1992/11/26 - Pl. ÚS 1/92 (Czechoslovak Const. Court): Lustration

26-11-1992

Petition of a group of 99 members of the Federal Assembly of the Czech and Slovak Federal Republic against the Federal Assembly, seeking a decision that Act No. 451/1991 Coll., which sets down some additional preconditions for holding certain offices in governmental bodies and organizations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic, is not in conformity with the Charter of Fundamental Rights and Basic Freedoms, with the International Convention on Civil and Political Rights, with the International Convention on Economic, Social, and Political Rights, with the Discrimination (Employment and Occupation) Convention 1958 (No. 111), with the Vienna Convention on Treaties, with the Constitution of the Czech and Slovak Federal Republic, and with the Constitutional Act on the Czechoslovak Federation, on 26 November 1992.

Overview of the most important legal regulations

1. § 2 par. 1 letter c) of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR a SR, provides that a requirement for holding a position specified in § 1 (i.e. a position named by election, appointment or determination in some bodies, particularly state administration bodies) is that, in the period from 25 February 1948 to 17 November 1989, a citizen was not c) a conscious collaborator with the State Security Police (Státní bezpečnost); § 2 par. 1 letter a) and b) require, for holding of the same offices, that a citizen was not an officer in the National Police (Sbor národní bezpečnosti), or listed in National Police materials as a resident, agent, holder of a loaned apartment, holder of a conspiratorial apartment, informer or ideological collaborator of the State Security Police.

2. § 2 par. 2 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that conscious collaboration with the State Security Police means that a citizen was listed in State Security Police materials as a confidante (důvěrník), candidate for secret cooperation (kandidát tajné spolupráce) or a secret coworker with confidential contact (tajný spolupracovník důvěrného styku) and knew that he was meeting with an officer of the National Police and giving him reports through secret contact or fulfilled tasks assigned by him.

3. § 4 par. 2 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that a citizen shall document facts provided in § 2 par. 1 letter c) by a certification issued by the federal ministry of the interior, or a finding by the commission under § 11.

4. § 4 par. 4 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of

the CSFR, CR and SR provides that, before beginning a position provided in § 1, a citizen is required to submit a declaration that he was not and is not a collaborator of any foreign news or intelligence service.

5. Art. 2 par. 3 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that everyone may do that which is not prohibited by law and nobody may be compelled to do that which is not imposed on him by law.

6. Art. 4 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides in paragraph 1, that duties may be imposed only on the basis of and within the bounds of law, and only while respecting the fundamental rights and freedoms; par. 3 provides that statutory limitations upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions.

7. § 2 par. 3 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that in justified cases the minister of defense of the Czech and Slovak Federal Republic may waive the condition under paragraph 1 letter a), if applying it would violate an important security interest of the state and if it does not endanger the purpose of the Act.

8. § 3 par. 2 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that in justified cases the minister of the interior of the Czech and Slovak Federal Republic, the director of the Federal Security Information service, and the director of the Federal Police may waive the condition under paragraph 1 letter a), if applying it would violate an important security interest of the state and if it does not endanger the purpose of the Act.

9. § 13 par. 3 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that if a citizen who otherwise does not meet the conditions provided in § 2, proves that after he ceased to be in the position of a person specified in § 2 par. 1 letter d) to h), was punished for acts specified in § 2 of Act no. 119/1990 Coll., on Judicial Rehabilitation, and that he was rehabilitated under that Act, the commission shall decide that he meets the requisites for holding office specified in § 1.

10. Art. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that people are free, have equal dignity, and enjoy equality of rights. Their fundamental rights and freedoms are inherent, inalienable, non-prescriptible and not subject to repeal.

11. § 11 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that an independent commission shall be established in the federal ministry of the interior and it further governs membership in that commission.

12. § 12 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, governs the conduct of the above-mentioned independent commission.

13. § 13 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that the commission shall open proceedings at the proposal of a citizen or organization and that the commission shall make decisions within 60 days based on a finding which must be justified.

14. § 18 par. 1 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that if a citizen claims that information stated in a finding (under § 13) is untrue, he may ask a court to review the content of the finding no later than two months from the day the finding is delivered. The court of jurisdiction is the regional court of the citizen's place of permanent residence, as the court of the first level.

15. § 20 of Federal Assembly Act no. 451/1991 Coll., which provides some other requirements for holding certain positions in state bodies and organizations of the CSFR, CR and SR, provides that anyone who states before the commission (established under § 11) an untruth about a circumstance which has substantial importance for the finding, or conceals such a circumstance, shall receive a prison sentence of up to three years or a fine.

16. Art. 37 par. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that everyone has the right to refuse to give testimony if he would thereby incriminate himself or a person close to him.

17. Art. 38 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides in paragraph 1 that no one may be removed from the jurisdiction of his lawful judge and in paragraph 2 that everyone has the right to have his case considered in public, without unnecessary delay, and in his presence, as well as to express his views on all of the admitted evidence and that the public may be excluded only in cases specified by law.

18. Art. 98 par. 1 of the Constitution of the CSFR no. 100/1960 Coll., as amended by Constitutional Act no. 326/1991 Coll., provides that the judicial power is exercised by independent courts of the Czech and Slovak Federal Republic.

19. § 6 par. 1 of Constitutional Act no. 23/1991 Coll., which enacts the Charter of Fundamental Rights and Freedoms, provides that statutes and other legal regulations must be brought into accordance with the Charter of Fundamental Rights and Freedoms no later than 31 December 1991; on that day provisions which are not in accordance with the Charter of Fundamental Rights and Freedoms cease to have effect.

CONSTITUTIONAL COURT OF
THE CZECH AND SLOVAK FEDERAL REPUBLIC

JUDGMENT:

The Plenum of the Constitutional Court of the Czech and Slovak Federal Republic, in the matter of the petitioner, a group of 99 members of the Federal Assembly of the Czech and Slovak Federal Republic, against the Federal Assembly of the Czech and Slovak Federal Republic, seeking a decision that Act No. 451/1991 Coll., which sets down some additional preconditions for holding certain offices in governmental bodies and organizations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic, is not in conformity with the Charter of Fundamental Rights and Basic Freedoms, with the International Convention on Civil and Political Rights, with the International Convention on Economic, Social, and Political Rights, with the Discrimination (Employment and Occupation) Convention 1958 (No. 111), with the Vienna Convention on Treaties, with the Constitution of the Czech and Slovak Federal Republic, and with the Constitutional Act on the Czechoslovak Federation, on 26 November 1992, decided thusly:

§ 2 para. 1, letter c) 1), § 2 para. 2 2), and § 4 paras. 2 3) and 4 4) of Act No. 451/1991 Coll. are not in conformity with Article 2 para. 3 5) and Article 4 paras. 1 and 3 6) of the Charter of Fundamental Rights and Basic Freedoms, and Article 4 of the International Convention on Economic, Social and Cultural Rights, promulgated under No. 120/1976 Coll.

