Strasbourg, 28 March 2001
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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Venice Forum

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Introduction

The Venice Commission's Internet Forum (Venice Forum) has been established in 1997 as a tool for co-operation between the Constitutional courts and similar jurisdictions. It gives the participating jurisdictions a possibility to discuss important practical issues of constitutional practice 'on line' and to be informed of the work of their colleagues in other countries on similar issues.

This document includes questions and replies from different constitutional jurisdictions and similar bodies on a number of practical issues they had to deal with in 1998 – 1999 and which they submitted to the forum. Not all replies were made available to the Secretariat. They will be added at a later stage.

The Venice Commission Secretariat would like to thank all the liaison officers from constitutional courts and other equivalent bodies who have responded to the requests.

This is a selection of these questions and answers in the original language (English or French) the answeres being presented in alphabetical order by country.

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Introduction

Le Forum internet de la Commission de Venise ("Venice Forum") a été créé en 1997 comme outil pour faciliter la coopération entre les Cours constitutionnelles et juridictions équivalentes. Il offre aux juridictions participantes la possibilité de discuter "en ligne" de questions d'ordre pratique importantes relevant du domaine constitutionnel et d'être informées du travail de leurs collègues dans d'autres pays sur des questions similaires.

Ce document inclut des questions et des réponses de différentes juridictions constitutionnelles et institutions équivalentes sur bon nombre de questions d'ordre pratique auxquelles elles ont été confrontées de 1998 à 1999 et qu'elles ont soumis au forum. Il y a un nombre de questions dont les réponses n'ont pas été envoyées au secrétariat. Celles-ci seront publiées ultérieurement.

Le Secrétariat de la Commission de Venise voudrait remercier tous les agents de liaison des cours constitutionnelles et institutions équivalentes qui ont répondu à ces demandes.

Voici une sélection de questions et réponses en langue originale (anglais ou français), les réponses étant présentées par ordre alphabétique selon le pays.

Table of Contents:

I. **Hungarian Constitutional Court**: the right to freedom of expression; the limits of the MPs' right to free speech

Before the Hungarian Constitutional Court there is a case concerning the parliamentary representatives' right to freedom of expression.

A petitioner challenged Section 4 of the Act LV of 1990 on the Legal Status of Members of Parliament, under which a Member of the Parliament and a former Member of the Parliament cannot be held responsible before a court or other authority for the way they vote or for facts and opinions they express during the time they serve as MPs. This immunity excludes the disclosure of state secrets, libel, defamation and civil law liability of MPs.

From: Mrs Krizstina Kovacs

Date: 09/01/01

Responses from:

1. Albania, the Constitutional Court, Mr Luan Pirdeni**,** 30/01/01

Chère Madame Kovacs,

J'ai distribué une copie de votre demande à tous les juges de la Cour constitutionnelle. La réponse en a été la suivante:

Il n'y a rien dans la jurisprudence constitutionnelle albanaise sur le sujet.

Il n'y a que le premier alinéa de l'article 73 de la Constitution qui énonce:
1. A deputy does not bear responsibility for opinions expressed in the Assembly and votes given. This provision is not applicable in the case of defamation.
2. *Le député ne porte pas de responsabilité pour les opinions exprimées par lui dans l'Assemblée et pour le vote exprimé. La présente disposition ne s'applique pas à la diffamation*.

Je vous prie de croire, Madame Kovacs, en l'assurance de ma haute considération.

2. Austria, the Constitutional Court, Mrs R. Huppmann, 11/01/01

Dear Mrs. Kovacs,

All provisions concerning the immunity of members of parliament are provisions of the Constitution itself.

The so-called "objective immunity" (sachliche Immunität) is laid down in Article 33 and seen as a consequence of the "personal immunity" which is stipulated in Article 57 (for members of the National Council = first chamber of parliament). Article 58 of the Constitution contains immunity-rules of members of the Federal Council (Bundesrat =second chamber of parliament).

I think that you have the text of the Austrian Constitution at the Court. If the text is not available for you I will try to send it.

With best regards,

R. Huppmann

3. Azerbaijan, the Constitutional Court, Mr Raouf Guliyev, 18/01/01

Dear Ms. Kovacs,

Herewith, please find below some relevant information (extracts from legislation of the Azerbaijan Republic). The rendered information relates mostly to parliamentary ethics.

Best regards,

Raouf Guliyev

Article 91 of the Constitution:

The Deputies of the Milli Majlis of the Azerbaijan Republic may not be brought to responsibility for their activity, voting and ideas expressed in the Milli Majlis. Concerning these cases explanations and evidence can be required only upon their (MPs) consent.

Article 17 of Law "On the Status of Deputy":

The deputy shall neither resort to unlawful actions as well as treatment which can degrade respective name, actions of cruel, abusive criticism of person's honour and dignity, nor to call upon others to commit these actions.
Deputy shall respect rules of the sessions of Milli Majlis and its commissions.

Article 9 of Internal Statute of Milli Majlis of Azerbaijan Republic:

The participants of the sessions of Milli Majlis shall respect parliamentary ethics. They should not frustrate the session holding, interrupt reporters, infringe the session order and rules of work, resort to actions of cruel, abusive criticism of person's honour and dignity, call upon to unlawful actions. Chairman of the sessions shall warn persons, who do not respect the parliamentary ethics. If the same person repeats breach this person shall be deprived of expression for the whole day and Chairman shall declare about this fact.

In case when that person continues to behave the same way, then by instruction of Chairman he/she shall be expelled out of session hall.

All facts, related to the breach of rules of session, shall be noted in the minutes of Milli Mejlis sessions.

4. Belgium, the Constitutional Court/Court of Arbitration, Ms Anne Rasson and Mr Rik Ryckeboer, 14/01/01

Dear Ms Kovacs,

Via the Centre of Constitutional Justice of the Venice Commission, we received your request about the parliamentary representatives' right of freedom of expression.

We apologise for the delay in answering, but we wanted to wait until the pronouncement of a very recent decision, in which the Belgian Court of Arbitration came to a conclusion about the importance of the freedom of expression of the members of Parliament in the exercise of their duties.

Article 58 of the Belgian Constitution provides (see CODICES):« No member of either of the two Houses can be prosecuted or pursued with regard to opinions and votes given by him in the exercise of his duties. »

This provision aims at ensuring total independence of the members of the two federal legislative chambers (the same rule is applicable to the members of the parliamentary assemblies of the federative entities of Belgium under the terms of article 120 of the Constitution).

The parliamentary representatives enjoy immunity against any penal or civil proceedings and even against any investigation for opinions they expressed in the course of parliamentary work or for their way of voting. Immunity only concerns the exercise of duties as a member of Parliament: it is limited to the sessions of the assembly and to the committee meetings; it does not apply for opinions stated outside the Parliament, even if they are nothing more than a repetition of what has been said in parliamentary session.

In its decision no. 10/2001 of the 7th of February 2001, the Court concluded to the constitutionality of a legislative provision by which a political party can lose part of its annual budget when this party or components thereof show their manifest hostility against the rights and freedoms guaranteed by the European Convention on Human Rights or the additional protocols (article 15*ter* of the law of the 12th of February 12, 1999, accessible in French, Dutch and German on the site www.moniteur.be). The Court admitted the validity of this law (with the precautions that it contains) but nevertheless it expressed some reserve which is precisely linked to the above-mentioned article 58 of the Constitution: « The challenged provisions do not affect the rights to stand as a candidate, to be elected and to be a member of a legislative assembly, and cannot be construed as affecting the parliamentary immunity guaranteed by article 58 of the Constitution. An opinion or vote in the exercise of a parliamentary mandate cannot rise to application of article 15ter. Under this reserve, the measure is not disproportionate » (consideration B.4.7.4 of the decision).

This decision is available in French, Dutch and German languages, on the website of the Court: www.arbitrage.be.

Hoping that this answer may be useful to you in your work, we remain,

Yours sincerely,
Anne Rasson and Rik Ryckeboer

5. Bulgaria, the Constitutional Court, Mr Kiril Manov, 10/01/01

Dear Ms. Kovacs,

Replying to your e-mail of January 9, 2001 I can offer the following information:

The Constitution of the Republic of Bulgaria adopted by the Grand National Assembly on July 12, 1991 contains the following texts:

Art. 69. Members of the National Assembly shall not be held criminally liable for their opinions or votes in the National Assembly.

Art. 70. A Member of the National Assembly shall be immune from detention or criminal prosecution except for the perpetration of a grave crime, when a warrant from the National Assembly or, in between its session, from the Chairman of the National Assembly, shall be required. No warrant shall be required when a Member is detained in the course of committing a grave crime; the National Assembly or, in between its session, the Chairman of the National Assembly, shall be notified forthwith.

Sincerely yours,

Kiril Manov

6. Canada, the Supreme Court, Mr Claude Marquis, 17/01/01

Dear Ms. Kovacs,

According to Mr. Kirkwood of the Library of Parliament there are no federal statutes specific to the limits of a Members of Parliament's right to free speech. A Member of Parliament's free speech limitations have been established by precedent. The expert on this matter in Canada is J.P. Joseph Maingot, who has codified this issue in his book "Parliamentary Privilege in Canada (2nd ed. 1997). Chapters 3 and 14 discuss this matter:

Chapter 3 (Privilege of Freedom of Speech) addresses case law limitations and chapter 14 (The Canadian Charter of Rights and Freedoms and Parliamentary Privilege) discusses the Charter.

Yours sincerely,

Claude Marquis

7. Croatia, the Constitutional Court, Mrs Marija Salecic, 12/01/01

Dear Ms Kovacs,

Answering your request I can inform you on the relevant provisions from the Croatian Constitution.

Article 75

1. Representatives of the Croatian Parliament shall enjoy immunity.
2. No Representative shall be prosecuted, detained or punished for an opinion expressed or vote cast in the Parliament.
3. No Representatives shall be detained nor shall criminal proceedings be instituted against him without the consent of the House of the Parliament.

The immunity includes protection of the representatives inside and outside of the Parliament. Members can express opinions and cast votes inside the Parliament even if their actions are considered to be a criminal offence. This protection covers them after the end of their term. Whereas, representatives can be criminally liable only upon decision of the House of the Representatives, except they are caught in the act of committing criminal offence which carries a penalty of imprisonment of more than 5 years. This protection last only while there are Members of Parliament.

Sincerely,

Mrs Salecic

8. Former Yugoslav Republic of Macedonia, Constitutional Court, Simeon Petrovski, 01/02/01

Dear Ms. Kovacs,

Regarding your request, I can inform you that the question of MPs` immunity is enshrined within the Constitution itself, i.e. Art.64 therein.

According to the referenced provision, a representative cannot be held to have committed a criminal offence or be detained owing to views he/she has expressed or to the way he/she has voted in the Assembly.

Par.2 thereof stipulates that a representative cannot be detained without the approval of the Assembly unless found committing a criminal offence for which a prison sentence of at least five years is prescribed.

Furthermore, this constitutional guaranty is not elaborated in a statutory provision. The only act that deals with MPs` immunity is the Rules of procedure of the National Assembly adopted in 1986. Namely, among others, the act states that the delegate enjoys immunity in the Assembly and out of it starting from the day of verification of his/her office and it lasts till its cessation. The delegate cannot be held responsible, be detained nor penalized for opinion he/she expressed or for its vote given in each of Assembly's bodies.

Hoping that this information will help your Court in certain way to reach the judgment in the case, I remain

Sincerely Yours,

Simeon Petrovski

9. Iceland, the Supreme Court, Mr Hjörtur Torfason,

Dear Ms. Kovacs,

I have received from the Venice Commission a copy of your information request concerning the right of parliamentary representatives to freedom of expression. I am sorry that I could not respond before the end of January, but am hoping that the following may be of some use.

In Iceland, this subject matter is mainly dealt with in the Constitution of the Republic No. 33/1944 (as amended), the relevant provisions of which run as follows:

Article 36

The Althing (i.e. the national Parliament or General Assembly) is immune. No one may disturb its peace or liberty.

Article 48 (as amended by Constitutional Law No. 56/1991, Art. 17)

The members of the Althing are bound solely by their own convictions and not by any instructions from their voters.

Article 49 (as amended by Constitutional Law No. 56/1991, Art. 18)

While the Althing is in operation, no member of the Althing may be remanded in custody or subjected to an action at law without the consent of the Althing, unless he is caught in the act of committing a crime.

No member of the Althing can be called to account outside of the Althing for what he may have stated in the Althing, unless the Althing so permits.

The general constitutional provision on freedom of expression runs as follows:

*Article 73 (*as amended by Constitutional Law No. 97/1995, Art. 11)

Everyone shall enjoy freedom of opinion and conviction.

Everyone has the right to express his thoughts, but must be ready to accept responsibility for them before the courts of law. Censorship and other similar interference with the freedom of expression may never be legalised.

Restrictions on the freedom of expression may be imposed only by law in the interest of general public order or national security, for the protection of health and morals or on account of the rights or reputation of others, and provided that they are held necessary and consistent with democratic traditions.

In further explanation of the matter, I have the following brief comments:

1. The freedom of conviction provided for in Article 48 reflects the concept that the loyalty of parliamentary representatives should at bottom run towards the nation as a whole, rather than to the voters in their constituency or the political party to which they belong, and thus gives them a status of basic independence on which they may be able to fall back in times of trouble, although they will, of course, in fact normally be working under pressures both from their constituents and their party.

2. The first paragraph of Article 49 is held to apply only to criminal matters, i.e. to custody as part of the investigation of a crime or offence and to the bringing of criminal charges in a court action. The immunity from prosecution which it affords is not qualified by any particular exceptions (e.g. relating to state secrets or treasonable conduct), but can be lifted by consent of the Althing given by a parliamentary resolution approved with simple majority.

The immunity applies while the Althing is "in operation" or in session, which is interpreted in a broad sense so as to cover all the time in which the parliamentary assembly is active or potentially active and to exclude only those periods during which the Althing stands formally adjourned. Nowadays, such periods only occur in the case of adjournment for a short summer recess and before forthcoming parliamentary elections.

While this immunity is thus broadly defined, it follows that the said periods of formal adjournment can be utilised to instigate a criminal action for conduct performed while the Althing was in operation (an application of custody presumably is less likely to occur in practice, considering the probable lapse of time between the conduct and the adjournment next following). However, this opening for criminal prosecution does not extend to actions for defamatory or other punishable statements made within the Althing, which are covered by the next paragraph of Article 49.

3. The parliamentary immunity provided for in the second paragraph of Article 49, exempting members of the Althing from being called to account for statements made within the Althing, applies both during the tenure of the members as elected representatives and afterwards. It is held to cover all statements made by the members in the course of carrying out their work in that capacity, whether made in plenary sessions or committe meetings, open or closed, and whether in writing or orally, i.e. in speeches in ordinary debate (whether or not broadcast to the public through the media) or in committee discussions etc. It is also held to cover such positions as may be expressed by the members through their votes on matters before the Althing.

However, the immunity is held not to cover statements in private conversation or otherwise not forming a part of the direct contribution of the members to the work before the Althing. Thus it is *inter alia* thought not to cover statements made in group meetings of the political parties represented in the Althing, even though these form an important part of the day-to-day business of the members.

The immunity extends both to criminal law and civil law liability, so that it precludes not only public prosecution or governmental action in respect of the statements, but also prevents private persons from suing the members in court in defamation actions for damages and/or punishment. It may here be noted that in Iceland, it has been possible to instigate a defamation action solely for the purpose of having specific statements declared null and void by judgement of the court. It is thought by some that the immunity should not preclude this type of action (seeing that no retribution is being claimed), but the better view probably is that it should also be covered.

The immunity is not limited by any particular exceptions, but can be lifted by consent of the Althing given by a parliamentary resolution approved with simple majority.

Historically, the instances in which the Althing has been asked to lift the immunity are very few. Furthermore, they show that the Althing has been rather reluctant to grant consent,

inter alia for the reason that the matter is not of concern only for the particular member, but for the institution as a whole.

4. While statements in the course of the work of the Althing are thus protected, it follows that parliamentary representatives are subject to ordinary civil liability for defamatory or otherwise injurious statements expressed outside the Althing. In that connection, however, it is to be noted that over the most recent decades, the legal development in Iceland (and in its neighbouring countries, I believe) has been marked *inter alia* by a growing respect for the importance of freedom of expression, one of the results of which is a decline in the importance or effectiveness of the general rules against defamation or injurious statements. This has been reflected in a judicial practice evidencing a strong reluctance to entertain claims of injury by defamation except in cases of major or special gravity. In particular, the courts have tended to take a liberal attitude towards oral or written insults or accusations in the course of debate over political affairs or other matters of public interest, and to favour the need for free and open exchanges of opinion in a democratic community.

