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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DOCUMENTATION ON THE CO-OPERATION
OF THE VENICE COMMISSION
WITH THE CONSTITUTIONAL COURT OF BELARUS
BY VIRTUE OF RESOLUTION IV OF THE CIRCLE OF PRESIDENTS
OF THE XIITH CONFERENCE
OF EUROPEAN CONSTITUTIONAL COURTS
(BRUSSELS, 13-16 MAY 2002)

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Resolution IV of the Circle of Presidents, convened in Brussels on 13 and 16 May 2002 on the occasion of the XIIth Conference of European Constitutional Courts

Resolution IV

The Circle of Presidents, convened in Brussels on 13 and 16 May 2002 on the occasion of the XIIth Conference of European Constitutional Courts,

Having regard to the application by the Constitutional Court of the Republic of Belarus for full membership of the Conference of European Constitutional Courts,

Having heard Mr Grigory A. Vasilevich, President of the Constitutional Court of the Republic of Belarus, and the report of the ad hoc working group, delivered by the Chairman, Mr Ludwig Adamovich, at the meeting of the Circle of Presidents on 13 May 2002,

Having regard to Articles 4, 6 and 9, seventh heading, of the Statute of the Conference of European Constitutional Courts,

Having regard to the vote, at which twenty-nine members were present, so that the quorum was attained, and where sixteen members voted in favour of granting full membership to the Constitutional Court of the Republic of Belarus,

Having established that the requisite two-thirds majority, in pursuance of Article 9, seventh heading, indent (a), was not attained,

Has decided the following:

1° the Constitutional Court of the Republic of Belarus shall not be granted full membership.

2° the European Commission for Democracy throu gh Law, also known as the Venice Commission, is invited to re-establish contact with the Constitutional court of the Republic of Belarus and to report on that matter on the occasion of the Preparatory Meeting of the XIIIth Conference in Cyprus.

Brussels, 16 May 2002

A. ARTS President	M. MELCHIOR President	F. MEERSSCHAUT Secretary-General

http://www.confcoconsteu.org/en/congress/resolution_vii.html

Visit of a delegation of the Venice Commission to Belarus (Minsk 26-27 June 2003) Synopsis

On 26-27 June 2003, a delegation of the Venice Commission visited Belarus. The delegation was composed of Mr. Lopez Guerra, Professor at the University Carlos III in Madrid and former Vice-President of the Constitutional Court of Spain, Mr. Russell (Ireland), former member and President of the Sub-Commission on Constitutional Justice of the Venice Commission and Mr. Vogel, member of the Commission and Professor at the University of Lund, Sweden, the Secretary of the Commission, Mr Buquicchio, and Mr Dürr from the Secretariat. The visit had been organised following a request by the Conference of European Constitutional Courts inviting the Venice Commission to resume co-operation with the Constitutional Court of Belarus and to inform the Conference on this co-operation in view of an application by the Court for full membership with the Conference. The Conference of European Constitutional Courts is an independent body uniting practically all European constitutional courts (http://www.confcoconsteu.org). The co-operation between the Constitutional Court of Belarus and the Venice Commission had been suspended following the constitutional referendum in 1996.

During the first day of the visit, the delegation participated in the Conference on "Strengthening of the Principles of a Democratic State Ruled by Law in the Republic of Belarus by Way of Constitutional Control". At the Conference, the delegation presented *inter alia* a critical evaluation of the Constitution currently in force, which was hotly debated. The delegation also learned that even though the Constitution and the Law on the Constitutional Court provided only for appeals from state bodies like the President of the Republic, Parliament or the Government, the Constitutional Court had in fact extended its jurisdiction to allow appeals also from individuals. The Court had based this extension and the ensuing human rights case-law *inter alia* on articles of the Constitution, which provide that individuals can make petitions to any state body including courts.

During the second and third days of the visit, the delegation met with the Ministers of Foreign Affairs and Justice, the *Chargé d'affaires* of the Embassy of Moldova, holding the Presidency in the Committee of Ministers of the Council of Europe, the OSCE Mission in Belarus and the Belarus Helsinki Committee. During the meetings with the authorities, the delegation insisted that any co-operation could take place only on the basis of concrete issues. In this respect, the delegation took good note that shortly before the visit Belarus had submitted draft laws on the Parliament and on the ombudsman to the Commission for opinion. The delegation also reminded the authorities that the Council of Europe was still waiting for the promised submission of the Law on the Media for expertise.

Taking note of an open attitude towards European integration of several of its interlocutors, the delegation concluded that bodies like the Constitutional Court willing to make progress towards democratisation should be encouraged and assisted given the delicate political context of their endeavour.

Extract of the meeting report by Mr. Buquicchio following the visit of a delegation of the Venice Commission to Belarus

1. At a meeting with the delegation, the judges of the Constitutional Court presented several decisions relating to human rights, in particular discussing Article 40 and 122 as constitutional basis for individual appeals. While there was a constitutional basis for these decisions an introduction of the individual appeal into the law on the constitutional court would be useful.

2. The Court gave two types of decisions: judgments upon request by state bodies which had a clear constitutional basis and decisions which in which it allowed individual appeals by direct application of the Constitution. Article 122 of the Constitution allows individuals appeal to "a court of law" against decisions of local authorities violating their human rights. As the Constitution of 1996 deals with the Constitutional Court no longer in a separate chapter but as part of the chapter on the judiciary, the Constitutional Courts considers itself to be one of the courts of law in Belarus and as such enabled to accept appeals against decisions of local authorities. Another provision used by the Court to extend its jurisdiction is Article 40 of the Constitution which states that "every person has the right to address personal or collective appeals to state bodies". Again, the Constitutional Court considers this to be a basis for accepting individual appeals. Nevertheless, given their weaker basis, these 'decisions' are in fact less categorically as concerns their effects. Often, the Court notes that a certain practice is unconstitutional and recommends to the authorities concerned to change its practice in accordance with the Constitution. The Constitutional Court points out though, that in most cases these recommendations are being followed by the authorities concerned. A problem in this respect seems to be the Supreme Court which did not follow repeated decisions by the Constitutional Court concerning the right to judicial appeal against sanctions against imprisoned persons. The former judge of the Constitutional Court, Mr. ***, suggested that the individual appeal should be formally introduced into the law on the Constitutional Court in order to give it better effect. In my introductory speech to the Conference I had insisted on the introduction of the individual appeal, which would give the Constitutional Court occasion to show its independence from the legislative and especially the executive branches of power.

3. Mr Vasilevich pointed out that the Constitutional Court was often consulted by Ministries on their opinion on the constitutionality of certain matters. The Court also developed an educative activity participating in conferences and seminars where they promoted human rights.

4. Another means of influencing the authorities was the annual message by the Constitutional Court on constitutional legality addressed to all state powers. In these documents the Court addressed the issues it deemed important for maintaining human rights. At the Conference, the former Constitutional Court judge Mr. *** had questioned this type of expression of the Court because it might be biased in future cases if it already had given its opinion on certain issues. This instrument would draw the Court into the political process. Probably with reference to his predecessor, Mr. Vasilevich had replied that such messages voted upon by the Court were at least better than political statements made by the chairman in individual cases.

5. Taking note of an open attitude towards European integration of several of its interlocutors, the delegation concluded that bodies like the Constitutional Court willing to make progress towards democratisation should be encouraged and assisted given the delicate political context of their endeavour.

Gianni Buquicchio

Report on the Separation of Powers and the Republic of Belarus
by Mr Matthew RUSSELL[1]

Seminar on
"Strengthening of the principles of a democratic state ruled by law in the Republic of Belarus by way of constitutional control"

(Minsk, Belarus, 26-27 June 2003)

The principle of the separation of power is usually attributed to the ideas of the political philosophers Montesquieu and John Locke. However I believe that it owes its origin to the recognition of a much older phenomenon, put into the famous words of Lord Acton "Power corrupts and absolute power corrupts absolutely".

From this universal truth came the recognition that in an ordered society the three organs of power, the Legislative, the Executive and the Judicial, should have broadly equal status and should exercise their respective powers largely independent of each other, and that if this is not so the concentration of two or three of these powers in the same hands will lead to absolute rule or even tyranny.

The application of the principle in actual practice has not always been easy. This is particularly so in the case of the former socialist countries, for historical reasons. Under the old regime the principle of unity of state power was established in the constitutional framework as interpreted and applied by the one-party system. The task facing the new democracies during the '90s as they set about establishing their new constitutional order was to select a particular system of government - presidential, semi-presidential or parliamentary - and to strike the right balance in the distribution of power between the three organs. The Venice Commission, which played a prominent role in the drawing up of many of the new constitutions, found much enthusiasm for the new order and particularly for the concept of the separation of powers. But not all of the new democracies have found it easy to arrive at, and to maintain, the balance. In some countries the legislature can be too strong, at the expense of the executive, which can be rendered weak and inefficient; in other countries the executive is too strong, which can lead to a weakening of democracy.

For all of these reasons the role of the Judiciary is vital, in adjudicating between the other two organs and restraining excess by either, as well as guarding the interests of the ordinary citizen. Because of the legacy of their history this is obviously the case in the new democracies. But it is also the case in the older, Western democracies where the threat today is not of internal absolutism but of corruption, both real and as perceived and presented by the media, among the rulers which has led to public distrust of political leaders and to a worrying disengagement by the electorate from the democratic process. In all countries, therefore, the judiciary has a vital role in maintaining or, where appropriate, generating, public confidence and respect for itself by its stability and its fearless independence. In the new democracies the particular task of the judiciary is to help, within the constraints of the constitutional framework and their own jurisdiction, to promote the right balance between the executive and the legislative arms of the state.

***

Turning now from these general remarks, it is of interest to consider the extent of which they are relevant in the case of the Republic of Belarus. Let us first look at the constitutional framework which is provided by the text adopted at the referendum held on 24 November 1996 and which made important changes to the Constitution which had been adopted at the 13th session of the Supreme Council on 15 March 1994. Because of time constraints I am not going refer to those changes which made improvements on the 1994 text or to the many positive features of the Constitution, such as Article 61 (which, when it becomes effective, will for example enable the ordinary citizen to apply to the European Court of Human Rights at Strasbourg if he believes that his basic human rights and freedoms have not been upheld). Rather, it may be more useful if I offer some thoughts on certain aspects of those parts of the Constitution which are relevant to our discussions today and which I believe are open to criticism.

1 Former President of the Sub-Commission on Constitutional Justice, Venice Commission

Article 6 of the Constitution has remained unamended and provides that "the State power in the Republic shall be exercised on the basis of its separation into legislative, executive and judicial power. State bodies, within the limits of their authorities, shall act independently and co-operate with one another, and restrain and counterbalance one another"

This is an admirably clear statement of the classical theory of the separation of powers.

However, an examination of other parts of the Constitution reveals provisions which inhibit, and in some instances prevent, the application of the principle in reality.

For example, in the case of the legislative organ of power, we find that the right to initiate legislative proposals is conferred on the President, the Government, members of Parliament and 50,000 citizens [A99]. However, Article 99 contains the important proviso that draft laws which might reduce state resources or involve or increase expenditure may only be introduced with the consent of the President. This amounts to a virtual power of veto because almost every law involves some public expenditure. This means that the President's power in relation to the initiation of legislation is very much greater than that of the Government or of the members of Parliament.

The limitation of the sessions of the Houses to a total of 170 days beginning and ending on stated dates [A95] deprives the Parliament of the right to organise its activity independently (e.g. to sit in permanent session or to continue debating an important law or public issue). Furthermore, the listing in the 1996 text [A97.2] of the topics which the House of Representatives may legislate upon [cf.A83,1994] can only be a limitation, in the case of Belarus, on the powers which a parliament normally has. By contrast there are no limitations on the subject matter of the decrees and orders which the President may issue [A85] [see also A101] or the acts which the Government may issue and which have binding force in the entire territory of the Republic [A108]. This gives considerable power to the President, who appoints and dismisses the members of the Government [A84.7] and appoints the Prime Minister with the consent of the House of Representatives [A84.6] - which consent, if not granted by the House, will lead to its dissolution and new elections [A106]. Also, the President has an unlimited right to abolish the acts of the Government [A84.25]. While the Government is stated to be the organ exercising executive power [A106], it is accountable to the President and responsible to Parliament [A106]. Although this arrangement is to be found in semi-presidential systems elsewhere, it is accompanied in those countries by rules which maintain a certain balance between president and parliament as well as between president and government. That balance is not evident in the Constitution of the Republic of Belarus where, for example the provision in the 1994 text that Parliament is "the unique legislative body of state authority of the Republic" [A79,1994] has been replaced by the provision that it is "a...legislative body of the Republic" [A90].

Very worringly, the normal immunity which members of parliament in other countries have in expressing their views is withheld in Belarus in the case of what A102 calls "charges of slander and insult". This entirely vague and subjective formula is open to any interpretation and therefore to being abused.

For all of these reasons - and there are other negative aspects of the constitutional framework relating to the President, the Parliament and the Government which time constraints do not allow us to go into - the separation of powers between these organs cannot be regarded as satisfactory.

As regards the judiciary, the Constitution, as amended in 1996, contains a number of provisions which give rise to concern.

This is especially regrettable because in any country the relationship between the judicial power and the executive and legislative processes is of enormous importance for the well-being of the country. It is of course true that the great majority of citizens will never become personally involved in any conflict between these organs at the highest level. The average citizen, if he is ever involved in court proceedings at all, whether civil or criminal, will be dealt with in the lower courts, and will know nothing of the great issues of constitutional principle which affect the relationships between the three organs of power. He or she is content if the trial judge gives the case a patient hearing, knows the law and applies it in a fair and unbiased manner. These are the qualities which are universally required in a judge, no less in an old democracy than in a new. It is only the accident of European history that has unfortunately - and often unfairly - placed on the judiciary of the new democracies a heavier burden of convincing their peoples that they possess these qualities than that which rests on their counterparts in countries which have a longer and more settled judicial tradition. Luckily this burden is a phenomenon particular to this generation, and we may anticipate that it will disappear with the passing of time. This is important for the

ordinary citizen before the courts but also for economic progress, because if a country does not have the reputation of a stable and reliable judicial system, foreign firms will be reluctant to establish industries or commit themselves as investors or trading partners in the country.

In seeking to identify the balance which should exist in a country between the judicial power and the other powers, one looks in particular at the position of the constitutional court or the court of equivalent jurisdiction.

At this point I wish to emphasise that the views which I am expressing relate only to the position of the Constitutional Court of the Republic of Belarus as it is set out in the Constitution. I am not speaking of the manner in which the Court is carrying out its functions, nor am I discussing the jurisprudence of the Court - and, of course it is by its jurisprudence that the activity of a court is to be judged, and not by the constitutional framwork in which it is obliged to operate and for which it is not responsible. Looking at that framework one notices, in the first place, that while in the 1994 text of the Constitution the Constitutional Court was to be found in a separate chapter [6] under the heading "State Control and Supervision", the ordinary courts being dealt with in a different chapter [5] not under that heading, in the 1996 text the heading has disappeared and the Court is now included in the chapter [5] dealing with the ordinary courts. Whatever may have been the intention of this change, a positive result which should be noted is that it has enabled the Constitutional Court to identify a wider jurisdiction than that conferred on it by A116 in decisions made by it in relation to A60 (which provides that "Everyone shall be guaranteed protection of one's rights and liberties by a competent, independent and impartial court of law ....."), and A122 (which enables certain decisions of local councils to be challenged in a court of law), while A40 enables "everyone" to have "the right to address personal or collective appeals to state bodies" - such as the Court itself).

Under the 1994 Constitution the 11 judges of the Court were appointed by the Supreme Council of the Republic, the elected parliament [A126]. By contrast under the1996 amendments the Court of 12 are appointed in a significantly different manner. Six are appointed by the President and six by the Council of the Republic [A116]. The Chairman is appointed by the President with the consent of the Council of the Republic [A116] [A98]. Because of the even number of judges the composition of the Council is obviously important: 1/8 of its members are appointed by the President.

While the appointment of judges by the Executive is the practice in a number of countries, and has been held not to be in breach of the European Convention on Human Rights *(Campbell & Fell - v - UK, 1984),* the essential point is that in these countries an effective system of checks and balances between the organs of power means that the Executive is subject to measures of control by the courts which, once appointed, are protected from arbitrary interference or removal by the Executive or the Legislature.

In the case of Belarus it is to be noted, regretfully, that the usual protections of judicial independence normally found in a constitution - for example, strict limitations on the grounds for removal from office; prohibition on reduction of salary during period of office, etc. - are absent from the Constitution. Instead, it is provided that the grounds for dismissing a judge are to be determined by ordinary law [A111]. The dismissal is done by the President on notification of the Council of the Republic [A84.11]. The unsatisfactory nature of this arrangement is compounded by the distortion of the balance of powers as between the President and the Council of the Republic (as well as the House of Representatives).

