



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

1 Jura Alunāna Street, Rīga, LV-1010. Phone: 67830735, 67210274. E-mail: tiesa@satv.tiesa.gov.lv

SEPARATE OPINION

of the Justice of the Constitutional Court

Ineta Ziemele

Riga, 9 November 2017

in Case No. 2016-31-01

“On Compliance of Section 4(9) and Section 6¹ (1) of “Law on Remuneration of Officials and Employees of State and Local Government Authorities” with Article 83 and Article 107 of the *Satversme* of the Republic of Latvia”.

1. On 26 October 2017, the Constitutional Court passed the judgement in the case No. 2016-31-01 “On Compliance of Section 4(9) and Section 6¹ (1) of “Law on Remuneration of Officials and Employees of State and Local Government Authorities” with Article 83 and Article 107 of the *Satversme* of the Republic of Latvia” (hereinafter – the Judgement) and recognised the first sentence of Section 4 (9) and Section 6¹ (1) of “Law on Remuneration of Officials and Employees of State and Local Government Authorities” (hereinafter – the contested norms) as being incompatible with Article 83 and Article 107 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*) and void as of 1 January 2019.

I uphold the findings included in the Judgement, as well as the Substantive Part thereof. However, I find it necessary to highlight those principles of a democratic state governed by the rule of law, in accordance

with which, already at the time when the Remuneration Law was created, it was obvious that the system of judges' remuneration that had been established by the contested norms was incompatible with the *Satversme*.

2. First of all, I would like to note that the case No. 2016-31-01 is already the fifth case adjudicated by the Constitutional Court, in which the system of judges' remuneration and the principles of its functioning have been examined (*see Judgement of 18 January 2010 by the Constitutional Court in Case No. 2009-11-01, Judgement of 22 June 2010 in Case No. 2009-111-01, Judgement of 14 December 2010 in Case No. 2010-39-01, as well as Decision of 28 March 2012 on Terminating Legal Proceedings in Case No. 2011-10-01*). Already since 2010, the Constitutional Court has regularly reminded the legislator of those principles that must be implemented to ensure the independence of the judicial power. Actually, already for seven years, with the mediation of rulings by the Constitutional Court, discussions have been held on the issues of the independence of the judicial power in the context of the system of judges' remuneration.

Already in the judgement of 18 January 2010 by the Constitutional Court in case No. 2009-11-01 (hereinafter – the Judgement in Case No. 2009-11-01) those criteria, which follow from the principle of separation of powers and that should be met in the process of establishing the system of judges' remuneration, were defined.

Whereas in the judgement of 22 June 2010 in the case No. 2009-111-01 (hereinafter – the Judgement in Case No. 2009-111-01), the Constitutional Court examined the proportional decrease of a judge's remuneration and restrictions that were linked to the remuneration of the highest ranking official of the executive power – the Prime Minister. Once again, the Constitutional Court repeated the most important thesis included in the Judgement in Case No. 2009-11-01 regarding the content and scope of the principle of the independence of courts. It pointed out the different principles for setting the remuneration of judges and the remuneration of officials of the executive power (*see the Judgement in Case No. 2009-111-01, Para 13 and Para 14*). However, it was found that the system of judges' remuneration that was in force ensured a balance between the branches of power and the judge's remuneration that had

been set in the framework of the system was able to ensure a judge's financial independence to a sufficient degree in order to safeguard a judge's independence (*see the Judgement in Case No. 2009-111-01, Para 19.4.*). This finding by the Constitutional Court was based on the assessment of the functioning of the remuneration system that was conducted at a particular time. Additionally, the Constitutional Court noted *obiter dictum* that in assessing the compliance of judges' remuneration only justified comparison with other salaries could be used, taking into consideration the rank of a judge's office within the constitutional legal order, the responsibility of this office, the requirements of competence, qualification and experience set for this office, as well as the requirement of independence and the restrictions that followed from a judge's office (*see the Judgement in Case No. 2009-111-01, Para 19.5.*).

Upon establishing that the system of judges' remuneration was incompatible with the *Satversme*, the Constitutional Court repeatedly reminded of the constitutional principles that had to be complied with in creating the dialogue between the judicial power and the legislator within the framework of the principle of separation of powers. In establishing the system of judges' remuneration, it is important that the dialogue between the legislator and the judicial power were meaningful and oriented towards the main aim – establishing such a system of judges' remuneration that would be able to ensure the independence of the judicial power. In discussing issues of the judges' remuneration and the budget of the judicial power, the judicial power, uncontestedly, is in a weaker position compared to the other branches of power. Therefore, direct negotiations between the legislator and some representatives of the judicial power about these issues is not the most appropriate form of communication between the branches of power since in such negotiations the legislator has, at least apparently, a possibility to influence the judicial power and its rulings; however, even a possible appearance like this is unacceptable (*see the Judgement in Case No. 2009-111-01, Para 29.1.*).

