам человека или конфронтирует с ним, едва ли может считаться приемлемым. В частности, для нас чрезвычайно важны выводы Европейского суда относительно соблюдения соразмерности (пропорциональности) государственного вмешательства в сферу основных прав. Мне близка идея, получающая закрепление во многих решениях Европейского суда по правам человека, относительно обязанностей государств-участников Конвенции о правах человека не только признавать права, закрепленные ею, и не только защищать эти права, но и защищать те социальные и иные ценности, которые за этими правами и свободами скрываются, поскольку только в этом случае права и свободы, которые мы провозглашаем, обретают реальный смысл. Многократно тиражировались в решениях Конституционного Суда позиции Европейского суда по правам человека, касающиеся роли и значения судебной власти и условий ее эффективности и многие другие.

Несколько слов о субъектах обращения в Конституционный Суд России с конституционными жалобами. Согласно статье 125 (часть 4) Конституции Российской Федерации в Конституционный Суд России с индивидуальными жалобами могут обращаться граждане. Должен, однако, заметить, что с самого начала действия Конституции Российской Федерации мы (в контексте обсуждаемой проблемы) дали достаточно широкое истолкование самого этого понятия «граждане» – в смысле политической принадлежности лица к государству. В практике деятельности Конституционного Суда весьма нередки обращения лиц без гражданства, а также иностранных граждан.

При определении круга субъектов конституционной жалобы нельзя не учитывать, что многие права и свободы, будучи инструментами обеспечения индивидуальной автономии человека, в то же время являются и способами его социализации и осуществляются в различных коллективных формах. Стало быть, правом на подачу конституционной жалобы обладают объединения граждан, включая, например, профессиональные союзы, акционерные общества. В нашей практике есть примеры рассмотрения Конституционным Судом жалоб государственных унитарных предприятий, имущество которых принадлежит им на праве хозяйственного ведения или на праве оперативного управления.

Весьма вероятно признание права обращаться с подобными жалобами и политических партий, хотя с 1993 года в практике деятельности Конституционного Суда подобных обращений не было. Но вот обращения религиозных объединений достаточно часты. В числе субъектов конституционной жалобы, согласно позиции Конституционного Суда, выраженной весной 2002 года, – также органы местного самоуправления, защищающие конституционное право на местное самоуправление. Важным инструментом обеспечения Конституционным Судом прав человека и гражданина могут стать обращения Уполномоченного по правам человека в Российской Федерации. Уже сегодня такую функцию выполняют

многочисленные обращения судов – общей юрисдикции и арбитражных. При этом мы максимально широко истолковали право судов на обращение с запросами в Конституционный Суд.

Уважаемые коллеги, теперь буквально несколько слов об основных направлениях и формах деятельности Конституционного Суда в плане защиты прав человека.

Во-первых, мы считаем важным направлением и формой нашей деятельности выявление нормативного содержания основных прав. Речь идет, с одной стороны, об адекватной интерпретации конституционных формулировок, памятуя при этом о том, что Конституция всегда «умнее» своих создателей, с другой же стороны, об установлении объективных пределов основных прав, без чего невозможна оценка на оселке конституционности проверяемых актов.

Во-вторых, существенное место в деятельности Конституционного Суда России занимает конституционное истолкование тех или иных законов, выявление их конституционного смысла. Тем самым Конституционный Суд корректирует правоприменительную практику, а также формирует позитивную, соответствующую Конституции Российской Федерации правоприменительную практику. Тем самым в орбиту судебного конституционного контроля одновременно включаются акты иных судов, в целом правоприменительная практика.

В-третьих, в последние годы значительное место занимают обращения к законодателю и даже поручения законодателю. В данном контексте должен сделать одну оговорку: конституционные суды, на мой взгляд, являются не только «негативным», но и «позитивным» законодателем, и именно это качество позволяет рассматривать их правовые позиции в качестве нормативных установлений, юридическая сила которых совпадает с юридической силой самой Конституции. Кстати, этим обусловлено деление наших определений на два вида: так называемые отказные определения (они обычно бывают относительно небольшими) и определения с «позитивным» содержанием. Конституционная жалоба разрешается без ее рассмотрения в открытом заседании Суда на основе тех позиций, которые выработаны ранее при рассмотрении того или иного дела. При этом такие правовые позиции – процессуально-правовые и материально-правовые – формулируются Судом не только в его постановлениях, но и определениях.

В-пятых, в качестве важного направления защиты прав человека можно рассматривать толкование самой Конституции. В этом случае Суд особенно часто прибегает к так называемым общим принципам права. Это, однако, тема самостоятельного обсуждения.

Резюмируя сказанное, в контексте защиты прав и свобод человека и гражданина значение решений Конституционного Суда можно оценивать по меньшей мере в следующих аспектах: этими решениями прямо и непосредственно защищаются права человека и гражданина, как они закреплены в Конституции; они дают ориентиры для всех властей (прежде всего судов и иных правоприменителей) и определяют параметры их деятельности в данной сфере; эти решения учат граждан бороться за свои конституционные права, используя при этом механизмы конституционного

правосудия; они формируют свободную от политических пристрастий конституционно-правовую доктрину России на современном этапе развития отечественной государственности; эти решения, преодолевая наслоения прошлого, формируют и утверждают в общественном правосознании демократическое видение взаимоотношений государства и личности в Российской Федерации, основанных на осознании инструментальной роли государства и права.

Благодарю за внимание. И еще раз выражаю сердечную признательность нашим коллегам из братской Армении за великолепную организацию нашего форума, за тепло души и гостеприимство!

BULGARIE

D. Gotchev
Juge de la Cour constitutionnelle de Bulgarie

L'egalite devant la loi et la pratique de la Cour Constitutionnelle

L'un des principes fondamentaux de la Constitution bulgare, énoncé dans son art. 6, est celui de l'égalité devant la loi. Cette égalité ne peut être limitée par les lois se fondant sur la distinction de race, de nationalité, d'appartenance ethnique, de sexe, d'origine, de religion, d'éducation, de convictions, d'appartenance politique, de condition personnelle et sociale ou de situation de fortune.

La pratique de la Cour constitutionnelle est liée à l'interdiction de limiter les droits des citoyens selon les distinctions ci-dessus. Dans le cadre du contrôle de constitutionnalité conformément à l'art. 149, al. 1, p. 2 de la Constitution, la Cour a pu se prononcer à plusieurs reprises sur l'inconstitutionnalité de textes de lois, mais c'est la décision interprétative No 14 du 10 novembre 1992, sur l'affaire constitutionnelle No 14 du 1992 (J.O. No 93 de 1992), qui est considérée comme principale en la matière.

Cette décision traite en premier lieu le principe de l'égalité devant les lois de tous les citoyens. Il est signalé que ce principe est fondamental dans toute société démocratique et qu'il est énoncé dans le préambule de la Constitution en tant qu'une valeur universelle parallèlement à la liberté, à la paix, à l'humanisme, à la justice et à la tolérance.

Selon cette décision le respect du principe de l'égalité des citoyens est considéré comme le respect même de la Déclaration universelle des droits de l'homme de l'Organisation des Nations Unies.

Le principe de l'égalité des citoyens devant la loi est lié à l'interdiction d'un traitement inégal fondé sur les distinctions citées dans l'art. 6, al. 2 de la Constitution, autrement dit à l'interdiction de la discrimination.

La Cour repartit en deux catégories les distinctions définissant la discrimination comme inadmissible. La première catégorie regroupe les distinctions de naissance – race, sexe, nationalité, appartenance ethnique, origine. L'inadmissibilité de la discrimination sur la base de ces distinctions relève de la règle qui stipule que «tous les individus naissent libres et égaux en droit... ». Les distinctions de la seconde catégorie – religion, éducation, convictions, appartenance politique, condition

personnelle et sociale et situation de fortune – sont acquises et changent au cours de la réalisation sociale de l'individu.

Sont inadmissibles toute limitation des droits et toute attribution de privilèges fondées sur quelle que soit des distinctions mentionnées ci-dessus.

Les distinctions en question sont exhaustivement énumérées dans l'art. 6, al. 2 de la Constitution. L'interdiction par une loi de la discrimination et de l'établissement d'un régime de limitation des droits ou d'attribution de privilèges sur la base d'autres distinctions n'existant pas, le législateur peut limiter les droits ou attribuer des privilèges sur la base des distinctions autres que celles citées dans l'art. 6, al. 2 de la Constitution. Dans la décision en question la Cour constitutionnelle indique que «la Constitution n'exclut pas la limitation des droits et l'attribution de privilèges strictement définis sur la base d'autres distinctions sociales».

Exposées comme elles le sont, les considérations principales du texte de cette décision interprétative de la Cour ont trouvé une application dans nombre de décisions prononcées dans le cadre du contrôle de constitutionnalité exercé sur des textes de lois concrets (art. 149, al. 1, p. 2 de la Constitution).

A titre d'exemple on peut citer la décision No 8 du 27 juillet 1992, affaire constitutionnelle 7/1992 (J.O. No 62/92), par laquelle la Cour constitutionnelle s'est prononcée sur l'inconstitutionnalité du paragraphe 9 des Dispositions finales et transitoires de la Loi sur les banques et les crédits interdisant notamment l'accès aux organes dirigeants des banques à des personnes ayant occupé auparavant certains postes électifs ou faisant partie des effectifs.

La Cour a noté que cette limitation est en contradiction avec l'art. 6, al. 2 de la Constitution parce qu'elle est fondée sur des distinctions qui y sont mentionnées et qui excluent la limitation des droits en matière d'accès à de tels postes.

Par sa décision No 11 du 29 juillet 1992, affaire constitutionnelle No 18/92 (J.O. No 64/92) la Cour a déclaré l'inconstitutionnalité du paragraphe 6 de la Loi modifiant et complétant la Loi sur les pensions de retraite (J.O. No 52/1992) qui porte création d'un nouvel article 10 «a». Le texte en question stipule que le temps passé à un poste dirigeant au sein du personnel des partis et organisations politiques visés dans le texte ne sera pas pris en considération pour l'ancienneté de l'individu concerné.

La Cour a décidé que priver cette catégorie de citoyens de leurs droits conformément à l'art. 51 de la Constitution est en contradiction avec l'art. 6, al. 2. Il n'y a pas de fondement pour un traitement inégal des citoyens.

La Cour a affirmé ce principe constitutionnel aussi dans sa décision No 3 du 3 avril 1992, affaire constitutionnelle No 30/91 (J.O. No 30/92). Elle a notamment rejeté la requête demandant l'établissement d'inconstitutionnalité du paragraphe 1 de la Loi modifiant et complétant la Loi sur le Conseil suprême judiciaire (J.O. No 106/91) ce paragraphe ayant abrogé l'al. 4 de l'art. 2 de cette loi lequel interdit aux avocats en exercice d'être élus au Conseil suprême judiciaire. La Cour a indiqué «qu'on ne peut pas, aux termes d'une loi, établir des limitations fondées sur une telle caractéristique professionnelle de la profession juridique» visant notamment la distinction «d'éducation» de l'art.6, al. 2 de la Constitution.

La Cour a exprimé une position similaire aussi dans sa décision No 9 du 30 septembre 1994, affaire constitutionnelle No 11/94 (J.O. No 87/94). Par cette décision la Cour a déclaré inconstitutionnel l'art. 16, al.4, p. 3 de la Loi sur le pouvoir judiciaire (J.O. No 59/94) lequel stipule que l'exercice d'une profession libre de la part des membres du Conseil suprême judiciaire est incompatible avec leur statut.

C'est toujours en suivant le principe d'inadmissibilité de la limitation des droits, fondée sur les distinctions énumérées dans l'art. 6, al. 2 de la Constitution, que la Cour constitutionnelle a prononcé sa décision No 12 du 4 juin 1998, affaire constitutionnelle 13/98 (J.O. No 66/98), qui établit l'inconstitutionnalité de l'art. 1 de la Loi déclarant propriété de l'Etat les biens immobiliers des familles des anciens rois Ferdinand et Boris et de leurs héritiers (J.O. No 305/47). Dans cette décision la Cour exprime son avis qu'il est inadmissible, du point de vue de la Constitution actuellement en vigueur, de porter atteinte aux droits des individus, selon la distinction de «condition personnelle» ou celle «d'origine».

Dans l'esprit de ce principe s'inscrit aussi la décision No 2 de la Cour du 21 janvier 1999, affaire constitutionnelle No 33/98 (J.O. No 88/99). Dans cette décision la Cour a prononcé l'inconstitutionnalité du paragraphe 1 des Dispositions transitoires et finales de la Loi sur l'administration (J.O. No 108/98) qui interdit aux personnes ayant exercé des fonctions de responsabilité au sein de l'appareil politique et administratif du Parti communiste bulgare d'occuper de postes de responsabilité au sein de l'administration pendant cinq ans.

La Cour a signalé que le droit au travail, énoncé dans l'art. 48 de la Constitution, est limité de façon inadmissible sur la base de l'une des distinctions visées à l'art. 6, al. 2 de la Constitution.

Le principe constitutionnel d'interdiction de la discrimination fondée sur les distinctions visée dans l'art. 6, al. 2 de la Constitution est pris en considération par la Cour constitutionnelle aussi dans l'exercice des compétences qui lui sont attribuées aux termes de l'art. 149, al. 1, p. 4 de la Constitution. Par sa décision No 2 du 18 février 1998, affaire constitutionnelle No 15/97 (J.O. No22/98) la Cour s'est prononcée sur la conformité à la Constitution de la Convention cadre pour la protection des minorités nationales. La Cour a statué que cette Convention est tout à fait conforme aux principes constitutionnels fondamentaux et en particulier à la disposition de l'art. 6, al. 2 de la Constitution portant sur la limitation des droits des citoyens sur la base des distinctions de race, de religion, de nationalité et d'appartenance ethnique.

L'autre principe constitutionnel d'importance, découlant de l'art. 6, al. 2 de la Constitution, selon lequel la limitation légitime des droits des citoyens et l'établissement de différences dans le régime juridique, sur la base des distinctions autres que celles visées dans l'art. 6, al. 2, sont constitutionnellement admissibles, est également appliqué dans nombre de décisions de la Cour constitutionnelle.

A titre d'exemple on peut citer la décision No 1du 11 février 1993, affaire constitutionnelle No 32/92, (J.O. No 14/93), par laquelle la Cour a statué que la Loi sur l'application provisoire de certaines exigences complémentaires concernant des membres des directions des organisations scientifiques et de la Haute commission d'attestation (J.O. No 104/92) n'est pas contraire à la Constitution parce que les

distinctions, visées dans l'art. 6,al. de la Constitution, sont exhaustivement énumérées alors que la limitation des droits, sur la base d'autres distinctions, est constitutionnellement admissible. Ainsi par exemple le principe du professionnalisme, visé dans la loi en question, n'est pas cité dans l'art. 6, al. 2 de la Constitution.

Par sa décision No 1 du 16 janvier 1997, affaire constitutionnelle No 27/96, (J.O. No 9/97), la Cour a rejeté la requête demandant l'établissement d'inconstitutionnalité du paragraphe 1 et du paragraphe 2 de la Loi modifiant et complétant la Loi sur la protection des dépôts et des comptes en banques de commerce pour lesquelles la Banque Nationale Bulgare a demandé l'ouverture d'une procédure de déclaration en faillite (J.O. No 90/96). La Cour a noté que la protection inégale, des déposants de la part de l'Etat, dépasse, dans ce cas, la question de l'inadmissibilité du traitement inégal des citoyens, découlant de l'art. 6, al. 2 de la Constitution.

La Cour a utilisé la même approche dans sa décision No 18 du 14 novembre 1997, affaire constitutionnelle No 12/97, (J.O. No 110/97). Par cette décision la Cour a rejeté la demande d'inconstitutionnalité du texte de l'art. 9, al. 1, p. 1 de la Loi sur les banques (J.O. No 52/97).

La Cour a considéré que l'exigence à l'égard des membres du conseil d'administration et du conseil des directeurs d'avoir fait des études supérieures en droit ou économie n'est pas une discrimination inadmissible aux termes de l'at. 6, al. 2 parce que cette exigence de la loi ne figure pas parmi les distinctions, visées dans cet article.

Les exemples, cités de la pratique de la Cour constitutionnelle, qui devient, il faut le dire, pratique courante, témoigne clairement du rôle que la Cour constitutionnelle joue en matière de protection des droits des citoyens contre des dispositions de loi discriminatoires.

АРМЕНИЯ

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Некоторые вопросы имплементации Европейской конвенции о правах человека в Республике Армения

25 января 2001г. Республика Армения, став членом Совета Европы, обязалась принять принцип верховенства права.

Как известно, Конвенция о защите прав человека и основных свобод 1950г. от других аналогичных международных договоров и соглашений отличается тем, что для гарантирования исполнения обязательств государств, предусмотренных Конвенцией и протоколами к ней, действует специальная надзорная система в лице Европейского суда по правам человека и Комитета министров Совета Европы.

Европейская конвенция о правах человека имеет, образно говоря, "свой собственный" суд. В свое время о Конвенции, лежащей в основе этого Суда и его деятельности, достаточно оптимистически высказался Уинстон Черчилль. 17 августа 1949г. он, как представитель Соединенного Королевства, на первом заседании Совещательного конгресса Совета Европы заявил: "Как только будут согласованы основы прав человека – в духе решений, принятых Организацией Объединенных Наций в Женеве, но, я уверен, в гораздо более краткой форме, – надеемся, удастся создать Европейский суд, в рамках которого дела о нарушении этих прав в нашем сообществе из 12 стран можно будет выносить на суд цивилизованного мира"1.

Я уверен, что эффективность Европейской конвенции о правах человека и Европейского суда у многих сомнения не вызывает.

Как показали исследования опыта других государств, до присоединения к упомянутой Конвенции желательно провести в стране некоторые организационно-подготовительные работы.

Накануне ратификации Конвенции в нашей республике уже были опубликованы Конвенция и протоколы к ней на армянском языке и розданы судьям, прокурорам, адвокатам, а также работникам законодательной и исполнительной сфер. На армянском языке изданы также Регламент Европейского суда по правам человека и его решения. При содействии наших иностранных коллег для судей, прокуроров и адвокатов республики были

организованы семинары, в которых приняли участие также судьи и эксперты Европейского суда по правам человека.

Можно сказать, что, с точки зрения осведомленности, наша республика действительно готова к исполнению Конвенции.

Прежде чем говорить о некоторых вопросах, связанных с имплементацией Европейской конвенции о правах человека, я хотел бы специально остановиться на постановлении Конституционного Суда Республики Армения относительно Конвенции, потому что, по моему мнению, разъяснения и анализы, нашедшие место в постановлении Конституционного Суда Республики Армения, – серьезные аргументы, имеющие теоретическое и практическое значение, и могут быть полезны лицам, занимающимся вопросами имплементации Конвенции.

Конституционный Суд в своем постановлении от 22 февраля 2002г., рассматривая вопрос о соответствии закрепленных в Конвенции о защите прав человека и основных свобод 1950г. и в протоколах к ней N 1, 4 и 7 обязательств Конституции РА, констатировал имеющие, на мой взгляд, важное значение следующие исходные положения:

1. Конвенция от 4 ноября 1950г. призвана защитить от органов государственной власти лиц и общественные организации, что является одним из важных свойств правового государства, закрепленных в статье 1 Конституции Республики Армения. Конвенция и протоколы основаны на таких правах и мерилах, которые созвучны духу и букве гарантированных Конституцией Республики Армения и универсальными международными договорами Республики Армения прав и основных свобод человека.

2. В силу статьи 4 Конституции РА государство обязано защищать права и свободы человека, а также их возможные ограничения осуществлять в соответствии с нормами и принципами международного права.

3. Перечисленные в Конституции РА права и свободы не могут считаться исчерпывающими, т.к. человек и гражданин могут иметь другие общеизвестные права и свободы; это, в особенности, обусловлено тем, что нормы Конституции РА относительно прав и свобод человека имеют не запрещающий, а уполномочивающий характер.

4. Несмотря на то, что ряд прав и свобод, нашедших место в рассматриваемой Конвенции и протоколах, непосредственно не закреплены в Конституции РА (например, закрепленное в статье 34 Конвенции право лиц и общественных организаций обращаться в международный суд за защитой своих прав и свобод не имеет аналогичной нормы в Конституции РА), тем не менее значительная часть закрепленных в Конвенции и протоколах к ней N 1, 4 и 7 прав и свобод в содержательном плане созвучна правам и свободам, закрепленным в других действующих международных документах с участием РА, в частности в Международном пакте о гражданских и политических правах 1966 г. и протоколах к нему, как и в Международном пакте об экономических, социальных и культурных правах 1966 г. Следовательно, предусмотренные Европейской конвенцией и протоколами к ней обязательства в аспекте прав и свобод человека и гражданина, а также их возможные ограничения для

Армении уже имеют обязательную юридическую силу независимо от того, ратифицирует Парламент Конвенцию или нет.

5. Цели или принципы защиты закрепленных в Конвенции и протоколах прав и свобод человека в основном созвучны целям и принципам предусмотренных Конституцией РА норм и положений, регулирующих однородные правоотношения. В то же время между нормами Конвенции и нормами Конституции РА имеются определенные различия как с точки зрения формулировки, так и в содержательном плане. Однако эти различия не направлены на целевое ограничение прав и свобод лиц, находящихся в правомочии РА. Сущность различия заключается в том, что конвенционные нормы защищают права и свободы человека в более широком объеме, чем соответствующие нормы Конституции РА.

Думаю, что важность решения Конституционного Суда РА обусловлена не только тем, что оно может стать для судей указателем при рассмотрении дел относительно защиты прав и свобод, предусмотренных Европейской конвенцией о правах человека, но и тем, что оно содержит серьезные исходные правовые установки для рассмотрения и решения дел, соприкасающихся с правами, предусмотренными в других международных документах относительно прав человека.

Республика Армения после ратификации Конвенции для обеспечения ее исполнения должна была предпринять ряд практических шагов, в том числе: предложить трех кандидатов в судьи Европейского суда, один из которых должен был быть назначен судьей; назначить полномочного представителя для координации своей деятельности с Европейским судом и сформировать его аппарат; решить вопрос агента; провести серьезные работы по приведению законодательства республики в соответствие с требованиями этого международного документа, а также принять меры для повышения уровня научной подготовки судей Республики Армения по вопросам международного права и конституционного права, чтобы они могли ориентироваться и реализовывать положения Конвенции, в том числе учитывая прецедентное значение решений Европейского суда.

После ратификации Конвенции прошло уже 10 месяцев, но, насколько я осведомлен, до сих пор еще даже не предложены кандидаты в судьи Европейского суда.

Надеюсь, что, хоть и с опозданием, все-таки решится вопрос назначения вышеуказанных должностных лиц. Требуется более серьезная работа по приведению законодательства республики в соответствие с требованиями Конвенции.

Для имплементации Европейской конвенции о правах человека необходимо осуществить ряд мероприятий нормативного правового характера, имеющих первостепенное значение.

В республике должна быть создана необходимая законодательная база для обеспечения исполнения решений Европейского суда по правам человека.

В частности, необходимо в законодательстве Республики Армения предусмотреть порядок оплаты суммы, предоставленной Европейским судом потерпевшей стороне в качестве справедливого возмещения и указанной в

решении Суда. Для разрешения этого вопроса, по-видимому, будет необходимо принять специальный закон, который установит порядок оплаты суммы, предоставленной в качестве справедливого возмещения на основе решения Европейского суда, а также на основе соглашения, достигнутого посредством дружеского урегулирования. Этот закон должен решить такие вопросы, как: кто должен предоставить финансовые средства для возмещения, оплата должна осуществляться наличными или по перечислению, в каких случаях и на каких основаниях можно возбудить обратный иск против тех следователей, прокуроров и судей, которые виновны в причинении ущерба?

Для имплементации Европейской конвенции о правах человека необходимо пересмотреть процессуальное законодательство республики с учетом того, чтобы наши суды получили возможность пересматривать те дела, в связи с которыми Европейский суд вынесет своё решение. Необходимость этого обусловлена тем, что часто совершенное по отношению к потерпевшему правонарушение, по сущности, является таковым, что восстановление нарушенного права лица только предоставлением справедливого возмещения недостаточно. Учитывая подобные случаи, для исполнения решения Европейского суда необходимо, чтобы внутригосударственное законодательство государства-ответчика предусмотрело особый порядок, с помощью которого будет возможно восстановить положение, имеющее место до правонарушения.

Между тем, несмотря на то обстоятельство, что Конвенция прямо не обязует стороны предусмотреть во внутригосударственном законодательстве законодательные основы пересмотра дела и возобновления производства, все же, как показывает практика, наличие таких оснований в национальном законодательстве необходимо.

Для решения этой задачи Комитет министров Совета Европы 19 января 2000 г. принял рекомендацию по пересмотру или возобновлению на внутригосударственном уровне дел на основании решений Европейского суда.

В рекомендации отмечено, что государства-участники Конвенции должны в своих внутригосударственных правовых системах обеспечить соответствующие возможности пересмотра дела, включая возобновления производства в тех отдельных случаях, когда Европейский суд пришел к заключению, что имело место нарушение Конвенции.

В связи с этим вопросом Европейский суд в своем решении по делу “Папамихалопулос против Греции” от 31 октября 1995 г. отметил, что “решение, которым Суд признал, что имело место нарушение, обязует государство-ответчика устранить нарушение и компенсировать его последствия восстановлением положения, имеющего место до нарушения”.

Ряд государств-членов Совета Европы уже приняли специальное законодательство, предусматривающее возможность пересмотра дела и возобновления производства на основе решения Европейского суда. Эта задача должна быть разрешена и в нашей республике.

Необходимость пересмотра дела особенно важна в тех случаях, когда потерпевшая сторона и после принятия решения Судом продолжает, вследствие оспариваемых внутригосударственных решений, нести серьезные убытки,

испытывать отрицательное воздействие, которые не компенсируются справедливым возмещением и могут быть улажены только посредством пересмотра дела и возобновления производства. Это может относиться к тем лицам, которые приговорены к долгосрочному заключению и которые находятся в тюрьме в то время, когда Европейский суд рассматривает дело относительно них. Это может относиться и к тем случаям, когда, например, лицо несправедливо лишилось некоторых гражданских и политических прав, в частности не признается его правоспособность и правосубъектность, лицо объявлено недееспособным или ему запрещено заниматься политической деятельностью и т.д. То есть налицо прямая причинная связь между признанным решением Суда правонарушением и продолжающимися отрицательными последствиями по отношению к потерпевшей стороне.

Возобновление производства, как правило, имеет место, когда Европейский суд постановляет, что решение национального суда относительно осуждения лица принято: 1) с нарушением Европейской конвенции или протоколов к ней; 2) если нарушение своим характером и тяжестью вызывает основательные сомнения в виновности лица; 3) ущербные последствия этого нарушения не компенсированы оплатой справедливого возмещения; 4) продолжающееся правонарушение может быть приостановлено только посредством возобновления производства данного уголовного дела.

Примером сказанному может служить рассмотренное Европейским судом 1 октября 1982 г. дело "Пирсяк против Бельгии". По данному делу Суд решил, что имело место нарушение принципа беспристрастности судьи, предусмотренного статьей 6 Конвенции. По данному делу одно и то же лицо выступило в качестве прокурора, а потом при рассмотрении дела в суде – в качестве председателя суда. Апелляционный Суд Бельгии, приняв за основу решение Европейского суда, отменил решение Суда присяжных и передал дело на рассмотрение другого суда.

В Уголовно-процессуальном кодексе Республики Армения имеется статья о возобновлении производства дела. Это статья 408, которая, однако, нуждается в редактировании.

Согласно статье 408 Уголовно-процессуального кодекса Республики Армения, дела возобновляются в результате вновь открывшихся обстоятельств.

Если уголовно-процессуальное законодательство РА считает основанием для возобновления дела наличие только вновь открывшихся обстоятельств, то согласно статье 4 Протокола N 7 к Конвенции пересмотр дела может иметь место в соответствии с законом и уголовным судопроизводством данного государства, если стали известны новые или вновь открывшиеся обстоятельства или в процессе предшествующего рассмотрения имели место существенные недостатки, которые могли повлиять на его результат.