It is true that the Constitution declares that "any interference in judges' activities in the administration of justice shall be impermissible and liable to legal action" [A110]. This formula (which was also in the 1994 text) is rather imprecise, and it would be interesting to know what is meant by 'legal action', and also whether the jurisprudence of the Constitutional Court - or other courts - over the years contains any example of the application of A110. Certainly it seems less comprehensive than the special protection which was given to the Constitutional Court by the 1994 Constitution but deleted by the 1996 text: "Direct or indirect pressure on the Constitutional Court or its members in connection with the execution of constitutional supervision shall be inadmissible and shall involve responsibility in law" [A126]. The deletion of that very positive provision can hardly be regarded as an improvement, especially in view of the absence of a number of constitutional protections and the consequent exposure of the judges to decisions of the legislature which could adversely affect their salaries or other conditions of office, either generally or in particular instances. It is to be noted also that the protection from arbitrary arrest or prosecution which was given to the Constitutional Court judges by the 1994 Constitution [A131] - which required the consent of the Supreme Council - has been removed by the 1996 text.

The function which has been given to the Constitutional Court by the 1996 text [A94] of deciding whether either or both Houses of the National Assembly have been engaged in "systematic and gross violation of the Constitution", the President having the function of bringing it into effect, with the consequential dissolution of the House, is undesirable. This is firstly because it brings the Court directly into the political arena, and secondly because it amounts to a continuing threat to the independence of Parliament. This provision, undesirable in any circumstances, is made even more undesirable by the vagueness of the concept "systematic and gross" violation, and by the fact of the preponderance of Presidential nominees on the Court. This combination of factors must inevitably result in a situation where a decision of the Court declaring such a violation will provoke considerable political controversy and scepticism among the public and be likely to lessen the respect which they should give to the judgements of the most important court in the country.

This is an example of the Court being given a jurisdiction which it ought not to have. By contrast the 1996 text also deprives the Court of an important jurisdiction which it formerly had. Whereas under the 1994 text [A127] the Court could be invoked by, among others, the Chairman of the Supreme Council, permanent committees of the Supreme Council, 70 deputies or the Procurator General, under the 1996 text [A116] the only opportunity which the Parliament now has of invoking the Court is through a majority of either House, while the Procurator General no longer has the right at all. This is a serious diminution of the democratic process because it prevents a minority of members of Parliament from seeking a ruling from the Court, and as we know, minorities are usually the group in any society who are most in need of the protection of the courts.

Furthermore, the provision in the 1994 text [A127] which gave the Court jurisdiction to examine at its own discretion the constitutionality and legality of the regulatory enactments of a State body has been deleted.

Other changes in the constitutional balance of powers which the 1996 text introduced are that the Prosecutor General is now appointed by the President with the consent of the Council of the Republic, and is to be accountable to him [A125-6], whereas under the 1994 Constitution [A134-5] the Procurator General was appointed by the Supreme Council and was accountable to it. Also the State Supervisory Committee is now formed by the President and its Chairman is appointed by him [A130], whereas formerly the Supervisory Authority was established by the Supreme Council, its Chairman was elected by it and the Authority was accountable to it [A138-9].

This concentration in the hands of the President of power in relation to these two State organs (organs to whom is entrusted important functions which should be carried out by them with total independence) adds to the distortion of the balance of powers in the Republic. It is also to be found in other parts of the amended Constitution, such as the provision [A138] that amendments to the Constitution may only be proposed by the President or by 150,000 voters rather than as formerly, when the right was also available to 40 deputies of the Supreme Council [A147].

The legal position created by some of the changes of 1996 is not entirely clear, at least to someone who is using the English translation. For example, the 1994 text provided in A112 that the courts shall administer justice in conformity with "the Constitution, laws and other ensuing regulatory enactments", and it goes on to say that if during a trial a court comes to the conclusion that a regulatory enactment is in conflict with the Constitution or other law it shall make a ruling in accordance with the Constitution and the law. These provisions recognise, firstly, a distinction between "laws" (which presumably are made by Parliament) and "regulatory enactments" (which presumably are of a lower order than laws and are made by some organ other than Parliament). Secondly, these provisions recognise, in accordance with the principle of *intra vires,* the subordination of a regulatory enactment to a law with which it is in conflict.

However, a 1996 amendment to A112 has deleted the reference to "law" in the case of conflicts. It thus appears that there is a *lacuna* in the case of regulatory enactments which are in conflict with a law (as distinct from being in conflict with the Constitution).

Furthermore, whereas the 1994 text stated [A146] in clear terms that in the case of a conflict between a law and a regulatory enactment the law should have priority, the 1996 text provides [A137] that where there is a discrepancy between a law and a decree or ordinance, the law shall prevail only when the power to issue the decree or ordinance was given by the law. Thus, a decree or ordinance which has been issued otherwise than under the law shall prevail over the law. I find this situation puzzling - if I have understood it correctly - and I would welcome a clarification at some stage of our discussions. Obviously it would be undesirable if citizens were to be bound by a regulatory enactment or decree which was in conflict with the law and which the courts would not be able to declare to be *ultra vires* and invalid.

Matthew Russell
Dublin
June 2003

Extract of the report of the 2nd meeting of the Joint Council on Constitutional Justice of the Venice Commission (Oslo, 8-9 May 2003)

…

5.f Co-operation with the Constitutional Court of Belarus

The Secretariat informed the participants on the background of the resumption of relations of the Commission with the Constitutional Court of Belarus in the light of the Conference of European Constitutional Courts request to do..

In 1996, following a series of decisions of the Constitutional Court of Belarus annulling decrees of the President because of a violation of the separation of powers, the latter proposed a draft constitution attributing increased powers to his office. This text was to be adopted by referendum. In reaction to this presidential draft, two major political groups in Parliament made a counter-proposal for a constitutional revision which would have abolished the office of the President of the Republic altogether. Upon request by the speaker of Parliament, the Constitutional Court decided that the existing Constitution (dating from 1994) could only be amended by Parliament and that a constitutional referendum could not have binding effects
(http://venice.coe.int/docs/1997/CDL(1997)009-e.html).

Again upon request by the Speaker of Parliament, the Venice Commission gave an opinion on both drafts (presidential and parliamentarian) and came to the conclusion that "both the examined proposals fall short of the democratic minimum standards of the European constitutional heritage" and called on the "authorities of Belarus to abide by the decision of the Constitutional Court" (http://venice.coe.int/docs/1996/CDL-INF(1996)008-e.html).

Nevertheless, a referendum was held on both proposals and ended in favour of the presidential draft, which was promulgated by the President thus ignoring the decision of the Constitutional Court. Seven out of ten members of the Constitutional Court resigned in protest and the new, current Constitutional Court - recomposed according to the new Constitution -, annulled the previous decision on the constitutional referendum.

In reaction to these events, the Bureau of the Parliamentary Assembly of the Council of Europe suspended the special guest status of the Parliament of Belarus thus blocking the procedure of accession of Belarus to the Council of Europe. Given the continuation of the situation in Belarus, this special guest status remained suspended. For its part, the Venice Commission discontinued publication of the decisions of the Constitutional Court in the *Bulletin on Constitutional Case-Law.*

Already before 1996, the Constitutional Court of Belarus had become associate member of the Conference of European Constitutional Courts (http://www.confcoconsteu.org). At the XIIth Conference (Brussels, 13- 16 May 2002), the Constitutional Court of Belarus requested full membership with the Conference. The Circle of Presidents of the Conference decided in its Resolution IV that "the Constitutional Court of the Republic of Belarus shall not be granted full membership" but that "the European Commission for Democracy through Law", also known as the "Venice Commission", is invited to re-establish contact with the Constitutional Court of the Republic of Belarus and to report on that matter on the occasion of the Preparatory Meeting of the XIIIth Conference in Cyprus." (http://www.confcoconsteu.org/en/congress/resolution_vii. html). In view of this request by the Conference, the Commission considered resuming publication of the decisions of the Constitutional Court of Belarus in the *Bulletin* with a view to familiarising not only members of the Conference but also the public with the case-law of the Court since 1997. However, a note explaining the background of this publication would be added for the benefit of the readers. In addition, for June 2003 the Commission planned a Conference in co-operation with the Constitutional Court of Belarus on the separation of powers and the possible introduction of an individual appeal to the Court..

Several liaison officers expressed their opposition to publishing the case-law of the Constitutional Court of Belarus in the *Bulletin* in the light of the situation in Belarus.

Mr. Buquicchio replied that that the activities of the Commission were also geared towards furthering the principles of the Council of Europe in places where they were not or not yet fully respected. However, it had to be made certain, that the Commission's interlocutors were committed to reform.

The Joint Council decided to present the précis of the Constitutional Court of Belarus as a special working document for the Preparatory Meeting of the XIIIth Conference of European Constitutional Courts to be held in Nicosia, October 2003. Depending on the decision of the Conference to admit the Constitutional Court of Belarus as a full member, the précis would be published in the *Bulletin*.

Resolution 1306 (2002)[1] of the Parliamentary Assembly of the Council of Europe on the situation in Belarus

Resolution 1306 (2002) [1]
Situation in Belarus

1. The Parliamentary Assembly recalls that the question of Belarus has been on its agenda since September 1992. The Special Guest status granted to the Parliament of Belarus was suspended in January 1997. The Assembly, however, decided at that time to keep the channels of contact open with all the political forces in Belarus and to follow developments closely in that country. In January 2000, in its Recommendation 1441 on the situation in Belarus, the Assembly considered that political progress in the country was not yet of a nature to allow a change in relations with the Council of Europe.

2. The Assembly has since continued to do its best to maintain dialogue with Belarus. Isolating the country was not considered a good policy and the Assembly has carefully avoided applying double standards in its evaluation of the situation in Belarus. The Council of Europe standards on pluralist democracy and the protection of human rights and individual freedoms have constituted the principle yardstick in its evaluation.

3. Today, despite some progress in a number of areas, the democratisation process in Belarus appears to be stagnant. Moreover, relations between Belarus and the international community remain strained. A key example is the tension between Belarus and the Organisation for Security and Co-operation in Europe (OSCE) due to a crisis over the mandate of the OSCE Advisory and Monitoring Group (AMG), which culminated in the refusal by the Belarusian authorities to issue visas to and to accredit the AMG officials. The *Ad hoc* Committee on Belarus of the Bureau of the Assembly expressed its extreme concern about the situation after its visit to the country in June 2002.

4. The Assembly is seriously concerned about the lack of progress made in clarifying the cases of missing people. Despite assurances from the Belarusian authorities about ongoing investigations into their cases, no reliable information, let alone any concrete results, are available at present. The Assembly encourages the setting up by its Committee on Legal Affairs and Human Rights of an *ad hoc* sub-committee in order to help clarify the circumstances of these disappearances, and appeals to the Belarusian authorities to provide this *ad hoc* sub-committee with all necessary information.

5. Recent developments in Belarus have also given rise to growing concern regarding freedom of expression and of the media. The independent media continue to be subject to increasing pressure and harassment from the Belarusian authorities. The recent convictions of journalists for their opinions are unacceptable. As regards the audiovisual media, the creation of a second semi-independent television channel has not yet delivered the results expected by the public. The new draft law on the media has not yet been adopted by the Parliament, and the proposals made by the Assembly to the authorities to submit the draft law to the expertise of the Council of Europe has not been followed up.

6. The Assembly notes with satisfaction the release from prison of Mr Andrei Klimov, prominent businessman and opposition politician, in March 2002, and urges the authorities to reconsider other cases of imprisonment on political grounds, including those relating to sentenced journalists.

7. Having welcomed the earlier release from custody of Mr Mikhail Chigir, former Prime Minister of Belarus, in its Resolution 1441 (2000), the Assembly notes with concern that Mr Chigir was sentenced in July 2002 by a district court in Minsk to a suspended prison sentence of three years with the confiscation of his property. The Assembly continues to be worried about the fairness of Mr Chigir's trial, as well as the treatment of political opponents by state authorities in general. It also expresses its concern regarding the situation of independent trade unions.

8. The Assembly notes that a new awareness seems to be developing in Belarus, in particular in parliamentary circles, on the question of the abolition of the death penalty. It welcomes the hearing on this issue organised by the Parliament of Belarus in May 2002 and notes the recommendations addressed by the parliament to the government on the possibility of a step-by-step approach from a moratorium regarding the death penalty to its eventual abolition, with the exception of some specific grave crimes.

9. At present, Belarus shows severe democratic deficits and it does not yet meet the Council of Europe's relevant standards. The electoral process is imperfect, human rights violations continue, civil society remains embryonic, the independence of the judiciary is doubtful, local government is underdeveloped and, last but not least, parliament has limited powers. Although there is now a new awareness among a group of parliamentarians as to an increase in parliamentary competences, relations between the regime and foreign powers, the European Union and other international organisations remain tense.

10. Against this background, the Assembly considers that for the time being a discussion on full membership of Belarus in the Council of Europe cannot be put on the agenda. However, depending on future developments regarding the competences of the Belarusian Parliament and its commitment to fostering democratic development in Belarus, the Bureau of the Assembly may reconsider the restoration of Special Guest status of the Parliament of Belarus with the Assembly.

11. In the meantime, co-operation between the Council of Europe and Belarus should continue and develop in specific areas such as parliamentary co-operation in the form of dialogue and the organisation of joint seminars on specific topics; co-operation programmes targeted at local elected representatives especially regarding policy issues on education, employment and social security; co-operation with the Venice Commission with a view to improving concepts of governance; co-operation projects for developing civil society; legislative assistance with the laws on the media, religion, the ombudsman and defamation, and also training programmes for journalists. In this regard the Assembly also draws the attention of member states to the importance of bilateral contacts at parliamentary level between member states and Belarus.

12. The Assembly also encourages the Council of Europe's Commissioner for Human Rights to pay particular attention to the situation in Belarus with a view to fostering respect for human rights in that country.

[1]. *Assembly debate* on 27 September 2002 (32nd Sitting) (see Doc. 9543, report of the Political Affairs Committee, rapporteur: Mr Behrendt and Doc. 9574, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr. Stankevic).

Text adopted by the Assembly on 27 September 2002 (32nd Sitting)

http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta02%2FERES1306.htm

OSCE Permanent Council: EU Statements - EU statement on Belarus

PERMANENT COUNCIL No. 461, 17 July 2003

The European Union is deeply disturbed to hear that further, unacceptable restrictions have been imposed on the operation of media and civil society in Belarus.

The Union has learned of the closure of the Internet Network Corporation, a US-based charity group that supports local media, the International Research and Exchanges Board (IREX) and the Russian Television Station NTV in Belarus. Subsequently, the Union has also learned of the closure of the NGO resource centre Varuta, the denial of an extension of accreditation to the US-based media support organisation Inter News, the unsuccessful appeal of the Chairman of another NGO resource centre Ratusha, which allows the local Justice Department to resume legal proceedings against the centre and follows the closures of the NGO's The Youth Christian Social Union and Civil Initiatives.

We would like to recall the EU's Statement of 25 June on the worsening of the media situation in Belarus. Since then, other independent newspapers, namely Narodnaya Volya, Vcherny Stolin, Ekho and Navinki, have also been on the receiving end of restrictive measures from the Belarusian authorities.

The EU strongly urges the Belarusian authorities to take immediate action to reverse the restrictive measures taken against these and other media outlets in the country and to consult ODIHR and the Council of Europe on the draft media law before it is presented to the Parliament.

The Union notes that the Head of the Ad Hoc Working Group on Belarus of the OSCE's Parliamentary Assembly, Uta Zapf, said that, "the closure of the Belarusian office of Russia's NTV is yet another attempt to stifle all independent voices in the run up to a referendum on the extension of presidential powers planned by Belarusian President Aleksandr Lukashenko."

These incidents are too numerous to be described as isolated. We are concerned that these events demonstrate the systematic repression of the independent media and civil society in Belarus. The European Union urges Belarus to respect fully its OSCE commitments on freedom of the media and civil society, which it has freely entered into.

The European Union is deeply disappointed that the Belarusian Government is once again pursuing a policy which can only deepen self-isolation.