In view of this development, it may be said that the burden imposed on parliamentary representatives by potential liability for excesses in public statements outside the Althing is not necessarily very heavy. By the same token, however, their ability to complain over excesses in statements aimed at themselves is not necessarily very great, as they will be expected to have to take not less than they give.

5. Since the principle of immunity for statements made in the Althing is embedded in the Constitution itself, it is of course difficult to contest its general validity. However, I should think that if one were to imagine a situation involving such abusive and pernicious conduct by members of the Althing as to conflict with the human rights provisions of the Constitution or other fundamental rules of law, coupled with a refusal by the Althing to a reasonable request for lifting the immunity, the principle perhaps might have to cede to the effects of these fundamental rules, so that the members concerned could be brought to account by the persons injured before the courts of law. This might in particular be conceivable if the injurious statements were directed against specific individuals or limited groups of persons under circumstances placing them in a position of jeopardy or a serious disadvantage in the matter of ability to present an adequate response. The situation then might perhaps be characterised as a case of discrimination or denial of justice severe enough to break the immunity, or alternately to give rise to a claim against the State for damages to the persons injured due to want of a remedy in their favour.

In evaluating the scope and application of the parliamentary immunity, it is in any event proper to recall that its origins may be traced back to a time when parliaments stood in a defensive position towards royal power, and that its primary purpose presumably is not to protect parliamentary representatives against members of the public, but to enable them to maintain debate and cirticisim over matters concerning the good of the country without fear of direct retribution from the executive power or major power groups in the society.

6. There have been no court cases in Iceland where the legal validity of the parliamentary immunity under the second (or first) paragraph of Article 49 has been called in serious question. On the other hand, there are cases illustrating the relatively liberal view of the courts towards statements expressed in the course of debate over matters of public interest (cf. 4 above), if these should be of interest.

With kind regards, Hjörtur Torfason

10. Israel, the Supreme Court, Mr Yigal Mersel, 22/01/01

The Israeli Supreme Court dealt a few times with the issue of parliamentary immunity (privilege). Our law (law on the rights and duties of a Parliament Member, 1950) states that" members of Parliament should be immune from any legal act regarding an act or omission, expression (written or oral) or any other activity that are connected to their activity as MPs". In the 1993 the Court had to rule on the meaning and scope of this immunity, which stands also after the end of the MP's term. The opinion of the Court is that an act should be protected if it is a natural act for an MP or if the act falls within the ambit of activities, which an MP is expected to perform. For this reason it was ruled that in most cases, mere speech will fall within the scope of immunity. On the other hand the use of violence will not. The Court was also ready to consider the type of speech, the link and the importance of the speech to a proper action of an MP and whether a crime was intended or not.

Since I do not know the circumstances of your case, it is hard to know what further details might be interesting to you. We do not have an English copy of this decision or the relevant law. Nonetheless, please inform us if you need more details.

Yours sincerely,

Yigal Mersel

11. Italy, the Constitutional Court, Mr Giovanni Cattarino, 01/02/01

Chère Madame Kovacs,

Je m'excuse tout d'abord du retard avec lequel je répond à votre demande de renseignements, mais je viens tout juste de sortir d'une mauvaise grippe!

Je vous écris en français en espérant que ceci ne vous cause pas de problèmes.

La Constitution italienne prévoit à son art. 68, premier alinéa, que "Les membres du Parlement ne peuvent être appelés à répondre des opinions exprimées et des votes émis dans l'exercice de leurs fonctions".

Le Parlement avait dans le passé retenu une notion "souple" des fonctions parlementaires en considérant comme recomprises dans ces fonctions les expressions (parfois injurieuses vis à vis des tiers) dont les députés et les sénateurs avaient fait usage dans des articles de presse ou au cours de débat politiques qui se tenaient au dehors des enceintes parlementaires. La Cour avait accepté ce point de vue en estimant que la définition du Parlement sur ce qui rentrait sous l'immunité parlementaire constituait une "political question" qui échappait à son syndicat.

Plus récemment, appelée à juger un conflit entre les Chambres du Parlement et le pouvoir judiciaire auquel les premières avaient opposè l'insindicabilité d'une expression injurieuse utilisée par un parlementaire au dehors du Parlement à l'encontre d'une tierce personne, la Cour a adopté une notion plus stricte de "fonction parlementaire". Cette dernière s'explique à l'intérieur des deux Chambres ou bien même à l'extérieur de ces dernières, pourvu que ça soit au cour de l'exercice d'une fonction parlementaire (une enquête, par exemple). La

simple activité politique n'est pas recomprise dans la "fonction parlementaire" : même si elle est exercée par un membre des Chambres elle connaît les mêmes limites qui s'imposent à tout autre citoyen: l'immunité ne doit pas être un privilège, elle est fonctionnelle au bon déroulement de l'activité parlementaire.

Naturellement si l'epression utilisée au cour des travaux parlementaires est diffusée , en tant que telle, à l'extérieur l'immunité s'appliquera même dans ce cas.

J'espère que ces renseignements pourront encore vous être utiles; en tout cas je vous rappelle que l' arrêt n. 11 de 2000, qui constitue la jurisprudence plus récente de la Cour en la matière, se trouve dans le Bulletin n. 1 de l'an 2000.

Bien amicalement

Giovanni Cattarino

12. Japan, the Consulate-General of Japan in Strasbourg, Yoshihide Asakura, 09/01/01

Dear Ms. Kovacs,

Following your request to the liaison officers, please find hereby a relevant provision of the Constitution of Japan.

I am not aware of any provision at the statutory level in my country.

Article 51. Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.

It would be a pleasure for me if the information could be of any help to you and your court.

Sincerely,

Yoshihide Asakura

13. Lithuania, the Constitutional Court, Stasys Staciokas; 10/01/01

Dear Ms Kovacs,

Responding to your request I must emphasize that the right to freedom of expression for the Members of the Parliament (Seimas of the Republic of Lithuania) is established in Article 62 of the Constitution of the Republic of Lithuania. Besides, the Statute on the Seimas, which has the power of law, establishes the same regulation (22 Article, Part 2 of the Statute).

S. Staciokas

Article 62 of the Lithuanian Constitution
The person of a Seimas member shall be inviolable. Seimas members may not be found criminally responsible, may not be arrested, and may not be subjected to any other restriction of

personal freedom without the consent of the Seimas. Seimas members may not be persecuted for voting or speeches in the Seimas. However, legal actions may be instituted against Seimas members according to the general procedure if they are guilty of personal insult or slander.

AND
Articles 22 of the Statute on the Seimas of Lithuania

Immunity of a Seimas Member
1. The person of a Seimas Member shall be inviolable.
2. A Seimas Member may not be persecuted for his voting or speeches in the Seimas, i.e. at the sittings of the Seimas, Seimas committees, commissions and parliamentary groups, however, he may, for personal insult or slander, be held liable in accordance with the general procedure.
3. Criminal proceedings may not be instituted against a Seimas Member, he may not be arrested, and may not be subjected to any other restrictions of personal freedom without the consent of the Seimas, except in cases when he is caught in the act of committing a crime (in flagrante delicto). In such cases the Prosecutor General must immediately notify the Seimas thereof.

14. Latvia, the Constitutional Court, Mrs Inese Nikulceva, 16/01/01

Dear Ms. Kovacs,

In Latvia the parliamentary members' right to free speech is regulated by the Constitution. There are no statutory provisions on the issue.

The Latvian Constitution, adopted in 1922, contains the following Articles:
Article 28. Members of the Saeima [the Parliament] may not be called to account by any judicial, administrative or disciplinary process in connection with their voting or their views as expressed during the execution of their duties. Court proceedings may be brought against members of the Saeima if they, albeit in the course of performing parliamentary duties, disseminate:
1) defamatory statements which they know to be false, or
2) defamatory statements about private or family life.

Article 31. Members of the Saeima have the right to refuse to give evidence:
1) concerning persons who have entrusted to them, as representatives of the people, certain facts or information;
2) concerning persons to whom they, as representatives of the people, have entrusted certain facts or information; or
3) concerning such facts or information itself.

Sincerely,

Inese Nikulceva

15. Poland, the Constitutional Tribunal, Mrs Halina Plak, 15/01/01

Please find an extract from the act on Deputy/Senator Mandate
from 9th May 1996:

The Parliamentary Immunity

Article 6

1. A Deputy or Senator shall not be held accountable for his activities associated with the exercise of his mandate during the period of such mandate or after its expiry, unless he has violated the personal rights of other persons.

2. The activities, referred to in para. 1, shall include moving of motions, delivery of speeches and voting at the sittings of the Sejm, Senate and National Assembly and their organs, at the sittings of the Sejm's, the Senate's or parliamentary clubs, groups and groupings, as well as other activities indispensable for the exercise of the mandate of a Deputy or Senator.

Article 7

1. No Deputy or Senator shall be prosecuted before a criminal or criminal administrative court without the consent of the Sejm or the Senate.

2. The requirement of consent by the Sejm or Senate shall also apply to the criminal accountability of a Deputy or Senator for violation of the personal rights of other persons, as referred to in Article 6, para.1.

3. Prosecution may take place only in respect of the act indicated in the motion which has served as the basis for the granting of such consent by the Sejm or Senate. A separate consent by the Sejm or Senate shall be required to prosecute a Deputy or Senator for the commission of an act other than that specified in the motion.

Article 8

1. The privilege of a Deputy or Senator not to be prosecuted before a criminal or criminal-administrative court without the consent of the Sejm or Senate shall also apply to acts committed before assuming the mandate. Criminal proceedings instituted before this date shall be suspended at the time of assuming the mandate; they may be recommenced after the consent of the Sejm or Senate has been obtained.

2. Limitation period in respect of criminal accountability for acts covered by parliamentary immunity shall not run during the period of enjoyment of the immunity.

Article 9

l. No Deputy or Senator may be arrested or detained without the consent of the Sejm or Senate.

2. The privilege not to be detained referred to in para. I, shall include all forms of deprivation or limitation of personal liberty by law enforcement organs, unless for reasons of necessity or self-defence. In such case, only acts which cannot be delayed may be taken, and such detention shall be notified to the Marshal of the Sejm or the Marshal of the Senate. On the Marshal's request, the detained Deputy or Senator shall be immediately released.

3. The privilege, referred to in para. I, shall not apply to deprivation of liberty in criminal proceedings instituted after obtaining the consent of the Sejm or Senate for criminal prosecution.

Article 10

1. The procedure for dealing with applications for consent to a prosecution before a criminal or criminal-administrative court, or arrest or detention of a Deputy or Senator shall be specified by the Standing Orders of the Sejm and the Rules and Regulations of the Senate.

2. In the case se of publicly prosecuted offences and in cases of misdemeanours, any application for consent to a prosecution of a Deputy or Senator before a criminal or criminal-administrative court shall be submitted by the Prosecutor General.

3. Any application in the case of privately prosecuted offence shall be drawn up and signed by an advocate.

4. The consent, referred to in para.1, shall be granted by means of a resolution of the Sejm or Senate.

5. The Sejm or Senate may, in setting aside immunity, indicate that the competent court for City district of the commune of Warsaw-Central shall be the appropriate court to consider the case.

Article 11

A renunciation of immunity shall be of no effect.

Article 12

1. The provisions of this Chapter shall apply from the day of announcement of the results of elections to the Sejm and Senate until the expiry of the mandate of a Deputy or Senator.

2. In respect of Deputies obtaining a mandate in the course of the term of office of the Sejm, the provisions referred to in para.1, shall apply from the day of assumption of the mandate in accordance with the procedure specified in the provisions of the Law on Elections to the Sejm of the Republic of Poland.

3. The provisions of para.1 shall apply to Senators obtaining a mandate as a result of supplementary elections to the Senate, from the day of announcement of the results of the elections.

16. Slovenia, the Constitutional Court, Mr Arne Mavcic, 12/01/01

Dear Mrs. Kovacs,

The Slovenian Constitutional Court practice does not have a case which would be of interest for you, however, I am pleased to enclose a part of the Slovenian Constitutional Law.

Looking forward to being in contact with you, I am sending
to you my best regards from Ljubljana

Sincerely yours,

Arne Mavcic

Article 83 Immunity of Deputies of the National Assembly

(1) A Deputy of the National Assembly shall not be held liable under the criminal law for any opinion expressed or for any vote cast at any sitting of the National Assembly or of any of its Committees or duly constituted organs.

(2) A Deputy relying on such parliamentary immunity may not be arrested or detained, nor have any criminal proceedings instituted against him, without the consent of the National Assembly, except where he has been found committing a criminal offence for which a penalty of over five years goal is prescribed.

(3) The National Assembly may grant immunity to a Deputy notwithstanding that such immunity has not been claimed by him or notwithstanding that he has been found committing a criminal offence of the sort referred to in the last preceding paragraph.

17. South Africa, the Constitutional Court, Mr Richard Moultrie,05/02/01

Dear Ms Kovacs,

I am the Venice Commission Liaison officer for the Constitutional Court of South Africa. I am writing in response to your request sent to me regarding parliamentary speech.

As you no doubt know, the Constitution of South Africa was ratified in 1996. The Constitution deals extensively with the powers of all of the arms of government, including the Legislature. There is, however, no specific reference in the Constitution itself to Parliamentary speech and its protection. Chapter 2 of the Constitution (The Bill of Rights), on the other hand, contains an express provision protecting freedom of speech.

The judgment* that I enclose is one of the Supreme Court of Appeal, which, along with the Constitutional Court, is the joint highest court in South Africa. The litigant in this case, Ms De Lille, is a member of parliament for a small opposition party and is well known for her work in keeping the government accountable. Although not directly on point, I thought it might be useful for your purposes.
Please feel free to contact me should you have any further queries.

Richard Moultrie

*Note from the Secretariat: The above-mentioned judgement of the South African Constitutional Court can be obtained upon request from the Venice Commission Secretariat.

II. **The Constitutional Court of Latvia**: review of the legality of a government act

The Constitutional Court of Latvia has received a petition questioning the legality of an act of the government.

Latvenergo is a state owned company in process of privatisation. Latvenergo is purchasing energy from a private company and the government passes an act obliging the Privatisation Agency to be in charge of the signing of the sales contract and prescribes the conditions of the contract.

The call is for information on similar cases from other constitutional courts.

From: Ms Inese Nikulceva

Date: 04/01/00

Responses from:

III. **The Constitutional Court of Lithuania**: the use of agents-provocateurs, anonymous informers, etc. for the purpose of crime investigation and possible restrictions on fundamental rights for the same purpose

The Constitutional Court of Lithuania has to decide whether some provisions of the Law on Operational Activities violate human rights and freedoms in the process of investigation of a crime.

The call is for information on practice from the other constitutional courts on:

1. The compatibility of the use of secret investigators or agents/ agents-provocateurs, anonymous informers, other informers in the investigation of crimes with the protection of human rights as well as the right to fair trail.
2. Lawful restrictive measures on fundamental human rights and the limits of such restrictions allowed for the purpose of crime investigation.

From: Mr Ernestas Spruogis, acting for Judge S. Staciokas

Date: 01/02/00

Responses from:

1. The Venice Commission Secretariat, Mr Schnutz Rudolf Dürr,

Dear Judge Staciokas,

In reply to your e-mail of 28 January 2000 concerning “agents provocateurs”, please find below the result of my research in CODICES for the keyword “undercover agent” and “anonymous witness”. I have forwarded your request to all liaison officers and I hope that you have received some answers from you by now. …

I hope that my research and the replies from the liaison officers are of use for you and I look forward to meeting you in Venice on 29 March at the meeting of the Sub-Commission on Constitutional Justice with the liaison officers.

Yours sincerely,

Schnutz Rudolf Dürr

Identification: CZE-1994-3-003

Full text: Czech

a) Czech Republic / b) Constitutional Court / c) / d) 12/10/1994 / e) Pl. ÚS 4/94 / f) Anonymous witness as evidence in criminal trial / g) / h) .

Keywords of the systematic thesaurus:

4.7.7.2 Institutions - Jurisdictional bodies - Ordinary courts - Criminal courts.
5.2.9.14 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rights of the defence.
5.2.9.15 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Equality of arms.
5.2.9.24 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Anonymous witness / Criminal procedure.

Headnotes:

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

Summary:

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

Languages:

Czech.

Identification: SUI-1999-1-001

a) Switzerland Switzerland / b) Federal Court / c) First Public Law Chamber / d) 02/12/1998 / e) 1P.277/1997 / f) Demokratische JuristInnen der Schweiz (DJS) and others v. Canton of Basel-Land / g) Arrêts du Tribunal fédéral (Official Digest), 125 I 127 / h) .

