

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment

of 8 December 2003 No. 18-II

in the case concerning the review of the constitutionality of the provisions of Articles 125, 219, 227, 229, 236, 237, 239, 246, 254, 271, 378, 405 and 408 and Chapters 35 and 39 of the Criminal Procedure Code of the Russian Federation in connection with requests of courts of general jurisdiction and citizens' complaints.

Moscow, 8 December 2003

The Constitutional Court of the Russian Federation composed of Presiding Judge G. A. Zhilin and Judges M. V. Baglay, Yu. M. Danilov, L. M. Zharkova, V. D. Zorkin, S. M. Kazantsev, M. I. Kleandrov, V. O. Luchin, N. V. Seleznev, O. S. Khokhryakova,

in the attendance of Judge V. P. Degtyareva of the Vologda Regional Court, Judge A. N. Savchenko of the Sovetsky District Court of Chelyabinsk, A. A. Tyuvikov, representative of V. L. Fadeyeva, I. A. Diyev, representative of G. V. Pavlyuk, D. N. Mamedov and his representative attorney V. K. Strelnikov, L. N. Melnikova and her representative attorney V. I. Rudnev, V. A. Kukhranov and his representatives attorneys A. V. Gandzioshen and Y. A. Nakhayev, S. S. Zimin and his representative attorney T. A. Zagidullin, L. M. Kurilko and her representative attorney Yu. T. Latyshev, L. G. Nosova and her representative attorney N. Yu. Belousova, Plenipotentiary Representative of the Council of the Federation to the Constitutional Court of the Russian Federation Yu. A. Sharandin,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation and Subsection 3 Section 1, Sections 3 and 4, Article 3, Subsection 3, Section 2, Article 22, Articles 36, 74, 96, 97, 99, 101, 102 and 104 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation",

in an open hearing, examined the constitutionality of the provisions of Articles 125, 219, 227, 229, 236, 237, 239, 246, 254, 271, 378, 405 and 408, and of Chapters 35 and 39 of the Criminal Procedure Code of the Russian Federation.

The reason for the consideration of the case is requests of the Vologda Regional Court, Kurgan Regional Court and Kurgansky Town Court of the Kurgan Region, the Podolsky Town Court of the Moscow Region, the Sovetsky District Court of Chelyabinsk, and complaints of S. S. Zimin, L. M. Kurilko, V. A. Kukhranov, L. S. Larina, D. N. Mamedov, L. N. Melnikova,

L. G. Nosova, G. V. Pavlyuk and V. L. Fadeyeva, who challenge the constitutionality of the abovementioned provisions of the Criminal Procedure Code of the Russian Federation. The ground for the consideration of the case is the discovered uncertainty of whether the provisions challenged by the applicants are in conformity with the Constitution of the Russian Federation.

Insofar as all the requests and complaints concern the same subject matter and pursuant to Article 48 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation is permitted to consider these applications together.

Having heard the report of Judge-Rapporteur N. V. Seleznev, statements by the parties and their representatives, statements of the representatives invited to participate in the hearing: V. V. Demidov, Judge of the Supreme Court of the Russian Federation for the Supreme Court of the Russian Federation, S. G. Kekhlerov, Deputy Prosecutor General of the Russian Federation for the Office of the Prosecutor General of the Russian Federation, S. I. Nikulin for the Ministry of Justice of the Russian Federation, L. N. Bashkatov for the Federal Security Service of the Russian Federation, V. I. Seliverstov for the Commissioner for Human Rights of the Russian Federation, and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. The courts of general jurisdiction in their requests and the citizens in their complaints about violations of their constitutional rights request to recognize as non-conforming to the Constitution of the Russian Federation certain provisions of the Criminal Procedure Code of the Russian Federation, which define the consequences of dismissal of indictment by a prosecutor (*nolle prosequi* notice) or amendments to the indictment during the trial, and regulate the content of decisions, which the trial, cassation and supervisory review courts shall render if violations of the law during the preliminary investigation and inquiry are disclosed.

1.1. The Sovetsky District Court of Chelyabinsk is considering a criminal case against S. A. Izosimov charged with a crime envisaged Section 1, Article 264 “Violation of the Traffic Rules and Use of Transport Vehicles” of the Criminal Code of the Russian Federation. As follows from the documents attached to the request, the court considered it impossible to consider the case on the merits after it had established that during the preliminary investigation certain violations took place, namely a failure to provide the accused with qualified legal assistance of an attorney (defense counsel), to consult the criminal case file upon completion of the preliminary investigation, and to submit motions. The court concluded that Article 237 of the Criminal Procedure Code of the Russian Federation does not allow it to remedy the violations of the

rights of the accused, which took place during the preliminary investigation, because this Article does not consider these violations as grounds for remitting the criminal case to the prosecutor in order to remove the obstacles for consideration of the case. The Sovetsky District Court of Chelyabinsk lodged with the Constitutional Court of the Russian Federation a request for a review of the constitutionality of Article 237 of the Criminal Procedure Code of the Russian Federation and of Article 271 which establishes rules of lodging and examining motions during the pre-trial hearing in the criminal case; however, it does not provide for a possibility to examine a motion for remittal of the criminal case for further investigation in order to remedy violations of the rights of the participants in the criminal proceedings. In the applicant's opinion, the challenged norms do not conform to Articles 18, 45, 46 and 48 of the Constitution of the Russian Federation and violate the citizens' rights guaranteed by these Articles.

The constitutionality of Article 237 of the Criminal Procedure Code of the Russian Federation is also challenged by the Kurgan District Court of the Kurgan Region. The court discovered that there was no investigator's signature under the text of the decision to charge M. V. Zubarev with a crime stipulated by Section 3, Article 158 "Theft" of the Criminal Code of the Russian Federation; and thus the court concluded that it may not consider the criminal case on the merits under these conditions and that there were no grounds in criminal procedure law to remit the criminal case to the prosecutor to remedy this violation. Further, the applicant requests to recognize Section 7, Article 236 of the Criminal Procedure Code of the Russian Federation, as non-conforming to Articles 21 (Section 1), 22 (Section 1), 45 (Section 2) and 46 (Sections 1 and 2) of the Constitution of the Russian Federation, to the extent that it precludes appeals against a decision to stay criminal proceedings rendered at the pre-trial hearing.

S. S. Zimin, L. M. Kurilko, D. N. Mamedov, L. G. Nosova and V. L. Fadeyeva, the victims in different criminal cases, in their complaints lodged with the Constitutional Court of the Russian Federation, equally assert that the provisions of Article 237 of the Criminal Procedure Code of the Russian Federation does not conform to the Constitution of the Russian Federation.

It follows from the complaint of S. S. Zimin and the attached documents that on 6 May 2002 the Dzerzhinsky District Court of the Nizhny Novgorod Region remitted the criminal case on the murder of the applicant's son for further investigation because the victim did not consult the criminal case file during the preliminary investigation and was deprived of an opportunity to submit motions and present additional evidence. The decision of the trial court, as upheld by the decision of the Judicial Section on Criminal Cases of the Nizhny Novgorod Regional Court of 11 June 2002, was annulled by the Presidium of the Nizhny Novgorod Regional Court on 11 July 2002. The decision of the Presidium of the Nizhny Novgorod Regional Court stated that the

Criminal Procedure Code of the Russian Federation, which entered into force on 1 July 2002, does not allow remittal of a criminal case for further investigation, and therefore there are no legal grounds for the preliminary investigation authorities to receive the case.