Таким образом, согласно статье 4 Протокола N 7 к Европейской конвенции, основанием для пересмотра дела считается наличие не только вновь открывшихся обстоятельств, но и возникновение новых обстоятельств. Есть серьёзное различие между этими двумя понятиями. Вновь открывшиеся обстоятельства – это те обстоятельства, которые существовали в момент вынесения приговора, но не были известны суду. Между тем новые

обстоятельства открываются после вынесения окончательного приговора суда. Решение Европейского суда – новое обстоятельство. Следовательно, законодательство РА должно быть изменено, и им должно быть установлено, что основанием для возобновления производства дела могут служить не только вновь открывшиеся обстоятельства, но и новые обстоятельства.

Для имплементации Европейской конвенции о правах человека и протоколов, думаю, важное значение имеет также вопрос взаимоотношений Европейского суда и национальных судов государств-участников. Важность этого вопроса обусловлена, особенно, прецедентным значением решений Европейского суда по правам человека. Конечно, исследования в этом направлении вряд ли приведут к равноприемлемым для всех решениям. Однако, думаю, в общем эти взаимоотношения должны квалифицироваться как имеющие координационный характер. Подобный подход обусловлен тем, что, с одной стороны, решения Европейского суда имеют надгосударственный характер, а, с другой – национальные суды в осуществлении своих функций независимы даже от своих государственных органов. По этому случаю можно сказать, что решения Европейского суда имеют обязательную юридическую силу для государства, а для внутригосударственных судов имеют сугубо прецедентное значение. А ответ на вопрос, обязаны ли внутригосударственные суды следовать прецедентному праву Европейского суда, может быть следующим: хотя не предусмотрена прямая обязанность внутригосударственных судов руководствоваться решениями Европейского суда, тем не менее следование прецедентному праву исходит из обязанности внутригосударственных правоприменительных органов применять положения Конвенции.

В вопросе непосредственного применения положений, предусмотренных не только Европейской конвенцией о правах человека, но и другими международными правовыми документами, серьезную роль играют суды общей юрисдикции РА.

Важной функцией судов общей юрисдикции является разрешение противоречия между Конвенцией или международным договором и национальным законом. Наличие такого противоречия, по сути, – наличие спора, т.к. противоречие может быть также кажущимся. Споры такого характера должны быть разрешены только судом.

К сожалению, в практике нашей республики уже имеется отклонение от этого важного принципа, которое было допущено Советом председателей судов РА.

Совет председателей судов РА, в основе формирования и деятельности которого лежит Закон РА "О судоустройстве" от 18 июня 1998 г., уполномочен осуществлять функцию организационно-консультативного характера. Более того, в изложенном в статье 27 Закона списке его полномочий нет прямого упоминания о том, что он может проверять соответствие законов и других нормативных актов международным договорам, ратифицированным Республикой Армения, и по этому вопросу принимать заключение. Вопреки этому обстоятельству, Совет председателей судов РА в своем решении N 20

(пункт 4) от 12 февраля 2000 г. пришел к такому заключению, которое, несмотря на важность, выходит за рамки его полномочий.

Считаю целесообразным изложить текст пункта 4 решения полностью: "Согласно части 5 статьи 6 Конституции Республики Армения ратифицированные международные договоры – составная часть правовой системы РА. Если в них установлены иные нормы, чем предусмотрено законами, то применяются нормы договора". 1 апреля 1991г. Республика Армения присоединилась к Пакту "О гражданских и политических правах", пункт 4 ст. 9 которой устанавливает, что любое лицо, лишенное свободы в результате ареста или задержания под стражей, наделено правом рассмотрения его дела в суде, чтобы этот суд мог поспешно принять решение о законности ареста или вынести решение об освобождении, если арест незаконный.

Исходя из требований вышеуказанной Конвенции и ст. 39 Конституции РА, в части 5 ст. 137 Уголовно-процессуального кодекса РА установлено, что "решение суда о выборе ареста как средства предотвращения может быть обжаловано в вышестоящий суд". Однако этот же Кодекс не урегулировал порядок проверки законности и обоснованности решений Апелляционного суда о выборе ареста как средства предотвращения, о продлении срока задержания под стражей. Следовательно, в подобных случаях решение Апелляционного суда может быть обжаловано в Кассационный суд. Палата по уголовным и военным делам должна рассмотреть дело в соответствии с правилами, установленными ст. 288 Уголовно-процессуального кодекса РА.

Из сути приведенного решения не трудно догадаться, что право принятия подобного решения может иметь только суд, а не орган, имеющий полномочия чисто организационно-консультативного характера.

Следующий вопрос, по которому хотелось бы высказаться, – это значение и роль конституционных судов в имплементации Европейской конвенции о правах человека.

Надеюсь в ходе этого семинара найти ответ на этот вопрос. Известно, что конституционные суды отдельных стран, в особенности конституционные суды новых демократических стран, стремятся в этом вопросе проявить определенную активность, что, на мой взгляд, больше делается для того, чтобы подчеркнуть их передовую позицию.

Думаю, что в этом вопросе желательно, чтобы наша республика проявила сбалансированный подход. Согласно Конституции РА Конвенция является составной частью правовой системы страны, однако она не является частью Конституции, как это имеет место в ряде других стран. А Конституционный Суд РА уполномочен проверять соответствие нормативных актов только Конституции, то есть для проверки конституционности любого правового акта Конституционный Суд РА в качестве основы должен принимать только Конституцию и никакой другой акт.

Конституционный Суд РА в своих решениях несколько раз ссылался на Европейскую конвенцию о правах человека, думаю, однако, что это делалось не с целью обоснования конституционности или неконституционности проверяемого национального нормативного акта, а с целью глубже раскрыть и разъяснить идеологическую направленность и внутреннюю логику содержания

положений Конституции РА. По-моему, и Конвенция, и решения Европейского суда для Конституционного Суда РА должны играть сугубо содействующую, вспомогательную роль, но никогда не должны быть правовой основой для решения вопроса конституционности нормативного акта.

К этому вопросу нужно относиться по-иному, когда речь идет о судах общей юрисдикции. Несмотря на то, что Конституция РА не наделила суды общей юрисдикции полномочиями по проверке соответствия законов РА ратифицированным международным договорам, однако они, как правоприменительные органы, обязаны в своей каждодневной деятельности не только обеспечивать применение противоречащих законам ратифицированных международных договоров, но и обеспечивать применение любого ратифицированного международного договора, если даже касательно применения этого договора нет какого-либо противоречия.

Изучение судебной практики РА свидетельствует, что суды общей юрисдикции очень редко ссылаются на Европейскую конвенцию о правах человека и протоколы к ней, а также на решения Европейского суда, а в случае ссылки должным образом не дают разъяснения её необходимости.

Я могу привести ряд конкретных примеров для доказательства сказанного мною, однако я не делаю этого, так как это упущение носит, на мой взгляд, временный характер. Многие судьи пока ещё полноценно не овладели ни Конвенцией и протоколами к ней, ни решениями Европейского суда о правах человека. Как мне представляется, те редкие ссылки, которые делают судьи, имеют целью больше застраховать собственные судебные решения, чем сделать их более обоснованными и аргументированными.

GERMANY

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The protection of fundamental rights by the Federal Constitutional Court, in particular, by way of a constitutional complaint

I. Different Ways of Ensuring the Protection of Fundamental Rights

1. The role of the Federal Constitutional Court as regards the protection of fundamental rights

The Constitution of the Federal Republic of Germany (i.e. the Basic Law) contains, in its first part, an extensive catalogue of fundamental rights. The fundamental rights include, for example, the guarantee of property, the occupational freedom, i.e. the right to freely choose one's occupation or profession, the freedom of expression, the freedom of the press, the freedom of creed and of conscience, the protection of marriage and the family, etc. All these fundamental rights are binding upon legislature, executive and judiciary as directly valid law (Article 1, sub-section 3 of the Basic Law). This means that all holders of public authority must directly observe the fundamental rights. For that reason, the protection of the fundamental rights is not delegated to one specific body; the protection of the fundamental rights is; in principle, the task of all state bodies within their respective spheres of activities.

The Basic Law, has, however, established a special court for constitutional disputes - the Federal Constitutional Court. The Federal Constitutional Court stands at the top of the German court system. It is not an ordinary court of appeal in proceedings of civil, criminal or administrative law. Its exclusive power is to decide on questions of Federal constitutional law. The Basic Law and the Federal Constitutional Court Act provide different types of proceeding by means of which practically all conceivable constitutional disputes can be decided. This also includes disputes that concern the protection of fundamental rights.

There are several ways in which problems that concern the protection of fundamental rights can be brought before the Federal Constitutional Court. I would like to explain the different ways with the help of an example:

A specific German Act (on the practice of craft trades) provides that a craftsman - for example a shoemaker or a car mechanic - may only work as an entrepreneur, i.e. in an self -employed capacity, if he has been awarded a master craftsman's certificate after having passed a specific, rather difficult practical and theoretical examination (the so-called Meisterprilfung). Many craftsmen do not succeed in passing this examination and therefore cannot practice their trade in a self-employed capacity but only as employees of a master craftsman. Some of them regard this as an unconstitutional restriction of their occupational freedom. The question whether the respective Act violates these craftsmen's fundamental rights

can be submitted to the Federal Constitutional Court for decision in at least three different manners:

· The first manner is by way of the so-called abstract judicial review, i.e. a proceeding that concerns the abstract review of a statute (Article 93, sub-section 1, number 2 of the Basic Law). An abstract judicial review proceeding is opened upon application of the Federal Government or of one of the governments of the 16 Federal States (Lдnder) or of a third of the members of the German Parliament (Bundestag). The Federal Constitutional Court, then, decides whether or not a statute -like, for example, the regulations governing the examination for the master craftsman's certificate - is compatible with the Basic Law. The decision has the force of law and is binding upon all bodies of the state.

· The second manner is by way of the so-called concrete judicial review, i.e. a proceeding that concerns the review of a statute, which is relevant to a specific lawsuit (Article 100, sub-section 1 of the Basic law). If a court is convinced that a law on whose validity its decision depends is unconstitutional, it must suspend the proceedings and obtain a preliminary decision from the Federal Constitutional Court. This means that every German court has to examine whether a law that it must apply is compatible with the Constitution and also with the fundamental rights that are contained in the Constitution. However, only the Federal Constitutional Court is entitled to hold, in a decision that is generally binding, whether the statute is constitutional or not. In our example, a craftsman who did not pass the examination for a master craftsman's certificate may bring an action before an administrative court in order to obtain the permission to practice his trade in a self-employed capacity. This case will lead to a concrete judicial review proceeding, if the administrative court concludes that the statutory requirement of obtaining a master craftsman's certificate for practising a trade in a self-employed capacity violates the fundamental right of occupational freedom. The administrative court will then submit the issue to the Federal Constitutional Court for decision and the Constitutional Court will decide upon the validity of the regulation.

· The third manner, finally, is by way of an individual constitutional complaint (Article 93, sub-section 1, number 4a of the Basic Law). The craftsman can institute a constitutional complaint proceeding if the action that he brought before the administrative court was unsuccessful and if the court did not submit the case to the Federal Constitutional Court for review. In this case, the person affected can directly file a constitutional complaint before the Federal Constitutional Court alleging that the statutory regulations and the decisions by public authorities and courts that prevent him from practising his trade as an entrepreneur violate his fundamental right of occupational freedom.

All three manners exist side by side, they do not exclude each other. If, for example, a proceeding that concerns the abstract control of a statute is already pending before the Federal Constitutional Court, a citizen who is affected by the statute can, at the same time, file a constitutional complaint. Moreover, the constitutional complaint complements the possibility of the concrete judicial review in an important manner, because if a court, for whatever reason, fails to obtain a decision from the Federal Constitutional Court, the citizen who is affected still has the possibility of bringing the case before the Federal Constitutional Court himself

by way of a constitutional complaint. This shows that the system of protection of the fundamental rights by the Federal Constitutional Court is almost perfect.

2. Some statistics

In practice, the constitutional complaint is by far the most frequent type of proceeding. At present, approximately 5,000 constitutional complaints are brought before the Federal Constitutional Court every year. Of the about 134,400 proceedings that the Federal Constitutional Court dealt with until the end of 2001, i.e. in the first fifty years of its existence, about 129,300 were constitutional complaints, i.e. approximately 96.2% of all proceedings. However, only about 3,300 constitutional complaints out of a total of approximately 129,300 were successful, this is only about 2.5%.

The relatively small number of successful constitutional complaints gives, incidentally, no indication of the importance of this legal remedy. On the one hand, a decision repealing a sovereign act that is complained of frequently has an impact that reaches far beyond the individual case involved. If, for example, the Federal Constitutional Court overturns a court decision because it rests on an unconstitutional interpretation of a statutory provision, this means that in future all state bodies, including all courts, must base their decisions on the interpretation of the provision which is in conformity with the constitution. On the other hand, if a constitutional complaint is rejected, the statement of the reasons for the decision to that effect often contains observations on questions of constitutional law which have a considerable impact on the activities of the legislature, the executive and the judiciary that go beyond the individual case involved.

3. The constitutional complaint

After having given this general introduction, I will, in the following, focus on the constitutional complaint proceeding because the constitutional complaint is the most important instrument by which the Federal Constitutional Court ensures the protection of fundamental rights. At the same time, it is the type of proceeding that is particularly characteristic of the Federal Constitutional Court's activity.

Pursuant to Article 93, sub-section 1, number 4a of the Basic Law, the Federal Constitutional Court rules on constitutional complaints, which can be filed by any person alleging that one of his fundamental rights or one of his rights contained in certain other Articles of the Basic Law has been violated by public authority. The Basic Law and the Federal Constitutional Court Act specify a number of procedural requirements for the admissibility of a constitutional complaint. I will, at first, give a summary of these requirements (II.) and I will make, then, some short remarks on the acceptance procedure, i.e. a kind of preliminary review of each constitutional complaint (III.), and on the enforcement of the decisions of the Federal Constitutional Court (IV.).

II. Prerequisites for the Admissibility of a Constitutional Complaint

The following requirements must be fulfilled for filing an admissible constitutional complaint:

1. First question: Who is entitled to file a constitutional complaint?

"Any person", as the Basic Law (Article 93, sub-section 1, number 4a) says, can file a constitutional complaint. This means: Anyone is entitled to file a constitutional

complaint that challenges the violation of a fundamental right to exactly the same extent that he is a holder of the respective fundamental right. In this way, the entitlement to file a constitutional complaint is the counterpart, under procedural law, of the fundamental right that is granted under substantive law.

The requirement of being entitled to file a constitutional complaint is fulfilled, without any problem, by all natural persons who are Germans. The same applies to foreigners to the extent that they are holders of the respective fundamental right. This is the case, for instance, as concerns the freedom of speech, the freedom of the press, the guarantee of property, the principle of equality before the law, or the protection of marriage and the family. If a fundamental right is expressly reserved to Germans only, like, for example, the freedom of assembly, it is possible for foreigners to invoke the fundamental right of the free development of one's personality (Article 2, sub-section 1 of the Basic Law) in order to file a constitutional complaint.

Finally, domestic legal persons, like, for instance, an association or a stock corporation, can also file constitutional complaints. Domestic legal persons can invoke fundamental rights if those rights, by their nature, are applicable to the legal person (Article 19, subsection 3 of the Basic Law). This is the case if the formation and the activity of the legal person is an expression of the free development of the personality of the individuals that are behind the legal person, for example the shareholders of a stock corporation.

2. The second requirement is that the complainant must claim the violation of a fundamental right by "public authority".

All powers, i.e. the legislative power, the executive power and the judicial power, fall under the concept of "public authority". This means that a law that was enacted by Parliament can be challenged by a constitutional complaint, but also an ordinance or a decision of the executive power, or a judgement of a court.

The most frequent type of constitutional complaint, however, is the constitutional complaint that challenges the iudgement of a court. The reason for this is that in the case of the violation of rights, recourse to the ordinary courts (i.e. to those courts which are not exclusively competent for constitutional matters) must be taken first before a constitutional complaint can be filed. The result of this is that in most cases, constitutional complaints primarily challenge judgements issued by a court of last instance. I will come back to this in greater detail later on.

A constitutional complaint can only challenge acts of German public authority. Acts of foreign states and of the former German Democratic Republic cannot be reviewed. The same applies to regulations of the European Community and to all other acts adopted by the institutions of the Communities. A different and difficult question -which I will leave aside- is whether German regulations that are based on European law, or execute European law, can be reviewed by way of a constitutional complaint.

3. The third requirement is that the complainant must claim a violation of his fundamental rights or of one of his rights that are additionally specified.

This provision contains several points:

a) Only the violation of specific riqhts can be claimed. These rights are, first and foremost, the fundamental rights that are listed in Part I of the Basic Law (Articles

1 to 19). Apart from this, the violation of certain rights that are additionally mentioned in Article 93, subsection 1, number 4a of the Basic Law can also be challenged. These rights comprise: the right to resist any person seeking to abolish the constitutional order (Article 20, sub-section 4 of the Basic Law), certain civic rights (Article 33), the right to vote (Article 38), the right to one's lawful judge (Article 101), the right to a hearing in court, and certain guarantees in criminal proceedings and in the event of detention (Articles 103 and 104). All these rights that are additionally mentioned in Article 93 are equivalent to the fundamental rights in Part I of the Basic Law (grundrechtsgleiche Rechte).

A constitutional complaint can, however, not be based on the violation of other provisions that concern fundamental or human rights; in particular, it cannot be based on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As concerns the fundamental rights of the Basic Law, it is important to point out a special feature of the interpretation of Article 2, sub-section 1 of the Basic Law. Since its so-called "Elfes" Decision (BVerfGE 6, 32), the Federal Constitutional Court understands the free development of one's personality that is guaranteed in this provision in the sense of a general freedom of action. This means that Article 2, sub-section 1 protects every activity of a citizen that is not already protected by a specific fundamental right. Thus, a comprehensive protection of fundamental rights is ensured and, correspondingly, far-reaching possibilities of invoking the jurisdiction of the Federal Constitutional Court, by way of a constitutional complaint.

Just to make another point clear: a constitutional complaint cannot be directly based on a violation of objective constitutional law, for instance on a violation of regulations that govern the allocation of competencies or procedural provisions. A fundamental right, however, may only be directly or indirectly restricted by a law that is constitutional in every respect. If, therefore, the violation of a fundamental right is claimed in an admissible manner, the Federal Constitutional Court also examines whether the law or other legal basis is in accord with the regulations of objective constitutional law. This means that when the violation of a fundamental right is asserted, this allegation is like a "lever" for a comprehensive review of constitutionality.

b) The complainant must, then, sufficiently substantiate the allegation that one of his fundamental rights has been violated, and he must put forward the allegation in a clear manner. The violation of a fundamental right must at least appear possible.

c) Apart from this, the complainant must demonstrate that the challenged measure affects him "personally presently and directly".

The complainant is "personally" affected if he is addressed by a statute or other measure. If this is not the case the complainant must explain in detail to what extent he is indirectly affected. A popular action, however, i.e. an action that challenges an act of public authority that does not affect the complainant in any way, is inadmissible.

Moreover, the measure must affect the complainant "presently." This means that the challenged act of public authority must already show effects and that it must still be in force.

Finally the complainant must demonstrate that the measure affects him "directly." This prerequisite is particularly important in the case of constitutional complaints that challenge laws or other statutes. A law only affects a complainant directly if it does not require execution by the public authorities. If it requires an act of execution, the complainant must wait for this act and, if necessary, challenge this act before the competent courts. A constitutional complaint is, then, only possible against the judgement of the court of last instance.

4. This becomes clearer when we look at another requirement for the admissibility of a constitutional complaint, namely the exhaustion of all legal remedies.

If legal remedies against the claimed violation of a fundamental right exist, a constitutional complaint can not be filed until all remedies are exhausted (§ 90 sub-section 2 of the Federal Constitutional Court Act). Legal remedies are all possibilities of recourse to a court that are provided by rules of procedure, for example by the Code of Civil Procedure or by the Rules of the Administrative Courts.

The complainant must have unsuccessfully tried to remedy the violation of his fundamental right by invoking the jurisdiction of the competent courts. The complainant must also resort to all rights of appeal that are legally admissible. If he fails to do so, his constitutional complaint is inadmissible. Apart from this, the Federal Constitutional Court has established a general principle of subsidiarity. Pursuant to this principle, the complainant must also resort to all other legal possibilities that are suitable to remedy the claimed violation of a fundamental right in the individual case.

One reason for this regulation is the function of the constitutional complaint as an extraordinary and subsidiary legal remedy. It would be contrary to this function if the constitutional complaint could be filed instead of or parallel to the "normal" admissible legal remedies. Another reason for this regulation is to reduce the large number of constitutional complaints and to enable the Federal Constitutional Court to concentrate on the questions that are specifically constitutional. At the same time, this regulation emphasises the responsibility of the ordinary courts for safeguarding and enforcing the fundamental rights, because it is first and foremost the ordinary courts that are to provide legal protection against the violation of fundamental rights. Finally, the previous exhaustion of all legal remedies is also supposed to convey to the Federal Constitutional Court how the ordinary courts assess the case in fact and in law. Otherwise, the Federal Constitutional Court would easily run the risk of having to take far-ranging decisions on an in- complete basis of information.

In exceptional cases, however, the Federal Constitutional Court can decide about a constitutional complaint immediately (i.e. before all legal remedies are exhausted) if the constitutional complaint is of general relevance or if earlier recourse to other courts would entail a serious and unavoidable disadvantage for the complainant.

5. There are also time-limits to observe.

A constitutional complaint shall be filed and substantiated within one month. The time- limit commences with the service or informal notification of the complete decision that is challenged by the constitutional complaint (§ 93 sub-section 1 of the Federal Constitutional Court Act).

If the constitutional complaint challenges a law, it can be filed only within one year, from the entry into force of the law (§ 93 sub-section 3 of the Federal Constitutional Court Act). This time-limit, however, only applies to constitutional complaints that directly challenge a law. It is possible to file a constitutional complaint against an act of execution of the law even after the one-year time-limit. In the context of this constitutional complaint against the act of execution, the Federal Constitutional Court will also review the constitutionality of the law itself.

6. No special requirements exist as to form. The only requirement is that applications for the institution of proceedings must be submitted in writing.

7. The complainant may be represented at any stage of the proceedings by a lawyer or by a professor of law. He is, however, not obliged to do so. Only in oral hearings, which, however, only take place as a rare exception, the complainant has to be represented in this manner (§ 22 of the Federal Constitutional Court Act).

8. Finally the cost: In principle, constitutional complaint proceedings, like all other proceedings before the Federal Constitutional Court, are free of charge. The Court can only impose a fee of up to €2,600 in cases in which the constitutional complaint was filed in an abusive manner (§ 34 of the Federal Constitutional Court Act).

III. Acceptance procedure

1. If a constitutional complaint meets all these requirements, it is admissible. This however does not automatically mean that it is dealt with by the Panel.

As you probably know, the Federal Constitutional Court consists of two Panels (or Senates), each of which is composed of eight judges. Each of the two Panels (or Senates) represents the Federal Constitutional Court as a whole. In view of the large number of constitutional complaints, the Federal Constitutional Court could not work effectively if every single constitutional complaint had to be dealt with directly by a Panel of eight judges. The law, therefore, provides for a preliminary examination, a so-called acceptance procedure (§93a to 93d of the Federal Constitutional Court Act). Each constitutional complaint requires acceptance. And the decision whether a constitutional complaint is accepted or not is at first conferred on chambers consisting of three judges. Each panel must appoint three such chambers. The Chambers' decisions must always be unanimous.

2. A constitutional complaint shall be accepted on two reasons (§ 93a sub-section 2 of the Federal Constitutional Court Act):

- firstly: in so far as it has fundamental constitutional significance or
- secondly: if acceptance is indicated in order to enforce the fundamental rights; this may also be the case if the complainant would suffer especially grave disadvantage as a result of refusal to decide in the complaint.

If one of these two requirements is fulfilled the constitutional complaint has to be accepted. Acceptance is always a question of law, not a political question or a discretionary decision.

3. The chamber has two possibilities of making a final decision (§ 93b and § 93c of the Federal Constitutional Court Act).

- The chamber may refuse acceptance of a constitutional complaint if it is inadmissible or if it does not meet the requirements for acceptance. The chamber need not state its reasons for such a decision. In this way the Federal Constitutional Court is able to reject quickly and without excessive effort the many constitutional complaints which do not have any prospect of success.

- On the other hand, the chamber may accept and immediately approve a constitutional complaint under the following conditions: firstly, acceptance of the complaint is indicated in order to enforce the fundamental rights; secondly, the constitutional issue that determines the judgement has already been decided upon by the Federal Constitutional Court; and, thirdly, the complaint is clearly justified. However, a decision which declares that a law is incompatible with the Basic Law or other Federal law is always reserved to the Panel.

4. If the Chamber does agree upon whether or not to accept a constitutional complaint for decision, the Panel shall decide on acceptance. In this case the constitutional complaint is accepted when at least three of the eight judges agree (§ 93d sub-section 3 of the Federal Constitutional Court Act).

IV. Effects and Enforcement of Federal Constitutional Court Decisions

Finally, I would like to make some remarks about the effects and the enforcement of the Federal Constitutional Court's decisions.

1. The decisions of the Federal Constitutional Court, and the essential reasoning of the decisions, are binding upon the constitutional bodies of the Federation and of the Federal States (Lдnder) and upon all courts and administrative authorities (§ 31 sub-section 1 of the Federal Constitutional Court Act).

If a law is declared compatible or incompatible with the Basic Law, or if it is declared to be null and void, the decision of the Federal Constitutional Court shall have the force of law (§ 31 sub-section 2 of the Federal Constitutional Court Act). The decision shall be published in the Federal Law Gazette by the Ministry of Justice. If the Federal Constitutional Court finds that a law is only in compliance with the Basic Law if it is interpreted in a specific way, this specific interpretation is binding upon all courts or public authorities which have to apply this law.

If the Federal Constitutional Court finds that in the case of a constitutional complaint an administrative authority or a court has applied a valid law in an unconstitutional way, it will overturn their decisions.

In all these cases, no enforcement in the proper sense exists. The Federal Constitutional Court Act also does not provide any regulations on enforcement. The legal effects of the Federal Constitutional Court's decisions arise automatically. In practice, the legal effects are always complied with. The Federal Constitutional Court's authority, and the authority of the principles of the rule of law, of the lawfulness of the action of administrative authorities, and of the other Courts' commitment to law are so strong that coercion is not required in order to enforce the Federal Constitutional Court's decisions.

2. Real practical problems only arise as regards a specific type of cases. The characteristic feature of this group of cases is that the Federal Constitutional Court

holds that a specific regulation is incompatible with the Constitution without declaring it to be null and void.

Let me give you an example: German labour law very often differentiates between employees ("white-collar workers") on the one hand and manual workers ("blue-collar workers") on the other hand. This differentiation also existed in the legal provisions that regulate the termination of employment contracts by the employer. The employer has to observe certain periods of notice if he wants to dismiss an employee or a manual worker. But the periods of notice were shorter for manual workers than they were for employees; the workers' legal position was therefore inferior to that of employees. The Federal Constitutional Court held that this situation was unconstitutional. The Federal Constitutional Court concluded that there must be equal treatment for workers and for employees because there is no factual reason that justifies applying different periods of notice.

The Federal Constitutional Court itself, however, could not create consistency with the Basic Law. If it had declared the regulations about the periods of notice null and void, no periods of notice would have been in force at all. This would have resulted in a deterioration of their legal position for employees and workers alike; this consequence would have been even worse than the unequal treatment of both groups. In such cases, the Federal Constitutional Court therefore only declares the respective Act unconstitutional without declaring it null and void.

It is, then, in the competence and responsibility of the Parliament, to enact a new regulation that ensures equae treatment of both groups. The Parliament has different possibilities at its disposal for doing so: it can extend the worker's period of notice, it can shorten the employees' period of notice, or it can introduce a mixture of both approaches. In such cases, the Federal Constitutional Court therefore only holds that the Parliament is obliged to create consistency with the Basic Law. Sometimes, it sets the Parliament a time-limit for doing so.