Keywords of the systematic thesaurus:

2.1.1.4 Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
2.1.1.14 Sources of Constitutional Law - Categories - Written rules - Other international sources.
2.1.3.2.1 Sources of Constitutional Law - Categories - Case-law - International case-law - European Court of Human Rights.
2.3.2 Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.

3.16 General Principles - Weighing of interests.
4.7.7.2 Institutions - Jurisdictional bodies - Ordinary courts - Criminal courts.
5.2.9.12 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rules of evidence.
5.2.9.14 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rights of the defence.
5.2.9.24 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to examine witnesses.
2.1.3.2.3 Sources of Constitutional Law - Categories - Case-law - International case-law - Other international bodies.

Keywords of the alphabetical index:

Undercover agent, anonymity / Undercover agent, evidence / Witness, protection / Defence, effective / Witness, anonymous.

Headnotes:

Anonymity of undercover agents during criminal proceedings, revision of the Code of Criminal Procedure of the Canton of Basel-Land, Article 4 of the Federal Constitution and Articles 6.1 and 6.3.d ECHR.

Examination of prosecution witnesses and use of anonymous evidence in the light of the case-law on the right to a fair trial (recital 6).

General observations on the protection of witnesses (recital 7).

Difficulty in making an effective defence in the presence of evidence given by anonymous witnesses (recital 8). Procedural measures to compensate (recital 9). Balancing conflicting interests; interpreting provisions on safeguarding the anonymity of undercover agents to comply with the Constitution and the European Convention on Human Rights (recital 10).

Summary:

The Cantonal Parliament of Basel-Land introduced a new section on operations by undercover agents into the Code of Criminal Procedure. The change in legislation was adopted by referendum. The new provisions lay down the conditions and manner of operations by undercover agents, their training, monitoring and period of deployment. It is stipulated specifically that any such undercover operation must have the prior approval of the courts, which can guarantee the anonymity of the agents concerned to the extent that their identity may not be revealed either during investigation or during court proceedings. When they are giving evidence to a criminal court, the identity of undercover agents may be kept secret by the temporary exclusion of the public from the court or by measures to prevent their identification, such as the use of screens, face masks or devices altering the human voice. Only the president of the court is made aware of an undercover agent's identity.

By means of a public-law appeal, the Basel section of the Swiss Association of Democratic Lawyers and a number of private individuals contested this change in legislation before the Federal Court. At issue in particular were the provisions safeguarding the anonymity of undercover agents. It was argued that such anonymity did not permit the defendant to make an effective defence, and consequently that it was in breach of Article 4 of the Federal Constitution and Article 6.3.d ECHR.

The Federal Court undertook an abstract review of the provisions in question and dismissed the appeal. It made a detailed analysis of the case law of the European Court of Human Rights in connection with Article 6.3.d ECHR. It considered the problem of protecting undercover agents alongside the more general issue of witness protection and contrasted these with the rights of the defence, making particular reference to legal theory and to Recommendation no. R(97)13 of 10 September 1997 of the Committee of Ministers of the Council of Europe.

The purpose of guaranteeing anonymity was to protect undercover agents and their families against intimidation and threats; it also enabled agents to continue working for the prosecution once proceedings were under way. However, in the opinion of the European Court of Human Rights, the anonymity of an undercover agent called to testify against a defendant was "an almost insurmountable handicap". Although the latter could contest evidence as to the facts of the case and examine the witness, he/she was unable to call in question the credibility of an undercover agent. In order to compensate in part for the difficulties experienced by the defence, it was possible to apply a verification procedure whereby the witness must be reliably identified, the president of the court could personally examine the agent and report to the opposing parties, further important information might arise from consultation of the file on the agent's deployment, and, lastly, the person overseeing the agent's deployment could be examined.

It was not easy to achieve a balance between the conflicting interests. In view of the defendant's right to examine the agent in the criminal court and the possibility of verification measures, it was not contrary to Article 4 of the Federal Constitution or Article 6.3.d ECHR to allow anonymous evidence by undercover agents. However, the guarantee on the rights of the defence limited the use of such evidence, and the trial judge must take account of all circumstances. It would nevertheless be contrary to both the Constitution and the Convention to base a conviction solely or mainly on anonymous evidence.

Languages:

German.

Identification: SUI-1996-1-003

Full text: French

a) Switzerland Switzerland / b) Federal Court / c) Court of cassation in criminal law / d) 17/11/1995 / e) 6P.63/1995 / f) L. against Public Prosecutor of the Canton of Neuchâtel / g) Arrêts du Tribunal fédéral (Decisions of the Federal Court), 121 I 306 / h) .

Keywords of the systematic thesaurus:

5.2.9.24 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to examine witnesses.
5.2.9.3 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Public hearings.
2.1.1.4 Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.

Keywords of the alphabetical index:

Undercover agent / Evidence, administration / Criminal proceedings / Witness, prosecution / Defence witness / Anonymous witness.

Headnotes:

Right to questioning of witnesses for the prosecution and for the defence. Right to a public hearing.

When an undercover agent has been involved in a case, his testimony must be heard unless there is conclusive evidence that the part he played was no more than that described in the case file (recital 1).

An in-camera hearing may be ordered for an undercover agent if there is no other way to preserve his anonymity (recital 2).

Summary:

The Assize Court of the Canton of Neuchâtel sentenced L. to eleven years' imprisonment for serious violation of federal narcotics law. The Court of Cassation of the Canton of Neuchâtel rejected the defendant's appeal. L. then lodged an appeal in public law with the Federal Court for violation of Articles 6.1 and 6.3 ECHR and of Article 4 of the Constitution.

The applicant alleged violation of the right to the questioning of witnesses for the prosecution and the defence insofar as he was not allowed to question P, who was working for the police and who allegedly prompted him to act and put him in touch with undercover agent B. Article 6.3.c ECHR does not exclude the possibility of refusing to hear a witness because the evidence concerned is not decisive or would add nothing to the facts previously established. In this case, however, the exact role played by P. was relevant. His testimony would have established just what this role was. The appeal was therefore justified on this point.

L. also alleged violation of the right to a public hearing guaranteed under Article 6.1 ECHR. He did not object to the steps taken to enable undercover agent B. to give evidence in such a way as not to be seen or recognised by his voice. Safeguarding the identity of an undercover agent reflects a legitimate interest, and justifies restrictive measures. In this particular case, however, the reasons given for the disputed decision were not sufficient to warrant the examination of the witness in camera. As a result, the accused's right to a public hearing was violated.

Languages:

French.

Identification: SUI-1993-1-001

Full text: French

a) Switzerland Switzerland / b) Federal Court / c) First public law Chamber / d) 07/08/1992 / e) 1P.212/1992 / f) B. against Public Prosecutor of the canton of Vaud / g) Arrêts du Tribunal fédéral (Decisions of the Federal Court), 118 la 327 / h) Semaine judiciaire, 1992, 618; Revue universelle des Droits de l'Homme, 1992, 500.

Keywords of the systematic thesaurus:

4.7.7.2 Institutions - Jurisdictional bodies - Ordinary courts - Criminal courts.
5.2.9.14 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rights of the defence.
2.1.1.4 Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
5.2.9.24 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Fair trial / Criminal proceedings / Evidence, submission / Witness, prosecution / Anonymous witness / Undercover agent / Drugs, traffic.

Summary:

Articles 6.1 and 6.3.d ECHR, Article 4 of the Constitution; testimony of the undercover agent.

Summary of the Case-law relating to the testimony of anonymous witnesses and undercover agents (recitals 2a-b).

In this Case, the applicant ought to have been allowed to confront the undercover agent, more especially on the decisive question of the extent of his involvement (recitals para. 2c.).

Languages:

French.

Identification: ECH-1996-1-005

Full text: English French

a) Council of Europe / b) European Court of Human Rights / c) Chamber / d) 26/03/1996 / e) 54/1994/501/583 / f) Doorson v. the Netherlands / g) to be published in the Reports of Judgments and Decisions, 1996 / h) .

Keywords of the systematic thesaurus:

5.2.9.14 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rights of the defence.
5.2.9.3 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Public hearings.
2.1.1.4 Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
5.2.9.24 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:
Witness, anonymous.

Headnotes:

The reliance by a trial court on the evidence of anonymous witnesses, and on an incriminating statement made to the police by a named witness who retracted in open court and on a statement made during the police investigation by a named witness whom the defence had had no opportunity to question, was held not to infringe the right to a fair trial.

Summary:

Mr Doorson was arrested in April 1988 on suspicion of having committed drug offences. A number of drug users, including six who remained anonymous, had identified him to the police as a drug dealer from a photograph taken of him in 1985.

At the trial, the Amsterdam Regional Court rejected a request by the defence that the case should be referred back to the investigating judge for the examination of all six anonymous witnesses but it ordered that two identified witnesses should be brought before the court. The first witness never appeared and the second one withdrew his earlier statement.

In December 1988 the Regional Court convicted the applicant of drug trafficking and sentenced him to fifteen months' imprisonment.

Mr Doorson appealed to the Amsterdam Court of Appeal. Following his request for an examination of the anonymous witnesses, the Court referred the case back to the investigating judge. Counsel for the applicant was permitted to put questions to the two witnesses who appeared, but they were not confronted with the applicant himself. In the light of previous experience, the witnesses wished to remain anonymous for fear of reprisals.

The Court of Appeal turned down a request by Mr Doorson's lawyer that all six anonymous witnesses should be summoned to the hearing, and ruled that the anonymity of the two witnesses should be preserved.

The first witness withdrew his previous statement and the second one repeatedly failed to appear.

In December 1990 the Court of Appeal found Mr Doorson guilty and sentenced him to fifteen months' imprisonment. It said that it had relied upon the statements of the two named witnesses and the anonymous witnesses.

With regard to the reliance by a trial court on the evidence of anonymous witnesses to found a conviction, the European Court of Human Rights held that Contracting States should organise their criminal proceedings in such a way that those interests of witnesses in general, and those of victims called upon to testify in particular, were not unjustifiably imperilled.

The principles of fair trial also require that in appropriate cases the interests of the defence were balanced against those of witnesses or victims called upon to testify.

While it would clearly have been preferable for the applicant to have attended the questioning of the witnesses, the Court considered, on balance, that the Amsterdam Court of

Appeal had been entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses.

The requirement of a fair trial was thus satisfied, and there had been no violation of Article 6.1 ECHR taken together with Article 6.3.d ECHR.

With regard to the witness who retracted his statements, the Court held that it could not hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two were in conflict.

With regard to the witness who did not appear at the hearing, the Court found that it had been open to the Court of Appeal to have regard to the statement obtained by the police, especially since it could consider that statement to be corroborated by other evidence before it.

Consequently, there had been no violation of Article 6.1 ECHR combined with Article 6.3 ECHR.

Languages:

English, French.

Identification: ECH-1989-S-004

a) Council of Europe / b) European Court of Human Rights / c) Plenary Court / d) 20/11/1989 / e) 10/1988/154/208 / f) Kostovski v. the Netherlands / g) Vol. 166, Series A of the Publications of the Court / h) .

Keywords of the systematic thesaurus:

2.1.1.4 Sources of Constitutional Law - Categories - Written rules - European Convention on Human Rights of 1950.
5.2.9.3 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Public hearings.
5.2.9.14 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rights of the defence.
5.2.9.24 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right to examine witnesses.

Keywords of the alphabetical index:

Robbery, armed / Witness, anonymous / Hearing, adversarial.

Headnotes:

A conviction for armed robbery based to a decisive extent on the reports of two anonymous witnesses, heard in the absence of the accused and his counsel, by the police, and in one case by the examining magistrate, but not by the trial courts, violates the right to a fair trial.

Summary:

Mr Slobodan Kostovski, who was born in 1953, has a very long criminal record. In August 1981 he escaped, together with others, from a prison in the Netherlands and remained on the run until the following April.

In January 1982 three masked men conducted an armed raid on a bank in Baarn. Subsequently the police received visits from two persons who wished to remain anonymous for fear of reprisals and who made statements implicating the applicant and others in the robbery.

An examining magistrate later interviewed, in the absence of the public prosecutor and of the applicant and his defence counsel, one of the witnesses, who confirmed his/her previous statement. The applicant's lawyer was afterwards given the opportunity of submitting, through an examining magistrate, written questions to the witness, but the majority were either not asked or not answered in order to preserve his/her anonymity.

In September 1982 the Utrecht District Court convicted the applicant and his co-accused of armed robbery and sentenced each of them to six year's imprisonment. The anonymous witnesses, whose identity was known to the public prosecutor, were not heard at the trial. The District Court based its finding on the reports drawn up by the police and the examining magistrates on the hearings of the witnesses, which it admitted as evidence and regarded as decisive and reliable.

In May 1983 after a retrial before the Amsterdam Court of Appeal, where the aforesaid reports were also admitted as evidence, the applicant and his co-accused were once more convicted and given the same sentence as before.

In September 1984, the Supreme Court decided to nonsuit the plaintiff of his appeal.

The essence of the applicant's claim was that he had not received a fair trial on account of the use as evidence of reports of the anonymous witnesses' statements.

The Court began by pointing out that its task was not to express a view as to whether those statements had been correctly admitted and assessed by the Netherlands courts, but rather to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.

In principle, the Court recalled, all the evidence had to be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, statements obtained at the pre-trial stage could be used as evidence provided the rights of the defence had been respected. As a rule, those rights required that an accused be given, at some stage in the proceedings, an adequate and proper opportunity to challenge and question a witness against him.

In the Court's view, such an opportunity had not been afforded in the present case. At no stage could the anonymous witnesses be questioned directly by the applicant or on his behalf. Furthermore, the questions which the defence had been able to put to those who heard the witnesses and, indirectly, to one of the latter, had been restricted by reason of the decision to preserve the witnesses' anonymity. This feature of the case had compounded the applicant's

difficulties: if the defence was unaware of a witness's identity, it might be unable to demonstrate that he or she was prejudiced, hostile or unreliable.

Moreover, the Court did not consider that the procedures followed by the judicial authorities had counterbalanced the handicaps suffered by the defence. The trial courts did not see, and so could not form their own impression of the reliability of, the anonymous witnesses. In addition, only one of them had been heard by an examining magistrate, but he had been unaware of the witness's identity.

Whilst recognising the force of the Government's references to an increase in the intimidation of witnesses and the need to balance the various interests involved, the Court observed that the right to a fair administration of justice could not be sacrificed to expediency. The use of anonymous statements as sufficient evidence to found a conviction, as in the present case, was a different matter from reliance, at the investigation stage, on sources such as anonymous informants. The former had involved limitations on the rights of the defence which were irreconcilable with the guarantees of a fair trial in Article 6 ECHR.

The Court therefore held that there had been a violation of Article 6.3.d ECHR (right to examine witnesses), taken together with Article 6.1 ECHR (right to a fair trial and public hearing).

Cross-references:

Delcourt v. Belgium, 17/01/1970, Series A, no. 11; [ECH- 1970-S-001].Bönisch v. Austria, 06/05/1985, Series A, no. 92.Unterpertinger v. Austria, 24/11/1986, Series A, no. 110; [ECH-1986-S-004].Barber…, Messegu, and Jabardo v. Spain, 06/12/1988, Series A, no. 146; [ECH-1988-S-008].Ciulla v. Italy, 22/02/1989, Series A, no. 148

Languages:

English, French.

IV. **The Constitutional Court of Lithuania**: liability of investigation bodies and compensation for damages in cases of unlawful arrest

The Lithuanian Constitutional Court has received a petition for a review of certain provisions of the Law on compensation for damage inflicted by unlawful actions of the interrogation and investigation Bodies, the Prosecutor's Office and Courts. The Court has to find out whether these provisions violate the human rights and freedoms enshrined in the Constitution.

Call for information concerning the practices of other European countries in cases pertaining to the following issues:

1. Liability of the investigation bodies, the prosecutor's office and courts for damage inflicted by unlawful actions.
2. Compensation for damages in cases of unlawful detention or arrest.

From: Ms Zivile Liekyte, acting for Judge Staciokas

Date: 27/04/00

Responses from:

1. Austria, the Constitutional Court, Mrs Reinhild Huppmann, 05/05/00

As to the request of Ms Liekyte of the Lithuanian Constitutional Court I want to answer as follows:
1) "unlawful actions" set by investigation bodies, prosecutor's office and/or courts:
There is of course a liability of all those authorities if they acted culpably. "Unlawful actions" can lead to disciplinary measures (disciplinary authorities) and/or to a lawsuit (ordinary courts). But neither of these can be brought to the Constitutional Court!

