



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Riga, November 5, 2004

## JUDGMENT in the name of the Republic of Latvia

in case No. 2004 – 04 – 01

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš as well as the justices Ilma Čepāne, Romāns Apsītis, Aija Branta, Juris Jelāgins, Gunārs Kūtris and Andrejs Lepse under Article 85 of the Republic of Latvia Satversme (Constitution) as well as Articles 16 (Item 1), 17 (Item 11 of the first Part) and 28<sup>1</sup> of the Constitutional Court Law on the basis of the claim by Ieva Azanda on October 19, 2004 at the Court session in written proceedings reviewed the case

**”On the Compliance of the Words ”or a Lay Judge”, Incorporated in Section 75 of the Law ”On Judicial Power” with Articles 84 and 92 of the Republic of Latvia Satversme (Constitution)””.**

### The establishing part

1. On December 15, 1992 the Law ”On Judicial Power” was adopted. The objective of the Law was to regulate the general principles and procedures for the adjudication of court cases by the independent Republic of Latvia judicial power, procedures for the appointment and confirmation of judges as well as other issues, connected with the court system.

The initial wording of Section 75 of the Law ”On Judicial Power” anticipates that during the temporary absence of a judge of a District (city) court the Minister of Justice may assign a judge of another district (city) court, a judge emeritus or administrative court judge to fulfill the duties of the judge”.

On January 29, 1997 the Republic of Latvia Saeima (henceforth – the Saeima) adopted the Law "Amendments to the Law "On Judicial Power"", expressing Section 75 in the following wording:

"During the temporary absence of a judge of a District (city) court, the Minister of Justice may assign a judge emeritus, administrative judge of the particular court as well as a judge of another District (city) court or a lay judge, who meets the requirements for the nomination of a candidate for a judge as set out in Section 52 of this Law to fulfill the duties of a judge".

In its turn on October 15, 1998 the Saeima adopted the Law "Amendments to the Law "On Judicial Power", expressing Section 75 in the following wording: "in case of a vacancy or the temporary absence of a judge of a District (city) court, the Minister of Justice may, for a period not exceeding two years, assign a judge of another District (city) court, a judge emeritus, a judge of a regional court or a lay judge, who meets the requirements for the nomination of a candidate for a judge of a district (city) court as set out in Section 52 of this Law, if such person has given written consent to fulfill the duties of a judge of a District (city) court."

This wording was in effect also at the moment of submission of the constitutional claim.

- 2. The submitter of the constitutional claim Ieva Azanda** (henceforth – the submitter) requests to assess the conformity of the words "or a lay judge" (henceforth – the impugned legal norm) included in Section 75 of the Law "On Judicial Power" (wording of October 15, 1998 ) with Articles 84 and 92 of the Republic of Latvia Satversme (henceforth – the Satversme).

**The submitter** indicates to the following actual circumstances in the case: since June of 2003 the claim, submitted by her, lies in the office of G.Rezgoriņa, who carries out obligations of a judge at the Madona District court. On July 8, 2003 an application with the request of securing of a claim was submitted. On July 8, 2003 the acting judge G.Rezgoriņa reached the decision to reject the request of securing of a claim. The submitter has submitted a neighboring claim on July 8, 2003 court decision. It requests to vacate the above court decision, besides in the claim it is indicated that the court had reached the decision being in illegal body, namely, it had violated the requirements of Article 16 of the Civil Procedure Law. The Vidzeme Regional court by its December 2, 2003 decision repealed the Madona District court July 8, 2003 decision, at the same time satisfying the request of the submitter of securing of a claim. The argument, included in the neighboring claim,

on the procedure of appointing (confirming) G.Rezgoriņa, has not been assessed on its merit by the Vidzeme regional court.

The submitter concludes that the impugned legal norm gives the right to a person, not confirmed by the Saeima, to adjudicate justice, thus it runs contrary to Article 84 of the Satversme, which establishes that judicial appointments shall be confirmed by the Saeima. To her mind from the above Article of the Satversme follows that only a person, appointed by the Saeima, has the right of carrying out the duties of the judge. She holds that the Minister of Justice cannot be entitled to the right of appointing a person, which is not confirmed by the Saeima, to the office of the judge.

To her mind the impugned legal norms is at variance also with Article 92 of the Satversme, which anticipates that everyone has the right to defend their rights and lawful interests in a fair court. She holds that from the Article follows that the judge shall meet certain criteria, determined by the legislator- he/she - if he/she has attained certain age - needs a certain length of service and a good reputation. Besides, the decision of the Parliament, by which the judge is confirmed, guarantees his/her independence and impartiality. The circumstance that justice is adjudicated by a person, whom the legislator has not confirmed and who has been appointed to the post for a comparatively short period of two years to her mind is a well-grounded reason for questioning the ability of the person to adjudicate fair justice.