Problems may arise as regards the fulfillment of this obligation. Sometimes, the Parliament does not succeed in adopting a constitutional Act in time. This can, for example, be due to the fact that no majority for adopting such an Act can be found in Parliament, or that other problems are regarded as priorranking and more important. In such a case, the question of how to enforce the Federal Constitutional Court's decision would indeed arise. There is no really satisfying answer to this question. At any rate, the Basic Law and the Federal Constitutional Court Act do not provide, for example, the possibility of imposing fines or of making use of other means to put pressure on the responsible bodies of the state. The Federal Republic of Germany, however, has not as yet experienced a definitive struggle of power because the Parliament has always, ultimately, complied with the Federal Constitutional Court's legislative directives. This fact also reflects the Federal Constitutional Court's importance and eminent position in the political system of the Federal Republic of Germany.

ITALY

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Constitutional Court of Italy and Human Rights Protection

1. Judicial review of the constitutional legitimacy of state and regional laws, and enactments having the force of law, makes up the principal, and quantitatively the most important, function of the Italian Constitutional Court (art. 134 of the Constitution).

It is said, therefore, that the Constitutional Court is the "judge of the laws'', in the sense, precisely, that it is called upon to judge the conformity of ordinary State and Regional laws with constitutional norms, rather than to apply the law to concrete facts. Should this review turn out negative, meaning that the Court should find a discrepancy between the constitutional norm and the ordinary law, the law is declared constitutionally illegitimate, and, as a consequence, it is immediately voided.

In choosing the legitimate actors to initiate constitutional review, the Italian Founding Fathers opted for a review that was incidental to the judgment of the case itself. The question of a law's constitutionality is raised -officially, or on the petition of a party -by a judge in the course of a trial, whenever he holds that the question of the norm's constitutional illegitimacy is not manifestly unfounded, and that the question is itself relevant, and thus that its resolution is indispensable to the decision that he will have to make.

If, therefore, we speak of human rights protection as immediate and direct protection, we must say that such is not the work of the Constitutional Court. The Italian legal order assigns this task to the common judge, whose independence from the executive power is guaranteed by the Constitution.

The Constitution does not provide the possibility that an individual rights-bearer might petition the Constitutional Court directly, after having exhausted the ordinary remedies, as happens in the legal orders that recognize individual constitutional petitions (Veifassungsbeschwerde; amparo). The concrete protection of individual rights unfolds and exhausts itself before the common judge, and then passes through two levels of appeal, to which may be added -for the proceedings falling within the competence of the ordinary or military judge -a hearing before the Court of Cassation for violation of legal norms.

Once the remedies before the common judge have been exhausted, the citizen can only petition the European Court of Human Rights in Strasbourg, on the basis of the European Convention for the Protection of Human Rights and Fundamental Liberties of 1950, to which Italy has adhered since the beginning, and the 1998 Added Protocol n. 11 to this Convention, which provides for direct recourse to the Court by a person who alleges a violation of a Convention right. The possible condemnation of a State by the Strasbourg Court cannot always remedy the violation suffered by the individual, because of situations of fact which cannot be changed or final judicial decisions which cannot be revisited. The citizen may win monetary reparations to be paid by the State.

On this subject, I call your attention to the fact that Italy -in the face of thousands of petitions to the Court of Strasbourg in which the violation of the right to a hearing within a reasonable time was alleged, a right guaranteed by Art. 6, paragraph 1 of the European Convention (and now by Article 11 of the Italian Constitution), and numerous condemnations, which verified the existence of an endemic delay of the domestic legal procedures in our country -has introduced a new domestic law remedy, which an individual may make use of in order to obtain fair reparations for the viola1 at ion of this right (law n. 89 of 2001). The Strasbourg Court will not review a claim based on this right unless the domestic remedy has been exhausted.

The efficacy of the human rights ' protection in Italy depends first of all on the efficacy of the ordinary justice system. And, even before that, it depends on the possibility that the legal system enables individuals to pursue legal remedies in the face of acts or practices that violate such rights. On this point, the Italian Constitution provides a comprehensive guarantee: whenever an individual complains that a right is being violated or is in danger of violation, he ought to find a competent judge to hear his claim. If there is a substantial right, there must be a judge competent to know of it; protection gaps or "free trade zones" are not admissible. Indeed, Article 24 of the Constitution provides that "everyone may take legal action to protect individual rights and legitimate interests" (the "legitimate interests" are, in Italian legal terminology, those individual situations protected by norms that regulate government action); Article 113 declares that "the judicial protection of rights and legitimate interests against government violations, before ordinary or administrative judges, is always permitted," and that "such judicial protection may not be limited to particular kinds of appeal or to particular categories of acts."

In practice, the only gaps in protection regard the remedies for the non-legislative acts of organs- like the Parliament -which the jurisprudence does not recognize as administrative acts, and for which there is no possibility of legal recourse. But these are situations of quite dubious constitutional legitimacy. The Constitutional Court considers the principle of judicial protection, and therefore the "right to a judge'', to be one of the "supreme principles" of the constitutional order, which cannot be compromised even by constitutional amendment, because "the guarantee of a judge and a judgment, to everyone, always, for whatever controversy, is intimately connected with the very principle of democracy" (Decision n. 18 of 1982). If it were therefore to happen that the law did not expressly provide a remedy for the violation of a substantial right before an independent and impartial judge, the Constitutional Court, called upon by a judge, though not considered competent by the law, could review the constitutionality of the situation and affirm the possibility of petitioning existing judges, even though the legislature can always regulate or amend the competences (cfr. for example Decision n. 26 of 1999).

2. On the normative level, the Constitutional Court performs an important function of protection in the very delicate area of human rights, understood as those fundamental rights that modern consciousness increasingly recognizes to be an essential feature of human dignity .It is worth being reminded that such rights, in addition to constituting the object of international conventions, also signed by Italy, are expressed and guaranteed in the Constitution: here, not only the general recognition of the inviolable rights of man, contained in Art. 2 ("The Republic recognizes and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality") comes into play, but also more importantly, the protection specifically accorded to the individual rights themselves: either classical civil rights, like religious liberty (articles 8 and 19), personal freedom (Art. 13), the inviolability of the home (Art. 14), freedom of correspondence (Art. 15), freedom of movement and residence (Art. 16), free assembly (Art.17), freedom of association (Art. 18), freedom of speech (Art. 21);

or rights tied to "social and ethical relationships" (family, articles 29-31; health, Art. 32; school, articles 33-34); economic relations (right to work, right to economic freedom and property, articles 35-47); to political relations (active and passive electorate, access to public offices; articles 48-51).

Now it has to be taken into account that Italian judges -before whom, as we have seen, all individual rights may be protected, and whose independence from the executive power is guaranteed by the Constitution-manifest, in general, a significant sensitivity in the area of constitutionally protected rights.

The risk is therefore quite remote that a law, which might only be suspected of harming fundamental human rights, would not be immediately submitted to constitutional review, in the course of any concrete judgement in which that law must be applied cases: that can also be initiated precisely for this purpose, as long as the plaintiff has legally cognizable interest.

The catalogue of rights guaranteed by the Constitution mostly coincide with those contained in the Universal Declaration of Human Rights of 1948, the International Covenant for the protection of Civil and Political Rights of 1966, the European Convention for the protection of Human Rights and Fundamental Freedoms of 1950, and now the Nice Charter of Rights of the European Union of 2001.

The Court, when it is judging the laws, uses only the constitutional dispositions as its parameter: the international conventions, made executive in Italy by ordinary laws, have not yet been considered as sources of law standing above legislative acts, prevailing upon ordinary laws (even though on one occasion the Constitutional Court affirmed that international rights norms occupy a separate position within the legal order, because they derive from a "source that traces back to an atypical competence'', and they are not susceptible of being amended or modified by an ordinary law: Decision n. 10 of 1993; and even though it is possible that the Court might one day return to the issue). Often, the judges, raising questions of the constitutionality of domestic laws, invoke these international norms alongside the Constitution: and the Court generally takes the content of these norms into account in its reasoning.

The system of the incidental review of laws makes it such that the Court is called upon, not only to compare a law's abstract terms with constitutional provisions, but also to judge the conformity of constitutional principles with various legal situations that derive from the application of the laws to concrete cases. It follows that the Court is often induced to interpret the laws, and likewise to confront factual situations that are not expressly covered by the provision of the laws, or pose particular problems. Turning to the interpretation of laws, the Court does not only proceed autonomously, even detaching itself from the conclusions reached by the judge raising the constitutional question; but it has always affirmed the duty -of everyone, therefore judges too -to construe the laws as consistent with the constitution, rejecting those interpretations that lead to unconstitutional consequences. In this way, the Court's jurisprudence approaches the jurisprudence of common judges, so as to give effective application to the rights protected by the Constitution. In the same way, in the case of real or apparent "lacuna" in the laws,

the Court avails itself, or exhorts the judges to avail themselves, of constitutional principles, in order to arrive at constitutionally valid resolutions of concrete cases.

In the face of laws that are constitutionally defective, the Court does not have to choose just between striking down or upholding the law in toto. The Court often adopts interpretative or "manipulative" judgments, which adjust the law's scope to the minimum requirements of constitutionality.

The Court has often proceeded in this way in reviewing laws, including penal laws, from the period prior to the Constitution, that were inspired by principles conflicting with constitutional principles, and that were left on the books, by interpreting them restrictively, or eliminating some of their individual provisions, thereby tailoring their contents to the Constitution.

3. Still, the most interesting insights on the topic of human rights protection are drawn less from our legal system's model of judicial review, than from an analysis of the Court's jurisprudence.

The Court's jurisprudence seems to be inspired on the whole by a generally extensive, protectionist approach to the constitution' s fundamental rights provisions. This can be seen in many areas (from freedom of speech to personal freedom, from the inviolability of the house, to freedom of communications), having recently become quite evident in the area of defendants, rights in the new criminal trial.

The same has happened in the area of social rights (like the right to social security, the right to health or the right to education), in relation to which the Court, mainly through its review of the law's reasonableness, has invoked the principle of formal and substantial equality. In the area of social rights, the Court has faced the very grave problem of the consequences of burdening the public finance, that can follow from recognizing a broader right than that embodied in the governing law, itself accused of unconstitutionality for its violation of the principle of equality. In several cases the Court did not hesitate from making immediately operative decisions, which were criticized for burdening the public budget: though recognizing the legislature's possibility to intervene in order to attenuate such effects, above all with respect to the past, through an appropriate adaptation of the social security rights derived from the Court's decisions.

It must likewise be mentioned that often the wider consideration of the interests and values underlying the constitutional area is not extraneous to the constitutional review of individual laws.

This is catrried out on the one hand by the determination of the essential content of the constitutional rights, on the other hand by the determination of new rights. The Constitutional Court finally recognized the appeal to principles, and went so far as to determine a core of supreme, inviolable principles, which even constitutional amendments cannot modify; at the same time, it has drawn from such liberty norms some "new rights", not expressly provided by, but implicitly deducible from, the Constitution. Limiting ourselves to the most noted cases, one can mention the right to privacy, the right to personal and sexual identity, the right to the life of relation, environmental rights, or the right to information.

It is also worth adding that the Constitutional Court has, in recent years, practically disposed of all the pending questions, so that the judgment has its effect

pretty rapidly. It is clear that the citizen senses in the quickness of the constitutional decision a greater protection, without considering the possibility that this may positively influence the judicial system as a whole.

4.Especially in recent years, many academics and politicians have advanced proposals for direct recourse to the Constitutional Court, by individuals or groups, like that provided by other legal systems, for the protection of fundamental rights.

The arguments put forward in favour of such proposals underscore the possibility of offering citizens a "residual" remedy, before a body like the Court, that is charged precisely with safeguarding constitutional principles, for all claims in which the violation of rights cannot be traced back to provisions of ordinary law (in which case the mechanism of the "incidental" review provides a sufficient remedy), but to the concrete functioning of administrative and judicial apparatuses, or to the interpretations and implementations of law, coming precisely from the judicial branch, that departs from those principles; or for claims in which the violation comes from organizational malfunctioning of public apparatuses or improper action of public officials, more than from particular legal acts or judicial decisions.

The experience in countries like Germany and Spain, which have long recognized this remedy, demonstrate that the number of petitions that turn out to be admissible and well-founded is generally few: but this does not exclude that it might be important to provide a remedy even in those few situations, also because the very possibility of the petition is a factor able to guide the whole administrative, judicial and legal system towards being concretely more responsive to the needs of protecting human rights.

It must however be said that there are many who fear that the provision of the possibility of direct access to the Constitutional Court may have an effect actually opposite to the desired one, rendering the Court's operation less prompt and therefore less effective, for the lengthening the time it takes to get a decision that could result from a great number of direct petitions lacking foundation, and not passed through any filter. Some people observe that this risk might not be avoided by the introduction of forms of preliminary evaluation regarding the manifestly unfounded nature of the petition, insofar as the relative evaluation would always follow a judgment that, however summary, could significantly burden the work of the Court.

SLOVENIA

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Economical and social rights, regulation and practice in Slovenia

System of Protection
A. National System

The Slovenian constitutional order is based on the protection of human rights and freedoms (the Preamble of the Constitution). On its own territory, Slovenia shall protect human rights and basic freedoms (Para. 1 of Article 5 of the Constitution).

1. Judicial Protection

1.1. Human rights and basic freedoms shall be protected by judicial protection (e.g. civil law, penal law, constitutional law, administrative law). Moreover, this protection shall include the right to obtain redress for the abuse of such rights and freedoms (Para. 4 of Article 15 of the Constitution).

1.2. Specialized Courts

The specialized courts have jurisdiction only in their respective legal field. Under the Labor and Social Courts Act, such courts are as follows:

– Labor Courts: are empowered to decide on individual labor disputes (concerning e.g. gaining employment, termination of employment, economic and other individual rights which are based on employment, among employers and workers concerning inventions and other intelectual property rights, contracts for work and labor, grants etc.) and collective labor disputes (concerning collective agreements, the legality of strikes, the participation of workers in management, the powers of trade unions as regards employment, the representative character of trade unions, etc.).

– Social Courts; the Social Court of first instance is empowered to decide on disputes concerning pension and disability insurance, health insurance, unemployment insurance, as well as family and social support benefits. As regards the mentioned cases the social court is empowered to decide on disputes concerning damage settlements owed to an insured person by an insurance institution, or concerning damage settlements to an insurance institution in connection with an insurance policy. The higher labor and social courts (decided by three judges) shall decide matters relating to complaints against decisions decided by the labor courts and the social court of the first instance.

2. Administrative-Penal Protection (Offences)

If no other legal redress is provided, courts of competent jurisdiction shall also be empowered to decide upon the legal validity of individual activities and acts which infringe the constitutional rights of the individual (Para. 2 of Article 157 of the Constitution).

The right to the judicial review of the acts and decisions of all administrative bodies and statutory authorities which affect the rights and legal entitlements of individuals or organizations shall be guaranteed (Para. 3 of Article 120 of the Constitution).

3. Constitutional Complaint (Subpara. 6 of Para. 1 of Article 160 of the Constitution; Article 50 through 60 of the Constitutional Court Act)

The provisions of the Slovenian Constitution of 1991 that regulate the constitutional complaint in detail are relatively modest (Articles 160 and 161 of the Constitution). However, the Constitution itself (Para. 3 of Article 160 of the Constitution) envisages a special regulation (the provisions of Articles 50 through 60 of the Constitutional Court Act).

The Constitutional Court decides cases of constitutional complaints alleging violations of human rights and basic freedoms (Item 6 of Para. 1 of Article 160 of the Constitution). The protection thus embraces all constitutionally guaranteed basic human rights and freedoms2 including those adopted through the international agreements that have become part of the national law through ratification.

Any legal entity or individual may file a constitutional complaint (Para. 1 of Article 50 of the Constitutional Court Act), as may the Ombudsman if directly connected with a particular case he is concerned with (Para. 2 of Article 50 of the Constitutional Court Act), although subject to the agreement of those whose human rights and basic freedoms he is protecting in an individual case (Para. 2 of Article 52 of the Constitutional Court Act). The subject-matter of a constitutional complaint is an individual act of a government body, a body of local self-government, or public authority allegedly violating human rights or basic freedoms (Para. 1 of Article 50 of the Constitutional Court Act).

The precondition for lodging a constitutional complaint is the prior exhaustion of all possible legal remedies (Para. 3 of Article 160 of the Constitution; Para. 1 of Article 51 of the Constitutional Court Act). As an exception to this condition the Constitutional Court may hear a constitutional complaint even before all legal remedies have been exhausted in cases if the alleged violation is obvious and if the carrying out of the individual act would have irreparable consequences for the petitioner (Para. 2 of Article 51 of the Constitutional Court Act).

A constitutional complaint may be lodged within sixty days of the adoption of the individual act (Para. 1 of Article 52 of the Constitutional Court Act), though in individual cases with good grounds, the Constitutional Court may decide on a constitutional complaint after the expiry of this time limit (Para. 3 of Article 52 of the Constitutional Court Act). The complaint must cite the disputed individual act, the facts on which the complaint is based, and the suspected violation of human rights and basic freedoms (Para. 1 of Article 53 of the Constitutional Court Act). It shall be made in writing and a copy of the respective act and appropriate documentation shall be attached to the complaint (Para. 2 of Article 53 and Para. 3 of Article 53 of the Constitutional Court Act).

In a panel of three judges (Para. 3 of Article 162 of the Constitution; Para. 1 of Article 54 of the Constitutional Court Act) the Constitutional Court decides whether it will accept or reject the constitutional complaint for review (or its allowability) at a closed session. The Constitutional Court may establish a number of senates depending on the need. The ruling of the Constitutional Court on the allowability of a constitutional complaint (Para. 3 of Article 55 of the Constitutional Court Act) is final. The constitutional complaint may be communicated to the opposing party for response, either prior to or after acceptance (Article 56 of the Constitutional Court Act). The Constitutional Court normally deals with a constitutional complaint in a closed session but it may also call a public hearing (Article 57 of the Constitutional Court Act). The Constitutional Court may suspend the implementation of an individual act, or even suspend the implementation of a statute and other regulation or general act on the grounds of which the disputed individual act was adopted (Article 58 of the Constitutional Court Act).

The decision in merito of the Constitutional Court may:

- deny the complaint as being unfounded (Para. 1 of Article 59 of the Constitutional Court Act);

- partially or in entirety annul or invalidate the disputed (individual) act or return the case to the body having jurisdiction for retrial (Para. 1 of Article 59 of the Constitutional Court Act);

- annul or invalidate (ex officio) unconstitutional regulations or general acts issued for the exercise of public authority if the Constitutional Court finds that the annulled individual act is based on such a regulation or general act (Para. 2 of Article 161 of the Constitution; Para. 2 of Article 59 of the Constitutional Court Act);

- in case it annuls or invalidates a disputed individual act it also decides on the disputed rights or freedoms if this is necessary to remove the consequences that have already been caused by the annulled or invalidated individual act, or if so required by the nature of the constitutional right or freedom, and if it is possible to so decide on the basis of data in the documentation (Para. 1 of Article 60 of the Constitutional Court Act). Such an order is executed by the body having jurisdiction for the implementation of the respective act which was retroactively abrogated by the Constitutional Court and replaced by the Court's decision on the same. If there is no such body having jurisdiction according to currently valid regulations, the Constitutional Court shall appoint one (Para. 2 of Article 60 of the Constitutional Court Act).

4. Ombudsman3

The Ombudsman is an institution for out of court and informal protection of human rights and basic freedoms. According to the Constitution, its function is to protect human rights and basic freedoms in matters involving state bodies, local government bodies and statutory authorities (Para. 1 of Article 159 of the Constitution).

The Ombudsman is empowered to submit proposals, opinions, critiques or recommendations to state bodies, local government bodies and statutory authorities which these bodies are obliged to discuss and answer to within the term determined by the Ombudsman (Article 7 of the Ombudsman Act). The Ombudsman may submit initiatives for amendments of statutes and other legal acts to the National Assembly and the Government (Para. 1 of Article 45 of the Constitutional Court Act), and provides opinions from the viewpoint of the protection of human rights and basic freedoms on the issue dealt with to all other bodies (Article 25 of the Ombudsman Act). The Ombudsman may enter any premise and may perform a so-called inspection also in jails and other premises with limited freedom of movement (Article 42 of the Ombudsman Act). The Ombudsman is also authorized to discuss broader questions important for the protection of human rights and basic freedoms as well as for the legal protection of citizens in the Republic of Slovenia (Para. 2 of Article 9 of the Ombudsman Act). Under Para. 2 of Article 50 of the Constitutional Court Act, the Ombudsman is empowered to lodge a constitutional complaint before the Constitutional Court.

Special ombudsmen may be empowered by statute to make determinations on particular subjects (Para. 2 of Article 159 o the Constitution).

B. International System

Slovenia shall be bound by the constitutional provision which determines that statutes and other regulations shall comply with generally accepted principles of international law and shall accord with treaties which bind Slovenia from time to time. Proclaimed treaties to which Slovenia adheres shall take immediate effect; that means with ratification and publication they become a part of Slovenian internal legal order (Article 8 of the Constitution).

Under the Constitution, the principles of international law and ratified treaties have an important position within the hierarchy of legal acts. The Constitution makes a distinction between treaties ratified by the National Assembly (statutes must conform with them; Article 213 of the Rules of Procedure of the National Assembly), and treaties ratified by the government (regulations and other legislative measures must conform with them). The Constitution gives to ratified treaties the character and position of legal source. The mentioned matters are specified by Article 153 of the Constitution: Statutes must conform with generally accepted principles of international law and with treaties currently in force and adopted by the National Assembly, and regulations and other legislative measures must also conform with other ratified treaties. On the proposal of the President of the Republic, of the Government or a third of the Deputies of the National Assembly, the Constitutional Court issues an opinion as to the conformity of a treaty in the process of ratifying, with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court (Para. 2 of Article 160 of the Constitution; Article 70 of the Constitutional Court Act).

As a member of the United Nations as well as a member of the Council of Europe Slovenia shall take into consideration the corresponding documents which impose obligations on States also as regards economic and social rights:

1. United Nations4

– the Charter of the United Nations, 26 June 1945,

– the Universal Declaration of Human Rights, 10 December 1948,

– the International Pact on Citizenship and Political Rights of 19 December 1966,

– the International Pact on Economic, Social and Cultural Rights of 19 December 1966,

– the Facultative Protocol of the General Assembly of the UN to the International Pact on Citizenship and Political Rights of 19 December 1966 (Resolution No. 2000 A (XXI).

2. Council of Europe

- The European Convention for the Protection of Human Rights and Basic Freedoms of 4 November 1950 incl. the 11 Protocols.5

As an associated member of the European Community Slovenia is becoming familiar also with the following documents (but the mentioned documents are not self-executing in Slovenian law):

3. European Communities

As an associated member of the European Community, Slovenia is becoming familiar also with the following documents (but the mentioned documents are not self-executing in Slovenian law):

– the Declaration on Basic Rights and Freedoms of the European Parliament of 12 April 1989,

– the Contract on the European Community of 1 February 1992.

General Provisions of the Slovenian Constitution

A. Equality Before the Law

The Constitution of the Republic of Slovenia contains a provision concerning equality before the law within the section on human rights and basic freedoms. However, the mentioned principle involves a general legal principle which relates to all constitutional rights and freedoms. All persons shall be equal before the law (Para. 2 of Article 14 of the Constitution). Each individual shall be guaranteed equal human rights and basic freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status or any other personal circumstance (Para. 1 of Article 14 of the Constitution). Any unequal treatment before law is prohibited. The contents of the mentioned principle is legal equality. This equality signifies that for the same situations, the same general and abstract legal provisions are valid and to be implemented, or, conversely, that similar situations (cases) shall be treated and decided in the same way. Laws shall be equally implemented in all situations (cases) of the same character, and all persons shall be equal before the law under equal conditions. Each person shall be guaranteed equal protection of his rights in any proceeding before a court and before other state authorities, local community authorities and bearers of public authority that decide on the rights, duties or legal interests of such person (Article 22 of the Constitution). The procedural rules, determined in advance, which are the legal basis for the decision-making of State bodies, shall guarantee the equality of proceedings concerning the implementation of the law by the State bodies of the same character, but on different locations on the State territory. Generally speaking, this entails the constitutional prohibition of discrimination.

The above principle does not prevent the Legislature from regulating legal relations differently, but on the other hand, the same principle binds the Legislature to regulate the same or similar relations equally, and different relations differently. While deciding on a possible violation of the principle of equality before law the Constitutional Court shall not enforce its own priority options, which could oppose the Legislature's options, but the Court shall always evaluate, only if the Legislature's different regulation could be objectively based.6

The equality of legal entities before the law is a precondition for a Democratic State and its Rule of Law. The Principle of Equality before the Law also implies the Principle of Impartiality, the guiding principle for arranging all inter?relations in a law?abiding society. The Principle of Equality before the Law is understood to exclude the arbitrary use of law in the approach to all legal subjects in judicial and administrative fields as well by the legislative authority. Exceptions may be tolerated to the Principle of Equality where the Legislature, for material or political reasons, or for the purpose of rationality, defines them. But such exceptions must be based on the public interest. From a financial point of view, it is not, in principle, possible to make a distinction between natural persons and legal entities. The Legislature is obliged to treat them equally. The Constitution does not differentiate

between natural persons and legal entities, with the exception of foreigners, both with respect to obtaining property and with respect to limiting the extent of their property. The Legislature did not have a constitutionally grounded reason for the unequal treatment of natural persons and legal entities, nor for the unequal treatment of legal entities themselves. In determining which legal entities are rightful claimants to denationalization, the Legislature has acted arbitrarily (The Constitutional Court of the Republic of Slovenia, Decision No. U-I-25/92, 4 March 1993, Official Gazette RS, No. 13/93; OdlUS II, 23).

The Principle of Equality before the Law (Article 14 of the Constitution) principle prohibits the introduction, direct or indirect, of unjustified differentiation between legal subjects independently of the nature of the matter and of the definition of the persons involved. The Principle of Equality implies a statute must be permeated by the Principle of Reasonableness and by the Aim of the Law (rationabilitas and causa legis). This extreme understanding of equality, without taking into consideration the specific nature of a particular actual or legal status, may in fact lead to inequality (The Constitutional Court of the Republic of Slovenia, Decision No. U-I-57/92, 3 November 1994, Official Gazette RS, No. 76/94 OdlUS III, 117).

Zupancic, B., Ustavni okvir enakosti kot novi vir prava, Zbornik znanstvenih razprav, 1992, LII, 251. Sturm, L., Ustavno nacelo enakosti, Zbornik znanstvenih razprav, 1995, LV, 269-303.

B. Exercise of and Limitations on Rights

Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution (Para. 1 of Article 15 of the Constitution). The manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom (Para. 2 of Article 15 of the Constitution). Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution (Para. 3 of Article 15 of the Constitution). Judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms, shall be guaranteed (Para. 4 of Article 15 of the Constitution). No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognize that right or freedom or recognizes it to a lesser extent (Para 5 of Article 15 of the Constitution).