S. S. Zimin asserts that this decision violated his rights guaranteed by Articles 46 (Section 1), 52 (Section 1) and 123 (Section 1) of the Constitution of the Russian Federation and requests to recognize as non-constitutional the provisions of Section 1, Article 237 of the Criminal Procedure Code of the Russian Federation, applied by the supervisory review court, and the provisions of Articles 378 and 408 of the Code, which contain an exhaustive list of decisions to be rendered upon consideration of the criminal case by the trial, cassation and supervisory review courts, and do not include a decision to remit a criminal case for further investigation in that list.

L. M. Kurilko, D. N. Mamedov and V. L. Fadeyeva lodged a motion to remit the criminal cases in which they were victims for further investigation due to the need to remedy the violations of the criminal procedure law, which took place during the preliminary investigation and due to the presence of grounds to charge the accused with the commission of more grave crimes. Apart from Article 237, the applicants challenge the constitutionality of the following provisions of the Criminal Procedure Code of the Russian Federation: (a) L. M. Kurilko challenges the provisions of Articles 125, 219 and 227, which regulate the judicial procedure for consideration of complaints against actions (inactions) and decisions of preliminary investigation authorities and prosecutors, the procedure for consideration, by an inquirer and an investigator, of motions lodged by the participants in criminal proceedings, the powers of a judge in a criminal case received by a court; (b) D. N. Mamedov challenges the provisions of Articles 227, 229, 236, 378, 405 and 408, and the provisions of Chapters 35 and 39, to the extent that they prescribe decisions which trial, cassation and supervisory review courts shall render upon consideration of the criminal case and general rules of judicial proceedings on criminal case; (c) V. L. Fadeyeva challenges the provisions of Section 1, Article 239, to the extent that they vest a judge with the power to render a decision to discontinue criminal proceedings at a pre-trial hearing upon discovery of grounds stipulated by Subsection 5, Section 1, Article 27 of the Criminal Procedure Code of the Russian Federation (existence of a valid decision of an investigator to discontinue criminal proceedings on the same charges).

1.2. In the course of the proceedings at the Belozersky District Court of the Kurgan Region on the criminal case of K. Yu. Volosnikov and P. V. Vagin charged with crimes stipulated by Subsection “a”, “c”, “d”, Section 2, Article 162 (Robbery), and Subsection “a”, “c”, Section 2, Article 163 “Extortion” of the Criminal Code of the Russian Federation, the prosecutor dismissed the indictment to the extent it concerned the robbery. Taking into

consideration the position of the prosecutor, the court applied only Subsection “a”, “c”, Section 2, Article 163 of the Criminal Code of the Russian Federation, and sentenced each convicted person to three years of imprisonment and released them on probation. While the court concluded in the reasoning of the judgment of conviction that it was proved that the defendants had committed both crimes, it disregarded the motion by the victim’s representative, who participated in the trial proceedings, to find the defendants guilty of both extortion and robbery.

The Judicial Section on Criminal Cases of the Kurgan Regional Court, where the victim appealed against the judgment of conviction, stated that it may not consider the arguments of the appeal on the merits. The cassation court followed Sections 7, 8, 9 and 10, Article 246 of the Criminal Procedure Code of the Russian Federation, according to which dismissal of an indictment by a prosecutor or amendment of an indictment are obligatory for the trial and cassation courts, which consider the criminal case. The Judicial Section on Criminal Cases of the Kurgan Regional Court submitted a request with the Constitutional Court of the Russian Federation requesting review of the constitutionality of the mentioned provisions, because it believes that they do not conform to Articles 2, 18, 19 (Section 1), 45, 46, 52, 55 and 123 (Section 3) of the Constitution of the Russian Federation.

Similar requests was lodged with the Constitutional Court of the Russian Federation by the Vologda Regional Court (in connection with cassation proceedings on the criminal case of V. Y. Kiryanov charged with a crime stipulated by Section 1, Article 109 “Negligent Homicide” of the Criminal Code of the Russian Federation), and the Podolsky Town Court of the Moscow Region (in connection with the trial of A. V. Kaznacheyev and S. E. Nazarov charged with a crime stipulated by Subsection “a”, “b”, Section 2, Article 213 “Hooliganism” of the Criminal Code of the Russian Federation).

L. N. Melnikova, a victim in the criminal case on the death of her daughter, requests to review the constitutionality of the same provisions of Article 246 of the Criminal Procedure Code of the Russian Federation. It follows from the complaint that regardless of the prosecutor’s motion to re-qualify the defendant’s actions from Section 1, Article 105 “Premeditated Murder” of the Criminal Code of the Russian Federation, to Section 1, Article 109 “Negligent Homicide” of the Code, the Cheremushkinsky District Court of Moscow found the defendant guilty of a crime stipulated by Section 1, Article 105 of the Criminal Code of the Russian Federation. In making this decision the court took into consideration the opinion of the victim, who did not agree with the conclusions of the prosecution, and found that the premeditated nature of the defendant’s action was proven. This judgment of conviction was appealed to the Moscow City Court both by the prosecution and the defence. While the cassation court found that the trial court correctly ascertained the facts, it followed the provisions of Articles 246 and 254 of the

Criminal Procedure Code of the Russian Federation and changed the qualification of the defendant's actions from Section 1, Article 105 of the Criminal Code of the Russian Federation, to Section 1, Article 109 of the Code.

In L. N. Melnikova's opinion, the provisions of Article 246 of the Criminal Procedure Code of the Russian Federation, which oblige a court to accept dismissal of the indictment by the prosecutor, deprive the victim and his representative of an opportunity to object against the dismissal, and thus they do not conform to Articles 2, 18, 19 (Section 1), 45, 46, 52, 55 and 123 (Section 3) of the Constitution of the Russian Federation.

L. S. Larina, G. V. Pavlyuk and V. A. Kukhranov hold the same opinion. Further, in his complaint, V. A. Kukhranov, along with the provisions of Article 246 of the Criminal Procedure Code of the Russian Federation, challenges the constitutionality of Subsection 2, Article 254 of the Code, according to which after dismissal of the indictment by the prosecutor a court in the hearing must discontinue criminal proceedings under Section 7, Article 246 of this Code.

1.3. The norms of Articles 125 and 219 of the Criminal Procedure Code of the Russian Federation, which are challenged in the complaint of L. M. Kurilko, do not deprive the participants in criminal proceedings, *inter alia* victims, of their rights but rather directly guarantee these rights to appeal against the decisions and actions (inactions) of an inquirer, an investigator or a prosecutor, to examine motions lodged during the examination of the criminal case file, and to appeal against decisions upon these motions. Article 227 of the Criminal Procedure Code of the Russian Federation defines the forms and procedure for decisions made by a judge upon receipt of a criminal case by a court without a pre-trial hearing. The norms of this Article do not regulate what decision a judge shall render if the participants in criminal proceedings do not agree to the conclusions stated in the indictment or information, and, consequently, do not infringe on the constitutional rights of the applicant, including those she considers violated.

