

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment

of 30 October 2003 No. 15-II

in the case concerning the constitutionality review of certain provisions of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” in connection with a request of a group of deputies of the State Duma of the Russian Federation and complaints of S. A. Buntman, K. A. Katanyan, and K. S. Rozhkov.

Moscow, 30 October 2003

The Constitutional Court of the Russian Federation composed of President V. D. Zorkin and Judges M. V. Baglay, N. S. Bondar, G. A. Gadzhiev, Yu. M. Danilov, L. M. Zharkova, G. A. Zhilin, S. M. Kazantsev, M. I. Kleandrov, A. L. Kononov, L. O. Krasavchikova, V. O. Luchin, Yu. D. Rudkin, N. V. Seleznev, A. Ya. Sliva, V. G. Strekozov, O. S. Khokhryakova, B. S. Ebzeev, V. G. Yaroslavtsev,

in the attendance of representatives of the group of deputies of the State Duma of the Russian Federation who submitted the request to the Constitutional Court of the Russian Federation, deputies of the State Duma of the Russian Federation A. N. Kotyusov and B. B. Nadezhdin, and the attorney V. Yu. Prokhorov; S. A. Buntman and his representative, the attorney P. A. Astakhov, K. A. Katanyan and K. S. Rozhkov; representatives of the State Duma of the Russian Federation, deputies of the State Duma of the Russian Federation V. V. Grebennikov and S. A. Popov; Plenipotentiary Representative of the Council of the Federation of the Russian Federation to the Constitutional Court of the Russian Federation Yu. A. Sharandin; Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation M. A. Mityukov,

pursuant to Subsection “a”, Section 2 and Section 4, Article 125 of the Constitution of Russian Federation, Subsection “a”, Section 1 and Subsection 3, Section 1, Sections 3 and 4, Article 3, Section 1, Article 21, Articles 36, 74, 84, 85, 86, 96, 97 and 99 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of certain provisions of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”.

The reason for the consideration of the case is a request of a group of deputies of the State Duma of the Russian Federation and complaints of S. A. Buntman, K. A. Katanyan and K. S. Rozhkov, in which the applicants challenge the constitutionality of certain provisions of Articles 45, 46, 48, 49, 50, 52 and 56 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”. 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 the request and the complaints concern essentially 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 Judges-Rapporteurs M. V. Baglay and V. G. Strekozov, statements by the parties’ representatives, statements by the invitees to the hearing: M. Yu. Barshchevsky, Plenipotentiary Representative of the Government of the Russian Federation to the Constitutional Court of the Russian Federation, and V. I. Lysenko and M. V. Grishina, representatives of the Central Electoral Commission of the Russian Federation; M. N. Malinovsky, a representative of the Prosecutor General 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 group of deputies of the State Duma of the Russian Federation in their request and the citizens S. A. Buntman, K. A. Katanyan and K. S. Rozhkov in their complaints challenge the constitutionality of certain provisions of Articles 45, 46, 48, 49, 50, 52 and 56 of the Federal Law of 12 June 2002, “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” (as amended on 4 July 2003), which concern regulation of the activities of organizations which broadcast and publish the mass media for informational support of elections and referenda.

1.1. The group of deputies of the State Duma of the Russian Federation, who applied to the Constitutional Court of the Russian Federation, assert that the provisions of Subsection 2 “e”, “f” and “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, which define the notion and the types of pre-election campaigning, do not conform to Articles 29 and 55 (Section 3) of the Constitution of the Russian Federation. In the applicants’ opinion, these

provisions allow to attribute any activity on disseminating information about the candidates, lists of candidates, electoral associations, electoral blocs to pre-election campaigning. This in conjunction with Subsection 7 “g”, Article 48 of the said Federal Law, which prohibits the representatives of mass media organizations exercising their professional activities from engaging in pre-election campaigning and referendum campaigning, imposes disproportionate restriction on the freedom of speech, everyone’s right to convey, produce and disseminate information and violates the guarantees of freedom of the press.