§ 2 para. 3 7), § 3 para. 2 8) and § 13 para. 3 9) of Act No. 451/1991 Coll., are not in conformity with Article 1 of the Charter.10)

§§ 11 11), 12 12), § 13 paras. 1, 2, 4 and 5 13´), § 18 para. 1 14) and § 20 15) of Act No. 451/1991 Coll., are not in conformity with Article 37 para. 1 16) and Article 38 17) of the Charter and with Article 98 para. 1 of the Constitution of the CSFR, No. 100/1960 Sb, as amended by constitutional act No. 326/1991 Coll.18)

The remainder of the petition is rejected on the merits.

REASONING:

I.

On 10 March 1992, a group of 99 Deputies of the Federal Assembly of the Czech and Slovak Federal Republic (hereinafter "Federal Assembly") submitted to the Constitutional Court of the Czech and Slovak Federal Republic (hereinafter "Court") a petition requesting that the Court declare that, pursuant to § 6 para. 1 of Constitutional Act No. 23/1991 Coll.19), which Introduced the Charter of Fundamental Rights and Basic Freedoms as a Constitutional Act of the Federal Assembly, the Court declare that Act No. 451/1991 Coll., which Sets Down Some Additional Preconditions to Holding Certain Offices in Governmental Bodies and Organizations of the Czech and Slovak Federal Republic, the Czech Republic, and the Slovak Republic, lost force and effect as

of 31 December 1991 due to its non-conformity with the Charter of Fundamental Rights and Basic Freedoms.

II.

While considering the petition, the Court had to concern itself, first of all, with the issue of whether the group of Deputies which submitted the petition still has full standing to bring this proceeding, even after the June, 1992 elections to the Federal Assembly. Under Article 8 para. 2 of Constitutional Act No. 91/1991 Coll., a petition may be submitted by a group of at least one-fifth of the Deputies to the Federal Assembly, that is 60 Deputies (Article 8 para. 2 of Constitutional Act No. 91/1991 Coll.). Since it was determined that of the original 99 Deputies of the Federal Assembly who signed the petition, only 43 Deputies were re-elected in the June, 1992 elections, it was necessary to decide the following issue: at what point in time must the requirements set down in Article 8 para. 2 of Constitutional Act No. 91/1991 Coll., be met.

The Court had dealt with an analogous issue in the matters Pl ÚS 95/92 and Pl ÚS 22/92, in which it came to the conclusion that the decisive point in time for the submission of the petition, as meant by the earlier-cited provisions of Constitutional Act No. 91/1991 Coll., is the moment to which the statute's time conditions point, that is the moment when the petition is submitted. This conclusion follows both from the interpretation of Constitutional Act No. 91/1991 Coll., and from the fact that a reduction in the number of Deputies who submitted the petition is not included in the Act as one of the grounds for halting an already-commenced proceeding, as well as from the fact that the requirement of the protection of constitutionality means that the Court should deal with already-commenced matters on grounds of the general public interest.

Thus, no formal impediments that would prevent the Court from continuing in the proceeding were discerned in this matter either.

On the merits of the matter itself, the Court introduced the following documentary evidence:

The Report on the 17th Joint Session of the Chamber of Peoples and the Chamber of Nations of the Federal Assembly, at which the contested statute was adopted (print No. 841), and documents and writings:

from the archive of the Federal Interior Ministry, which were submitted to the Court at its request, namely:

- the Minister of Security's Order No. 49 of 10 December 1951 concerning Work with Agents,

- the Interior Minister's Order concerning Work with Agents (the Directive on the Operational Work of Agents), No. 72/54, from 20 April 1954,

- the Directive from 1962 for the Operational Work of Agents of the State Security Services (top secret, of extraordinary importance),

- the Interior Minister's Interpretation of Certain Fundamental Issues concerning the State Security Service's Work and of the new Directive for the Operational Work of Agents issued under Interior Minister Order 13/1962 from 16 May 1962,

- the Directive for Work with those Clandestinely Cooperating with Czechoslovak Counterintelligence A-oper-I-3 issued under CSSR Interior Minister Order No. 8 of 16 February 1972,

- the Directive for Work with those Cooperating with Counterintelligence A-oper-I-3 of 25 January 1978,

- the Principles for Counterintelligence Activities, file no. CB-002040/03-89 from 28 November 1981,

from the Federal Assembly archives, the record of the testimony given before the Federal Assembly Commission for the Investigation of Events of 17 November 1989 by the former heads of the First Division, Second Department of the State Security Services [hereinafter "State Security" or "StB"], Jan Roller, Josef Jeřábek and Zdeněk Kožuch, concerning the manner in which clandestine StB collaborators were recruited and in which records were kept on them, and

from the archives of the former Central Committee of the Czechoslovak Communist Party, Directives on the Organization and Activities of the People's Militia and Directives on the Cadre Orders of the Czechoslovak Communist Party.

At the Court's request, the Office of the Presidium of the CSFR Government submitted the Report of the Director-General of the Governing Body of the International Labour Office GB-252/16/19 concerning the examination of the Complaint Submitted by the Trade Union Association of Bohemia, Moravia, and Slovakia and by the Czech and Slovak Confederation of Trade Unions alleging non-observance of the Discrimination (Employment and Occupation) Convention 1958 (No. 111), which the Governing Body adopted at its session held in Geneva on June 2-6, 1992, including the correspondence of the government bodies in this matter and the Secret Government Resolution No. 256 of 14 March 1958 on Reorganization and Wage Restructuring.

The following documents were requested from the criminal file of the Higher Court Martial in Tabor in the matter brought against defendant Alojz Lorenc and others (T 8/91):

- Instruction of the 1st Deputy Interior Minister of the CSFR NZ-006 71/8, Instruction CB-00134/01-89, and Instruction CB 00153/01-09 including a Telex about Discarding Items.

- Expert Opinion of the Federal Interior Ministry and the Supplementary Opinion on the Consequences of Discarding Items with Numerical Data on the Consequences of Discarding Items

- that portion of the record containing the testimony of witnesses Dr. Zdeněk Formánek, Capt. Jan Frolík, Dr. M. Churáň and Dr. Z. Vajda.

The Court further supplemented this documentary evidence with the testimony of witnesses, namely Dr. J. Šetina, Mag. J. Frolík, Jar. Bašta and Dr. St. Novotný.

On the basis of the introduced evidence, the Court came to the following factual and legal conclusions:

In the period from 1948 until 1989, which Act No. 480/1991 Coll., defines as "the era of non-freedom", the totalitarian regime violated not only human rights, but also its own laws, which it had adopted for the purpose of establishing and maintaining its hold on power (§ 1 of the Act). In addition to the formally legitimate institutions of legislative and executive power, the composition and activities of which were adapted in a purpose-oriented fashion to their designs on power, other state bodies and organizations also took part in the suppression of rights and freedoms without having any foundation at all in law for their activities (People's Militia), or they obtained such a foundation only through subsequent legal approval (Action Committees, Screening Commissions).