The constitutional provisions on human rights and freedoms are material; they not only involve obligatory instructions for the Legislature, but also directly applicable guarantees for each individual. In doubtful situation, if the Legislature overacts concerning the regulation of the manner in which human rights and basic freedoms shall be exercised, the decision has to be taken by the Constitutional Court (Article 1 of the Constitutional Court Act). The Constitution also guarantees the institutionalized protection of constitutional rights: their judicial protection as well as the right to obtain redress for the abuse of such rights and freedoms (the respective matter is specified by Articles 22, 23 and 25). Para. 5 of Article 15 of the Constitution relates to the provision of Article 5 of the International Pact on Citizenship and Political Rights, however, the respective constitutional provision is adapted to the constitutional protection of rights.7

The exercising of human rights and freedoms is limited directly by the Constitution, but only the manner of such exercising or implementation can be regulated by statute. The rights and freedoms of an individual shall only be limited by the equal rights and freedoms of other individuals in such cases as are determined by the Constitution, i.e. a person deprived of his liberty (Para. 2 of Article 19 of the Constitution); the exceptions concerning the Public Nature of Court Proceedings (Article 24 of the Constitution); the limitation of the Freedom of Movement (Para. 2 of Article 32 of the Constitution); the exceptions concerning the Inviolability of Dwellings (Article 36 of the Constitution) as well as concerning the Privacy of Correspondence and other Means of Communication (Para. 2 of Article 37 of the Constitution); the limitations to the Right of Assembly and Association (Para. 3 of Article 42 of the Constitution); the abrogation and limitation of the Rights and Duties of Parents (Para. 1 of Article 54 of the Constitution) - but only to the extent required by the Constitution itself in so far as the Constitution prescribes reasons for limitations (in the interest of public order, national security, public safety or the protection of the public). An interference with the rights of other individuals also signifies the abuse of certain rights, i.e. a situation when certain rights have been exercised excessively, crossing the line which gives also some other individual the opportunity to exercise his/her own constitutional right to the same extent of quality.

The Constitution stipulates the following:

– the principle of constitutionally directly guaranteed human rights and basic freedoms which are exercised directly under the Constitution (Para. 1 of Article 15 of the Constitution);

– the principle and/or the right of protection against arbitrariness or the unconstitutionality of any which could constitute the revocation, violation or restriction of human rights and basic freedoms (irrespective of the person who takes such a measure) (Para. 5 of Article 15 of the Constitution);

– the legal remedies for the protection of human rights and basic freedoms (Article 25 of the Constitution):

– judicial protection: under civil procedure, under criminal law, under administrative procedure (Para. 4 of Article 15 of the Constitution);

– the administrative criminal protection (offences) (Para. 3 of Article 120 of the Constitution);

– the constitutional complaint (Subpara. 6 of Para. 1 of Article 160 of the Constitution; Articles 50 through 60 of the Constitutional Court Act);

– the protection by the Ombudsman (Article 159 of the Constitution);

– other forms of legal protection (the Social Legal Office, the police, the monitoring by inspections);

– protection under international law (the Charter of the United Nations, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Basic Freedoms, the International Pact on Citizenship and Political Rights, the International Pact on Economic, Social and Cultural Rights).

With the intention to promote the exercise of rights and freedoms, the Constitution guarantees the judicial protection of human rights and basic freedoms as well as the right to obtain redress for the abuse of such rights and freedoms

(Para. 4 of Article 15 of the Constitution) (in connection with many other constitutional provisions on principles and the exercising of judicial protection). The Republic of Slovenia accepted by signing and ratifying the European Convention for the Protection of Human Rights and Basic Freedoms of 4 November 1950 incl. the 11 Protocols, also the international monitoring of violations of human rights and basic freedoms. In other words, the individual is entitled besides national judicial protection to request also protection before the European Court for Human Rights. It is necessary to bear in mind, that statutes, regulations and other legislative measures must conform with generally accepted principles of international law and with treaties currently in force and ratified by the National Assembly (Para. 2 of Article 153 of the Constitution). In addition, under the Constitution, the treaties shall take immediate effect (Article 8 of the Constitution). The mentioned provisions are linked with another constitutional provision, that it shall not be permissible to restrict any human right or basic freedom exercisable by act which would otherwise be legal in Slovenia, even if this Constitution does not specifically recognize that right or freedom or only recognizes it to a limited extent (Para. 5 of Article 15 of the Constitution).

C. Temporary Revocation or Restriction of Rights

It is permissible to temporarily or revoke or restrict the human rights and basic freedoms guaranteed by the Constitution, but only in exceptional circumstances of war or a State of emergency. Human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, but only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political or other conviction, material standing, birth, education, social status or any other personal circumstance (Para. 1 of Article 16 of the Constitution). The provision of the preceding paragraph does not allow any temporary suspension or restriction of the rights provided by Articles 17, 18, 21, 28, 29 and 41 (Para. 2 of Article 16 of the Constitution).

Concerning its essence, the regulation of these situations can be comparable with the provisions of Article 4 of the International Pact on Citizenship and Political Rights.8

The exceptional and temporary revocation and restriction of rights, defined by the Constitution, can be relevant only in explicitly and restrictively determined situations - e.g. in circumstances of war or a State of Emergency. A State of Emergency shall be proclaimed if the existence of the State is threatened by a great and general danger. The proclamation of a State of War or a State of Emergency, and the introduction and repeal of measures necessitated by such proclamation, shall be effected by the National Assembly on the proposal of the Government. In the event that the National Assembly is unable to convene, the mentioned matters may be effected by the President of the State (Article 92 of the Constitution). It shall be permissible to temporarily revoke or restrict the human rights and basic freedoms guaranteed by the Constitution, but only in exceptional circumstances of a State of War or a State of Emergency (Para 2 of Article 108 of the Constitution),

but only to the extent required by the same and only inasmuch as the revocation or restriction does not create inequality of treatment based only on national origin, sex, language, religion, political or other conviction, material standing, birth, education, social status or any other personal circumstance (Para. 1 of Article 16 of the Constitution). However, the Constitution determines, that there shall be no temporary revocation or restriction of the following constitutional rights and freedoms and/or constitutional principles: the Inviolability of Human Life (Article 17 of the Constitution), the Prohibition against Torture (Article 18 of the Constitution), the Protection of Human Personality and Dignity (Article 21 of the Constitution), the Presumption of Innocence (Article 27 of the Constitution), the Principle of Legality in the Criminal Law (Article 28 of the Constitution), the Legal Guarantees in Criminal Proceedings (Article 29 of the Constitution) as well as the Freedom of Conscience (Article 41 of the Constitution).

Social Rights - Historical Outline9

The Slovenian constitutional systems before 1991 declared the priority of the social and economic rights as an essential part of the former systems. Beside classical political and economic rights also some constitutional rights more typical of the former social systems were declared, e.g. the right to self-government as one of the basic human and citizens' rights in the former so-called socialist society. In current constitutional systems in force such as the Slovenian system, we can see the renaissance of classical rights as well as the gradual discontinuation of constitutional regulation of social and economic rights to a great extent.

The contents of the constitutional provisions concerning part II Human Rights and Basic Freedoms as well as the Part III. Economic and Social Relations, shows that all rights which are a part of a general complex of human rights are there included. The system also includes two international protective measures:

– Article 8 of the Constitution which declares that statutes and other legislative measures shall comply with generally accepted principles of international law and shall be in accord with international agreements which bind Slovenia from time to time, and

– the provision of Para. 5 of Article 15 of the Constitution, which prescribes that it shall not be permissible to restrict any human right or basic freedom exercisable by acts which would otherwise be legal in Slovenia, on the basis that this Constitution does not recognize that right or freedom or only recognizes it to a limited extent, as arises from some international legal acts concerning human rights.

The most important constitutional provisions are as follows:

– the protection of human rights against different possible repressive interventions of the State as well as against abuse of power (see Articles 16, 17, 18 through 31, 34 through 38 of the Constitution);

– the economic, social and cultural rights (in general, the III. Part of the Constitution);

– legal and other mechanisms for efficient human rights protection (Articles 15, 129, 130, 131, 132, 133, 134,155, 156, 157, 158, 159 of the Constitution).

Particular Economic and Social Rights10

Under the Constitution in force, the economic and social rights guaranteed are as follows:

The Slovenian constitutions adopted after World War II contained many social and economic rights. The Constitution of 1991, however, is based on the concept that the current Constitution shall contain only a minimal number or extent of economic and social rights.

A. The Right to Own and Inherit Property

The right to private property and inheritance shall be guaranteed (Article 33 of the Constitution).

The Constitution explicitly underlines the extended social function of property. In addition, the Constitution declares the economic and environmental function. In such mode the Constitution essentially limits the power of private (and some other) owners who shall while acquiring and enjoying immovable and movable property, respect the objective wider interests of the community or society. Limitations of the right to property are specified by the Constitution in Article 68 (the Property Rights of Foreigners), Article 69 (the Compulsory Acquisition - the Expropriation), Article 70 (the National Assets and National Resources) and in Article 71 (the Protection of Land). The inheritance shall be regulated in detail by statute: the Inheritance Act; the Inheritance of Inheritance of Farmsteads Act. However, foreigners can under certain conditions acquire the right to property affixed to land (Article 68 of the Constitution). The Constitution guarantees by Article 33 the right to own and inherit property, but in Article 67 provides for the economic, social and environmental function of property (which determine the obligations and limitations to ownership while acquiring and enjoying property). The result is that the Constitution has moved from the liberal understanding of private property. The conditions under which property is acquired and enjoyed are regulated by statute so as to assure the economic, social and environmental benefit of such property (Para. 1 of Article 67 of the Constitution). The way in which property may be inherited, as well as the conditions under which it may be inherited, shall be determined by statute (Para. 2 of Article 67 of the Constitution).

The basic constitutional provision declares that the right to private property shall be guaranteed. Private property is the predominating form of property. However, the right to own property can be expropriated or limited in the public interest. Land and property affixed to land may be compulsorily acquired, or ownership thereof may be limited by the State in the public interest and subject to a right to such compensation in kind or monetary compensation from the State as shall be determined by statute (Article 69 of the Constitution).

The Constitution defines that the right to property affixed to land may be expropriated or limited on the basis of monetary compensation or compensation in kind. Such a formulation is a peculiarity of the Slovenian constitutional system, but it is reasonable as regards the expropriation of land.11

Furthermore, the Constitution regulates beside private property also public property (State property and the property of local self-government bodies). The Constitution also regulates special modes of acquisition, enjoyment and disposal: e.g. special conditions for land use - Article 71; the special protection of land - Article 71; special conditions governing the exploitation of natural sources - Article

70; the protection of the natural and cultural heritage - Article 73. Concerning acquisition, besides classical forms of the acquisition of property, it is necessary to take into consideration also statutes which regulate the procedure of the transformation of (former) so-called social ownership into ownership with so-called known title holder. The economic function of property involves property as a basis for acquiring economic benefits as well as a basis for business, good husbandry, production, income and profit making. But the exercising of the economic function of property is limited by the public interest. On the other hand, the social function of property is limited by the phenomena of the social welfare state (Article 2 of the Constitution) - by the aspiration to insure the existential minimum quality of life level for all citizens. The environmental function of property is connected with the protection of a healthy living environment.

Denationalization is not based on optional norms but on norms of a forced character (ius cogens). Denationalization claimants obtain rights on the basis of decisions of state bodies.12

2. The Constitutional Court of the Republic of Slovenia, Decision No. U-I-25/92, 4 March 1993, Official Gazette RS No. 13/93, OdlUS II, 23. Unequal treatment of natural persons and legal entities with respect to the right to denationalisation property violates the constitutional Principle of Equality before the Law (Article 14 of the Constitution).

The nature of the legal entity status of the Catholic Church organisations and foundations is judged according to national regulations. The statute of limitations for submitting the denationalization requests must be the same for all rightful claimants, and, therefore, this time limit for legal entities who are rightful claimants, according to the decision of the Constitutional Court, must begin on the day on which this decision takes effect.

3. The Constitutional Court of the Republic of Slovenia, Decision No. U-I-122/91, 10 September 1992, Official Gazette RS No. 46/92, OdlUS I, 56. The legal provisions which in a general way restrict or deny the right of ownership over farmland are considered by the Court to be in conflict with those provisions of the Constitution which ensure the right to personal property and inheritance, specify the ways of acquiring and enjoying the property and determine the revocation or restricting of property rights for the public good with compensation in kind or remuneration as are stipulated by the statute. The Constitution does not restrict ownership rights but only makes it possible for the ways of acquiring and enjoying property to be regulated by statute in such a way as to ensure its economic, social and ecological functions, and makes it possible for ownership rights to be taken away or to be restricted only for the public benefit under such conditions as are stipulated by statute.

4. The Constitutional Court of the Republic of Slovenia, Decision No. U-I-57/92, 3 November 1994, Official Gazette RS No. 76/94, OdlUS III, 117. It is not contrary to the Constitution for special rules concerning the inheriting of farmland and private farms to be prescribed by statute, for thereby the commitment of Slovenia to the Social Welfare State (Article 2 of the Constitution) is observed, and special social and economic functions of medium-sized farms are defined (Articles 67 and 71 of the Constitution). The restricting of the freedom of testator and the right to

inherit farmland by statute does not infringe upon the Principle of Equality before the Law (Article 14 of the Constitution), this differentiation is introduced by statute on the basis of generally acknowledged specificities of the state of facts. To restrict the right to inherit and the right to own property is contrary to the principles of a State governed by the Rule of Law if the criteria prescribed by statute are not identified or at least identifiable.

The Protection of Land: The State shall regulate land use by statute (Para. 1 of Article 71 of the Constitution). Agricultural land shall be afforded special protection by statute (Para. 2 of Article 71 of the Constitution). The State shall have a special responsibility to foster the economic, cultural and social advancement of those members of the population living in mountainous areas (Para. 3 of Article 71 of the Constitution). The provisions of this programme are reasonable because of the nature of the Slovenian territory as well as because of the social structure of the inhabitants of Slovenia.

The Protection of the Natural and Cultural Heritage means that each person shall be obliged, in accordance with statute, to protect rare and precious natural areas, as well as structures and objects forming part of the national and cultural heritage. State and local government bodies shall be responsible for the preservation of the natural and cultural heritage (Article 73 of the Constitution). These constitutional provisions of the programme are connected with some other constitutional provisions (e.g. Articles 67, 70 and 71 of the Constitution).

The Provision of Proper Housing means that the State shall create the conditions necessary to enable each citizen to obtain proper housing (Article 78 of the Constitution).This constitutional provisions has a programmatic character and takes the form of instructions to the Legislature concerning the regulation of matters connected to work as well as incomes and the standard of living.

B. Property Rights of Foreigners

Under the former constitutional regulation of 1991, foreigners were entitled only to acquire title to property affixed to land under such conditions as were determined by statute (Para. 1 of Article 68 of the Constitution). Foreigners was not entitled to acquire title to land except by inheritance in circumstances where the reciprocity of such rights of acquisition were recognized (Para. 2 of Article 68 of the Constitution).

As regards the European Agreement Establishing an Association between the Republic of Slovenia, of the One Part, and the European Communities (hereinafter: Community) and their Member States, Acting within the Framework of the European Union, of the Other Part of 9 June 1996, it was necessary before the ratification of the respective Agreement to adapt the provision of Article 68 of the Constitution to the EEC standards of the<normative regulation of the respective matters (the Constitutional Law on the Amendment of Article 68 of the Constitution of the Republic of Slovenia, Official Gazette RS, No. 42/97). Under the amended constitutional provision, foreigners can acquire title to property affixed to land under such conditions as are determined by statute or as are determined by treaty ratified by the National Assembly, in circumstances where the reciprocity of such rights of acquisition are recognized. The mentioned statute and the treaty must be

passed by the National Assembly by two-thirds majority of all elected deputies casting their votes in favor of the same.13

On June 5, 1997 the Government of Slovenia commenced proceedings to review the constitutionality of the European Agreement Establishing an Association between the Republic of Slovenia, of the One Part, and the European Communities (hereinafter: Community) and their Member States, Acting within the Framework of the European Union, of the Other Part (hereinafter: ESP). The Constitutional Court, according to Para. 2 of Article 160 of the Constitution and Article 70 of the Constitutional Court Act (Official Gazette RS, No. 15/94), provided the opinion:

On the Government's proposal concerning the process of the ESP establishing an association between the Republic of Slovenia and the European Union, the Constitutional Court provided an opinion regarding the conformity of Article 45, Items 7.b and 7.c of the ESP, and Annex XIII in conjunction with Article 64, Para. 2 of the ESP, with the Constitution of Slovenia.

Article 45, Item 7b of the ESP provides that subsidiaries of Community companies shall have the same rights enjoyed by Slovenian nationals and companies to acquire and sell real property, including, natural resources, agricultural land and forestry, when these rights are necessary for conducting their economic activities. The Court held that it is constitutional for an established, registered Community company acting according to Slovenian laws in the Slovenian territory to possess these rights.

Article 45, Item 7c of the ESP, requires that Slovenia grant foreigners the same rights as Slovenian nationals and companies to acquire and sell real property including natural resources, agricultural land and forestry, when it is necessary for conducting their economic activities. The Court held that Article 45, Item 7c of the ESP conflicts with Para. 2 of Article 68 of the Constitution of Slovenia, which provides that foreigners can not acquire land, except by inheritance in circumstances where the reciprocity of such rights of acquisition are recognized.

Item 1 of Annex XIII to the ESP, compels Slovenia to take measures necessary to allow the citizens of the Member States of the European Union, upon a reciprocal basis, the right to purchase real property in Slovenia on a non-discriminatory and reciprocal basis. This is in conflict with Para. 2 of Article 68 of the Constitution of Slovenia, which provides that foreigners can not acquire land, except by inheritance in circumstances where reciprocity of such rights of acquisition are recognized.

Item II of Annex XIII to the ESP requires, on a reciprocal basis, that Slovenia grant to citizens of EU Member States who have resided in the territory of Slovenia for a period of three years the right to purchase real property. This requirement conflicts with Para. 2 of Article 68 of the Constitution of Slovenia, which provides that foreigners can not acquire land, except by inheritance in circumstances where reciprocity of such rights of acquisition are recognized.

Item II of Annex XIII to the ESP is consistent with Article 13 of the Constitution of Slovenia. Article 13 can be interpreted in a manner that allows citizens of member States of the European Union the right to purchase real estate in Slovenia under the same conditions as apply to citizens of the Republic of Slovenia. Article 13 provides that foreigners shall, in accordance with international agreements, enjoy all those rights, which are guaranteed by this Constitution and by the law.

Except rights which only citizens of Slovenia may enjoy pursuant to the Constitution and law. Such laws must respect Para. 1 of Article 14 of the Constitution of Slovenia, which provides that in Slovenia each individual shall be guaranteed equal human rights and basic freedoms regardless of national origin, race, birth, sex, language, religion, political or other beliefs, financial status, birth, education, social status or any other personal circumstance.

A competent State body must not bind the Republic of Slovenia to an international agreement that would violate the Constitution. An obligation imposed by the international agreement would be unconstitutional if the international agreement coming into force creates directly applicable unconstitutional norms, or if the international agreement binds the State to adopt an unconstitutional law. Ratification of the ESP would bind the Republic of Slovenia to adopt legal acts implementing the rights contained in the ESP provisions referred to in Items III, IV, and V of this opinion. Most significantly the Republic of Slovenia would force itself to amend Para. 2 of Article 68 of the Constitution of Slovenia, according to which foreigners may not acquire title to land.

C. Rights to Utilize National Assets and National Resources

Special rights to utilize national assets may be acquired subject to such conditions as are determined by statute (Para. 1 of Article 70 of the Constitution). The conditions governing the exploitation of natural resources shall be determined by statute (Para. 2 of Article 70 of the Constitution).

"National assets" signify the real estate which may be utilized by each person as regards the character of the good itself or as regards its intention, specified by statute14.

The particular kind of natural resources (e.g. mineral sources, flora, fauna, land, forests, water etc.) and form of protection shall be determined by statute - the Natural and Cultural Heritage Act.

This special right to utilize national assets shall be determined by statute for real estate designed for public unionization as regards the nature of the good itself or as regards the intention specified by regulations and concerning the rules of utilization. A special group of provisions regulate the protection of goods, but at the same time determine duties and conditions of protection as a form of limitation of property. The protection of the natural and cultural heritage is (Article 73 of the Constitution) determined by statutes and other regulations (e.g. municipal ordinances).

D. Rights of Foreigners to Exploit Natural Resources

The rights of foreigners to exploit natural resources, and the conditions under which any such exploitation may take place, may only be determined by statute (Para. 3 of Article 70 of the Constitution).

E. Right to a Healthy Living Environment

Everyone has the right in accordance with the law to a healthy living environment (Para. 1 of Article 72 of the Constitution). The state shall promote a healthy living environment. To this end, the conditions and manner in which economic and other activities are pursued shall be established by law (Para. 2 of Article 72 of the Constitution). The law shall establish under which conditions and to what extent a person who has damaged the living environment is obliged to provide

compensation (Para. 3 of Article 72 of the Constitution).This constitutional provision concerning the responsibility of the State to assure a healthy living environment has a programme character.

F. Free Enterprise (The Business Sector)

Free economic initiative shall be guaranteed (Para.1 of Article 74 of the Constitution). The conditions for establishing commercial organisations shall be established by law. Commercial activities may not be pursued in a manner contrary to the public interest (Para. 2 of Article 74 of the Constitution). Unfair competition practices and practices which restrict competition in a manner contrary to the law are prohibited (Para. 3 of Article 74 of the Constitution).

Such provisions are required for the system of a market economy. Furthermore, the protection of free competition is one of the fundamental state functions in such a system. The above mentioned constitutional provision is the legal basis for the statutory regulation of the organisational forms of companies (Companies Act).

The Constitution in force assigns the regulation of the whole economic field to statute, which shall follow the constitutional provisions. However, the Constitution declares that free enterprise shall be guaranteed (Article 74). The constitutional provision on free enterprise was embodied in a concrete form by the Companies Act:

- each natural person shall have the legal opportunity to establish a company irrespective of his physical or social characteristics;
- the above mentioned broadly defined legal right can be limited by statute;
- the statutory prohibition on establishing companies must be sufficiently clear and specified irrespective of the regulation by which it is regulated, e.g. Articles 3 and 5 of the amended Foreign Trade Act .

G. Participation in Management

Employees shall participate in the management of commercial organisations and institutions in a manner and under conditions provided by statute (Article 75 of the Constitution).

The Worker's Participation in Management Act determines the manner and conditions as regards worker's participation in the management of companies (unless a special statute determines otherwise) as well as enterprises carrying out economic public services, banks, insurance companies and institutions (Article 1 of the Worker's Participation in Management Act). Worker's participation in management is evidenced:

- by the right to make initiatives and by the right to receive a reply to such initiatives;
- by the right to be informed;
- by the right to submit opinions and proposals as well as the right to reply to them;
- by the opportunity or obligatory exercising of common consultation with employer;
- by the right to take part in decision-making;
- by the right to suspend the consequences of decisions made by the employer;

- by other forms of participation which shall be specified by an agreement concluded between the employer and the workers' council (Article 2 of the Worker's Participation in Management Act).

The listed rights shall be exercised by individual workers or collectively by the workers' council or the workers' trustee, by the workers' assembly, or by the workers' representatives in company bodies (Article 3 of the Worker's Participation in Management Act). Workers' participation in management of the company shall be exercised as follows:

- they shall be informed directly; in addition, they can submit proposals and opinions directly;
- they shall be informed through the workers' trustee or the workers' council; in addition, they can submit proposals and opinions through the workers' trustee or the workers' council; they can request a common consultation with the employer; they can participate in the decision-making process on particular matters specified by statute; they also can request the suspension of the consequences of particular decisions of employers until a final decision is taken by the empowered body (Article 85 of the Worker Participation in Management Act).

H. Freedom of Trade Unions

The freedom to establish, operate and join trade unions shall be guaranteed (Article 76 of the Constitution).

Only employees can exercise the above-mentioned freedom. On the other hand, trade unions shall not act contrary to the legal order in force. With such a formulation, the Constitution wishes to emphasize the Freedom of Trade Unions as an essential element of the economic system. The provision of Article 76 of the Constitution is connected to Article 42 of the Constitution (the Right of Assembly and Association).

I. Right to Strike

Employees have the right to strike (Para. 1 of Article 77 of the Constitution). Where required by the public interest, the right to strike may be restricted by law, with due consideration given to the type and nature of activity involved (Para. 2 of Article 77 of the Constitution).

Strikes shall be governed by such rules as are valid for legal strikes, i.e. within the scope of statutory regulation (the Strike Act) and the Strike Rules. The strike may be limited by statute, considering the type and nature of a certain field of activity (particular social activities, the economic infrastructure, the police, customs), or where such a restriction is in the public interest (e.g., if the strike can threaten human life, or if it can result in damages in tort).15

J. Freedom of Work

Freedom of work shall be guaranteed (Para. 1 of Article 49 of the Constitution). Everyone shall choose his employment freely (Para. 1 of Article 49 of the Constitution). Everyone shall have access under equal conditions to any position of employment (Para. 3 of Article 49 of the Constitution). Forced labour shall be prohibited (Para 4 of Article 49 of the Constitution).

The above constitutional provision provides the programme principle and at the same time instructs the National Assembly when it decides on economic or other policies of the State.

The present right does not entail a subjective right to a respective position or job. On the other hand, some statutes impose concrete duties and obligations on employers and the State (the protection of workers against illegal acts of employers, compulsory social insurance for employees, protection of disabled persons etc.). The freedom of work involves three elements: the free choice of employment, the equal availability of work opportunities under equal conditions to each person, as well as the prohibition of forced labor.

The security of employment means that the state shall create opportunities for employment and work, and shall ensure the protection of both by law (Article 66 of the Constitution).

Under the above constitutional provision, the State creates possibilities for employment and work as well as insures the respective legal protection. To recognize the freedom of work (first of all, the freedom of the availability of work) and to insure the respective judicial protection, it would be unreal and would mean the introduction of declaratory provisions into such a legal act as the Constitution is. The same is relevant as regards the obligation of the State that it shall create the conditions necessary to enable each citizen to obtain proper housing (Article 78 of the Constitution).

The inspectorate for work carries out the supervisory control of the implementation of statutes, other regulations, collective agreements and general acts regulating employment, salaries and other incomes arising from the employment of workers in Slovenia and abroad, workers' participation in management, strikes and safety at work (Article 1 of the Labor Inspection Act). The inspectorate shall be established as a body (with its organisatorial units) within the Ministry of Labor (Article 2 of the Labor Inspection Act). The inspectorate shall provide for the implementation of policies and measures of labor inspection, cooperate with the Ministry of Labor concerning the preparation of regulations in its field of activity (Article 3 of the Labor Inspection Act). In addition, the inspectorate shall prepare reports on its activity for the parent Ministry (Para. 1 of Article 5 of the Labor Inspection Act). The Government must submit the respective report to the National Assembly. After approval, the report must be sent to the International Labor Office (Para. 2 of Article 5 of the Labor Inspection Act). During the exercising of their duties, the inspectors are empowered to make all respective arrangements (Articles 12 through 23 of the Labor Inspection Act).

The right to equitable payment (salary):

Under the Basic Rights Arising from Labour Relations Act (a former federal law, beside Slovenian statutes, and partially still legal source, which is in general not incompatible with the Slovenian legal system in force; published in the Official Gazette SFRY, Nos. 60/89, 42/90), a worker has a right to personal income (payment, salary), in conformity with a respective general act, adjusted in accordance with the collective agreement and statute. Under the general act and/or the collective agreement, workers are entitled to such a share of personal income that corresponds to the firms income or profit, in proportion to the worker's participation in profit making. Statute also declares the right of workers to personal income in proportion to profit making due to their exceptional participation based on innovation, rationalization or other forms of creativity related to work. The

mentioned statutory provisions are not bound by some special compulsory measures. Statute determines the sanction (penalty) for a concrete case if the employer doesn't pay an employee his salary at least once in a month.

The General Collective Agreement for the Commercial Sector and the Collective Agreement for Non-Commercial Activities specify the obligatory minimal standards and grounds for the determination of the contents of collective agreements in particular activities and organisations as regards personal incomes and other supporting benefits. The starting personal incomes shall be valorized concerning the particular increase clause taken into consideration the increase in the costs of living. The collective agreements for sectors can not determine lower starting personal incomes, unless such payments could threaten the operation of the organization and/or the employer, but only taking into consideration the respective criteria and with a maximum deccase of 20%. The mentioned collective agreements also include provisions on allowances and their amounts which are due to workers because of difficult and harsh working conditions, inconvenient organisation of working hours, etc. Salary continuances are separately determined in the event of allowed absenteeism (illness, education, holidays with pay) as well as some other special benefits of employees: e.g. the holiday cash grant, jubilee awards, retirement benefits. The following are regulated separately: the personal income of trainees as well as the payment for the work of students in the case of their compulsory practical work as a part of a schooling programme. The personal income of trainees is determined in proportion to the personal income of other workers (70%), the payment for the compulsory practical work of students is determined with reference to the average personal income in the business sector, with a relatively low minimum share of 15%; but these persons are entitled to such additional benefits as other workers.