1.2. S. A. Buntman, an employee of the Ekho Moskvyy radio station, gave his comments and expressed his opinion on air about possible consequences of electing one of the candidates for this office and stated that under these circumstances he would vote against all candidates during the Governor of Saint Petersburg electoral campaign, in breach of Articles 45, 48 and 49 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”. By the order of the editor-in-chief of the radio station, a disciplinary sanction in the form of a reprimand was imposed on him.

The civil action of S. A. Buntman for revocation of the reprimand, which, in his opinion, was imposed on the basis of provisions contradicting Articles 3, 29 and 32 of the Constitution of the Russian Federation, was dismissed by courts of general jurisdiction. The courts of general jurisdiction indicated that pursuant to Section 4, Article 125 of the Constitution of the Russian Federation the review of the constitutionality of the law is within the competence of the Constitutional Court of the Russian Federation.

S. A. Buntman’s complaint submitted to the Constitutional Court of the Russian Federation asserts that the provisions of Subsection 5, Article 45 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, which prohibit to comment on news concerning election events in television and radio programmes and in periodic printed media publications, and Article 48 of the same Federal Law, which regulates pre-election campaigning, violate the constitutional guarantees of the freedom of information and electoral rights. During the hearing at the Constitutional Court of the Russian Federation the applicant’s representative, the attorney P. A. Astakhov, specified the subject matter of the complaint to the extent it concerned Article 48 and requested review of the constitutionality of Subsection 2 “c” and “g”, which recognizes portrayal of possible consequences of electing or non-electing a candidate and other actions aimed at encouraging or encouraging voters to vote for or against a candidate or against all candidates as an electoral campaign.

1.3. By their decisions the courts of general jurisdiction dismissed the civil action of K. A. Katanyan against the editorial board of the *Vremya MN* newspaper seeking annulment of

the order imposing disciplinary sanction on him in the form of a reprimand. The courts stated that the plaintiff, who was editor of the department of politics of the editorial board at *Vremya MN* at the time the decision was delivered, violated the provisions of Articles 45, 46, 48, 50 and 52 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, which prohibit pre-election campaigning by journalists exercising their professional activities and which require them to give equal consideration to all candidates without giving preferences to any of the candidates.

In his complaint submitted to the Constitutional Court of the Russian Federation K. A. Katanyan asserts that Subsection 2, Article 45, Subsection 2, Article 46, Subsection 2 “b”–“g”, Subsection 5 and 7 “g”, Article 48, Subsection 11, Article 50, Subsection 5, Article 52 and Subsection 6, Article 56 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” disproportionately restrict the citizen’s right to participate in free elections, everyone’s right to freely convey and disseminate information, everyone’s right to freely use his abilities and property for entrepreneurial and economic activities not prohibited by law. Consequently, these provisions do not conform to Articles 3, 29, 32, 34 and 55 (Section 3) of the Constitution of the Russian Federation.

Moreover, as follows from the reasoning of the decision delivered in the case of K. A. Katanyan, on the basis of examination of the case file (including the statements of the plaintiff and content of his article in *Vremya MN*) the court of general jurisdiction concluded that the information published by the plaintiff was conducive to the formation of a positive or negative attitude of voters towards one of the candidates for the office of the Head of the Mordovia Republic and thus violated the equality of the candidates by giving preference to one of them, which did not conform to the requirements of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”. This means that the court reasoned its decision with reference to Subsection 5, Article 45 and Subsection 2 “b”, Article 48 of the said Federal Law, which considers expression of preference for any of the candidates, in particular, statements indicating the candidate for which a voter will vote as pre-election campaigning (in conjunction with Subsection 7 “g” of the same Article).

Therefore, only these legal provisions, pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Sections 1 and 3, Article 3, Section 1, Article 36, Section 3, Article 74, Section 1, Article 96 and Subsection 2, Article 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, are the subject matter for consideration by the Constitutional Court of the Russian Federation upon this

complaint. The proceedings upon the complaint for review of other provisions of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” challenged by K. A. Katanyan are to be discontinued, pursuant to Subsection 2, Section 1, Article 43 and Article 68 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”.