In keeping with the theory of a permanent class struggle and of the leading role of the Communist Party of Czechoslovakia, the totalitarian regime deprived hundreds of thousands of persons not only of their freedom or their lives (Act No. 119/1991 Coll., on Judicial Rehabilitation, alone affected 245,000 persons), but also even of their employment. Thus, this arbitrariness became subsequently legalized (by Act No. 213/1948 Coll., for example), and the action committees' manner of proceeding was characterized as measures taken "in accordance with law, even in cases which would not have otherwise been in conformity with the appropriate enactments" (§ 4 para. 3 of the Act).

The Czechoslovak Republic Government Secret Resolution No. 256 of 14 March 1958, also had a similar character of a mass, unlawful purge in that the reorganization and wage restructuring effected thereby were connected "with the screening of the class and political reliability of the state and economic team ("aparat"), the goal of which was to cleanse this team of all politically unreliable elements and to prevent them from obtaining some other position of importance." This directive enumerates the categories of persons who were not permitted to be employed in the governmental and economic sectors. Their ranks included, for example, wholesalers, owners of financial and law offices, former high state officials, military officers, directors of large factories and those working closely with them, as well as those whose close relatives were in a capitalist country or had been punished for anti-state activities. Those measures applied not only to the group of persons listed, but also to their close relatives. In order to sever employment relations with such employees, it was not necessary to obtain the consent of the division of work force of the ONV [District National Committee], which would have otherwise been required.

The process of normalization, which took place after the occupation of Czechoslovakia by the Warsaw Pact, belongs among those measures of mass repression relating to employment law. The Screening and Normalization Commissions were the bodies that carried out this normalization process, and their procedures and decision-making were

regulated by Presidium of the Federal Assembly Measure No. 9 of 22 August 1969, which provided (in § 4): "Anyone who, by his actions, disrupts the socialist societal order and, as a consequence, loses the trust needed to hold the office or work position he is currently holding, may be removed from that office, or his employment relations may be immediately severed; as for employees to whom the provisions of the Labor Code on the severance of employment relations do not apply, the employment or service relations with them, as well as other possible expert relations, may be immediately terminated by dismissal. In the circumstances mentioned above, students can be expelled from their schools. In the case of teachers at the university and other levels, the responsible minister may remove them from their position or immediately cancel their employment relations also due to the fact that, in conflict with their duties, they are educating the youths placed in their care contrary to the principles of a socialist society and of the building thereof. The trade union bodies' refusal to consent shall not have suspensive effect."

Among the measures taken for the purpose of repression, neither can we overlook the transfer of 77,500 persons employed in the administrative sector to the production sector, carried out in the fall of 1951 under the pretext of limiting the growing bureaucracy. The arbitrariness and maliciousness of these measures is manifestly confirmed by the fact that during the same period, that is from September to December, 200,000 to 300,000 persons were newly taken on into positions in state administration, security, justice, and the army, generally persons without the desirable or otherwise necessary qualifications, almost always exclusively members of the Communist Party of Czechoslovakia.

This scarcely systematic way of filling leading positions at all levels and the blanket purges were gradually replaced by a methodical and purpose oriented personnel policy worked out by the Central Committee of the Czechoslovak Communist Party. For each level of administration, binding directives were issued (the "cadre orders") and, as a general qualification for candidates for all leading positions, it required "political maturity, a creative marxist-leninist approach to the solution of problems, and the determination to consistently bring the party's policies to life." As concerns professional qualifications, such should be linked to "skill at resolving issues of party policy and ideology in the sector entrusted to them and linked to moral qualities, that is, a high sense of responsibility to the party and to society in particular." (Cadre Orders of the Central Committee of the Czechoslovak Communist Party, file no. ÚV 057/84 - principles for the Submission of Cadre Proposals to Bodies of the Central Committee of the Czechoslovak Communist Party, point 1.)

Until the end of 1989, every crucial position at all levels of administration (as well as those in bodies and organizations of state and economic teams) was filled in accordance with these cadre orders, so that the influence of the Communist Party of Czechoslovakia on events in all areas of public and economic life was decisively guaranteed by means of the persons engaged in this way.

Both in terms of significance and numbers, however, neither the abolition of the leading role of the Czechoslovak Communist Party which had been embodied in the Constitution, nor the statutory measures of the Presidium of the CSFR Federal Assembly No. 362/1990 Coll., which increased the amount of leading offices to be

filled by appointment, thus making it possible to recall compromised persons from leading offices, were substantial.

To maintain its position of power, the totalitarian regime relied above all on the tools of repression, the decisive component of which consisted of State Security and the network of clandestine collaborators. As early as 10 December 1951, the Secret Order of the Minister of National Security No. 49 characterized the network of agents as "the keenest and most effective weapon against class enemies, which enables us to expose and dispose of class enemies before they effect their criminal purposes . . . . For this reason, it is the fundamental duty of the commanders at all levels to work with the agents" (Part V of the Order). The agency itself was designated as "the front-line weapon of national security which must be made the center of an all-encompassing vigilance and must be directed against the enemies of socialism" (Part VI of the Order).

In conformity with these principles, those holding totalitarian power in the preceding regime tried to preserve, to the greatest possible extent, a mutually connected and conspiratorial team which would enable it, even under a changed internal political situation, to influence even the ensuing democratic developments, or to reverse these developments at a propitious time.

That this conclusion is justified is borne out by, among other things, the directives for counterintelligence activities (file no. CB-002040/03-8) issued on 28 November 1989, that is 11 days after the 17th of November, 1989; parts 3a) and b) of that directive laid down the following way of proceeding for the anticipated situation:

"The managerial, organizational and cooperative sphere

-despite the current position of the agents and official relations to earmarked sites, to maintain conditions for the possible infiltration of StB agents into their structures.

Our own operational task

- to markedly increase the operational activities of a conspiratorial nature in the overall workings of the StB;

- to reevaluate the network of agents and to ensure its stabilization and gradual spread to positions of true significance; to place emphasis on the influential and well-positioned agents; to activate to the greatest extent possible the agents' work, in particular by the use of influential agents;

- active measures aimed at disinforming our opponents, compromising in as confrontational a manner as possible the favorably disposed representatives of these structures before the public, and deepening the clash of ideologies, personalities, and actions;

- to obtain, with the greatest possible speed, high quality and influential agents in the mass media and from among the university-level students who are capable of influencing the operational situation in those institutions for the benefit of the Czechoslovak Communist Party."

In order to shield the network of clandestine collaborators or to make it impossible to identify them and to assess, on an individual basis, the extent and nature of their activities, on 4 December 1989 the former Deputy CSFR Interior Minister, Lt. Gen. Ing. Alojz Lorenc, issued an Instruction to all Chiefs of Administration of the StB (under file no. NZ-00671/89), ordering them to discard material which "had lost value for the purposes of state security".

In this Instruction he stated, among other things:

"It is necessary to proceed in such a manner that no material which could be of a compromising character, in view of the present political constellation, remains in this section of the organization."

Subsequently (on 8 December 1989), the 1st Deputy CSFR Interior Minister issued a further Instruction (file no. 00133/01-89), the attachment to which has an order which in content is entirely identical to that from 4 December 1989, except that the paragraph about discarding compromising materials was omitted. At the same time, it ordered the first instruction from 4 December 1989 to be discarded.