Irrespective of the provisions of the collective agreements the worker has the right at least to the minimum wage. The minimum wage is regulated by the Minimum Wage Act (Official Gazette RS, No. 48/90). Under this statute the minimum wage is set for each worker who works full time and fulfills work obligations, it is at least an amount which assures material and social security. Workers who work part time are entitled to receive a proportional share of such personal income. The minimum wage is determined by the Government after hearing the preliminary opinion of the Chamber of Commerce. At this determination the Government shall consider the value of the basic necessarities of life, the variation and level of personal incomes in the business sector of the State as well as the achieved level of labor productivity in the business sector of the State.

The statutes and collective agreements don't contain provisions, which could - regarding the right to salary - express discrimination based on sex.17

K. Special Rights of Foreigners Employed in Slovenia

Aliens employed in Slovenia and members of their families have special rights provided by law (Article 79 of the Constitution).

L. Right to Social Security

Citizens have the right to social security under conditions provided by law (Para. 1 of Article 50 of the Constitution). The state shall regulate compulsory health, pension, disability and other social insurance, and shall ensure its proper

functioning (Para. 2 of Article 50 of the Constitution). Special protection in accordance with the law shall be guaranteed to war veterans and victims of war (Para. 3 of Article 50 of the Constitution).

The national social security system is based on the principle of national solidarity; this means that each citizen shall contribute from his/her personal income in order to cover dues within the scope of social security. As regards social security, first of all the principles of mutuality and solidarity shall be taken into consideration 1. The legal system which used to be in force in Slovenia before 1991 is still in the process of being changed and adapted. On the basis of the new Constitution, legislation was passed which stated the following goals:18

- first of all the Constitution declares of the rights to social security, to health care as well as special protection models for certain individuals included in the basic human rights;
- the intention of the new legislation it is to adapt the system of social security to the new social circumstances, first of all to introduce by law the opportunities for additional voluntary insurance as well as for private initiatives concerning health care services, social welfare and child welfare;
- to assure by the new system the possible continuaity with the former system of social security as regards the scope of entitled persons as well as the list or extent of available rights;
- the harmonization of the system with current international standards concerning the regulation of social security as well as harmonization with European systems of social welfare;
- that under the prevailing point of view it would be not possible to introduce some short-term extreme change in the system of social security, but only during a certain longer period. By means of a long-term successive introduction of changes, the violation of vested rights and expected rights of individuals can be prevented.

The new statutes regulating the social insurance preserved the starting point that with the public system offering support benefits (salary continuances and pensions) the lost salary will still be replaced to a great extent. Furthermore, the system provides opportunities for additional voluntary insurance, especially for higher income arising from pension insurance as well as for totally free health service. For persons without earned incomes or receipts from social insurance, the right to financial assistance within the social welfare system is guaranteed.

The constitutional provisions of Article 50 are very general and instructive. The Constitution guarantees the right to social security to all citizens. In addition, it is necessary to consider also the provisions of Article 79 of the Constitution, which determines that foreigners employed in Slovenia, together with their family members, shall enjoy such special rights as determined by statute. The formulation of Para. 2 of Article 50 of the Constitution provides for compulsory and voluntary insurance as a novelty within the Slovenian system of health and pension insurance. On the other hand, under Para. 3 of Article 50 of the Constitution, war veterans and civilian casualties of war shall be guaranteed special benefits as provided by statute; it concerns especially the regulation of their own rights as regards their social insurance and social welfare.19

The right to social security has to be included beside the right to work and the right to adequate payment among these human rights which are the basis for the achievement of two basic universally recognized values, human dignity and human economic security.20

The new statutes by which the constitutional right to social security has been exercised, regulate in the field of the social insurance the following branches: pension and disability insurance, health protection and insurance as well as unemployment insurance21.

Social support is regulated by the Social Welfare Act (Official Gazette RS, Nos. 54/92, 56/92). In addition, the special protection of children and the family are regulated by the Child Welfare Act (Official Gazette RS, Nos. 35/79, 8/90).

The statutes on security regulate the health care and payments determined by the Convention of ILA No. 102, which also applies to Slovenia. The particular support benefits (pensions, salary continuances as well as other support benefits) are assessed as a percentage of earlier salaries. These percentages concerning the assessment of support benefits exceed the minimum level as defined by the Convention of ILA No. 102. Under the Health Care and Health Insurance Act, each person shall have the right to the highest level of health but he/she shall be obliged to take care of his/her health. Health care and particular support benefits concerning motherhood as well as financial assistance for children, are regulated by the Child Welfare Act.

It is characteristic for the system of social insurance that a wide circle of entitled persons is included in the uniform system of pension and disability insurance as well as health insurance. The circle of entitled persons includes beside regular employees and their family members, also independent professionals, farmers and their family members and some other categories of active persons. Health insurance has been nearing universality, because into the system are included beside actively employed inhabitants also all Slovenian citizens with residence in Slovenia. Unemployment insurance shall be compulsory for those regularly employed.

The Social Welfare Act defines the system of social services and the institutionalized protection of needy individuals as well as the rights to support benefits from social welfare. The mentioned Act is based on some new starting points as regards entitled persons, who are not only some socially handicapped groups of inhabitants as has been the case, but a current entitled person can be any person who is in material or social need and needs help. The entitled persons to support benefits are older persons and disabled persons who do not have sufficient life resources and under the new system also persons able to work who are not able to assure the sufficient resources for their own survival as well as for the survival of their dependent relatives. With the extension of the circle of entitled persons to persons able to work, it is guaranteed that all unemployed socially handicapped persons are entitled to receive minimum support benefits. In addition, there was introduced the universal protection of citizens with residence in Slovenia and foreigners with permission for residence, if they are socially handicapped.

The support benefits and services under Article 1 of the Social Welfare Act have the character of rights. Some conditions for the acquisition of a right are defined by

law, but other conditions are dependent on a discretional evaluation by an organisation of public power, which is empowered to evaluate entitlements.

The system of social insurance and social welfare also includes the status of jobseekers, which is important in the circumstances of relatively high unemployment in Slovenia. People who have lost their jobs and become unemployed, shall acquire the right to support benefits within the scope of the system of unemployment insurance. People who don't have any rights arising from insurance can acquire the respective support benefits within the system of social welfare. All unemployed persons who are Slovenian citizens with residence in Slovenia have the right to health care. Citizens without sufficient resources for their survival have the right to support benefits as well as the right to health care.

The protection of child, mother and family is specially regulated by the Child Welfare Act and by the Family Support Benefits Act (Official Gazette RS, Nos. 65/93, 71/94, 73/95). Until the present, the protection of children and the family was oriented first of all to the protection of families' interests with both employed parents as well as families with the lowest incomes. The statute guarantees a universal child allowance and a universal parental allowance for parents who are not entitled to receive parental pay benefits. So the statute fulfills to a higher degree the rights of individuals and obligations of the State than those under the European Social Charter.

A general characteristic of the new statutory regulation of rights within the system of social security is the tendency towards the reduction of rights within the public compulsory system of social insurance as well as the tendency towards the concurrent legalisation of additional private insurance, as well as private initiatives in health care, child welfare and in social welfare. At the same time the rights to social benefits in the field of social welfare have been extending, especially as regards the circle of entitled persons and the right to support benefits in the field of the protection of children and the family.22

M. Right to Health Care

Everyone has the right to health care under conditions provided by law (Para. 1 of Article 51 of the Constitution). The rights to health care from public funds shall be provided by law (Para. 2 of Article 51 of the Constitution). No one may be compelled to undergo medical treatment except in cases provided by law (Para. 3 of Article 51 of the Constitution).

Health care has to be considered as a system of social, collective and individual measures for strengthening, preserving and restoring health. These measures and who health caretakers are, beside each individual, are determined by statute. Along with the right to the health care, the Constitution adds the right to health insurance, as determined in Article 50 of the Constitution. As regards the principle that the right to health care is enjoyed to each person, the Health Care and Health Insurance Act (Article 7) determines that the Republic of Slovenia provide from the State budget also the resources for the emergency health care of persons without residence, of foreigners from countries with which Slovenia has not concluded treaties as well as foreigners and Slovenian citizens with permanent residence abroad who are staying in the Republic of Slovenia or who are traveling through

Slovenia, but for whom it is not possible to guarantee the respective resources for payment of costs of their health service.23

The Constitution explicitly refers to the statutory regulation of rights arising from health care, which are financed out of public revenue. The obligation to take care of ones own health and the prohibition against threatening the health of others are in Slovenia the object of statutory regulation. The Constitution determines only that no person shall be compelled to undergo medical treatment except in such cases as are determined by statute (Para. 3 of Article 51 of the Constitution). The mentioned constitutional provision also guarantees personal integrity of person.

While exercising the above mentioned constitutional right, concerning Article 14 and /or Article 51 of the Constitution, it is a question whether each person could have equal right to health care, regardless of their financial circumstances in a concrete case. In addition, Article 51 of the Constitution determines that the conditions for the exercising of the right to health care shall be regulated by statute. But according to Article 14 of the Constitution (the principle of equality before law) the statute could not regulate such conditions which could entail unequal rights, among others also concerning financial circumstances. The Health Care and Health Insurance Act (Article 23 of the Act, Official Gazette RS, Nos. 9/92, 13/93, 9/96) established the basis for the relatively high level of participation of individuals in the costs of health care concerning some kinds of services or in certain circumstances (medical treatment of non-occupational injuries); but despite some exceptions determined by statute, which are not determined in detail, this obligatory participation can prevent an individual who has financial difficulties from exercising the right to health care, because he/she is not able to help pay for the medical treatment costs.24

N. Rights of the Disabled

Disabled persons shall be guaranteed protection and worktraining in accordance with the law (Para. 1 of Article 52 of the Constitution). Physically or mentally handicapped children and other severely disabled persons have the right to education and training for an active life in society (Para. 2 of Article 52 of the Constitution). The education and training referred to in the preceding paragraph shall be financed from public funds (Para. 3 of Article 52 of the Constitution).

The Constitution includes in Article 52 the generally implemented term: the disabled, which includes two categories of persons, disabled workers and disabled persons. Among the different rights, which by statute belong to disabled persons, the Constitution determines in Para. 2 and 3 of Article 52 explicitly only the right of mentally and physically handicapped children and other severely disabled persons to education and worktraining in order that they may lead an active life in society. The education and worktraining shall be financed out of public revenue. The special protection of war veterans and civilian casualties of war are guaranteed by the constitutional provision on the right to social security (Para. 3 of Article 50 of the Constitution).25

O. Marriage and the Family

Marriage is based on the equality of spouses. Marriages shall be solemnized before an empowered state authority (Para. 1 of Article 53 of the Constitution). Marriage and the legal relations within it and the family, as well as those within an

extramarital union, shall be regulated by law (Para. 2 of Article 53 of the Constitution). The state shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection (Para. 3 of Article 53 of the Constitution).

From the point of view of the Constitution only marriage between man and woman is important, which must be performed in conformity with statute (civil marriage), but not necessary under rules of religious communities. On the other hand, the Constitution refers to the statute, which regulates marriage and the legal rights and obligations within marriage, within the family, as well as within common law marriage. Marriage is based on the equality between spouses, which denotes the implementation of the general principle of equality before law as well as equality with regard to sex. A common law marriage is the equivalent to marriage only as regards the legal consequences, which are determined for spouses by the Marriage and Family Relations Act. The statute does not deal with the children born out of wedlock. If a common law marriage has any consequences, and the kind of consequences it has in certain fields is regulated by other statutes, they are determined by these statutes (the second section of Article 12 of the Marriage and Family Relations Act). In such a way the equalization of a common law marriage partner with spouse is determined e.g. by the Inheritance Act. The State shall protect the family, motherhood, fatherhood, children and young people (Para. 3 of Article 53 of the Constitution). This constitutional provision is valid for the whole legal system. Therefore it does not concern only protection under family law, but also other forms of protection: e.g. services and support benefits of social welfare, social security, health care, the preschool and school system, as well as protection under the labor law. Under the Constitution, the State shall provide proper conditions for effecting such protection.26

The protection of the family by the State means first of all the protection of the benefits of children also within the family. The relations between parents and children are regulated by law (first of all the Marriage and Family Relations Act).

P. Rights and Obligations of Parents

Parents have the right and duty to maintain, educate and raise their children (Para. 1 of Article 54 of the Constitution). This right and duty may be revoked or restricted only for such reasons as are provided by law in order to protect the child's interests (Para. 2 of Article 54 of the Constitution). Children born out of wedlock have the same rights as children born within it (Para. 3 of Article 54 of the Constitution).

The provision of Para. 1 of Article 54 of the Constitution provides the constitutional ground for the so-called parental right, which is under statute (Para. 2 of Article 4 of the Marriage and Family Relations Act) composed of the rights and obligations of parents to maintain, educate, guide as well as to protect the rights and benefits of children. The parental right desists from the child's majority; At that time the obligation of parents to represent the child also desists. Under the Constitution, the State could or must intervene in the exercising of the parental right with measures, which are carried out by first of all by the social welfare system. Children born out of wedlock shall have the same rights as children born within marriage.27

R. Freedom of Choice in Childbearing

Everyone shall be free to decide whether to bear children (Para 1 of Article 55 of the Constitution). The state shall guarantee the opportunities for exercising this freedom and shall create such conditions as will enable parents to decide to bear children (Para. 2 of Article 55 of the Constitution).

The State creates opportunities for the exercising of this freedom. Under the Health Measures on the Implementation of the Freedom of Choice in Childbearing, the health service shall assure the manners and methods which can serve the people to, at their will, prevent or freely choose to bear children. The freedom of choice in childbearing could pose difficulties for the health service by refusing cooperation as regards birth control measures, in the form of the right of conscientious objection guaranteed by the Constitution and statute (Article 46 of the Constitution and Article 56 of the Health Services Act). As a limitation of the freedom of choice in childbearing the compulsory partial participation in bearing the costs of respective health service could be considered (Subpara. 1 of Item 3 of Para. 1 of Article 23 of the Health Care and Health Insurance Act).28

S. Rights of Children

Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity (Para. 1 of Article 56 of the Constitution). Children shall be guaranteed special protection from economic, social, physical, mental or other exploitation and abuse. Such protection shall be regulated by law (Para. 2 of Article 56 of the Constitution). Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state (Para. 3 of Article 56 of the Constitution). Their position shall be regulated by law (Para. 4 of Article 56 of the Constitution).

The Constitution declares the special protection of children from economic, social, physical, mental and other exploitation and maltreatment (Para. 3 of Article 53). The attitude to children and minors is regulated by statute: the Marriage and Family Relations Act guarantees two forms of protection: fostering (Article 8 of the Marriage and Family Relations Act) and tutorship (Para. 1 of Article 9 of the Marriage and Family Relations Act). Under the Marriage and Family Relations Act, adult persons are entitled to special tutorial protection if they are not able to care for themselves (Para. 2 of Article 9 of the Marriage and Family Relations Act). Children have also special rights guaranteed by the Convention on Children Rights; but the Constitution does not mention these special rights.29

T. Temporary Asylum

The Chapter on refugees in the Foreigners Act can not be applied to temporary refugees because it regulates the status and other matters of persons who left their mother country (usually for a long duration) owing to persecution because of political belief, cultural or scientific activity or national origin, race and /or religion and they requested in the Republic of Slovenia recognition as refugee under the Convention of UN on refugees of 1951 and the Protocol of UN on refugees of 1967.

The Temporary Asylum Act determined the temporary refugees as a legal category, with precisely determined proceedings for the acquisition of the status as well as with rights and obligations arising from the status.

The Republic of Slovenia has been guaranteeing temporary asylum under such conditions and in the manner determined by the statute (Article 1 of the Temporary Asylum Act). If the Government ascertains that in the neighboring country such circumstances have arisen such as a war or similar circumstances, occupation, mass violation of human rights or similar, the Government shall guarantee temporary asylum to persons coming from the respective country (Para. 1 of Article 2 of the Temporary Asylum Act). Considering the economic and other possibilities in Slovenia, the issues of national security, public order and peace etc., the National Assembly, on the proposal of the Government, determines the number of persons, whom the Republic of Slovenia will guarantee temporary asylum and the conditions; the determined number can be exceeded (Para. 2 of Article 2 of the Temporary Asylum Act). Statute regulates the conditions for the acquisition of the status of temporary asylum (Articles 3 and 4 of the Temporary Asylum Act) as well as the conditions of its cessation (Article 5 of the Temporary Asylum Act). The statute specifies details when temporary asylum can be deprived (Article 6 of the Temporary Asylum Act). Persons with temporary asylum have the following rights:

- to residence and sustenance during the period of the temporary asylum, within the range of possibility;
- to health care;
- to education;
- to work;
- to receiving humanitarian help;
- to personal help as well as help as regards the exercising of these rights (Article 20 of the Temporary Asylum Act).

When the circumstances ceases due to which the temporary asylum was granted (Article 2 of the Temporary Asylum Act), the Government determines a term of six months for leaving the State (Article 26 of the Temporary Asylum Act).

A foreigner with the recognized status of refugee shall be guaranteed necessary premises, subsistence and health care until departure to another country or until the concerned person is able to make a living, but two years at longest from the answer to a petition for the recognition of the status of refugee (Para. 1 of Article 39 of the Foreigners Act). This time limitation is irrelevant as regards the foreigner to whom the status of refugee was recognized, but who is unable to make a living (Para. 2 of Article 39 of the Foreigners Act). The subsistence and the lodging of foreigners with the recognized status of the refugee shall be financed out of public budget (Para. 3 of Article 39 of the Foreigners Act).

Some Benefits Under the Legislation

The personal income tax shall not be paid on support benefits awards and social admissions, allowances and receipts paid to war veterans, support benefits under the regulations on the rights of war disabled and military disabled as well as civil casualties of war, support benefits arising from work during work-training, support benefits for periodical or temporary nursing and/or help of invalids, jubilee awards, compensation for dismissal and salary continuances paid out under the regulations on employment and unemployment insurance support benefits arising from social security (supplementary pension, financial assistance for unemployment, child allowances etc.), support benefits arising from fostering, support benefits arising

from a disability benefit, allowances for help and nursing, support benefits from the periodical work of disabled persons and students and grants (Article 17 of the Personal Income Tax Act). The mentioned support benefits are under the Tax Administration Act, also excluded from the compulsory withholding (Article 49 of the Tax Administration Act). The Personal Income Tax Act guarantees also income tax relief for dependent family members (children, adoptees, grandchildren, spouse and parents and/or adopter of the obliged, who are supported by the obliged, if they do not have their own means (Para. 1 of Article 9 of the Personal Income Tax Act). The municipal council can under the explained proposal of the tax authority, allow the obliged to remiss totally or partially his/her tax load, if the exaction could threaten the vital minimum standard of living of the obliged and maintenance of his/her family members (Article 107 of the Personal Income Tax Act). The tax authority can permit the deferral of the payment of one's tax load to a maximum of six monthly installments or it can permit the obliged to remiss totally or partially his/her tax load, if the exaction could threaten the vital standard of living of the obliged and maintenance of his/her family members (Para. 1 of Article 118 of the Personal Income Tax Act; the Tax Administration Act also contains a similar provision - Article 89 of the Tax Administration Act).

With the compulsory exaction, only one third of the personal income can be affected. The pension of farmers, support benefits arising from movable property and life annuities as well as the support benefits of a life insurance policy can be affected with the exaction, if these support benefits exceed the amount of financial support as the only source of income under the regulations on social welfare (Article 32 of the Amended Tax Act). Salary, salary continuance, other support benefits arising from employment (if they are not excluded from the compulsory exaction) as well as a pension can be affected by the compulsory exaction only to one third of the net amount of the respective support benefits (Para. 1 of Article 50 of the Tax Administration Act). The mentioned support benefits can not be an object of compulsory exaction if they do not exceed the amount of financial support as the only source of living under the regulations on social welfare (Para. 2 of Article 50 of the Tax Administration Act).

The support benefits arising from social welfare rights ,which have been paid out of public revenue, have been brought into line with the movement of the minimum wage (Article 10 of the Budget Act).

Under the Family Support Benefits Act, the child allowance is paid out to one of the parents who has the right to the child allowance (Para. 1 of Article 42 of the Family Support benefits Act). For a child in a certain institution where he is provided accommodation free of charge, the child allowance can be not recognized for the period of stay in the institution. The same has to be taken into consideration as regards the child during military service. A child has the right to the child allowance on the basis of international agreements (Article 34 of the Family Support benefits Act).

Under the Employment and Unemployment Insurance Act, also the dependents of insured people if they don't have own source of income, are insured (Article 23 of the Act).

The statute (Article 11 of the Social Welfare Act) provides for the following special services by which social needs and emergencies can be eliminated: the first social support, personal help, family support, the institutionalized protection, guidance, protection and employment under special conditions, the help to workers employed in enterprises, institutions and other employers). The first social support under this statute includes help concerning the determination of social need and problem, the evaluation of possible solutions as well as the informing of the entitled person of all possible forms of social welfare services and support benefits which he can take advantage of, and of obligations (Article 12 of the Social Welfare Act). Public service in the field of social welfare includes the social prevention, the first social support, personal help, family help for housekeeping, institutionalized protection as well as guidance and protection and employment under special conditions (Para. 1 of Article 42 of the Social Welfare Act). Public service can be carried out by public social welfare institutions (e.g. Centers for the social welfare - Article 49 of the Social Welfare Act), but under concession, also by private persons (Para. 2 of Article 42 of the Social Welfare Act). The State guarantees the public service of a social prevention network (Para. 1 of Article 43 of the Social Welfare Act), and the municipality guarantees the public service of a personal help network as well as a network of family help at home (Para. 2 of Article 43 of the Social Welfare Act). Social welfare activity shall be financed out of the budget of the Republic of Slovenia (Article 98 of the Social Welfare Act). Entitled persons are obliged to pay for services, except the services of social prevention, the first social support and institutionalized protection in social welfare institutions for worktraining. The recipients of financial support as the only source of income and the recipients of the disability benefit are exempted from payment of these services (Article 100 of the Social Welfare Act).

The State and municipalities are obliged by statute to assure the treatment and emergency provision of the inhabitants who are because of acts of god or some other disaster without a home and a source of income and who are residing out of their permanent residence because of threat of danger (Para. 1 of Article 62 of the Protection Against Acts of God Act). The mayor can exceptionally order that the owners and users of flats are obliged to offer temporarily lodging to such evacuated and threatened persons, if there is no possible way to assure such lodging in some other way (Para. 2 of Article 62 of the Protection Against Acts of God Act).

Because of the assurance of social security, persons entitled to a pension annuity, disability pension, as well as dependents' pension with a permanent residence in the Republic of Slovenia whose pension does not reach the level of the minimal pension of the full pensionable allowance, have the right to a hardship allowance if they together with family members don't have other incomes which would be sufficient for survival (Article 23 of the Amended Pension and Disabled Persons Insurance Act).

Under the Health Care and Health Insurance Act, as an insured persons the following categories are treated: beside employed persons and pensioners, also the unemployed who have been receiving a salary continuance and/or financial support through the employment register office; persons with permanent residence in the Republic of Slovenia who are entitled to the disability benefits under the laws on

war veterans, support benefits under the regulations on the rights of war disabled and military disabled as well as civil casualties of war; persons with permanent residence in the Republic of Slovenia who have been receiving a salary continuance under the Social Protection of Mentally and Physically Disabled Adult Persons Act, if they are not insured in virtue of some other purpose; persons with permanent residence in the Republic of Slovenia who have been receiving permanent financial support as their source of income under the laws on the social welfare etc. (Article 15 of the Health Care and Health Insurance Act).

Men serving in the national service and the Army Reserve, have during the performance of the national service the right to health care free of charge, to financial support benefits as well as to the compensation of expenses resulting from military service. Members of the standing army have during the period of military service the right to emergency medical treatment free of charge (Para. 1 of Article 53 of the Defense Act). The costs of the health care and the health insurance are covered by the State, if for men in the national service the insurance has not been assured on some other grounds (Para. 2 of Article 53 of the Defense Act). Dependents of members of the Slovenian Army have after the proclamation of a State of War the right to financial support until that member returns from the military service (Para. 4 of Article 53 of the Defense Act).

The military disabled have the right to the compensation for transportation expenses also as regards travel to work-training in some other place, in case of a permanent transport, if this person is not assured free transportation with the public transportation under any other rule (Para. 1 of Article 55 of the War Disabled Act).

The rights of war veterans are as follows: the right to the veteran allowance, the allowance for help and nursing, health care, health resorts and climatic medical treatment, free transport, etc. (Article 17 of the War Veterans Act), funeral expenses and the acknowledgement of pensionable service (Article 5 of the War Veteran Act).

The Government prescribes the cases and conditions for the free granting of licences as regards national resources in demographically threatened areas (management, usage and exploitation) (Article 21 of the Environment Protection Act).

The proceedings before the Ombudsman are informal and for parties free of charge (Article 9 of the Ombudsman Act).

A voluntary fireman has the right to salary continuance during an intervention as well as during worktraining. The salary continuance has been paid out by the employer (Para. 1 of Article 25 of the Fire Fighting Act). In case of an intervention, which is longer than three hours, the participants are entitled to a free meal (Para. 2 of Article 25 of the Fire Fighting Act). Because of participation in an intervention or a worktraining, a voluntary firemen can't be dismissed, transferred to some other post or be curtailed in any other way by an employer (Para. 3 of Article 25 of the Fire Fighting Act).

Under the Primary School Act, a student with a residence a certain distance from the school has the right to free transportation. Furthermore, a student attending their first year has the right to free transportation irrespective of the

distance of their residence from the primary school, but students attending other years only if the body competent for preventive measures relating to road traffic determines that the security of the student can be threatened on the way to school (Para. 1 of Article 56 of the Primary Schools Act). Children with special needs have the right to free transport irrespective of the distance of their residence from the primary school, if so specified by statute (Para. 4 of Article 56 of the Primary School Act).

Those required to pay a holiday cash grant, are legal entities and natural persons who employ employees in the Republic of Slovenia (Para. 1 of Article 2 of the Implementation of the Social Agreement for 1996 Act). The provisions concerning the minimum wage are applicable to all employers who employ workers in the Republic of Slovenia (Para. 2 of Article 2 of the Implementation of the Social Agreement for 1996 Act).

The Resolution Concerning the Basis for the Creation of Family Policies in the Republic of Slovenia specifies that it is necessary to exceed the current priority of the residual model of social policies, and also the industrial model of social policies, where social security had been provided first of all to the actively employed segment of the population (employees). At the same time it is necessary at least in the long term to strive for the formation of a model of social policies which can assure social security to as wide a circle of people as possible, and influence the improvement of the quality of life of all people. It is also necessary to exercise the fundamental starting points of the social policies. The social policies cannot be based any more on full employment and/or the status of regular employment, nor on the family model, designed once and for all. Under the new model of social policies, the social security of every human shall be based on the status of citizenship as well as on the status of employment. At the same time the mentioned model shall take into consideration also the plurality of the family forms and needs of the people. The Resolution specifies the following measures: in the economic-fiscal field, the direct awarding of payments/benefits to families, which shall complement or replace their incomes; the allocation of income in favour of families within the scope of the tax policy as well as the special credit policy. In the field of the education, health care, consulting agencies, help in favour of the aged, help in favour of mentally or physically handicapped persons; the respective services shall support the functioning of the family; measures in the field of employment; measures in support of the reconciliation of the family and professional obligations of both parents as well as with other benefits connected with the manual labor market; measures in the field of housing with specific programmes for housing development as well as other possible forms of help in favour of families.

Under the Housing Act, citizens of the Republic of Slovenia who's total family income doesn't exceed the level specified by the rules on social welfare for the right to a financial allowance, are entitled to obtain social housing on lease (Para. 1 of Article 100 of the Housing Act). Assistance as regards the enjoyment of housing has been offered under the rules regulating social welfare rights (Para. 2 of Article 100 of the Housing Act).