- 3. The Saeima** points out that the norms of the Satversme in their structure are laconic and in most cases the mechanism of their implementation is determined in other normative acts. Such a procedure refers also to the confirmation of the judges. Already originally the laws, which regulate the activities of the courts, determined that first of all the judge was appointed by the Cabinet of Ministers and only then the Saeima confirmed him/her. Similar practice has been included in the Law "On Judicial Power". Initially the Saeima confirms the judge for the period of three years, but when the judge has proved his/her ability and has turned out to be a respectable pretender to the post, he/she is appointed to the post with the limitation of the term of his/her authority. The Saeima points out also that the appointment and confirmation in their contents are different concepts and the impugned legal norm refers only to the procedure of appointment of the judges.

The Saeima holds that the impugned legal norm is not at variance with Article 92 of the Satversme. The circumstance that the court is created and acts in accordance with the law shall be regarded as the main criterion, which secures independent and impartial review of cases at the court. It is determined by the law that only such a person may be

assigned to fulfill the duties of the judge, who meets the requirements determined for the candidate for the office of the judge. Thus the possibility that the duties of the judge may be assigned to an incompetent person is precluded.

Equivalent guarantees of independence are determined to the judge and the lay judge, who carries out the duties of a judge. For example, it is possible to raise objection to the lay judge, who is carrying out the duties of the judge, his decisions may be appealed against; restrictions to combine work in the office of the judge with other work (office) as well as provisions on the submission of the declaration of the state official are binding on him/her. The main difference lies in the term of holding the office – for a lay judge, who carries out the duties of the judge, it is of short duration – for two years.

The Saeima concedes that - with the work load of the courts unceasingly increasing - in certain cases of temporary absence of a judge, like during pregnancy or during the leave for nursing the child, there is no possibility of ensuring that other judges shall substitute her/him.

The Saeima holds that the impugned norm is not at variance with Articles 84 and 92 of the Satversme and shall remain valid.

4. **The State Human Rights Bureau** points out that up to this moment it has not had to assess the action of the impugned legal norm in a concrete situation. Yet, a case, when justice is adjudicated by a lay judge, who carries out the duties of a judge, gives reason for questioning the legitimacy of the court decisions and undermines trust in the judicial power. Thus the impugned legal norm is unconformable with the Satversme.
5. **The Institute of Human Rights of the Latvian University Faculty of Law** holds that in case, if a person, who has been appointed to office by the Minister of Justice, is adjudicating justice, the issue of guaranteeing of independence of the judge is problematic. For example, the Minister may appoint a judge to office just for adjudication of a certain case as well as shorten or prolong the term of his/her authority. Thus there is a possibility that the judge may be influenced; as well as doubt about the independence of the judge arises. Thus the impugned norm does not comply with Article 92 of the Satversme.
6. **The Republic of Latvia Ministry of Justice** points out that beginning from November 12, 1998 the Minister of Justice has appointed nine lay judges to the office of the judge. Three of them are still carrying out the duties of the judge as substitutes, four of them have been confirmed as judges by the Saeima but the performance of two lay judges has been

deemed as unsatisfactory and therefore labour relations with them have been terminated.

Incorporation of the impugned legal norm in the Law "On Judicial Power" at a certain period was justifying, as the courts were overburdened and the remuneration system of the judges was not settled. The impugned legal norm is directed towards reaching a legitimate aim and at that time complied with the principle of proportionality.

However it should be taken into consideration that at the present moment the salary reform of the judges has been commenced, labour conditions of the judges have improved, the choice and training of judges has been improved and thus – the interest on the profession of the judge has increased. The Ministry of Justice concludes that the impugned legal norm restricts the rights of an individual and is unconformable with Article 84 and 92 of the Satversme.

7. The viewpoints of the Senators of **the Republic of Latvia Supreme Court** are different.

7.1. Zigmants Gencs and Rolands Krauze – **the Senators of the Civil Case Department of the Senate** – point out that the impugned legal norm is contradictory to Article 84 of the Satversme, as only judges, confirmed by the Saeima, may carry out functions of a judge. The Satversme does not anticipate exceptions, allowing delegation of the confirmation function to the Minister of Justice.