The expert opinion of the Chief of the Federal Interior Ministry Office for the Protection of the Constitution and of Democracy, which was part of his testimony before the Higher Court Martial in Tabor, stated that, as a result of the first instruction, operational bound volumes or files for entire departments of the internal reporting system, including bound volumes on clandestine collaborators, were destroyed. He further stated that bound volumes (files) on clandestine collaborators, candidates for clandestine collaboration, trusted agents and others were disposed of "in a panic". He was not able to reliably demonstrate, however, whether these documents were actually destroyed, were merely relocated, or were hidden at the homes of some StB agent.

After joining the Federal Ministry of the Interior (on 2 February 1990), the witness ascertained that 90 to 95 % of the safes in the 2nd Administrative Unit (concerned with the struggle against internal enemies) were empty, or in other cases contained only the volume covers or some worthless scrap paper.

According to the findings of the Statistical-Record Division (SEO) of the Interior Ministry, during the period from 1 October 1989 until 31 January 1990, the number of volumes in the records of the 2nd Administrative Unit (concerned with the struggle against internal enemies) decreased from the original 20,337 volumes to 2189. Therefore, a full 89.9 % of the volumes were destroyed or relocated to an unknown place.

Considering all of these facts both individually and in their entirety, the Court has come to the conclusion that this calculated and malicious conduct created a real and potentially very perilous source of destabilization and danger, which could easily threaten the developing constitutional order. Therefore, in light above all of these considerations, the Court assessed the aims which the legislators were advancing when they issued Act No. 451/1991 Coll., the justification for the statute, and the consequences tied to the application of it. In this case the decisive criterion was consideration of the issues whether the act or any of its provisions are in conflict with the CSFR Constitution, with constitutional acts of the Federation (Republics), or with

international treaties on human rights and fundamental freedoms that the CSFR has ratified and promulgated.

Thus, the Court has come to the following conclusions:

A democratic state has not only the right but also the duty to assert and protect the principles upon which it is founded, thus, it may not be inactive in respect to a situation in which the top positions at all levels of state administration, economic management, and so on, were filled in accordance with the now unacceptable criteria of a totalitarian system. Of course, a democratic state is, at the same time, entitled to make all efforts to eliminate an unjustified preference enjoyed in the past by a favored group of citizens in relation to the vast majority of all other citizens where such preference was accorded exclusively on the basis of membership in a totalitarian political party and where, as was already inferred earlier, it represented a form of oppression and discrimination in regard to these other citizens.

In a democratic society, it is necessary for employees of state and public bodies (but also of workplaces which have some relation to the security of the state) to meet certain criteria of a civic nature, which we can characterize as loyalty to the democratic principles upon which the state is built. Such restrictions may also concern specific groups of persons without those persons being individually judged, a situation which can be found, without a great deal of difficulty, in other legal systems as well (for example, in the Federal Republic of Germany, persons from the former German Democratic Republic or the east bloc may not be engaged by firms producing highly developed technology for the weapons industry.)

In comparison with the situation that existed during the communist regime, where all the top positions at all levels were filled not only in contradiction to democratic principles and international norms, but also at variance with the regime's own (hence, domestic) laws, the statute under consideration affects only a very limited group of employees, exclusively in the power, administrative, and economic apparatus, and it affects licensed trades which are or could be the source of certain risks, be it merely from the perspective of protecting the establishment of democracy and its principles, the security of the state, or the protection of state secrets or of those positions from which it is possible, either overtly or covertly, to influence the development of society and the desirable performances of jobs in individual bodies or organizations.

In addition, the conditions prescribed by the statute for holding certain positions shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished (by 31 December 1996).

As a result of the considerations mentioned above, the Court is convinced that it cannot deny the state's right, if in conformity with the international commitments it has undertaken, to lay down in its domestic law conditions or prerequisites crucial for the performance of leadership or other decisive positions if, in which conditions or prerequisites, as was already referred to above, its own safety, the safety of its citizens and, most of all, further democratic developments are taken into consideration when setting the conditions or prerequisites.

If compared with the preceding legal order, these conditions might appear to be, from a formal perspective, a restriction on civil rights; however, in the current legal order the basic criteria, which will serve as the guide for our actions in the future, are those found the Charter and its introductory act. (23/1991 Coll.).

In contrast to the totalitarian system, which was founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria. Even the statute now under consideration, Act No. 451/1991 Coll., was based on them. It cannot be understood as revenge against particular persons or groups of persons, nor as discrimination against persons who, acting contrary to generally recognized principles either alone or in cooperation with or through a repressive body, had violated fundamental human rights and basic freedoms as they are understood and professed in a democratic society.

The statute under consideration does not even discriminate against such persons (neither in employment nor in their profession), it merely provides (and strictly for the future) certain additional preconditions for those positions designated as crucial by law, or for engaging in a licensed trade, particularly those linked with the possession of a firearm, of ammunition, of especially dangerous poisons, or with access thereto.

Such generally prescribed conditions do not, therefore, offend against either constitutional acts or international conventions. Each state or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by a totalitarian regime has the right to enthrone democratic leadership and to apply such legal measures as are apt to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.

The law-based state which, after the collapse of totalitarianism, is tied to the democratic values enthroned after the collapse of totalitarianism, cannot in the final analysis be understood as amorphous with regard to values. With the adoption of the Charter of Fundamental Rights and Basic Freedoms as part of our legal system fundamentally changed the nature and the value system of our entire constitutional and legal order changed fundamentally.

Constitutional acts, statutes and other legal enactments, as well as the interpretation and application of them, must conform to the Charter of Fundamental Rights and Basic Freedoms (§ 1 para. 1 of the Introductory Act 23/1991 Coll.). Thus, an entirely new element of the renaissance of natural human rights was introduced into our legal order, and a new foundation for the law-based state was established in this way.

Thus, the concept of the law-based state does not have to do merely with the observance of any sort of values and any sort of rights, even if they are adopted in the procedurally proper manner, rather it is concerned first and foremost with respect for those norms that are not incompatible with the fundamental values of human society as they are expressed in the already referred to Charter of Fundamental Rights and Basic Freedoms.

Finally, from this perspective not even the principle of legal certainty can be conceived in isolation, formally and abstractly, but must be gauged by those values of

the constitutional and law-based state, which have a systemically constitutive nature for the future.

As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt a criteria of formal-legal and material-legal continuity which is based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken.

Therefore, after taking these thoughts into consideration, the Court has come to the following conclusions concerning individual parts of the group of Deputies' petition:

With reference to § 6 para. 1 of Constitutional Act No. 23/1991 Coll., which introduced the Charter of Fundamental Rights and Basic Freedoms 19), the petition seeks a declaration that Act No. 451/1991 Coll., lost force/effect on 31 December 1991 due to its lack of conformity with the Charter.