The Acceding Countries Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia and the Associated Countries Bulgaria, Romania and Turkey align themselves with this statement.

http://europa.eu.int/comm/external_relations/osce/stment/07_03/belarus.htm

Précis prépared by the Constitutional Court of Belarus (1997-2002)

Statistical data
1 January 1997 – 31 December 1997

Total number of decisions: 5

Statistical data
1 January 1998 – 31 December 1998

Total number of decisions: 11

Statistical data
1 January 1999 – 31 December 1999

Total number of decisions: 17

Statistical data
1 January 2000 – 31 December 2000

Total number of decisions: 28

Statistical data
1 January 2001 – 31 December 2001

Total number of decisions: 48

Statistical data
1 January 2002 – 31 August 2002

Total number of decisions: 30

Statistical data
1 January 2002 – 31 December 2002

Total number of decisions: 40

Categories of cases:
- Judgments: 2
- Decisions: 38

All official decisions of the Constitutional Court of the Republic of Belarus in their original language and in English (translations by the Court) are available on the following web-site: http://ncpi.gov.by/constsud.

Important decisions

Identification: BLR-1997-B-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 25.03.1997 / **e)** J-55/97 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/1997 / **h).**

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Residence, choice, free / Housing, right to purchase and sell, national, foreigner.

Headnotes:

Nationals of the Republic of Belarus, irrespective of their place of residence, may sell and purchase flats (houses) freely in any locality in Belarus.

They may freely move and choose their place of residence within Belarus.

Foreign citizens and stateless persons who have a permanent place of residence in Belarus and who have a legal source of subsistence shall enjoy the right to acquire flats (houses) through the established procedures for purchase and sale on an equal footing with citizens of Belarus.

Summary:

The Court opened the case as a result of a constitutional motion of the Ministry of Justice concerning the interpretation of the Court's judgment of 27 June 1996, since certain ambiguities as to its meaning have created difficulties in its application in practice.

The Court clarified the interpretation of its judgment of 27 June 1996 concerning the constitutionality and legality of the Supreme Council Resolution of 11 June 1993 on the procedure of purchase and sale of flats (houses) in the Republic of Belarus and temporary provisions on procedures for the purchase and sale of flats (houses), approved by Resolution of the Council of Ministers of 31 August 1993 no. 589. This judgment found certain provisions, which restricted the rights of nationals to conclude an agreement of purchase and sale of flats (houses) in Belarus, to be unconstitutional and illegal.

The Court explained that a citizen of the Republic of Belarus who has no possibility freely to sell his or her own flat (house) or to buy a flat (house) in any locality of Belarus, suffers to a certain extent a restriction of the right to possess, use and dispose of his or her own property, as well as of the right freely to move and choose a place of residence within the Republic, to leave it and to return to it without hindrance. Therefore, the Court concluded that nationals of the Republic of Belarus, including those who reside outside its borders, may freely transact agreements for the purchase and sale of flats (houses) in Belarus.

Foreign citizens and stateless persons who have a permanent place of residence in Belarus and who have a legal source of subsistence shall enjoy the right to acquire flats (houses) through the established procedures for purchase and sale on an equal footing with citizens of Belarus.

Cross-references:

- Judgment of 27.06.1996, J-39/96, *Bulletin* 1996/2 [BLR-1996-2-007].

Languages:

Russian, English (translation by the Court).

Identification: BLR-1997-B-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 09.07.1997 / **e)** J-57/97 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 3/1997 / **h).**

Keywords of the systematic thesaurus:

1.6.5.1 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (ex *tunc).*
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.3.36.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Crime, qualification / Retroactivity, exceptional circumstances.

Headnotes:

A law making certain acts no longer subject to punishment or reducing the sentences that can be imposed for a given act shall be retroactive *(lex benignior retro agit),* i.e. it shall apply to persons who committed the relevant act before the law in question came into effect, including persons already serving a sentence. Final judgments with respect to those persons shall be subject to revision.

Summary:

The Constitutional Court decided to examine the case as a result of a constitutional motion of the Supreme Court.

The Constitutional Court examined the question of the constitutionality of Section III.3 of the Final Clauses of the Law of 17 May 1997 on the introduction of alterations and addenda into the Criminal Code and the Code of Criminal Procedure of the Republic of Belarus. In accordance with the specified provision, final judgments with respect to persons convicted before the entry into force of the Law for offences under Articles 72, 87-91, 93, 94 and 96 of the Criminal Code, shall not be subject to revision upon the entry into force of the Law.

Having analysed the provisions of the Constitution, the International Covenant on Civil and Political Rights and the provisions of various Articles of the Criminal Code and other acts, the Court concluded that the Law, aiming as a whole to strengthen criminal liability, had changed the approach towards the estimation of the degree of danger posed to society by certain acts, by setting new criteria for the qualification of certain crimes depending on the amount of theft or of damage caused. As a result, a number of acts which were considered to be crimes before the adoption of the Law were no longer subject to punishment, and the punishment for certain crimes was reduced. Therefore, the Court considered that the Law should have retroactive effect. The constitutional rule on the retrospective effect of a law reducing or abolishing the responsibility of citizens for certain offences also extended to persons already serving sentences for such offences.

Since the law had made certain acts no longer subject to punishment and reduced the sentences that could be imposed for certain crimes, the Court concluded that Section III.3 of the final clauses of the Law, insofar as it restricted the retrospective effect of the criminal law with respect to persons convicted of a crime listed in that section and with respect to whom the court judgment had become final, was not in conformity with Articles 8, 21 and 104 of the Constitution, Articles 2, 4 and 15 of the International Covenant on Civil and Political Rights, ratified by the Republic of Belarus, or Article 6 of the Criminal Code.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1997-B-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 31.10.1997 / **e)** J-59/97 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/1997 / **h).**

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.18 **General Principles** – General interest.
4.10.2 **Institutions** – Public finances – Budget.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem.*
5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, calculation / Tax, evasion, profits, confiscation / Tax, income / Sanction, financial.

Headnotes:

The issuing of instructions and guidelines concerning procedures for the calculation, recording and collection of taxes and other payments shall fall within the competence of the state tax authority. The calculation and payment of taxes due on concealed (underdeclared) income or some other concealed (underdeclared) object of taxation shall be in conformity with the provisions of the relevant laws in this field.

The calculation of additional tax and of fines for late payment and for the cost of recovery of amounts owing shall be dealt with in separate measures, which should be applied independently, irrespective of any liability found for a tax offence.

Summary:

The case was examined by the Court following a constitutional motion of the Supreme Economic Court of the Republic of Belarus.

The Court examined the constitutionality of point 12.4.11 of the Instructions of the Principal State Tax Office on the Procedure for Applying the Law of the Republic of Belarus on Taxes and Duties Levied under the Budget of the Republic of Belarus and the Law Amending and Supplementing the Legislative Acts of the Republic of Belarus on the Issue of Taxation of 1 July 1994 no. 110, and the guidelines of the Principal State Tax Office of 21 June 1994 no. 03/104 and of 7 February 1995 no. 03/22, insofar as they regulated the obligatory recovery from persons having committed tax offences of additional taxes and fines for delays in their payment.

Having analysed the relevant provisions of the Constitution, laws and other binding enactments, the Court concluded that taxes are the main source of revenue for the state budget. Non-performance of duties with respect to the payment of taxes leads to violations of both the interests of the state and the interests of citizens guaranteed by law, since, in accordance with the laws with respect to the budget, the state shall ensure that it is able to carry out its tasks and functions, and shall finance socially significant spheres such as public health, education, culture and so on.

The state shall have the right and is bound to take measures regulating tax relations in order to protect the rights and lawful interests of both taxpayers and other citizens. Imposing legal liability for tax offences is one of the measures introduced to ensure compliance with tax legislation.

Point 12.4.11 of the Instructions of 1 July 1994, which regulates the liability of citizens having breached tax regulations, provides that in the event of the inclusion in an income declaration of material expenses that are not accounted for, or concealment from the taxation authorities (underdeclaration) of gross income (returns), financial sanctions, penalties, fines or other measures imposing administrative liability shall be applied according to the Law on the Taxes and Duties Levied under the Budget of the Republic of Belarus and according to the Administrative Code. A similar approach is contained in the guidelines issued by the Principal State Tax Office on 21 June 1994 and 7 February 1995.

In the opinion of the Court, the fact that a person has been called to account shall not discharge him or her from his or her obligations under the Constitution and the law.

The Court did not agree with the argument that in the process of confiscating the sum of concealed (underdeclared) profit or income the object of taxation itself may be subject to confiscation and, therefore, it may be impossible to collect the income tax. The Court considered that in this case the burden of financial responsibility lay on the tax offender who had made possible the concealment (underdeclaration) of profits or income on an account.

Having analysed the provisions of Articles 56 and 58 of the Constitution, the relevant laws and other binding enactments, the Court concluded that point 12.4.11 of the Instructions of the Principal State Tax Office of 1 July 1994 and the guidelines of the Principal State Tax Office of 21 June 1994 and of 7 February 1995 were in compliance with the Constitution and the law.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1998-B-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 19.06.1998 / **e)** J-66/98 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/1998 / **h).**

Keywords of the systematic thesaurus:

5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Detention, administrative / Search and seizure, document / Search, body.

Headnotes:

Personal searches, the inspection of personal belongings and the confiscation of belongings and documents may be appealed against by the interested person to a higher body (official) or to a public prosecutor, as well as to a court of law.

Summary:

The Court examined the case on the basis of a constitutional motion filed by the President of the Republic of Belarus.

The Court examined the constitutionality of Article 246 of the Administrative Code. In accordance with the above Article, a person subject to administrative detention, personal searches, the inspection of belongings and confiscation of belongings and documents may appeal against these measures to a higher body (official) or a public prosecutor.

Having analysed the relevant provisions of the Constitution and the Code, the Court ruled that the procedure laid down by Article 246 of the Administrative Code for appealing against the above-mentioned measures to a higher body (official) or a public prosecutor was not itself at variance with the guarantees of the rights and liberties of citizens proclaimed in the Constitution. Such a procedure is designed to ensure that any violations of the law that take place when the law is applied in practice are quickly remedied. However, the appeals procedure established in the given Article had practically excluded the possibility for an interested person to lodge a complaint with a court of law.

The analysis of the provisions of the Administrative Code showed that personal searches, the inspection of belongings and the confiscation of belongings and documents may take place both in instances of the administrative detention of an individual and where the individual is not detained. Taking into account the character of these measures the Court considered that their application could lead to violations of the rights and liberties of citizens guaranteed by the Constitution such as, first of all, the right to personal inviolability and dignity (Article 25 of the Constitution), non-interference with one's private life (Article 28 of the Constitution) and inviolability of one's property (Article 44 of the Constitution).

Thus, the Court concluded that the provisions of Article 246 of the Administrative Code, insofar as they restricted citizens' rights of to access to justice and prevented the implementation of everyone's right to the protection of their constitutional rights and liberties by a competent and impartial court of law, were at variance with the Constitution and the International Covenant on Civil and Political Rights ratified by the Republic of Belarus.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1998-B-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 24.06.1998 / **e)** J-67/98 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 3/1998 / **h).**

Keywords of the systematic thesaurus:

5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

Keywords of the alphabetical index:

Penalty, administrative, imposition / Appeal, instance.

Headnotes:

Restricting the right to judicial protection while establishing an extrajudicial procedure for appealing against an administrative penalty is at variance with Article 60 of the Constitution, under which everyone shall be guaranteed the protection of their rights and liberties by a competent, independent and impartial court of law.

Summary:

The Court examined the case following a constitutional motion filed by the President of the Republic of Belarus.

The Court examined the constitutionality of Article 267 of the Administrative Code and point 2 of the Ruling of the Supreme Court no. 7 of 20 September 1990 on the practice of examination by the courts of the Republic of Belarus of complaints against the actions of bodies and officials in connection with the imposition of administrative penalties.

Having analysed the relevant provisions of the Constitution, the Administrative Code and other binding enactments, the Court ruled that Article 267.1, 267.2 and 267.3 of the Administrative Code and point 2.2 of the Ruling of the Supreme Court of 20 September 1990 no. 7 on the practice of examination by the courts of the Republic of Belarus of complaints against the actions of bodies and officials in connection with the imposition of administrative penalties, insofar as they do not recognise the right of citizens to appeal to a court of law against decisions on cases of administrative offences where these have been challenged before a higher administrative body (or higher-ranking official), were contrary to the Constitution. Article 267.4 and 267.5 of the Administrative Code, insofar as they laid down rules on the challenging of such decisions before a higher administrative body (or higher-ranking official) only did not provide for the right of a citizen to appeal to a court of law against a decision imposing an administrative penalty by way of notice, and enacted the decision without keeping a full record of the proceedings, were also at variance with the Constitution. Citizens shall in all instances have the right to lodge a complaint before a court of law.

The right to judicial protection is one of the universally acknowledged principles and norms of international law; therefore, the Court considered that the above-mentioned provisions were also at variance with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1998-B-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 26.06.1998 / **e)** J-68/98 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 3/1998 / **h).**

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Adoption, against parents' will, grounds / Child, parents, separation / Child, parents, duties.

Headnotes:

Adoption, i.e. separation of children from their families, against the will of their parents and persons *in loco parentis* is possible only on the basis of a decision of a court of law, if the parents or persons *in loco parentis* fail in their duties.

Summary:

The Court examined the case on the basis of a constitutional motion filed by the President of the Republic of Belarus.

The Court examined the constitutionality of Article 116.2 of the Matrimonial and Family Code. Under the above provision, adoption may be carried out without parental consent if a child's parents do not reside together with the child for more than six months and if, without reasonable excuse, in spite of the warnings of guardianship authorities, they do not take part in the child's upbringing and care, and show no parental concern about the child.

The requirement that the separation of children without the consent of parents or persons *in loco parentis* can only occur on the basis of judicial proceedings was introduced with the enactment of the Constitution of 1994, as altered and amended by the republican referendum of 1996. Before this, the question of the adoption of children was considered by the executive committee of a region or municipal council.

On the basis of the contents of Article 32.4 of the Constitution, the separation of a child from his family without parental consent is possible in cases where parents fail in their duties to raise their children, to take care of their health, development and education, and this separation is possible only on the basis of a decision of a court of law.

Adoption in the instances envisaged by Article 116.2 of the Code results in the separation of children from their family without the consent of their parents or persons *in loco parentis.* Whereas Article 32.4 of the Constitution stipulates that such separation can only occur as a result of judicial proceedings, the Court concluded that extrajudicial procedures of adoption, if the adoption is carried out without the consent of the parents, are against the order established by the Constitution.

The Court found the provisions of the Matrimonial and Family Code to be in conflict with Articles 23 and 24 of the International Covenant on Civil and Political Rights and Article 9 of the Convention on the Rights of the Child.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1998-B-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 23.07.1998 / **e)** J-70/98 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 3/1998 / **h).**

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.
5.3.13.24 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to testify against spouse/close family.

Keywords of the alphabetical index:

Family member, right not to testify.

Headnotes:

In the determination of any criminal charge against them, everyone shall be entitled to the following minimum guarantees, in full equality: to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them; not to be compelled to testify against themselves or to confess guilt.

Any person who may know any circumstances which may affect the decision on the case in question may be summoned to give evidence.

Summary:

The Court examined the case following a constitutional motion of the President of the Republic of Belarus.

The Court considered the constitutionality of Article 66.2.3 of the Code of Criminal Procedure, which provides that close relatives and family members of a person who is accused of a crime may not be interrogated as witnesses.

Having analysed the provisions of the Constitution and of the International Covenant on Civil and Political Rights, the Court held that close relatives and family members of suspected or accused persons or defendants shall have the right not to give evidence or testify against themselves or against the suspected or accused person or defendant. Furthermore, the bodies carrying out inquiries or preliminary investigations, as well as courts of law, have no right to demand testimony from persons against themselves, members of their family or close relatives.

The provisions of Article 27 of the Constitution and Article 14 of the International Covenant on Civil and Political Rights contain no restrictions on the right of witnesses, where they consent to do so, to give evidence with regard to themselves or close relatives and family members being suspected or accused persons or defendants. Nor are these provisions grounds for discharging such persons from performing the duties of witnesses that are laid down by the law of criminal procedure.

Under Article 66.2.3 of the Code of Criminal Procedure, the prohibition on interrogating as witnesses family members and close relatives of a person accused or suspected of a crime entails the restriction of the right of a suspected or accused person or a defendant to a defence, whereas the essential circumstances of the case, which may go towards acquitting the person in question or reducing his or her criminal responsibility, may be known to close relatives and family members.

By virtue of Article 27 of the Constitution, under which witnesses shall not be compelled to give evidence against themselves or against close relatives and family members being suspected or accused persons or defendants, investigators or judges are bound to explain to such persons their right not to testify against themselves or the specified persons, and that the refusal to give evidence in these instances shall involve no criminal liability. At the same time, however, witnesses shall be informed of their responsibility to give other evidence on the case which is not related to testimony against themselves or close relatives or family members being suspected or accused persons or defendants.