The Constitutional Court of the Republic of Slovenia, Decision No. U-I-135/92, 30 June 1994, Official Gazette RS No. 44/94, OdlUS III, 84 decided as follows: The

fact that the Deputies Act grants to deputies of the National Assembly more favourable opportunities for acquiring and asserting rights arising from old-age insurance is not unconstitutional itself. For such benefits not to be contrary to the constitutional provision concerning Slovenia as a State governed by the Rule of Law and a Social State, they should be based not only on the fact of deputy mandate, but primarily on the specificities and duration of such a mandate; they should be proportionate to these factors and may depart from the rules of the general insurance system only to the degree mentioned, also taking into consideration general social circumstances. The principles according to which Slovenia is a democratic republic and a State governed by the Rule of Law require that proposals concerning special benefits for deputies of the National Assembly have to be justified and accessible to the public, together with the reasons given, throughout the procedure in which such proposals are decided by the National Assembly.

Митюков М.А.

"К истории конституционного правосудия России"
Москва, 2002г.

Вышла в свет книга профессора, заслуженного юриста Российской Федерации М. А. Митюкова "К истории конституционного правосудия России".

В работе рассмотрены проблемы истории конституционного правосудия России, при этом особое внимание уделено воззрениям государственных

деятелей, ученых и политиков XIX и начала XX вв. на судебный конституционный контроль и конституционным проектам, в которых предполагалось их реализовать. Впервые автором по материалам парламентских и других официальных политико-правовых дискуссий исследуются вопросы учреждения Конституционного Суда России, его образования и принятия первого Закона об этом Суде, а также обсуждения его судьбы и статуса на Конституционном совещании 1993г.

Автор – Председатель Комитета Верховного Совета РФ по законодательству (1991-1993гг.), Председатель Комиссии законодательных предложений при Президенте РФ (1993-1994гг.), член Конституционной комиссии и участник Конституционного совещания – обращается к истории конституционного правосудия, основываясь не только на литературных и архивных источниках, но и на личном опыте и впечатлениях о событиях, к которым он был причастен.

ЛАТВИЯ

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Конституционная жалоба в Республике Латвия: основные проблемы и тенденции развития

Уважаемые дамы и господа!

Конституционный Суд Латвии и Конституционный Суд Армении почти ровесники (Конституционный Суд Латвии действует с декабря 1996 года, а первое дело им было возбуждено и рассмотрено в начале 1997 года). Многие проблемы Конституционного Суда Латвии и Конституционного Суда Армении схожи. К такому выводу мы неоднократно приходили и на предыдущих Ереванских международных семинарах. Еще недавно одной из таких проблем было право индивидуума обращаться в Конституционный Суд, то есть – быть или не быть конституционной жалобе.

Сегодня в Латвии эта проблема решена. С 1 июля 2001 года индивидуум имеет право обращаться в Конституционный Суд. Однако реализация упомянутого права выявила много новых проблем.

Изменилась ли работа Конституционного Суда Латвии за последних 15 месяцев, то есть после 1 июля 2001 года? Несомненно. Во-первых, за этот период возбуждено больше дел, чем за предыдущие четыре с половиной года.

Во-вторых, весомую часть работы Конституционного Суда составляет стадия принятия решения о возбуждении дела или об отказе в возбуждении дела по конституционным жалобам. Примерно 9/10 конституционных жалоб, которые поступают в коллегии Конституционного Суда, отвергаются на этой стадии.

Латвийская модель конституционной жалобы имеет существенные особенности. Почему? При изучении опыта работы конституционных судов других стран, в которых есть институт конституционной жалобы, наряду с преимуществами, выявлялись и некоторые недостатки.

Работая над соответствующим проектом изменений в Законе о Конституционном Суде, мы прежде всего пытались найти ответ на вопрос, который на этом семинаре был задан представителю Федерального Конституционного Суда Германии доктору Лангеру, а именно: что делать, чтобы избежать перегрузки Конституционного Суда? Второй вопрос, ответ на который мы пытались найти, был: что делать, чтобы избежать конфликтов между Конституционным Судом и судами общей юрисдикции? Ответом на эти вопросы была наша модель конституционной жалобы.

Какова эта модель? Можно ли её вообще назвать конституционной жалобой?

С одной стороны, в законе заявления лиц традиционно названы конституционными жалобами (konstitucionala sudziba), так как лицо имеет право подать такое заявление в случае ущемления определенных в Конституции прав и основных свобод. С другой стороны, латвийская модель конституционной жалобы существенно отличается от "классической" модели, имеющей место во многих конституционных судах Европы. По мнению немецких ученых, латвийская модель является так называемой "ненастоящей" (unechte) конституционной жалобой1.

Согласно части первой статьи 192 Закона о Конституционном Суде "конституционную жалобу (заявление) в Конституционный Суд может подать любое лицо, которое считает, что определенные в Конституции его основные права ущемляются правовой нормой, которая не соответствует правовой норме высшей юридической силы". Это значит, что Конституционный Суд рассматривает только соответствие нормативного акта или его части нормам высшей юридической силы. Вопросы о соответствии Конституции других актов

государственной власти, в том числе решений судов, в компетенцию Конституционного Суда не входят.

Оправдала ли латвийская модель конституционной жалобы ожидания?

С одной стороны, лицо имеет возможность защитить свои основные права от ущемления их такими нормативными актами, которые не соответствуют Конституции. За этот короткий период рассмотрены дела, касающиеся разных основных прав, например права на справедливый суд, права на личную жизнь, права на собственность, права на социальное обеспечение. Многие дела были "громкими", то есть связаны с высоким интересом общества. Но, на наш взгляд, важную роль в защите ценностей, закрепленных в Конституции, играют не только конкретные рассмотренные дела, но и сама возможность обращения в Конституционный Суд.

Удалось также избежать вышеуказанных проблем. Перегрузок суда, а также конфликтов с судами общей юрисдикции не наблюдается. На 1 октября сего года по конституционным жалобам возбуждено 25 дел, пока провозглашено 11 решений. В большинстве из них Конституционный Суд признал, что оспоренный акт не соответствует Конституции.

Но, с другой стороны, ставится вопрос: образно говоря, убегая с "волка", не натолкнулись ли мы на "медведя"? А именно лицу предоставлена только частичная возможность защитить свои основные права в Конституционном Суде. Рассмотрению не подлежат вопросы об ущемлении основных прав, если оно допущено судом общей юрисдикции, а также административными актами. А как раз о таких случаях больше всего пишут заявители. Например, "классический" вопрос – о разбирательстве дела в разумный срок, то есть допустимой длительности уголовного процесса. Уголовно-процессуальное законодательство Латвии предусматривает сжатые сроки, однако эти сроки судами не соблюдаются. В рамках нашей модели конституционной жалобы Конституционный Суд не вправе дать оценку этой ситуации.

Конституционная жалоба в Латвии – это заявление о контроле норм. В конституционной жалобе можно оспорить только соответствие правовой нормы (акта) правовой норме высшей юридической силы. Причем оспорить можно не только закон, но и подзаконные акты, по существу любой нормативный акт или его часть. Большая часть дел, возбужденных по конституционным жалобам, – это дела о несоответствии Конституции актов Кабинета министров или органов, подчиненных ему.

Выше процитированная часть первая статьи 192 Закона о Конституционном Суде гласит: " … может подать любое лицо, которое считает, что определенные в Конституции его основные права ущемляются … ".

Термин Закона "любое лицо" соответствует термину "каждый", употребляемому в 8-ой главе Конституции: "…каждый имеет право …". То есть заявителем может быть любое лицо, которому Конституция в конкретном случае предоставляет основные права: 1) в основном, как правило, гражданин и негражданин (большая часть дел); 2) иностранец, лицо без гражданства (дел пока не было); 3) в ряде случаев – юридическое лицо.

Как раз с последней категорией заявителей связаны некоторые проблемы. Сам факт, что на юридическое лицо в ряде случаев распространяются

основные права человека, не вызывает сомнения. Это было одобрено практикой Конституционного Суда ещё до того, как вступил в силу институт конституционной жалобы, а именно: Суд констатировал, что принцип равенства, который содержит статья 91 Конституции, распространяется и на юридические лица2. Имеется и решение по делу, которое возбуждено по конституционной жалобе юридического лица3 – крестьянского хозяйства "Кантули" ("Kantuli").

Однако некоторые жалобы, по которым дела возбуждены не были или которые ещё рассматриваются, показали, что этот вопрос очень сложный.

Круг вопросов, по которым можно подать конституционную жалобу, ограничен. Лицо может обратиться в Конституционный Суд только в случае ущемления определенных в Конституции основных прав. Относительно других субъектов, которые перечислены в части первой статьи 17 Закона о Конституционном Суде, например депутатов Парламента, подобное ограничение не предусмотрено.

Чтобы ограничить конституционную жалобу от actio popularis, то есть так называемой "жалобы в пользу общественности", Закон предусматривает, что лицо может подать конституционную жалобу, если ущемлены "его основные права". Конституционную жалобу имеет право подать только то лицо, права которого ущемляются.

Практика Конституционного Суда Латвии показала, что иногда возникают трудности в этом разграничении. Например, по так называемому "делу депутатских компенсаций"4 представитель Парламента больше сил потратил на то, чтобы доказать, что оспоренный акт не касается заявителя самого, чем на то, чтобы доказать, что этот акт не противоречит Конституции. По этому делу Конституционный Суд констатировал, что ущемление конституционных прав заявителя имеет место.

Упомянутое дело выдвинуло также вопрос о том, как толковать выражения "считает, что … ущемляются …" в упомянутой статье Закона о Конституционном Суде. Суть вопроса в том, насколько глубоко содержание соответствующего основного права, а также наличие ущемления должно констатироваться уже в стадии возбуждения дела. Суд пришел к выводу (этот вывод содержится в решении по упомянутому делу), что для возбуждения дела достаточно, чтобы заявитель сформулировал обоснованную возможность, гипотезу факта ущемления. Проверка этого мнения является предметом судопроизводства по делу в целом.

Конституционная жалоба является дополнительным средством защиты прав. Согласно статье 192 Закона о Конституционном Суде "конституционную жалобу (заявление) можно подать лишь тогда, если использованы все возможности защиты упомянутых прав общими средствами защиты права (жалоба в высший орган или высшему должностному лицу, жалоба или исковое заявление в суд общей юрисдикции и др.) или если таковых нет …". Но Закон предусмотрел иной порядок в особых случаях. "Если рассмотрение конституционной жалобы (заявления) является общезначимым или если защита прав общими средствами защиты права не может предотвратить существенный вред для заявителя жалобы, Конституционный Суд может принимать решение о рассмотрении

жалобы (заявления) до использования всех общих средств защиты права. Возбуждение дела в Конституционном Суде запрещает рассмотрение соответствующего гражданского дела, уголовного дела или административного дела в суде общей юрисдикции до момента оглашения решения Конституционного Суда". Заявители часто просят применить эту норму, однако она еще ни разу не была применена.

Срок подачи конституционной жалобы ограничен. Закон гласит, что "конституционную жалобу (заявление) Конституционному Суду можно подать в шестимесячный срок после вступления в силу постановления последнего органа".

Несмотря на то, что этот срок даже больше, чем в конституционных судах некоторых других стран, соответствие этой нормы Конституции было оспорено. Соответствующее дело5 подготавливается к рассмотрению.

Может возникнуть вопрос о том, имеет ли смысл подавать конституционную жалобу, если дело в суде общей юрисдикции уже решено и решение этого суда проверке Конституционного Суда не подлежит. Этот вопрос решен следующим образом. Часть третья статьи 32 Закона о Конституционном Суде гласит: "правовая норма (акт), которую Конституционный Суд признал не соответствующей правовой норме высшей юридической силы, считается утратившей силу со дня опубликования решения Конституционного Суда, если Конституционный Суд не установил иное". На практике Конституционный Суд часто устанавливает, что оспоренная норма признаётся утратившей силу с момента её издания или момента вступления в силу нормы высшей юридической силы. Имело место и решение6, в котором Конституционный Суд установил, что оспоренная норма признаётся утратившей силу со дня опубликования решения Конституционного Суда, а по отношению к заявителям – с конкретной даты, связанной с соответствующим делом в суде общей юрисдикции.

Соответствующее процессуальное законодательство, например, статья 479 Гражданско-процессуального закона, устанавливает, что признание нормы, которая применена в деле, не соответствующей норме высшей юридической силы, является новооткрывшимся обстоятельством, то есть основанием для возобновления судопроизводства по делу.

В аспекте процесса в Конституционном Суде относительно конституционных жалоб очень важна именно стадия возбуждения дела. Дальше ход судопроизводства в основных чертах не отличается от других видов дел. В Конституционном Суде Латвии можно выделить два важных звена, цель которых – отборка тех конституционных жалоб, которые соответствуют требованиям закона.

Первое звено – решение Председателя Конституционного Суда о том, является ли документ, поступивший в Конституционный Суд, процессуальным документом – заявлением (pieteikums) или это просто письмо или заявление (iesniegums).

Регламент Конституционного Суда гласит: "не рассматривается как заявление – независимо от его названия – документ, … который явно не соответствует требованиям, установленным в законе для заявления".

Закон о Конституционном Суде предусматривает, что заявление о возбуждении дела подается в Конституционный Суд в письменном виде. В заявлении должны быть указаны заявитель, орган или должностное лицо, издавшее оспариваемый акт, изложены фактически обстоятельства дела, юридическое обоснование заявления, а также требование к Конституционному Суду.

Если в Конституционный Суд поступает документ, не содержащий требования, которое входит в компетенцию Конституционного Суда, то есть требования о соответствии норм права нормам права высшей юридической силы, Председатель Конституционного Суда делает вывод, что заявление явно не соответствует требованиям, установленным в законе для заявления. Заявитель получает письмо Председателя Конституционного Суда, в котором ему дается информация о компетенции Конституционного Суда и сообщается, что его заявление не будет рассмотрено по существу.

Статистика показывает, что, к сожалению, более половины всех обращений лиц явно не соответствуют требованиям, установленным в законе для заявления. С 1 июля 2001 года по 1 октября сего года в Конституционный Суд поступило около 800 писем физических и юридических лиц. Только относительно около 300 из них Председатель счел, что это процессуальные документы – заявления, и передал их на рассмотрение в коллегии Конституционного Суда.

Второе звено – решение коллегии Конституционного Суда.

Конституционную жалобу рассматривает и решение в отношении возбуждения дела или отказа в возбуждении дела принимает коллегия в составе трех судей. Коллегии создаются Конституционным Судом абсолютным большинством голосов всего состава судей на один год. На сегодняшний день созданы четыре коллегии таким образом, что Председатель Конституционного Суда и его заместитель входят в состав одной коллегии, а остальные судьи – каждый в состав двух коллегий.

Заседания коллегии являются закрытыми. В них участвуют только члены соответствующей коллегии. При необходимости члены коллегии могут пригласить к участию в заседании заявителя работников Конституционного Суда, а также других лиц. Связанные с организацией работы коллегии вопросы определяет Регламент Конституционного Суда и коллегия сама.

Решение коллегии о возбуждении дела или об отказе в возбуждении дела обжалованию не подлежит.

При рассмотрении любого заявления коллегия вправе отказать в возбуждении дела, если: 1) дело не подсудно Конституционному Суду; 2) заявитель не вправе подать заявление; 3) заявление не соответствует требованиям закона; 4) заявление подано по требованию, по которому уже вынесено решение.

При рассмотрении конституционной жалобы коллегия может отказать в возбуждении дела также в случаях, когда содержащееся в жалобе юридическое обоснование является явно недостаточным для удовлетворения требования. Эта норма является гарантией, чтобы суд не тратил время, рассматривая абсолютно необоснованные жалобы.

Как уже упоминалось выше, около 9/10 заявлений отвергаются коллегиями. Это свидетельствует об их невысоком качестве.

В заключение хочу подчеркнуть, что введение института конституционной жалобы было большим и важным шагом в развитии конституционного судопроизводства в Латвии. Большинство наших проблем связано с новизной этого института. Мы надеемся, что со временем мы с ними справимся. Некоторые проблемы связаны с нашей моделью конституционной жалобы. Но идеальной модели нет. Может быть, через какое-то время мы возвратимся к дискуссии об этой модели. Но на сей день мы считаем, что выбрали правильный путь.

Спасибо за внимание!

CYPRUS

G. Pikis
President of the Supreme Court of Cyprus

Judicial protection of Human Rights in Cyprus

The Constitution of the Republic of Cyprus safeguards fundamental rights and liberties in a comprehensive way. Human rights are entrenched in a separate part of the Constitution, Part II, extending from Article 6 to Article 35. The constitutional charter of human rights is modelled on the European Convention on Human Rights, save that its ambit is broader. Article 33 of the Constitution provides that limitations or restrictions to the rights and liberties guaranteed, "shall be interpreted strictly and shall not be applied for any purpose other than those for which they have been prescribed". As indicated in the case of Police v. Ekdotiki

Eteria (1982)2 C.L.R. 63, any restrictions imposed by law must refer to and serve exclusively the purposes for which the Constitution permits limitations of the rights protected.

Soon after independence, achieved in 1960, Cyprus became a member of the Council of Europe. Cyprus acceded to the European Convention on Human Rights on 16th December 1961, soon afterwards ratified by the House of Representatives becoming part of domestic law. This was accomplished by Law 39 of l962 promulgated on the 24th May 1962. The Constitution is the supreme law of the Republic (Article 179.1 of the Constitution.).

The constitutional protection of human rights and the protection guaranteed by the European Convention on Human Rights are coincidental; Save that their ambit under the Cyprus Constitution is wider and they are defined in greater detail. Decisions of the European Court of human Rights are a source of guidance in the interpretation and application of both the relevant provisions of the Constitution and the Convention. An important consequence of the embodiment of human rights in the supreme law of the country is that no law and no act or decision of an organ of the Republic repugnant to or inconsistent with the provisions of the Constitution, including those protecting human rights, can be validly issued. (Article 179.2 of the Constitution.) A law, rule, or regulation issued and every executive or administrative decision taken in breach of the provisions of the Constitution, can be adjudged unconstitutional by a court of law, and on that account be declared unenforceable.

Human rights have a universal dimension. They are perceived as inherent in man constituting the inborn attribute of human existence to be enjoyed at all times, in all circumstances and in every place.

Viewed in their proper context Human Rights are definitive of the framework of the system of government and social order. They incorporate the values that should characterize every civilized society. The following passage from one of the judgments in the case of Police v. Georghiades (cited above), reflects their essence:

"The pursuit of truth is no warrant for watering down fundamental rights. If that were to be allowed to happen, fundamental human rights would soon be chased out of the statute book. The recognition and effective enforcement of basic human rights is, in itself, an ultimate truth for the realisation of the human ideal, of supreme importance for the release of the creative forces in man. Recognition of fundamental human rights is a principal object of civilisation."

Brief reference is made hereunder to a small number of judicial decisions from the voluminous body of Cyprus case law on the interpretation and application of human rights, characteristic of judicial approach to the subject.

In Police v. Georghiades (1983) 2 C.L.R. 33, it was affirmed that human rights can be asserted not only against the State but against everybody. Respect for the fundamental rights of the individual is owed by everyone. Evidence obtained in or resulting from breach of the fundamental rights of a person is inadmissible as evidence in any court of law. Consequently, a tape, recording the conversation between a psychologist and his client, made in secret was held to be inadmissible as evidence in criminal proceedings against the doctor on charges of perjury and

related offences because it derived from a breach of the accused's rights to privacy and freedom of communication. In the same spirit it was decided in Police v. Yiallourou (1992) 2 C.L.R. 147, that the tapping of a telephone conversation without the sanction of the interlocutors, constituted a breach of both the right to privacy and the right to freedom of communication.

Two decisions subsequent to Georghiades (supra), established conclusively that not only evidence stemming directly from breach of fundamental human rights but indirectly too, is inadmissible as evidence. In Merthodja v. Police (1987) 2 C.L.R. 227, a statement obtained by the accused while in custody was found to be inadmissible because at the time it was given the authority for the detention of the accused, had expired. The confinement of the suspect without judicial authority constituted a breach of his right to liberty and security of person. In Parpas v. Republic (1988) 2 C.L.R. 5, it was decided that specimens of signature given by the accused while in custody on suspicion for possession of explosive substances, could not be received in evidence in criminal proceedings against the accused on charges of impersonation, uttering a forged document and obtaining money by false pretences, because his detention had been secured not for the purpose for which it was authorised but for an ulterior purpose, namely to provide an opportunity to obtain specimens of his signature.

The presumption of innocence safeguarded in article 6(2) of the Convention and entrenched in article 12.4 of the Constitution, is all embracing. In President of the Republic v. House of Representatives (1994)3 C.L.R. 1, it was decided that the presumption imports the right against self-incrimination. Consequently, a law obliging a category of persons to make statements regarding their affairs that could incriminate them, was declared to be unconstitutional. A necessary inference is that the right to silence in the face of accusation cannot be forfeited in any circumstances. Article 12.2 of the Constitution, provides: "A person who has been acquitted or convicted of an offence shall not be tried again for the same offence." In Pernell and others v. The Republic, Criminal appeals 6148, 6149, 6150 - 9 July 1998, it was held to be impermissible for the prosecution to adduce on appeal incriminating evidence that emerged after the conclusion of the trial in an effort to strengthen the foundation of a conviction challenged on appeal by the accused. Acceptance of such evidence, the Court noted, would be tantamount to allowing the prosecution a second opportunity to prove the offence.

The right of the individual to a fair trial for the determination of his civil rights and obligations and of any criminal charge brought against him/her by an independent impartial and competent court, established by law, is safeguarded by Article 30 of the Constitution (Article 6.1 of the Convention). In Kyriakides and Others v. The Republic Cases 298/96, 299/96, 300/96 - 26.11.1997, it was held in line with the case law of the European Court of Human Rights on the subject, that only a court of law can pronounce a person guilty of a criminal offence. No valid pronouncement can be made on the civil rights and obligations of the individual or his criminal liability, except by a competent court of law. In Ellinas v. Republic (1989)2 C.L.R. 149, it was stressed that the courts of law are the sole arbiters of the guilt of the accused and his rights generally. Trial through the press is incompatible with the right of the accused to a fair trial. The right to trial free from

prejudice and every kind of stigmatisation is bound up, it was observed, with freedom itself, in essence an inseparable part of it.

Breach of the right to a fair trial derails the judicial process and renders its outcome void. In Efstathiou v. The Police (1990)2 C.L.R. 294, the conviction of the accused for a traffic offence was quashed because the criminal charge against him was not determined within a reasonable time. The court pointed out that compliance with the constitutional norms of a fair trial, is a prerequisite for a valid judicial determination. In Victoros v. Christodoulou (1992)1 C.L.R. 512, the judgement of a civil court was set aside for failure to try the case within a reasonable time. In Gregoriou v. Bank of Cyprus Ltd (1992)1 C.L.R. 1222, the judgement of a civil court was set aside and a retrial of the case was ordered because of breach of Article 30.3 (b) of the Constitution safeguarding the right of a litigant "to present his case before the court and to have sufficient time necessary for its preparation". The trial court had wrongly dismissed an application made on behalf of the plaintiff to adjourn the case at the stage of final addresses in order to enable him to attend and help in the presentation of his address.

Another attribute of fair trial is that the judgment of the court should be duly reasoned. The reasoning of a judgment is a species of accountability for the exercise of the judicial power (competence - jurisdiction) of the State designed to eliminate arbitrariness in the judicial process. A judgment must be reasoned by reference to matters in dispute, the evidence produced before the Court and the arguments advanced on either side. Failure to reason a judgment, like every failure to observe the norms of a fair trial, renders the proceedings a nullity. (Eteria Pafitis & Iordanous Contractors Ltd and others v. A. N. Stasis Estates Co., Ltd C.A. 9434 - 15.5.1998; Costa Glyky v. Demou Lemesou C.A. 10005 - 17.12.1998.)

There is a rich body of case law definitive of human rights safeguarded by the Constitution and the Convention, and the range of their application. Space confines us to an enumeration of only a small number of decided cases. I may only add, for the completion of the short survey here undertaken, that the right of equality before the law, the administration and justice, and the exclusion of every species of discrimination direct or indirect, is comprehensively safeguarded by Article 28 of the Constitution. In Koullouros v. Koullourou and another (1989)1 (E) C.L.R. 50, the court affirmed in the strongest terms that men and women have equal rights and equal responsibilities. It is within this context, it was emphasised, that marital rights and obligations must be determined.

Human rights are embodied in a separate part of the Constitution (Part II, Articles 6-35 inclusive), establishing the inalienable rights of the individual. Article 35 of the Constitution provides:

"The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part."

This Article has been interpreted as imposing a positive obligation on each power of the State to ensure the effective application of Human Rights in its domain. In the recent decision of Yiallourou v. Nikolaou C.A. 9931 - 8.5.01, the Supreme Court (in plenary session), held that breach of a fundamental right or liberty of the individual safeguarded by the code of Human Rights enshrined in the

Constitution confers per se a right of action against the wrongdoer, be it the State or a fellow human being.

The person whose fundamental right is violated may claim any appropriate remedy known to the law, including compensation. In Yiallourou (above), a sum of C?5,000 damages, (the equivalent of approximately U.S.$ 7,600), was awarded against the defendant, a fellow employee of the Municipality, for tapping his telephone conversations. Such interference constituted a breach of his right of privacy safeguarded by Article 15.1 and freedom of communication safeguarded by Article 17.1 of the Constitution. The sum of ?5,000 represented compensation for injured feelings, distress, pain and suffering, and ultimately for violating his being as a physical and social entity. The plaintiff had suffered no financial loss.

Limitations may be imposed to the exercise of certain Human Rights in the interest of constitutional order, security of the Republic, public health, public morals, or the protection of the rights of others. Property rights may be limited for the sake of town planning. A restriction of human rights is only permissible if, (a) the limitation is specifically permitted by the Constitution, (b) it is introduced by Law, and (c) it is warranted by a serious, if not an inevitable danger to one or more of the causes for which limitation is possible.

It is for the legislature to establish the need for legislating, particularly the urgency of the need for legislation; and it is for the Courts ultimately to decide whether the limitation is warranted by a pressing need in the interest of the specified causes. The matter is examined at great length in a fairly recent decision of the Supreme Court, namely the President of the Republic v. House of Representatives 2/99 - 12.5.2000.

It must be noted that the Constitution itself in Article 33 provides:

"1. Subject to the provisions of this Constitution relating to a state of emergency, the fundamental rights and liberties guaranteed by this Part shall not be subjected to any other limitations or restrictions than those in this Part provided.

2. The provisions of this Part relating to such limitations or restrictions shall be interpreted strictly and shall not be applied for any purpose other than those for which they have been prescribed."

Human Rights, properly appreciated, establish the framework for the identification of what is and ought to be the common law of mankind uniting humanity in its common pursuits.

In 1974 Cyprus was invaded by Turkey. The invader occupied about thirty-eight per cent of the territory of the island, causing the displacement of an approximately corresponding percentage of the population from their homes and ancestral land. As a result the island was cut in two. The occupation continues nearly twenty-eight years after the invasion. As a consequence of the Turkish invasion and occupation of a large part of the island, citizens of the Republic were and are denied fundamental human rights as the European Court of Human Rights judicially acknowledged in a series of decisions. (See inter alia Case of Loizidou v. Turkey judgment of 18 December, 1996, 1996-VI No. 26 and the Case of Loizidou v. Turkey, judgment of 28th July 1998. Case of Cyprus v. Turkey Application No. 25781/94).

Notwithstanding the calamity that befell Cyprus in 1974, the occupation of a large part of the country by the Turkish army and the displacement of thousands of citizens of the island, human rights remained intact in every part of the country under the control of the State. The case law of the Supreme Court does demonstrate, I believe, that human rights are given effect to and are duly protected as ever before.

ЛИТВА

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Защита прав и свобод обвиняемого в юриспруденции Конституционного Суда Литовской Республики

За десять лет действия Конституции Литовской Республики (в дальнейшем – Конституция) открылась широкая панорама правовых проблем в институте обвиняемого.