The legislators inserted § 6 into Introductory Act No. 23/1991 Coll.19), so that statutes and other legal enactments (understood to mean those that were in force prior to 8 February 1991, when the Charter went into effect by declaration) would be brought into conformity with the Charter by the 31 December 1991 deadline.

Here the petitioners took into consideration the specific nature of the problems of Act No. 451/1991 Coll., and confused its employment law character with criminal law concepts and requirements, as if such would arise from collective responsibility for being a member of a specific, formally defined group of persons. However, the contested statute does not have a criminal law character, neither in its sense or content, nor does it give rise to any sort of responsibility in this regard. As was indicated earlier, the basic purpose of this statute is to prescribe, exclusively for the future, the preconditions for holding certain narrowly defined offices or for engaging in certain activities precisely specified in the statute, and not permanently, but only for a transitional period.

For conditions prescribed in this way by statute, only the manner and the degree of the asserted restriction is decisive; of course, it must be in conformity both with domestic law and with the international obligations to which the CSFR is bound.

On the domestic legal plane, Article 4 para. 2 of the Charter of Fundamental Rights and Basic Freedoms provides that limits may be placed on the fundamental rights and basic freedoms only under the circumstances set out in the Charter and only if laid down in a statute. Article 26 para. 2 then specifies that the preconditions for and limitations upon engaging in certain professions or activities may be prescribed by statute. Article 4 para. 3 of the Charter then specifies that if such a restriction is placed by statute, then the statutorily prescribed conditions must apply equally to all cases which meet those conditions.

Finally, Constitutional Act No. 143/1968 Coll. concerning the Czechoslovak Federation, promulgated in its entirety as amended under No. 103/1991 Coll., lays down in Article 2 para. 1 the requirement that the state and both republics be built upon the principles of democracy. As this provision is applicable against the state, it is also doubtless reasonable to apply it as against persons who represent the state or who are in its service.

In adopting the statute at issue, the legislators proceeded on the basis of the justified opinion that, at least to the degree of reasonableness necessary, it cannot be assumed that the values embodied in the above-mentioned constitutional principles would, unconditionally and without more, be given expression in the life even of members of the then power structure or those who having been bound in employment to the StB or in collaboration with them, those who climbed to important state, societal or economic positions on the basis of antagonistic value criteria solely to be able to serve, as a representative of the earlier reigning ideology, to maintain the power monopoly of the ruling bureaucratic machinery. Among other things, the instruction shows that the effort to maintain such positions even under the new conditions and the effort to encroach upon the democratic development of the present society is one of the key elements of the totalitarian regime (see the Principles of Counterintelligence Activities of 28.11.1989).

In comparing the statute with international legal obligations, it was necessary to review its conformity with the International Convention on Civil and Political Rights and with the International Convention on Economic, Social, and Cultural Rights, which were promulgated on 10 May 1976 by Declaration No. 120/1976 Coll.

In the first of these conventions, Article 2 lays down the state's obligation to ensure equal rights of all individuals without distinction of any kind and Article 26 lays down the prohibition on any sort of discrimination. So far as concerns the possibility to restrict the holding of an office or the performance of some employment in the public service, Article 25 of the Convention sets in substance three requirements:

1) no restriction may be applied if it concerns one of the distinctions explicitly set down in Article 2, first sentence;

2) the limiting conditions must be justifiable and justified (Article 25, first sentence), and

3) each citizen has the right to enter into his nation's public service under the same conditions (Article 25, letter c), which means that the prerequisites set down for acceptance or tenure in the public service must apply to all persons.

Article 4 of the International Convention on Economic, Social, and Cultural Rights provides, as a framework requirement, that the state may make these rights subject to such conditions as are set by statute and only in so far as they are compatible with the nature of these rights and exclusively for the purpose of advancing the common good in a democratic society.

Article 6 of the Convention provides for the right of everyone to earn their livelihood through the type of work which they have freely chosen or accepted, as well as the equality of both partners to an employment contract as far as concerns their decision to enter into the contract, but does not provide job seekers with a claim to be hired for the position, or in such employment to hold a position for which the law sets special conditions not met by the applicant.

Article 7 of the Convention concerns the equality of opportunity in employment already performed and, in particular, equal opportunity for all to gain promotion solely on the basis of the length of service and of their ability (Article 7, letter c). This provision concerns persons who, on the basis of the set prerequisites and conditions, are already performing some work; they are not, however, conditions and prerequisites for holding the job itself. Finally, the statute at issue cannot be understood to be in conflict with the Discrimination (Employment and Occupation), Convention 1958 No. 111 from 25 June 1958 (promulgated by Federal Ministry of Foreign Affairs Notice No. 465/1990 Coll.). Article 1, letter b) of the Convention designates as discrimination any sort of distinction, exclusion, or granting of preference for the purpose of making it impossible or jeopardizing their chances to get an equal opportunity or equal treatment in matters of employment or professions. Nonetheless, para. 2 of the same Article states that distinctions, exclusions or the giving of preferences shall not be considered discrimination if it is grounded in the qualifications required for certain professions.

In connection therewith, it must be emphasized that in stabilized democratic systems where it is a matter of persons competing for employment in service of the state, in public service and at workplaces which are considered to be a risk with regard to the security and stability of the state, are considered to be at risk, one part of the necessary requirements consists in the fulfillment of certain criteria of a civic nature from which it can be judged whether their views are in conflict with the interests of the state, as well as their loyalty to it and to the democratic principles upon which the state is built. The insufficiency of such prerequisites and the appropriate restrictions arising therefrom may also relate to formally defined categories (groups) of persons without, however, these persons being distinguished on the basis of an individual evaluation.

Thus, even in light of the state's above-indicated convention and treaty commitments, the state cannot be denied the right to set down precisely defined requirements for persons employed in selected categories at worksites, in positions, or in activities that are significant for the protection of the democratic constitutional system, the security of the state, its economic and political interests, or the protection of state secrets, or for those persons who lack the level of loyalty toward the state which is required, or who might, in the positions they are performing, have a considerable impact on public affairs.

In addition, the statutorily prescribed measures are in conformity with Article 4 of Convention No. 111, according to which it is not considered discriminatory to take measures against persons who are justifiably suspected of activities which are damaging to state security if, in opposition to specific measures, those persons are given the opportunity to make use of legal protections before a body established in conformity with domestic practice.

The Court has determined that the statute at issue respects the general requirement that the citizen have the right to seek protection before an independent court, as provided for by Article 36 of the Charter, Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, and Article 14 para. 1, the first two sentences, of the International Covenant on Civil and Political Rights. Citizens can assert a claim before the appropriate independent court that the termination of their employment or service relations was invalid. In order to put emphasis on high-quality decision-making in such proceedings, the contested statute provides (§ 18 para. 2) that the regional court in the place where the citizen has his residence shall be the court of first instance in such matters. In contrast to the general jurisdiction of courts in employment matters, the citizen is thus accorded increased judicial protection.

Finally, the judicial protection of citizens' rights in these matters is also sufficiently guaranteed by civil law enactments (§§ 11 to 16 on the protection of personhood).

