



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

---

## J U D G E M E N T

on Behalf of the Republic of Latvia  
in Case No. 2013-04-01  
7 February 2014, in Riga

The Constitutional Court of the Republic of Latvia, comprised of: the chairperson of the court sitting Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinišs and Sanita Osipova,

with the secretary of the court hearing Elīna Kursiša,

and participation of Inese Volkova, the authorised representative of the submitter of the constitutional complaint – the limited liability company “Gardie Visdari”,

and the authorised representatives of the institution, which adopted the contested act, – the Saeima of the Republic of Latvia, Gunārs Kusiņš, the head of the Saeima Legal Bureau, and Edgars Pastars, the legal advisor of the Saeima Legal Bureau,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 1 of Section 16, Para 11 of Section 17(1), Section 19<sup>2</sup> and Section 28 of the Constitutional Court Law,

on 12 and 19 November 2013 and on 13 January 2014 heard at an open court hearing the case

**“On the Compliance of Para 1 of Section 33(3) of the Civil Procedure Law with Article 91 and Article 92 of the Satversme.”**

## The Facts

1. The Saeima of the Republic of Latvia (hereinafter – the Saeima) on 14 October 1998 adopted the Civil Procedure Law (hereinafter also – CPL), which entered into force on 1 March 1999, including into it Section 33 entitled “Costs of Adjudication” and providing in Para 1 of the third part of this Section that the costs related to conducting a matter, *inter alia*, are “costs related to assistance of a sworn advocate.”

Whereas on 20 June 2001 the Saeima adopted the law “Amendments to the Civil Procedure Law”, which entered into force on 1 July 2001. By these amendments the words “sworn advocate” were replaced with the word “advocate” throughout the law. Thus, this amendment pertained also to Para 1 in CPL Section 33(3), which provides that the costs related to conducting a matter are “costs related to the assistance of an advocate” (hereinafter – the contested norm).

2. The applicant – **the limited liability company “Gardie Vīdāri”** (hereinafter – the Applicant) – notes in its constitutional complaint that the contested norm is incompatible with Article 91 and Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

2.1. The Applicant notes that it had been a party in a civil case, where the court had recognised the claims of the other party as being unfounded and had rejected them. Therefore, on the basis of the contested norm, the Applicant had requested the court to recover from the other party the costs related to conducting the matter, *inter alia*, the costs incurred by receiving legal assistance. The first instance court and the appellate instance court rejected this claim, noting that legal assistance in the case had been provided by a person, who was not a sworn advocate. Following the appellate instance judgement, the Applicant submitted a cassation complaint.

With the Judgement of 10 November 2010 by the Department of Civil Cases of the Supreme Court Senate (hereinafter – the Senate) the judgement by the appellate instance court was revoked and the case was transferred for hearing *de novo*. The Senate noted that the concept “advocate” that the contested norm comprised should be interpreted broadly, understanding by it not only advocates, but also other qualified lawyers, who were able to provide

legal assistance and be representatives in civil proceedings. In view of the notes made by the Senate, the appellate instance court, to which the case was transferred for hearing *de novo*, by judgement of 9 February 2011 satisfied the Applicant's claim. Whereas the other party submitted a cassation complaint regarding this judgement.

By the judgement of 21 March 2012 by the Senate, the judgement by the appellate instance court referred to above was revoked and the case was transferred once again for reviewing *de novo* at the appellate instance court. The Senate stated that it deviated from the findings expressed in its judgement of 10 November 2010, substantiating its position with the fact that the Saeima on 21 July 2011, when reading the draft law "Amendments to the Civil Procedure Law", did not support the proposal that envisaged that the costs related to conducting a matter would be compensated for to a party also in those cases, where such costs had been necessary to pay for the assistance of a qualified lawyer. The Senate holds that by this the legislator had clearly expressed its opinion that the concept "advocate", included in the contested norm, could be applied only to sworn advocates. This, allegedly, excludes the possibility to compensate, on the basis of the contested norm, for the costs in those cases, where legal assistance had been provided to a person by a lawyer, who is not a sworn advocate. In view of the Senate's findings, with the judgement of 16 July 2012 by the appellate instance court, the Applicant's claim to recover the costs related to conducting a matter from the other party was rejected.