Consequently, the complaint of L. M. Kurilko, to the extent that it concerns the review of the constitutionality of Articles 125, 219 and 227 of the Criminal Procedure Code of the Russian Federation, is inadmissible under the requirements of Articles 96 and 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", and the proceedings on the complaint to this extent shall be discontinued under Article 68 of the mentioned Law. On the same ground the proceedings on the complaint of D. N. Mamedov shall be discontinued to the extent that they concern the review of the constitutionality of Article 227 of the Criminal Procedure Code of the Russian Federation and Article 229 of the Code, which stipulates grounds making the pre-trial hearing necessary.

The provisions of Article 236 (Section 1), Article 237 (Sections 2, 3 and 5), Articles 271, 378, 405, 408 and Chapters 35 and 39 of the Criminal Procedure Code of the Russian Federation, challenged in the complaints of D. N. Mamedov and S. S. Zimin and the request of the Sovetsky District Court of Chelyabinsk, may not be the subject matter of consideration by the Constitutional Court of the Russian Federation since their meaning within the system of the criminal procedure regulation in force is predetermined by other norms of the Criminal Procedure Code of the Russian Federation which are reviewed for constitutionality in the present proceedings. The challenged provisions on their own may not be considered as violating the constitutional rights of the victims and the accused. The same applies to Section 10, Article 246 of the Criminal Procedure Code of the Russian Federation, challenged by the Kurgan Regional Court, and according to which discontinuance of the proceedings due to dismissal or amendment of indictment by the prosecutor does not preclude subsequent consideration of a civil lawsuit in civil proceedings.

In the present proceedings, the Constitutional Court of the Russian Federation may not consider the complaint of V. L. Fadeyeva to the extent that it concerns the review of the constitutionality of Section 1, Article 239 of the Criminal Procedure Code of the Russian Federation. On the basis of this provision the court discontinued the criminal proceedings on larceny charges (in respect of the applicant's money), because the case file included a valid (not annulled) decision of the investigator to discontinue the criminal proceedings due to the absence of elements of crime in the actions of the accused. The challenged provision is aimed at ensuring the universally recognized legal principle *non bis in idem* in the criminal proceedings reflected in Article 50 (Section 1) of the Constitution of the Russian Federation, and it does not violate the constitutional rights of the applicant. As regards the lawful interests of V. L. Fadeyeva infringed by the alleged crime, their protection shall be exercised not by resuming the criminal proceedings in spite of the decision of the investigator to discontinue them (the applicant insists on that), but by annulling this decision and re-opening the criminal proceedings.

Consequently, the subject matter of the present proceedings is:

- the provisions of Sections 1 and 4, Article 237 of the Criminal Procedure Code of the Russian Federation, to the extent that they restrict the power of the trial court to remit a criminal case to the prosecutor if violations of the criminal procedure law are disclosed during the pretrial hearing;
- the provisions of Section 7, Article 236 of the Criminal Procedure Code of the Russian Federation, to the extent that they preclude appeals against a decision to stay criminal proceedings rendered at the pretrial hearing;

– the provisions of Sections 7, 8 and 9, Article 246, and Subsection 2, Article 254 of the Criminal Procedure Code of the Russian Federation, to the extent that they oblige a court to discontinue criminal proceedings (criminal prosecution) or to convict the defendant for a less grave crime when the prosecutor respectively dismisses or amends the indictment; and to the extent that they preclude review of this decision by a superior court.

2. According to the Constitution of the Russian Federation, in the Russian Federation, as a rule of law state, an individual, his rights and freedoms are the supreme value, and the recognition, observance and protection of the rights and freedoms of man and citizen is a duty of the State; in the Russian Federation recognition and guaranties are provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the Constitution; the right and freedoms determine the essence, meaning and implementation of laws, and are ensured by administration of justice (Articles 1, 2, 17, 18 and 118); state (including judicial) protection of the rights and freedoms of man and citizen is guaranteed in the Russian Federation; everyone is free to protect his rights and freedoms by all means not prohibited by law and decisions and actions (inactions) of state authorities and officials may be appealed against in court (Article 45; Article 46, Sections 1 and 2).

It follows from the cited provisions of the Constitution of the Russian Federation and the corresponding provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that administration of justice in its very essence may be recognized as such only if it conforms to the requirements of fairness and ensures effective restoration of rights. In criminal proceedings it implies at least the following: establishing, on the basis of the evidence examined, the circumstances of an incident, which is the ground for instituting criminal proceedings; proper legal qualification of an incident; evaluation of specific damage caused to society and certain persons, and the actual degree of the person's guilt in the commission of an offence. In order to ensure the rights and lawful interests of such participants in criminal proceedings as an accused and a suspect, these persons shall be provided with an opportunity to present before the court their position on the merits of the case and the arguments they consider necessary for its substantiation. This rule is reflected in Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation was committed by persons acting in an official capacity.

Within the meaning of Articles 46–52, 118, 120 and 123 of the Constitution of the Russian Federation and the corresponding Articles 6 and 13 of the Convention for the Protection

of Human Rights and Fundamental Freedoms, a court as an authority administering justice shall ensure, within criminal proceedings, observance of the requirements established for rendering a just, i.e. lawful, reasonable and fair decision on the case and shall take measures to remove obstacles impeding it. This means that the court shall be vested with respective powers by criminal procedure law. Otherwise, it would be impossible to fully ensure the right to judicial protection.

2.1. By virtue of Articles 46–52, 118 (Section 1 and 2), 123 (Section 3) and 126 of the Constitution of the Russian Federation the adjudicatory and prosecutorial functions shall be strictly separated and vested in respective authorities. Instituting criminal prosecution, filing and pursuing charges before the court shall be exercised by authorities and officials as prescribed by law, and, in cases established by law, by victims as well. The court exercising judicial power in criminal proceedings based on adversariness and equality of parties may not take either the side of the prosecution or the side of the defence, it may not substitute itself for the parties or assume their procedural powers. The court shall remain an objective and impartial arbiter.

Vesting a court with an obligation to perform prosecutorial function in whatever form does not correspond to the provisions of Article 123 (Section 3) of the Constitution of the Russian Federation and precludes independent and impartial administration of justice, as required by Articles 10, 118 and 120 of the Constitution of the Russian Federation, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 § 1 of the International Covenant on Civil and Political Rights.

2.2. According to the order of criminal proceedings established in the Russian Federation, pre-trial proceedings taking place prior to the consideration of the case by a court pursue the aims of comprehensive and objective examination of the case. In the course of the investigative actions exercised within the preliminary investigation the majority of evidence in the case is obtained and examined, while certain investigative actions may be exercised only at this procedural stage. During the pre-trial proceedings the respective authorities file the charges which subsequently become the subject matter of judicial proceedings and determine the limits of these proceedings (Article 252 of the Criminal Procedure Code of the Russian Federation).