At the end of 2010, the *Saeima* developed a new system of judges' remuneration, envisaging linkage of a judge's monthly salary to the maximum amount of the monthly salary of the head of a legal structural unit at an institution of direct public administration or the 12th group of monthly salaries (*see Para 12 of the Judgement*). In its decision on terminating legal proceedings

in case No. 2011-10-01 (hereinafter – the Decision in Case No. 2011-10-01), the Constitutional Court examined the constitutionality of a number of legal norms linked to the setting of judges’ remuneration in the new system of judges’ remuneration.

In view of the fact that application in the case No. 2011-10-01 had been submitted as a constitutional complaint, in the particular case, the Constitutional Court examined, whether the contested norms infringed upon the applicant’s rights defined in Article 107 of the *Satversme* to receive commensurate remuneration for the work done. I.e., the Constitutional Court verified, whether, in establishing the judges’ remuneration in accordance with the new system of remuneration, a judge’s financial security had not been restricted, by significantly decreasing a judge’s salary by the norms that were contested in the respective case (*see the Decision in Case No. 2011-10-01, Para 26*).

The Constitutional Court noted that it would examine the content of the remuneration system and the procedure, in which it was adopted, only in the case if an infringement on the applicants’ fundamental rights was established (*see the Decision in Case No. 2011-10-01, Para 27.2.*). Upon establishing that the contested norms, at the particular moment of examining the case, had not decreased the actual value of judges’ remuneration and, thus, did not infringe upon the applicants’ rights defined in Article 107 of the *Satversme* to receive commensurate remuneration for the work done (*see the Decision in Case No. 2011-10-01, Para 29.3.*), the Constitutional Court adopted the decision to terminate legal proceedings in the case.

Hence, the Constitutional Court did not examine:

- 1) the procedure for adopting the contested norms;
- 2) the compliance of the system of judges’ remuneration with the *Satversme*;
- 3) the content of the contested norms and the compliance thereof with Article 83 of the *Satversme* and the general principles of law.

Thus, the point made by the *Saeima* that the Constitutional Court, by the decision in the case No. 2011-10-01, “recognised the system of judges’ remuneration, established in 2010, in particular, the linking of judges’ remuneration to the maximum amount of the monthly salary of the head of legal

structural unit in an institution of direct public administration, as being compatible with Article 1 and Article 83 of the *Satversme*” (see *Case Materials, Vol. 1, p. 21*), is not valid. Issues related to the constitutionality of legal norms cannot be examined in a decision on terminating legal proceedings since in such instances a case is not examined on its merits.

As follows from the findings expressed in the rulings adopted by the Constitutional Court over the course of seven years in cases regarding judges’ remuneration, the enforcement of the rulings by the Constitutional Court in these cases, i.e., the legislator’s response to the aforementioned rulings is not indicative of a successful dialogue between the Constitutional Court and the legislator. Neither does this Judgement prove this.

3. In the Judgement, the Constitutional Court examined the contested norms on the basis of the criteria included in the Judgement in Case No. 2009-11-01. The Constitutional Court:

1) found that the contested norms were incompatible with the *Satversme* [the actual value of judges’ remuneration does not ensure the financial security of judges because it is not commensurate with the requirements set for and restrictions imposed on the office of a judge (see *Para 22.3. of the Judgement*); the system of judges remuneration established by the contested norms do not ensure to judges such remuneration for work that would guarantee their financial security and does not protect the actual value of judges’ remuneration (see *Para 22.4. of the Judgement*)] but due to procedural economy did not continue examination. Hence, the Constitutional Court did not examine the procedure, in which the contested norms had been adopted;

2) set a term of 14 months for the legislator for eliminating the identified deficiencies;

3) did not include special instructions for the legislator, being of the opinion that both the principles and criteria, as well as aims and the scope of discretion had been defined in the rulings by the Constitutional Court in cases concerning judges’ remuneration, the respective information was sufficient for due enforcement of the judgement by the Constitutional Court.