Значительная их часть стала предметом юриспруденции Конституционного Суда Литовской Республики (в дальнейшем – Конституционный Суд). Юриспруденция Конституционного Суда в области защиты конституционных прав и свобод обвиняемого имеет многоплановый характер. Эта сфера деятельности Конституционного Суда не ограничивается исследованием соответствия Конституции только отдельных норм уголовно-процессуального

права, определяющего правовой статус обвиняемого (подозреваемого, подсудимого). Предметом конституционного надзора были и конкретные нормы уголовного, гражданского, государственного и других отраслей права, также прямо или косвенно влияющие на правовое положение обвиняемого (подозреваемого, подсудимого) в уголовном процессе.

В частности, Конституционный Суд проверял, не противоречат ли Конституции нормы Уголовного кодекса Литовской Республики, определяющие правила действия уголовного закона во времени, предусматривающие конфискацию имущества как меру уголовного наказания (см.: Постановление Конституционного Суда Литовской Республики от 11 января 2001 г. "О соответствии части 2 статьи 7 Уголовного кодекса Литовской Республики Конституции Литовской Республики" и Постановление от 13 декабря 1993 г. "О соответствии части 2 статьи 148 Уголовного кодекса Литовской Республики и пунктов 1 и 2 статьи 93 Уголовно-процессуального кодекса Литовской Республики Конституции Литовской Республики"). Конституционный Суд защитил право лиц на возмещение ущерба, причинённого незаконными действиями органов дознания, расследования, прокуратуры и суда (см.: Постановление Конституционного Суда Литовской Республики от 30 июня 2000 г. "О соответствии части 1 статьи 3 и пункта 1 части 1 статьи 4 Закона Литовской Республики "О возмещении ущерба, причиненного незаконными действиями органов дознания, следствия, прокуратуры и суда" Конституции Литовской Республики"). Конституционный Суд исключил из правовой системы нормы Статута Сейма, не обеспечивавшие право лиц, отстраняемых от должности или лишаемых мандата члена Сейма в порядке процесса импичмента на основании подозрения лица в совершении преступления, участвовать в этом процессе и защищаться (см.: Постановление Конституционного Суда Литовской Республики от 11 мая 1999 г. "О соответствии статьи 259 Статута Сейма Литовской Республики Конституции Литовской Республики").

Следует подчеркнуть, что юриспруденция Конституционного Суда как в целом, так и в области защиты прав и свобод обвиняемого (подозреваемого, подсудимого) основывалась не только на положениях, нормах, принципах, закреплённых в Конституции. Конституционный Суд руководствовался также международными договорами (в частности Европейской конвенцией о защите прав человека и основных свобод), ратифицированными Сеймом Литовской Республики и в соответствии с Конституцией являющимися составной частью правовой системы Литовской Республики. Учитывалась юриспруденция Европейского суда по правам человека как источник толкования права. Значительное место при принятии постановлений (решений) занимали и доктрины Конституционного Суда, разработанные на основе интерпретации положений, норм Конституции.

Уже в начале своей деятельности в области конституционной защиты прав и свобод обвиняемого Конституционный Суд подчеркнул, что вопросы уголовной политики государства (в том числе и процесс правового регулирования применения принудительного воздействия в отношении подозреваемых, обвиняемых, подсудимых) должны решаться, учитывая положения преамбулы Конституции Литовской Республики, провозглашающей, что литовский народ

стремится к открытому, справедливому, гармоничному гражданскому обществу и правовому государству. Конституционный Суд в своей юриспруденции всегда исходит из того, что Конституция – единый акт, закрепляющий систему конституционных ценностей и устанавливающий их баланс, равновесие. Законодатель, устанавливая правовое регулирование, должен сохранить это равновесие. Защита гарантий одних конституционных ценностей не может создавать предпосылок для ущемления или нарушения других.

Анализ дел, рассмотренных в Конституционном Суде, даёт возможность указать, что Суд при защите прав и свобод обвиняемого весьма часто руководствовался и другими положениями Конституции и конституционными принципами: в частности, осуществление правосудия только судом; публичное и справедливое судебное разбирательство; неприкосновенность и беспристрастность суда; разделение функций суда и других субъектов уголовно-процессуальной деятельности; презумпция невиновности; равенство перед законом и судом; право на судебную защиту. Эти положения, принципы в конкретных постановлениях Конституционного Суда при решении вопросов конституционности отдельных норм, определяющих правовой статус обвиняемого, как правило, получали определённую интерпретацию. Например, относительно права на судебную защиту Конституционный Суд неоднократно подчёркивал, что в демократическом правовом государстве суд является основной конституционной гарантией прав и свобод человека, что конституционный принцип судебной защиты универсален. Поэтому согласно Конституции законодатель обязан установить такое правовое регулирование, которое гарантировало бы правовые возможности судебного разрешения споров о нарушении прав и свобод человека. Конституционный Суд отметил, что возможен и досудебный порядок решения споров. Однако не может быть такого правового регулирования досудебного порядка решения споров, которое сводило бы на нет право человека, считающего, что его права и свободы нарушаются, защищать их в суде. Развивая эту конституционную доктрину защиты прав и свобод человека, Конституционный Суд констатировал, что согласно Конституции судебная защита нарушенных прав и свобод человека гарантируется независимо от правового статуса лица. В суде должны защищаться нарушенные права и законные интересы как при прямом их закреплении в Конституции, так и при отсутствии такого прямого их закрепления в Конституции.

Уже говорилось, что юриспруденция Конституционного Суда по защите прав и свобод обвиняемого охватывает много аспектов. Поэтому неудивительно, что некоторые постановления Конституционного Суда вызвали определённый интерес не только в кругу юристов, должностных лиц, имеющих полномочия применять законы, но и среди политиков, общественности. Например, в Постановлении Конституционного Суда Литовской Республики от 8 мая 2000 г. "О соответствии части 12 статьи 2, пункта 3 части 2 статьи 7, части 1 статьи 11 Закона Литовской Республики "Об оперативной деятельности" и частей 1 и 2 статьи 1981 Уголовно-процессуального кодекса Литовской Республики Конституции Литовской Республики" Конституционный Суд рассматривал вопрос соответствия Конституции положений Закона "Об оперативной

деятельности", фактически предоставлявших право субъектам оперативной деятельности применять модель, имитирующую преступную деятельность, в отношении Президента Республики и членов Сейма (понятие закона "преступную деятельность имитирующая модель", в сущности, соответствует понятию "тайные агенты").

В Конституции Литовской Республики установлено, что "личность Президента Республики неприкосновенна: до тех пор, пока он исполняет свои обязанности, он не может быть арестован, привлечён к уголовной или административной ответственности" (часть 1 статьи 86). В частях 1 и 2 статьи 62 Конституции установлено, что "личность члена Сейма неприкосновенна. Член Сейма без согласия Сейма не может быть привлечен к уголовной ответственности, арестован, не может быть иным образом ограничена его свобода".

Этими и другими положениями Конституции установлен иммунитет Президента Республики и члена Сейма. Иммунитет – это дополнительные гарантии неприкосновенности личности Президента Республики и члена Сейма, необходимые для надлежащего выполнения их функций, установленных в Конституции, и лишения возможностей негативного воздействия на этих лиц со стороны, например, должностных лиц правоохранительных органов. В связи с этим установление дополнительных гарантий личной неприкосновенности Президента Республики и члена Сейма является допустимым и не отрицает закреплённого в Конституции принципа равенства всех перед законом. Однако правовой статус Президента Республики как главы государства отличается от статуса любого гражданина, должностного лица, в том числе и от члена Сейма. Особенности статуса Президента Республики, члена Сейма определяют и разный объём иммунитета этих лиц.

Учитывая эти аргументы, Конституционный Суд констатировал, что в отношении Президента Республики недопустимо применение любых форм оперативной деятельности, в том числе и модели, имитирующей преступную деятельность. Конституционный Суд подчеркнул, что отсутствие в Законе "Об оперативной деятельности" запрета на применение модели, имитирующей преступную деятельность, в отношении Президента Республики даёт основание полагать, что такие оперативные действия в отношении главы государства допустимы, а это противоречит Конституции. Конституционный Суд также констатировал, что положениями Конституции не запрещается применение модели, имитирующей преступную деятельность, в отношении члена Сейма.

В указанном Постановлении от 8 мая 2000 года Конституционный Суд ответил и на вопрос конституционности применения модели в отношении других лиц, подозреваемых в совершении преступлений. Конституционный Суд подчеркнул, что применение модели, имитирующей преступную деятельность, – один из способов раскрытия подготовленного или начатого (но незаконченного), обычно тяжкого, преступления. С помощью такой модели субъекты оперативной деятельности стараются установить, как поведёт себя лицо в искусственно созданных условиях, благоприятных для совершения преступного деяния. Если лицо в такой ситуации совершает деяние, запрещённое в уголовном законе, создаются условия для доказательства его

виновности в совершении преступления, ибо лицо, совершающее преступную деятельность, сознаёт общественную опасность своего поведения, сознаёт или обязан и имеет возможность сознавать запрещённость, противоправность своего поведения, понимает, что за несоблюдение таких запретов в отношении него могут применяться меры государственного принуждения, в том числе – разные процессуальные, оперативные мероприятия.

Тем самым Конституционный Суд констатировал, что не может быть установлено такое правовое регулирование применения модели, имитирующей преступную деятельность, которое сохраняло бы за специальными службами государства возможность подстрекать, провоцировать лицо на совершение преступления и, таким образом, создавать основу для его наказания. Провоцирование преступления и другие злоупотребления указанной моделью, по мнению Конституционного Суда, делают ее антиконституционной, а собранная в результате ее применения информация не является доказательством уголовно-процессуального значения.

Конституционный Суд подчеркнул, что исследование и оценка обстоятельств реализации модели, имитирующей преступную деятельность, – предмет судебного разбирательства. В соответствии с Конституцией суды имеют обязанность проверять и оценивать законность, достоверность, допустимость всех им представленных доказательств, в том числе и собранных оперативным путём. Суды в каждом уголовном деле, в котором применяется указанная модель, должны устанавливать, не было ли провокации, подстрекательства к совершению преступления. При установлении такого злоупотребления таким образом собранная информация не может считаться доказательством по делу.

Конституционный Суд также отметил, что в Конституции закреплено право человека на судебную защиту, на рассмотрение его дела независимым и беспристрастным судом не только во время судебного разбирательства, но и в течение всего процесса дела, в том числе и во время предварительного расследования. Только при соблюдении требования беспристрастного процесса расследования уголовного дела создаются гарантии объективного, судебного разбирательства и справедливого разрешения уголовного дела. Требования беспристрастного процесса применимы и при совершении оперативных действий, ибо информация, полученная в результате проведения оперативных действий, в соответствии с Уголовно-процессуальным кодексом может быть использована в качестве доказательства в уголовном деле.

Конституционный Суд констатировал, что санкционирование модели, имитирующей преступную деятельность, судом, а не Генеральным прокурором или заместителем Генерального прокурора Литовской Республики, как установлено в Законе "Об оперативной деятельности", более соответствовало бы конституционному принципу охраны прав и свобод человека.

Конституционный Суд в Постановлении от 19 сентября 2000 г. "О соответствии статей 1181, 1561, пункта 5 статьи 267 и статьи 3171 Уголовно-процессуального кодекса Литовской Республики Конституции Литовской Республики", решая вопрос соответствия Конституции норм Уголовно-процессуального кодекса, предусматривающих возможность участия в

уголовном процессе засекреченных свидетелей, потерпевших, подчеркнул, что этот институт уголовного процесса должен соответствовать конституционному принципу права лица на справедливый суд. Суть этого принципа, по мнению Конституционного Суда, заключается в том, что суды обязаны безусловно соблюдать конституционные принципы и положения, закрепляющие следующие требования: равенство сторон процесса перед судом и законом; независимость и беспристрастность судей; право обвиняемого на защиту. Соблюдение и выполнение этих и других требований – необходимое условие установления истины и справедливого применения уголовного закона. Однако в Уголовно-процессуальном кодексе было установлено право суда не вызывать на судебное заседание свидетелей и потерпевших, данные о личности которых засекречены, и ограничиваться только оглашением на судебном заседании их (т.е. таких свидетелей и потерпевших) показаний, полученных во время предварительного расследования. Конституционный Суд признал, что такие положения института засекреченных свидетелей и потерпевших в уголовном процессе ограничивают право подсудимого задавать вопросы засекреченному свидетелю или потерпевшему, и в определённой мере a priori признаёт достоверность таких показаний как источника доказательств. Это ограничивает право подсудимого участвовать в исследовании доказательств, ущемляет его право на защиту и на справедливое рассмотрение уголовного дела и противоречит нормам Конституции, устанавливающим, что лицо, обвиняемое в совершении преступления, имеет право на открытое и справедливое рассмотрение его дела независимым и беспристрастным судом, что лицу, подозреваемому в совершении преступления, и обвиняемому лицу с момента их задержания или первого допроса гарантируется право на защиту (части 2 и 6 статьи 31 Конституции).

Конституционный Суд в указанном и в других постановлениях неоднократно подчёркивал, что нарушение любой гарантии неприкосновенности судьи и суда может негативно отразиться на осуществлении правосудия, защиты прав и свобод человека.

Конституционный Суд в своём Постановлении от 5 февраля 1999 г. "О соответствии частей 4 и 5 статьи 255, части 4 статьи 256, части 4 статьи 260 и частей 1, 2 и 6 статьи 280 Уголовно-процессуального кодекса Литовской Республики Конституции Литовской Республики" обратил внимание законодателя на то, что в Уголовно-процессуальном кодексе содержатся нормы, приписывающие суду не свойственные ему функции. В частности, в УПК было установлено право суда давать органу дознания, следователю указания совершать определённые следственные или другие процессуальные действия, возвращать уголовное дело на доследование. В УПК также было указано на право и обязанность суда при наличии определённых оснований заменять в суде обвинение, предъявленное во время предварительного следствия, на более тяжкое.

Конституционный Суд констатировал, что в деятельности суда, выполняющего указанные положения УПК, появляются элементы функций уголовного преследования, обвинения, несвойственные суду при осуществлении правосудия. Поэтому Конституционный Суд признал указанные

положения УПК противоречащими Конституции и элиминировал их из правовой системы.

Подытоживая изложенное, а также учитывая и неуказанные постановления Конституционного Суда относительно конституционности отдельных элементов (норм, положений) правового института обвиняемого (подозреваемого, подсудимого), есть основание утверждать следующее:

1) юриспруденция Конституционного Суда в области защиты конституционных прав и свобод обвиняемого имеет многоплановый характер, ибо предметом конституционного надзора являются не только нормы уголовно-процессуального, но и уголовного, гражданского, государственного права и других отраслей права;

2) интерес к этой проблеме не ослабевает, ибо число обращений в Конституционный Суд относительно конституционности отдельных элементов (норм, положений) правового статуса обвиняемого не сокращается;

3) растёт правовая культура судебных инстанций, ибо большинство обращений в Конституционный Суд по упоминаемой проблеме исходит от судов как общей, так и специальной (административной) юрисдикции. Это свидетельствует, что суды осознают свою миссию осуществления объективного, беспристрастного, справедливого правосудия;

4) Конституционный Суд сыграл значительную роль в процессе приспособления действующего законодательства к изменившимся условиям существования нашего государства: Конституционный Суд, признавая конкретные правовые нормы, акты антиконституционными, тем самым их, как несвойственных демократическому правовому государству, исключает из правовой системы;

5) общественность, субъекты уголовно-процессуальных отношений наглядно убеждаются, что независимый и беспристрастный суд – существенная, а нередко и единственная реальная гарантия защиты, восстановления нарушенных прав и свобод лица;

6) растёт авторитет Конституционного Суда, ибо его решения по делам о конституционной защите прав и свобод обвиняемого сыграли роль эффективного стимула для проведения реформ разных институтов уголовного процесса. Законодатель незамедлительно реагировал, в сущности, на все решения Конституционного Суда, в которых указывалась антиконституционность отдельных элементов (норм, положений) правового статуса обвиняемого;

7) тенденции совершенствования правового положения обвиняемого показывают, что законодатель всё больше учитывает необходимость в правовом регулировании балансирования интереса эффективного раскрытия преступлений и справедливого наказания виновных и интереса обеспечения прав и свобод обвиняемого.

ТАДЖИКИСТАН

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Защита прав человека в Конституционном Суде Республики Таджикистан

Уважаемый Председатель!
Уважаемые коллеги!
Уважаемые дамы и господа!

Прежде всего я благодарю Конституционный Суд Республики Армения во главе с уважаемым Гагиком Гарушевичем Арутюняном за организацию этой конференции.

Значение ее неоценимо, особенно для государств, которые встали на путь построения демократического правового государства.

Мы в Таджикистане, я думаю, и все присутствующие высоко ценим и чтим ваш большой вклад в установление и развитие связей между органами конституционного контроля постсоветских стран.

Я поддерживаю мнение о том, что признание, соблюдение и защита прав человека и гражданина – один из важнейших показателей состояния конституционной законности и конституционного правопорядка в обществе и государстве.

Защита прав и свобод человека и гражданина всегда и во все времена была и остается одной из насущных проблем государства, поскольку история развития человечества – это история борьбы человека за свои права и свободы.

И по мере достижения более высоких уровней развития государства и общества и внедрения более цивилизованных и общепризнанных стандартов, приемов и способов защиты прав и свобод людей эти вопросы приобретают все большую значимость, и естественным является преодоление на этом пути немалых проблем их осуществления.

В этом не является исключением и Республика Таджикистан, которая, приняв Декларацию о государственном суверенитете и новую Конституцию, стала полноправным субъектом международного сообщества, а следовательно, взяла на себя обязательство соблюдения всех демократических институтов, являющихся первоосновой в деле не только признания, но и гарантии защиты прав и свобод человека и гражданина.

Одной из характерных черт правового государства является признание им приоритета прав и свобод человека и гражданина, опирающегося на прочное закрепление в Конституции и законах их нерушимости, а также свою обязанность соблюдать и охранять эти права и свободы. Не человек создан для государства, а государство для человека – таков принцип их отношений. В этом состоит гуманистическая сущность новой Конституции Республики Таджикистан, принятой в 1994 году.

Новая Конституция в своих нормах, воплощая прогрессивные общественно-политические идеи правового демократического и светского государства, приобщает народы Таджикистана к историческим достижениям цивилизации.

В этом плане весьма примечательно, что в Конституции самая большая глава – это специальная глава (гл.2), которая содержит конкретные нормы и предписания, отражающие совокупность прав и свобод и основные обязанности человека и гражданина. Очень важно, что права и свободы человека и гражданина регулируются и охраняются не только Конституцией, но и признанными Таджикистаном международно-правовыми актами (ст.14). Это положение имеет особое значение, ибо оно в перспективе стимулирует развитие законодательства в сфере прав и свобод человека и гражданина и подтверждает вхождение нашей республики в мировое цивилизованное сообщество.

Следует отметить, что как по своей структуре, так и по концептуальному содержанию новая Конституция близка к Конституциям развитых демократических стран, большинство которых отражает стремление обеспечить координацию деятельности всех ветвей власти, добиться стабильности и

непрерывности ее функционирования. Одним из достижений передовой общественно-политической мысли является закрепление принципа разделения властей (ст.9), который был выработан мировым сообществом в ходе борьбы за демократическое государство.

Главный смысл этого принципа состоит в том, что демократический режим может быть достигнут в государстве, где функции государственной власти разделены между самостоятельными государственными органами.

Его содержание заключается в том, что для обеспечения свободы граждан различные функции государственной власти – законодательная, исполнительная и судебная – должны осуществляться различными органами, независимыми друг от друга и сдерживающими друг друга.

Однако для обеспечения свободы, согласно этой теории, недостаточно одного лишь распределения власти между несколькими органами. Нужно, кроме того, чтобы они находились во взаимном равновесии, чтобы ни один из органов не мог получить преобладание над другими, чтобы каждый из них был гарантирован от посягательств на его самостоятельность.

Разработчики Конституции, а я, являясь в то время Генеральным прокурором Республики Таджикистан, входил в состав рабочей группы по разработке проекта новой Конституции Республики Таджикистан, при подготовке 2-й главы Конституции отошли от старых схем и принципов, которые были свойственны Советской Конституции. В ее основу положены международные стандарты в области прав и свобод человека.

Так, международно-правовые акты, признанные республикой, являются составной частью правовой системы Таджикистана (ч.3 ст.10). Установлен приоритет международно-правовых актов над внутригосударственным законодательством. В статье 10 указывается, что "в случае несоответствия законов республики признанным международно-правовым актам применяются нормы международно-правовых актов". "Права и свободы человека и гражданина, – говорится в статье 14, – регулируются и охраняются Конституцией, законами республики, признанными Таджикистаном международно-правовыми актами".

Впервые Конституция предусматривает естественные права человека как неотъемлемые и неприкосновенные. Так, в статье 5 указывается, что "жизнь, честь, достоинство и другие естественные права человека неприкосновенны".

Основные положения Конституции Республики Таджикистан, касающиеся прав и свобод человека и гражданина, исходят из Всеобщей декларации прав человека (1948г.), Международного пакта о гражданских и политических правах (1966г.), заключительного акта Совещания по безопасности и сотрудничеству в Европе (Хельсинки, 1975г.), Парижской хартии для новой Европы (1990г.), Европейской конвенции о защите прав человека и основных свобод (1650г.) и других соответствующих документов. Конституция (ст. 17) закрепляет гарантии прав и свобод каждого, независимо от его национальности, расы, пола, языка, вероисповедания, политических убеждений, образования, социального и имущественного положения.

Таким образом, в целом нормы Конституции Республики Таджикистан, касающиеся прав и обязанностей граждан, воплощают в себе международные нормы и стандарты в этой области.

Важнейшим рычагом обеспечения Конституции является Конституционный Суд, который в соответствии со статьей 1 Конституционного закона Республики Таджикистан "О Конституционном Суде Республики Таджикистан" является органом судебной власти по защите Конституции Республики Таджикистан. Он учрежден в целях обеспечения верховенства и непосредственного действия норм Конституции на территории Республики Таджикистан, защиты Конституции, прав и свобод человека и гражданина.

В соответствии с этим Конституционным законом в Республике Таджикистан установлен довольно широкий круг субъектов, имеющих право обращения в Конституционный Суд. Важным является то, что право на обращение в Конституционный Суд имеют и граждане по вопросу нарушения их конституционных прав и свобод по примененным законам в конкретном деле после рассмотрения вопроса соответствующими органами.

Практика работы Конституционного Суда Республики Таджикистан показывает, что чаще других субъектами обращения как раз и являются граждане. В то же время другие субъекты обращения в Конституционный Суд крайне редко пользуются этим правом. К сожалению, еще очень пассивны суды республики. За время функционирования Конституционного Суда Республики Таджикистан по этим вопросам ни разу к нам не обратились ни Верховный Суд Республики Таджикистан, ни Высший Экономический Суд и другие нижестоящие суды.

К сожалению, в нашем обществе еще нет ясного понимания, что такое Конституционный Суд, каково его место в судебной системе, что он может, а что ему не подвластно в силу его природы.

Граждане зачастую воспринимают Конституционный Суд как вышестоящую надзорную или контрольную инстанцию. Поэтому к нам поступает большое количество обращений граждан, которые неподведомственны Конституционному Суду. В своих жалобах в Конституционный Суд на решения судов граждане требуют проверить установление фактических обстоятельств дела либо заново заняться их установлением, что Конституционному Суду в принципе запрещено делать.

Используя предоставленные законодательством полномочия, Конституционный Суд своевременно рассматривает и разрешает все поступающие обращения, принимает меры к восстановлению нарушенных прав и свобод граждан. Формируется практика рассмотрения конституционных жалоб граждан. Так, например, именно по обращениям граждан были признаны противоречащими Конституции ряд норм действующего законодательства Республики Таджикистан.

По обращениям граждан были признаны не соответствующими Конституции Республики Таджикистан положения Кодекса законов о труде Республики Таджикистан, устанавливающие рассмотрение в порядке подчиненности споров руководящих работников, избираемых, утверждаемых или назначаемых на должности высшими органами государственной власти и управления, судей,

прокуроров, их заместителей и помощников, а также следователей прокуратуры по вопросам увольнения, изменения формулировки причин увольнения, перевода на другую работу, оплаты за время вынужденного прогула и наложения дисциплинарных взысканий.

Ряд дел о несоответствии Конституции Республики Таджикистан некоторых положений уголовно-процессуального и гражданско-процессуального законодательства Конституционным Судом был рассмотрен по собственной инициативе, и это право нам дано Конституционным законом "О Конституционном Суде Республики Таджикистан", поскольку обращения граждан по этим вопросам не были надлежащим образом оформлены по форме и содержанию, как того требует закон.

В целях защиты конституционных и иных прав и свобод граждан Конституционным Судом Республики Таджикистан были использованы и другие правовые средства, предоставленные ему Конституцией республики и Конституционным законом "О Конституционном Суде Республики Таджикистан". В частности, в порядке законодательной инициативы нами были подготовлены и внесены в Парламент республики несколько законопроектов, которые были одобрены депутатами и приняты.

Вопросам защиты конституционных и иных прав и свобод граждан, а также состоянию конституционной законности уделяется большое внимание в ежегодных посланиях, направляемых Президенту Республики Таджикистан и Парламенту страны. Готовя ежегодные послания Президенту Республики Таджикистан, Конституционный Суд обобщает и анализирует поступившие в течение года обращения граждан, касающиеся вопросов защиты их прав и свобод, и в своем обращении о состоянии конституционной законности в республике обращает внимание на работу с обращениями граждан за защитой своих прав и свобод в различных органах государственной власти, а также на те недостатки, которые еще имеют место при подготовке и принятии законов и других нормативно-правовых актов. Так, результатом обращения Конституционного Суда по итогам 2001 года к Президенту Республики Таджикистан явилось то, что в последовавшем потом послании Президента Парламенту страны на совместном заседании обеих палат Парламента было обращено внимание на необходимость улучшения работы в законотворческой деятельности.

В заключение своего выступления еще раз благодарю организаторов этой конференции и считаю, что их проведение весьма актуально и полезно, и они, несомненно, оказывают существенную помощь в нашей работе: происходит обмен мнениями, обмен опытом, изыскиваются наиболее эффективные формы и методы работы, направленные на достижение благородных целей – торжества демократии и верховенства Конституции.

Председателем Конституционного Суда Украины избран Селивон Н.Ф.

22 октября 2002 года Председателем Конституционного Суда Украины избран Селивон Николай Федосович.

Селивон Николай Федосович родился в 1946 году в селе Шестовица на Черниговщине.

В 1973 году окончил юридический факультет Киевского государственного университета им. Т.Г.Шевченко (ныне - Киевский национальный университет им. Тараса Шевченко).

Свою трудовую деятельность начал в 1973 году стажером-исследователем Института государства и права им. В.М. Корецкого НАН Украины.

С 1979 года на ответственной работе в аппарате Правительства: старший референт юридической группы, и.о. заведующего юридическим отделом, заместитель министра Кабинета министров, первый заместитель министра Кабинета іинистров Украины.

В сентябре 1996 года Указом Президента Украины назначен судьей Конституционного Суда Украины. На специальном пленарном заседании

Конституционного Суда Украины в октябре 1999 года избран заместителем Председателя Конституционного Суда Украины.

В октябре 2002 года Селивон Николай Федосович избран Председателем Конституционного Суда Украины.

Кандидат юридических наук, член-корреспондент Академии правовых наук Украины, заслуженный юрист Украины. Награжден орденом "За заслуги" III степени, Почетной грамотой Кабинета іинистров Украины. Автор ряда научных монографий, в качестве эксперта принимал участие в разработке проекта Конституции Украины.

В настоящий выпуск вестника ‘’Конституционное правосудие’’ вошли материалы VII Ереванского международного семинара на тему ‘’Защита прав человека в конституционном суде’’, который состоялся 4-5 октября 2002г.

Семинар был организован Европейской комиссией ‘’Демократия через право’’ Совета Европы, международной организацией ‘’Конференция органов конституционного контроля стран молодой демократии’’ и Конституционным Судом Республики Армения.