The criminal procedure law giving regard to the contents and significance of pre-trial proceedings guarantees to the accused during preliminary investigation the right to be informed of the charges against him, the right to assistance of a defence counsel, the right to use the assistance of an interpreter and (or) translator free of charge, the right to submit evidence, the right to submit motions and objections, the right to consult the whole criminal case file upon completion of an inquiry or a preliminary investigation, and a number of other rights (Article 47 of the Criminal Procedure Code of the Russian Federation). A victim, on the other hand, has the

rights to know the charge filed against the accused, to have a representative, to submit evidence, to submit motions and objections, to consult the criminal case file, etc. (Article 46 of the Criminal Procedure Code of the Russian Federation). Violation of the procedural rights of the accused or a victim at the stage of preliminary investigation may deprive them of effective judicial protection.

The constitutional principles of administration of justice imply strict observance of the criminal prosecution procedures as a guarantee of the procedural rights of the participants in criminal proceedings. Therefore, if the procedural violations committed by the inquiry or investigative authorities are disclosed, a court, which administers justice independently and autonomously, may take measures to remedy the violations under criminal procedure law in order to restore the rights of the participants in criminal proceedings and to ensure conditions for comprehensive and impartial examination of the case on the merits. Thus, the persons who participate in the criminal proceedings (primarily, the accused and the victims), shall be guaranteed the right to judicial protection of their rights and freedoms prescribed by Article 46 of the Constitution of the Russian Federation and with other rights prescribed by Articles 47–50 and 52 of the Constitution of the Russian Federation.

3. The Constitutional Court of the Russian Federation has repeatedly considered issues of statutory guarantees of judicial protection for persons whose rights and lawful interests were been violated at the pre-trial stages of criminal proceedings by actions (inactions) and decisions of the inquiry authorities, inquirers, investigators and prosecutors; and issues of the powers of the court to remit the case to the prosecutor for rectification of the violations committed.

In the Judgments of 3 May 1995 in the case concerning the review of the constitutionality of Articles 220¹ and 220² of the Criminal Procedure Code of the RSFSR, of 13 November 1995 in the case concerning the review of the constitutionality of Section 5, Article 209 of the Criminal Procedure Code of the RSFSR, of 29 April 1998 in the case concerning the review of the constitutionality of Section 4, Article 113 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation recognized the mentioned provisions of the Criminal Procedure Code of the RSFSR as non-conforming to the Constitution of the Russian Federation to the extent that within the meaning attributed by the law-enforcement practice they preclude the possibility of judicial review, upon a request of the interested persons, of the lawfulness and reasonableness of decisions to impose a restraint measure in the form of detention, to discontinue criminal proceedings and to refuse to institute criminal proceedings.

In the Judgment of 23 March 1999 in the case concerning the review of the constitutionality of Articles 133, 218 and 220 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation emphasized that under the constitutional obligation

of the state to provide everyone with a possibility to defend his rights in disputes with any authorities and officials (*inter alia* those conducting preliminary investigation in criminal cases) and depending on the specifics of the challenged actions (inactions) and decisions of the preliminary investigation authorities, the legislator is entitled to prescribe judicial review of their lawfulness and reasonableness both during the preliminary investigation and after the completion of this procedural stage and transfer of the criminal case with an indictment (information) to court. In both of the mentioned cases, courts are obliged to examine the complaints of the participants in criminal proceedings on the merits and, having discovered violations committed by the inquiry and investigation authorities, to take measures to have the violation remedied either by the authority or official who committed it, or remedy it itself. This arrangement is meant to ensure the right to judicial protection, guaranteed by Article 46 (Section 2) of the Constitution of the Russian Federation, within the constitutional interpretation of the meaning of the criminal procedure law.

In its Judgment of 20 April 1999 in the case concerning the review of the constitutionality of Articles 232, 248 and 258 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation recognized the provisions of Subsections 1 and 3, Section 1, Article 232, and Section 1, Article 258 of the Criminal Procedure Code of the RSFSR, as non-conforming to the Constitution of the Russian Federation to the extent that they vested a court with the obligation to remit, upon its own motion, a criminal case to the prosecutor when preliminary investigation appeared to be incomplete and it could not be rectified within the judicial proceedings, and when there were grounds for filing new charges against the defendant or when more grave charges were filed or if the new charges considerably diverged from the circumstances of the crime indicated in the indictment. The Constitutional Court of the Russian Federation concluded that by remitting criminal cases upon their own motion to the prosecutor for further investigation and exercise of additional investigative actions (including investigative experiment, repeated expert examination, identifying and questioning new witnesses), i.e. initiating continuance of the investigation activity on substantiating the charges, courts of general jurisdiction essentially considered that necessary and sufficient evidence was absent. And if the court, upon its own motion, decides to remit a criminal case for further investigation (in the absence of the parties' motions), i.e. when neither the prosecution nor the defence insists on that, the court assumes atypical prosecutorial functions.

By the Decision of the Constitutional Court of the Russian Federation of 3 February 2000 upon a complaint of L. Yu. Berzina, the stated legal opinion was extended to Subsection 2, Section 1, Article 232 of the Criminal Procedure Code of the RSFSR, to the extent that it vested the court with the obligation to remit, upon its own motion, a criminal case to the prosecutor if it established that the evidence was inadmissible because it was obtained by the inquiry and

investigative authorities in violation of the criminal procedure law, provided that it entails incompleteness of investigation which may not be remedied in the hearing. The Constitutional Court of the Russian Federation stated that Subsection 2, Section 1, Article 232 of the Criminal Procedure Code of the RSFSR, must not be applied by courts, other authorities and officials to the extent that it contained a provision similar to provisions already recognized as non-conforming to the Constitution of the Russian Federation.

At the same time, by its Judgment of 4 March 2003 in the case concerning the review of the constitutionality of Subsection 2, Section 1 and Section 3, Article 232 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation recognized Subsection 2, Section 1, Article 232 of the Criminal Procedure Code of the RSFSR as conforming to the Constitution of the Russian Federation to the extent that it allowed to remit a criminal case to the prosecutor to rectify fundamental violations of the criminal procedure law if it is not meant to remedy the incompleteness of the inquiry and preliminary investigation.

The Constitutional Court of the Russian Federation relied on the legal opinion, according to which fundamental procedural violations are obstacles for consideration of a criminal case, which a court may not rectify itself and which (as it entails deprivation or restriction of the statutorily guaranteed rights of the participants in criminal proceedings) prevents adoption of a lawful and reasonable judgment. These obstacles *de facto* preclude the court from exercising the function of administration of justice, which is vested in it by the Constitution of the Russian Federation. However, these procedural violations do not include issues of fact, qualification of actions, and proving the guilt of the accused, which do not imply amendments to the previously filed indictment. In these cases a court remitting a criminal case to the prosecutor does not replace the prosecution, since it only highlights the discovered violations, which infringe the rights of the participants in criminal proceedings and demands their restoration. As it was stressed by the Constitutional Court of the Russian Federation, remitting a criminal case to a prosecutor is intended to ensure compliance of the preliminary investigation with the requirements established by the criminal procedure law. When the discovered fundamental procedural violations are remedied and the participants in the criminal proceedings are provided with an opportunity to exercise the respective rights, the case may be transferred back to court for consideration on the merits and rendering a decision. This approach ensures everyone's, including the accused person's, right to judicial protection and the right of victims to access to justice and compensation for damage (Article 46 and 52 of the Constitution of the Russian Federation).