4. In the Judgement, the Constitutional Court once again explained the principles that were important for ensuring judges' independence. However, taking into consideration the information included in the case materials as well as arguments referred to during the court hearing, which show that the principle of separation of powers and the principle of the independence of the judicial power have been ignored in establishing the system of officials' remuneration or unfoundedly narrow understanding of these principles, I am of the opinion that the arguments should have been more extensively elaborated in the Judgment and that it should have included an explanation of:

1) the status and the role of a judge, as well as the significance of a judge's independence in a democratic state governed by the rule of law;

2) the significance of the principle of separation of powers in a state governed by the rule of law and the role of an independent court in ensuring this principle;

3) the term set for enforcement of the Judgement, as well as the procedure for establishing a new system of remuneration, as well as for drafting and adopting other decisions linked to the operation of the judicial power.

The Constitutional Court choose to show in the Judgement, on the basis of sizeable information, the absurdity of the outcome caused by the contested norms, i.e., the aligning of a judge's and a civil servant's remuneration. I believe that, in accordance with the principles of separation of powers and independence of the judicial power, the link of this kind by default should be considered as being inoperable because it does not ensure that the different principles that characterise the judicial power are abided by and dismantles the system of checks and balances between the branches of power. In my separate opinion, I shall highlight some aspects in the principles of independence of the judicial power and the separation of powers, which, in my opinion, are of decisive importance in establishing a system of judges' remuneration that complies with the *Satversme*.

5. When reflecting on the principle of the independence of the judicial power, one has to keep in mind that the independence of a court and of a judge is not an end in itself but rather a tool for ensuring and reinforcing democracy and the rule of law, as well as a pre-requisite for effective exercise of the right to a

fair trial (*see the Judgement in Case No. 2009-11-01, Para 7*). The judge's independence is one of the main elements of a democratic state governed by the rule of law since ensuring the principles of separation of powers and the rule of law, as well proper functioning of society is based on it; i.e., it is the basis for the protection of human rights, economic security and free trade, good governance and public order. The judge's independence is considered to be the main foundation for democracy, liberty and aligned economy (*Shetreet S. Judicial Independence, Liberty, Democracy and International Economy. In: Shetreet S. (Ed.) The Culture of Judicial Independence. Rule of Law and World Peace. Leiden: Brill Nijhoff, 2014, p. 14*). Undoubtedly, a judge's independence is the pre-requisite for the rule of law (*Shetreet S. The Mt. Scopus International Standards of Judicial Independence: The Innovative Concepts and the Formulation of a Consensus in a Legal Culture of Diversity. In: Shetreet S., Forsyth C. (Eds.) The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges. Leiden: Nijhoff, 2012, p. 476*). Conditions that are favourable for the development of a person and the society are created and market economy successfully operates only in a state governed by the rule of law. Thus, the prosperity and stability of a state are directly linked to the independence of the judicial power. These are the basic tenets, on which the system of judges' remuneration should be founded. I.e., the aim of this system is to facilitate the independence of the judicial power and, thus, the economic and legal sustainability of the Latvian State.

Hence, the issue of judges' financial independence is a matter of interest for the whole society, not solely of judges. The Constitutional Court notes in the Judgement that a judge's financial security is guaranteed by such remuneration that ensures to a judge a due standard of living throughout his career (*see Para 21 of the Judgement*). The scope of this finding is broader since, essentially, the Constitutional Court urges to provide for such balance and mutual respect between the branches of state power that would prove understanding of the significance that each branch of the state power has in the development of a democratic state governed by the rule of law (*see also Para 21.2. of the Judgement*).

6. Ensuring of due remuneration is linked to ensuring also an independent and competent court, which is an element of the right to a fair trial (*see Para 19 of the Judgement*). A judge, whose obligation is to resolve disputes that have arisen in society, as well as disputes between a person and the State, should have not only a high professional qualification and an impeccable reputation but also be financially independent and should feel secure about his future (*see Para 22.1. of the Judgement*). Only a judge like that is able to pass rulings that comply with the *Satversme* and promote the welfare of society in general. In view of the responsibility imposed on a judge for ensuring the rule of law, the material and social guarantees envisaged for a judge should be such that are commensurate with the constitutional status and dignity of a judge.

A judge's financial security is one of the most real guarantees, which a judge, who has been elected to his office for life, feels as a daily support in the independent adjudication of justice. One of the aims of the financial security is to ensure that the courts are and also seem to be independent of political intervention via economic manipulations. For a judge to remain, to the extent possible, separated from the pressure and influence of all political and economic forces, he must be released from financial or business problems that could influence him or even cause a perception that are influencing the performance of his functions (*see Para 21.2. of the Judgement*).