The Court ruled that Article 66.2.3 of the Code of Criminal Procedure, insofar as it restricted the rights and duties of witnesses and prevented the realisation of the rights of the defence of suspected or accused persons or defendants, was not in conformity with Articles 22, 23, 26, 27, 28 and 58 of the Constitution and Article 14.3.e and 14.3.g of the International Covenant on Civil and Political Rights, ratified by the Republic of Belarus.

Languages:

English (translation by the Court).

Identification: BLR-1998-B-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 01.12.1998 / **e)** J-73/98 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/1998 / **h).**

Keywords of the systematic thesaurus:

5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Detention, right to appeal / Detention, maximum length.

Headnotes:

In the determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, and to be tried without undue delay.

The accused and his or her defence counsel or lawful representative shall have the right, on the expiry of the period of detention provided for by the law on criminal procedure, to challenge the legality and validity of the accused's detention during the period in which the accused and his or her defence counsel are familiarising themselves with the materials in the case-file.

Summary:

The Court examined the case following a constitutional motion of the President of the Republic of Belarus.

According to Article 92 of the Code of Criminal Procedure ("the Code"), detention during the investigation of criminal offences may not continue for more than two months; where a case is especially complex and in other exceptional instances following a decision of the relevant public prosecutor, the term of detention may be extended for one-and-a-half years. Further extension of the period of detention in accordance with Article 92.3 of the Code is not allowed and the accused in detention is subject to release without delay. At the same time, Article 92.5 of the Code provides that the time in which the accused and his or defence counsel are familiarising themselves with the case-file

shall not be taken into account while calculating the period of detention served as a preventive measure.

The Court examined the constitutionality of Article 92.5 of the Code. The provision in question makes it possible in practice to restrict the liberty of the accused during the period in which the accused and his or her defence counsel are familiarising themselves with the case-file, after the expiry of the period of detention set down in Article 92 of the Code, without a relevant decision having been made by the competent authorities.

Detention is the most severe form of preventive measure and essentially restricts the right to liberty and security of the person. During the period in which both the accused and his or her defence counsel are familiarising themselves with the case-file, the accused in detention is subject to the same conditions of isolation and the same regime as those imposed during a period of preventive detention. Therefore the procedures with respect to such preventive punishment, the instances where it may be imposed and conditions of its application must be regulated in detail by law.

Having analysed the provisions of the Constitution, the Code of Criminal Procedure, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by UN General Assembly Resolution of 9 December 1988 (A/RES/43/173) and the International Covenant on Civil and Political Rights, the Court considered that the detention of the accused during the period in which the accused and his or her defence counsel are familiarising themselves with the case-file must be carried out in accordance with the law on the basis of a decision of a court of law or other competent authority.

One of the constitutional guarantees of rights and freedoms is judicial protection of those rights and freedoms.

In accordance with Article 60 of the Constitution, everyone shall be guaranteed the protection of their rights and liberties by a competent, independent and impartial court of law within the time periods specified by law.

Having examined the application in practice of the relevant provisions on criminal procedure, the Court emphasised that accused persons held in detention during the period of familiarisation with case-file and beyond the time-limit for detention laid down by Article 92.2 of the Code suffer formal restrictions on their possibility of lodging a complaint against the detention. In such cases, no provision is made for a court of law or relevant public prosecutor to decide on the extension of the period of detention.

The Court ruled that Article 92.5 of the Code was not in conformity with the Constitution and with the relevant instruments of international law insofar as it contained no rule on the detention of the accused on the basis of a written order of a court of law or other authority specified by law during the period of familiarisation of the accused and his or her defence counsel with the case-file following the expiry of the time-limit for detention.

Languages:

English (translation by the Court).

Identification: BLR-1998-B-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 11.12.1998 / **e)** J-74/98 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/1998 / **h).**

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

Keywords of the alphabetical index:

Court, delimitation of powers / Inquiry, pre-trial material.

Headnotes:

Entrusting a court of law (judge) with the task of formulating the charge against an accused in its ruling on the initiation of criminal proceedings is contrary to the Constitution and the provisions of the International Covenant on Civil and Political Rights.

Summary:

The Court examined the case on the basis of a constitutional motion of the President of the Republic of Belarus.

According to Article 404 of the Code of Criminal Procedure ("the Code"), concerning the formalities to be observed in the pre-trial preparation of a case, the ruling on whether criminal proceedings shall be initiated shall be made by a court of law (judge) on the basis of the materials received from the investigating body. The court of law is also entrusted with the task of formulating the charge against the accused person, specificying the provision of the criminal law under which the person has been charged.

The Court, based on its analysis of the provisions of the Constitution and the International Covenant on Civil and Political Rights, found Article 404.3 of the Code to be unconstitutional on the following grounds.

Entrusting a court of law with functions that are characteristic of the prosecution bodies as well as with the task of administering justice is contrary to Article 60 of the Constitution and Article 14 of the International Covenant on Civil and Political Rights, which guarantee the protection of everyone's rights by an independent and impartial court of law. The independence and impartiality of justice are based on the right of a court of law to adopt a decision as a body of justice with respect to charges already laid.

The Court considered that entrusting a court of law with the task of formulating the charges against an accused person may be regarded as a predetermination by the court of the guilt of the person, leading to a guilty verdict in the case, because a judge, having formulated the charge, may turn out to be bound by his or her own decision.

The Court ruled that the provision of Article 404 of the Code that entrusts the court with the task of formulating the charge against an accused person is in conflict with the principle enshrined in Article 115 of the Constitution of the administration of justice on the basis of adversarial proceedings and the equality of the parties involved in a trial. The Court also emphasised that observing the formalities for the pre-trial preparation of a case in their present form restricts the possibility for a person subject to prosecution to protect his or her rights and lawful interests both personally and with the help of defence counsel. This is contrary to Article 62 of the Constitution and to international standards.

The Court found that it would be possible to observe the formalities in question in expedited criminal proceedings in certain categories of cases provided that all requirements were respected as to the proper guarantee of the rights and lawful interests of all the participants in the process.

Languages:

English (translation by the Court).

Identification: BLR-1999-B-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 25.03.1999 / **e)** J-77/99 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/1999 / **h).**

Keywords of the systematic thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.24 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to testify against spouse/close family.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

Accused, family member / Crime, concealment, liability.

Headnotes:

In accordance with Article 29.2 of the Universal Declaration of Human Rights, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

The Court also took into account the universally acknowledged principles of international law according to which individual rights and freedoms shall be considered in combination with the rights of other persons; restrictions of personal rights are considered to be justified when they are applied in the interest of protecting the rights and liberties of other citizens; the imposition of restrictions on human rights shall not prevent the implementation of fundamental individual rights and freedoms secured by international instruments or by the constitutions of states; the degree of any restriction imposed by law shall be strictly proportionate to the requirement or to the highest interest for the sake of which the restriction is imposed.

Nothing prevents the legislator from seeking a solution to the issue of liability for the withholding of evidence. The Court found that the legislator had the right to distinguish between its approaches to the issue of liability for withholding evidence in different situations. On the one hand, the withholding of information by close relatives and family members of a person who is preparing to commit a crime which could be prevented need not be covered by the exemption from liability. On the other hand, close relatives and family members of a person having committed a crime who concealed certain facts concerning the crime already committed, where such concealment was not promised prior to the commission of the crime, could benefit from the exemption from liability.

Summary:

The proceedings in the present case were brought in connection with certain ambiguities in meaning which had created difficulties as to the application in practice of the judgment of the Court of 19 December 1994 on the conformity between the Constitution and the note to Article 177 of the Criminal Code. The request of the Prosecutor's Office concerning the meaning of the judgment in question was also taken into account.

According to the provisions in force, close relatives or family members of a person preparing to commit a serious crime, which posed a threat to people's lives, were not subject to liability for withholding evidence as to the preparation of the crime in question, when information on such facts could not be given except by way of explanations and evidence aimed directly against the person intending to commit the crime.

In accordance with the note to Article 86 of the Criminal Code currently in force, which had been amended to bring it into line with the above-mentioned judgment, close relatives and family members of a person who has committed a criminal offence are subject to no liability for withholding of evidence (irrespective of the gravity of the offence). Such persons shall not be released from criminal liability for the concealment of facts related to a crime, where such concealment was not promised prior to the commission of the crime.

Under Article 27 of the Constitution of the Republic of Belarus no one shall be compelled to be a witness against themselves, family members or close relatives. Evidence obtained in violation of the law shall have no legal force.

Article 27 of the Constitution secures the right of family members and close relatives of a person who is suspected or accused of committing a crime or a defendant not to give evidence against themselves or against the person in question. That right is guaranteed by the statutory provision according to which a person is subject to no criminal liability for refusing to give evidence, if the evidence is directed against his family members or close relatives. The right of family members or close relatives of a person who committed a crime not to give information directed against the person in question to state bodies, which presupposes that criminal liability shall not be imposed on the relevant persons for the withholding of evidence related to a crime, follows from Article 27 of the Constitution.

The Court, in interpreting its judgment of 19 December 1994, ruled that the Constitution, and in particular Article 27 of the Constitution, does not prevent the exemption from criminal liability of close relatives and family members of a person who has committed a crime for concealment of facts related to a crime, where such concealment was not promised prior to the commission of the crime and concerned the person in question or his location and in instances when such concealment is justified by feelings existing due to the close relationship between the persons and was not prompted by any base (vile) motives.

The position of close relatives and family members having knowledge of the preparation of a serious crime prior to its commission was different, however. On the basis of Article 7 of the Constitution, according to which the Republic of Belarus shall be bound by the principle of the supremacy of the law – which means, first of all, the acknowledgement of the supremacy of human rights and freedoms as the main value guide both in making and applying the law – the Court found that it was possible to seek a legislative solution establishing the liability of close relatives and family members of a person who committed a crime for their withholding of knowledge relating to a serious crime under preparation, which posed a threat to people's lives, and which could have been prevented but for the silence of these persons.

Such an interpretation also followed from the provisions of the Constitution, which recognise the individual as being of supreme importance to society and the State (Article 2 of the Constitution), and the right to life (Article 24 of the Constitution) as the highest value in the system of all other constitutional rights of the citizens.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1999-B-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 13.05.1999 / **e)** J-78/99 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/1999 / **h).**

Keywords of the systematic thesaurus:

1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

Criminal procedure, guarantees / Investigation, preliminary.

Headnotes:

The lack of a provision in the law governing criminal procedure on the right to appeal to a court of law against a court ruling dismissing a criminal case at the pre-trial investigation stage prevents individuals from realising their right to judicial protection of the fundamental rights and freedoms guaranteed to everyone by the Constitution as well as by international legal standards.

Summary:

The Court examined the case following a constitutional motion of the President of the Republic of Belarus.

In accordance with Article 209.6 of the Code of Criminal Procedure, an appeal may be lodged with the public prosecutor against a ruling dismissing a criminal case at the pre-trial investigation stage.

On the basis of its analysis of the Constitution and international legal instruments, the Court found that the provision in question was unconstitutional to the extent that it did not provide for the right to appeal to a court of law against the ruling dismissing the criminal case.

The Court concluded that when a criminal case is dismissed at the pre-trial investigation stage, in situations where it is recognised that a *prima facie* case appears to exist on the facts but other grounds exist for releasing the person from criminal liability (such as the expiry of the time-limit within which proceedings must be introduced), the interested person is deprived of the right to judicial verification of the facts forming the basis of the ruling that the case should be dismissed. The lack of a provision in Article 209.6 of the Code of Criminal Procedure on the right to judicial protection constituted a violation of the constitutional rights of victims of crime, as well as other participants in the criminal proceedings whose rights and legitimate interests have been violated by the dismissal of the case at the stage of pre-trial investigation.

This violated the provisions of Article 60 of the Constitution, according to which everyone shall be guaranteed the protection of their rights and liberties by a competent, independent and impartial court of law within the time periods specified by law, as well as the provisions of Articles 8 and 10 of the Universal Declaration of Human Rights and of Article 14 of the International Covenant on Civil and Political Rights.

The Court ordered the National Assembly to amend and supplement the Code of Criminal Procedure so as to secure the realisation of the constitutional right of citizens to appeal to a court of law against a ruling dismissing a criminal case, and further order that, until such time as those amendments had been made, Article 60 of the Constitution should be applied directly.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1999-B-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 01.06.1999 / **e)** J-79/99 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/1999 / **h).**

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Employment, conditions / Official, liability, personal / Registration, obligatory / *Propiska* / ILO, Convention no. 111 / ILO, Convention no. 122.

Headnotes:

Making public servants working in state enterprises, establishments and organisations subject to administrative liability for employing citizens who were not registered as residents *(propiska)* in the locality of their employment was not in conformity with the relevant labour legislation, with the Constitution or with international legal standards.

Summary:

The Court examined the case on the basis of a constitutional motion of the President of the Republic of Belarus concerning the conformity with the Constitution and international legal instruments of Article 182.1 of the Administrative Code. According to this provision, public servants working in state enterprises, establishments and organisations who employed citizens without passports or holding invalid passports, or who employed citizens who were not registered as residents in the locality where they were employed, were subject to a fine of up to five minimum wages.

The Court concluded that making it an administrative offence to employ citizens who were not registered in the locality of their employment constituted a restriction of the right of these citizens to work, violated the principle of equality of all citizens before the law, and put persons who were registered as residents in the locality where they were employed or seeking employment and those who were not in unequal positions. Furthermore, it prevented citizens from realising the right to conclude labour contracts freely and employers from selecting employees on the basis primarily of their capabilities, education and professional training.

In studying the application of the law, the Court found that officials did in practice refuse to conclude labour contracts with citizens on the grounds that they were not registered as residents in the locality of the enterprises, establishments and organisations. Furthermore, in cases where they had employed such persons, they had been subject to administrative liability.

The Court held that the provisions of the Administrative Code under which public servants working in state enterprises, establishments and organisations were subject to administrative penalties for employing citizens who were not registered as residents in the locality of their employment were in conflict with the Constitution, with the relevant labour legislation of the Republic of Belarus, with the International Covenant on Economic, Social and Cultural Rights, with International Labour Organisation Conventions nos. 111, 122 and with other international legal instruments.

The Court ordered the National Assembly to make the necessary amendments to the Administrative Code in accordance with its judgment.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1999-B-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 02.06.1999 / **e)** J-80/99 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/1999 / **h).**

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.37.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Housing, privatisation, tenant, consent / Housing, tenant, right / Property, shared.

Headnotes:

Citizens who live in flats occupied by several tenants shall have the right to privatisation of the housing facilities occupied by them, even without the consent of other tenants.

Summary:

The Court examined the conformity with the Constitution of Article 5.2 of the Law on Privatisation of Housing Resources, following a constitutional motion of the Council of the Republic of the National Assembly.

In accordance with the challenged provision of the Law, a flat occupied by several tenants may be privatised simultaneously by all tenants into commonly shared property.

Having analysed the provisions of the Constitution, the Law on Privatisation of Housing

Resources and other binding enactments, the Court concluded that prohibitions and restrictions on the privatisation of housing facilities shall be permissible only in circumstances that in principle exclude the possibility of transferring housing facilities into private ownership or that objectively require the establishment of special procedures for such transfers. As concerned housing facilities in flats occupied by several tenants, there were no objective grounds requiring the establishment of specific procedures for their privatisation.

The Court found that the legislator – having proclaimed the principles governing the privatisation of housing, including, *inter alia,* the voluntary basis of the transfer into private ownership and the equal rights of all citizens of the Republic of Belarus to take part in privatisation – had no right, at the legislative level, to make the realisation of the right to privatisation of one tenant dependent on the consent (wish) of other tenants (i.e. at the subjective discretion of the latter).

Guided by the provisions of Articles 2, 21, 22, 23, 44, 48, 59 and 137 of the Constitution and Articles 2 and 9 of the Law on Privatisation of Housing Resources, the Court held that citizens who live in flats occupied by several tenants shall have the right to the privatisation of the housing facilities occupied by them, even without the consent of the other tenants.

The Court found Article 5.2 of the Law to be in conflict with the Constitution and to be invalid from the date of adoption of the Court's judgment.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1999-B-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 23.06.1999 / **e)** J-81/99 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/1999 / **h).**

Keywords of the systematic thesaurus:

1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
3.19 **General Principles** – Margin of appreciation.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Supreme Court, decision, appeal / Revision, conditions / Prosecutor, supervision proceedings.

Headnotes:

The full realisation by citizens of the right to appeal against rulings of courts of law requires greater protection than that afforded under the Code of Civil Procedure. Lodging an appeal with an appellate court shall always entail a full examination of the first-instance ruling, regardless of which court acted as the court of first instance.

Summary:

The Constitutional Court instituted proceedings following a constitutional motion of the President of the Republic of Belarus.

The Court examined the conformity with the Constitution and international instruments of Articles 207.2, 268.1, 269.1 and 291.1 of the Code of Civil Procedure ("the Code").