1.4. By the Justice of the Peace decision, an administrative fine was imposed on K. S. Rozhkov, who is the founder and editor-in-chief of the newspaper *Svetlogorye*, for publishing, in the newspaper, materials which had elements of pre-election campaigning provided for by Subsection 2 “c” and “d”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”. The Justice of the Peace considered that these materials contained a description of possible consequences of electing one of the candidates as the mayor of Kaliningrad and disseminating information with evidently prevailing negative statements about one of the candidates, which, in the opinion of the court, is prohibited for representatives of the mass media organizations exercising their professional activities during pre-election campaigning (Subsection 7 “g”, Article 48 of the mentioned Federal Law). The decision also noted that K. S. Rozhkov had published the materials before the beginning of the 30-day period of pre-election campaigning on television and radio and in the periodic printed media established by Subsection 2, Article 49 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”.

In his complaint to the Constitutional Court of the Russian Federation K. S. Rozhkov requests to review the constitutionality of Subsection 2, Article 48, and Subsection 2, Article 49 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, which, in his opinion, permits unlawfully broad interpretation of the notion “pre-election campaigning” and entails a possibility to include in this notion any data and information about candidates. Consequently, the freedom of information and the right to free elections, guaranteed by Articles 29 and Articles 32 of the Constitution of the Russian Federation, respectively, are violated.

K. S. Rozhkov does not challenge the constitutionality of Subsection 7 “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, which unconditionally prohibits the representatives of mass media organizations exercising their professional activities to engage in pre-election campaigning and excludes them from subjects of lawful pre-election campaigning. Therefore, Subsection 2, Article 49 of this Federal Law permitting pre-election campaigning within the period mentioned above does not apply to these persons. Without calling

the necessity of legislative delineation of pre-election campaigning and informing voters, the applicant essentially links the violation of his constitutional rights to the uncertainty of the provisions of Subsection 2, Article 48 of the Federal Law, which determines which actions fall under the notion of pre-election campaigning.

Since the court considered K. S. Rozhkov a representative of a mass media organization and applied Subsection 7 “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” prohibiting pre-election campaigning by this category of persons, there are no grounds to consider Subsection 2, Article 49 of the same Federal Law addressed to persons entitled to engage in pre-election campaigning in mass media under its Articles 50 and 51 as equally applicable.

Accordingly, the subject-matter of K. S. Rozhkov’s complaint is the provisions of Subsection 2 “c” and “d”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”. To the extent that they concern the constitutional review of Subsection 2, Article 49 of the said Federal Law, the proceedings are to be discontinued.

1.5. Therefore, under Articles 3, 84, 85, 96 and 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the subject matter for consideration in the present case is the following provisions of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”:

- Subsection 5, Article 45, imposing requirements concerning the content of reports on the election and referendum-related events in television and radio programs and publications in periodic printed media;

- the provisions of Subsection 2 “b”, “c”, “d”, “e”, “f”, “g”, Article 48 defining the normative content of pre-election campaigning, taken in conjunction with the provision of Subsection 7 “g” of the same Article, which prohibits the representatives of mass media organizations exercising their professional activities to engage in pre-election and referendum campaigning.

2. Pursuant to the Constitution of the Russian Federation, in the Russian Federation, as in a rule of law democratic state, the supreme direct expression of the people’s power is a referendum and free elections (Section 1, Article 1; Section 3, Article 3); citizens of the Russian Federation have the right to participate in the management of state affairs both directly and through their representatives, to elect and be elected to bodies of state power and local self-government, and to participate in referenda (Sections 1 and 2, Article 32). The Constitution of

the Russian Federation also guarantees everyone the freedom of thought and speech; everyone has the right to freely seek, receive, convey, produce and disseminate information in any lawful manner; the freedom of the press is guaranteed (Section 1, 4 and 5, Article 29). Under Article 2 of the Constitution of the Russian Federation, recognition, observance and protection of these rights and freedoms is a duty of the state.