The State's obligation to ensure the financial independence of judges as a safeguard for an unbiased and fair protection of every person's human rights follows from the basic norm and the norms of the *Satversme* that provide that the state is democratic and is governed by the rule of law. The Recommendation CM/Rec (2010)12 adopted by the Committee of Ministers of the Council of Europe also provides that "Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions". Further in the Recommendation, it is stated that legal norms should be such that would safeguard judges against a reduction in their remuneration. In the Judgement, the Constitutional Court clearly revealed that such mechanism had not been integrated into the contested norms from the moment of their adoption (*see Para 22.4. of the Judgement*).

Thus, the legislator, in establishing the system of judges' remuneration, has not abided by the principle of the independence of the judicial power.

7. The second aspect that must be kept in mind, when reflecting on the system of judges' remuneration, is the principle of separation of powers. The Constitutional Court assessed in the Judgement the way checks and balances between the branches of state power (the legislative, the executive and the judicial power) functioned in Latvia. The Constitutional Court noted that the judicial power was one of the three branches of the state power, in accordance with the principle of the separation of powers that is derived from the basic norm and falls within the scope of Article 1 of the *Satversme*.

Every judge, in administering justice, exercises the judicial power and acts as a check to the executive and the legislative power in the system of checks and balances that follows from the principle of separation of powers. Thus, the legislator has an obligation, which is derived from the principle of separation of powers, to treat the judicial power in a way to ensure a balance between the three branches of state power (*see Para 21.1. of the Judgement*). In a state governed by the rule of law, this legislator's attitude towards the judicial power should be reflected in the adoption of legal regulation on matters linked to the operation of the judicial power, *inter alia*, also in creating the state budget and allocating financial resources. A genuine system of checks and balances between the branches of state power is established only if equivalence of branches is ensured in all fields.

The aim of the separation of powers is to preclude arbitrariness. Each constitutional institution must be aware of the limits that follow from the basic norm and are defined in the *Satversme*, which may not be overstepped. Therefore the mission of final decision-taker with respect to revealing the scope of a legal norm must be entrusted to the independent judicial power, legitimised by the *Saeima*. A judge's independence is of particular importance, when the court safeguards the constitutionalism and fundamental human rights because in this field the court, by implementing the principle of separation of powers, acts as the controller of the State's actions (i.e., verifies the exercise of the state power (*Scheinin M., Krunke H., Aksenova M. (Eds.) Judges as Guardians of*

Constitutionalism and Human Rights. Cheltenham: Elgar, 2016, p. 5). Moreover, in view of the jurisdiction granted to courts to control the legality of the legislators' and the executive power's actions and decisions, it is important for the judges to be fair, consistent and incorruptible (*O'Connor S. D. The Majesty of the Law: Reflections of a Supreme Court Justice. New York: Random House, 2004, p. 251*).

This provides an answer to the question, whether the Constitutional Court, which is a court itself, has the right to adjudicate cases regarding judges' salaries at all. In a democratic state governed by the rule of law, the primary objective of a court is to reveal the content of legal norms. The court does not create or adopt laws; it does not act instead of the legislator. The legislative power is vested in the people and representatives elected by them. In a democratic state governed by the rule of law, it is generally assumed that the legislator is rational and never adopts unlawful laws. However, the fact that constitutional courts function in the majority of democratic states proves that erroneous solutions do occur. Verification, whether the contested norms comply with the principles of a democratic state governed by the rule falls also within the competence of the Constitutional Court of the Republic of Latvia. Within the structure of Latvia's constitutional bodies, this competence primarily has been granted to the Constitutional Court. Any speculations as to the absence of such competence of the Constitutional Court point to lack of understanding of the principles of a democratic state governed by the rule of law.

From the perspective of effective functioning of the state, it is important that all branches of power are performing their functions duly, that none of them would overstep the limits of its competence, and that each would pay due respect to the other branches of powers and would respect its legitimate field of functioning. In the contemporary constantly changing economic, political, social and global circumstances, the judicial power is the main entity that draws the lines of demarcation between the three branches of power (*Shetreet S. Judicial Independence, Liberty, Democracy and International Economy. In: Shetreet S. (Ed.) The Culture of Judicial Independence. Rule of Law and World Peace. Leiden: Brill Nijhoff, 2014, p. 16*).

In a state governed by the rule of law, there may be no interests of separate constitutional bodies or separate institutions. The Constitutional Court

has already repeatedly noted that in a democratic state reinforcing democracy in the interests of the people is the shared aim of all branches of the state power (*see Judgement in Case No. 2009-11-01, Para 8.1.*).

Ensuring the balance of the three branches of the state power is essential for every citizen, for the whole society and for the national development because the development and welfare of each inhabitant and the society as a whole can be ensured only in a state governed by the rule of law.