7.2. Senators **of the Criminal Case Department of the Senate** Valda Eilande, Voldemārs Čiževskis and Artūrs Freibergs point out that the impugned legal norm is unconformable with Article 84 of the Satversme because, in accordance with the Satversme, the representative of the executive power may not transpose the rights granted to the Saeima. Such a regulation gives a possibility to the representative of the executive power to influence the performance of the judicial power and it is at variance with the principle of separation of state power.

7.3. **The Department of Administrative Cases of the Supreme Court Senate** remarks that in addition to Article 84 of the Satversme the first sentence of Article 86, which determines that decisions in court proceedings may be made only by bodies upon whom jurisdiction regarding such has been conferred by law, and only in accordance with procedures provided for by law, also refers to courts. To their mind interpreting this Article in a more extended way one may conclude that it is possible to specify by law the persons, entitled to adjudicate justice. The Department concludes that the impugned

legal norm, if it is interpreted as read together with Article 86 does not run contrary to Article 84 of the Satversme.

However, one shall take into account that Chapter 6 of the Satversme has to be interpreted by taking into consideration the first Part of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention). To determine whether the court is independent, one has to assess the way of appointment of judges, the term of their authority, guarantees for non-influence as well as the fact whether the court is apparently independent. When taking into consideration these criteria the impugned legal norm might be unconfirmable with Articles 84 and 92 of the Satversme because of the comparatively short period of appointment of the lay judge to the post of the judge.

**7.4. The Civil Cases Chamber of the Republic of Latvia Supreme Court** points out that in accordance with Article 86 of the Satversme only the bodies upon whom jurisdiction has been conferred by law and only in accordance with procedures provided for by law may adjudicate justice. The Law "On Judicial Power" secures the independence, being subject to the law and immunity of the lay judge. In accordance with the above Law the lay judge is "the subject of adjudication of justice" and in accordance with the cases provided for by law substitutes the District (city) judge only for a limited period. The decisions, adopted by the judge, appointed in such a way, may be appealed against under the procedure of appellation and cassation. The same qualification requirements as on the judge are imposed on him/her. Besides, the Minister of Justice does not experience the right of revoking the lay judge and they hold that from the contents of Article 84 of the Satversme does not follow that only the judges, confirmed by the Saeima adjudicate justice.

### **The concluding part**

**8.** The application includes the claim to assess the conformity of the impugned legal norms with Articles 84 and 92 of the Satversme, however from the claim follows that as a matter of fact conformity of the first sentences of the above Articles are challenged.

**8.1.** When analyzing the first sentence of Article 92 of the Satversme, which determines that everyone has the right to defend their rights and lawful interests in a fair court, the Constitutional Court has already declared that the concept "a fair court", incorporated into Article 92 of the Satversme, includes two aspects, namely, "a fair court" as an independent institution of the judicial power, which adjudicates the matter and "a fair court" as an adequate process, characteristic to the law governed state in which this case is being reviewed

*(see the Constitutional Court March 5, 2002 Judgment in case No. 2001-10-01, Item 2 of the concluding part).*

The Republic of Lithuania Constitutional Court when debating about the right of the Minister of Justice to take the decisions in issues connected with appointment of the candidates to the post of the judge has also concluded that the independence of judges and courts is one of the fundamental principles of a democratic state. The duty of the judicial power is to see that - when adjudicating justice implementation of the Constitutional norms, laws and other legal acts as well as observation of the principle of legality and protection of human rights and freedoms shall be guaranteed (*see the Republic of Lithuania Constitutional Court December 21, 1999 Judgment in case No. 16/98, Item 1, Sub-item 2 of the Establishing Part*).

**8.2.** Furthermore one has to take into consideration that the contents of Article 92 of the Satversme shall be established by reading it together with Article 89 of the Satversme, which determines that "the State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia". Thus the objective of the legislator has been to achieve mutual harmony of the norms. In the cases, when there is doubt about the contents of human rights included in the Satversme, they should be interpreted in compliance with the practice of application of international norms of human rights (*see the Constitutional Court August 30, 2000 Judgment in case No. 2000-03-01, Item 5 of the concluding part*). It means that Article 92 of the Satversme shall be interpreted being guided by the Convention as well as the conclusions, fixed in the case law of the European Court of Human rights (henceforth – ECHR).

**Thus independent judicial power is one of the fundamental elements of a democratic state.**

**9.** The first sentence of Article 84 of the Satversme determines that judicial appointments shall be confirmed by the Saeima and they shall be irrevocable. However, one shall take into consideration that the Satversme is a single whole and the norms, included in it, shall be interpreted systemically (*see the Constitutional Court October 22, 2002 Judgment in case No. 2002-04-03, Item 2 of the concluding part*). Chapter 6, also Article 84 of the Satversme shall be interpreted in conjunction with the provisions of Chapter 8 (including Article 92) of the Satversme and the first part of Article 6 of the Convention.