Therefore, it follows from Articles 46–50, 52, 118, 120 and 123 of the Constitution of the Russian Federation and the legal opinions of the Constitutional Court of the Russian Federation

developed on their basis that within the criminal proceedings a court of general jurisdiction may remit a case to the prosecution for removal of obstacles to its consideration, upon a motion of a party or upon its own motion, when fundamental violations of law committed during the pre-trial proceedings are disclosed, provided that these flaws may not be removed during the trial, and if remitting a case is not meant to remedy incompleteness of the inquiry and preliminary investigation. Rectification of violations in these cases implies the exercise of necessary investigative and other procedural actions. Otherwise, the participants in criminal proceedings, whose rights and lawful interests were violated during the pre-trial proceedings, would be deprived of judicial protection.

4. According to Section 1, Article 237 of the Criminal Procedure Code of the Russian Federation, upon a party's motion or upon its own motion the court shall remit the criminal case to the prosecutor to remove obstacles for its consideration under the following circumstances: (a) when the indictment or information have been drawn in violation of the requirements of the Code, and it precludes the court from rendering a judgment or other decision on the basis of this indictment or information (Subsection 1); (b) when a copy of the indictment or information was not served on the defendant, unless the court recognizes the lawfulness and reasonableness of the prosecutor's decision under Section 4, Article 222, or Section 3, Article 226 of the Code (Subsection 2); (c) when it is necessary to draft an indictment or information in a criminal case transferred to court with a decision to prescribe compulsory medical treatment (Subsection 3); (d) when the grounds envisaged by Article 153 of the Code for the joinder of criminal cases are present (Subsection 4); (e) when the accused has not been informed of his rights guaranteed by Section 5, Article 217 of the Code, while consulting the criminal case file (Subsection 5).

Articles 215, 220, 221, 225 and 226 of the Criminal Procedure Code of the Russian Federation stipulate that the indictment and information are the final documents which are prepared upon completion of investigation or inquiry after all investigative actions in the criminal case are exercised and the evidence obtained is sufficient for the preparation of these documents. It follows from the mentioned Articles that if the violations of the criminal procedure law are committed at the pre-trial stages of criminal proceedings, neither the indictment nor the information may be considered as prepared in compliance with the requirements of the Code.

Within the meaning of Subsection 1, Section 1, of Article 237, taken in conjunction with Subsections 2–5, Section 1 of the same Article, and in conjunction with Articles 215, 220, 221, 225 and 226 of the Criminal Procedure Code of the Russian Federation, if in preparing the indictment or information the requirements of the Code are violated, the criminal case shall be remitted to the prosecutor upon a motion of a party or upon the court's own motion if it is necessary for the protection of the rights and lawful interests of the participants in criminal

proceedings. The remittal shall take place under a reasoned statement by the defendant, the victim and their representatives made during the hearing and proving violations committed at the pre-trial stages, which may not be remedied in the hearing. However, the ground for remittal of a criminal case to the prosecutor is in any event a fundamental violation of the criminal procedure law committed by an inquirer, an investigator or a prosecutor, when such flaw precludes rendering of a judgment or another decision by a court. Violations of the requirements of the Criminal Procedure Code of the Russian Federation committed at the pre-trial stages, which may not be remedied in the hearing and preclude rendering of a judicial decision (complying with the fairness requirements) in the criminal case, always demonstrate that the indictment or information do not conform to the requirements of the Code.

Thereby, within their constitutional meaning and in their interconnection the provisions of Section 1, Article 237 of the Criminal Procedure Code of the Russian Federation, do not preclude a court from remitting a criminal case to the prosecutor for removing obstacles to consideration of the criminal case by a court upon a motion of a party or on its own motion, provided that fundamental violations of the criminal procedure law are present and may not be remedied in the hearing and if the case is remitted not in order to remedy the incompleteness of the inquiry or preliminary investigation.

Any other interpretation of the mentioned provisions of the criminal procedure law would unlawfully restrict the right to judicial protection, access to justice and the right to compensation for the damage (Section 1 and 2, Article 46; Article 52, Section 3, Article 55 of the Constitution of the Russian Federation), and would encroach upon the prerogative of the court to administer justice and to secure the rights and freedoms of man and citizen (Article 18; Section 1 and 2, Article 118 of the Constitution of the Russian Federation).

At the same time, the provision of Section 4, Article 237 of the Criminal Procedure Code of the Russian Federation, which does not permit to exercise investigative or other procedural actions necessary to remedy the discovered violations, precludes any effective remedy of the violated rights of the participants in criminal proceedings either by the investigation authorities who committed these violations, or by a court. This approach does not conform to the requirements of independent, impartial and fair administration of justice, prescribed *inter alia* by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Within the meaning of the Convention provisions in determining the rights and obligations, everyone, including the accused and the victim, shall be provided with guarantees of a fair trial. In the system of criminal procedure norms in force, Section 4, Article 237 of the Criminal Procedure Code violate Articles 45 (Section 1), 46 (Section 1 and 2) and 52 of the Constitution

of the Russian Federation and do not conform to the requirements of its Articles 18, 49, 50 and 118 (Section 1 and 2).

5. Section 7, Article 236 of the Criminal Procedure Code of the Russian Federation, does not permit cassation review of a decision to discontinue criminal proceedings rendered at a pre-trial hearing.

The issue of appeals against trial court decisions concerning the stay of criminal proceedings has been already considered by the Constitutional Court of the Russian Federation. In the Judgment of 2 July 1998 in the case concerning the review of the constitutionality of Articles 331 and 464 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation recognized the norms which preclude appeals against these decisions as non-conforming to the Constitution of the Russian Federation. The Constitutional Court of the Russian Federation reached this conclusion, since these provisions objectively preclude further proceedings, and lack of a possibility to appeal against them entails danger of unreasonable and unlawful delay in rendering a decision in the criminal case and violation of the citizen's rights, which in these cases do not enjoy judicial protection and effective remedy.

The regulation provided by the legislator in Section 7, Article 236 of the Criminal Procedure Code of the Russian Federation, is similar to the norms recognized by the Constitutional Court of the Russian Federation as non-conforming to the Constitution of the Russian Federation. However, under Article 125 (Section 6) of the Constitution of the Russian Federation, legal acts or their provisions recognized as unconstitutional shall lose their legal force. Pursuant to Section 2, Article 79 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the judgments of the Constitutional Court of the Russian Federation in force may not be overridden by re-enactment of the provisions recognized as non-conforming to the Constitution of the Russian Federation, their unconstitutionality does not require repeated verification, and they have no legal force from the adoption and shall not be applied.