These provisions are in line with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which free elections shall be held at reasonable intervals by secret ballot, under conditions which ensure free expression of the people's opinion in the choice of the legislature (Article 3 of Protocol No. 1); everyone has the right to freedom of expression, which shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (Article 10 § 1).

Within the meaning of Articles 3, 29, 32 taken in conjunction with Articles 71 (Subsection "c"), 72 (Subsection "b", Section 1) and 76 (Sections 1 and 2) of the Constitution of the Russian Federation, in order to ensure free elections and referenda, the federal legislator is entitled to establish an order and conditions of their informational support. However, elections shall be recognized as free only when the right to information and freedom of speech are objectively guaranteed. That is why the federal legislator is obliged to ensure the citizens' rights to receive and disseminate information on elections and referenda. The federal legislator shall maintain a balance of values protected by the Constitution of the Russian Federation (the right to free elections and freedom of speech and information) and shall prevent inequality and disproportionate restrictions (Articles 19 and 55 of the Constitution of the Russian Federation; Article 10 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 19 § 3 of the International Covenant of Civil and Political Rights).

3. In the Russian Federation, as a rule of law democratic state, performance of such social function as informational support of elections and referenda by mass media organizations shall ensure conscious expression of the citizens' will and openness of elections and referenda. Within the meaning of Article 29 of the Constitution of the Russian Federation, Article 10 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 19 § 3 of the International Covenant of Civil and Political Rights the exercise of the freedom of the press imposes special duties and special responsibility on mass media organizations; the representatives of these organizations functioning on the basis of editorial independence and self-regulation norms adopted by the journalistic community, i.e. the rules of profession and ethical principles, shall take an ethical and reasonable stance and report on pre-election campaigning in a fair, balanced and impartial manner.

The Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, pursuant to which informational support of elections and referenda includes both informing voters and pre-election campaigning, presumes that the representatives of mass media organizations exercising their professional activities may not take part in campaigning. This approach is directly enshrined in Chapter 7 of this Federal Law “Guarantees of the Rights of Citizens to Receive and Disseminate Information about Elections and Referenda”: while citizens of the Russian Federation and public associations are entitled to pre-election campaigning in forms permitted by law and by lawful means (Subsection 1, Article 48), mass media organizations only inform voters (Article 45), and their representatives exercising their professional activities are prohibited from pre-election campaigning, production and dissemination of any campaigning materials (Subsection 7 “g”, Article 48). Under the Administrative Offences Code of the Russian Federation violation of the respective prohibition entails administrative responsibility (Article 5.8).

The distinction between pre-election campaigning and informing the voters defined by the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” is aimed at ensuring conscious expression of the citizens’ will and openness of elections and referenda. It conforms to the requirements of Articles 3 (Section 3), 29 (Sections 1, 3, 4 and 5), 32 (Sections 1, 2 and 3) of the Constitution of the Russian Federation, since elections may be recognized as free only when the right to information and freedom of speech are objectively guaranteed. In the context of mass media, the freedom of speech must not be equalized with the freedom of pre-election campaigning, because the latter is not required to be objective. That is why in order to protect the right to free elections, which is one of the fundamentals of the constitutional order, and in order to ensure free expression of the voters’ will, the freedom of speech of mass media representatives may be restricted by the federal law (as follows from Articles 3 (Section 3), 17 (Section 3), 29 (Section 5), 32 (Section 2) and 55 (Section 3) of the Constitution of the Russian Federation).

However, according to the legal opinions expressed by the Constitutional Court of the Russian Federation, restriction of the constitutional rights and, consequently, the freedom of the press shall be necessary and proportionate to the constitutionally recognized aims of these restrictions. When constitutional norms permit the legislator to restrict the rights provided by them, the legislator may not regulate in a way which encroaches upon the very essence of a certain right and deprive it of its real content. The state restricting certain rights in the name of the constitutionally permissible aims must ensure a balance of constitutionally protected values and interests by means which are not excessive but necessary and strictly preconditioned by

these aims. The public interests indicated in Article 55 (Section 3) of the Constitution of the Russian Federation may justify legal restrictions of the rights and freedoms only if these restrictions meet the requirements of fairness, are adequate, proportionate, commensurate and are necessary to protect the constitutionally significant aims, including the rights and lawful interests of others. The restrictions may not have retroactive effect and may not encroach upon the very essence of the constitutional right, i.e. shall not restrict the scope and application of the core contents of the respective constitutional norms. In order to preclude disproportionate restrictions of the rights and freedoms of man and citizen in a specific law-enforcement situation, a norm shall be formally certain, precise, clear and lucid, preventing broad interpretation of the restrictions imposed and, accordingly, their arbitrary application.