2) Payment of damages in cases when a person was temporarily detained or arrested:
This question can only concern unlawful detention (arrest). Yes, every person who was unlawfully detained is entitled to payment of damages. I may refer to the précis which is already enlisted in your email (codices search result): such a claim for compensation can be applied for according to the "Law on Compensation in Criminal Cases" (Strafrechtliches Entschädigungsgesetz). The decision of the Constitutional Court refers to a ruling of the ECHR of August 25, 1993, Nr. 21/1992/366/440, case Sekanina versus Austria) according to which the refusal of compensation "might raise an issue under Art. 6 § 2 of the Convention" and in this case (verdict of acquittal which became final) also violated this Article. The Austrian Constitutional Court following the ECHR's legal opinion could, however, interpret an impugned legal statute of the above-mentioned law in conformity with the Constitution. Due to this interpretation compensation must be paid to every applicant who was acquitted (no matter the reasoning of the acquittal verdict.) = Erk. VfGH of September 29, 1994, G 24/94 ao.
As those procedures are in the jurisdiction of the ordinary courts, there is no further "case-law" of the Constitutional Court.
In case that there are any questions left, please contact me.
Sincerely yours,
Reinhild Huppmann

2. Azerbaijan, the Constitutional Court, Mr Raouf Guliyev, 02/05/00

Dear Mr. Durr,

Unfortunately the Constitutional Court of Azerbaijan does not have the case law on the issue mentioned in the request from Constitutional Court of Lithuania.

However, I am sending the Law* of Azerbaijan Republic concerning indemnity to physical persons resulting from unlawful actions of inquest, investigation, prosecution and court bodies that can be of any use for our Lithuanian colleagues.
Best regards from Baku.

Sincerely,

Raouf Guliyev

*Note from the Secretariat: the above-mentioned law is available in Russian upon request

3. Belgium, the Court of Arbitration /Constitutional Court, Mr Rik Ryckeboer, 03/05/00

Dear Ms Liekyte,

Via Mr. Dürr, I received your request for information on the issue of damages after unlawful investigation actions and detention.

In Belgium, each person who has been kept in detention for more than 8 days and was acquitted afterwards by judgment is entitled to compensation, as well as any person who was detained in violation of article 5 of the European Convention on Human Rights (articles 27 and 28 of the law from 13/4/1973 on useless custody).

Yet we have no specific decisions from the Belgian Constitutional Court on this issue.

Sincerely yours,

Rik Ryckeboer

4. Denmark, the Supreme Court, Mr Søren Stig Andersen, 08/05/00

Dear Zivile Liekyte,

From the Secretariat of the Venice Commission I have received a request from you concerning, inter alia, the liability of investigation bodies.

In Denmark the question is regulated in the Administration of Justice Act, chapter 93 a. The rules for payment of damages, where a person has been arrested or remanded in custody, are found in § 1018 a.

Beside the Statute there is extensive case law and other decisions concerning the liability of investigation bodies as well as literature on the topic. In the following I will briefly outline the principles concerning damages for arrest and remand in custody.

Until 1978, a claimant would recover damages unless the police's information gave reason to believe that the claimant had committed the offence for which he was held in custody. In 1978, objective liability was introduced by an Act of Parliament. Now, the authorities have to pay damages whether or not their actions give rise to liability after the general law of damages. Only if the accused himself has been the cause of the investigative actions, the damages may, however, be reduced or extinguished.

I hope that this may be of some use to you. Please, do not hesitate to contact me for further, and more specific, information on this important area if needed.

Yours sincerely,

Søren Stig Andersen

5. Iceland, the Supreme Court, Mr Hjörtur Torfason, 09/05/00

Dear Ms. Liekyte,

I refer to your letter to Mr. Dürr of the Venice Commission Secretariat dated 27 April 2000, where you request information on the legal practice in other countries relating to liability and compensation for damage suffered by reason of unlawful action on the part of investigation bodies, prosecution authorities or the courts. In response, I am pleased to submit the following:

1.The Constitution of the Republic of Iceland of 1944 (Constitutional Law No. 33/1944) did not include provisions relating directly to this subject matter until its human rights chapter was amended in 1995 (by Const. Law No. 97/1995). As a result of that amendment, we now have an Article 67, para. 5 stating that a person who has been deprived of his or her liberty without just cause shall have a right to compensation, and an Article 70, para. 2 stating that anyone accused of criminal conduct shall he presumed innocent until his guilt has been proven.

In addition, as the European Convention on Human Rights and Freedoms has been given the force of law in Iceland by an Act No. 62/1994, the corresponding provisions of Articles 5 and 6 thereof now are a part of the general statutory law of the country and are also directly applicable to this matter in that capacity. While they thus do not formally stand on the level of constitutional law, it is likely that the above provisions of the Constitution will be interpreted in the light of the Convention provisions and the interpretation given thereto by the European Court of Human Rights from time to time.

2.During the first years of the Republic the general law on the matter was contained in isolated statutory provisions and common law principles, but in 1951, it was codified in a specific chapter of a new code of criminal procedure. This code was revised and renewed in 1974 and again in 1991 without a major change in that chapter, so that the provisions now are contained in *Chapter XXI, Compensation to Accused Persons et al., of the Act No. 19/1991 on Criminal Procedure.* However, a significant change in the Chapter has now been made by an amending Act No. 36/1999.

Although the provisions of the Chapter are designed to deal comprehensively with the matter, they are not necessarily fully exhaustive, and in any case they must be interpreted and applied in the light of the above constitutional provisions and other overriding general principles of law.

3.The said Chapter XXI of the Act No. 19/1991 on Criminal Procedure (as now amended) mainly deals with the matter in three Articles (175-177). The first of these sets out general conditions for compensating damage suffered by a suspected or accused person, the second deals with liability for acts of investigation and prosecution, and the third deals with liability for the results of judgements of the courts of law. They read approximately as follows, in my English translation:

Art. 175. Para 1. *A claim for compensation according to this Chapter may be accepted if an investigation has been discontinued or an indictment of prosecution not been issued by reason of the conduct allegedly committed by an accused person being thought not to be criminal or of proof for the conduct not being obtained, or if the accused has been acquitted of guilt for such reasons by an unappealled or unappeallable court judgement. However, compensation may be disallowed or reduced if the accused has caused or contributed to the actions on which he bases his claim.*

Para 2. *Compensation shall extend to pecuniary damage and immaterial damage, as the circumstances may warrant.*

Article 176. *Compensation may be awarded in respect of an arrest, a search of person or premises, a seizure of objects, an examination of the health of a person, a detention in custody and other actions involving a restraint of liberty, other than imprisonment, cf. Art. 177:*
(a) if the lawful conditions precedent for such action were not at hand, or
(b) if there was not sufficient reasonable cause for such actions in the particular circumstances or they were carried out in an unnecessarily dangerous, hurtful or insulting manner.

Art. 177. *Where it becomes clear that a person while innocent has been subjected to a criminal conviction by court sentence, to criminal punishment or to confiscation of property, he or she shall be awarded damages for immaterial and pecuniary damage, including a loss of position and employment, ... but such compensation may be reduced in proportion with the person's own fault in respect of having been wrongly convicted.*

Article 178 deals with the procedure for pursuing a claim for compensation and provides that it shall be brought before the courts in an ordinary civil action against the State, in which the claimant shall be granted free process both in the first instance and on an eventual appeal to the Supreme Court. It also states that the claimant may be ordered to pay costs in the ordinary manner if he loses the suit. (Under the Acts of 1951 and 1974, it had also been possible to ask an investigating judge or the judge in the criminal action itself to award compensation. The former alternative is no longer relevant, as the practice of having judges handle the investigation of cases has been wholly abolished, and the latter alternative may involve complications from the point of view of judicial impartiality and a balanced consideration of the issue.)

Article 179 provides firstly that the State Treasury shall be answerable for payment of the compensation, and secondly that the Treasury may have a claim against the judges, prosecutors or investigators concerned if the actions on which the claim was based or the injurious

performance thereof may be held to have been occasioned by intentional or grossly negligent fault on their part.

Article 180 provides that the rights of transfer to another of a claim of this kind and of succession to a claim by inheritance shall be the same as for ordinary civil damage claims.

Article 181 provides that a claim for compensation shall be barred by limitation if not made within six months of the time at which the person became aware of the discontinuance of investigation or prosecution or the rendition of an acquitting judgement or the time of his or her release from imprisonment. This time limit obviously relates to the importance of making swift correction and proceeding upon fresh evidence, but is relatively short in comparison with the limitation period for ordinary civil damage claims, which mainly is either 4 years (where special liability rules or insurance liabilities are concerned) or 10 years (for claims under the general rule of liability for culpable fault).

Finally, Article 182 provides that the accused can, instead of suing for compensation, demand from the authority concerned a certification to the effect that his treatment was not deserved.

4. The amendment of the Chapter by Act No. 36/1999 primarily was made in order to change the provisions of Article 175, para.1, which originally was phrased more restrictively than in the above. Before the amendment, this paragraph (and the corresponding provisions of the Acts of 1951 and 1974) read approximately as follows:

Para. 1. *A claim for compensation according to this Chapter may, except where otherwise specifically provided, only be accepted if:*
a. An accused person has not by wilful or grossly negligent unlawful conduct given cause to the actions on which his or her claim is based, such as by absconding, by giving false information, by attempts to obstruct investigation, etc., and
b. an investigation has been discontinued or an indictment of prosecution not been issued by reason of the conduct allegedly committed by the accused being thought not to be criminal or of proof for the conduct not being obtained, or the accused has for such reasons been acquitted of guilt by an unappealed or unappealable court judgement, and provided that he may be held more likely to be innocent than guilty of the conduct in question.
"As may be seen by comparison with the text in Section 3 above, the 1999 amendment mainly was to the effect of deleting the underlined passages or provisos in subparagraphs (a) and (b) and replacing them by the single proviso now contained in the second and concluding sentence of paragraph 1. In addition, the tenor of the introductory wording of the paragraph was changed from negative to positive. "

5.The said amendment did not come about as a result of views expressed by the Icelandic courts, which up to that time had not seriously challenged the constitutional validity of Article 175 or its predecessors in the earlier criminal procedure codes. Thus the above proviso that an accused or suspect in a criminal investigation should show that he was more likely to be innocent than guilty was relied on by our Supreme Court in a judgement given as late as 30 November 1995 (H.1995:2994) by three of my colleagues, where they were asked to apply the provisions of the 1974 criminal code. The case involved a young lady who was subjected to temporary detention in 1989 in the investigation of a cocaine traffic matter where her common law husband was eventually convicted of a serious offence. The lady *inter alia* was indicted for having handed over to the husband a sum of money for the purchase of cocaine, but was acquitted by the court handling the matter due to insufficiency of reliable proof on the incident. In her suit for

compensation on account of her arrest and detention, one of the grounds why the District Court of Reykjavík and the Supreme Court decided to reject her claim was that she was not held to have shown that she was more likely than not to have been unaware of the purpose for which the money handed over was to be used.

It is possible that the result of the case would have been different if the above amendment had already been in place (and the reasoning of the Court clearly would not have been the same). However, this is not certain, as the various complications of the overall drug traffic case might have led the Court to conclude e.g. that the lady's involvement with the principal actor and part of the events had been such as to render the suspicion upon which she was remanded in custody (which lasted about a month) entirely reasonable.

In another decision of 16 October 1997 (H. 1997:2742), three of my colleagues on the Supreme Court were asked to consider the claim of a foreign sailor who was accused in 1995 of having been party to a rape of a drunken woman aboard his ship in Icelandic harbour. In the court case following his detention and indictment, it was held to be proven by way of a DNA investigation that the sailor had had intercourse with the lady, but he was acquitted of the indictment due to insufficiency of proof that their relations had in fact constituted a rape. During the police investigation and in the criminal action, the sailor steadfastly denied having had any contact with the lady, despite the DNA evidence against him. In his suit for compensation following the acquittal, both the District Court of Reykjavík and the Supreme Court decided to reject his claim in full, primarily on the ground that his denial of sexual relations with the lady had been proven manifestly untrue. Citing the proviso in the above subpara. a of Art. 175, para. 1, the Supreme Court stated that by giving deliberately false testimony, the sailor had in fact drawn upon himself a strong suspicion of having committed rape and thus given cause for his formally lawful detention (which lasted more than 3 months, i.e. from the time the police had received the provisional results of the DNA investigation until the end of the criminal action).

Although the provision cited has now been deleted, it is rather likely that the result of this case would have been the same under Article 175 as now amended, seeing that the Constitution and Convention provisions referred to in Section 1 above were expressly cited in favour of the claimant, but did not affect the outcome in the opinion of my colleagues.

6.The amendment was initiated in a manner similar to that applied in most of the procedural law reforms of recent years, i.e. by a Law Bill drafted under the auspices of the Minister of Justice and in consultation with the Procedural Law and Justice Committee, a standing non-parliamentary committee operating in liaison with the Ministry. The Bill, which included amendments of some other specific parts of the 1991 criminal procedure code, was introduced to the Althing (parliament) in the winter of 1998-99 and presented as the forerunner of an overall revision of the code which the Ministry was aiming at completing in the near future. The proposed amendment of Article 175 was approved by the Althing in March 1999.

In the comments introducing the Law Bill, it was specifically explained that the change in Article 175 was being proposed by the Ministry in the light of Articles 70 (2) and 67 (5) of the Constitution and Articles 6 (2) and 5 (5) of the European Human Rights Convention, cf. Section 1 above. The Ministry stated that in its opinion, there especially was a pressing need for removing from the Article the condition that a person seeking compensation after having e.g. been acquitted in a criminal case due to insufficiency of proof must be more likely to be innocent than guilty of the conduct in question.

7.In the processing of the Law Bill, it was further explained that one reason for the desirability of the change in Article 175 was the fact that its validity was currently being contested before the European Court of Human Rights, in a case brought by the young lady whose claim for compensation was rejected by the above Supreme Court judgement of 30 November 1995. In this case (Vilborg Yrsa Sigurðardóttir vs. Iceland, application registered on 30 July 1996, file no. 32451/96), the Court of Human Rights has in fact declared in a decision rendered on 24 August 1999 that the lady's claim for redress against Iceland is not manifestly ill-founded, in so far as it is based on the Supreme Court having included a reference to the proviso of likely to be innocent rather than guilty among the grounds for its decision, and that her application accordingly is admissible for final processing. The Court thus has found that there may here be an application of inconsistency with Article 6 (2) of the Convention.

As I understand, an attempt to settle the case is presently going on, and that there accordingly is some likelihood that the court of Human Rights will not need to proceed to a judgement on the merits of the case.

8.While it is not appropriate for me to state a definitive opinion on the matter, I must say that there is much to recommend the view that there was in fact reason to regard the above proviso of the original Article 175 as unconstitutional in light of the Constitution and Convention provisions referred to in Section 1 above.

As regards the proviso formerly included in subpara. a of Art. 175, para. 1 (the reference to a suspect or accused absconding, giving false testimony or otherwise obstructing justice), the indication of unconstitutionality is perhaps not as strong, but there is much to recommend a view that this reference would be unconstitutional if interpreted as an absolute barrier to the success of a claim for compensation, in light of the rule against self-incrimination and other fundamental principles.

9.As noted in Section 6 above, it is to be expected that an overall revision of the Act No. 19/1991 on Criminal Procedure will take place in the near future. At this stage, I should think it is likely that such revision will not result in any major change in Chapter XXI as now amended, and that the eventual proposals for alteration of the text given in Section 3 above would relate more to wording and style than to substance.

10. As regards the question of the appropriate compensation for immaterial and/or pecuniary damage suffered as a result of the actions here in question, the prevailing rule in Icelandic law is that this determination should be left to the courts, as implicit in the text of Art. 175, para 2 and the other Articles referred to in Section 3 above. In other words, the principle is the same as the principle which traditionally has applied to ordinary civil damage claims, where the point of departure has been that the extent of damage and compensation therefore should be evaluated and determined by the courts according to the merits and circumstances of each case, without specific restriction or regulation of their deciding power.

Up to this time, it has not been regarded as constitutionally necessary to establish by law specific standards (minimum, maximum or otherwise) for determining the amount of appropriate compensation in this particular field, and that view is likely to prevail for some time. However, it is clear that the discretion of the courts in the matter is limited by several general principles, including those of reasonable equality among persons and sufficiency of individual redress and presumably that of maintaining an adequate deterrence against abuse.

As I do not know the exact problems of legislation which your Constitutional Court is being asked to consider at this time, much of the above may well be superfluous, but I hope you may find it of some help. If you should require further information on specific points, we will try to respond promptly.