Article 207.2 of the Code provides that decisions of the Supreme Court shall become binding immediately after their publication.

In accordance with Article 268.1 of the Code, decisions of all the courts of the Republic of Belarus, except for the decisions of the Supreme Court, are subject to appeal by the parties, as well as by other persons having participated in the case, or subject to challenge by the public prosecutor, within ten days of their publication ("supervision proceedings").

Article 269.1 of the Code provides that appeal proceedings and challenges by the public prosecutor may be lodged as follows:

- against the decisions of district (city) courts or of inter-garrison military courts: before a judicial bench dealing with civil cases in the relevant region, Minsk City, or the Belarusian military courts as appropriate;
- against decisions of regional courts or of the Minsk City Court in civil cases: before a

judicial bench of the Supreme Court dealing with civil cases; and
- against decisions of the Belarusian military courts: before the military bench of the Supreme Court.

In accordance with Article 291.1 of the Code, rulings of a court of first instance, except in cases where the Supreme Court acts as the court of first instance, are subject to a full appeal by the parties and by other persons having participated in the case, and to challenge by the public prosecutor before an appellate court in the cases specified by the Code, as well as in cases where the ruling of the lower court obstructs further investigation of the case.

In examining the present case, the Court found that the provisions of the Constitution and certain universally acknowledged provisions of international law – namely, Articles 8 and 29 of the Universal Declaration of Human Rights and Articles 2, 14 and 26 of the International Covenant on Civil and Political Rights – bound the state to secure not only citizens' access to justice and equality before the law, but also the full exercise of the right to judicial protection, which must be fair, competent and effective.

One of the essential guarantees ensuring the effective exercise of the constitutional rights to judicial protection and to a lawful judgment including reasons is the right to appeal against and challenge courts' rulings.

The Court examined the realisation of the right to judicial protection through the procedures laid down by law for appeals against court rulings, with regard to both full appeals and so-called “supervision” proceedings.

When a complaint or a challenge is lodged with regard to court rulings that are not yet binding, proceedings shall be initiated in the appellate court (appeal proceedings).

While examining a case on appeal, the appellate court, on the basis of the materials available at first instance and further materials presented on appeal by the parties and by other persons participating in the case, has to verify the legality and validity of the decisions of the court of first instance, with respect not only to the parts of the decision that are disputed on appeal but also to those parts that are not disputed, as well as with respect to the persons who made no claim. The court is thus obliged to verify the case in full.

Lodging an application for supervision proceedings against a valid court ruling, however, does not require that full appeal proceedings be instituted. Such an application may only serve as grounds for challenging the application of court rulings which have already taken effect.

The institution of supervision proceedings does depend not on the will of the persons participating in the case, but only on the will of the official who has the statutory right to make the challenge, where, in his opinion, the grounds for making such a challenge exist.

The analysis of the impugned provisions showed that rulings of the Supreme Court, where the Supreme Court was acting as the court of first instance, were subject to no appeal or challenge, and could be scrutinised only by way of supervision proceedings.

Having analysed the procedural legislation in force, the Court concluded that the impugned provisions of the Code and related provisions, which provided that the rulings of the Supreme Court shall, in cases where the Supreme Court acts as the court of first instance, become binding immediately after their publication, and which allow no appeals or challenges against the decisions and rulings of the Supreme Court in such cases, did not meet the requirements of Articles 21, 22, 60 and 115 of the Constitution and international instruments. The Court considered that the provisions in question did not properly secure the constitutional guarantees of the equality of all persons before the law, nor did they provide procedural guarantees of the realisation of the right to appeal against court decisions.

It fell within the prerogatives of parliament to resolve the question of the manner in which the rights of parties and other participants in legal proceedings to appeal against all rulings of courts of first instance should be secured. Therefore, the Court ruled that the National Assembly should consider strengthening the procedural guarantees under the Code of Civil Procedure to provide for appeals against and challenges to judicial rulings of the Supreme Court acting as the court of first instance, in accordance with the requirements of the Constitution and international instruments.

Languages:

Russian, English (translation by the Court).

Identification: BLR-1999-B-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 13.12.1999 / **e)** D-91/99 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/1999 / **h).**

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Defence counsel, access, right, conditions.

Headnotes:

Suspected and accused persons and defendants with respect to whom detention has been decided upon as a preventive measure shall have the right to the assistance of legal counsel at any time. Such legal assistance may be provided within the sight, but not within the hearing, of law enforcement officials.

Summary:

The Court examined the case following the complaint of the Republican Collegium of Advocates.

The Court, having examined the materials of the case, recommended that the state authorities responsible for applying the legal provisions governing criminal procedure secure, not only for accused persons but also for suspected persons and defendants with respect to whom detention has been decided upon as a preventive measure, the right, as enshrined in the Constitution and in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly Resolution of 9 December 1988 (A/RES/43/173), to obtain the assistance of legal counsel at any time. Such legal assistance may be provided within the sight, but not within the hearing, of law enforcement officials.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2000-B-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 26.05.2000 / **e)** D-98/2000 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2000 / **h).**

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.26 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Military service, alternative / Conscientious objection, recognition / Military service, evasion, liability.

Headnotes:

Citizens of the Republic of Belarus, in accordance with the Constitution and the Law on Universal Military Duty and Military Service as well as with international legal standards, have the right, in particular on the basis of their religious beliefs, to undertake alternative service in place of military service. This right shall be secured by effective mechanisms for its realisation.

Summary:

The Law on Universal Military Duty and Military Service specifically provides that universal military duty shall encompass both entry into military or alternative service, as well as actually undertaking military or alternative service (Articles 1 and 14 of the Law).

Under Article 31 of the Constitution, everyone shall have the right independently to determine their attitude towards religion, to profess any religion individually or jointly with others, or to profess none at all, to express and spread beliefs connected with their attitude towards religion, and to participate in the performance of acts of worship and religious ceremonies and rites that are not prohibited by law.

The above-mentioned provisions of national law correspond to universally acknowledged principles and norms of international law, the supremacy of which is recognised by the Republic of Belarus (Article 8 of the Constitution).

Article 18 of the Universal Declaration of Human Rights declares that, “Everyone has the right to freedom of thought, conscience and religion; the right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

The International Covenant on Civil and Political Rights reiterates this provision and supplements the right in question by the provisions that: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice” and: “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (Article 18.2 and 18.3 of the International Covenant on Civil and Political Rights respectively).

Finally, according to the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen, 1990), the participating States: “note that the United Nations Commission on Human Rights has recognised the right of everyone to have conscientious objections to military service; note recent measures taken by a number of participating States to permit exemption from compulsory military service on the basis of conscientious objections; note the activities of several non-governmental organisations on the question of conscientious objections to compulsory military service; agree to consider introducing, where this has not yet been done, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature; will make available to the public information on this issue; will keep under consideration, within the framework of the Conference on the Human Dimension, the relevant questions related to the exemption from compulsory military service, where it exists, of individuals on the basis of conscientious objections to armed service, and will exchange information on these questions.”

Having examined certain aspects of the effect of Article 57 of the Constitution, and in accordance with the Constitution and the Law on Universal Military Duty and Military Service, the Court concluded that citizens of the Republic of Belarus have the right, on the basis of their religious beliefs, to undertake alternative service in place of military service. That right must be secured by effective mechanisms for its realisation, and in particular by means of the immediate adoption of a law on alternative service or by amending and supplementing as necessary the Law in question.

The Court emphasised, with respect to the question of liability for evasion of military service, that it is necessary to determine to what extent the actions of a citizen are connected with the realisation by him of his constitutional right to replace military service with alternative service, on the basis of his religious beliefs, or with conscientious objection, which is not intended to secure the respect of his religious beliefs.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2000-B-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 04.07.2000 / **e)** D-100/2000 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 3/2000 / **h).**

Keywords of the systematic thesaurus:

5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Defence counsel, lay person / Criminal procedure / Legal assistance, lay person.

Headnotes:

Persons serving sentences in places of detention shall have the right to obtain legal assistance not only from lawyers but also from other persons, if they have been allowed by a court of law to act as their defence counsel. The provision of legal assistance by such persons should be subject to the same procedural rules as those set down in the regulations governing meetings of convicted persons with lawyers.

Summary:

The Court analysed the provisions of the Code of Criminal Procedure which allow for the possibility for both ordinary defence counsel and other persons (for example, close relatives, legal representatives of accused persons) to act as defence counsel in criminal cases. The Court noted that legal assistance for accused persons may be provided by other persons who, in accordance with the legislation in force, are allowed to act as defence counsel for a

defendant, because they fall within the provisions governing defence counsel under the Code of Criminal Procedure. Therefore, a person having provided legal assistance in a court of law shall have the right to continue providing legal assistance to the convicted person in the given case, with his consent and in places of detention, as well as to visit the convicted person in accordance with the Prison Rules regulating, in particular, the provision of legal assistance by defence counsel. The Court concluded that Article 27 of the Correctional Labour Code, which stipulates that legal assistance for convicted persons may be provided by defence counsel only, was not fully in conformity with Article 62 of the Constitution and did not comply with the provisions of the law governing criminal procedure.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2000-B-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 05.10.2000 / **e)** D-103/2000 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2000 / **h).**

Keywords of the systematic thesaurus:

1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
4.7.15 **Institutions** – Judicial bodies – Legal assistance and representation of parties.
5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Legal assistance, right / Lawyer, professional requirements / Legal assistance, lawyer.

Headnotes:

Legal aid shall be rendered by the persons who has necessary law knowledge and who carry out their activities on the protection of the rights and interests of citizens on professional basis.

Summary:

The Court emphasised that in accordance with international instruments legal assistance shall mean, primarily, assistance provided on a professional basis by specialists in law.

According to Principle 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly Resolution of 9 December 1988 (A/RES/43/173):

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

The Basic Principles on the Role of Lawyers adopted by Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-7 September 1990) underline that “adequate protection of the human rights and fundamental freedoms to which all persons are entitled…requires that all persons have effective access to legal services provided by an independent legal profession”. Legal assistance must be effective and must promote the observance of fairness. For these purposes the State shall provide effective procedures and flexible mechanisms to ensure effective and equal access to lawyers for all persons.

A similar understanding of legal assistance is contained in European instruments, which define a set of requirements applicable to those providing such assistance.

Resolution (78) 8 of the Committee of Ministers of the Council of Europe on legal aid and advice, adopted on 2 March 1978, states, in paragraph 5, that:

> Legal aid should always include the assistance of a person professionally qualified to practise law in accordance with the provisions of the state's regulations, not only where the national legal aid system always of itself so provides, but also:

a. when representation by such a person before a court of the state concerned is compulsory in accordance with the state's law;
b. when the competent authority for the granting of legal aid finds that such assistance is necessary having regard to the circumstances of the particular case.

In accordance with Rule 93 of the European Prison Rules adopted by the Committee of

Ministers of the Council of Europe on 12 February 1987 (Appendix to Recommendation no. R (87) 3), "Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative, or shall be allowed to apply for free legal aid where such aid is available and to receive visits from that legal adviser with a view to their defence and to prepare and hand to the legal adviser, and to receive, confidential instructions."

Thus, international instruments signify that legal assistance shall be provided by persons having the requisite knowledge of the law and who carry out their activities for the protection of the rights and interests of citizens on a professional basis.

The Court concluded that the right to legal assistance laid down in Article 62 of the Constitution, which is based on universally acknowledged principles of international law (recognised as supreme by Article 8 of the Constitution) for the realisation and protection of the rights and freedoms of citizens, shall be guaranteed by the state. These rights shall be secured primarily by means of providing qualified, professional legal assistance (by lawyers or other persons having the right to provide legal assistance).

Citizens shall have the right at any time to obtain legal assistance in the realisation of their rights in the fields of labour, housing, administrative, tax and other legal spheres. Legal assistance may be provided by persons other than practising lawyers (Article 72.1 of the Code of Civil Procedure) if they carry out such representation properly, in accordance with the legislation in force, and if they do not provide legal assistance on a systematic basis, and it is not their source of income except as otherwise specified in legislation.

In view of guaranteeing legal assistance to citizens and legal entities the state shall also authorise the provision of legal services, in the instances and in accordance with the procedure specified by law, both by lawyers and by other specialists in the field of law who in accordance with Government Resolution no. 456 of 21 August 1995 on the List of Types of Activities That Require Special Permits (Licences) and of the Bodies That May Issue Such Permits (Licences), and in accordance with the Provision approved by Order of the Ministry of Justice no. 242 of 12 November 1999, hold licences to provide such assistance on a professional basis.

Legal assistance in criminal proceedings (Article 49 of the Code of Criminal Procedure) may be provided by lawyers who are authorised to act as defence counsels and other persons who have the right to act as lawyers. Close relatives and lawful representatives shall have the right to defend the rights and interests not only of accused persons or defendants but also of suspected persons, acting as their defence counsel in criminal proceedings. A refusal to grant the right to act as defence counsel in a criminal case to the close relative of a suspected or accused person or a defendant or their lawful representatives may be appealed to a court under Article 60 of the Constitution.

If the above persons have participated in criminal proceedings as defence counsel, then they shall have the right to provide legal assistance in the given case as envisaged in the decision of the Constitutional Court of 4 July 2000 on some issues connected with providing legal aid in criminal proceedings [BLR-2000-B-002], including after the verdict has been handed down, and therefore, to communicate with convicted persons held in places of detention in accordance with the Prison Rules regulating the provision of legal assistance by lawyers.

Convicted persons held in places of detention have the right to obtain legal assistance both from lawyers and other persons they choose to entrust with this task on condition that the authorisation for such representatives to meet their clients in places of detention is drawn up properly, in conformity with the legislation in force. Taking into account the requirements involved in running places of detention, special conditions may be imposed with regard to the realisation of the right of convicted persons to obtain legal assistance, as well as conditions excluding possible abuses directed against the person providing legal assistance or the detainee. The Court in its decision recommended that the state authorities make the necessary amendments to the legislation in force with a view to ensuring the constitutional right of citizens to obtain legal assistance at any time.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2000-B-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 17.11.2000 / **e)** D-104/2000 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2000 / **h).**

Keywords of the systematic thesaurus:

1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
3.23 **General Principles** – Equity.
5.2 **Fundamental Rights** – Equality.

5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Sentence, reduction, application, conditions.

Headnotes:

Laws on the reduction of sentences shall be applicable to convicted persons with regard to whom verdicts have not yet become final and binding because of a failure by the courts to examine appeals or challenges concerning their cases for long periods of time for reasons beyond the control of the convicted persons.

The law governing criminal procedure must lay down specific time-limits within which observations on the court record of the court of first instance must be examined, as well as the time-limits within which a criminal case subject to an appeal (challenge) must be referred to the relevant appellate court.

Summary:

The decision in the present case was based on the need to secure the constitutional principle of the equality of all citizens before the law, including those persons who have the right to a reduction of their sentence, and the need to take a more equitable approach to convicted persons with regard to whom guilty verdicts had not yet become final and binding on the day on which the relevant law on the reduction of sentences had entered into force.

The Court took into account the facts arising in practice in the courts, where appeals by convicted persons were not heard by the courts for long periods of time for reasons beyond the control of convicted persons, and because of this, guilty verdicts entered against those persons had not yet become final and binding on the day on which laws on the reduction of sentences entered into force. In such instances, the above-mentioned persons had no right to a reduction of their sentence, since the laws on the reduction of sentences allowed for such reductions to be applied only to convicted persons with regard to whom verdicts had already become final and binding on the day on which the relevant law on the reduction of sentences entered into force.

Such an approach constitutes an infringement of the right to equality of citizens, as well as of their right to appeal against verdicts returned with respect to them. (Certain convicted persons lodge no appeals against verdicts only in order to be entitled to a reduction in their sentence.)

The Court concluded that a fair solution could be found regarding the application of the reduction of sentences to convicted persons with respect to whom verdicts had not become final and binding. In that connection the Court ordered that the National Assembly should examine (on the basis of the interpretation set forth in the present decision) the application of the laws on the reduction of sentences of 18 January 1999 and of 14 July 2000 to convicted persons with regard to whom verdicts had not yet become final and binding, due to the failure of the courts to examine appeals (challenges) on their cases for long periods of time for reasons beyond the control of the convicted persons.

Moreover, in the Court's opinion, the law on criminal procedure must lay down specific time-limits within which observations on the court record of the court of first instance must be examined, as well as the time-limits within which a criminal case subject to an appeal (challenge) must be referred to the relevant appellate court.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 23.03.2001 / **e)** D-110/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2001 / **h).**

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
5.1.1.4.4 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Military personnel.
5.3.13.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Military, personnel, discipline, public order, offence / Punishment, disciplinary / Appeal, time-limit.