Thus, in principle it is permissible on the basis of constitutional law norms to prescribe certain further prerequisites for holding those offices or engaging in those activities covered by Act No. 451/1991 Coll., and it is in conformity with international legal commitments. Other European states also took measures of a similar type after the collapse of the totalitarian regime's monopoly power, and they considered them to be a legitimate means, the purpose of which is not to threaten the democratic nature of the constitutional system, the value system of a constitutional and law-based state, nor the basic rights and freedoms of citizens, rather the protection and strengthening of just those things.

However, the system of such measures in post-totalitarian European states varies. These measures relate to the full gamut of sectors of state activity without regard to the office held (the army, the police, or the justice system) and are formulated unconditionally, or relate to the severance of employment or service relations with the exception or specific assessment (the absence of personal characteristics necessary for holding the office, the lack of a need to employ the person in question due to reasons of the organization, etc.).

The general objection that the contested statute violates the principle of equality of fundamental rights and basic freedoms in the sense meant by Article 3 para. 1 of the Charter must be judged in relation to the purpose and the content of the statute. From the constitutional law perspective, conditions prescribed by the state for holding certain offices and for engaging in certain activities is permissible in principle and, considering the current system of values and the nature of the present constitutional system, is also necessary.

To the extent that § 2 para. 3 of the statute 7) (the exception for the CSFR Ministry of Defense), § 3 para. 2 8) (the exception for the Interior Ministry), and § 13 para. 3 9) (the exception for persons rehabilitated under Act No. 119/1991 Coll.) violate this general principle of equality, the statute has already breached the constitutional confines; therefore, the Court has granted the petition of the group of Deputies and in its judgment has declared those provisions' to be inconsistent with Article 1 of the Charter.10)

The Court further inquired into the petitioners' objection concerning the asserted impermissible retroactivity of the contested statute. The objection in essence consists in the assertion that a statute may be applied with retroactive effect to situations and to legal relations arising before its issuance only in the case that an earlier acquired right is not infringed as a consequence.

However, the principle of retroactivity is not applicable to the contested statute at all. The statute does not declare the holding of certain offices in the past to be either an unlawful or legally actionable fact or the material elements of a criminal act, and it does not attach any legal consequences whatsoever to it retroactively. As was already earlier construed, it merely sets certain additional preconditions for holding in the future certain prominent positions.

Similarly, it is necessary to reject the objection contained in the petition that the statute under consideration is really a general prosecution simply for being formally affiliated with a particular group, above all where, in harmony with the policy of the totalitarian regime, it concerned affiliation with the power apparatus and its instruments of repression.

The Court also dealt with the issue of citizens' equality in relation to the defined categories of occupations. In the end, it came to the conclusion that it is not possible to guarantee the absolute equality of the category of persons affected, nor is it even necessary. The contested statute is an unmistakable effort to define categories that pose a risk, the danger of which for the democratic development of society can in essence be evaluated in the same way which for similar reasons is true also for the period during which these persons were inscribed in the registry files or continues in other activities.

For each objection of this type, contemplations on the asserted unreasonable breadth of the group of persons to whom the statute applies was taken into consideration. Even though considerations of quantity are not decisive for such legal judgments, the Court considered it appropriate to take such quantifications into account.

The Report of the Director-General of the Governing Body of the International Labour Office GB 252/16/19, which in Geneva on June 2-6, 1992 considered the complaint lodged by the Trade Union Association of Bohemia, Moravia, and Slovakia and by the Czech and Slovak Confederation of Trade Unions alleging non-observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), relied in its introduction upon the declaration made by the former Chairman of the Federal Assembly, Alexander Dubček, namely, that it is a discriminatory statute which deprives approximately one million Czechoslovak citizens of their basic human and trade-union rights (Point II-12 of the Report).

As a result of its inquiry directed to the bodies which keep records of employees and employment (the Federal Ministry of Labor and Social Affairs, the Federal Statistical Office) and of bodies which keep records of the issuance of certificates and their results (the Federal Interior Ministry), the Court has found out that the 1st Division of the Federal Interior Ministry, which is responsible for issuing certificates, had issued 168,928 certificates as of 7 September 1992, both at the request of individuals and of organizations (political parties, for example) not all of which were connected with Act No. 451/1991 Coll. Of the total number of certificates issued, there were 153,504

negative certificates and 15,424 positive certificates. The positive certificates include 4061 persons filed under § 2 para. 1, letter c) of the Act 1) so that, not including them, the total number of positive certificates concern a total of 11,363 persons.

According to the records of the Federal Statistical Office, as of the date of the inquiry there was in the CSFR a total of 7,123,000 employed persons recorded in the files. Thus, only 0.15% of the total number of employed persons received positive certificates (not taking into account those filed under § 2 para. 1, letter c) 1)).

Thus, it is evident that the group of persons affected by the statute under consideration is substantially smaller than has been asserted, and in reality only an insubstantial number of the total number of employed persons are affected. Finally, objections were also raised to the fact that the information contained in entries kept by bodies of the former Ministry of the Interior or its predecessor was treated as conclusive evidence. This objection does not pass muster either, primarily for the following reasons:

The cooperation with the State Security Services by clandestine collaborators listed in § 2 para. 1, letter b) of the Act 1) was in all respects regulated in detail. Clandestine collaborators were fully acquainted with their assignments and their position, and the cooperation with them was formally corroborated by the so-called binding act; clandestine collaborators signed either a prepared commitment to collaborate or they drafted it themselves in free form. If the clandestine collaborators' signature on the act would put "good relations" with counterintelligence at risk, an oral consent was sufficient. Recruited clandestine collaborators chose their code name themselves, and if they did not do so, a name was designated for them by a counterintelligence employee.

Clandestine collaborators did not have to submit written reports, and even if they did so, they were not required to sign them. Oral reports which were not tape-recorded were written up afterwards by employees of counterintelligence.

Some clandestine collaborators whose names have been made public have asserted that they only formally committed themselves to collaborate, but then nothing ever came of it. This is contradicted by what we know about the system of record-keeping and supervision, which for the management of the network of agents was unambiguously set down, and these facts are corroborated by witness testimony.

Counterintelligence agents entrusted with the direction of clandestine collaborators were, in addition, obligated to regularly and systematically supervise their activities and the results of their work, the manner in which they conducted themselves while on duty and in their private lives (Art. 78 of directive A-oper-I-3 from 25 January 1978). The purpose of such supervision was to obtain the best possible guarantee that the clandestine collaborators would perform their assignment scrupulously, that they would turn over correct information, that they would not double-cross counterintelligence people, that they would not betray them, and that they would perform their assignment in the manner in which it was set for them. Then, once a year he put together a written evaluation of the supervisory measures and the results thereof. The superior head of the counterintelligence agents would also take part in this supervision. The results of this supervision, of meetings with the clandestine collaborators in particular, were

formulated into an entry with the appropriate conclusion, and the entry itself was placed in the collaborator's file (Art. 87 of the above-cited directive).

At least once a year a comprehensive evaluation of the clandestine collaborators was carried out and additional specific goals of their activities were laid down. The responsible chief would approve this comprehensive evaluation (arts. 82 to 85 of the above-cited directive).