**2.2.** The Applicant holds that it follows from the principle of equality and the third sentence in Article 92 of the Satversme that in civil proceedings the party, against which the case has been adjudicated, has the obligation to compensate to the other parties the costs related to legal proceedings, *inter alia*, the costs related to legal assistance. This obligation and the procedure for fulfilling it have been specified in CPL Section 41 and Section 44. The Applicant underscores that the legislator has ensured protection of the rights to receive compensation of those parties, against whom unlawful claims have been brought, only by the legal norms included in the Civil Procedure Law, *inter alia*, the contested norm.

The Applicant holds that all persons, who are parties to legal proceedings, are under similar and comparable circumstances, therefore the

contested norm should be equally applicable to all such persons. Any party, irrespectively of the fact by whom it is represented at civil proceedings, is interested in winning in the proceedings and receiving compensation from the other party for having had to defend its rights in court. Therefore, both those persons, whose matters in court are conducted by advocates, and those persons, whose matters in court are conducted by other persons, are said to be under similar and comparable circumstances.

However, it is alleged that these groups are not treated similarly. I.e., a person, who has chosen an advocate as its representative for conducting the matter, may demand compensation for the costs of the received legal assistance. Whereas a person, who has chosen another representative for conducting a matter, has no right to demand compensation of the costs related to legal assistance provided by such representative.

It is alleged that the contested norm has the legitimate aim to ensure to a person an effective representation and high quality legal assistance in civil proceedings. It is contended, that the ability of a sworn advocate to ensure high quality legal assistance can be presumed. However, it is alleged that such an assumption does not always prove true, since there are frequent cases, where a person, whose matter has been conducted by a lawyer or another representative, win, whereas the person, whose matter was conducted by an advocate, loses. Therefore the contested norm does not always fulfil its basic tasks – to ensure compensation of costs that a person has incurred by asking for legal assistance for defending his or her rights in civil proceedings.

**2.3.** At the court hearing, the Applicant's representative narrowed the part of the claim regarding the compatibility of the contested norm with Article 92 of the Satversme, by noting that the contested norm should be examined only in the context of the right to free access to court, enshrined by the first sentence of Article 92 of the Satversme, since the obligation of the State to envisage compensation for adjudication costs was said to follow from this particular provision of the Satversme. It was alleged that this obligation, *inter alia*, could be substantiated with the consideration that in case the party, in favour of which the case has been adjudicated, would not have the right to receive compensation for costs that would follow from the Satversme, then the obligation of the losing party to compensate for such costs should be recognised as an anti-constitutional restriction upon its right to own property.

The Applicant's representative underscored that the State, in ensuring the right to access to court, had the obligation to abide by the principle of legal equality. Allegedly, the contested norm violates this principle. The legislator itself, allegedly, has recognised in "State Ensured Legal Aid Law" that high quality legal assistance can be provided by any qualified lawyer. I.e., with regard to persons that comply with the criteria established in "State Ensured Legal Aid Law", the State has established a mechanism for compensating for the costs related to legal assistance that has been provided also by a person, who is not a sworn advocate. Whereas at the same time the State has not envisaged a mechanism for compensation for the legal assistance provided by the same lawyer to other persons. Hence, it is alleged that the differential treatment of the groups of persons indicated by the Applicant, which the contested norm establishes, has no reasonable grounds.

**3.** The institution, which adopted the contested norm, – **the Saeima** – holds that the contested norm complies with Article 91 and Article 92 of the Satversme.

**3.1.** The Saeima notes in its written reply that it does not uphold the Applicant's statement that the compensation defined in the third sentence of Article 92 of the Satversme should be understood also as the compensation for the costs of adjudication envisaged in the Civil Procedure Law. Allegedly, the third sentence in Article 92 of the Satversme does not provide for such horizontal effect of the fundamental rights that it guarantees. Since in the Applicant's legal situation the breach of rights had not been caused by actions taken by the State or related to the State, it cannot be established that the contested norm restricted the Applicant's right to demand an appropriate compensation from another private person. Moreover, the Saeima holds that no legal norm prohibits the Applicant from turning against the other party in claims procedure and receiving compensation for the costs linked to payment for legal assistance that has been provided by a lawyer.