6. According to Article 123 (Section 3) of the Constitution of the Russian Federation, judicial proceedings shall rest upon adversariness and equality of parties. Consequently, the prosecution and the defence, participating in the hearing, shall be provided with equal procedural opportunities to assert their rights and lawful interests, including an opportunity to submit motions, appeal against actions and decisions of the court which administers the proceedings in the case.

In its Judgments of 10 December 1998 in the case concerning the review of the constitutionality of Section 2, Article 335 of the Criminal Procedure Code of the RSFSR, of 15 January 1999 in the case concerning the review of the constitutionality of Sections 1 and 2,

Article 295 of the Criminal Procedure Code of the RSFSR, and of 14 February 2000 in the case concerning the review of the constitutionality of Sections 3, 4 and 5, Article 377 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation stated that a true possibility, equally provided to the parties, to present to the court their opinion on all aspects of the case is a necessary guarantee of judicial protection and fair proceedings in the criminal case. Only under this condition the right to judicial protection is exercised in judicial proceedings, which within the meaning of Article 46 (Section 1 and 2) of the Constitution of the Russian Federation and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms shall be fair, comprehensive and effective.

This approach is equally applicable to judicial protection of victims of crimes, to whom under Article 52 of the Constitution of the Russian Federation the state ensures access to justice and compensation for damage. A victim has his own interests in criminal proceedings, since he is a person who sustained physical injury, pecuniary damage, psychological distress or damage to the reputation due to an offence (Section 1, Article 42 of the Criminal Procedure Code of the Russian Federation). For the protection of his interests a victim participates in the criminal proceedings on the side of the prosecution (Subsection 47, Article 5 of the Criminal Procedure Code of the Russian Federation) and has the following rights of a party in the criminal proceedings: to inform about the offence committed against him, submit evidence, press charges, appeal against actions (inaction) and decisions of an inquirer, investigator, prosecutor and a court, *inter alia* against a decision to deny instituting criminal proceedings and discontinuing criminal proceedings, appeal against a judgment, decision or ruling of a court.

This approach to the regulation of the victim's rights corresponds to the provisions of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by UN General Assembly Resolution 40/34 of 29 November 1985), which declares that persons who have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, are entitled to access to mechanisms of justice and to prompt redress as provided for by national legislation, for the harm that they have suffered (§ 4). The Member States of the United Nations shall facilitate the responsiveness of judicial and administrative processes to the needs of victims by "allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system", as well as by "providing proper assistance to victims throughout the legal process" (§ 6 (b) and (c)). These requirements are identical to certain provisions of Recommendation R (85) 11 of the Committee of Ministers of the Council of Europe, "On the Position of the Victim in the Framework of Criminal Law and Procedure", which emphasize

that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim; it is also important to enhance the confidence of the victim in criminal justice; in this connection the needs of the victim should be taken into account to a greater degree, throughout all stages of the criminal justice process; the Member States are recommended to review their legislation and practice in accordance with the guideline that the victim should have the right to ask for a review, by a competent authority, of a decision not to prosecute, or the right to institute private proceedings (Preamble; Part I.A, § 7)

Accordingly, the interests of a victim in criminal proceedings may not be restricted to compensation of the damage only, because to a great extent they are influenced by issues of proving the charges, scope of indictment, application of criminal law and imposition of punishment. In many cases the feasibility and specific amounts of compensation for damages directly depend on the resolution of these issues.

As was highlighted in the Judgment of the Constitutional Court of the Russian Federation of 24 April 2003 in the case concerning the review of the constitutionality of Subsection 8 of the Decision of the State Duma “On the Announcement of Amnesty in connection with the 55th Anniversary of the Victory in the Great Patriotic War of 1941–1945”, the duty of the state to ensure protection for the rights of the victims of crimes, including by providing them with adequate opportunities to assert their rights in court also follows from Article 21 (Section 1) of the Constitution of the Russian Federation. According to the latter provision, human dignity shall be protected by the state and nothing may serve as a basis for its denial. With respect to the personality of the victim this constitutional provision implies the duty of the state not only to prevent and suppress any infringements which may cause damage and moral sufferings to an individual, in the order prescribed by law, but also to provide the victim of a crime with an opportunity to assert, primarily in court, his rights and lawful interests by all legal means. Any other approach would result in derogation of human dignity not only by the offender, but also by the state itself.

7. The challenged provisions of Articles 246 and 254 of the Criminal Procedure Code of the Russian Federation, regulate the order and legal consequences of dismissal or amendment of the indictment by the prosecutor.

The criminal procedure law vests these powers with the prosecutor and imposes respective obligations on the court to discontinue criminal proceedings, criminal prosecution, or to find the accused guilty of a less grave crime in order to ensure that the judicial proceedings are based on adversariness and equality of parties (Section 3, Article 123 of the Constitution of the Russian Federation). According to this principle the adjudicatory functions and prosecution functions shall be separated and vested in different authorities. The stated principle in any event

implies that the institution of criminal prosecution, filing charges and indicting a person is performed by the authorities and officials listed in the law, and by victims. The competence of the court is to review and assess the lawfulness and reasonableness of the conclusions reached by them on the merits of the indictment.

The issue of legal consequences of indictment dismissal by the prosecutor has already been considered by the Constitutional Court of the Russian Federation. In the Judgment of 20 April 1999 in the case concerning the review of the constitutionality of certain provisions of Articles 232, 248 and 258 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation recognized Section 4, Article 248 of the Criminal Procedure Code of the of the RSFSR as non-conforming to the Constitution of the Russian Federation, to the extent that it permitted a court to exercise an atypical function to substantiate the charges filed by the investigative authorities after the dismissal of the indictment by the prosecutor (including amendment of the indictment) which it allowed. According to the legal opinion expressed in that Judgment, a court may establish a person's guilt only if it has been proved by the authorities and officials conducting the criminal prosecution since, within the meaning of Articles 118 and 123 (Section 3) of the Constitution of the Russian Federation, a court considering criminal cases exercises exclusively the function of administering justice and shall not replace the authorities which file and substantiate charges. Under Article 49 (Section 3) of the Constitution of the Russian Federation irremediable doubts as to the guilt of the person must be interpreted in favour of the accused. As was emphasized in the Decision of 15 May 2002 rendered by the Constitutional Court of the Russian Federation sitting as a Plenary Court in the proceedings on the complaint of I. N. Bychkov about violation of his constitutional rights by Section 2, Article 60, and Article 98 of the Criminal Procedure Code of the RSFSR, if criminal prosecution authorities have failed to prove the defendant's guilt, especially if the prosecutor or the victim dismissed the indictment (fully or partly), this shall lead to an acquittal or a conviction of a less grave crime.

While this conclusion was reached with regard for the system of criminal procedure norms in force at the material time (Criminal Procedure Code of the RSFSR), the Constitutional Court of the Russian Federation stressed in the Judgment of 20 April 1999 in the case concerning the review of the constitutionality of Articles 232, 248 and 258 of the Criminal Procedure Code of the RSFSR and repeated in the Decision of 5 July 2000 upon a request of the Prosecutor General of the Russian Federation on official clarification of that Judgment that the legislator may prescribe other procedural consequences precluding proceedings on a criminal case after the dismissal of the indictment by the prosecutor (a victim), *inter alia* discontinuation of criminal proceedings (as has been already established for jury trials).