All of the ascertained facts lead to the unequivocal conclusion that the methods described and the means of proceeding during the use and management of the network of agents in no way differed from the period when the Czechoslovak Communist Party took over power in 1948; with the passage of time these methods were merely made more precise and supplemented by new knowledge gained through relations with the network of agents.

The witnesses were questioned with regard to the circumstances connected with the commitment to collaborate (verbovka) and the clandestine collaborators relationship with the managing bodies of the State Security Services. Their testimony was in agreement and confirms that the directive for instituting binding acts with clandestine collaborators was carefully observed and that contact was made with them regularly, at least once every three months. A form was also created for this purpose and, while the chief supervised, the time and place of the meeting was recorded therein. If the meeting did not go as expected, the chief always made a proposal to discontinue the collaboration or to place the file into the archive (Jan Roller, page 2 of his testimony).

The possibility of separately proving collaboration by individual clandestine collaborators and the extent of their collaboration was in essence deliberately thwarted by the orders and procedures of the directors of the State Security Services' bodies, that is, by the intentional discarding of almost 90% of the files. The network of agents formed an inseparable part of the State Security Services' activities and was a "principle device in fulfilling operational tasks. For this reason, the most important part of the activities of the operational agents of State Security is their work with secret collaborators" (a strictly classified directive of special importance of the Interior Ministry for the operational work of agents of the State Security for 1962).

For this reason, the totalitarian regime's security services tried to keep the evidence concerning activities of the clandestine collaborators secret even for the future.

There was a further objection in the petition (complaint) to the effect that, in adopting the contested statute, the Federal Assembly exceeded its powers (Article 37 para. 2 of Constitutional Act No. 143/1968 Coll., on the Czechoslovak Federation, issued in its complete version as amended under No. 103/1991 Coll.) and that, in this way, it effected an indirect amendment to the Act on University-Level Schools or ÈSAV or SAV, which, however, it is not permitted to do under the Constitutional Act on the Czechoslovak Federation (Article 37 of the cited Act).

The Court cannot concur with this objection either because the statutory regulation of employment relations and measures to ensure international treaty commitments in this field comes under federal jurisdiction (Article 22, letter a) of the cited Act).

Finally, the petitioners attack the portion of the contested statute relating to carrying on a licensed trade (§ 1 para. 5) due to the fact that the requirement of reliability demanded for it (§ 1 para. 1 of the cited Act) is traditionally linked to the concept of "political unreliability", as that is found in the decrees of the President of the Republic (137/1945 Coll. and 138/1945 Coll.), and that the statute under consideration sets stricter conditions for licensed trades than is appropriate owing to the nature of the trade.

Not even in this respect does the Court find this objection to be well-founded.

As our legal order currently stands, the concept of reliability is contained not only in the presidential decrees to which the petitioners' make reference, but also in Act No. 34/1946 (§ 2 paras. 1 and 2) where this concept is also more or less defined.

The ratio legis (legal rational) for these legal provisions consists in the effort, during a period of far-reaching societal changes, to prevent those who in the preceding (war-time) period compromised themselves in the manner defined in the act by collaborating with those who adversely affected the democratic-republican state form, the security and defense of the state, or who instigated or induced others to commit such acts (§ 2 para. 2 of the cited Act).

The petitioners' reference, to the extent that it is aimed at the earlier-cited Presidential decrees, is not well founded if only because those decrees are of a criminal law nature. Keeping that in mind, these issues cannot be resolved otherwise than by the consideration that both cases involve measures that are necessary: in part for the stabilization of society, and in part – as is the case in the matter under consideration – because normal measures for the introduction of a legal order in a restored democracy, thus measures which are necessary in a democratic society, among other reasons, for the security of the state or for the protection of safety or of the public order (compare, for example, Articles 12 para. 3, 14 para. 3, 16 para. 4, 19 para. 2, 20 para. 3, and 27 para. 3 of the Charter).

In contrast to this, the Court has determined that the petition (complaint) is well founded to the extent it raises objections to the inclusion of the group of persons stated in § 2 para. 1, letter c) of the Act1); it is the Court's conviction that it can concur with the petitioners' objections in so far as files may have been kept on persons designated in the statute as collaborators (§ 2 para. 1, letter c) 1) without some written commitment and without their knowledge.

The results of evidence-taking in the proceeding before the Court yielded a sufficient basis for the conclusion that the files of persons who fall into this category (confidential affiliate, candidates for clandestine collaboration, or clandestine collaborators in confidential contact) was based on the personal relations with the selected candidates; this relationship was supposed to serve "personal acquaintance, in order to verify and deepen knowledge gained by administrative screening and by counterintelligence methods, further, for the purposes of ascertaining the relations of the candidate to the State Security Services and his willingness to provide information", while such personal relations should be put into effect so that "the conspiracy of the future covert collaborator would not be impaired in advance and so that the forms and methods of his

counterintelligence work would not be uncovered nor the actual grounds of the relationship." (Directive No. A-oper-I-3 Article 26 and following)

Finally, the above-cited directive testifies to the fact that in the case of these persons, it is not possible to judge reliably and without any sort of doubt concerning their conscious collaboration with agents of the State Security Services; thus, precisely for this reason, all that remains is to grant the petitioners' petition and to hold that this provision of the statute is not in conformity with Article 4 para. 3 of the Charter.6)

That the above-mentioned objection is well founded is also evidenced by the fact that, while certificates issued to persons upon whom files were kept under § 2 para. 1, letters a) and b) 1) have an unambiguous character showing either knowing solidarity with the tools of repression of the totalitarian regime (and records connected therewith), or that no such records exist, the certificate about files (§ 2 para. 1, letter c) 1)) is of a merely contingent character. That is to say, they do not evidence conscious collaboration, rather they are only an expression of the intention of the StB bodies to gain the person caught in this way for conscious collaboration in the future. It follows unambiguously from the witnesses testimony that entries for this category of the contested statute were made not only without the knowledge of the persons written in, but sometimes even with the intention on the part of the StB agent to feign his work zeal and activity (carkovaci kod).

In connection therewith, it was necessary to consider the status of the citizens who come within the category under consideration (§ 2 para. 1, letter c) 1)) and the nature of the independent commission within the Federal Interior Ministry which should verify the finding whether that citizen was a conscious collaborator of the StB or not, whether he knew that he was in contact with StB agents and regularly gave them reports by means of clandestine relations or performed tasks assigned by them. Only when the decision is issued by the independent commission of the Federal Interior Ministry is there decisive evidence for citizens, and the consequences following from the act at issue. The unequal position of persons having such files as compared with other categories of persons, especially those coming under § 2 para. 1, letters a) and b) 1) follows not only from such a distinction as is made in the proceedings before this commission, but from other facts as well.

