



# LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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## **The Separate Opinion of Justices Kaspars Balodis and Kristīne Krūma on 16 July 2015, in Riga in Case No. 2015-01-01**

### **“On the Compliance of the First and the Second Part of Section 7 of the Law on the National Flag of Latvia and Section 201<sup>43</sup> of the Latvian Administrative Violations Code with Article 100 of the Satversme of the Republic of Latvia”.**

1. On 2 July 2015, the Constitutional Court (hereinafter also – the Court) passed the judgement in case No. 2015-01-01 (hereinafter – the Judgement), in which it examined compliance of the first and the second part of Section 7 of the Law on the National Flag of Latvia and Section 201<sup>43</sup> of the Latvian Administrative Violations Code (hereinafter, jointly also – the contested norms) with Article 100 of the Satversme of the Republic of Latvia (hereinafter – the *Satversme*). The case was initiated on the basis of a constitutional complaint submitted by Solvita Olsena (hereinafter – the Applicant).

In the Judgement, the Constitutional Court recognised the first and the second part of the Law on the National Flag of Latvia (hereinafter also – the Law on the National Flag) as being compatible with Article 100 of the *Satversme*, but Section 201<sup>43</sup> of the Latvian Administrative Violations Code (hereinafter also – LAVC ), to the extent it establishes sanctions for failure to place the national flag of Latvia on residential buildings owned by natural persons pursuant to the first and the second part of Section 7 of the Law on the National Flag of Latvia, as being incompatible with Article 100 of the *Satversme*.

2. We uphold the finding made in the Judgement that the first and the second part of Section 7 of the Law on the National Flag of Latvia (hereinafter – also the contested norms of the Law on the National Flag) were compatible with Article 100 of the *Satversme*. However, we believe that the reasoning and the methodology used by the Constitutional Court do not provide a convincing constitutional legal assessment on matters that are essential for the case under review.

We are of the opinion that the Constitutional Court has not conducted a sufficient assessment of the probable infringement upon the Applicant's fundamental rights and has expanded the limits for examining the case without grounds. The legitimate aim of the restriction upon rights is not clearly revealed by the reasoning included in the Judgement. Likewise, the Court has not taken into consideration the legislator's discretion, which it exercises, in defining the obligation to use the national flag and the sanction for failure to perform this obligation. We do not uphold the finding included in the Judgement regarding incompatibility of Section 201<sup>43</sup> of the Latvian Administrative Violations Code (hereinafter also – the contested LAVC norm) with Article 100 of the Satversme.

**3.** It follows from the case materials that on 14 June 2013 the Applicant had held a family celebration in her property, which is also her place of residence. The national flag of Latvia (hereinafter also – the national flag) in mourning presentation had not been placed on the building, because that would have hindered the celebrations. Minutes on an administrative violation had been drawn up, and the Applicant had been punished by an issued warning, on the basis of Section 32 and Section 201<sup>43</sup> (1) of LAVC.

**3.1.** Para 10 of the Judgement predominantly presents the Applicant's arguments with respect to the infringement upon her rights; however, the Court has not provided a sufficiently detailed assessment of the scope of this probable infringement. Therefore we cannot uphold the points made in Para 10.2 of the Judgement with respect to limits of examining the claim.

The examination and adjudication of a constitutional complaint, in difference to an abstract review of legal norms, is not a measure that serves only for the alignment of the legal system. First and foremost, it is a measure that serves to protect the fundamental rights of the submitter of the particular constitutional complaint. Therefore the Constitutional Court must conduct an individual examination of the proportionality of the contested restrictions with respect to the party submitting the constitutional complaint (*see Judgement of 15 June 2006 by the Constitutional Complaint in Case No. 2005-13-0106, Para 20.2*).

The Constitutional Court reviewed the obligation to place the national flag on residential buildings owned by natural persons with respect to all ten days referred to in the contested norms of the Law on the National Flag. However, the contested norms were applied to the Applicant only with respect to a particular date – 14 June.

In Para 10.2 of the Judgement the Court notes that the contested norms of the Law on the National Flag will be examined in interconnection with the contested norm of LAVC, although only the first part of LAVC Section 201<sup>43</sup> was applied to the Applicant. The Judgement, however, does not provide substantiation on why the Constitutional Court is examining such norms of the Law on the National Flag and LAVC, which were not applied to the Applicant. Likewise, the Constitutional Court has not differentiated between the dates, on which the flag must be placed on buildings in connection with festivities, and the dates, on which the national flag in mourning presentation must be placed on buildings.