**3.2.** The Saeima holds that the constitutionality of the contested norm should be examined only in the context of the first sentence of Article 91 of the Satversme. Undeniably, all persons, who are parties to civil proceedings, are under similar and comparable circumstances. The Saeima also confirms that the contested norm, indeed, provides: the costs related to an advocate's

assistance are costs that are related with conducting the matter and are to be compensated for, but does not envisage the application of this regulation to the costs related to legal assistance, if it has not been provided by an advocate.

The legitimate aim of the contested norm is said to facilitate the receipt of high quality legal assistance in civil proceedings. Since the institute of the advocacy has been established in Latvia, the legislator and also any other person in need of legal assistance may presume that any advocate would be able to provide such assistance in a professional way. Whereas in those cases, where a person chooses a representative, who is not an advocate, the legislator cannot guarantee that the person, as the outcome of his or her choice, would receive high quality legal assistance. With regard to advocates, sufficiently clear regulation exists on the amount of remuneration and professional rates as well as on the possible negative consequences that set in for the advocate if he, in representing his client, commits a professional error. The Saeima holds that there are no other measures, less restrictive upon a person's rights, for reaching the legitimate aim.

The Saeima notes, in addition, that the Judgement of 6 October 2003 by the Constitutional Court in Case No. 2003-08-01 "On the Compliance of the First Sentence in Section 96(2) of the Criminal Procedure Code with Article 89 and Article 92 of the Satversme of the Republic of Latvia" (hereinafter also – the Judgement in Case No. 2003-08-01) imposed the obligation upon the legislator to improve the professional activities of the bar; however, it did not follow from the judgement referred to above that the legislator had the obligation to equal all other providers of legal assistance in all rights to advocates. The contested norm is said to be one of the elements that differentiate between an advocate and any other representative in legal proceedings.

Uncontestably, any person may freely choose his or her representative in civil proceedings. However, this does not mean that the legislator should automatically equal in terms of rights any representative with a person belonging to the judicial power – an advocate. The Applicant's right to freely chose its representative are said not to be restricted, and it, upon choosing a representative, who is not an advocate, had known the valid procedural regulation, as well as the contested norm that it comprised.

**3.3.** At the court hearing the representative of the Saeima underscored that the term “advocate” as a name of a profession should be differentiated from the term “lawyer”, which denotes education. Likewise, it was said that it was important to differentiate between the terms “representation” and “legal assistance”. This difference was said to be of relevance also in the case under review in identifying the comparable groups of persons. The Applicants, allegedly, were trying to compare an advocate, who provided legal assistance in conducting a matter on the basis of a retainer, on the one hand, with, on the other hand, a person, who is a representative at a court on the basis of an authorisation. However, these are said to be two completely different groups of persons, since advocates are persons belonging to the judicial system, acting on the basis of a public act – a retainer, and cannot be compared to persons that do not belong to the judicial power and act on the basis of a private act – an authorisation.

The representative of the Saeima also underscored that the legitimate aim of the contested norm was the protection of the rights of other persons and a democratic state order, since high quality legal assistance in legal proceedings facilitated reaching of this aim. Therefore the legislator, allegedly, has the duty to ensure that high quality legal assistance is provided to persons in civil proceeding, and this can be guaranteed, first and foremost, by the institute of advocacy.

The representative of the Saeima expressed the opinion that the contested norm should be examined from the vantage point of the first sentence in Article 92 of the Satversme, and at the same time underscored that this norm of the Satversme did not demand that the compensation for the costs of legal assistance were identically regulated in all proceedings. In view of the case law of the European Court of Human Rights, the State has broad discretion in establishing this regulation.

**4.** The summoned person – **the Ministry of Justice** – holds that the contested norm complies with Article 91 and Article 92 of the Satversme.

The Ministry of Justice underscores that the profession of an advocate is one of the regulated professions of public importance; therefore regulatory enactments define professional standards and requirements that are applicable to it. The status of an advocate serves as the proof of his or her professional

qualification, experience, legal training and ability to defend and represent clients' interests before court. The representatives of this profession, upon obtaining the status of an advocate, also acquire the rights defined in regulatory enactments; however, the legal assistance provided by them is also subject to strict control. Regulatory enactments regulate also the profession of a lawyer; however, the requirements set for it were said not be as strict as the ones defined for advocates.