С приветствием к участникам семинара обратились Председатель Конституционного Суда Республики Армения Г. Арутюнян, секретарь Европейской комиссии ‘’Демократия через право’’ Дж. Букикио, Католикос Всех Армян Гарегин II.

В работе семинара приняли участие: Председатель Европейского суда по правам человека Л. Валдхабер и Руководитель аппарата Европейского суда по правам человека Р. Лиделл, комиссар по правам человека Совета Европы А. Х. Роблес и секретарь Европейской комиссии ‘’Демократия через право’’ Совета Европы Дж. Букикио, эксперт Европейской комиссии ‘’Демократия через право’’ С. Лангер (Федеральный Конституционный Суд Германии); судья Конституционного Суда Российской Федерации Б. Эбзеев; судья Конституционного Суда Украины Л. Чубарь; судьи Конституционного Суда Италии А. Марини, В. Онида; судья Конституционного Суда Словакии Л. Добрик и советник Конституционного Суда Словакии Ф. Гаврилла; судьи Конституционного Суда Чехии В. Гатлер и Ф. Дюшон; Председатель Конституционного Суда Таджикистана М. Салихов и судья Конституционного Суда Таджикистана Л. Абдуллаев; судьи Конституционного Суда Литвы А. Абрамавичус и Дж. Прапиестис; советник Председателя Конституционного Суда Латвии Дз. Педедзе; а также члены Конституционного Суда Республики Армения, депутаты Парламента, члены правительства, ученые, государственные и политические деятели, преподаватели и студенты вузов, представители СМИ РА. В сборник включены также представленные на данный семинар в качестве докладов статьи Руководителя правового информационного центра Конституционного Суда Словении А. Мавчича; Председателя Верховного Суда Кипра Г. Пикиса; судьи Конституционного Суда Болгарии Д. Готчева.

L.Wildhaber

President of the European Court
of Human Rights

Aspects of the freedoms of expression and association under the European Convention on Human Rights: Articles 10 and 11

Pierre-Henri Teitgen, often referred to as the father of the European Convention on Human Rights, described the objective of that instrument as "defining the seven, eight or ten fundamental freedoms that are essential for a democratic way of life". Indeed we can only fully understand the Convention if we see it from that perspective as a means of preserving the core values of democracy. The essence of human rights protection under the Convention is to be found in the principles of democracy and the rule of law. The rule of law provides the framework for the effective operation of democracy. Democracy without the rule of law is no democracy; the rule of law without democracy is no rule of law, at least as

understood in the European Convention and the case-law of the European Court of Human Rights.

So what are those fundamental rights and freedoms ''essential for the democratic way of life''? Of course there are the rights, which respect the physical integrity and dignity of human beings, the sanctity of life in its broadest sense. There are the rights, which guarantee due process in criminal and civil proceedings as well as protection against arbitrary detention. There is the guarantee of respect for family and private life. Then there are the rights and freedoms, which make possible normal and active participation in democratic society, notably the freedom of expression under Article 10 of the Convention and freedom of association under Article 11. It is these two Articles that I would like to consider in this paper. The two Articles are linked. As the Court has observed, the protection of personal opinions, secured by Article 10, is one of the objectives of the freedoms of assembly and association as enshrined in Article 11[1]. Moreover the structure of the two Articles is more or less identical: a first paragraph which broadly defines the freedom protected and a second paragraph which identifies the circumstances in which restrictions may be placed on those freedoms. The Court's case-law has concentrated on the latter aspect, that is the justification of such restrictions. Its examination of that justification comprises three stages or three tests. Is the measure complained of prescribed by law? Does it pursue one or more of the legitimate aims set out in the provision? And finally is it necessary in a democratic society to attain such aim or aims? It is the third test, which has most often proved decisive.

But first a few more words about the relationship between the Convention and democracy are called for. As it has been interpreted by the European Court the Convention is infused with a profound respect for the democratic process to the extent that it not only recognizes, as I have said, that restrictions on certain fundamental rights may be "necessary in a democratic society" but also that deference should to be accorded to national democratic institutions in determining what is necessary. This notion of subsidiar present either expressly or by implication throughout the Convention is not merely the practical question of the proximity to events of national authorities and the sheer physical impossibility for an international court, whose jurisdiction now covers 44 States with a population of some 800 million inhabitants, to operate as a tribunal of fact. It also embraces a degree of deference or respect. It is not the role of the European Court systematically to second-guess democratic legislatures. It is certainly not equipped to do so. What it has to do is to exercise an international supervision to ensure that the solutions found do not impose an excessive or unacceptable burden on one sector of society or individuals. The democratically elected legislature must be free to take measures in the general interest even where they infringe individual interests and the balancing exercise between such competing interests is most appropriately carried out by the national authorities.

There must however be a balancing exercise and this implies the existence of procedures, which make such an exercise possible. Moreover the result must be that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest

concerned. In that sense the area of discretion accorded to States, what we in Strasbourg call the margin of appreciation, will never be unlimited and the rights of individuals will ultimately be protected against the excesses of majority rule. This margin of appreciation is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law. The international judge owes a degree of deference to decisions taken by national democratic institutions in full compliance with the rule of law, and although that deference will never exclude the international review completely, it will call for some measure of judicial self-restraint at international level.

Coming then to Article 10 of the Convention and the freedom of expression: this is where the operation of the mechanism that I have just described is perhaps best observed. The cases show that as the expression gets closer to the core operation of democracy, so the margin of appreciation contracts. Thus it can hardly ever, if at all, be necessary in a democratic society to restrict speech which amounts in effect to participation in public debate on a matter of general interest, even if couched in excessive terms and involving insulting or defamatory language directed at private individuals2. The right to express political ideas and to engage in political activities is so fundamental to democratic society that democratic legitimacy cannot logically be invoked against it.

In the first attempt by the Strasbourg Court to enounce clear principles for the operation of freedom of expression under the European Convention on Human Rights, it made the much repeated ringing declaration that freedom of expression ''constituted one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man''3. This unlimetedly goes back to Article 11 of the French Declaration of the Rights of Man of the Citizen of 1789 which affirmed that the right freely to express one's opinion was one of the most precious rights of man, ''un des droits les plus prйcieux de l'homme''. In the Handyside case the European Court continued that this right is "applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population''. Such were, the Court said, ''the demands of the pluralism, tolerance and broadmindedness without which there is no 'democratic society'''4.

But how far does such a ''right to offend" extend? It seems clear that it does not cover hate speech or incitement to violence5. Nor does the right to offend, as interpreted by the Court in some older cases, appear to protect expression that is regarded as obscene or offensive to the majority moral attitudes of the community concerned6, although there is always European supervision as to what restrictions are necessary in a democratic society. What the right to offend is intended to guarantee is the participation in the democratic process through public debate of questions of general concern. The strength of the protection offered will depend on the extent to which the expression can be linked to the direct functioning of democratic society.

[Mr. Handyside, the applicant in that landmark case, had been convicted and fined after he had published a book aimed at schoolchildren, containing explicit guidance on a number of controversial matters, including sex. He was soon to learn

that the right so resoundingly proclaimed by the Court was not unlimited. As I have indicated, the very structure of Article 10 makes it clear that freedom of expression under the Convention was never intended to be as purportedly absolute as in for instance the United States under the First Amendment. I reiterate that under paragraph 2 of Article 10 restrictions on the protected right may be permitted provided that they are prescribed by law, that is that they have a basis in law which must satisfy certain requirements of accessibility and foresee ability; that they pursue at least one of the aims defined by paragraph 2 of the Article; and finally that they be "necessary in a democratic society" to attain the legitimate aim or aims identified. Those legitimate aims include "the prevention of disorder or crime, the protection of health or morals, the protection of the reputation and the rights of others" or again "maintaining the authority and impartiality of the judiciary".

The case of Handyside laid down the leading principles for the application these tests and particulaly those relating to the margin of appreciation. The Court defined the concept of necessity as reflecting a "pressing social need". Under the margin of appreciation approach it was for the national authorities to make the initial assessment of that need or, to put it another way, balance the relevant competing interest against that of freedom of expression. Thus the Court recognizes that this is an issue in respect of which State authorities are in principle in a better position than the international judges to give an opinion, as the Court put it, "by reason of their direct and continuous contact with the vital forces of their countries"7. The Court's role is a supervisory one, incompressing a determination of whether the interference was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient"8. In the Handyside case, the Court reached the conclusion that there had been no violation of Article 10, referring notably to the margin of appreciation.

The freedom of the press occupies a particularly important place in the Court's case-law under Article 10. The Court has consistently highlighted the role of the press in a democratic society, notably in connection with its duty to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. The Court has stressed the vital function of the press as a "public watchdog"9.

The Court has thus been at pains to ensure that defamation proceedings are not used to extinguish criticism of public figures and especially politicians.

An early case10 established that politicians were in a special category. An Austrian journalist had criticized the then Chancellor, Bruno Kreisky, for, among other things, his allegedly over-accommodating attitude to former Nazis. He called Kreisky amoral and lacking in dignity. Following a private prosecution, the journalist, was convicted of criminal defamation and fined. Underlining the crucial role of the press in imparting information, the Court rejected the notion accepted by the Austrian courts that information to the reader. "Freedom of the press", said the Court in a well-known passage, "affords the public one of the best means of discovering an opinion of the ideas and attitudes of political leaders". Freedom of political debate was at the very core of the concept of democratic society, which prevailed throughout the Convention11.

It followed that the limits of acceptable criticism were wider as regards a politician than for a private individual. A politician inevitably and knowingly laid himself open to close scrutiny of his every word and deed. The statements in question were moreover value judgments, the truth of which was not susceptible to proof. The facts on which the applicant had founded his value judgments were undisputed, as was his good faith. Yet there was no defense of fair comment under Austrian law, and so the Court found a violation of the freedom of expression.

The Court has also recognized that although a politician was entitled to have his reputation protected even when he was not acting in his private capacity, the requirements of that protection had to be weighed against the interests of open discussion of political issues12.

The Court has thus distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of a value judgment is not susceptible to proof. Requiring the author of a value judgment to prove the truth of that statement places an impossible burden on him or her and accordingly in itself inringes freedom of opinion13. On the other hand, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exits a sufficient factual basis for the statement. A value judgment without any factual basis to support it may be excessive and thus fail to attract the protection of Article 1014.

Where a journalist had used the word "Trottel", which roughly translates as "idiot", to describe Mr. Haider, leader of the Austrian Freedom Party, in an article reporting a speech by Mr. Haider, the Austrian courts had taken the view that the mere use of the word was sufficient to justify conviction. The Strasbourg Court observed that the speech in question, in which Haider had stated that all the soldiers who had served in World War II, whatever side they were on, had fought for peace and freedom and had contributed to founding today's democratic society, was clearly intended to be provocative. The applicant's article, including his use of the word found to be insulting, could certainly be regarded as polemical, but did not on that account constitute a gratuitous personal attack as the author had provided an objectively understandable explanation derived from Haider's speech. As such the article and the term used were part of the political discussion provoked by the speech and amounted to an opinion, whose truth was not susceptible of proof. Such an opinion might be excessive in the absence of any factual basis, but this was not the case here15.

A recent Estonian case involved public criticism of the wife of a prominent politician, who had herself been a senior civil servant. Remarks had been published suggesting that she had broken up a marriage and was an unfit and uncaring mother. The applicant was convicted of insulting the woman. The Strasbourg Court noted, among other things, that the woman's public-figure status was not such as to substantiate the claim that her private life was an issue that affected the public at the time when the interview was published. By then her husband was no longer in government and she had left her post in the civil service. Looking at the way the Estonian courts dealt with the case, the Court found that they had fully recognized the conflict between the right to impart information and the reputation and rights of

others and had properly balanced the competing interests. There had been no breach of the Convention requirements16.

This case sets some cautious limits on the operation of freedom of expression in respect of the private life of public figures. It is not every person who has been in the public eye whose private life can be regarded as a matter of public concern.

The Court has taken a rather different approach in relation to public criticism of judges. Thus, while it has accepted that the functioning of the system of justice is undoubtedly a matter of public interest, it has stressed that the judiciary has to enjoy public confidence and that it may prove necessary to protect such confidence against destructive attacks that were essentially unfounded, particularly in view of the fact that judges were subject to a duty of desecration which prevented them from replying17.

[Further proof of the importance which the Court attaches to freedom of the press may be found in a Norwegian case. Here the Court examined the obligations of a journalist in relation to statements of fact. Notably the Court observed that the safeguard accorded to journalists in relation to reporting on issues of general interest was subject to the proviso that they were acting in good faith in order to provide accurate and reliable information according to the ethics of journalism. The case concerned defamation proceedings brought by crew members of a seal-hunting vessel against the newspaper Bladet Tromsш which had published a report of a seal hunting inspector which contained allegedly defamatory accusations. The accusations were statements of fact, for example that seals had been skinned alive, and were based on, or were directly quoting from, the inspector's report. The newspaper had not conducted its own research. The Court had to consider whether special circumstances dispensed the newspaper from its ordinary obligation to verify facts that were defamatory of private individuals. To determine this, the Court had regard to the nature and degree of the defamation and examined the question in the light of the situation as it presented itself to the newspaper at the time, rather than with the benefit of hindsight after the inspector's report had been largely discredited. It concluded that the paper could reasonably rely on the official report without being required to carry out its own research into the accuracy of the facts. It saw no reason to doubt that the newspaper had acted in good faith18.

Thus the Court has to place itself in the position of journalists at the material time of publication and assess the justification of publishing in the light of what they then knew or should have known. It is on this basis that it will assess the proportionality of the interference with the legitimate aim pursued. It is true to say that the scales are heavily weighted in favour of the freedom of the press, as this case shows. It is the essential role of a free press in a democratic society, which limits the margin of appreciation or area of discretion available to national authorities in this field.]

Ultimately it is the role-played in democratic society by the expression at issue, which determines the level of protection that will be accorded to it. The importance of the principle of democracy, of democratic society, of the democratic process in the scheme of the Convention cannot be overstated. This is why the emphasis is placed on the contribution to a public debate, on the role of the press, on the active participation in the democratic assimilation of ideas.

It follows logically that where it is the speech concerned that threatens to undermine democracy by inciting to violence, the margin of appreciation accorded to States will be much wider. In a group of thirteen cases concerning Turkey19, the applicants had all been convicted and sentenced to a term of imprisonment and/or a fine after publishing statements or making public declarations linked to the situation in south east Turkey and in particular the Kurdish problem; the charges included disseminating separatist propaganda and encouraging violence against the State.

The Court applied the principles set out in its case-law, stressing the importance of freedom of the press and public debate in a properly functioning democratic society and reiterating the very narrow scope for restrictions on political speech. It noted that the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion. In addition, as the Court pointed out, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticism of its adversaries.

Where there is incitement to violence against an individual or a public official or a sector of the population, State authorities will enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression. It is, moreover, open to State authorities to take measures, and even to resort to the criminal law, where public comments could seriously undermine public order.

In these cases the interference had to be considered on its facts, in particular in the light of the context and content of the impugned statements. In other words the Court had to consider whether the expression in question really did involve a threat to society, in which case a wide margin of appreciation would have operated in the Government's favour. If the Court failed to find a sufficient link between the words used and a real possibility of resulting violence, the protection offered by the Convention to political speech would prevail. Looking at the facts and all the circumstances the Court took the view that the statements in the majority of the cases which were then before it did not, despite the aggressive language sometimes employed, amount to incitement to violence or armed revolt. The Court also had to determine whether the penalties imposed by the authorities were proportionate in relation to the aims pursued. In fact it was struck by the severity of the sanctions imposed in these cases, typically a jail sentence of some one and a half years and a substantial fine. These considerations led it to conclude in eleven out of the thirteen cases that the interference had been disproportionate and that there had accordingly been a breach of Article 10. In one case, on the other hand, the expressions used were found by the Court to amount to an appeal for bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence20. The Court found that this was ''hate speech'' and the ''glorification of violence'', and the interference

complained of, in this instance accompanied by a fairly modest fine, was proportionate to the legitimate aim pursued.

[There will clearly always be some tension between the need to take measures to prevent violence, and particularly terrorism, on the one hand, and certain fundamental rights, notably the freedom of expression, on the other. In the field of Article 10 the Court will examine the reality of the threat and the nature and severity of the sanction. The Convention will pull in the direction of democracy and free political speech as an essential component of democracy, but violence being by definition anti-democratic will in principle never attract its protection. Where the reality of the link between speech and violence is established, the speech in question should not do so either21.]

The right to offend, shock or disturb in the case-law of the European Court of Human Rights is a function of democratic society. Contribution to public debate on matters of public concern, even if couched in excessive terms will attract protection and this may also be so where criticism or insulting or defamatory language is directed at private individuals. The competing interest of the right to protection of reputation has so far carried little weight in the balancing process. I believe we must be careful not to take this development too far. With the enormous power and immediacy of the modern media, the potentially devastating effect to public statements reinforces the duties and responsibilities of those making them. While the Court has rightly stressed the potentially chilling effect of placing restrictions on speech that may be offensive to individuals or sectors of the community, genuine debate may also be stifled by over-aggressive and inadequately researched journalism. It also seems to me that the nature of the media has changed since 1986 the Court decided the Lingens case. In the harsh competitive world of the modern media, the emphasis has inevitably shifted from the aim of imparting ideas that further the democratic process to the commercial reality of the need to sell newspapers, advertising space and so on. This truism may perhaps influence the way the judicial balancing of freedom of expression against the different interests which compete with it, and notably the right to reputation, carried out.

I turn now to Article 11, which guarantees the freedom of peaceful assembly and association. As I indicated at the beginning of this paper, the link between this provision and the freedom of expression is a strong one. Thus Article 11 has to be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 1122. The same considerations accordingly apply as to the central role of freedom of expression in democratic society. Again freedom of assembly under Article 11 protects a demonstration that may annoy or give offence to persons opposed to ideas or claims that it is seeking to protect23. The Court has declared that "freedom of thought and opinion and freedom of expression as guaranteed by Articles 9 and 10 of the Convention respectively, would... be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others particularly through associations of individuals having the same beliefs, ideas or interests"24. The term "association" moreover has an autonomous Convention meaning; the national law classification will not be decisive in determining whether Article 11 applies25. Article 11

expressly covers the right to form and join trade unions. It also protects a negative right to form and join trade unions. It also protects a negative right, the right not to be compelled to join an association or a trade union26.

But again the essence of the right is be found in active participation in democratic life and the democratic process. One of the principle characteristics of democracy, the Court has held, is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when those problems are irksome. Democracy thrives on freedom of expression in all its forms. From that point of view, there can be no justification for hindering a group solely because it seeks to debate in public the situation of part of the State's population and to find, according to democratic rules, solutions capable of satisfying everyone concerned27. Restrictions imposed on the formation or activities of associations seeking to take part in democratic debate will be difficult to justify under paragraph 2 of Article 11, which sets out an exhaustive list of legitimate aims in respect of which restrictions may be applied provied that they are necessary in a democratic society to attain those aims. Those exceptions must be strictly construed; only convincing and compelling reasons can justify restrictions on freedom of association28. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned29.

In the light of the above, it can be readily understood that the dissolution of a political party, and therefore the extinction an essential actor in the democratic process, will be difficult to justify in the context of Article 11. There have been a series of Turkish cases concerning just that issue and they have again given the Court the opportunity to stress the primordial place of democracy in the Convention scheme. In United Communist Party of Turkey and Others v. Turkey, the Turkish Constitutional Court had dissolved a political party. The Strasbourg Court established firstly that the freedom of association applied also to political parties as "a form of association essential to the proper functioning of democracy" and that freedom extended not only to the founding of the association, but also to its right to engage in activities once formed. The Court resisted an argument by the Government to the effect that a political party regarded by the national authorities as undermining the constitutional structures of the State could never attract the protection of the Convention. Restrictions imposed on such parties had to be compatible with the State's Convention obligations whether the origin of the restrictions was constitutional or legislative.

The Court underlined that the choice of the name of a political party could not in principle justify a measure as drastic as dissolution in the absence of other relevant and sufficient reasons. The importance of democracy in the Convention system is highlighted. Democracy appears to be, says the Court, the only political model contemplated by the Convention and accordingly the only one compatible with it. Thus the right to form and carry on an association designed to promote political aims and ideas is an area in which the Contacting States enjoy only a limited margin of appreciation. The test under the Convention standards imposed on the various freedoms is one of the necessity in a democratic society and that will be

more difficult to satisfy where what is at stake is the right to participate effectively in the democratic process.

In this case the party had been dissolved before it had been able to start its activities, only ten days after it was formed. In these circumstances it is perhaps not surprising that the Court was not persuaded that the immediate and permanent dissolution of the United Communist Party had been necessary in a democratic society. It found on the contrary that this measure, ordered before its activities had even been started and coupled with a ban barring its leaders from discharging any other political responsibility, was disproportionate to the legitimate aim pursued. The fact that the party's programme referred to the Kurdish problem was not sufficient justification, particularly as it had not in any way advocated violence30.

In the case of Sidiropoulos and Others v. Greece, the national courts had refused to register the applicants' association. The European Court regarded the proposed association's aims, namely to preserve and develop the traditions and folk culture of the Florina region, as "clear and legitimate" on their face. It could not and did not rule out that once founded a political party or association might under cover of the aims mentioned in its memorandum of association have engaged in activities incompatible with those aims. But that possibility had to be tested against facts, and, as with the Turkish Communist party, the association had not had any time to take action which might have proved or disproved the Government's allegations. The refusal to register the association was therefore disproportionate.

In a Bulgarian case31 concerning the freedom of assembly, the applicants complained of a ban on meetings organized by them to commemorate certain historical events. The Strasbourg Court did not find evidence that those involved in the organisation of the prohibited meetings had violent intentions. At the same time it recognized that the inhabitants of a region in a country were entitled to form associations to promote the region's special characteristics. The fact that an association asserted a minority consciousness could not in itself justify interference with its rights under Article 11. An essential factor was whether there had been a call for violence. The Court noted that in the case before it there was no real foreseeable risk of incitement to violence or any form of rejection of democratic principles. In those circumstances the measures banning the applicants from holding commemorative meetings had not been necessary in a democratic society and were therefore in breach of Article 11.

Once again the protection and strengthening of democracy and the democratic process is central to the Court's approach. As it stated: "Freedom of assembly and the right to express one's views through it are among the paramount values in a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be - do a disservice to democracy and often even endanger it". The Court continued: "In a democratic society based on the rule of law political ideas which challenge the existing order and whose realization is advocated by

peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means''[32].

In a Polish case[33], on the other hand, a Chamber of the Court found, in a judgment which is not final at the time of writing[34], that the refusal to register an association, which was to be called the ''Union of People of Silesian Nationality'', was proportionate to the legitimate aim pursued, namely the prevention of disorder and the protection of the rights of others. The Court took note of the fact that the applicants could have dispelled the authorities' doubts by slightly changing the name of their association and by sacrificing or amending a single provision of the memorandum of association, alterations which in the Court's view would not have prevented the association's members from achieving the objectives they has set for themselves. It pointed out that democracy and pluralism are, in the nature of things, based on a compromise that requires concessions by individuals and groups of individuals. Most conclusively perhaps, the Court accepted that the association had attempted to circumvent certain provisions of the electoral law, notably those laying down conditions for exemption from the threshold of votes required to participate in the distribution of seats in Parliament. It was reasonable on the part of the authorities to act in order to protect the electoral system which is an indispensable element of the proper functioning of a ''democratic society'' within the meaning of Article 11. Once again the emphasis is on the democracy. Here, unlike the other cases involving refusal to register, the Chamber was satisfied that there were sufficient indications that the association had motives other than those set out in its proposed memorandum of association and that these were capable of affecting the proper functioning of the electoral process. It remains to be seen whether the Grand Chamber will take the same view.

I cannot leave Article 11 without referring to one more case concerning the dissolution of a political party in Turkey. In Refah Partisi and Others v. Turkey[35] a Chamber of the Court concluded that the grounds cited by the Turkish Constitutional Court to justify Refah's dissolution were relevant and sufficient and that the interference complained of was necessary in a democratic society. Refah had, so the Chamber found, declared their intention of setting up a plurality of legal systems and introducing Islamic law and had adopted an ambiguous stance with regard to the use of force to gain power and retain it. The case has now been referred to the Court's Grand Chamber of 17 Judges, and so will be reheard. I can say nothing that would prejudge that rehearing, but we can still look at the general principles enounced. These were that democracy and the rule of law have a key role to play in the integrated system for the protection of human beings set up under the Convention. Only institutions created by and for the people may be vested with the powers and authority of the State; written law must be interpreted and applied by an independent judicial power. There can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious. There is a very close link between the rule of law and democracy. As it is a function of written law to establish distinctions on the basis of relevant differences, the rule of law cannot be sustained over a long period of time if persons governed by the same laws do not have the last word on

the subject of their content and implementation. I would add, as I suggested earlier, nor can democracy be sustained over a long period of time without the effective operation of the rule of law.

The competent Chamber accepted that a political party might campaign for a change in the law or the legal and constitutional basis of the State on two conditions: first that the means used to that end must in every respect be legal and democratic and, second, that the change proposed must itself be compatible with fundamental democratic principles. It followed that a party whose leaders incited recourse to violence or proposed a policy that did not comply with one or more of the rules of democracy or was aimed at the destruction of democracy and infringement of the rights and freedoms granted under democracy could not lay claim to the protection of the Convention. Again we must await the Grand Chamber's judgment to see whether this approach is confirmed.

Whatever the outcome in the different cases pending before the Court's Grand Chamber, it seems to me clear that the Convention in general, and the freedoms of expression and association in particular, can only be understood when seen in the context of a fully democratic society. Human rights as we understand them in Strasbourg have no existence outside democracy. Human rights law must therefore not only reinforce the effective operation of democracy, it must also preserve democracy from attack, whether the threat comes from government or other sources. Articles 10 and 11 of the Convention enshrine rights that are fundamental to the daily functioning of democracy and democratic society. Their exercise as part of ordinary democratic life therefore attracts a high level of protection, but they cannot be invoked to undermine democracy, notably in connection with the use of violence.

The materials of the VII Yerevan International Seminar on "Protection of Human Rights before the Constitutional Court", taken place on October 4-5 2002, were included in this Bulletin "Constitutional Justice".

The seminar was organised by the Constitutional Court of the Republic of Armenia, European Commission "For Democracy through Law" of the Council of Europe and International organisation "Conference of constitutional control bodies of the states of new democracy".

G. Harutyunyan, President of the Constitutional Court of the Republic of Armenia, G. Buquicchio, Secretary of the European Commission "For Democracy through Law", Garegin II, Catholicos of all Armenians addressed to the participants of the seminar by their greeting speeches.

L. Wildhaber, President of the European Court of Human Rights and R. Liddell, Head of the Cabinet of the European Court of Human Rights, G. Buquicchio, Secretary of the European Commission "For Democracy through Law" of the Council of Europe and S. Langer, expert of European Commission "For Democracy through Law" (Federal Constitutional Court of Germany), B. Ebzeev, Judge of the Constitutional Court of the Russian Federation, L. Chubar, Judge of the Constitutional Court of the Ukraine, A. Marini and V. Onida, Judges of the Constitutional Court of Italy, L. Dobrik, Judge of the Constitutional Court of the Slovak Republic and S. Havrilla, Adviser of the Constitutional Court of the Slovak Republic, F. Duchon and V. Guttler, Judges of the Constitutional Court of Czech

Republic, M. Salikhov, President of the Constitutional Council of the Republic of Tajikistan and L. Abdulaev, Judge of the Constitutional Council of the Republic of Tajikistan, J. Prapiestis and A. Abramavicius, Judges of the Constitutional Court of the Republic of Lithuania, D. Pededze, Advisor to the Chairman of the Constitutional Court of Latvia, as well as scientists, officials and politicians, professors and students and representatives of Mass Media participated in the works of the seminar. The articles of G. Pikis, President of the Supreme Court of Cyprus, Arne Mavcic, Head of the Legal Information Center of the Constitutional Court of Slovenia, D. Gotchev, Justice of the Constitutional Court of the Republic of Bulgaria, are also included in the Bulletin.