Headnotes:

Military personnel shall have the right to appeal to a court of law against disciplinary punishments imposed on them within a time-limit of three months from the day on which they first knew or should have known about the violation of their right.

Summary:

The application concerned the time-limits for appeals to a court of law by military personnel against disciplinary punishment. A number of servicemen applied to the Court concerning, in particular, appeals against the disciplinary punishment of demotion. Their application pointed out the absence of uniform judicial practice with regard to the time-limits for lodging appeals against disciplinary punishments imposed on that category of persons.

A serviceman who has committed a breach of military discipline or of the public order may be penalised under the Temporary Disciplinary Rules of the Armed Forces (approved by Decree of the President of 4 June 1997 no. 318). Demotion is one of the forms of penalty for such a breach.

The right of military personnel to appeal to a court of law against unlawful actions of officials and military governing bodies is established in the Law on the Status of Military Personnel, as well as in the aforementioned Temporary Disciplinary Rules of Armed Forces. However, in most cases those acts do not lay down time-limits for applications to a court of law for disciplinary punishments to be lifted.

Having analysed provisions of the Constitution, international instruments and binding enactments, as well as judicial practice, the Court concluded that military personnel shall have the right to appeal to a court of law against disciplinary punishments imposed on them within a time-limit of three months from the day on which they first knew or should have known about the violation of their right.

Examination of those applications should be carried out in accordance with the rules applicable to civil proceedings.

The Court ordered the National Assembly to amend and supplement the Law on the Status of Military Personnel with a view to its further improvement.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 02.04.2001 / **e)** D-111/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2001 / **h).**

Keywords of the systematic thesaurus:

5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.3.13.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Prisoner, penalty, criminal law / Penalty, application by administration / Appeal, conditions / Constitution, direct applicability.

Headnotes:

Convicted persons serving a prison sentence who appeal against the penalty imposed on them and convicted persons who do not agree with decisions adopted with respect to them have the right to appeal to a court of law on constitutional grounds.

Summary:

Article 60 of the Constitution guarantees the protection of everyone's rights and freedoms by a competent and impartial court of law within the time periods specified by law.

The provision of the Constitution in question, which has direct effect, is an important guarantee of the protection of citizens from any actions and decisions violating their rights and freedoms.

The Court emphasised that the Code of Criminal Sentencing did not lay down any procedures for appeals to a court of law against actions of the administration of a penitentiary institution concerning the execution of penalties imposed on convicted persons. Neither the Code of Criminal Procedure nor any other legislation laid down procedures for regulating issues related to the execution of sentences, and that was not fully in conformity with the Constitution.

The Court therefore ordered the National Assembly to amend the legislation in force in order to specify the procedures for judicial appeals against the application of penalties to convicted persons by the administration of a penitentiary institution.

Taking into account the direct effect of the provisions of the Constitution, the Court also considered judicial appeals by convicted persons serving a prison sentence against penalties applied to them before the relevant legislation was amended to be admissible.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 03.04.2001 / **e)** D-112/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2001 / **h).**

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** - Jurisdiction - Types of litigation - Litigation in respect of Fundamental Rights and freedoms.
1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
5.3.13.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.

Keywords of the alphabetical index:

Inquiry, decision, appeal / Fundamental rights, criminal protection / Constitution, direct applicability.

Headnotes:

By virtue of the Constitution and of its supremacy, citizens have the right to lodge complaints against the actions and decisions of a body of inquiry, individual inquirer or investigator both to the prosecutor and to the courts of law in order to protect their fundamental rights and freedoms guaranteed by the Constitution.

Summary:

The Court emphasised that the Code of Criminal Procedure as in force allows the possibility of appealing to a court of law against the actions of a person carrying out an inquiry or an investigator only in cases of the termination of the preliminary investigation of a case or criminal prosecution, or where measures of preventive punishment such as custody or home arrest are taken or their duration extended.

In all other instances the Code of Criminal Procedure provides for appeals to made against actions and decisions of a body of inquiry, individual inquirer or investigator to the prosecutor only.

However, such an approach is in conflict with Article 60 of the Constitution, under which everyone shall be guaranteed the protection of their rights and freedoms by a competent and impartial court of law within the time periods specified by law. It is also at variance with international legal instruments securing the right to an effective remedy, such as Article 8 of the Universal Declaration of Human Rights, which provides that, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

In this connection the Court ordered the National Assembly to amend and supplement the legislation governing criminal procedure, securing in this legislation the right to appeal against the actions and decisions of a body of inquiry, individual inquirer or investigator both to the prosecutor and to the courts, and specifying in the latter case the procedure applicable in appeals by citizens for judicial protection.

Taking into account the direct effect of the provisions of the Constitution, the Court also considered that citizens' complaints against the actions and decisions of a body of inquiry, individual inquirer or investigator made before the relevant legislation was amended were admissible.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 04.04.2001 / **e)** D-113/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2001 / **h).**

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
3.25 **General Principles** - Market economy.
4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.
5.3.40 **Fundamental Rights** - Civil and political rights - Right to self fulfilment.

Keywords of the alphabetical index:

Entrepreneur, equal status / Transport, taxi / Taxpayer, differentiation.

Headnotes:

The guarantee of equal rights to conduct economic activities secured by the Constitution does not exclude the necessity of taking into account objectively different conditions of exercise of economic activities. Different taxation should not restrict the possibilities of *bona fide* competition between parties acting in different economic and legal conditions, since this may adversely affect the rights, freedoms and lawful interests of citizens who are the users of taxi transport services.

Summary:

A group of owners of taxi fleets of the Brest, Vitebsk, Gomel and Mogilyov regions and of the city of Minsk lodged a collective motion concerning the taxation of entrepreneurs in the sphere of the provision of transport services for citizens. The motion specified that at present many citizens are illegally carrying out such activities in Belarus. Moreover, it was emphasised that certain state authorities were not exercising due control over persons who had no licence to carry out entrepreneurial activities or over those who had licences but were hiding income from taxation authorities. In the opinion of the applicants, local authorities that set tax rates for those categories of (individual) tax payers 5-10 times lower than for legal entities contributed to the shortfall in taxes collected by the state.

A comparative analysis of the rates of income tax payable by individual entrepreneurs fixed by the oblasts and the Minsk City Council attests to their significant variation across the regions: from 3 minimum wages per month in the Minsk region to 12 minimum wages in the Brest region. The taxation of legal entities, taxi fleets included, along with income tax and profit taxes, also extends to other taxes (VAT, land tax, property tax etc.).

According to the arguments of the representatives of taxi fleets, the fixed rate of income tax collected from individual entrepreneurs who deliver transport services is only about 65 per cent of the tax load imposed on taxi companies for each person employed by the company.

At the same time, account must be taken of the fact that the legal entities – taxi fleets and individual entrepreneurs – that provide transport services carry out their economic activities under different conditions. Thus, a driver – an individual entrepreneur – carries out activities at his own risk, provides maintenance and buys fuel and lubricants for his own account, whereas drivers in taxi fleets have maintenance facilities, and management personnel, and bear no direct responsibility as owners of dangerous objects. There are other differences in their activities.

In the opinion of the Court, the guarantee of equal rights to conduct economic activities secured in Article 13 of Constitution does not exclude the need to take into account objectively different conditions in which those economic activities are carried out. However, different taxation schemes should not restrict the possibilities of *bona fide* competition between business persons acting in different economic and legal conditions, since this may adversely affect the rights, freedoms and lawful interests of citizens who are the users of taxi transport services.

The Court ruled that the Council of Ministers should analyse the economic validity of the fixed rates of income tax established by the regional councils and by Minsk City Council and collected from individual entrepreneurs who provide transport services in accordance with Resolution no. 228 of the Cabinet of Ministers of 27 April 1995. At the same time it ordered the Government to recommend to the above-mentioned Councils that they reassess those rates taking into account the comparability of the tax load per employee in a taxi company for the purpose of protecting the economic viability of the various parties undertaking economic activities.

Tax bodies, agencies of the state motor licensing and inspection department (GAI), the Committee of financial investigations and other auditing bodies were ordered to strengthen their review of activities in the field of the provision of transport services and proper application of penalties for the non-observance of the legislation governing entrepreneurship and taxation.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 25.04.2001 / **e)** D-115/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2001 / **h).**

Keywords of the systematic thesaurus:

3.9 **General Principles** - Rule of law.
3.15 **General Principles** - Publication of laws.
4.7.9 **Institutions** - Judicial bodies - Administrative courts.
4.7.16 **Institutions** - Judicial bodies - Liability.
4.10 **Institutions** - Public finances.

5.4.6 **Fundamental Rights** - Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Offence, customs, penalty / Customs, clearance, effectiveness / Confiscation, terms, conditions.

Headnotes:

Judicial practice that excludes the possibility of abrogating or revising judicial rulings on the termination of proceedings in cases of administrative customs offences is at variance with the requirements of the legislation on administrative offences.

The failure to apply the relevant provisions of the Administrative Code, as regards proper customs clearance of imported goods, constitutes a real threat for the economic and financial system of the country, its economic security, public health and even the life of citizens (for example, through the importation of low quality goods), and prevents the achievement of other socially significant goals of a state governed by the rule of law that are enshrined in the Constitution.

One of the principles of a state governed by the rule of law is not only the protection of individuals by law but also fairness, which is expressed in the inevitability of liability for offences committed and in the proportionality between the punishment and the offence committed.

Summary:

The conformity with the Constitution of Article 37 of the Administrative Code ("the Code") was examined on the basis of Articles 40, 116.1 and 125 of the Constitution, Articles 7 and 11 of the Law on the Constitutional Court and Article 35 of the Law on the Prosecutor's Office, on the basis of the constitutional motion of the Prosecutor-General of Belarus.

The Prosecutor-General noted that when exercising supervision over the legality of the examination of administrative cases by the courts it is in many instances established that the requirements of the relevant legislation are violated in the handing down of rulings of the courts of law on customs offences under administrative law (i.e. administrative, rather than criminal, customs offences). Appeals by public prosecutors against those rulings often find no satisfaction. A judicial practice has been established that erroneously excludes the possibility of quashing or revising judicial rulings terminating proceedings in cases of customs offences under administrative law, contrary to the requirements of Article 37.3 of the Code.

The Court analysed various provisions of the Constitution, the Code, a resolution of the Plenum of the Supreme Court which deals with the specified issues, and a number of cases on customs offences under administrative law examined by the courts of law. The Court concluded that the practice of the courts of law with respect to the examination of such offences is inconsistent and is at variance with the Constitution and with the law due to non-observance of the requirements of Article 37.3 of the Code. Under that provision, whereas a time-limit applies for the initiation of proceedings against customs offenders, no such time-limits apply to the confiscation of goods that are direct objects of administrative customs offences or to the sealing off of specially made premises used to conceal goods to avoid clearing customs. These measures shall be taken irrespective of the time of commitment or revelation of an administrative offence. The Court found that the failure to apply Article 37.3 of the Code constituted a real threat to the economic and financial system of the country, its economic security, public health and even the life of citizens (for example, through the importation of low quality goods), and prevented the achievement of other socially significant goals of a state governed by the rule of law that are enshrined in the Constitution.

At the same time the Court indicated that the legislative approach providing, on points of fact, for open-ended liability for administrative customs offences was not in line with the general principles of legal liability, under which time-limits are usually established after which a person can no longer be held liable for an administrative offence. For the purposes of securing the rights of citizens, the legislator may thus fix a maximum time-limit within which the given issue must be resolved.

The Court found that Article 37 of the Code, in so far as it allowed for the confiscation of goods that are direct objects of administrative customs offences, and the sealing off of specially made premises used to conceal goods to avoid clearing customs, after the expiry of the time-limits fixed in Article 37.1 and 37.2 of the Code, was in compliance with the Constitution and with the laws of the Republic of Belarus.

The Court considered the application of a general three-year time-limit for the confiscation of goods or sealing off of premises to be admissible until the legislator had resolved the issue of setting time-limits for initiating proceedings for administrative liability.

The Court also pointed out that current judicial practice on the application of Article 37.3 of the Code was unconstitutional and ordered the Supreme Court to ensure uniformity of judicial practice.

Moreover, the Court ordered the National Assembly to consider the establishment of time-limits within which a person who had committed an administrative customs offence may suffer the confiscation of goods that are direct objects of administrative customs offences or the sealing off of specially made premises used to conceal goods to avoid clearing customs.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 15.06.2001 / **e)** D-120/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2001 / **h).**

Keywords of the systematic thesaurus:

3.3.1 **General Principles** - Democracy - Representative democracy.
3.9 **General Principles** - Rule of law.
4.4.2.1 **Institutions** - Head of State - Appointment - Necessary qualifications.
5.2.1.4 **Fundamental Rights** - Equality - Scope of application - Elections.
5.3.38.2 **Fundamental Rights** - Civil and political rights - Electoral rights - Right to stand for election.

Keywords of the alphabetical index:

Citizen, living abroad / Presidential candidate, citizenship, residence, requirements.

Headnotes:

A national of Belarus – the Chairman of the Conservative Party, which is officially registered, and whose chairmanship of a registered political party is a confirmation of his participation in political life – who retains his citizenship of the Republic of Belarus, who considers his living abroad to be a result of the political situation, and who has not established permanent residence in another state but who has been granted asylum, fulfils the legal requirements for registration through an initiative group as a candidate in the presidential elections.

Summary:

The Court was required to express its opinion on the meaning of the phrase “citizen of Belarus who has been resident in the Republic of Belarus”, which is used in Article 80 of the Constitution, as a result of request of the Central Commission of the Republic of Belarus for Elections and the Conduct of Republican Referenda.

The Court noted that the determination of the location of permanent residence must take into account both the actual location of a person during the relevant period of time (in the territory of Belarus or outside) and the person’s intention to have the given location as their permanent residence. The aims of the person in leaving Belarus – whether they are leaving temporarily or with the purpose of establishing permanent residence in another state – are conclusive in this regard.

The Court emphasised in the instant case that Z.S. Poznyak remained a citizen of Belarus. He considered his departure to be temporary, due to the political situation in Belarus. He had not planned to depart in order to establish permanent residence in another state. He was the Chairman of the Conservative Christian Party – BNF (Belaruski Narodny Front) – which was officially registered by the Ministry of Justice (certificate no. 18). This confirmed his participation in the political life of Belarus.

The Court also concluded that the Central Commission of the Republic of Belarus for Elections and the Conduct of Republican Referenda had had the necessary legal grounds for registering the initiative group of Z.S. Poznyak for the presidential election.

The Court also noted that the registration of the initiative group of Z.S. Poznyak for the presidential election was an indication of the good will of Belarus as a democratic State governed by the rule of law and of its striving to strengthen the foundations of the sovereignty of the people and desire to hold free and fair elections and to settle problems governed by the standards of international law directed at the safeguarding and protection of fundamental human rights and freedoms and the rights and freedoms of citizens.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-007

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 05.07.2001 / **e)** D-122/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 3/2001 / **h).**

Keywords of the systematic thesaurus:

4.6.3 **Institutions** - Executive bodies - Application of laws.
5.2 **Fundamental Rights** - Equality.

5.3.5.1.1 **Fundamental Rights** - Civil and political rights - Individual liberty - Deprivation of liberty - Arrest.

Keywords of the alphabetical index:

Detention, administrative, offence / Detention, regime / Detainee, obligation to provide / Subsistence means.

Headnotes:

It is permissible to collect from persons having committed administrative offences and been sentenced to a penalty of administrative detention the costs of their detention and food.

Summary:

A group of citizens lodged a collective appeal concerning the legal regulation of the detention regime applicable to persons detained or arrested for administrative offences.

The appeal raised the question of the conformity with the Constitution of a number of requirements contained in Rule no. 206 on Special Custodial Reception Centres under the authority of the Ministry of Internal Affairs of 18 October 1999. In particular, the citizens challenged the lawfulness of recovering the costs of food and detention from persons having committed offences for which a court of law may inflict a penalty such as administrative detention.

The Court analysed a number of binding enactments governing the status of administrative detainees and administrative arrestees, and the regime applicable to them, against the standards laid down in the Constitution and in international legal instruments. The acts analysed included decisions of executive and administrative bodies, acts issued by the Ministry of Internal Affairs and resolutions of the Government which provide for the recovery – which is not open to challenge – of the sums in question on the basis of an official assessment of the relevant costs. In analysing the content of the specified acts and their application in practice, the Court also paid attention to the legislative approach taken towards analogous issues under the detention regime applicable to persons having committed criminal offences.