The Ministry of Justice takes into consideration the findings of the Judgement in Case No. 2003-08-01 that the term "counsel" included in Article 92 of the Satversme had to be interpreted broadly, as well as the findings made in the Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01 "On the Compliance of Section 82(5) and Section 453 of the Civil Procedure Law with Article 91 and Article 92 of the Satversme of the Republic of Latvia" (hereinafter – the Judgement in Case No. 2003-04-01) and the Judgement of 6 November 2003 in Case No. 2003-10-01 "On the Compliance of Para 4 of Section 83 of the Civil Procedure Law with Article 92 of the Satversme of the Republic of Latvia" (hereinafter – the Judgement in Case No. 2003-10-01) that high quality legal assistance in civil cases may be provided not only by advocates, but also by other persons. However, the judgements referred to above have been delivered with regard to different facts of the case and a different legal situation. I.e., no legal regulation existed that would guarantee legal assistance paid for by the State to persons with low income and other persons in need of it. Moreover, over the last decade the number of advocates had increased significantly, and the issue of advocates' professional and disciplinary liability had been regulated. Thus, the facts of the situation under review have changed significantly.

The legitimate aim of the contested norm that had been identified by the Saeima should be recognised as being well-founded, since the rights that have been granted to an advocate and the requirements set, as well as the mechanism that makes an advocate aware of the responsibility for his work, ensure such adjudication of the case that conforms better with a person's interests, is of higher quality and more efficient. The persons are said to be totally unaware of their civil procedural rights and would not be able to make full use of them without an advocate's assistance. Since civil proceedings are held in

compliance with the adversarial principle, a person without legal assistance could harm the protection of his interests before court.

The Ministry of Justice holds that in the case under review it is important to differentiate between the concepts “an authorised representative of a party” and “the provider of legal assistance.” The provider of legal assistance, allegedly, can always perform also the functions of a representative, whereas the representative of a party may not engage in providing legal assistance. The procedure for formalising this representation by these persons also differs.

At the court hearing the representative of the Ministry of Justice – **Laila Medina, Deputy State Secretary on issues of legal policy of the Ministry of Justice** – underscored that the possibility to invite and advocate for the provision of legal assistance in civil proceedings is the right of a party. The contested norm, allegedly, places no restrictions upon a person’s right to choose his representative.

A situation, where legal assistance is ensured by the State, should be differentiated from the case under review. I.e., “State Ensured Legal Aid Law” does envisage that in civil proceedings legal assistance can be provided also by persons, who are not advocates. However, this law also establishes a procedure and mechanism for verifying the abilities of these persons to provide high quality legal assistance. Moreover, in situations covered by this law, the resources spent for legal assistance are not collected from the losing party.

Whereas the regulation on the procedure for compensation for the costs related to adjudication, should be examined in the framework of the first sentence in Article 92 of the Satversme, i.e., from the vantage point of the right to access to court. However, it should be taken into consideration that the legislator’s broad discretion in defining the way in which such costs are compensated for must be recognised. Therefore, the positive obligation of the State to envisage as comprehensive as possible compensation for adjudication costs is said not to follow from Article 92 of the Satversme.

**5. The summoned person – the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – holds that in the case under review the compliance of the contested norm with the third and the fourth sentence in Article 92 of the Satversme should be examined, by establishing, first of all,

whether the costs that a person has incurred in the framework civil proceedings by asking for legal assistance should be recognised as causing “violation of rights without basis”, in the meaning of the third sentence in Article 92 of the Satversme.

In this respect, the provisions made in Section 7(3) of the Law on Reparation of Damages Caused by State Administrative Institutions that the material damages comprise also the costs linked with the legal assistance provided by a representative should be taken into consideration. The concept of unlawful infringement of rights in civil law is said to be broader compared to criminal law and administrative law, since an action that unfoundedly infringes upon other person’s subjective rights and lawful interests must be recognised as an unlawful action in civil law. This is said to mean that the right to receive compensation for costs incurred in relation to the need of paying for the necessary legal assistance falls with the scope of Article 92 of the Satversme.