The stated legal opinions of the Constitutional Court of the Russian Federation are in line with the legal opinions of the European Court of Human Rights expressed in cases defining the limits of the freedom of expression and the right to information during electoral campaigns. The judgment of 19 February 1998 in *Bowman v. the United Kingdom* states that it is necessary to consider the right to the freedom of expression under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms in the light of the right to free elections. The European Court emphasizes that free elections and the freedom of expression, particularly the freedom of political debate, together form the bedrock of any democratic system, the two rights are inter-related and operate to reinforce each other; for this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely; nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the free expression of the opinion of the people in the choice of the legislature.

4. Pursuant to Subsection 5, Article 45 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, in television and radio programs and in publications in periodic print media, reports concerning elections and referendum related events shall be always presented as special news reports without any comments. These news reports shall not give preference to any candidate, electoral association, electoral bloc, referendum initiative group, another group of referendum participants, in particular with regard to the time devoted to coverage of their electoral or referendum activities and the amount of space allocated in the print media for such reports.

Pursuant to Subsection 2, Article 48 of this Federal Law, the following actions shall be regarded as pre-election campaigning during an electoral campaign:

- expression of preference for any of the candidates, electoral association, electoral bloc, and, in particular, statements indicating for which candidate, list of candidates, electoral association, electoral bloc a voter will vote (Subsection 2 “b”);
- description of possible consequences of election or non-election of a candidate (list of candidates) (Subsection 2 “c”);
- dissemination of materials with marked predominance of information on certain candidates, electoral associations, electoral blocs combined with positive or negative comments (Subsection 2 “d”);
- dissemination of information on the activities of a candidate unrelated to his professional activity or performance of his official duties (Subsection 2 “e”);
- actions promoting the formation of a positive or negative attitude of voters towards a candidate, electoral association, electoral bloc, of which the candidate is a member, an electoral association, an electoral bloc which nominated the candidate, candidates, list of candidates (Subsection 2 “f”);
- other actions which aim at encouraging or encourage voters to vote for or against a candidate, list of candidates or against all candidates, all lists of candidates (Subsection 2 “g”).

Pursuant to Subsection 7 “g”, Article 48 pre-election campaigning, referendum campaigning may not be exercised, and any kind of campaigning materials may not be produced or disseminated by representatives of mass media organizations exercising their professional activities.

4.1. These provisions of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” regulating social relations in informational support of elections by mass media organizations shall be considered in conjunction with other provisions of this Federal Law, which equally reflect the differences between these organizations informing voters and pre-election campaigning in mass media.

Article 44 establishes that informing voters and pre-election campaigning are elements of informational support of elections, which assist conscious expression of citizens’ will and openness of elections and referenda. At the same time, pursuant to Article 45, informational materials in mass media shall be objective and accurate and shall not violate the equality of candidates, electoral associations, electoral blocs (Subsection 2); mass media organizations shall be free in their activity aimed at informing voters and referendum participants (Subsection 4).

Pre-election campaigning is defined as activities during an electoral campaign that are aimed at encouraging or encourage voters to vote for a candidate, certain candidates, a list of candidates, or against him or them, against all candidates (against all lists of candidates) (Subsection 4, Article 2). These activities may take the form of calls to vote for or against a candidate (list of candidates) (Subsection 2 “a”, Article 48), and other actions indicated in Subsection 2 “b”–“g”, Article 48. Accordingly, the notion “pre-election campaigning” encompasses a set of activities aimed at encouraging or encouraging voters to vote for or against a candidate, certain candidates, a list of candidates and exercised by a candidate, electoral association, electoral bloc themselves or by other persons in the procedure prescribed by law (Subsection 4, Article 48). These activities are exercised from the day of nomination or registration (Subsection 1, Article 49), and on the television and radio and in the print media 30 days before the voting day (Subsection 2, Article 49).

