



LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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DISSENTING OPINION of the Justice of the Constitutional Court

Gunārs Kusiņš
in Case No 2019-23-01

"On the compliance of Section 464(1) of the Civil Procedure Law with the first sentence of Article 92 of the Constitution of the Republic of Latvia"

Riga, 30 July 2020

1. On 16 July 2020, the Constitutional Court passed a judgment in case No 2019-23-01 "On the compliance of Section 464(1) of the Civil Procedure Law with the first sentence of Article 92 of the Constitution of the Republic of Latvia" (hereinafter – the Judgment), ruling to recognise Section 464(1) of the Civil Procedure Law (hereinafter – the contested provision) as being compatible with the first sentence of Article 92 of the Constitution (*Satversme*) of the Republic of Latvia (hereinafter – the Constitution).

I concur with the Constitutional Court's conclusion that the first sentence of Article 92 of the Constitution requires that an individual's right to a fair trial be ensured in every stage of legal proceedings in a manner consistent with the nature of a particular stage of legal proceedings (paragraph 10 of the Judgment), as well as with the Court's conclusion that neutrality of the court must be ensured in every stage of legal proceedings by providing for measures sufficient to achieve this aim in accordance with the nature of a particular stage in legal proceedings (paragraph 11 of the Judgment). <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme>

I cannot, however, concur with the conclusion made by the Constitutional Court in the Judgment that the measures provided for in regulations are sufficient to ensure neutrality of the court at the stage of initiating cassation proceedings in civil procedure. My opinion is based on the arguments presented below. In substantiating my opinion, I will be using abbreviations used in the Judgment.

2. The contested provision stipulates that the question regarding the initiation of cassation proceedings in a civil case is decided by a three-judge panel of the Department of Civil Cases of the Supreme Court. The Applicant only found out the composition of the panel of judges after receiving the decision on refusal to initiate cassation proceedings and thus had not been able to request recusal of the judge whose neutrality the Applicant doubted. The Applicant held that the contested provision was incompatible with the first sentence of Article 92 of the Constitution as it did not provide for the right of the participants in the case to request recusal of the Supreme Court judges who would decide on the initiation of cassation proceedings.

Thus, the principal issue in the adjudicated case was whether neutrality of the court is ensured in accordance with the requirements of the first sentence of Article 92 of the Constitution if the legal framework does not provide for the right of the participants in the case to request recusal of the judges who are to decide on the initiation of cassation proceedings. In other words, what the Constitutional Court had to assess in the case in question was whether sufficient measures for ensuring neutrality of the court are provided for at the stage of initiating cassation proceedings in civil procedure, considering the nature of this procedural stage.

3. In case No 2017-16-01, the Constitutional Court assessed the constitutionality of legal provisions laying down the procedures for initiating proceedings in an administrative violation case in an appellate instance court. The Constitutional Court recognised that the first sentence of Article 92 of the Constitution requires that, at this stage of legal proceedings, the participants in the case be guaranteed the right to inquire about the composition of the court and request recusal of the judges constituting it, given that the court, in deciding whether appellate proceedings should be initiated, examines the case files, the court decision under appeal, as well as the arguments of the participants in the case, and may take a final decision, which is not subject to appeal and marks the completion of legal proceedings in the administrative violation case. In addition, the Constitutional Court noted that the same guarantees of the right to a fair trial, as following from the first sentence of Article 92 of the Constitution, apply to administrative violation cases and criminal cases (*see paragraphs 15.2 and 15.3*

of the Constitutional Court Judgment of 15 March 2018 in Case No 2017-16-01).

It is my understanding that, in evaluating whether the measures provided for in regulations are sufficient to ensure neutrality of the court, the court's jurisdiction at a particular stage in legal proceedings, that is, the nature of decisions the court may take, as well as the scope of assessment performed by the court, is of crucial importance. The requirement of court's neutrality, as enshrined in the first sentence of Article 92 of the Constitution, cannot vary depending on the type of legal procedure and the court instance. To my mind, the first sentence of Article 92 of the Constitution requires that the participants in the case are guaranteed the right to request recusal of judges constituting the court at such a stage in legal proceedings where case files, as well as the case participants' arguments regarding a solution to the dispute underlying the case, are examined and the court may take a final decision, which is not subject to appeal.

Previously, the Constitutional Court had already examined, in a number of judgments, the jurisdiction of the judicial panel at the stage of initiating cassation proceedings in civil procedure and found that, at this procedural stage, a panel of judges does not just verify whether the formal prerequisites set out in law are met, but also examines the case files, the arguments of the participants in the case, and evaluates the correctness of the decision under appeal (*see, for example, paragraph 12 of the Constitutional Court Judgment of 21 October 2013 in case No 2013-02-01 and paragraph 16.4 of the Constitutional Court Judgment of 12 March 2020 in case No 2019-13-01*). The Constitutional Court has recognised that only after a comprehensive examination of all the materials in the case can a panel of judges draw conclusions regarding the need to initiate cassation proceedings, and that deciding on the question of initiation of cassation proceedings can essentially be likened to reviewing a case in written procedure (*see paragraph 12 of the Constitutional Court Judgment of 21 October 2013 in case No 2013-02-01*).

In paragraph 14.1 of the Judgment, too, the Constitutional Court found that the judges deciding on the initiation of cassation proceedings in a civil case examine, *inter alia*, the court decision under appeal, the arguments presented in the cassation complaint, and the materials in the case. And still, the Constitutional Court's conclusion in the Judgment is that the said examination is only performed insofar as it is necessary to identify whether there is a need to

initiate cassation proceedings in accordance with the aims of such proceedings, and that such examination cannot be likened to reviewing a case on its merits in a cassation instance court. However, not a single argument is provided in the Judgment to substantiate why the Constitutional Court has deviated from the conclusions made in case No 2013-02-01 regarding the nature of the procedural stage such as the initiation of cassation proceedings and the likening of it to reviewing a case in written procedure.

It follows from Section 250³⁸(4)(1) and Section 434(2)(1) of the Civil Procedure Law that the decision of the panel of judges to refuse to initiate cassation proceedings is the final decision in a civil case: it is not subject to appeal, and the appealed decision comes into effect along with its entering into force. Considering the above, as well as the scope of the assessment performed by the panel of judges in deciding on the initiation of cassation proceedings in a civil case, I am of the opinion that, at the stage of initiating cassation proceedings in civil procedure, the case participants' right to a fair trial only qualifies as secured if they have the right to inquire which judges will be deciding on the question of whether cassation proceedings should be initiated and to request their recusal.

In paragraph 15 of the Judgment, the Constitutional Court notes that, in practice, the case participants' requests for recusal of the judges who will be deciding on the initiation of cassation proceedings are resolved on their merits, while doubts about a judge's neutrality which a participant in the case starts having after receiving the decision on refusal to initiate cassation proceedings serve as grounds for reviewing the case in connection with newly discovered circumstances. To my mind, such practice of the Supreme Court is indicative of the fact that the Supreme Court, too, is of the opinion that, at the stage of initiating cassation proceedings in civil procedure, the participants in the case should be guaranteed the right to request recusal of the judges who will be deciding on the initiation of cassation proceedings.

It is therefore my opinion that the contested provision, insofar as it does not provide for the right of the participants in the case to know which judges will decide on the initiation of cassation proceedings and to request their recusal, is incompatible with the first sentence of Article 92 of the Constitution.