With kind regards,

Sincerely, Hjörtur Torfason

6. The Venice Commission Secretariat, Mr Schnutz Rudolf Dürr, 27/04/00

CODICES search results:

ARG-1997-2-001: **a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 04/05/1995 / **e)** D.236.XXIII / **f)** De Gandia c. Buenos Aires, Provincia de (indemnización por daño moral) / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 315:2309 / **h)** .

AUT-1994-3-012: a) Austria / **b)** Constitutional Court / **c)** / **d)** 29/09/1994 / **e)** G 24/94, G 85/94, G 86/94 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Collection of decisions and judgments of the Constitutional Court), 13879/1994 / **h)** .

IRL-1998-2-002: **a)** Ireland / **b)** Supreme Court / **c)** / **d)** 04/03/1997 / **e)** 53/97 / **f)** The People (at the Suit of the Director of Public Prosecutions) v. Peter Pringle / **g)** / **h)** .

NED-1998-1-013: **a)** The Netherlands / **b)** Supreme Court / **c)** First division / **d)** 23/01/1998 / **e)** 16.490 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 27.

POL-1998-3-023: a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08/12/1998 / **e)** K 41/97 / **f)** / **g)** to be published in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzêdowy* (Official Digest) / **h)** .

ROM-1998-1-001: a) Romania / **b)** Constitutional Court / **c)** / **d)** 10/03/1998 / **e)** 45/1998 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 504, paragraph 1, of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), no. 182/18/05/1998 / **h)** .

RSA-1997-2-005: a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05/06/1997 / **e)** CCT 14/96 / **f)** Fose v. Minister of Safety and Security / **g)** 1997 (3) *South African Law Reports*, 786 (CC) / **h)** 1997 (7) *Butterworths Constitutional law Reports*, 851 (CC).

SUI-1998-3-008: a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 23/09/1998 / **e)** 1P.684/1997 / **f)** André Plumey v. Public Prosecution Service and the Appeal Court of the canton of Basle-Urban / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 274 / **h)** .

SUI-1997-3-008: a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 20/10/1997 / **e)** 1P.689/1996 / **f)** Walter Stürm v. Public Prosecutor's Office and Cantonal Court of the Canton of Valais / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 123 I 283 / **h)** .

SUI-1993-3-007: a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 26/05/1993 / **e)** 1P.147/1993 / **f)** H. against the State Counsel's Department and the Grisons cantonal court / **g)** *Arrêts du Tribunal fédéral* (Decisions of the Federal Court), 119 Ia 221 / **h)** *Europäische Grundrechte-Zeitschrift*, 1993, 406.

USA-1999-1-001: **a)** United States of America / **b)** Supreme Court / **c)** / **d)** 26/05/1998 / **e)** 96-1337 / **f)** County of Sacramento v. Lewis / **g)** 118 *Supreme Court Reporter* 1708 (1998) / **h)** .

ECH-1998-2-007: a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25/05/1998 / **e)** 15/1997/799/1002 / **f)** Kurt v. Turkey / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)** .

ECH-1998-1-004: a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 19/02/1998 / **e)** 158/1996/777/978 / **f)** Kaya v. Turkey / **g)** to be published in *Reports of Judgments and Decisions*, 1998 / **h)** .

ECH-1997-3-016: **a)** Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25/09/1997 / **e)** 57/1996/676/866 / **f)** Aydin v. Turkey / **g)** to be published in *Reports of Judgments and Decisions*, 1997 / **h)** .

ECH-1988-S-007: **a)** Council of Europe / **b)** European Court of Human Rights / **c)** Plenary Court / **d)** 29/11/1988 / **e)** 10/1987/133/184-187 / **f)** Brogan and Others v. the United Kingdom / **g)** Vol. 145-B., Series A of the Publications of the Court / **h)** .

Note from the Sectertariat: The ruling of the Lithuanian Constitutional Court from 30 June 2000 is available in English from the Court's web site http://www.lrkt.lt

V. The Constitutional Court of the Republic of the **Former Yugoslav Republic of Macedonia**: rights of the President after the end of his/hers mandate

A petition challenging the Law on the rights of the President of the Republic after expiration of his/her office has been launched before the Constitutional Court of the Former Yugoslav Republic of Macedonia.

The call is for information on statutes from the other countries regulating Presidential rights after the end of his/her mandate.

From: Mr Simeon Petrovski

Date: 05/05/00

Responses from:

1. Belgium, the Constitutional Court/ Court of Arbitration, Mr Rik Ryckeboer, 11/05/00

Dear Mr. Petrovski,

We received via Mr. Durr your question and have following information concerning Belgium.

Belgium is not a republic but a monarchy. Basic rules on succession of the King are in the Constitution itself (articles 85 and following) (See CODICES 1999/2). Members of the royal family receive an annual donation by law of parliament allowing good living conditions, including staff and other facilities.

Yours sincerely,

Rik Ryckeboer

2. Lithuania, the Constitutional Court, Mr S. Staciokas, 15/05/00

Dear Mr. R. S. Dürr,

We've got your letter with the request of Mr. Simeon Petrovski which contains questions about the President's rights after expiration of term of his/her office.

Thus, the Constitutional Court of the Republic of Lithuania hasn't investigated these problems yet. But there is such statutory regulation in Lithuania. Firstly, Article 90 of the Constitution provides that "The financing of the President of the Republic and of the President's residence shall be established by law." The Parliament of Lithuania - the Seimas - has adopted the Law on the Office of President (No. I-56). Article 20 of this Law establishes that "Upon leaving state service, the President of the Republic shall, for the rest of his life, be:
1) given a monthly pension equal to 50 percent of the salary of the President of the Republic;

2) provided with vacation residence and services, as well as protection and transport. The number of persons providing assistance, as well as the amount of protection and means of transport shall be established by the Government of the Republic of Lithuania."

The procedures of the payment of President's pension are established by 19 February 1998 Government of the Republic of Lithuania resolution, but it must be emphasized once more that the sum of this pension is established by the Law. Besides, I must stress that on 23 of December 1997 the Government of the Republic of Lithuania adopted the resolution which is an individual act fixing maintenance and service (except pension) for (ex)President Mr. Algirdas Brazauskas.

Sincerely yours,

S. Staciokas

LAW ON THE OFFICE OF PRESIDENT

Article 1.

The announcement of the results of the elections for President of the Republic shall be the publication of the Resolution of the Electoral Committee for Elections of the President of the Republic in the newspapers of the Republic of Lithuania through the Lithuanian News Agency (ELTA).

The Electoral Committee for Elections of the President of the Republic shall present the elected President of the Republic with the Presidential certificate of the Republic of Lithuania within three hours of the publication of results of the elections for President of the Republic.

Article 2.

The elected President of the Republic shall begin presidential duties on the day following the expiration of the term of the previous President of the Republic, and after taking the presidential oath to the People in Vilnius and in the presence of members of the Seimas, who are representatives of the People.

In the event that the President was elected in cases provided for in part 1 of Article 89 of the Constitution of the Republic of Lithuania, the president shall begin duties five days after the publication of the results of the elections for President of the Republic, and after taking the presidential oath to the People in Vilnius and in the presence of members of the Seimas, who are representatives of the People.

Article 3.

The following text shall be the established oath of the President of the Republic:I, (full name), swear to the People to be faithful to the Republic of Lithuania and its Constitution, to respect and implement the laws, and to protect the integrity of the territories of Lithuania; swear to conscientiously execute the Office of President of the Republic and to be equally just to each individual; swear to strengthen, to the best of my ability, the independence of Lithuania, and to serve the Homeland, democracy and the well- being of the people of Lithuania.

So help me God!

The last sentence may be omitted from the oath.

Article 4.

The President of the Republic shall take the oath in the Seimas building during a sitting of the Seimas.

The President of the Republic shall take the oath while Standing before the Chairperson of the Constitutional Court who shall administer the oath, or, in the absence of the Chairperson, in front of one of the judges of the Constitutional Court; the President shall read the text of the oath holding his hand on the Constitution of the Republic of Lithuania.

Upon taking the oath, the President of the Republic shall sign the act of the oath. After the President, the act of the oath shall be signed by the Chairperson of the Constitutional Court, or, in the Chairperson's absence, by the judge of the Constitutional Court who has administered the oath. The act of oath of the President of the Republic shall be handed to the Chairperson of the Seimas and shall be kept in the Seimas.

The text of the oath shall not be amended or changed. Non-compliance with this provision as well as refusal to take the oath at a sitting of the Seimas, refusal to sign the act of the oath, or signing with reservations thereof shall signify that the President of the Republic has not taken the oath and therefore may not carry out presidential duties.

The National Anthem shall be sung after the signing of the act of the oath.

Article 5.

The signatories of the 11 March 1990 Act on the Reestablishment of the Independent State of Lithuania, members of the Government of the Republic of Lithuania, dignitaries and representatives of the Churches of Lithuania, representatives of political parties and other political and public movements, as well as diplomats of foreign states accredited in Lithuania shall be invited to take part in the inaugural ceremony of the President of the Republic.

Lithuanian radio and television shall broadcast (live) the inauguration ceremony of the President of the Republic.

Article 6.

The day after the President of the Republic takes oath, the Government shall return its powers to the President.

Article 7.

A person who has been elected the President of the Republic must suspend his or her activities in political parties and political organisations until the beginning of a new presidential election campaign. The President of the Republic must publicize such a statement the day after the Electoral Committee for Elections of the President of the Republic presents him with the certificate of President of the Republic.

Article 8.

The honour and dignity of the President of the Republic shall be protected by the laws of the Republic of Lithuania.

Laws shall provide responsibility for public insult or slander of the President of the Republic.

Article 9.

The President of the Republic, as the head of the State, shall be allotted time on State radio and television to speak on issues of domestic and international policy.

In the event of an emergency, time which has not been provided for in radio and television programs must be given to the President of the Republic.

Article 10.

Persons who have served as President of the Republic shall hold the title of President of the Republic for the rest of their lives.

Article 11.

The President of the Republic shall use a round stamp and document forms inscribed with the State Emblem of Lithuania. The stamp shall contain the inscription "The President of the Republic of Lithuania.

Article 12.

The President of the Republic shall have a flag which shall be the symbol of the head of the State.

The flag of the President of the Republic shall be made of purple cloth, on both sides of which the State Emblem of Lithuania shall be in the centre, held by a griffin on the right and a unicorn on the left. The width to length ratio of the flag of the President of the Republic shall be 1: 1.2.

The flag of the President of the Republic as well as pictures thereof must always correspond to the standard picture of the colours of the flag of the President of the Republic, which shall be approved by the Seimas of the Republic of Lithuania on the recommendation of the Heraldry Committee of Lithuania.

The flag of the President of the Republic shall be flown over the residence of the President of the Republic when the President of the Republic is in Vilnius, or in the place where the President's summer residence is located.

The flag of the President of the Republic shall also be flown on ships or other vehicles, on or in which the President of the Republic is.

Article 13.

The President of the Republic shall have a residence, which shall serve as the premises for the President of the Republic's work, representation and residence, as well as the working premises of assistant officials.

Funds allocated to finance the residence of the President of the Republic shall be provided for in the Law on the State Budget, where funds allocated to finance units providing services to the President of the Republic shall be indicated separately. Fixed-term labour contracts shall be concluded with the officials of the units providing assistance to the President of the Republic for the term of office of the President of the Republic. In the event that the powers of the President of the Republic are terminated, the officials assisting the President shall, in all cases, resign.

The President of the Republic shall issue orders related to issues of his residence, the structure of the units assisting him, personnel, and the organization of internal work.

Article 14.

The material accumulated in the Chancellery of the President of the Republic as well as in other units shall be a special and constituent part of the history of the People and the State of Lithuania, and shall be national property. The archival material which is accumulated in the Chancellery of the President of the Republic as well as in other units shall be arranged and kept in pursuance with regulations which shall be established by special provisions of the Republic of Lithuania Law on Archives. The Head of the Chancellery of the President of the Republic shall be personally responsible for the accumulation, arrangement and keeping of such archival material.

Article 15.

The President of the Republic, in implementing the powers vested in him, shall issue acts - decrees.

Decrees of the President of the Republic shall be registered in the book of decrees of the President of the Republic and shall be given an appropriate current number.

In accordance with the established procedure, decrees of the President of the Republic shall be published in the Parliamentary and Governmental Records and newspapers, and shall be publicized through radio and television.

Decrees of the President of the Republic shall enter into force on the day after the announcement thereof, provided that another date of entry into force is not indicated therein.

Article 16.

Decrees of the President of the Republic concerning issues specified in Article 85 of the Constitution of the Republic of Lithuania shall also be signed by:

1) The Prime Minister of the Republic of Lithuania – concerning issues of the appointment or dismissal of diplomatic representatives of the Republic of Lithuania to foreign states and in international organisations;
2) the Minister of Foreign Affairs of the Republic of Lithuania -concerning the granting of highest diplomatic ranks and special
titles;
3) The Prime Minister of the Republic of Lithuania – concerning the granting of highest military ranks;

4) The Prime Minister of the Republic of Lithuania – concerning the declaration of a state of emergency; and
5) The Minister of Internal Affairs - concerning the granting of Lithuanian citizenship.

Article 17.

Laws which are handed over to the President of the Republic of Lithuania to be signed and officially promulgated must be signed by the Seimas Chairperson or Deputy Chairperson, thereby certifying the authenticity of the law which has been adopted by the Seimas, in accordance with the procedure established by the Statute of the Seimas.

Laws of the Republic of Lithuania which are handed to the President of the Republic to be signed and officially promulgated shall be registered in a special book in which the date of the signing and promulgation thereof shall later be indicated, or records shall be made concerning the return of these laws to the Seimas for repeat consideration.

At the end of the text of a law of the Republic of Lithuania and before the signature of the President there shall be and entry reading: "I promulgate this Law adopted by the Seimas of The Republic of Lithuania".

Article 18.

The following state maintenance and service for the President of the Republic shall be established:
1) a salary equal to 12 average monthly salaries;
2) a residence and official flat in Vilnius as well as a summer residence;
4) a special aircraft and two motor cars;
5) security provided by a special service;

6) special fund for representation expenses in the country and in foreign states. In accordance with the international diplomatic practice, representation expenses should be accounted for, except for expenditure equaling 25 per cent of the monthly salary of the President.
Amendment of Article 18/ No. I-664, 17.11.94

Article 19.

Gifts which the President of the Republic receives during official visits to foreign states, as well as from representatives of foreign states during their official visits to Lithuania, shall be the property of the State and shall be kept in the residence of the President of the Republic. Such gifts may, in the established manner, be transferred to museums for safekeeping; particularly valuable gifts may be transferred to the Bank of Lithuania.

The procedure established in this Article shall also be applied to gifts, which are presented to the President of the Republic as the head of the State in Lithuania.

Article 20.

The safety of the President's of the Republic family shall be ensured by the special service.

Upon leaving state service, the President of the Republic shall, for the rest of his life, be:

1) Given a monthly pension equal to 50 percent of the salary of the President of the Republic;
2) provided with vacation residence and services, as well as protection and transport. The number of persons providing assistance, as well as the amount of protection and means of transport shall be established by the Government of the Republic of Lithuania.

Burial costs for Presidents of the Republic shall be covered by the State.

3. Italy, the Constitutional Court, Mr Giovanni Cattarino, 17/05/00

Dear Mr. Petrovski,

According to art. 59 of the Italian constitution, the President of the Republic, after expiration of his term of office (seven years), becomes a member of the Senate (one of the two chambers that form the Parliament) for life. Consequently, he has the right to enjoy all the prerogatives that are to be recognized to Senators by the internal regulations of the Senate (emoluments, possibility of using the staff of the Senate, office in the premises of the Senate, etc.).

Best regards,

Giovanni Cattarino

4. Romania, the Constitutional Court, Ms Gabriela Dragomirescu, 16/05/00

Cher Monsieur,

Suite à votre lettre datée le 11 mai courrant, relative aux droits du *Président du pays après l'expiration de son mandat* nous vous transmettons, ci joint, en roumain, le projet de la Loi relative à l'octroi de certains droits aux personnes qui ont eu la qualité de chef de l'Etat roumain.

Ce document n'est qu'un projet, aux débats du parlement de la Roumanie, parce que, ainsi que vous pouvez y remarquer, à la fin du document, cette loi a été adoptée uniquement par la Chambre des Députés.

Espérons que, dans ce projet de loi, notre collègue de la Cour Constitutionnelle de Skopje, retrouve des réponses au problème que l'intéresse.

Nous saisissons cette occasion pour vous confirmer encore une fois notre détermination en ce qui concerne une bonne collaboration entre la Cour Constitutionnelle roumaine et la Commission de Venise, ainsi qu'entre notre institution et les autres membres de cette organisme international et vous prions de croire, cher Monsieur, à l'assurance de notre considération distinguée.