The Ombudsman recognises that the legal aim of the contested norm is to ensure that persons receive high quality legal assistance. Thus, the State may set the demand that persons’ representatives in civil proceedings should have appropriate legal qualification. However, the legitimate aim of the contested norm could be reached by measures that were less restrictive upon persons’ rights, for example, by defining uniform pre-requisites and liability to the providers of legal assistance, *inter alia*, to register as providers of legal assistance. This path to reaching the legitimate aim is said to be more efficient and fairer, since also now, when the right to demand compensation for the legal assistance that has been received, are restricted, in Latvia in many cases legal assistance is provided by persons, who are not advocates. The assistance by such persons in legal proceedings is said to be more frequently used by persons with low income, since the assistance provided by advocates is expensive. Moreover, the participation of an advocate in legal proceedings *per se* does not guarantee a positive outcome.

During the court hearing the Ombudsman’s representative – **the Deputy Head of the Division of Civil and Political Rights of the Ombudsman’s Bureau Gundega Bruņeiece** – underscored that in the judicature of the Constitutional Court the concept “advocate” has been interpreted broadly, applying it not only to advocates in the grammatical meaning of the word, but also to other qualified lawyers. A situation, where a person has no possibility

whatsoever to require that the costs of legal assistance, provided by a person who is not an advocate, were compensated for, could lead to an infringement upon a person's fundamental rights. Therefore it should be assessed, whether the differential treatment of the groups of persons receiving legal assistance that is established by the contested norm is necessary.

6. The summoned person – **the Council for the Judiciary** – supports the provision established by the contested norm, i.e., that only the costs for legal assistance provided by an advocate, but not by another person, are costs related to conducting a matter, and holds that the contested norm complies with Article 91 and Article 92 of the Satversme.

At the court hearing the representative of the Council for the Judiciary – **member of the Council for the Judiciary Ināra Garda** – noted that the contested norm is being supported because currently the legislator and the Ministry of Justice are foregrounding the need to introduce in civil procedure the so-called procedure of advocates, to strengthen the rule of law in the State. In examining the contested norm, it must be taken into consideration that advocates are persons belonging to the judicial system, they are bound by norms of ethics and are subject to disciplinary liability. Advocates, as persons belonging to the judicial system, have been ensured much broader authorisation and the possibility to represent their clients' interests than other lawyers. The candidates for the office of an advocate must take a special examination, therefore the quality of legal assistance that they provide may be presumed. Currently the number of advocates in the State is not limited, therefore any lawyer having appropriate qualification may become an advocate. Moreover, in Latvia legal assistance is guaranteed also to persons with low income.

7. The summoned person – **the Latvian Council of Sworn Advocates** (hereinafter also – LCSA) – holds that the term “advocate” included in the contested norm should be understood as the persons referred to in Section 4 of the Advocacy Law of the Republic of Latvia (hereinafter – the Advocacy Law). I.e., not any lawyer or only a sworn advocate should be considered as being an advocate, but these are a sworn advocate, an assistant to a sworn advocate and advocate of another country, who has obtained the right to practice in Latvia. The lawyers, who participate in civil proceedings, without being sworn

advocates, as to their status are only authorised representatives. Therefore the costs for the legal assistance, which is provided by such persons, should be qualified as remuneration for the assistance provided by an authorised representative. However, pursuant to Section 2304 of the Civil Law, such remuneration cannot be a source of profit, and this means that such costs should not be compensated for.

This interpretation is said to be based upon the legitimate aim of the contested norm – to ensure that timely, efficient and high quality legal assistance is provided to persons in civil proceedings. Hence, it is alleged that the contested norm ensures a balance between the legal interests of parties. On the one hand, the contested norm limits the types and amount of payment for costs that a party has incurred due to a claim that has been brought against him, thus not subjecting the losing party to an obligation to compensate for incommensurate expenditure. On the other hand, the contested norm, in the procedure and scope defined by the legislator, grants the winning party the right to claim compensation for the legal assistance provided by an advocate in the particular case.

The efficiency and quality of the legal assistance provided by advocates are said to be guaranteed by a number of facts: affiliation of an advocate to the system of courts, which grants to him broader authorisation and possibilities to defend his client's interests; the professional, material and disciplinary liability of an advocate for his actions; an advocate's obligation to abide by the advocates' standards of ethics; clear enumeration of the tasks performed in the interests of the clients; the possibility for an advocate to insure his professional activities, and other facts. LCSA also holds that civil proceedings is not as simple proceedings as to allow a person without legal education to represent himself, properly defend one's interests and provide counter-arguments to the arguments of the opposite party.

