



# JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## Separate Opinion of Justices of the Constitutional Court

**Sanita Osipova and Ineta Ziemele**

**in Case No. 2015-19-01**

### **“On Compliance of the First, Third and Fifth Part of Section 657 of the Criminal Procedure Law with the First Sentence in Article 92 of the Satversme of the Republic of Latvia”**

1. On 29 April 2016 the Constitutional Court in its judgement in Case No. 2015-19-01 “On Compliance of the First, Third and Fifth Part of Section 657 of the Criminal Procedure Law with the First Sentence in Article 92 of the Satversme of the Republic of Latvia” (hereinafter – the Judgement) recognised the first, third and fifth part of Section 657 of the Criminal Procedure Law, insofar they allowed that a prosecutor, who in criminal proceedings had performed investigative activities, had supervised investigation, had performed criminal prosecution or brought public charges, decided on the issue of renewing these criminal proceedings due to newly discovered circumstances, as being incompatible with the first sentence of Article 92 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*).

2. The contested norms provide for initiation of a procedure – renewing criminal proceedings due to newly disclosed circumstances. The Constitutional Court has examined compliance of this institution of law with the first sentence of Article 92 of the *Satversme* previously, in case No. 2001-10-01. The question, whether this institution of law fell within the content of the right to a fair trial, was answered in the affirmative (*see Judgement of 5 March 2002 by the Constitutional*

*Court in Case No. 2001-10-01*). The Constitutional Court noted already in 2002 that the same prosecutor, who had brought charges in the case, did not have the right to make the final decision on whether there were newly disclosed circumstances in the case (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 10 of the Findings*). Therefore the Constitutional Court validly pointed out in the Judgement that the contested regulation had not eliminated the previously identified problem (*see Para 16.3 of the Judgement*).

3. However, the fact that legal system has developed and human rights standards have improved since 2002 must be taken into consideration. For this very reason the Constitutional Court validly recognised in the Judgement that the claim regarding compliance of the contested norms with the first sentence of Article 92 of the *Satversme* could not be regarded as being already adjudicated (*see Para 10.6 of the Judgement*). However, appropriate conclusions were not made in the Judgement, and essentially the Judgement does not state anything that the Constitutional Court had not stated already in its judgement of 5 March 2002.

**Therefore we do not uphold the reasoning included in the Judgement by the Constitutional Court regarding incompatibility of the contested norms with the first sentence of Article 92 of the *Satversme* in the part thereof on neutrality of the prosecutor in adopting a decision on renewing criminal proceedings.**

4. The finding that the right to a fair trial comprises both the principle of *res judicata* and the principle of a fair judgement (*see Para 12.2 of the Judgement*) must be upheld. We would like to draw attention, in particular, to Para 12.3 of the Judgement, in which the Constitutional Court notes that the European Court of Human Rights (hereinafter – ECHR) encourages the States party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), to the extent possible, to renew legal proceedings in cases, where violation of the right to a fair trial has been established. However, in those cases, where the right to a fair trial has been violated by using in the case

evidence that has been obtained by breaching prohibition of torture and cruel treatment, the States party to the Convention have an obligation to renew legal proceedings. We established that ECHR has reviewed cases initiated against Latvia because evidence had been obtained by illegal methods. ECHR has adopted rulings in these cases and has established violation of the right to a fair trial (*see ECHR Judgement of 11 February 2014 in case “Cēsnieks v. Latvia”, application No. 9278/06, Para 65 and 78, and Decision of 9 October 2012 in case “Viktors Jeronovičs v. Latvia”, application No.44898/10, Para 13 – 16*); however, the Prosecutor’s Office of the Republic of Latvia in some cases has refused to renew criminal proceedings due to newly discovered circumstances, ignoring the findings by in ECHR proceedings. The fact that the prosecutor’s office is exercising in this way the right established in the contested norms is incompatible with international commitments of the Republic of Latvia.

5. Legal system of the Republic of Latvia is characterised by openness to international law. Pursuant to the doctrine of monism, international law provisions binding upon the Republic of Latvia are applied directly in Latvia [*see: Ziemele I. Starptautisko tiesību (vieta) un nacionālo tiesību attiecības. Juristu Žurnāls, 1997, Nr. 5; Cilvēktiesību Žurnāls, 1997, Nr. 6, 65.–70.lpp.*]. The Constitutional Court has always interpreted norms of the *Satversme* in accordance with international commitments of the Republic of Latvia, insofar this does not lead to decreasing or restricting fundamental rights included in the *Satversme* (*see, for example, Judgement of May 13 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 5 of the Findings*). Thus, the international norms of human rights are the minimum standard of human rights. The human rights defined in the *Satversme*, in turn, are either identical to these or envisage greater guarantees. Thus, the first sentence of Article 92 of the *Satversme* envisages the obligation to renew criminal proceedings due to newly disclosed circumstances, if these circumstances are obtaining evidence in criminal proceedings by methods of torture or cruel treatment. The contested norms do not impose an obligation upon the prosecutor’s office to renew criminal proceedings due to such newly disclosed circumstances, but envisage a prosecutor’s right and provide that a prosecutor’s decision on

refusal to renew criminal proceedings is final. Section 655(1) of the Criminal Procedure Law also envisages the right to renew criminal proceedings, but not an obligation to do so (*see Para 14 of the Judgement*).