The Court found that the recovery of the costs of food and detention from persons who had been found to have committed administrative offences and who were subject to an administrative penalty such as administrative detention was permissible. At the same time, the Court emphasised that the requirement that food and detention costs be covered both by persons subject to administrative detention and by persons arrested on suspicion of having committed offences for which a court of law may impose a penalty of administrative detention, as provided by the Rule on Special Custodial Reception Centres, was not in compliance with the resolution of the government, which allowed the forced deduction of the costs of food and detention only from those persons subject to administrative detention.

The Court instructed the Council of Ministers to remove before 1 January 2002 the existing contradictions between the acts issued by the Ministry of Internal Affairs and the Government, and to examine the question of renaming the special establishments (special custodial reception centres) under the authority of internal affairs bodies in order to use more appropriate names that befit the modern level of legal culture and feeling for law and order.

The Court ordered the National Assembly to take measures to improve further the legislation governing matters related to administrative detention and the regime applicable to the holding of persons in special custodial reception centres under the authority of internal affairs bodies (persons in temporary isolation). At the same time, in the opinion of the Court, the possibility of applying relevant approaches laid down in the legislation on the execution of penalties imposed under the criminal law when determining the legal status of the persons in question was not excluded.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-008

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 05.10.2001 / **e)** D-128/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2001 / **h).**

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
3.9 **General Principles** - Rule of law.
5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.2 **Fundamental Rights** - Equality.
5.3.13.3 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Double degree of jurisdiction.

Keywords of the alphabetical index:

Convicted person, recidivist, dangerous / Offence, criminal, qualification / Verdict, revision / Law, criminal, retrospective effect.

Headnotes:

Judgments reached and executed before 1 January 2001, under which convicted persons have been recognised as particularly dangerous recidivists, should be open to revision by the courts of law in accordance with the revised criminal legislation and criminal procedural legislation not only in instances where the actions of a guilty person were qualified as having been committed by a particularly dangerous recidivist, but also in all other instances, even if the offences previously committed by them under the Criminal Code in force do not constitute particularly dangerous repeated offences.

Summary:

The Court verified the constitutionality of Article 13 of the Law on the Entry into Force of the Criminal Code. Under that article persons recognised before the entry into force of the Criminal Code of 1999, i.e. before 1 January 2001, as particularly dangerous recidivists according to Article 24 of the Criminal Code of 1960, shall be treated as if they were persons having committed particularly dangerous repeated offences.

The Court concluded that the impugned provision was not at variance with the Constitution, since it constituted a general rule concerning the specified category of criminal offenders. However, in the instances where, under the new Criminal Code, previously committed offences constituted particularly dangerous repeated offences, then the principle of the retrospective effect of the less severe law should be applied. On the basis of that rule, which is enshrined both in the Constitution and in the Criminal Code, Article 16 of the Law of 18 July 2000 was drafted. That provision makes it possible to review cases concerning particularly dangerous recidivists also in instances where, under the Criminal Code in force, they may not be referred to as persons having committed a particularly dangerous repeated offence.

The Court instructed the Supreme Court to ensure the strict and uniform application by the courts of the Constitution, the Criminal Code and the Law of 18 July 2000 on the Entry into Force of the Criminal Code and specified that the less severe criminal law should be applied retrospectively not only in cases where the actions of a convicted person may be qualified as those committed by a particularly dangerous recidivist, but also in all the other instances, even if the offences previously committed by the person did not constitute a specially dangerous repeated offence under the Criminal Code in force.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2001-B-009

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 12.11.2001 / **e)** J-129/2001 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2001 / **h).**

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
3.9 **General Principles** - Rule of law.
3.12 **General Principles** - Clarity and precision of legal provisions.
3.18 **General Principles** - General interest.
4.5.8 **Institutions** - Legislative bodies - Relations with judicial bodies.

Keywords of the alphabetical index:

Official, definition / Education, higher, lecturer, status / Bribery, elements / Crime, against official duty.

Headnotes:

The State shall take all measures at its disposal to secure the domestic and international order, as well as to ensure the protection of the rights, liberties and interests of citizens against criminal infringements and, in particular, against abuses committed by public officials.

Lecturers at higher and specialised education institutions who run exams or tests perform legally significant acts and, therefore, may be considered as officials, and may be subject to criminal liability for receiving unlawful remuneration from students in exchange for good marks for the evaluation of their knowledge in exams or tests organised as part of their course.

The question whether criminal liability should be imposed for offences of corruption committed by such lecturers shall be determined on the basis of the facts of each case, taking into account the presence or absence of other elements of the relevant *corpus delicti,* as well as all the circumstances of the case affecting the estimation of the nature and the degree of social danger posed by a given act, and all the

circumstances affecting the answer to questions concerning the presence or absence of an unimportant deed within the meaning of the relevant criminal legislation.

Summary:

The Council of Ministers introduced a constitutional motion on the basis of the application of the Ministry of Internal Affairs, requesting the Court to verify the constitutionality of the provision of the Criminal Code under which persons authorised in the established legal system to undertake "legally significant acts" are also referred to as officials. The notion of "officials" has no unique interpretation in practice and therefore there is no clear understanding of whether lecturers in higher or specialised secondary education institutions who run exams or tests are to be considered as falling within the ambit of the term.

The Court concluded that the provision in question was not at variance with the Constitution, since the legislator is competent to define the circle of persons falling within the group of persons that may be liable to commit offences qualified as corruption. The legislator is also competent to determine the penalties that may be imposed for such crimes. This prerogative is limited by the constitutional obligation of the State to take all measures at its disposal to secure the domestic and international order, as well as by the purpose of the protection of the rights, liberties and interests of citizens against criminal infringements and, in particular, the protection of these rights, liberties and interests against abuses committed by public officials.

Furthermore, based on the existing notion of legally significant acts and guided by the normative acts of the Ministry of Education, the Court concluded that lecturers in higher and specialised education institutions who run exams or tests do perform legally significant acts and, therefore, may be recognised as potentially open to bribery.

The Court emphasised the conflicting case-law concerning the question whether the specified persons are subjects of corruption, drawing the attention of the Supreme Court to the need to ensure a uniform approach to the application of Article 4.4.3 of the Criminal Code and to bring Ruling no. 4 of the Plenum of the Supreme Court of 4 June 1993 strictly into line with this provision.

Courts of law shall have the right to raise before parliament the question of amending and supplementing legislation that has already entered into force, if they consider it is necessary to lay down by law the features of legally significant acts or to exclude from criminal liability lecturers who have accepted bribes, to establish a different *corpus delicti* for that category of persons (lecturers) or to introduce a different form of legal responsibility applicable to the acceptance of bribes by lecturers.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2002-B-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 11.01.2002 / **e)** D-135/02 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2002 / **h).**

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.2 **Fundamental Rights** - Equality.
5.3.13 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Convicted person, right to amnesty / Verdict, revision / Amnesty, legal terms.

Headnotes:

Persons with respect to whom criminal sentences have become final on the day on which the law on amnesty enters into force shall have the right to amnesty even in cases where those verdicts are later subject to review in supervisory proceedings.

Summary:

The Court examined the question of the right to amnesty of convicted persons with respect to whom final sentences were later subject to revision in supervisory proceedings. It noted that the application of amnesty provisions should not be geared to the revision of those sentences in supervisory proceedings.

There was no need for additional amnesty legislation in those instances, since on the day on which the law governing amnesty came into force, the sentences had become final.

At the same time, the Court considered that the equal right of convicted persons to amnesty would be secured in full if the legislator extended the effect of the laws on amnesty to persons who had committed crimes before the entry into force of the specified laws, but whose sentences had not become final on the day on which the laws on amnesty entered into force.

In this connection the National Assembly was ordered to take the position of the Court into consideration when adopting further laws on amnesty.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2002-B-002

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 15.01.2002 / **e)** D-136/02 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2002 / **h).**

Keywords of the systematic thesaurus:

4.10.7.1 **Institutions** - Public finances - Taxation - Principles.
5.1.1.3.1 **Fundamental Rights** - General questions - Entitlement to rights - Foreigners - Refugees and applicants for refugee status.
5.3.13.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.39 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.

Keywords of the alphabetical index:

Refugee, application denied / Refugee, status denied / Tax, reduction.

Headnotes:

Foreign citizens and stateless persons whose application to be recognised as refugees was not accepted for registration or who were not recognised as refugees are unable in practice to realise their right to judicial protection, since the effective rate of fees payable for appeals is an excessive burden for the majority of persons who appeal to a court of law.

Persons who appeal to the courts against a refusal to register their application to be recognised as refugees shall be entitled to pay a reduced fee or shall be granted privileges as regards the payment of the fee.

Summary:

The Court examined the question of the payment of a fee ("state tax") by persons who appeal to the courts against a refusal to register their application to be recognised as refugees or a refusal (following the registration of their application) to recognise them as refugees, with reference to the relevant provisions of the Constitution, the 1951 Convention Relating to the Status of Refugees, the Law on Refugees and the Law on State Tax. It ordered the Council of Ministers to examine the question of reducing the fees payable or on granting relief with respect to the payment of fees for persons who appeal to the courts against a refusal to register their application to be recognised as refugees.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2002-B-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 07.02.2002 / **e)** J-137/02 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2002 / **h).**

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** - Effects - Determination of effects by the court.
3.13 **General Principles** - Legality.
4.6.3.2 **Institutions** - Executive bodies - Application of laws - Delegated rule-making powers.
5.2 **Fundamental Rights** - Equality.
5.3.36.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

Keywords of the alphabetical index:

Property, private, public / Premise, rent, price determination / Contract, leasing.

Headnotes:

The purpose of a lease is to deal with payment for the transfer of property in use, and not payment for the provision of services.

The provisions of the Instruction at issue stipulating the procedure for calculating rent rates for the renting out of non-residential buildings (premises) by private lessors, which differ from those for the lessors of state-owned property and therefore create unequal conditions for the development of state and private forms of

ownership, are contrary to the Constitution, to the Civil Code and other legislative enactments, which guarantee the equal protection of and equal conditions for the development of all forms of ownership.

Summary:

The House of Representatives of the National Assembly brought a constitutional motion concerning the conformity between the Constitution and the Instruction on the Procedure for Setting Rent Rates by Privately Owned Legal Entities when Renting Non-Residential Premises ("the Instruction").

The House of Representatives stated in the motion that the Instruction provided for unequal rights for privately owned entities carrying out economic activities compared with state-owned economic entities, and created unequal conditions for their development.

The Instruction was approved by Resolution no. 96 of 29 May 2001 of the Ministry of Finance, which indicated that the basis for the adoption of the Instruction was the legislation in the sphere of price-setting. Under Article 14 of the Law on Price-Setting, entrepreneurs may be subject to financial penalties if they violate the price-levels fixed by the relevant state bodies for items subject to price regulation, whether they overcharge or undercharge, or if they violate the established procedure for price-setting by legal entities and officials. Heads and other officials of such economic entities may also be held liable. The Court concluded that the setting of rent rates in the civil sphere did not fall within the types of relations that are regulated by the legislation on price setting. The Ministry of Finance argued that its (opposite) approach to setting rent rates was based on the fact that income received for the rental of non-residential buildings (premises) had come to be reflected in company accounts as the realisation of a product (works, services). The Court found these arguments to be ill founded. It pointed out that companies' classification of income received for renting property under a different heading had not changed the economic essence of rent relations.

Moreover, applying the legislation on price-setting when fixing rent rates resulted in an additional obligation on private lessors to apply additional coefficients for their calculation and to take a different approach to the entry of taxes, dues and other payments into the budget.

The Court found the specified Instruction to be in conflict with the Constitution, with the Civil Code and with other legislative acts of the Republic of Belarus and considered it to be null and void from the day of adoption of the Judgement, i.e. from 7 February 2002.

Languages:

Russian, English (translation by the Court).

Identification: BLR-2002-B-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 27.09.2002 / **e)** J-146/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)** CODICES (Russian, English).

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
3.4 **General Principles** - Separation of powers.
3.9 **General Principles** - Rule of law.
3.12 **General Principles** - Clarity and precision of legal provisions.
5.2 **Fundamental Rights** - Equality.
5.3.6 **Fundamental Rights** - Civil and political rights - Freedom of movement.
5.3.10 **Fundamental Rights** - Civil and political rights - Rights of domicile and establishment.

Keywords of the alphabetical index:

Citizens, travelling abroad, right, limitations / Passport, note, obligatory / Tax rate.

Headnotes:

The right of nationals to move freely, to leave the country and to return to it without hindrance is guaranteed by Article 30 of the Constitution and Article 3 of the International Covenant on Civil and Political Rights. This means that each national is an unconditional bearer of this constitutional right. Furthermore, restrictions on the temporary departure of certain nationals abroad are possible only in strict conformity with the requirements of the Constitution and must be consistent with the principles and purposes of a democratic state governed by the rule of law, and must be proportionate to the values guaranteed by the Constitution, under which the supreme values of society and the State are the individual, his or her rights and freedoms, and the guarantees of their realisation (Article 2 of the Constitution).

Summary:

The case was initiated by the Constitutional Court on the basis of a constitutional motion filed by the House of Representatives of the National Assembly and concerned the verification of the constitutionality of Article 6.2 of the Law on the Procedures Governing the Departure from and Entry into the Republic of Belarus of Citizens of Belarus ("the Law") and other binding enactments, with regard in particular to the requirement that an authorisation valid for five years be inserted in the passports of citizens of Belarus leaving the country temporarily.

Having analysed the relevant provisions of the Constitution, the Law and international legal instruments, the Court concluded that the question of the collection by the state of a fee for the examination of requests for permission to leave Belarus, which was the aim of the proposal of the House of Representatives, was within the competence of the authorised bodies, i.e. the National Assembly and the Government, which were competent to resolve fairly the issues of the collection of fees on behalf of the state, the amount of such fees, the procedure for their collection and the conditions of their payment.

The Court found that the provisions in question, which provided for the insertion of an authorisation in the passport of a national of Belarus who was temporarily leaving the country, were not fully in line with the Constitution, since the insertion of such an authorisation was required for all citizens of Belarus wishing to leave the country temporarily. This infringed upon the rights of the absolute majority of nationals, who were not subject to any limitations on their right to depart.

The Court deemed that the most reasonable approach, which would allow nationals of Belarus more fully to realise the right, enshrined in Article 30 of the Constitution, to move freely and choose their place of residence within Belarus, would be to establish a procedure under which a civil passport which met the relevant international standards could be used for travel abroad without the insertion of an authorisation. For this reason the Court instructed the Council of Ministers and other state bodies competent to resolve the above-mentioned issues to take the appropriate measures.

The National Assembly was ordered to consider the improvement of the provisions of the Law. The need to revise and elaborate the list of limitations on the temporary departure of nationals from Belarus was also emphasised.

Languages:

Belarusian, Russian, English (translations by the Court).

Identification: BLR-2002-B-005

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 09.10.2002 / **e)** D-147/2002 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)** CODICES (Russian, English).

Keywords of the systematic thesaurus:

4.8.8 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers.
4.10.7 **Institutions** - Public finances - Taxation.

Keywords of the alphabetical index:

Local council, exclusive power / Persons, natural / Border, crossing / Tax, imposition / Tax authority.

Headnotes:

Under the Constitution the setting of local taxes and dues in accordance with the law shall fall within the exclusive competence of local councils.

Taxes and dues correspond to financial obligations collected from individuals in connection with a service provided by a state body exercising its powers in the common interest.

Summary:

The case was brought to the Constitutional Court on the basis of a constitutional motion of citizens of Belarus concerning the constitutionality of decisions of the councils of Brest city, Brest region and Kamenets region (local administrative units) in so far as they required individuals to pay fees to the local authorities when they crossed the border of the Republic of Belarus through the border control points at Warsaw bridge, Brest-Central, Peschatka, Domachevo-Slovatychi and Tomashovka.

Having analysed the relevant provisions of the Constitution, the Budget Law of 2002 and other applicable legal acts, the Court emphasised that, under Article 121 of the Constitution, the setting of local taxes and dues in accordance with the law shall fall within the exclusive competence of local councils.

The list of local taxes and dues that shall be imposed in 2002 by oblasts, the Minsk City Council and local councils on the territory of the relevant administrative and territorial units is specified in Article 10 of the Budget Law of 2002. Among those taxes and dues there are fees to be

paid by individuals when they cross the border of the Republic of Belarus at the above-mentioned border control points.

The Court found the decisions of the above-mentioned local councils with respect to the imposition of the impugned local fees to be in line with the Constitution and the law.

At the same time, the Court drew the attention of the Brest Regional Council to the unconstitutionality of the delegation of its exclusive competence to the executive committee and to the presidium of the Council, and ordered the Council in question to modify its practice with respect to the further adoption of provisions on local dues and with respect to amendments to those provisions after their adoption by the executive committee and presidium of local councils.

Languages:

Belarusian, Russian, English (translations by the Court).