Both campaigning and any kind of informing may encourage voters to make a certain choice, while it is clear that authentic and objective information about a candidate provide greater assistance to voters in settling their preferences than mere calls for voting “for” or “against”. Consequently, it is obvious that the only criterion which allows to distinguish pre-election campaigning from informing is the special purpose of campaigning i.e. to shift the voters to a certain side, to ensure support or, on the contrary, opposition to a certain candidate or electoral association. Otherwise, the difference between informing and pre-election campaigning would be erased to the extent that any activities on informing of voters might be identified as pre-election campaigning. Considering the aforementioned prohibition for the representatives of mass media organizations, this approach would unreasonably restrict the constitutional guarantees of the freedom of speech and information and would violate the principles of free and open elections.

Within the meaning of Subsection 2, Article 48 taken in conjunction with its Subsection 7 “g” and Subsection 4, Article 2, the consequences of pre-election campaigning as an *actus reus* of a representative of a mass media organization exercising his professional activities is not an element of the objective aspect of *corpus delicti* of this offence, which is limited only to *actus reus* itself and does not encompass verification of whether the disseminated information indeed influenced or could influence the attitude of an uncertain range of voters towards the respective candidate or electoral association. Accordingly, the intent as a necessary element of the subjective aspect of formal *corpus delicti* of illegal pre-election campaigning may not encompass its consequences and consists only in acknowledgement of the direct aim of an *actus reus*. That is why informing of voters (Subsection 2, Article 48) in mass media about calls to vote “for” or “against” a candidate or about other campaigning activities may not be

recognized as pre-election campaigning without a direct campaigning aim being established. The presence or absence of this aim in any event shall be established by courts of general jurisdiction or other law-enforcement authorities, when they recognize certain specific actions as illegal pre-election campaigning.

4.2. Subsection 2, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, stipulates that pre-election campaigning is an expression of preference for any of the candidates, including statements indicating the candidate for whom a voter will vote (Subsection 2 “b”). In itself, a positive or negative opinion about certain candidates is not pre-election campaigning and shall not be a ground for holding a representative of mass media organization administratively responsible. There is a need to prove a special purpose, which is an intention to support or oppose a certain candidate, electoral association, electoral bloc. “Expression of preference” is nothing else but a kind of expression of an opinion. Accordingly, without any proof of an intent for pre-election campaigning, it would be a restriction of the freedom of expression and violation of the freedom of the press to consider an expression of preference by representative of mass media organization exercising professional duties as an offence (Sections 1, 3 and 5, Article 29 of the Constitution of the Russian Federation).

The presence of a precise aim of campaigning is also implied by Subsection 2 “c”, Article 48, which considers a description of possible consequences of electing or non-electing a candidate (list of candidates) as a type of pre-election campaigning. In the absence of this aim such “description” would be nothing else but an expression of an opinion.

Subsection 2 “d”, Article 48 considers dissemination of materials with marked predominance of information about certain candidates combined with positive or negative comments as pre-election campaigning. However, reports on the electoral activities of a certain candidate may not but contain prevailing information about this specific candidate. Accordingly, the main emphasis in this type of pre-election campaigning established by Subsection 2 “d” is to make positive or negative comments about him, which is also an expression of an opinion, and in the absence of the aim to campaign may not be regarded as pre-election campaigning.