Gabriela Dragomirescu

Note from the Secretariat**:** The above-mentioned draft law on the rights of the President after the end of his mandate is available in Romanian upon request

VI. **The Constitutional Court of Albania**: Interpretation of the phrase "the participation of the armed forces in protecting the constitutional order"

The Constitutional Court of Albania has been seized with a request to interpret the first paragraph of article 12 of the Constitution stipulating that *« 1. The armed forces secure the independence of the country, as well as protect its territorial integrity and the constitutional order."* It has been asked, in particular, to interpret "the participation of the armed forces in protecting the constitutional order". The Constitutional Court is missing the practice relative to problems of constitutional order and even more so to the functions of armed forces

French text:
La Cour constitutionnelle d'Albanie a été saisie d'une demande d'interprétation du premier paragraphe de l'article 12 de la Constitution stipulant que « *1. Les forces armées assurent l'indépendance du pays ainsi qu'elles protègent l'intégrité territoriale et son ordre constitutionnel » (1. The armed forces secure the independence of the country, as well as protect its territorial integrity and constitutional order.)* Il y est demandé, spécialement, d'interpréter "la participation des forces armées pour protéger l'ordre constitutionnel". Il manque à la Cour constitutionnelle la pratique relative aux problèmes d'ordre constitutionnel et d'autant plus aux fonctions des forces armées.

From: Mr Luan Pirdeni, the Constitutional Court, Republic of Albania
M Luan Pirdeni, Cour constitutionnelle, République d'Albanie

Date: 12/12/00

Responses from:

1. Belgium; the Constitutional Court; Mr Rik Ryckeboer and Ms Anne Rasson, 19/12/00

Dear Mr Pirdeni,

In Belgium, we have no constitutional provision of the type of your Article 12, first paragraph.

In Belgium, we have no constitutional provision of the type of your Article 12, first paragraph.

However, the Belgian Constitutional Court (Court of Arbitration) expressed on two occasions the functions of the Gendarmerie as a part of the armed forces.

We distinguish Army from Gendarmerie and Police. The Army is purely dedicated to the duties of safeguarding independence and territorial integrity, which correspond to the two first functions in your Article 12.

The other forces (Gendarmerie and Police, which are to be integrated) are purely dedicated to what appears to be related to the third function in your Article 12, which poses the interpretation problem that you mention.

In a decision no. 62/93 of 15 July 1993, the Belgian Court of Arbitration outlines the specific role which the Gendarmerie has to play « as a national police force, more particularly the need to ensure the continuity of service under all circumstances with a view to keeping law and order and safeguarding the proper functioning of the institutions of a democratic constitutional state » (consideration B.3.15).

In its decision no. 34/96 (consideration B.3.2), the Constitutional Court declares that the specific duties that are entrusted to the Gendarmerie « contribute to the achievement of objectives of public interest, namely internal security and law and order ».

We hope that this will help the Constitutional Court of Albania in the description of the constitutional functions of armed forces.

Rik Ryckeboer
Anne Rasson

2. Croatia; the Croatian Constitutional Court; Mrs Marija Salecic; 18/12/00

Dear Colleague,

The issue of the participation of the armed forces in protecting the Constitutional order did not appear before Croatian Constitutional Court.

The Constitution of Croatia recently changed. Art. 7 (sect. 4. and 5.) says that in cases foreseen in art. 17. and 101., /which means: in state of war, immediate threat to the independence and unity of the State, or in the event of severe natural disasters (=17), and in state of immediate threat to the independence, unity and existence of the state or when the bodies of state authorities are prevented from regular performance of their constitutional duties (=101)/ the armed forces may, should the nature of the danger require, be used for assistance to the police and other state bodies. Also that the defence system commanding, administration and democratic supervision over the armed forces of the Republic shall be regulated by the Constitution and the law. I can reply no more to the question.

Marija Salecic

3. France; the Constitutional Council, Mme Dominique Remy-Granger, 14/12/00

Cher Monsieur Pirdeni,

Il n'y a rien dans la jurisprudence constitutionnelle française sur le sujet; en revanche il existe plusieurs décisions de tribunaux japonais sur la "Garde de défense" (certainement disponibles en anglais) puisque le Japon n'a pas, contrairement à l'Allemagne, modifié sa constitution d'après-guerre qui l'empêchait d'avoir une armée. Voir en particulier "Le constitutionnalisme et ses problèmes au Japon; une approche comparative" de Tadakazu Fukaze et Yoichi Higuchi p.91 à 127; mais ce livre remonte à 1984; il n'est pas impossible que 1/ la Cour suprême du Japon ait pu, depuis, se saisir de la question et 2/ que les débats actuels sur la révision constitutionnelle abordent précisément le problème de la nécessité d'une armée pour préserver l'ordre constitutionnel d'un Etat. Cela dit, les débats préparatoires parlementaires allemands préalables à

la révision de la loi fondamentale sur le sujet devraient également fournir des éléments intéressants et plus accessibles.

Dès que vous aurez pris cette intéressante décision, je serais heureuse d'en avoir connaissance. Bon courage.

Dominique REMY-GRANGER

4. Iceland; the Supreme Court, Mr Hjortur Torfason, 18/12/00

Dear Mr. Pirdeni,
I have received from the Venice Commission a copy of your information request concerning the subject matter of Article 12 (1) of the Albanian Constitution.

I must report on behalf of the Icelandic Supreme Court that we have no comparable examples of cases where the Court has been asked to interpret especially the phrase "constitutional order", whether in relation to armed forces or otherwise. We also have no comparable phrase in our constitution, partly due to the fact that we have no armed forces except our naval Coast Guard. This force mainly has a general policing function together with a marine salvage and safety assistance function, and thus is not organised the same way as a conventional armed force.

For my part, however, I would expect the phrase "constitutional order" in the context of Article 12 (1) to be largely comparable to that which we call "*stjórnskipan*" in Icelandic, i.e. the basic system or institutional organisation of government as set out in the Constitution and represented by the principal institutions of the three powers, legislative, executive and judiciary. Accordingly, I would expect the relevant text of the Article to mean that the armed forces should exist to protect the integrity and basic lawful working capability of your principal institutions of government under the Constitution, i.e. the President, the General Assembly, the Cabinet of Ministers and its ministries, and the courts. To the extent that your system of government is regional, the protection might extend in the same manner to the basic lawful regional authorities.

In line with this concept, and in looking at Article 12 (1) as a whole, I should think that there is a direct interrelation between the phrases "independence of the country", "territorial integrity" and "constitutional order", so that the last one should be interpreted in light of the other two. On that basis, it might perhaps not be out of line to restate the last phrase by saying that the armed forces should safeguard the integrity of the lawfully constituted organs of government which are basic to the independence of the country under the Constitution.

However, these are merely my own reflections (relevant to the Icelandic *stjórnskipan*") and should be valued accordingly.
What I mainly wish to add is that I believe that the phrase "constitutional order" of the country is not wholly synonymous with the phrase "law and order", which is typically associated with the functions of the police. In our Police Law No. 90/1996, the description of the role of the police thus starts out by stating that the police should "preserve public safety and maintain law and order, and endeavour to secure the legal rights of the citizens and protect rights of property, public interests and lawful activity of all kinds". (Article 1.2.a). I should think that a description as involved in the first part of this quotation is too wide to be applicable to armed forces.

With kind regards, Hjörtur Torfason

5. Italy; Corte costituzionale, Mr Giovanni Cattarino, 15/12/00

L'art. 52 de la Constitution italienne qui concerne le service militaire et les Forces Armées ne prévoit pas que ces dernières puissent "protéger " l'ordre constitutionnel.

L'art. 52 , à son 3ème alinéa,dispose que "l'organisation des Forces Armées se conforme à l'esprit démocratique de la République". La jurisprudence de la Cour constitutionnelle concerne surtout la "conformité" à la Constitution de l'organisation militaire et des règles qui régissent cette organisation dans les différents sécteurs.

La Cour a ainsi estimé qu'était contraire à la constitution, car elle n'était pas justifiée par les péculiarités de l'organisation militaire et donc contraire au principe d'égalité) la règle qui rendait non applicable à la seule justice militaire la suspension des termes de procédure pendant les jours fériés (sent. n. 278 de 1987). Voir aussi la sent. n. 449 del 1999 (Bull. n. 3/99) sur l'interdiction pour les membres des Forces Armées de constituer ou d'adhérer à des organisations syndicales et l'ordonnance n. 396 de 1996 qui a déclaré conforme à constitution, car la défense du préstige des Forces Armées était en jeu, la faculté reconnue aux commandants militaires de demander d'initier l'action pénale pour les délits de moindre gravitè commis par leurs subordonnés

6. Kazakhstan; the Constitutional Council, Mr N. Akuev; 18/12/00

In response to your question I can say the following. The participation of the armed forces in protecting the constitutional order is a matter that should be decided by each country alone after all circumstances and conditions have been considered. The lawful basis for protection of the constitutional order is the current legislation of the country and the Constitutional norms have priority.

Yours sincerely,

N. Akujev

7. South Africa; The Constitutional Court, Mrs Lize Nadine Louw, 18/12/00

Unfortunately the South African Constitutional Court has no jurisprudence as yet on the role of the armed forces in protecting the constitutional order. This court has dealt with the armed forces in the context of labour law and the freedom of expression of individual members of the armed forces, and briefly within the context of the South African Truth and Reconciliation Commission. It has also dealt with the protection of the constitutional order by the subdivisions of the executive but not the armed forces in particular. Accordingly we have no direct authority which will contribute to your task of interpreting the provision you refer to.

I'm sorry we could not be of more assistance and we hope you succeed in your research.

Yours sincerely,

L N Louw

VII. **The Constitutional Court of Georgia**: the right to judicial protection and judicial review of state administrative decisions

A parliamentary faction is requesting the examination of the constitutionality of a provision of the law on Parliamentary Elections before the Constitutional Court of Georgia. The law provides that a decision or activities of a local electoral commission may be appealed to the court only when the decision concerns registration of a political party for the participation in the elections. In other cases the decisions of local electoral commissions can be appealed only to a superior electoral commission. The complainant asserts that the above-mentioned provision restrict the right to court appeal for the protection of rights and freedoms stipulated in Article 42 of the Georgian Constitution.

From: Mr Vano Tavadze

Date: 22/02/99

Responses from:

1. The Czech Republic, the Constitutional Court, Mr Mark Gillis,10/03/99

In response to the request from Mr. Tavadze of the Georgian Constitutional Court which you forwarded to me, I sent to Mr. Tavadze some basic information concerning the way the Czech Republic deals with the issue that interests him.

Memorandum

The Right to Judicial Protection in the Czech Republic

In the Czech Republic, the issue of the right to appeal to courts has been dealt with by the Constitutional Court, both in general and specifically for political parties. With regard to the information specifically requested on the right of a political party to appeal to a court against decisions of the Central Electoral Commission, the matter can be analyzed from two perspectives:
1.The general right to appeal to a court concerning administrative decisions.
2.The special right to judicial protection enjoyed by political parties.
1. Article 36 paras. 1-2 of the Charter of Fundamental Rights and Basic Freedoms lay down the general principle for the right of judicial protection:

(1) Everyone may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body.

(2) Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts.

Para. 1 of Article 36 provides for the judicial protection of rights, with the exception "in specified cases" of rights that may be asserted "before another body". This exception consists

primarily in the cases entrusted to decision of administrative agencies by the Administrative Procedure Act, No. 71/1967 Sb. As a complement, para. 2 of Article 36 provides that persons whose rights are decided upon by administrative authorities may have recourse to courts, but that exceptions to this principle may be laid down in a statute. For example, Act No. 99/1963, the Civil Procedure Code lays down in its Appendix A several such exceptions to the jurisdiction of ordinary courts to review administrative decisions for legality. Nonetheless, Article 36 para. 2 of the Charter provides that restrictions upon judicial review of administrative decisions of decisions affecting fundamental rights must remain within the jurisdiction of courts. Hence, as in the Georgian example, decisions concerning the exercise of political rights or the right to associate in a political party are fundamental rights and must remain subject to review by courts.

The Czech Constitutional Court has decided one major case concerning this Appendix A of the Civil Procedure Code [the University Admissions Cases judgment of 3 April 1996, No. Pl. 32/95, reported as 5 S.n.u., No. 26, p. 215, and No. 112/1996 Sb.] and upheld it in relation to a provision excepting from the jurisdiction of courts decisions by the rector of a university concerning admission to a university study program. Unfortunately, there is not yet a translation of this case available.

It emerged from the University Admissions Case, however, that even if it is permissible for a particular class of administrative decisions to exclude review before ordinary courts, the Constitutional Court jurisdiction to hear constitutional complaints may not be removed pursuant to Article 36 para. 2 of the Charter. That jurisdiction is given by Article 87 para. 1, lit. d), which confers on the Constitutional Court jurisdiction over cases in which an individual or a legal person claim the violation by a state authority of his/its constitutionally guaranteed fundamental rights. In the University Admissions Cases, although the Constitutional Court did not overturn the statutory exception to the jurisdiction of ordinary courts, it did exercise jurisdiction itself to determine whether the rector's actions in relation to the admission of two particular applicants had violated their fundamental rights. Ultimately, the Court decided that the rector's decision had not had not violated their fundamental rights.

2. Political Parties enjoy a special status and special protection in the Czech legal order.

The Act on the Elections to the Parliament of the Czech Republic, No. 247/1995 Sb., in Part One, Chapter 5 on Judicial Review, provides for the cases when decisions of the electoral commissions concerning elections may be appealed to courts. Sections 86 - 88 of that Act provides for judicial review before the Supreme Court of certain decisions of the Central Electoral Committee (CEC): either rejecting a list of candidates for elections to the Assembly of Deputies or removing a candidate from a list (§ 86), rejecting the registration of an individual candidate for elections to the Senate (§ 87), issuing of a certificate of election (§ 88; any person or party who competed in the election may submit this type of complaint). No further provisions provide specifically for appeals against CEC decisions, on the other hand, there are no special provisions excluding such an appeal pursuant to the general provisions on judicial review of administrative actions. Further, there exists a special proceeding in which SC decision under Section 88 may be appealed to the Constitutional Court. This proceeding, created by Article 87 para. 1, lit. e) of the Constitution, empowers the Constitutional Court to decide on "remedial actions from decisions concerning the certification of the election of a Deputy or Senator". In fact, in February 1999, the Constitutional Court decided the first proceeding of this type (its judgment is as yet unpublished) overturning a decision by the Supreme Court which had invalidated the election of a Senator.

In addition, just as is the case with all other natural and legal persons, political parties have the right under Article 87 para. 1, lit. d), to submit a constitutional complaint against any decision or action of state bodies alleged to have violated a constitutionally protected right. In the case of political parties, that will normally be the right to associate in political parties (as guaranteed by Article 20 para. 2 of the Charter), or the right to equal conditions of access to elective office (guaranteed by Article 21 para. 4 of the Charter), as well as rights deriving from the principle of free competition of political forces (found in Article 22 of the Charter). The Constitutional Court has already decided several such cases, one in relation to the 1996 elections to the Assembly of Deputies **[Judgment of 28 May 1996, No. I.ÚS 127/96, reported as 5 Sb.n.u., No. 41, p. 349** - see appendix to this memorandum for the summary published in] and eight in relation to registration to the 1996 Senate elections [Judgments of 15, 22, 29 October 1996, 6 Sb.n.u., Nos. 103-111, pp. 243 - 306, two of these judgments have been translated into English - see files attached to this memorandum for these translations].

In addition, Act of 2 October 1991, No. 424/1991 Sb., on Association in Political Parties and Political Movements, contains several provisions guaranteeing judicial protection in relation to the formation, dissolution, and activities of political parties. That Act provides that a political party is formed by means of an application submitted to the Ministry of Interior by a Preparatory Committee of the incipient party. A Ministry decision that application does not meet formal requirements may be appealed to a regional court [§ 7 para. 4], and a Ministry decision rejecting the application because the incipient party does not meet the laws substantive requirements [for example, § 4 forbids parties whose goal is to abolish the democratic foundations of the state or who do not themselves have democratically established internal bodies] may be appealed to the Supreme Court [§ 8 para. 5]. Changes to a party's articles of association must be notified to the Ministry, and the just-described procedures (with the same possibilities for judicial review) apply to the notification of amended articles. Further, the § 15 of the Act empowers the Supreme Court, on the proposal of the government or in some cases the President, to decide on a party's dissolution or the suspension of its activities.