The first sentence of Article 6 (the first part) of the Convention determines: "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal". Analyzing the contents of the concept "independent court", included in Article 6 (the first

sentence of the first part)of the Convention, ECHR has concluded that several criteria shall be taken into consideration, for example, the manner of appointment of its members and their term of office, regard must be had to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence (*see ECHR Judgment in case "Campbell and Fell v. the United Kingdom"§78; in case "Langborger v. Sweden"§32; in case "Bryan v. the United Kingdom"§37; in case "Coeme and others v. Belgium"§120*).

**10.** By regulating the procedure of appointment of the judges the objective of Article 84 of the Satversme is to implement the principle of separation of power and thus secure the existence of independent judicial power. On the one hand undoubtedly the Law "On Judicial Power" formally guarantees that the lay judge, who carries out the duties of the judge, is independent. However, on the other hand one has to take into consideration that the procedure, under which the Minister of Justice charges the lay judge with the duty of substituting the judge of the particular District (city), may cause suspicion on the potential dependence of the appointed judge from the executive power as well as create doubt on the legitimacy of the decisions, adopted by him/her. In a law-governed state separation of power shall be in effect as the principle and independence of judges from interference of the executive power (*see Cipeliuss R. General teaching on the State.- Riga: editing house AGB, 1998, p.244*).

**10.1.** One of the main criteria, ensuring independence of a judge is the Saeima decision on his/her appointment (confirmation) to office. In a democratic society formation of the court shall be left in the hands of the legislator so as to avert influence of the executive power on it. The above conclusion on the guarantees of the independence of the judicial power, fixed in the Satversme, is confirmed also by the fact that only the Saeima or the people may amend the laws on the court structure and process, but the executive power – the Cabinet of Ministers is denied the right to do so even under Article 81 of the Satversme.

**10.2.** Even before the adoption of the impugned norm concern was expressed about the possibility of having an effect on the independence of the lay judge in case if the lay judge were confirmed by the Minister of Justice. Thus on September 10, when the Amendments to the Law "On Judicial Power" were being reviewed in the second reading at the session of the 6<sup>th</sup>. Saeima, the rapporteur of the Saeima Legal Affairs Committee proposed it was necessary to specify the wording of Article 75, namely to supplement the phrase "...the Minister may for a period not exceeding six months..." with the phrase "so that the judicial power would not be subordinated to the executive power too much" (*see p.56 of the case*). In its turn, on October 15, 1998 when reviewing the draft law in the third reading the Saeima deputies supported another proposal, which anticipated to supersede the words "for the period not exceeding six months",



incorporated in Article 75 of the Law "On Judicial Power" with the words "for the period not exceeding two years" (*see p. 60 of the case*).

**11.** The Constitutional Court agrees with the viewpoint expressed by the Human Rights Institute of the Latvian University Faculty of Law and the Administrative Case Department of the Republic of Latvia Supreme Court Senate that in case when guarantees with regard to the period of authority of the judge do not suffice, then the judge may become easily influenced. Besides, it shall be taken into consideration that Article 75 of the Law "On Judicial Power" allows the Minister of Justice on his/her own discretion to appoint the lay judge to the office of the judge for the period, which is shorter than two years.

**11.1.** Already on November 9, 1921 at the session of the Constitutional Assembly the member of the Commission for Elaboration of the Satversme Jānis Purgals pointed out: "We need an independent court. Therefore we shall elaborate such a procedure for the appointment of judges, which guarantees such independence". [...] If we appoint the chief judges just for six years, then their independence would not be secured; the judges would not be sure that they were able to use their experience in practice. Every judge will figure out for what period he/she is elected..." (*see the Verbatim Report of the Republic of Latvia Constitutional Assembly. Riga, 1921, Number 20, pp.1876-1877*)

**11.2.** In accordance with Article 60 (the first Part) of the Law "On Judicial Power" judges of a District (city) court shall be appointed to office by the Saeima, upon the recommendation of the Minister of Justice, for three years. In its turn the second part of the above Article anticipates that after a judge of a district (city) court has held office for three years, the Saeima, upon the recommendation of the Minister of Justice, and on the basis of an opinion of the Judicial Qualifications Board, shall confirm him or her in office, for an unlimited term of office, or shall re-appoint him/her to office for a period of up to two years. After the expiration of the repeated term of office, the Saeima, on the recommendation of the Minister of Justice, shall confirm in office a judge of a District (city) court for an unlimited term of office.