**3.2.** Pursuant to 19<sup>2</sup> (1) of the Constitutional Court Law, any person, who holds that his or her fundamental rights, established in the *Satversme*, are infringed upon by a legal norm that is incompatible with a legal norm of higher legal force, may submit a constitutional complaint to the Constitutional Court. Whereas Para 4 of Section 18 (1) of the Constitutional Court Law, in interconnection with Para 1 of Section 19<sup>2</sup> (6) of this Law, requires to substantiate in the application incompatibility of the contested norms with a legal norm of higher legal force. Moreover, the application must also substantiate that the infringement upon the applicant's fundamental rights defined in the *Satversme* is caused exactly by this incompatibility.

The Constitutional Court has noted that the term “infringe” has been included in the law with the purpose of separating the constitutional complaint from the *actio popularis*. This requires the existence of a substantiated probability that the contested norm causes an infringement with respect to the applicant (*see Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.4 of the Findings*). In the meaning of the Constitutional Court Law, an infringement upon a person's fundamental rights is to be understood as a situation where the contested norm causes adverse consequences for the applicant himself (*see Decision of 11 November 2002 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2002-07-01, Para 3*). This means that a constitutional complaint may be submitted in cases, where, first, the infringement upon fundamental rights is direct, concrete, the contested norm affects the applicant himself, and, secondly, affects at the moment of submitting the application, i.e., at the moment of submitting the application the infringement on fundamental rights already exists (*see, for example, Judgement of 18 February 2010 by the Constitutional Court in Case*

*No. 2009-74-01, Para 12, and Decision of 11 November 2002 on Terminating Legal Proceedings in Case No. 2002-07-01).*

In the case of a constitutional complaint, it is important to establish, whether, indeed, the applicant's fundamental rights, established in the *Satversme*, have been infringed upon (*see Judgement of 15 April 2009 by the Constitutional Court in Case No. 2012-04-03, Para 18*). The act of applying the legal norm that causes adverse consequences to a person may prove the infringement itself (*see Judgement of 10 May 2013 by the Constitutional Court in Case No. 2012-16-01, Para 21.1*).

**3.3.** It follows from the case materials that only Section 7(2) of the Law on the National Flag and Section 201<sup>43</sup> (1) of LAVC had been applied to the Applicant. The administrative sanction – a warning – had been applied to the Applicant because on 14 June 2013 the national flag in mourning presentation had not been placed on the residential building in her ownership (*see Case Materials p. 22*). The application does not comprise legal substantiation on why Section 7(1) of the Law on the National Flag had caused adverse consequences for the Applicant and, thus, would infringe upon her fundamental rights. It has been recognised in the case law of the Constitutional Court that a person has the right to turn to the Constitutional Court only if a direct link between the restriction upon the fundamental rights of this person and the legal norm, which is contested in the application, exists (*see Judgement of 18 February 2010 by the Constitutional Court in Case No. 2009-74-01, Para 12*).

The application and the case materials allow ascertaining only that a link exists between the infringement of the Applicant's fundamental rights and the obligation, defined in Section 7 (2) of the Law on the National Flag, to place on residential buildings the national flag in mourning presentation on 14 June. With respect to other norms of the Law on the National Flag that are contested, as well as to Section 201<sup>43</sup> (2) of LAVC, an infringement upon the Applicant's fundamental rights cannot be established. The Constitutional Court, on the basis of Para 3 of Section 29 (1) of the Constitutional Court Law, had to terminate legal proceedings with respect to those contested norms of the Law on the National Flag and norms of LAVC that did not infringe upon the Applicant's fundamental rights.

**Therefore, the Constitutional Court should have examined compliance of the contested norms with the first sentence of Article 100 of the *Satversme*, insofar these applied to the obligation of natural persons to place the national flag in mourning presentation to the residential buildings**

**in their ownership on 14 June, but with respect to the other contested norms of the Law on the National Flag and LAVC norms legal proceedings had to be terminated.**

4. We are of the opinion that the Constitutional Court, in reviewing compliance of the contested norms with the right to freedom of speech, which has been enshrined for everyone in the first sentence of Article 100 of the *Satversme*, has not sufficiently revealed and characterised the legitimate aim of the restriction upon fundamental rights. The reasoning that the Constitutional Court has provided with respect to the legitimate aim predominantly comprises considerations as to the legal policy aims that the legal regulation on using the national flag of Latvia serves.

At the end of Para 15.1 of the Judgement, the Court, in addition to protecting the democratic order of the State, has also noted such aims as “increasing the welfare of society” and the security of the state, calling these two last purposes jointly as “a general aim”. The security of the State as the aim of the restriction is mentioned in the Judgement by referring to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, the content of the statement regarding increasing the welfare of society and the security of the state as the legitimate aims of the restriction is not revealed in the Judgement. Likewise, the Constitutional Court has not provided reasoning as to why these two aims, referred to above, should be linked to the constitutional values referred to in Article 116 of the *Satversme*, which would allow restricting fundamental rights.