Political parties have, in addition to ordinary constitutional complaints, an added measure of protection from actions by state authorities which consists in the special type of complaint proceeding before the Constitutional Court. Article 87 para. 1, lit. j) of the Constitution grants the Court jurisdiction "to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws". It should be noted that only formal decisions may be contested in the context of this type of procedure and that, in such a procedure, the Constitutional Court may review such decisions for their conformity with both the Constitution and statutes (whereas ordinarily its review is confined to determining conformity with the Constitution). Proceedings of this type might be initiated in relation to the type of decisions pursuant to Act No. 424/1991 Sb., as described in the preceding paragraph. Up until now, however, no such proceeding of this type has been initiated before the Constitutional Court.

Identification: CZE-1996-2-005

Full text: Czech

a) Czech Republic / b) Constitutional Court / c) First Chamber / d) 28/05/1996 / e) I. ÚS 127/96 / f) Legal definition of a coalition in an election / g) / h) .

Keywords of the systematic thesaurus:

1.2.2.4 Constitutional Justice - Types of claim - Claim by a private body or individual - Political parties.
5.2.34.2 Fundamental Rights - Civil and political rights - Electoral rights - Right to be elected.

Keywords of the alphabetical index:

Electoral coalition, definition / Elections / Electoral subject, definition.

Headnotes:

Act no. 247/1995 Sb., on Elections to the Parliament of the Czech Republic, does not set forth conditions of public law for the creation of coalitions, nor for their activities, and does not grant to any State body the authority to decide the question whether a political party or a movement or a grouping of them should be considered to be a coalition taking part in the elections. Consequently, no State or other public body is authorized to take decisions interfering with the pre-election activities of political bodies, and it manifestly was not the intention of the legislature to intervene by public authority into the creation of electoral coalitions.

It may be inferred from the present state of the law, that it is only political bodies themselves who may decide whether they want to participate in an election as an independent (electoral) subject or as part of an (electoral) coalition. When there is a lack of other legal rules, the only relevant issue is the means by which the subject registered its list of candidates. This follows also from the fact that, in addition to political parties, the cited law also lists coalitions as among those persons authorized to submit lists of candidates for elections without any further specification or characteristics. The creation of an (electoral) coalition is subject to the agreement of the parties, which public law in no way regulates or forbids. The cited law does not attach to such actions any legal consequences for the parties presenting candidates, nor does it designate that only members of such a party may be registered in the list of candidates. Under the present legal rules, the creation of a coalition is a free act, that is, it is an expression of intention on the part of two or more political parties or movements to create a coalition, which is not subject to any further approval or review by State bodies.

Summary:

The complainant, the political party Free Democrats - National and Social Liberal Party (SD-LSNS), submitted a constitutional complaint against the decision of the Central Electoral Commission (CEC) to the effect that a registered list of candidates of SD-LSNS in the elections to the Assembly of Deputies of the Czech Parliament, held on 1 May and 1 June 1996, was in fact a list of candidates of a coalition between SD-LSNS and SPR (Party of Entrepreneurs, Farmers and Tradesmen). It objected that if this decision, which the CEC was authorized to issue, remained in effect, then the SD-LSNS would be disadvantaged in relation to other political parties, because, instead of needing to receive 5% of all votes cast, which is what individual parties need in order to secure representatives in the Assembly of Deputies, as a two-member coalition it would need at least 7%. This decision accordingly diminished their chances for success in the elections.

The Constitutional Court agreed with the complainant because no law, not even the Electoral Act, no. 247/1995 Sb., either defines a coalition or authorises anybody, even the CEC, to decide with binding force whether a political body is a coalition or not. The term coalition is well known from political practice, deriving mostly from the co-operation between the parties of a governing coalition, which has already for a long time had a settled meaning. In other situations, the term coalition can designate various types of relationships, from mere co-operation between any parties, closer and freer liaisons, up to a level of co-operation that precedes the merging of parties. In the case that legal rules are lacking, it is necessary to be guided by the rule that only a political party itself may freely decide if it will take part in the elections as a party or as a coalition, and the political party SD-LSNS has registered as an independent electoral subject. For these reasons, the Constitutional Court ordered the Central Electoral Commission to annul its decision, to return the SD-LSNS its status in the elections as an independent subject, and to inform the voters thereof by means of the press.

Languages:

Czech.

Identification: CZE-1996-3-010

Full text: Czech

a) Czech Republic / b) Constitutional Court / c) Fourth Chamber / d) 15/10/1996 / e) IV. ÚS 275/96 / f) Interpretation of statutes affecting constitutional rights / g) / h) .

Keywords of the systematic thesaurus:

2.2.2.1.1 Sources of Constitutional Law - Hierarchy - Hierarchy as between national sources - Hierarchy emerging from the Constitution - Hierarchy attributed to rights and freedoms.
2.3.9 Sources of Constitutional Law - Techniques of interpretation - Teleological interpretation.
3.2 General Principles - Democracy.
5.1.2.1 Fundamental Rights - General questions - Entitlement to rights - Nationals.
5.2.34.2 Fundamental Rights - Civil and political rights - Electoral rights - Right to be elected.

Keywords of the alphabetical index:

Election, candidate, requirements / Nationality.

Headnotes:

The basic interpretation guideline for laws which regulate the exercise of political rights in greater detail is Article 22 of the Charter of Fundamental Rights and Basic Freedoms from which it ensues that anybody applying law is obliged to construe and use provisions of law so as to enable and protect the political pluralism in a democratic society.

This principle demands that disputed provisions of the Act on Election be construed and used in favour of the purpose and meaning of the law. The purpose and meaning of the law, at

the same time, cannot be found in words and sentences contained in a legal regulation only; principles recognised by democratic States governed by the rule of law must also be considered. The Czech Republic claims to be such a State in Article 1 of the Constitution.

If, therefore, the purpose of the Act on Election to the Parliament of the Czech Republic is to implement and more closely define the fundamental political right to elect and be elected, than the disputed provisions must be construed in favour of this right, viz., that a citizen be, if possible, enabled to elect and be elected. This opinion is also supported in Article 4.4 of the Charter of Fundamental Rights and Basic Freedoms, according to which, in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved.

Summary:

The District Election Committee and, on appeal the Central Election Committee and the Supreme Court refused to register PhDr. J. as an independent candidate during the elections to the Senate of the Parliament of the Czech Republic on the grounds that he did not provide proof of his Czech citizenship, which is the basic prerequisite for the exercise of the right to be elected, in time.

All the aforementioned bodies presumed that although an identification card is a sufficient proof of Czech citizenship under the Act on Acquisition and Loss of Czech Citizenship, it is insufficient for the purpose of candidates' registration for the Senate in accordance with the Act on Election. The Act on Election does not contain any special provision in this respect, because the clerk of the election committee is not authorised to receive an identification card, which exists only as an original and a copy of which cannot be officially verified, in accordance with laws concerning identification cards, verification of copies or transcripts and the genuineness of signatures.

The Constitutional Court concluded that both the election committee and the Supreme Court, as bodies applying law, raised aspects of suitability and practicality over law, and in particular, over constitutional principles, and construed the incompatibility of laws to the detriment of the person exercising his constitutional rights.

In the opinion of the Constitutional Court, the identification document which the candidate presented to the election committee is a sufficient proof of citizenship. In addition to this, the candidate did present the requested certificate of citizenship, albeit after the lapse of time period for registration set by law. For these reasons, the Constitutional Court has annulled all three contested decisions. As a result of this measure, the appropriate election committee registered the candidate.

Languages:

Czech.

VIII. **The Constitutional Court of Croatia**: time limits for claims for review of the constitutionality of a law

The call is for information on time limits for claims for review of the constitutionality of a law.

From: Mrs Marija Salecic

Date:18/03/99

Responses from:

1. Belgium; the Constitutional Court, Mr Rik Ryckeboer and Mr Pierre Vandernoot, 26/03/99

Dear Mrs. Salecic,

We received your request for information on time limits for claims for review on constitutionality and can answer the following as far as concerns the Belgian Court of Arbitration:
Direct claims for constitutional review of laws must be filed in at the Constitutional Court within six months starting from the day on which the law was published in the official bulletin (Moniteur Belge – Belgisch Staatsblad - see: www.just.fgov.be).
A special delay of 60 days is determined for claims against laws by which international treaties are confirmed.

(See the special bulletins, one with the short presentation of the Court and another with the law of the Court (article 2).

The Belgian Court of Arbitration is competent for laws passed by parliamentary assembly's, but has no competence regarding the decision-making process in parliament. So, there is no object to answer the first part of your question.

Rik Ryckeboer and Pierre Vandernoot

2. France; the Constitutional Council, Mr Stéphane Cottin; 22/03/99

Hello from Paris,

Here comes an extract from the Codices Database,

Identification: FRA-1997-3-005

a) France France / b) Constitutional Council Constitutional Council / c) / d) 07/11/1997 / e) 97- 392 DC 97- 392 DC / f) Law on the reform of national service / g) Journal officiel de la République française - Lois et Décrets (Official Gazette of the French Republic - Acts and Decrees), 08/11/1997, 16255 / h) .

Keywords of the systematic thesaurus:

1.2.1.1 Constitutional Justice - Types of claim - Claim by a public body - Legislative bodies.
1.2.4.2 Constitutional Justice - Types of claim - Type of review - Ex post facto review.
1.5.3.1 Constitutional Justice - Procedure - Time limits for instituting proceedings - Ordinary time limit.
4.2.7 Institutions - Legislative bodies - Law-making procedure.

Keywords of the alphabetical index:

Jurisdiction / Promulgation / President of the Republic.

Headnotes:

The Constitutional Court is not competent to rule on a request contesting the constitutionality of a law after it has been promulgated by the President of the Republic.

Summary:

This case raised a novel question of procedure: was it within the Constitutional Councils powers to hear a submission by a group of parliamentarians (in this case, senators) concerning a law that had been passed by Parliament and submitted to the Council within the maximum time limit set by Article 10 of the Constitution for its promulgation (fifteen days), given that the President of the Republic had promulgated the said law in advance of this time limit, the day before the application was filed by the senators, at a time when the law had not yet been published in the Official Gazette?

By its decision, the Constitutional Council confirms an accepted premise of administrative law, whereby a distinction is drawn between promulgation and publication, and the former is afforded a specific meaning with legal implications that are different from those of the latter. (For example, promulgation serves as the legal basis for an ce of laws reviewed compared to the Constitution.

IX. **The Constitutional Court of Latvia**: the right of the Constitutional Court to review beyond the limits of a claim

The call is for information on regulations and practice of the other Constitutional Courts on the right of the Constitutional Court to review beyond the limits of a claim.

From: Ms Daiga Iljanova

Date: 23/04/99

Responses from:

1. Austria, the Constitutional Court, Mrs Reinhild Huppmann, 28/04/99

Dear Mrs. Iljanova,

I can inform you that the Austrian Constitutional Court in general cannot "go beyond the claim submitted by the petitioner" as you put it. Yet one has to differ. In case that there is a constitutional complaint according to Article 144 of the Constitution the Court is not bound to the claim if the Court doubts himself the constitutionality of a legal norm which the Court would have to apply (norm control ex officio).

As it is not quite clear to me whether your question (claim of a petitioner) meets with the Austrian constitutional jurisdiction I can only give you this basic information.

Sincerely yours,

Reinhild Huppmann.

2. Croatia, the Constitutional Court**,** Mrs Marija Selecic, 27/04/99

Dear Mrs. Iljanova,

In procedure before the Croatian Constitutional Court one can discern two situations:

1) in cases of abstract review of constitutionality of laws and constitutionality and legality of other regulations where everyone has the right to propose that the Court be set into motion. The Court itself may initiate review proceedings. This is established by art. 15. of the Constitutional Act on the Constitutional Court.

Article 15 of the Constitutional Act:

(1) Everyone has the right to propose that the Court may set into motion proceedings in which it will review constitutionality and legality.
(2) The Constitutional Court itself may start by its own motion proceedings in which it will review constitutionality and legality

This competence of the Court is used very restrictively and it does not mean that the Court is a prosecutor and a judge at the same time; it is used, for instance, when the subject "everyone" disputes one provision of the law but does not dispute the provision of the same law or other law with the same content. The Court may repeal those provisions which are identical with the disputed ones.

2) in case of violation of constitutional rights when an individual is filing a complaint using a wrong constitutional provision, the Court can reach a decision as long as it is clear which right is violated.

...

Hoping that it will give you a general idea of the regulations.

I am sending my regards,

Marija Salecic

3. France, Conseil constitutionnel, Mr Stéphane Cottin, 27/04/99

Dear Mrs Iljanova,

The answer is definitively 'yes' for constitutional issues: the French Council can and must go beyond the claim even if there is no claim.

On the other hand, the answer can be 'no' for other issues because of the principle of "in abstracto" judicial review. I do not know if this topic is relevant for the Latvian constitutional procedure but for example, for electoral complaints, the Council cannot go beyond the claim.

Yours, Stéphane Cottin

4. Sweden, the Supreme Court, Mr Johan Munck, 29/04/99

Dear Mrs Iljanova,

According to the Swedish law the answer is in principle 'no'. Exception may be made in cases where a sentence against which the claim is submitted is manifestly ill founded on grave breach of the procedure.

Sincerely,

Johan Munck

4. Turkey, the Constitutional Court, Mr Mehmet Turhan, 29/04/99

Dear Mrs Iljanova,

According to the Art. 29 of the Organisational and Trial Procedures of the Constitutional Court of Turkey, the Constitutional Court is not obliged to review the constitutionality of the laws, the decrees having the force of law or the standing orders of the Grand National Assembly. This means that if a court with a pending case before it finds that the law to be applied is contrary to Art. 10 of the Constitution, it should suspend the further consideration of the case until the Constitutional Court pronounces on the issue.

However, if the request is for review of the constitutionality of only specific articles or provisions of law and their annulment leads to questions about the constitutionality of other articles, the Constitutional Court may decide to annul other articles and provisions or to annul the law as a whole.

Yours Sincerely,

Mehmet Turhan

X. **The Constitutional Court of Slovenia**: constitutional review of income tax rates on legal entities

The request concerns information on cases involving constitutional review of income tax rates on legal entities.

From: Mr Arne Mavcic

Date: 11/06/99

Responses from:

1. The United States, the Supreme Court, Mr Peter Krug, 14/06/00

Dear Arne,

I just read your request for information about cases involving constitutional review of income tax rates on legal entities. Unfortunately, I do not have access to much material because it is Sunday and the law library is closed (I am in Wisconsin and do not have a special key to the library), but I can tell you that the U.S. Supreme Court has decided some cases in this area which might be relevant. They generally relate to the question of whether the tax classification scheme violates the "equal protection" clause of the 14th amendment to the U.S. Constitution. One of them is entitled Metropolitan Life Insurance Co. v. Ward, decided in 1985.

The citation is 470 U.S. Reports 869, 105 Supreme Court Reporter 1676.

Sometimes, but not often, these challenges have been successful. The Court generally analyzes them under a "rational basis" test, unless the classification is based on a so-called "suspect" classification (such as racial characteristics) or implicates the exercise of a "fundamental" constitutional right (such as the exercise of free expression). If a rational basis test is used, the Court will usually ask only if the classification bears some rational relationship to a goal of government that is not prohibited by the Constitution. It is often used in cases involving economic legislation such as taxation. If the classification is based on a suspect classification or implicates the exercise of a fundamental right, then the Court employs strict scrutiny, which means that it places a heavy burden on the state to justify the classification. As you can see, in the end, an important factor in all of these cases is the identification of the state interest.

Also, there is some case law from the period around the year 1913, when the U.S. federal government first adopted an income tax. An example is the case of Brushaber v. Union Pacific Railroad Company (decided in 1916). The citation is 240 U.S. Reports 1, 36 Supreme Court Reports 236. In these cases, taxpayers challenged the tax scheme as unconstitutional under the "due process" clause of the 5th amendment to the U.S. Constitution (no taking of property without "due process"). Generally, these challenges (including that in the Brushaber case) were not successful.

I am not aware of any cases in which the fact that the tax was imposed on a legal entity (for example, a corporation) made the case distinguishable from the analysis in other taxation cases.

I hope that this information is of some help. Please let me know if you want me to send you some information tomorrow, or if you have any questions about this message. If you want to see any court opinions and are not able to find them on the Internet, please let me know.

Good luck!