Subsection 2 “e” of Article 48 considers dissemination of information about the activities of a candidate unrelated to his professional activity or performance of his official duties as pre-election campaigning. The application of this norm to representatives of mass media organization as persons prohibited from pre-election campaigning, without establishing the aim to campaign in their actions would result in considerable restriction of the voters’ right to receive authentic, objective and comprehensive information about the candidates. In order to form a thorough opinion about a certain candidate it is necessary for a voter to have information both

about his current professional and other actions. Further, such approach would infringe the citizens' right to freely seek, receive, convey, produce and disseminate information in any lawful manner and, accordingly, would not conform to Article 29 (Sections 4 and 5) of the Constitution of the Russian Federation.

Subsection 2 "f", Article 48, recognizes activities promoting the formation of a positive or negative attitude of voters towards a candidate as pre-election campaigning. In cases of illegal campaigning this activity also implies the presence of such necessary attribute (element) of campaigning as its intentional character. Any other approach would lead to unlawful extension of the application of this norm to an arbitrarily wide scope of actions related to informing voters, which objectively may influence formation of a positive or negative attitude of voters towards a candidate. However, in the absence of the intent it may not be considered as campaigning, since otherwise it would entail excessive restrictions both on the voters' right to receive authentic information and the freedom of the press.

Therefore, Subsection 2 "b", "c", "d", "e", "f", Article 48 of the Federal Law "On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum" taken in conjunction with the provisions of Article 45, Subsection 2 "a" and Subsection 7 "g", Article 48, considering their constitutional purpose and meaning, do not permit broad interpretation of the prohibition of pre-election campaigning for the representatives of mass media organizations exercising their professional activities, i.e. without acknowledging that illegal campaigning (violation of the imperatives of Subsection 7 "g", Article 48) may be established only if these actions, provided for by Subsection 2, Article 48, take place in order to achieve a special aim of campaigning (as opposed to the professional activity of informing voters under Subsection 5, Article 45, which might be similar in appearance to pre-election campaigning).

The provisions of Subsection 5, Article 45, pursuant to which television and radio programmes shall not give preference to any candidate, electoral association, electoral bloc, as norms which regulate the informing of voters (but not campaigning), taken in conjunction with Subsection 2 of this Article, Article 48 and Subsections 1 and 2, Article 52, shall not be interpreted as prohibiting the representatives of mass media organizations to express their opinion and comment on elections outside the scope of special news report, because only these special news reports shall not contain any comments and shall not give preference to any candidate, electoral association, electoral bloc in terms of time devoted to the coverage their electoral activities, the amount of space allocated in the print media and ratio of free and paid reporting. Any other approach would result in unjustified restriction of the rights guaranteed by Article 29 (Section 4) of the Constitution of the Russian Federation.

The constitutional meaning of the mentioned provisions of Subsection 5, Article 45, Subsection 2 “b”, “c”, “d”, “e”, “f”, Article 48, taken in conjunction with Subsection 7 “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, established in the present Judgment, pursuant to Article 6, Section 2, Article 74 and Section 2, Article 79 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, is generally binding and precludes any other interpretation in the law-enforcement practice.

5. Pursuant to Subsection 2 “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, other actions (besides those indicated in Subsection 2 “a”–“f”) which are aimed at encouraging or encourage voters to vote for or against a candidate, list of candidates or against all candidates, all lists of candidates are considered as pre-election campaigning.

The use of the words “other actions” for prohibitive purposes leaves open the list of illegal pre-election campaigning types, it permits broad interpretation of the notion and types of prohibited campaigning and thereby does not preclude arbitrary application of this provision. Such broad interpretation in matters of disciplinary and administrative responsibility of the representatives of mass media organizations exercising their professional activities is incompatible with legal equality and the principle of proportionality of the restrictions imposed on the constitutionally significant aims. It leads to violation of the freedom of the press.

Actions which are not aimed at encouraging or do not encourage voters to vote for or against candidates, i.e. which are not predetermined by objectively verified intent to achieve a certain result during elections, may not be recognized as pre-election campaigning. However, within the meaning of Subsection 2 “g”, Article 48, taken in conjunction with Subsection 4, Article 2 (which defines the notion of campaigning) and with Subsection 7 “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, “other actions” within the scope of illegal campaigning also encompass actions of the representatives of mass media organizations in informational support of elections, which are not predetermined by objectively verified intent (conscious activity) to achieve a certain result during elections. The use by the legislator of the notion “actions which encourage to vote” (in addition to the notion “actions which are aimed at encouraging to vote”) permits to assess the compelling effect of campaigning instead of establishing the intent to persuade the voters to vote in a certain manner.