In the reasoning included in Para 15.2 of the Judgement, the Constitutional Court, essentially, has provided considerations regarding the aims of the legal regulation on the use of the Latvian national flag and the symbolic meaning of the national flag, rather than providing substantiation for the final conclusion of this paragraph on the protection of the democratic order of the State as the legitimate aim of the restriction on fundamental rights.

The general aim of a law and other legal policy aims of the legislator may, to a larger or smaller extent, coincide with the legitimate aim of the restriction on fundamental rights or allow to identify it with greater precision, however, the establishment of these is not the main matter in review. The proportionality of the restriction upon fundamental rights is to be examined with respect to the legitimate aim of this restriction and not in connection with the legal policy aims that the legislator has wanted to achieve. Therefore the Constitutional Court must

establish the legitimate aim of the particular restriction on fundamental rights, i.e., the essential interest, for the ensuring of which a person's fundamental rights have been restricted.

**The conclusion, included in the Judgement, regarding protection of the democratic order of the State as the legitimate aim of the restriction on fundamental rights can be upheld; however, the Constitutional Court has not provided sufficient reasoning on why the restriction upon a person's freedom of speech has been established for reaching exactly this aim.**

5. In assessing the proportionality of the restriction on fundamental rights included in the contested norms, the Constitutional Court has not taken into consideration to a sufficient degree the merits of the case and has not complied with the limits of the claim. Likewise, the Constitutional Court has deviated from the conclusion included in the Judgement regarding examining the contested norms in their interconnection.

5.1. In Para 10.2 of the Judgement, the Court has provided substantiation on why the contested norms must be examined in interconnection. The Court notes: since all features of an administrative violation have not been exhaustively listed in the contested LAVC norm, the obligation to place the Latvian national flag on residential buildings owned by natural persons and the administrative sanction envisaged for failure to perform this obligation must be examined in interconnection.

However, in Para 16 of the Judgement, the Constitutional Court, in examining proportionality of the restriction upon fundamental rights, has not substantiated deviation from the methodology indicated in Para 10.2 of the Judgement and has analysed the contested norm of LAVC separately from the contested norms of the Law on the National Flag. Upon beginning to examine, whether the measures chosen by the legislator are suitable for reaching the legitimate aim of the restriction on fundamental rights, the Court has indicated that "the restriction upon the freedom of speech that the contested norms comprise" will be examined (*see Para 16.1 of the Judgement*). However, the following reasoning until the end of Para 16.4 of the Judgement does not pertain to the contested norms in the totality thereof, but rather only to the contested norms of the Law on the National Flag. It is concluded at the end of the aforementioned paragraph that the contested norms of the Law on the National Flag are compatible with Article 100 of the *Satversme*. Whereas in Para 16.5 of the Judgement, in which the contested norm of LAVC is examined, the Court has

established that the punishment for failure to place the national flag on residential buildings owned by natural persons changes the legal nature of the restriction on fundamental rights.

In fact, a conclusion should follow from the methodology for assessing proportionality and the arguments that the Court has used in Para 16 of the Judgement that rather than one restriction on fundamental rights, established by the contested norms in the totality thereof, two restrictions on fundamental rights existed. I.e., the restriction on the freedom of speech established by the contested norms of the Law on the National Flag and the punishment established by the contested norm of LAVC – also as a restriction on the freedom of speech. The Constitutional Court also admitted it indirectly, by concluding that “the restriction included in the contested LAVC norm, insofar it established a penalty for failure to place the Latvian national flag upon residential buildings owned by natural persons, is disproportional and is incompatible with Article 100 of the *Satversme*” (*see Para 16.8. of the Judgement*). However, in the Judgement the appropriateness and necessity of the restriction on fundamental rights were examined only with respect to the obligation of placing the national flag established in the contested norms of the Law on the National Flag.

**We are of the opinion that the Constitutional Court had to abide consistently with the finding included in Para 10.2 of the Judgement regarding the need to examine the contested norms in their interconnection. This would have allowed reaching a uniform conclusion regarding compliance of the restriction on fundamental rights included in the contested norms with the principle of proportionality.**

5.2. We agree to what is said in the Judgement regarding the importance of the Latvian national flag in strengthening an independent state. The national flag, as the symbol of the State, is an indispensable element in the constitutional and international identity of the State (*see Para 15.2. of the Judgement*). The national flag of Latvia is defined in Article 4 of the *Satversme*. The Constitutional Court, referring to the sources of the science of state law, has recognised that the norms referred to in Article 77 of the *Satversme*, *inter alia*, Article 4 of the *Satversme*, are the most important norms of the *Satversme*, without amending or revoking of which it would be impossible to change the nature of the order of the State of Latvia as a democratic republic; therefore these articles have been placed under the protection of the people themselves and can be amended only in a national referendum (*see Judgement of 7 April 2009 by the Constitutional Court in Case No. 2008-35-01, Para 14*). However, in the case

under review, the Constitutional Court has not taken into consideration the fact that the special status of the Latvian national flag, established in the *Satversme*, influences also the limits of the constitutional review.