**The Constitutional Court has not examined compliance of the contested norms with the first sentence of Article 92 of the *Satversme* in such an interpretation that would comply with the obligation enshrined in the Convention to renew legal proceedings in cases, in which evidence that had been obtained by violating the prohibition of torture or cruel treatment is used.**

6. It is explained in the Judgement that in Latvia the prosecutor's office is an institution of judicial power and that this status of the prosecutor's office has been created with the aim to ensure independence of the prosecutor's office from the executive power, bringing the status of a prosecutor as close as possible to the status of a judge (*see Para 15 of the Judgement*). The Judgement also comprises a reference to a finding by the Supreme Court that not just any newly disclosed circumstance *per se* is the reason for revoking a valid ruling, but only such circumstance, which had been of decisive importance in adopting this ruling (*see Para 15 of the Judgement*). These two arguments are used to substantiate the statement by the Constitutional Court that the initial verification of newly disclosed circumstances in the prosecutor's office if necessary.

7. The finding that the prosecutor's office both has appropriate competence and sufficient guarantees of independence for performing the initial verification can be upheld. However, we are of the opinion that it had to be underscored in the Judgement that in the context of the right to a fair trial a prosecutor's office cannot be equalled to a court. ECHR has clearly pointed to this in a number of cases. ECHR has consistently rejected the thesis that a prosecutor's office could be regarded as being an independent and unbiased court in the meaning of Article 6 of the Convention and has noted that the procedure in the prosecutor's office does not comply with the guarantees of judicial proceedings, because, for example, the applicant does not participate in the process of verifying the application; public

hearings are not held; a prosecutor usually has broad discretion in proceeding with the case, moreover, a prosecutor's neutrality can be contested. Appealing to a prosecutor of higher standing does not resolve these issues, because the prosecutor's office is a centralised and hierarchically built institution. ECHR has clearly stated: the fact that the protection of public interests falls within the competence of a prosecutor's office cannot be recognised as grounds for equalling a prosecutor's office to a court (*see ECHR Judgment in case "Zlinsat, spol. s r.o., v. Bulgaria", application No. 57785/00, Para 78*). Also in case "Ternovskis v. Latvia" ECHR established that examination of a person's application in the prosecutor's office was incompatible with guarantees of fair legal proceedings (*see ECHR Judgement of April 2014 in case "Ternovskis v. Latvia", application No. 33637/02, Para 72*).

8. Therefore, from the perspective of the first sentence of Article 92 of the *Satversme*, the issue is not at all, whether the prosecutor's office is able to perform the initial verification of a person's application on newly disclosed circumstances. It is not doubted that the prosecutor's office should do it. Actually, the issue is, whether the contested legal regulation that provides that a prosecutor's decision may be final is compatible with such understanding of the right to a fair trial, which, in accordance with the findings made by the Constitutional Court, comprises also renewal of criminal proceedings in connection with newly disclosed circumstances, in particular in a case, where Latvia, in view of certain circumstances, has an obligation to renew legal proceedings in accordance with its international commitments (*see Para 4 and Para 5 of the Judgement*). The contested norms, basically, grant discretion to the prosecutor to decide on how to proceed with the procedure linked to the application regarding newly disclosed circumstances. They do not envisage an obligation that would follow from certain circumstances. Thus, the contested regulation does not ensure in all cases a balance, which would be compatible with the principle of a state governed by the rule of law, between the principle of *res judicata* and the right to a fair judgement. The finding made by the Constitutional Court, which is included in Para 16 of the

Judgement, may be upheld, although it does not follow from the reasoning included in this paragraph.

9. In the case of collision between the principle of *res judicata* and the principle of a fair judgement, a balance can be ensured solely by a court, because the right to a fair trial is guaranteed only by a court. Thus, also an answer to the question, whether in an adjudicated case a person's right to a fair trial has been respected, can be provided only by a court. A prosecutor's office may not answer this question on its merits.

**In view of the above, it can be concluded that the part of Findings in the Judgement provides only a partial answer to the constitutional question.**

In Riga, on 13 May 2016

Justice of the Constitutional Court

Sanita Osipova

Justice of the Constitutional Court

Ineta Ziemele