Therefore, law-enforcement authorities enjoy impermissibly broad discretion in qualifying the informational activity of representative of mass media organizations as violation of the prohibition of pre-election campaigning under Subsection 7 “g”, Article 48 of this Federal

Law. This approach is incompatible with legal equality and restricts the freedom of the press and the citizens' right to receive information necessary to form free expression of will during elections.

Therefore, the provision of Section 2 "g", Article 48 of the Federal Law "On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum" taken in conjunction with the provisions of Subsection 4, Article 2, does not conform to the Constitution of the Russian Federation and its Articles 3 (Section 3), 19 (Section 1 and 2), 29 (Section 4 and 5), 32 (Section 1 and 2) and 55 (Section 3).

Concluding from the above and pursuant to Articles 6 and 68, Sections 1 and 2, Article 71, Articles 72, 75, 79, 87 and 100 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 provisions of Subsection 2 "b", "c", "d", "e" and "f", Article 48 of the Federal Law "On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum" as conforming to the Constitution of the Russian Federation. These provisions within their constitutional meaning and taken in conjunction with Subsection 2 "a", Article 48, Article 45, and Subsection 7 "g", Article 48 of the same Federal Law do not permit broad interpretation of pre-election campaigning for imposing a prohibition on the representatives of mass media organizations exercising their professional activities, and imply that their campaigning activity is illegal only if they intentionally commit actions prescribed by Subsection 2, Article 48, and these actions shall be directly aimed at campaigning, as opposed to the professional activity of informing voters under Subsection 5, Article 45, which might be similar in appearance to pre-election campaigning.

2. To recognize Subsection 5, Article 45 of the Federal Law "On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum" as conforming to the Constitution of the Russian Federation. These provisions within their constitutional meaning in the system of norms may not be used to prohibit the representatives of mass media organizations to express their opinion and comment on elections outside the scope of special news reports and imply that only these news reports may not contain any comments and shall not give preference to any candidate, electoral association, electoral bloc, especially as regards the time devoted to the coverage of their electoral activities,

the amount of space allocated in the print media for these reports, and the ratio of free and paid reporting.

3. To recognize the provision of Subsection 2 “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum” as non-conforming to the Constitution of the Russian Federation and its Articles 3 (Section 3), 19 (Section 1 and 2), 29 (Section 4 and 5), 32 (Section 1 and 2) and 55 (Section 3), to the extent that under these provision any other actions (besides indicated in Subsection 2 (a) – (f)), which are aimed at encouraging or encourage voters to vote for or against a candidate, list of candidates or against all candidates, all lists of candidates are considered pre-election campaigning.

4. The constitutional meaning of interrelated provisions of Subsection 5, Article 45, Subsection 2 “b”, “c”, “d”, “e”, “f” and Subsection 7 “g”, Article 48 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”, established in the present Judgment, is generally binding and precludes any other interpretation in the law-enforcement practice, including any other interpretation of similar provisions of other normative acts.

5. The provisions of the normative acts which contain the same provision as that recognized non-conforming to the Constitution of the Russian Federation by Subsection 3 of the present Judgment shall not be applied by courts, other authorities and their officials and shall be annulled according to the established procedure.

6. To discontinue the proceedings in the case to the extent that they concern the review of the constitutionality of Subsection 2, Article 45, Subsection 2, Article 46, Subsection 5, Article 48, Subsection 2, Article 49, Subsection 11, Article 50, Subsection 5, Article 52, and Subsection 6, Article 56 of the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum”.

7. The cases of S. A. Buntman, K. A. Katanyan and K. S. Rozhkov are to be reconsidered according to the established procedure and taking into consideration the present Judgment, provided there are no other obstacles to it.

8. Pursuant to Sections 1 and 2, Article 79 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon 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 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.

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