8. In view of the principles of the independence of the judicial power and of the separation of powers, it is important to develop such a system of judges' remuneration that would facilitate the development of the State of Latvia.

The Constitutional Court noted in Para 23 of the Judgement that, first, the legislator should develop a system of judges' remuneration that would comply with requirements of Article 83 of the *Satversme*, and, secondly, that the legislator needed time for developing a system like this, and it also set a term, which, in the opinion of the Constitutional Court, would be sufficient, i.e., envisaged more than 14 months for the development of the aforementioned system. The exact model of judges' remuneration and the amount of remuneration for work – regulating these issues falls within the legislator's competence. Therefore the Constitutional Court has treated the legislator with extreme tolerance and allowed it a sufficiently long period of time for eliminating the non-conformities identified in the Judgement. The period that has been allowed to the legislator this time is one of the longest transitional periods ever set by the Constitutional Court. It was done because such a system of judges' remuneration must be developed that would facilitate the development of the State of Latvia. This system must be well-considered and compatible with the *Satversme*. The Constitutional Court did not explain in the Judgement once again what requirements followed from the principles of separation of powers and judges' independence and had to be complied with in a state governed by the rule of law in order to consider that the system of judges' remuneration had been adopted in a legal procedure that was compatible with the *Satversme*.

However, in view of the circumstances related to the development and adoption of the current system of judges' remuneration that were identified while

examining the case, I am of the opinion that Constitutional Court should have underscored some requirements that follow from the *Satversme* and have already been revealed in the case law of the Constitutional Court.

First, the legislator, in developing a new system of judges' remuneration, must ensure an independent, effective and objective procedure for setting the salaries of judges (*see the Judgement in Case No. 2009-11-01, Para 11.5.*). The procedure and terms of enforcing the previous rulings by the Constitutional Court reveal that the procedure for developing the new system of remuneration needs to be considered seriously so that it would comply with the criteria revealed by the Constitutional Court. It must be added, that the contested system of judges' remuneration was drafted, discussed, examined and adopted by the *Saeima* within five weeks. Within such a period of time it is impossible to ensure, even theoretically, an independent, effective and objective procedure for setting the judges' remuneration.

Secondly, the Constitutional Court noted already in the judgement in case No. 2009-11-01 the procedural activities that followed from the principle of separation of powers and the legislator had to take in adopting decisions that immediately affected the functioning of the judicial power and of courts (*see the Judgement in Case No. 2009-11-01, Para 24*). The legislator, *inter alia*, must hear the opinion of the independent institution that represents the judicial power – the Council for the Judiciary – and respect it in accordance with the principle of separation of powers. Moreover, the Constitutional Court has explained what the words “respect the opinion of an independent branch of power” mean in a state governed by the rule of law. I.e., if this opinion is not taken into consideration or is taken into consideration only partially the legislator must provide substantiation for its actions in the scope that would provide all information required for the proportionality test in case if the Constitutional Court had to examine the compliance of the respective actions with the *Satversme* (*see Judgement in Case No. 2009-11-01, Para 11.5.*)

Thirdly, the contested system of judges' remuneration was adopted by the *Saeima* within the framework of the package of draft budget laws (comprising more than 90 draft laws). In the judgement of 19 December 2011 in case No. 2011-03-01, the Constitutional Court has already pointed to the legislator's duty to evaluate the issues to be included in the law on the state budget and the

accompanying package of laws. The system of judges' remuneration is an issue, which pertains not only to the planning of the state budget but directly influences the implementation of the principle of separation of powers and relationships between the constitutional bodies. By resolving this matter solely within the framework of the package of draft budget laws, reinforcement of the judicial power is jeopardised.

In developing the system of judges' remuneration, the legislator must ensure its quality both as to its content and form. The principles of independence of the judicial power and separation of powers must be complied with in every stage of the functioning of the judges' system of remuneration.

9. The prolonged discussions about the system of judges' remuneration have not only required large resources but also obviously had hindered ensuring as high as possible welfare of the Latvian society.

Recommendation of the Council of Europe (*see Para 6 of this Separate Opinion*) is one among many documents of international law that provides that the state institutions, which are responsible for the organisation and functioning of the system of courts, have the obligation to ensure to judges such working conditions that would allow them to implement their mission and to work with sufficient effectiveness. This also guarantees the independence and objectivity of judges. I draw attention to the fact that judges' remuneration is an extremely significant factor, and yet, is only one among all those factors, which in their totality should ensure the due status and working conditions of a judge. Therefore, currently, it would be of particular importance to focus on this set of factors in Latvia, finding effective and well-considered solutions.

Justice of the Constitutional Court.

I. Ziemele