At the court hearing the representative of LCSA – **sworn advocate Lauris Liepa** – noted additionally that at the moment there were 1236 sworn advocates and 92 assistants to sworn advocates practising in Latvia, as well as 14 citizens of the European Union member states, who had obtained the status of an advocate in other member states of the European Union.

The content of the concept “advocate” was said to be sufficiently clear, and in no case it could mean the same as the concept “lawyer”. None of

Latvian regulatory enactments defines what a qualified lawyer is. Moreover, the quality of the legal assistance provided by such a person, in difference to the one provided by an advocate, cannot be presumed. If the contested norm were to be recognised as being anti-constitutional, then the courts of general jurisdiction in civil proceedings would have to assess the quality of legal assistance provided by such persons, as well as deal with the issue of remuneration of such persons. Moreover, it is alleged that the Applicant in its constitutional complaint does not differentiate between representation and legal assistance. This is said to mean that the Applicant holds that legal assistance can be provided by any person, who has the right to be a representative before a court. However, such opinion is said not to comprise the requirement of legal qualification.

The judgements delivered by the Constitutional Court in 2003 had been critical of the activities of advocacy with good reason, since at that time serious deficiencies could be identified. However, during the last decade essential changes had taken place in the advocacy, as the result of which advocacy has evolved as a very strong and overseable organisation.

L. Liepa also underscored that in 11 European countries the advocacy procedure has been established in civil proceedings. Therefore, the legislator, in adopting the contested norm and deciding on leaving it unamended, is said to have even greater discretion, and the legislator may stipulate that only costs of the legal assistance provided by an advocate should be compensated for.

**8. The summoned person – the Association for Supporting Advocates** – holds that the contested norm complies with Article 91 and Article 92 of the Satversme.

The costs that a person has incurred by paying for the services of a provider of legal assistance, who is not an advocate, should be qualified as losses in the meaning of the Civil Law. It is said that it is easy to prove such losses, since the person who wants to claim them must only refer to the court judgement, which recognizes the claims of the opposite party as unfounded. Whereas the recovery of the costs of paying for an advocate's assistance in a way that is procedurally more privileged is said to be part of the guarantees of the fundamental rights enshrined in Article 92 of the Satversme, which the

legislator, with good reason, attributes only to the assistance by such lawyers, whose qualification can be presumed.

**9.** The summoned person – **the Association of Latvian Lawyers** – upholds the opinion of the Saeima that the contested norm complies with Article 91 and Article 92 of the Satversme.

Allegedly, the legitimate aim of the contested norm is to implement the principle of justice, so that the person, in favour of who the judgement has been delivered, would not suffer financial losses incurred by using assistance provided by an advocate. The legislator, by envisaging in CPL Section 44 the right to recover costs for an advocate's assistance, has provided that in civil proceedings only costs for high quality legal assistance should be compensated for, but not the costs of any assistance. This regulation is said to lead to the conclusion that the legislator had wished to differentiate in civil proceedings between the functions of representation and of providing legal assistance, as well as had the intention to grant to advocates the exclusive right to provide legal assistance.

It is contended that in the case under review it is important to take into account the fact that the constitutional complaint was submitted by a legal person. In attributing the contested norm to a more extensive circle of those providing legal services, a situation could occur that the party compensating for the costs would have to cover also such costs that the legal person had incurred due to other commitments, for example, on the basis of an employment contract or the by-laws of a company that it would incur irrespectively of the fact whether this legal person was or was not involved in legal proceedings. Since the contested norm should protect also the rights of the party that compensates for the costs of legal assistance, this norm should not be applied to a more extensive circle of persons, otherwise the risk of infringing upon the interests of the party that compensates for the costs would be too high.

In this particular case the Applicant had had ample possibilities to receive high quality legal assistance, without turning for additional assistance to the person referred to in the application.