Identification: BLR-2002-B-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 09.10.2002 / **e)** D-148/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)** CODICES (Russian, English).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** - Legislative bodies - Powers.
4.8.7.2 **Institutions** - Federalism, regionalism and local self-government - Budgetary and financial aspects - Arrangements for distributing the financial resources of the State.
4.8.7.3 **Institutions** - Federalism, regionalism and local self-government - Budgetary and financial aspects - Budget.
4.10.7 **Institutions** - Public finances - Taxation.
5.2.1.1 **Fundamental Rights** - Equality - Scope of application - Public burdens.

Keywords of the alphabetical index:

Real-estate, owner / Tenancy / Taxpayer, differentiation / Tax authority / Tax, determination.

Headnotes:

Apartments in apartment buildings owned by individuals shall be exempt from property tax on the basis of Article 4 of the Law on Property Tax, as a tax privilege. Where an individual owns two or more apartments, the exemption shall apply to only one of the apartments they own, and the individual is entitled to choose the apartment to which the exemption shall apply.

Under the Constitution, the introduction of national taxes and dues lies within the competence of the Parliament, and the Parliament shall have the right to regulate by law the most important issues in this field, without which the tax obligation and the procedure for paying it would not be clearly defined. These include the subject, object, rate of tax and also certain other issues. Tax privileges fall within this last group.

The introduction by the parliament, within the limits of its competences, of a tax privilege by way of exemption from property tax of one of the apartments in an apartment building owned by an individual is in conformity with the Constitution.

Summary:

The case was initiated by the Constitutional Court on the basis of a constitutional motion of citizens.

On the basis of Articles 40, 116.1 and 122.4 of the Constitution, the Court examined the issues raised in the collective and individual complaints of citizens concerning the calculation of property tax, in particular the inequalities between citizens who are private householders and citizens who are owners of apartments in apartment buildings, and between citizens who own houses in the city of Minsk and in other cities and regions. The former pay property tax according to a sliding tax scale approved by point 23 of Decision no. 219 of Minsk City Council of 11 January 2002 on the Budget of the City of Minsk of 2002, whereas the latter pay tax fixed at 0.1% of the cost of buildings based on the estimated value of private dwellings and grounds.

The Court emphasised that under Articles 97 and 98 of the Constitution the setting of state taxes and dues shall lie within the competence of the parliament. The parliament shall have the right to regulate by law not only such significant issues related to taxation as the subject, object, rate of tax and other issues without which the tax obligation and the procedure for paying it would not be clearly defined, but also certain other issues. These include, in particular, the tax privilege provided for in Article 4 of the Law on Property Tax as an exemption from taxation of one of the apartments in apartment buildings owned by individuals.

The decision of Minsk City Council was found to be in line with the Constitution and with the Budget Law of 2002 in so far as it specified the rate of property tax. At the same time, the Court ordered the parliament, in order to secure more fully the protection of the constitutional rights of citizens, to eliminate the inequalities between persons liable to pay property tax in different cities and regions, to ensure the adoption by local councils of optimal decisions with respect to the setting of the tax rates in question, and to specify in the ordinary annual Budget Law the maximum limits within which local councils may raise the rates of the property tax.

The Constitutional Court instructed the Government to analyse the method of evaluating buildings owned by individuals with a view to finding ways to revise the method so as to ensure the fullest protection of the constitutional rights and lawful interests of citizens; to examine whether the evaluation for tax purposes of buildings owned by individuals could be tied to similar evaluations conducted for the purpose of registering real property under the state registration system; and to systematise binding enactments on the basis of which buildings owned by individuals are evaluated.

Cross-references:

In its earlier decision of 11 June 2001 on the payment of succession duties, the Court had stated that the applications of citizens against ill-founded overestimations of the value of buildings and constructions when they were assessed by official valuers indicated that there was a need to reconsider the existing technique for the assessment of buildings and constructions in order to achieve an optimal balance of interests between the state and citizens who received an inheritance. The Court had instructed the authorised bodies to analyse the method of evaluation of buildings and constructions owned by individuals in order to find ways to revise it to ensure the fuller protection of the constitutional rights and lawful interests of citizens who inherited property. A letter had subsequently been addressed to the Council of Ministers on 14 September 2001 concerning the obligatory insurance of constructions owned by citizens, referring to the above-mentioned decision of the Court and specifying that its instruction was intended to include the determination of the insurance value of constructions subject to obligatory insurance.

The applications and complaints under examination in the present case indicated that the proposals made by the Court in its decision of 11 June 2001 were still applicable.

Languages:

Belarusian, Russian, English (translations by the Court).

Identification: BLR-2002-B-007

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 05.11.2002 / **e)** D-149/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)** CODICES (Russian, English).

Keywords of the systematic thesaurus:

4.6.3.2 **Institutions** - Executive bodies - Application of laws - Delegated rule-making powers.
4.8.8 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers.
5.2 **Fundamental Rights** - Equality.
5.3.39 **Fundamental Rights** - Civil and political rights - Rights in respect of taxation.
5.4.6 **Fundamental Rights** - Economic, social and cultural rights - Commercial and industrial freedom.

Keywords of the alphabetical index:

Local council, exceeding of power / Entrepreneur, equal status / Tax rate / Market, trading place, size.

Headnotes:

The minimum size of a stall at a market place is subject to normative regulation in order to secure the protection of the rights and legitimate interests of citizens, and in particular, the equal right of all to conduct economic and other activities, except for activities that are prohibited by law (Article 13.2 of the Constitution).

Summary:

The case was initiated by the Constitutional Court on the basis of a constitutional motion of individual entrepreneurs concerning the payment by them of a local tax.

The Court examined the constitutionality of Decision no. 153 of Gomel Oblast Council of 28 March 2002 on the Setting of a Local Tax Applicable to Individual Entrepreneurs and to Other Individuals Dealing in Goods and Services within the Basic Local Tax Rates Specified in the

List of Types of Activities for which Individual Entrepreneurs and Other Individuals Shall Be Subject to Local Tax, as well as the Basic Local Tax Rates Approved by Decree no. 12 of the President of Belarus of 17 May 2001. This Decision established increasing coefficients for the local taxes applicable to individual entrepreneurs who did not use wage labour and who sold goods at market places (outside the network of immovable trading places), from stalls the size of which exceeded the standard stall size fixed by the owner of the market.

In the opinion of the Court, the oblast council had not exceeded its powers in so far as it allowed for the application increasing coefficients for the local taxes payable by individual entrepreneurs who did not use wage labour and who sold goods at market places.

At the same time, however, the size of the standard stall at a market is determined by the owner of the market place, and the rate of local tax applicable to stalls is then specified by the lessor in accordance with the relevant legislation; such trading places correspond to selling places and the rate of local tax payable depends on their quantity and size. The Court therefore ordered the Government, in order to secure more fully the protection of the rights and legitimate interests of individual entrepreneurs, to determine at the normative level (rather than leaving it to the owners of each market place) the minimum size of those trading places.

Languages:

Belarusian, Russian, English (translations by the Court).

Identification: BLR-2002-B-008

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 06.11.2002 / **e)** D-150/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)** CODICES (Russian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** - Proportionality.
3.21 **General Principles** - Equality.
3.22 **General Principles** - Prohibition of arbitrariness.
4.5.2 **Institutions** - Legislative bodies - Powers.
5.4.8 **Fundamental Rights** - Economic, social and cultural rights - Freedom of contract.

Keywords of the alphabetical index:

Deposit, interest rate, reduction / Contractual relation, parties, equal status / Bank, unilateral modification of contract terms / Depositor, protection / State guarantee.

Headnotes:

Only the law may specify whether it is possible (and in what instances it is then possible) for banks unilaterally to reduce interest rates, in order to avoid any arbitrary introduction, in the absence of any objective prerequisites, of less favourable terms and conditions in the contract of an individual savings account-holder.

Summary:

The case was initiated by the Constitutional Court on the basis of a constitutional motion of citizens.

The Court, by recognising the existence of legitimate grounds for unilateral alterations of the terms and conditions of savings accounts as regards the payment of interest to the holders of such accounts, underlined that Article 13 of the Constitution means that the principle of freedom of contract is recognised as one of the freedoms of individual and citizens guaranteed by the state and proclaimed by the Civil Code to be the fundamental principles on which the Code is based. At the same time, the freedom of contract is not absolute, as it must not result in the denial or restriction of universally acknowledged rights and freedoms (Article 23.1 of Constitution).

The means by which the freedom of the contract may be restricted consist, in particular, of the institution of public contracts, which exclude the right of a profit-making organisation to withdraw from concluding the contract in question, except in the instances specified by law, and the institution of the standard contract, the terms and conditions of which may be accepted only by acceding to the proposed contract as a whole. The terms and conditions of savings accounts with banks correspond to this type of contract. As a result individual account-holders, as parties to such contracts, are deprived of the possibility of influencing the terms of the contract. This constitutes a restriction of the freedom of contract and, as such, requires that the principle of proportionality be observed. Individuals, as economically weak parties in such legal relations, need special protection of their rights, and this requires that the freedom of contract of the other party, i.e. the banks, also be relevantly restricted by law. In the Court's opinion such an approach promotes the realisation in full of the principle of equality of the participants in civil legal relations, as laid down in the applicable civil law. The possibility of refusing to conclude the contract required to open a savings account, which would appear to signify the recognition of the freedom of the contract, may

not be considered to be adequate to secure in practice the freedom of contract of individuals.

The legislator, in regulating relations between banks and individual account-holders, must comply with Articles 2, 13 and 44 of the Constitution, under which the individual, his or her rights and freedoms and the guarantees of their realisation constitute the supreme goal and value of society and the state, which "shall encourage and protect the savings of citizens and guarantee the conditions for the return of deposits" (Article 44.4 of the Constitution), and ensure the regulation of economic activities for social purposes (Article 13.5 of the Constitution).

However, based on the constitutional freedom of contract, the legislator has no right to limit itself by formally recognising the legal equality of parties. Rather, it should grant certain privileges to the economically weaker party, which is dependent on these, in order to prevent unfair competition in the sphere of bank activities and guarantee in practice the observance of the principle of equality in the carrying out of entrepreneurial and other authorised economic activities.

According to Article 29.2 of the Universal Declaration of Human Rights, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Under Article 23 of the Constitution the instances of necessary restrictions of individual rights and freedoms shall be determined only by law, and such restrictions must be proportionate to the purposes specified in the relevant constitutional norm.

Languages:

Belarusian, Russian, English (translations by the Court).

Identification: BLR-2002-B-009

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 12.11.2002 / **e)** D-151/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)** CODICES (Russian, English).

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** - Effects - Influence on State organs.
4.5.2 **Institutions** - Legislative bodies - Powers.
4.7.7 **Institutions** - Judicial bodies - Supreme court.
4.10.7 **Institutions** - Public finances - Taxation.

Keywords of the alphabetical index:

Entrepreneur, illegal activities / Income, definition / Crime, elements / Criminal code.

Headnotes:

The notion of "income" for the purposes of the qualification of offences against the procedural law applicable to economic activities shall be defined directly in the Criminal Code or the relevant interpretation shall be specified by the legislative body, and this shall encourage the development of a uniform judicial practice based on the law.

Summary:

The Court was called upon to clarify the definition of the notion of "income" for the purposes of the qualification of unlawful entrepreneurial activities under the criminal law.

The Court emphasised that according to Article 233.1 of the Criminal Code, unlawful entrepreneurial activities shall be considered to be crimes, if those activities entail earning a high income. Article 233.2 of the Criminal Code provides for increased liability for unlawful entrepreneurial activities that entail earning a high income. The explanatory note to Chapter 25 of the Criminal Code sets out what constitutes a high income and a very high income. However, there is no definition of the notion of income itself, what comprises income or the method of calculating it for the purposes of the criminal law.

The notion of income arises in other legislative acts – in the Law on Individual Income Tax, the Law on Measures to Prevent the Legalisation of Fraudulent Gains, in Decree no. 43 of the President of the Republic of Belarus of 23 December 1999 on the Taxation of Income in Certain Spheres of Activity, etc. An analysis of the content of these binding enactments indicates that the notion of income is defined differently depending on the purposes for which it is used.

For the purposes of qualifying unlawful entrepreneurial activities as criminal activities, the notion of income was clarified by Ruling no. 6 of the Plenum of the Supreme Court of 28 June 2001 on judicial practice in cases of unlawful entrepreneurial activities. Point 6 of this Ruling stated that "income arising from unlawful entrepreneurial activities shall mean the entire sum of proceeds in cash and in kind minus the expenses incurred in the receipt of these proceeds. Income in kind is subject to specification in monetary terms".

The Constitutional Court emphasised in the present decision that by giving its interpretation of what was meant by income arising from unlawful entrepreneurial activities, the Plenum of the

Supreme Court had in effect defined the notion of income under which activities that resulted in the earning of a high income or a very high income shall be found to constitute a crime. Thus, the Plenum of the Supreme Court had acted as the legislator.

Based on Articles 97 and 98 of the Constitution, Articles 1 and 3 of the Criminal Code, Articles 70 and 72 of the Law on Binding Enactments of Belarus and Article 49 of the Law on the Judicial System and Status of Judges, the Court specified that for the purposes of the uniform and precise application of the terms used in the Criminal Code, only the legislator has the right to define the notion of "income" as applied to unlawful entrepreneurial activities and to other offences against the procedural law applicable to economic activities; that the definition of the notion "income" as applied to unlawful entrepreneurial activities should not be contained in the Ruling of the Plenum of the Supreme Court but in the Criminal Code itself, or shall be revealed by way of interpretation of that notion as applied to the criminal legal relations by the legislative body.

The Court ordered the National Assembly to amend the law in accordance with the given Decision.

Languages:

Belarusian, Russian, English (translations by the Court).

Identification: BLR-2002-B-010

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 24.12.2002 / **e)** D-152/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)** CODICES (Russian, English).

Keywords of the systematic thesaurus:

5.1.1.4.3 **Fundamental Rights** - General questions - Entitlement to rights - Natural persons - Prisoners.
5.3.13.2 **Fundamental Rights** - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Access to courts.
5.3.34 **Fundamental Rights** - Civil and political rights - Right of petition.

Keywords of the alphabetical index:

Convicted person, imprisonment / Penalty, imposition, administration, reformatory / Appeal, right, to the courts / Refusal / Limitation period / Prosecutor's office, role.

Headnotes:

The constitutionally protected right of any person to judicial remedies (Articles 59, 60 and 137 of the Constitution), which is also guaranteed by Article 3 of the International Covenant on Civil and Political Rights, shall ensure the right of convicted persons serving prison sentences to appeal to the courts of law against penalties imposed on them by prison administrations.

The limitation period for appeals is not applicable to persons having suffered the violation of this right.

Such persons have the right to address the procurator's office directly to seek the application of appropriate measures by the prosecutor and for the restoration of the violated constitutional rights.

Summary:

The present decision was based on repeated complaints lodged with the Constitutional Court by convicted persons serving prison sentences concerning the refusal of the courts of law to hear their appeals against the application of penalties imposed on them by prison administrations.

Irrespective of the fact that Article 60 of the Constitution, which is directly applicable, guarantees everyone the right to judicial protection, and of the fact that the Constitutional Court had previously adopted two decisions on this issue confirming the right of imprisoned persons to appeal to the courts against the penalties imposed on them, the courts of law still continued to refuse to examine the complaints of these persons, on the grounds that the relevant legislation failed to lay down the procedure to be followed in the appeals in question.

The Court was therefore required to examine this issue again, to adopt its decision in the present case and to confirm once again the constitutional right of convicted persons serving prison sentences to appeal to a court of law in connection with the imposition on them of penalties. This right is also guaranteed under the Constitution (Articles 59, 60 and 137 of the Constitution), as well as by Decree no. 29 of the President of Belarus of 26 July 1999 on Additional Measures for the Improvement of Labour Relations, Strengthening of Labour and Discipline in the Work Force.

The Court also emphasised that persons who had previously been unlawfully denied access to the courts had the right to judicial protection, since the time limitation for appealing to a court of law would not be applicable in such cases.

Such persons had the right to address the prosecutor's office directly to seek the application of appropriate measures by the prosecutor and for the restoration of the violated constitutional rights.

Cross-references:

Former decisions concerning the constitutional right of convicted persons serving a prison sentence to appeal to the court of law due to imposition on them of the penalties: Decision no. D-111/2001 of 02.04.2001 on the right of convicted persons serving prison sentences to appeal to the courts against penalties imposed on them [BLR-2001-B-002] and Decision no. D-145/2002 of 19.07.2002 on securing the constitutional right of convicted persons serving prison sentences to appeal to the courts against penalties imposed on them.

Languages:

Belarusian, Russian, English (translations by the Court).