The legal opinion of the Constitutional Court of the Russian Federation has been acknowledged by the legislator and reflected in the Criminal Procedure Code of the Russian Federation. According to Article 246 of the Criminal Procedure Code of the Russian Federation, if the prosecutor during the trial reaches the conclusion that the available evidence does not corroborate the charge against the defendant, he shall dismiss the indictment and state the reasons to the court. In the course of a trial, the dismissal of the indictment by the prosecutor (in full or in part) shall entail discontinuation of the criminal proceedings on the case or discontinuation of criminal prosecution in full or in their respective parts on the grounds envisaged by Subsections 1 and 2, Section 1, Article 24, and Subsections 1 and 2, Section 1, Article 27 of the Criminal Procedure Code of the Russian Federation (Section 7, Article 246). Before the court retires to the deliberation room to render a judgment, the prosecutor may also amend the indictment by (a) excluding certain elements aggravating the penalty from the qualification of the offence; (b) excluding reference to a provision of the Criminal Code of the Russian Federation from the indictment if the actions of the defendant fall under a different provision of the Criminal Code he is already charged with in the indictment or information; (c) re-qualification of the actions in accordance with a provision of the Criminal Code of the Russian Federation stipulating a more lenient penalty (Section 8, Article 246). Subsection 2 Article 254 of the Criminal Procedure Code of the Russian Federation, stipulates that a court shall discontinue criminal proceedings in the hearing after the dismissal of the indictment by the prosecutor under Section 7, Article 246, or Section 3, Article 249 of the Code.

Within the meaning of the mentioned provisions, after the dismissal of the indictment by the prosecutor, the court shall discontinue the criminal proceedings. Full or partial dismissal of the indictment by the prosecutor in the course of pretrial hearing, and the amendment (reduction) of the indictment predetermine respective court decision. However, the prosecutor is obliged to present his reasons to the court referring to the grounds established by Subsections 1 and 2, Article 24, and Subsections 1 and 2, Article 27 of the Criminal Procedure Code of the Russian Federation (the absence of the event of a crime, the absence of elements of a crime, non-involvement of the defendant in the commission of a crime). Reduction of the indictment shall be reasoned in the same manner.

The Criminal Procedure Code of the Russian Federation, as a general rule, precludes review of the reasonableness of procedural decisions only when the authority which adopted the decision has no duty to give reasons (e.g. judgment of conviction in respect of a defendant who pleads guilty as charged, or a verdict of the jury). If the law requires to state reasons for a decision, it implies a possibility to subsequently review these reasons.

The use of grounds prescribed by the criminal procedure law for dismissal of the indictment by the prosecutor and reduction of the indictment normally implies prior analysis of all evidence obtained in the criminal case and its legal assessment. This conclusion is supported, in particular, by the fact that in other cases a court shall acquit a person on such grounds as the absence of the event of a crime and non-involvement of a defendant in the commission of a crime (Sections 2 and 8, Article 302 of the Criminal Procedure Code of the Russian Federation).

Accordingly, dismissal of the indictment by the prosecutor and reduction of the indictment, and respective judicial decisions may be rendered only after examination of significant materials of the case file has been completed and the opinions of both the prosecution and the defence have been heard. A failure to provide the mentioned participants in criminal proceedings with an opportunity to present their opinions to the court would defeat the purpose and limit the other rights guaranteed by the Criminal Procedure Code of the Russian Federation aimed at protecting their rights and lawful interests, namely the right to participate in closing arguments; the right to appeal against judicial decisions, including the decision to discontinue criminal proceedings due to the dismissal of the indictment by the prosecutor and to argue its unlawfulness, unreasonableness and unfairness before a superior court. This would have violated not only the procedural rights of the participants in criminal proceedings, but also their constitutional rights guaranteed by Articles 21 (Section 1), 45, 46 (Section 1) and 52 of the Constitution of the Russian Federation. This constitutional interpretation of the provisions of Sections 7 and 8 of Article 246 and Subsection 2 of Article 254 of the Criminal Procedure Code of the Russian Federation conforms to the requirement of Article 17 (Section 3) of the Constitution of the Russian Federation, according to which the exercise of the rights and freedoms of man and citizen, *inter alia* within criminal proceedings based on the principles of adversariness and equality of parties, shall not violate the rights and freedoms of others, including the participants in criminal proceedings.

Therefore, the provisions of Sections 7 and 8, Article 246, taken in conjunction with Subsection 2, Article 254 of the Criminal Procedure Code of the Russian Federation, conform to the Constitution of the Russian Federation to the extent that within their constitutional meaning in the system of norms they imply that the complete or partial dismissal of the indictment by the prosecutor, which entails discontinuing of criminal proceedings, as well as amendment of the indictment by the prosecutor must be reasoned with reference to the grounds prescribed by law. Moreover, a court decision predetermined by the respective position of the prosecutor may be rendered only after examination of significant materials of the case file has been completed and the opinions of both the prosecution and the defence have been heard. The lawfulness, reasonableness and fairness of this judicial decision may be reviewed by a superior court.

8. Article 46 (Section 1 and 2) of the Constitution of the Russian Federation, ensuring the right to judicial protection and to appeal to court against decisions and actions (inaction) of bodies of state power and local self-government, public associations and officials, imposes on the state a duty to guarantee everyone examination of his case by at least two judicial instances. In criminal proceedings, the right to examination of the case both by first and second instance courts equally follows from Article 50 (Section 3) of the Constitution of the Russian Federation, which guarantees that everyone convicted of a crime shall have the right to appeal against a judgment of conviction to a superior court. Taking into account that Article 123 (Section 3) of the Constitution of the Russian Federation guarantees equality of arms in the proceedings, such right shall also be guaranteed to the victim.

Meanwhile, Section 9, Article 246 of the Criminal Procedure Code of the Russian Federation, prescribing review of court decisions and rulings to discontinue criminal proceedings due to the dismissal of the indictment by the prosecutor only under new or newly discovered circumstances under Chapter 49 of the Criminal Procedure Code of the Russian Federation, deprives the parties of an opportunity to appeal against the mentioned judicial decisions to a superior court under other grounds and therefore violates their constitutional rights.

The review of judicial decisions under new or newly discovered circumstances stipulated by this norm may not be considered as sufficient guarantee of the rights of the participants in criminal proceedings, since re-opening criminal proceedings in these cases takes place not upon a motion of the parties, but only upon a motion of the officials mentioned by the criminal procedure law, and since these circumstances (as defined in Chapter 49 of the Criminal Procedure Code of the Russian Federation) entail reconsideration of judicial decisions only in a limited number of cases. As a result, judicial mistakes violating individual rights, freedoms and lawful interests, may remain unrectified. This contradicts the very essence of justice and its principles.