The outcome of the proceeding before the Higher Court Martial in Tabor against the defendant A. Lorenc and others (T 8/91) even increased the level of doubt with respect to whether it is possible for the commission to come to unambiguous conclusions at all. It was ascertained in that proceeding that the disposal of compromising material filed in the Interior Ministry archives was carried out by order of the defendant, A. Lorenc (case no. NZ-00671/89 from December, 1989). Between December of 1989 and January of 1990, of the 3913 files of candidates for clandestine cooperation, a total of 2643 files were discarded, of the 13,346 files of confidential affiliates, 9176 (p. 253 of the criminal file).

So the consequence of the above-indicated facts is that the necessary evidence-taking regarding conscious collaboration, quite often in conjunction with considerable time intervals between file entries, the death of witnesses, etc., results not only in the independent commission’s failure to meet the prescribed deadline for issuing its

findings (§ 13 para. 2), but also in the impossibility of deciding objectively on some particular cases.

In this connection, it is necessary to take into consideration as well the Court's findings that, according to the testimony of witness, so far citizens have submitted a finding that they were incorrectly categorized as StB collaborators. A mere 300 (11%) of these petitions have been resolved so far, and of these the commission came to the conclusion that it was conscious collaboration only in 13 cases.

Such a situation even raises doubts about the factual basis for these matters and evokes uncertainty in legal relations (both employment and civil).

It is not advisable to tolerate such a state of affairs, among other reasons, also due to the unfavorable consequences that follow from it for these citizens (they are not able to compete for the positions listed in § 1 of the Act, they are unable to successfully take part in a competition for such a position, etc.) for it is no longer possible to actually eliminate such consequences of a commission finding verifying that there was no conscious collaboration.

Taking into consideration all of these circumstances and findings, the Court has, thus, come to the conclusion that § 2 para. 1, letter c)1) of the statute under judgment and further provisions connected therewith (provisions on the Federal Interior Ministry Independent Commission and proceedings before it) are not in conformity with the Charter of Fundamental Rights and Basic Freedoms with regard to the provisions and to the extent which is made apparent from the judgment rendered herein.

Finally, even the nature of the independent commission (§ 11 of the Act11) under consideration) does not correspond to legal guarantees. The membership of the commission (apart from representatives of the legislative bodies, there were members named by the Interior Ministry, the Defense Ministry and the FBIS Director [FBIS means Federal Security Information Service] testifies to the fact, that it is first of all a state administrative authority, when its activities are secured by the Federal Interior Ministry as a central state administrative authority for the area of domestic order and security. The delegates appointed to the commission by the Interior and Defense Ministries are bound by the oath which is taken by police (§ 4 para. 6 of Act No. 334/1991 Coll.) and army (§ 2 para. 2 of Act No. 74/1990 Coll.) personnel. There is no doubt about the fact that they are bound by such an oath even while they are delegates to an independent commission. In addition to this, there is the further fact that the Act being adjudicated does not require any special oath, neither for these members nor for other delegates, even though such an oath would appear to be necessary (§ 37 of Act No. 335/1991 Coll.).

Thus, this commission was not established in conformity with the Constitution (Article 98 para. 1 of the CSFR Constitution No. 100/1960 Coll., as amended by Constitutional Act No. 326/1991 Coll.18)).

Finally, it was necessary to concur with one of the petitioners' further objections, namely, that for an independent commission and proceedings before it, provisions of the Criminal Procedure Code may not be applied nor may possible criminal sanctions be attached to it. The act at issue (§ 20) 15) substantially formulates the material elements

for the offense of giving false testimony (perjury); nonetheless, this statute does not designate these factual elements as a criminal offense, and it does not contain any reference to the Criminal Code (for example, § 175 of the Criminal Code). Since the Charter requires (Article 39) that only a statute may prescribe what sort of conduct shall be a criminal act and what punishment can be imposed therefore, the Court has come to the conclusion that in this respect as well the statute under consideration is not in conformity with the Constitutional Act.

In view of the Court's last mentioned conclusions which affect § 2 para. 1, letter c)1) on the merits, the Federal Interior Ministry Independent Commission has lost its raison d'etre.

The Court finds the petitioners' objections equally justified to the extent that they are directed against the fact that the Defense Minister and the Interior Minister of the CSFR may in justified cases waive the condition set down by para. 1, letter a) (§ 2 para. 3 7), § 3 para. 2 8) of the Act), to the extent that it would interfere with the state's vital security interests and would not undermine the purpose of this statute.

Exceptions from these statutory provisions creates blatant inequality between the personnel of the two departments (defense and interior) and other persons who are affected by the statute under consideration. Such inequality is not in conformity with the Charter (Article 1 10)), and therefore nothing remains but to hold that the claim of non-conformity of this part (of the statute) is justified.

For analogous reasons, the Court also concedes a further objection, directed against § 13 para. 3 13) by which persons who, while they were in the position of the persons listed in § 2 para. 1, letters d) through h), they were later convicted for acts set down in § 2 of Act No. 119/1990 Coll., on Judicial Rehabilitation and were rehabilitated out of compassion, should be regarded as persons who meet the conditions stated in § 1 of the Act. This provision, then disadvantages persons who were rehabilitated out of compassion under Act No. 119/1990 Coll. in relation to persons adversely affected in their employment relations and administrative relations and were rehabilitated out of compassion under Act No. 87/1991 Coll. on Extra-judicial Rehabilitation or under other enactments.

The Court also considers justified the objection that § 4 para. 4 of the Act at issue4) does not comport with the principle of equality (Article 4 para. 3 of the Charter) 6). For in this case, citizens are required (under § 4 para. 4 of the cited Act 4)), prior to taking up those offices listed in § 1, to submit a declaration that they were not and are not working for a foreign counterintelligence agency or foreign reconnaissance services. In contrast to the category of citizens listed in § 2 para. 1, letter d) through h) of the Act,1) who are with regard to possible membership in the named organization are obliged to submit a true and correct declaration of these facts (§ 4 para. 3 of the cited Act), a mere declaration is all that is required of those working for foreign intelligence services. Since such a declaration does not have the character of a legal act (§ 39 of the Administrative Procedure Code), the person is subject to no sanction if the declaration is untrue. Due to the lack of a statutory definition, no employment law or other restrictions (§ 2 of the contested statute) are tied to the fact that a person was or is working for a foreign counterintelligence or reconnaissance service. Thus, this provision is of a declarative character, and it places that category of persons into a position of

inequality in relation to other groups affected by the restrictions. Therefore, it was necessary to grant this part of the petition (complaint) as well.

On the day this decision is published in the Collection of Laws, the following provisions shall lose force and effect: § 2 paras. 2, 2) § 3 para. 2 8), § 4 paras. 2 3) and 4 4), §§ 11 11), 12 12), 13 13), § 18 para. 1 14) and § 20 15) of Act No. 451/1991 Coll., which Sets Down Several Additional Conditions for the Performance of Certain Offices in Governmental Bodies and Organizations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic.

If the Federal Assembly fails to bring these provisions into conformity with the Charter of Fundamental Rights and Basic Freedoms, with the International Convention on Economic, Social and Cultural Rights and with the CSFR Constitution, these provisions of Act No. 451/1991 Coll. shall cease to be valid six months from the day this decision is published.