With best wishes,

Peter

XI. **The Constitutional Court of Azerbaijan**: compulsion of a witness to testify in civil proceedings

The Constitutional Court of Azerbaijan has received a request to examine the conformity of provisions of the civil legislation with the Constitution. The request regards the compulsion of a person to testify in a civil proceeding. As Mr Raouf Guliyev informs us, according to the civil procedure legislation in Azerbaijan, every person who possesses any information concerning the civil case under consideration can be summoned to court and she/he is obliged to testify. If this person gives wittingly false evidence he/she shall be brought to criminal responsibility. Whereas, according to Art.66 of the Constitution nobody can be forced to testify against him or herself or his or her spouse, children, parents or siblings.

Bellow follows an extract from CODICES on compulsion of a witness to testify in criminal proceedings:

Identification: AZE-1998-3-001

a) Azerbaijan Azerbaijan / b) Constitutional Court / c) / d) 29/12/1998 / e) 03/15-5 / f) / g) to be published in Azerbaijan (Official Gazette) / h.

Keywords of the systematic thesaurus:

2.3.2 Sources of Constitutional Law - Techniques of interpretation - Concept of constitutionality dependent on a specified interpretation.
5.2.9.12 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Rules of evidence.
5.2.9.19 Fundamental Rights - Civil and political rights - Procedural safeguards and fair trial - Right not to incriminate one-self.

Keywords of the alphabetical index:

Evidence, false / Testimony, refusal / Criminal procedure.

Headnotes:

No person can be made criminally responsible for refusing to testify against him or herself or his or her spouse, children, parents or siblings.

No person can be prosecuted for not informing the law enforcement bodies about the crime committed by any relative mentioned in Article 66 of the Constitution.

A person who has knowingly provided false evidence can be held criminally responsible under Article 179 of the Criminal Code.

Summary:

The Prosecutor's Office asked the Constitutional Court to interpret Articles 67 and 70 of the Criminal Procedure Code and Articles 179 and 181 of the Criminal Code as to their conformity with Article 66 of the Constitution.

Articles 67 and 70 of the Criminal Procedure Code state that "any person who knows any circumstances regarding a case can be called to testify and he/she is obliged to give evidence he/she possesses and to testify as to the personality of the accused" and "the witness and the victim bear responsibility under Article 181 of the Criminal Code for refusal to testify and responsibility under Article 179 of the Criminal Code for knowingly providing false evidence".

Meanwhile according to Article 66 of the Constitution, nobody can be forced to testify against him or herself or his or her spouse, children, parents or siblings.

The Constitutional Court decided that Articles 67 and 70 of the Criminal Procedure Code and Articles 179, 181, 182 and 186 of Criminal Code should be applied in conformity with Article 66 of the Constitution.

Languages:

Azerbaijani (official version), English and Russian (translation by the Court).

From: Mr Raouf Guliyev

Date: 28/10/99

Responses from:

1. Albania, Cour constitutionnelle, M Luan Pirdeni, 11/11/99

'Tout d'abord, Dans la pratique de la Cour Constitutionnelle de la République d'Albanie, il n'existe pas de cas ayant une nature similaire avec votre problème. Néanmoins, la cour offre son avis base sur la législation albanaise.

L'article 32 de la constitution de la République d'Albanie stipule que 'Personne ne peut être tenue de témoigner contre soi-même ou contre les membres de sa famille ou bien d'avouer sa culpabilité'. De même, le Code de Procédure Civil n'oblige pas les membres de la famille d'une personne de témoigner contre elle, mais il prévoit que ces personnes sont libres de décider elles-mêmes si elles veulent témoigner ou non. Ces personnes ne peuvent pas être poursuivies ou condamnées parce qu'elles n'acceptent pas de témoigner. La même attitude est prévue par le Code de Procédure Pénale, suivant lequel la personne ayant des liens de parente avec le prévenu pourra, sur sa demande, être dispensée de l'obligation de témoigner.

Partant de ces définitions constitutionnelles et législatives, nous sommes d'avis que la personne de la famille ne pourra pas être tenue de témoigner contre leurs proches et elle n'est pas responsable d'avoir refuse de témoigner. En revanche, lorsqu'elle a accepte de témoigner et, ce faisant, fournit de faux témoignages, elle serait responsable d'avoir commis un fait pénal. Une exception est faite seulement au cas ou le témoignage qu'elle déposerait, servirait de charge contre elle-même pour l'inculper d'avoir commis un fait. '

2. Denmark; the Supreme Court, Mr Søren Stig Andersen, 08/11/99

Dear Mr Guliyev,

From Mr Dürr, I have received your e-mail of 28 October 1999.

The question raised in your mail is not regulated in the Danish Constitution but in the Danish Administration of Justice Act, cf. § 171 of the Consolidated Act of 13 September 1999, which reads (my own translation):

Subsection 1:“ A litigant’s next of kin are privileged to refuse to give evidence as a witness.”
[...]
Subsection 3: “ Regarding the situations described in subsection 1 and 2, the court can order the witness to testify, provided that the testimony is considered to be essential to the outcome of the case, and the nature of the case and its significance to the litigant and the society is held to justify it.”

§ 171 is applicable in both civil and in criminal proceedings. There is substantial case law on the applicability of subsection 3.
If you need further information on case law relating to a specific situation, do not hesitate to write.

Yours sincerely,

Søren Stig Andersen

2. The United States, the Supreme Court, Mr Peter Krug, 03/11/99

Dear Mr Guliyev: As a liaison officer from the United States Supreme Court to the Venice Commission, I received Mr. Durr's e-mail message with your request regarding the compulsion of a witness to testify in a civil proceeding. Although I know that your request was directed to the European courts, I thought that I would send you this brief note about the position that the U.S. Supreme Court has taken on this question. First, I should note that the U.S. Constitution does not contain a provision which protects a witness from testifying about his or her close relatives. There might be certain court-recognized "privileges" regarding this testimony, but they are not of a constitutional dimension.

However, the Fifth Amendment to the U.S. Constitution does state that a person shall not in any criminal case be compelled to be "a witness against himself". The U.S. Supreme Court has construed this constitutional protection against "self-incrimination" broadly, stating that an individual (in any form of litigation) shall not be compelled to produce evidence which later might be used against him or her as an accused in a criminal proceeding. The Court has stated that a witness in this situation has a choice: he may either produce the information and then seek appellate review of the court order which required production, or he can resist the court order with the understanding that he might be found guilty of contempt of court if his claim of protection is rejected on appeal.

The information in the paragraph just above is taken from the U.S. Supreme Court decision in Maness v. Meyers, Volume 95 Supreme Court Reporter, pages 584 and 592. This decision was issued on 15 January 1975.

I hope that this information might be helpful as you think about this problem. Please feel free to contact me if you have questions about this.

Peter Krug
University of Oklahoma College of Law, USA

Mr Francis Lorson, from the US, also refers us to the following books:

"Federal Testimonial Privileges" by Murl A. Larkin (West group; 1999)
"Revised Treaties. Page on the Law of Wills", volume 2 and 3 by William Bowe and Douglas Parker (W.H.Anderson Company)
"Testimonial Privileges" (2 ed.) by Scott Stone and Robert Taylor (Shepard's/McGraw-Hill, Inc.,1994)

XII. **The Constitutional Court of Georgia**: appointment of judges to courts of ordinary jurisdiction

A group of Georgian acting judges of the common judiciary are questioning the constitutionality of Article 86.1 of the Law on Common Judiciary before the Constitutional Court. These judges were appointed for period of ten years by the Supreme Council of Georgia, elected by multiparty elections in 1990. In 1995 Georgia started making first steps towards Constitutional reforms including a judicial reform. One of these reforms was the adoption of the Law on Common Judiciary from 13 June 1997. The Article 86.1 states that the tenure of the judges shall cease on 20.01.1999. Before this date acting judges have the right to take qualifying examinations and could get appointed again. The law was adopted under the present Constitution of 1995 but the applicants were appointed according to the Constitution of the former Soviet Republic of Georgia of 1978 and the new Georgian Constitution of 1995 does not state it is a successor of the 1978 one.

The call is for information on relevant cases or experience in this matter especially from the Eastern European countries and the former Soviet Republics.

From: Levan Bodzashvili, Constitutional Court of Georgia

Date: 20/10/98

XIII. **The Constitutional Court of Latvia**: the right of a court of ordinary jurisdiction to submit a claim before the Constitutional Court

Call for assistance from the Litvanian Constitutional Court regarding a draft law of Constitutional Procedure in the Constitutional Court of Latvia. There has been a proposition that regular courts be given the right to initiate a case before the Constitutional Court in order to declare null and void a statute or other normative act which is not in compliance with a higher legal norm.

There is a plea for information as to whether a court of ordinary jurisdiction has to resolve a pending case and then initiate a case before the Constitutional Court or such a court should temporarily suspends proceedings, ask the Constitutional Court to resolve the given question and then resume its work.

From: Mrs Anita Usacka

Date: 26/10/98

Responses from:

1. Albania, the Constitutional Court, Mr Kristofor Peci, 10/11/98

Dear Mrs Usacka,

…

Regarding the problem that you raised in your letter, let me explain as follows: Regular courts in Albania have the right to put into motion the Constitutional Court only if they find that the legal norms are incompatible with the Constitution and laws. According of art. 8 of law no. 7561, dated, 29/04/92 on some changes and amendments to the law no. 7491, dated 29/04/91 "On the main Constitutional Provision", if during the reviewing of the case, the regular court finds that the normative act is not in conformity with the law:" On the main constitutional provisions " it suspends the case and sends the issue to the Constitutional Court.

The same attitude is adopted by the new Constitution, approved in its entirety by the People's assembly of the Republic of Albania on 21 October 1998 and to be voted in a referendum on 22 November 1998. Pursuant to art 145: "If judges find that a law comes into conflict with the Constitution, they do not apply it. In this case they suspend the proceedings and send the issue to the Constitutional Court. Decisions of the Constitutional Court are obligatory for all courts".

According to these dispositions, every court of the ordinary system, in any stage of the proceedings, may initiate a case in the Constitutional Court in order to declare null and void the normative act, which is not in compliance with the Constitution and the other laws.

Hoping that the above explanations could help in elaborating the law of the Constitutional Procedures, we believe in fruitful cooperation between constitutional courts.

Sincerely yours,

Kristofor Peci

2. Croatia, the Constitutional Court, Mrs Marija Salecic, 27/10/98

Dear Mrs Usacka,

Art. 13 of the Constitutional Act on the Constitutional Court of Croatia prescribes that a claim to the Constitutional Court can be submitted by, among others, of the Supreme Court if a point of constitutionality and legality arises in proceedings before courts. Art. 14 of the Act makes a difference depending on whether a law or other regulations, passed by ministries, cities, municipalities etc., are disputed.

This Article runs as follow: "If a court in proceedings before it finds that the law which is to be applied is not in conformity with the Constitution, it will halt the proceedings and put a request to the Supreme Court of the Republic of Croatia to submit a claim to the Constitutional Court to make a decision concerning constitutionality of that law. If a court in proceedings before it finds that other regulations which are to be applied are not in conformity with the Constitution, or not inconformity with law, it will not apply these regulations and will notify its decision to the Supreme Court of the Republic of Croatia."

You will see that this regulation provokes an obvious issue: what happens when the Supreme Court and lower court which has requested of the Supreme Court to set proceedings before Constitutional Court into motion are not of the same opinion? The number of cases in which Supreme Court submitted its claim to the Constitutional Court is too small to give you an adequate answer.
…
Yours sincerely,

Marija Salecic

3. Denmark, the Ministry of Justice, Mrs Kristine Queitsch, 18/11/98

Extract from a description of the Danish Supreme Court:

I. Introduction:
There is no special constitutional court in Denmark. The examination of the constitutionality of acts or administrative regulations is left therefore to the ordinary courts of law.
…
III. Powers:
…
The Constitution does not explicitly state that the courts of justice have authority to test the constitutionality of enactments. This has been invariably assumed in theory as well as in practice, so that such a power of review is regarded as established by constitutional practice.

The testing of the constitutionality of an Act can assume the following forms:
- Testing of whether the legislative procedure has been adhered to;
- Testing of whether the separation of powers has been adhered to;
- Testing of whether an Act is materially constitutional, having regard for example to civil and political rights.

Legal action can be taken only by a party with a particular and individual interest in having a decision on a question. Thus, the concept of "popular complaint" is unknown in the Danish administration of justice. Nor has the Folketing (the Danish Parliament) any possibility of having opinions from the courts on the constitutionality of a Bill. Such questions are usually settled by the Folketing asking the Minister of Justice for opinions.

In practice the courts of law have been cautious in considering the constitutionality of Acts, thereby according the legislative power a margin of appreciation in difficult questions of evaluation or construction.

IV. Nature and effects of judgments

Review of the constitutionality of an Act takes place in tandem with the consideration of all other legal and factual circumstances of a case. If a court of law should find an Act unconstitutional, it cannot repeal it, but is limited to deciding whether the Act shall be applied in the concrete case put before the court for adjudication. If an Act has been considered to be invalid in a concrete case, the decision nonetheless has a general and normative valve, because as a precedent it means that the application of the Act will be paralysed in all similar future cases.

4. Georgia, the Constitutional Court, Mr Vano Tavadze, 27/10/98

Dear Ms Usacka,

Regarding your letter of October 27, I am glad to provide you with the following information from the Georgian Constitutional Court.

If at the proceedings over a particular case, a court of ordinary jurisdiction comes to the conclusion that the normative act that should be applied in this case, may be partially or completely incompatible with the Constitution, the court temporarily suspends proceedings and lodges a petition to the Constitutional Court, which subsequently takes a conclusion on the constitutionality of the disputed normative act. A court of ordinary jurisdiction may appeal to the Constitutional Court at any stage of the case review.

In addition one note regarding execution of the constitutional court judgements on the mentioned subject. Declaration of unconstitutionality of the disputed normative act only results in suspension of execution of those decisions which were taken by courts of ordinary jurisdiction in accordance with the unconstitutional normative act.

Yours sincerely,

Vano Tavadze

5. Luxembourg, the Constitutional Court, Mr Georges Kill, 27/10/98

Dear Colleague,

Proceedings in Constitutional cases are ruled in Luxembourg by the law of 27 July 1997 on the organisation of the Constitutional Court as follows:

Only courts have the right to initiate the case in the Constitutional
Court by asking a PRELIMINARY QUESTION when a party in a regular case raises a question concerning law's compliance to the State's Constitution.

After asking the Constitutional Court to resolve the given question the regular court must stop the case and only continue it after having received the answer.

To avoid long delays in the regular case the proceedings at the Constitutional Court are strictly ruled with compulsory deadlines.

Best regards,

Georges Kill

6. South Africa, the Constitutional Court, Mr James Chiumya, 27/10/98

Dear Ms Usacka,
…
Our Constitutional Court is the Highest Court in as far as constitutional matters are concerned. The system functions as follows:

1. The High Courts in the land have jurisdiction in terms of the new Constitution Section 169 (i) (ii) to hear Constitutional matters, except any matter that the Constitutional Court may decide.

2.Courts lower than the High Courts may not enquire into or rule on the constitutionality of any Legislation. Section 170.

3. Further, a matter may be brought before a High Court and a constitutional point may be determined in that High court. However, if there is disagreement on the constitutional point, then an appeal can at this stage be lodged to the constitutional Court which is the highest court on constitutional matters.

4. The rules of the constitutional court provide for direct access. Direct access can be applied for to the Constitutional court if the interests of justice so require. Thus, the cases are not just brought to the Constitutional court straight from the lawyers offices but on appeal and direct access as provided for by the rules of the constitutional court caters for situations where the interests of justice so require. i.e the matter might not have to first go to what we call the Supreme Court of Appeal (SCA). The reason being that even if the matter is taken to the SCA, chances are that it will not be finalised there and it will be necessary for it to be referred to the Constitutional Court.

I hope this gives you a picture of how our system functions. You spoke about regular court. I do not know how yours function but I think what I explain is that, our regular courts are the magistrates courts and they do not have the jurisdiction to inquire into or rule on the constitutionality of any legislation or any conduct of the president.

I hope this helps and if you need more information, please feel free to e-mail me again and I will also e-mail you again with the relevant rules and provisions.
James Chiumya

7. The United States, the Supreme Court of the US, Mrs Christie S. Warren, 30/10/98

Dear Judge Usacka,

I am responding to your October 26 request for assistance concerning your work on a new draft law of Constitutional Procedure in the Constitutional Court of the Republic Latvia.

The Supreme Court of the United States is primarily a court of appellative jurisdiction that rules on issues arising on appeal out of state and federal courts During the course of their work on ordinary cases, lower courts are free to rule on the constitutionality of rules and statutes without first referring this matters to the Supreme Court or to any other court. On appeal, constitutional issues may be raised and the Supreme Court decides whether or not to review the issues.
…
Best regards,

Christie S. Warren