The Constitutional Court has noted that the legal system comprises also such issues, for the adjudication of which strict legal limits have not been set, but the decisions adopted therein mainly depended upon political expedience and that such issues should be decided upon by democratically legitimised political bodies of the state, first of all – by the legislator (*see Decision of 20 January 2009 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2008-08-0306, Para 12*). This finding applies also to those issues, which are related to the use of important symbols of the State and the legislator's discretion to determine, when and in what circumstances these symbols should be used.

Likewise, in its Judgement, the Constitutional Court has not taken into consideration the findings expressed in its existing case law regarding the legislator's discretion with respect to the penal policy. Establishing a punishment for the failure to fulfil the obligation of placing the Latvian national flag is a penal policy matter.

The Constitutional Court has recognised that the legislator enjoys broad discretion in determining punishment for particular offences, as well as in envisaging requirements for releasing a person from liability therefor. Usually, in adopting this regulation, the legislator uses as the basis the perceptions, views and values that have been accepted by society and which it has right to express in regulation. The review that falls within the jurisdiction of the Constitutional Court reaches only insofar it must be assessed, whether the legislator has not obviously overstepped the limits of its discretion defined in the *Satversme* (*see Judgement of 29 October 2003 by the Constitutional Court in Case No. 2003-05-01, Para 29, and Decision of 6 January on Terminating Legal Proceedings in Case No. 2010-31-01, Para 5*). A situation, for example, where a legal norm poses a significant threat upon a person's fundamental rights, should be considered as overstepping the limits of discretion set in the *Satversme* (*see Judgement of 19 November 2013 by the Constitutional Court in Case No. 2013-09-01, Para 10*).

The *Saeima* has meticulously assessed not only the obligation established by the norms of the Law on the National Flag to place the flag but also the punishment for the failure to fulfil this obligation. For example, it was noted during discussions in the *Saeima*, that the legislator's aim was not to impose severe punishment on persons and that a warning was an appropriate punishment

for failure to place the flag on buildings on days of holidays and commemorative days indicated by the *Saeima* [see *Transcript of the sitting of the Saeima of 15 October 2009. Latvijas Vēstnesis, 2009. gada 27. oktobris, Nr. 170 (4156)*].

We uphold the opinion of Mārtiņš Mits, a person summoned in the case, that the sanction established by the contested norm of LAVC – initially, a warning, as well as a warning and a fine in the amount up to 40 *euro* in the case of a repeated violation – is proportionate, because it is not severe and the party applying the legal norm, in the case of a repeated violation, has the possibility to take into account the particular circumstances and apply once more the warning (see *Case Materials, p. 141*). It can be concluded that the *Saeima* has not overstepped the limits of its discretion and has complied with the principle of proportionality.

**The *Saeima*, within the framework of its discretion, has defined 14 June as a date that is important for the people of Latvia, when the national flag of Latvia in mourning presentation must be placed on buildings, and has envisaged a proportionate punishment for failure to fulfil this obligation.**

**5.3.** It is noted in Para 16.6 of the Judgement that in a democratic state, alongside imperative measures, also preconditions of general nature should be created for voluntary performance of civic obligations, which primarily are based not upon fear of punishment, but on the awareness of the statehood, which finds respective manifestations in the actions and behaviour of an individual. We uphold the finding by the Constitutional Court regarding the need to increase the awareness of the statehood; however, we find the assumption included in the Judgement that the national flag, on the days of holidays and commemorative days defined by the *Saeima*, is placed on residential buildings mainly because the owners of residential buildings are afraid of the punishment as being too general and unfounded. Irrespectively of the motivation that a person has to abide by the requirements of law, the State should have at its disposal also coercive measures to make a person abide by legal norms.

As noted in legal science, legal norms that are issued or recognised by the State are characterised by the fact that compliance with them can be coercively achieved. If sanctions for failure to comply with a legal norm are not defined, doubts could arise as to the quality of this norm, but the state governed by the rule of law loses authority and credibility (see: *Rüthers B., Fischer C. Rechtstheorie. 5. Auflage. München: Verlag C. H. Beck, 2010, S. 39*).

The Judgement has turned the contested norms of the Law on the National Flag, insofar they apply to natural persons, who own residential buildings, into declarative norms, which impose only a moral obligation on these persons. If a legislator has established in legal norms an objective obligation for persons, then there should be also legal coercive measures for ensuring that this obligation is met.

**We hold that not only the first and the second part of Section 7 of the Law on the National Flag of Latvia but also Section 201<sup>43</sup> of the Latvian Administrative Violations Code complies with Article 100 of the *Satversme* of the Republic of Latvia.**

Kaspars Balodis

Kristīne Krūma