Moreover, the prohibition to review decisions and rulings of a court to discontinue criminal proceedings after the dismissal of the indictment by the prosecutor stipulated by Section 9, Article 246 of the Criminal Procedure Code of the Russian Federation precludes their review on cassation. This approach does not comply with other provisions of the Criminal Procedure Code of the Russian Federation which provide for the right of the participants in criminal proceedings to appeal against judicial decisions which have not become final. According to the legal opinion of the Constitutional Court of the Russian Federation, restriction of the right to access to justice in a superior court may not be justified by the constitutionally significant aims as defined by Article 55 (Section 3) of the Constitution of the Russian Federation (judgments of 6 July 1998 in the case concerning the review of the constitutionality

of Section 5, Article 325 of the Criminal Procedure Code of the RSFSR, and of 28 May 1999 in the case concerning the review of the constitutionality of Articles 266 and 267 of the Code on Administrative Offences of the RSFSR).

The provision of Section 9, Article 246 of the Criminal Procedure Code of the Russian Federation, is essentially intended to preclude review of the lawfulness and reasonableness of discontinuation of the criminal proceedings on the grounds stipulated by Articles 24 and 27 of this Code upon the dismissal of the indictment by the prosecutor. At the same time decisions to discontinue criminal proceedings rendered by the prosecution authorities under the same grounds may be reviewed by courts (as has been conformed both by the decisions of the Constitutional Court of the Russian Federation and by provisions of the Criminal Procedure Code of the Russian Federation stipulating a possibility to appeal to court decisions to discontinue criminal proceedings at the pre-trial stages of criminal proceedings). These provisions violate the principle of everyone's equality before the law and the court established by Article 19 (Section 2) of the Constitution of the Russian Federation.

Moreover, taking into consideration that the Constitutional Court of the Russian Federation has recognized the lack of possibility to obtain judicial review of a decision to discontinue criminal proceedings as non-conforming to the Constitution of the Russian Federation (the Judgment of 13 November 1995 in the case concerning the review of the constitutionality of Section 5, Article 209 of the Criminal Procedure Code of the RSFSR), by enacting such regulation the legislator violated Article 125 (Section 6) of the Constitution of the Russian Federation and Article 79 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", according to which norms recognized as unconstitutional lose their force, and Section 2, Article 79 of the named Federal Constitutional Law, which prohibits to override the judgment of the Constitutional Court of the Russian Federation by re-enactment of provisions recognized as non-conforming to the Constitution of the Russian Federation.

The rule, established in Section 9, Article 246 of the Criminal Procedure Code of the Russian Federation, does not conform either to Article 129 (Section 1) of the Constitution of the Russian Federation, according to which the prosecutor's office of the Russian Federation is a single centralized structure where prosecutors are subordinated to superior prosecutors and the Prosecutor General of the Russian Federation. This constitutional norm implies that the Prosecutor General of the Russian Federation and the subordinate prosecutors have the power both to adopt decisions compulsory for subordinate prosecutors and to annul decisions adopted by subordinate prosecutors and to terminate their actions.

The existence of these powers in criminal proceedings is predetermined by the fact that criminal prosecution and pursuing charges before a court in cases of public and private-public

prosecution is performed by the prosecutor in the name of the state and in the public interests. A superior prosecutor, if he establishes that the subordinate prosecutor has failed to secure the stated interests, may and must remedy the discovered violations of the legal requirements. Otherwise the dismissal of the indictment by a subordinate prosecutor (or even by an investigator or an inquirer who participate in the hearing under his authorization) would constitute a final decision which, contrary to the principle of the rule of law state, may not be amended either within the centralized system of the prosecutor's office or by a court.

Concluding from the above and pursuant to Sections 1 and 2, Article 71, Articles 72, 74, 75, 78, 79, 100 and 104 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provision of Section 1, Article 237 of the Criminal Procedure Code of the Russian Federation, as conforming to the Constitution of the Russian Federation to the extent that within its constitutional meaning in the system of norms it does not preclude a court from remitting a case to the prosecution to remove obstacles to its consideration, upon a motion of a party or upon its own motion, each time when fundamental violations of law committed during pretrial proceedings are disclosed, provided that these flaws may not be removed during the trial, and if remitting a case is not meant to remedy the incompleteness of the inquiry and preliminary investigation.

The constitutional meaning of the mentioned provisions, established in the present Judgment, is generally binding and precludes any other interpretation in law-enforcement practice.

2. To recognize the provision of Section 4, Article 237 of the Criminal Procedure Code of the Russian Federation, as non-conforming to the Constitution of the Russian Federation and its Articles 45 (Section 1), 46 (Sections 1 and 2) and 52.

3. To recognize the provisions of Sections 7 and 8, Article 246, taken in conjunction with Subsection 2, Article 254 of the Criminal Procedure Code of the Russian Federation, as conforming to the Constitution of the Russian Federation to the extent that within their constitutional meaning in the system of norms they imply that the complete or partial dismissal of the indictment by the prosecutor, which entails discontinuing of criminal proceedings, as well as amendment of the indictment by the prosecutor must be reasoned with reference to the grounds prescribed by law. Moreover, a court decision predetermined by the respective position of the prosecutor may be rendered only after examination of significant materials of the case file has been completed and the opinions of both the prosecution and the defence have been heard.

The lawfulness, reasonableness and fairness of this judicial decision may be reviewed by a superior court.

The constitutional meaning of the mentioned provisions, established in the present Judgment, is generally binding and precludes any other interpretation in law-enforcement practice.

4. To recognize Section 9, Article 246 of the Criminal Procedure Code of the Russian Federation as non-conforming to the Constitution of the Russian Federation and its Articles 19 (Section 2), 45 (Section 1), 46 (Sections 1 and 2) and 129.

5. Pursuant to Article 125 (Section 6) of the Constitution of the Russian Federation and Article 79 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, Section 7, Article 236 of the Criminal Procedure Code of the Russian Federation, which precludes appeals against a decision to stay criminal proceedings rendered after a pre-trial hearing, shall not have legal force from the date of its adoption and shall not be applied, as it contains regulation which the Constitutional Court of the Russian Federation previously recognized as non-conforming to the Constitution of the Russian Federation.

6. To discontinue the proceedings to the extent that they concern the review of the constitutionality of Articles 125, 219, 227 and 229, Section 1, Article 236, Sections 2, 3 and 5, Article 237, Section 1, Article 239, Section 10, Article 246, Articles 271, 378, 405 and 408, Chapters 35 and 39 of the Criminal Procedure Code of the Russian Federation.

7. Pursuant to Section 2, Article 100 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the criminal cases against S. S. Zimin, L. M. Kurilko, V. A. Kukhranov, L. S. Larina, D. N. Mamedov, L. N. Melnikova, L. G. Nosova, G. V. Pavlyuk and V. L. Fadeyeva shall be considered by courts according to the established procedure and taking into consideration the present Judgment, if there are no other obstacles to it.

8. This Judgment shall be final and shall not be subject to appeal; it shall come into force immediately upon its pronouncement, shall be directly applicable, and shall not require confirmation by other authorities and state officials.

9. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be published without any delay in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court
of the Russian Federation