**11.3.** The initial three years of office, to which the Saeima has appointed the judge, as well as the eventual re-appointment for a period of two years is only an exception from the general principle that the judge is appointed for an unlimited term of office. Just the non-existence of the limitation of the term of authority secures the independence of the judge – during this term the judge may be removed from office or dismissed only in cases, established by law. Thus, in accordance with Article 82 of the Law "On Judicial Power" a judge shall be removed from office pursuant to his/her own request; in connection with election or appointment to another office; due to his/her state of health if it does not allow him/her to continue to work as a judge or in connection with reaching the maximum age for fulfilling the office of a judge as specified by

law. In its turn Article 83 of the above Law anticipates that a judge shall be dismissed from office if the judge has been convicted and the judgment of the court has come into legal effect or on the basis of a decision of the Judicial Disciplinary Board.

**Thus neither the procedure of the appointment of the lay judge nor the extremely short period of office complies with the concept "independent court". Court independence, created in such a way, is not secured well enough.**

**12.** The Constitutional Court agrees with the viewpoint, voiced by the Ministry of Justice that the legitimate aim of the impugned legal norm is securing the efficiency of the court performance and involvement of the number of judges, determined by law. The above procedure has been used and is being used (*see Item 6 of this Judgment*) in cases, when the judge has a child nursing leave or is not able to carry out his duties due to his/her state of health.

**12.1.** To assess whether the impugned legal norm reaches its legitimate aim, one shall estimate whether the means chosen by the legislator are proportionate. When incorporating into the law the regulation, which allows the Minister of Justice to appoint a lay judge to the office of a judge, the legislator had not sufficiently assessed other means, with the help of which the functioning of the judicial power, complying with the requirements of independent court shall be secured and the potential influence of the executive power upon the court shall be averted. For example, there was a possibility to determine that even in such cases on the proposal by the Minister of Justice the lay judge was confirmed by the Saeima and the issue would not be solved solely by the Minister of Justice.

Even though at the moment of adoption of the impugned legal norm – because of the insufficient funding – there were not enough judges in Latvia, the procedure for appointment of the lay judges, anticipated in it, is not proportionate to the aim – to achieve the number of judges, established by law, as it does not secure the independence of the judge, appointed to office in such a way.

**12.2.** It should be stressed that in the neighboring States of the Republic of Latvia – in the Republic of Estonia and the Republic of Lithuania does not exist the procedure for substituting judges anticipated in the impugned norm. The Republic of Lithuania court system does not anticipate the institute of lay judges. In its turn in accordance with Article 13 (the second Part) of the Republic of Estonia Law on Courts during the temporary absence of the District or city judge the Minister of Justice has the right of substituting him/her with another judge of the first instance court or appellate court but not with the lay judge.

**12.3.** The eighth Chapter of the Draft Law on the Judicial Power, which regulates the procedure for the substitution of judges also determines that the Judicial Board has the right of substituting the judge of the District court only with the judge or the judge emeritus of another court. Besides, in the above Draft Law was also envisaged to change the subject on whose proposal the Saeima takes the decision on the confirmation of the District court judge. Contrary to the existing procedure when – in accordance with Article 60 (the second part) of the Judicial Law – the Saeima upon the recommendation of the Minister of Justice shall confirm judges of a District (city) court; Article 28 (the second Part) of the above Draft Law delegates voicing of the proposal to the Judicial Board. In difference from the Minister of Justice, who is the representative of the executive power, Judicial Board has been intended as a collegial institution, which shall employ persons, belonging to the judicial power (*see Document No. 2192, Draft Register No.710 to be reviewed at the 8<sup>th</sup>. Saeima session, which was withdrawn by the Cabinet of Ministers on March 17, 2004*).

**Thus the procedure, in accordance with which the Minister of Justice may assign a lay judge to the office of a judge, does not comply with the concept of independent court, incorporated in the Satversme and the Convention and runs contrary to Articles 84 and 92 of the Satversme.**

### **The substantive part**

On the basis of Articles 30-32 of the Constitutional Court Law the Constitutional Court

### **hereby rules:**

to declare the words ” or the lay judge”, included in the norm of Article 75 of the Law ”On the Judicial Power” as unconfirmable with Articles 84 and 92 of the Republic of Latvia Satversme and null and void as of the day of publishing the Judgment.

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of publishing the judgment.

The Chairman of the Court session

Aivars Endziņš