**10.** The summoned person – **the Union of Latvian Lawyers** – holds that the legitimate aim of the contested norm is the protection of other persons’ rights, which is manifested in the fact that only the costs of an advocate’s assistance must be compensated for. Systemic interpretation of CPL is said to lead to the conclusion: had the legislator wished to establish the obligation in the framework of civil procedure to compensate also for the costs of a person’s representation, then the costs of adjudication had been attributed not only to the advocate, as provided for in the contested norm, but also to other representatives referred to in CPL Section 82(1), comprising also self-representation and authorised representatives.

A person has the possibility to claim compensation for the costs of other providers of legal assistance, not the one by advocates, in the general procedure of legal proceedings.

**11.** At the court hearing the representative of the summoned person – **the Latvian Judges Association – Dzintra Balta, board member of the Latvian Judges Association**, underscored that the court in legal proceedings should not have to assess the quality of legal assistance, since this was not a matter of administering justice. A person, who wishes to claim compensation for damages, has the right to choose, which provider of legal assistance to turn to, – the one whose costs related to assistance are compensated for, or the one whose costs related to assistance are not compensated for.

Allegedly, representation and legal assistance had different objectives. Legal assistance was said to reflect the State’s purpose to guarantee high quality and efficient legal proceeding. Thus, the provider of legal assistance is a person, who provides qualified legal assistance. Whereas a representative usually is the one who replaces the person, moreover, not always, but only on those occasions when the person himself does not wish, is unable to or is not allowed to represent himself.

In addition to the legitimate aim of the contested norm that the Saeima has referred to, proper functioning of a court should also be recognising as being such. Allegedly, it is in the interests of society and each individual that fair trial would be implemented with professional and high quality legal assistance. At the moment it could not be considered that a person, who receives an advocate’s assistance, and a person, who receives assistance

provided by another person, were in comparable circumstances, since a mechanism that allows presuming the quality of the provided legal assistance, has been established only for advocates. Whereas winning the case is not always an indicator of the quality of the legal assistance that has been provided.

With regard to the possible violation of Article 92 of the Satversme Dz.Balta noted that civil procedure was public law. Whereas compensation for losses was said to be a private law issue. Turning to court *per se* cannot cause a violation of a person's rights, since every person, if he comes to court, has the right to a fair trial – even in the case, where the person loses in the particular case.

**12.** The summoned person – **Dr. iur. Edvīns Danovskis** – noted at the court hearing that in connection with the third sentence in Article 92 of the Satversme it should be established, whether in this particular case a violation of rights without basis could be identified. The content of the concepts “violation of rights without basis” and “unlawful action” is said to be different. I.e., the first one is a broader concept, and the legislator should envisage that in certain cases compensation must be envisaged also for such action, which formally is lawful, for example, when restrictions upon economic activities are imposed.

However, in a judicial state legal proceedings *per se* cannot be a violation of rights without basis, and a person must be aware of the fact that a claim can be brought against him before court both with and without basis. At the same time it should be taken into consideration that legal proceedings are always the consequences of some unmet commitments or other violations of rights, i.e., the consequences of unlawful action. However, the fact that one person brings a claim in court against another person, even if this claim is recognised as being unfounded, cannot be considered as being an abuse of the right, established in law, to turn to court. Moreover, it is not the actions of the plaintiff, but of the court that creates the obligation for the defendant to appear in court. Therefore the costs of adjudication should be recognised as being self-evident, since they follow from the right to a fair trial. This, allegedly, means that in the case under review the issue of compensation for the costs of adjudication should be examined in the framework of the first sentence in Article 92 of the Satversme.

In this respect, it is important to establish the reason, why costs of adjudication are compensated for at all. Usually the following considerations are provided as the basis for such action, firstly, that such action is fair, and, secondly, that this procedure reduces submitting of unfounded complaints to court. However, it should be considered whether all costs of adjudication are related to access to court, among others also those that are incurred during the adjudication of the case and after the legal proceedings have been completed.

**13.** At the court hearing, the summoned person – **PhD student of the Faculty of Law, the University of Latvia, Aigars Strupiņš** – noted that the contested norm envisaged differential treatment of persons, who chose an advocate for conducting a civil case, and persons, who chose another person for the same purpose. Thus, a person, who has chosen an advocate, is said to be in a more advantageous situation compared to a person, who has chosen another provider of legal assistance.

The way in which the legislator ensures persons' right to a fair trial, in shaping the system of courts and regulating the procedural rights, is said to be, to a large extent, an issue of law policy. Thus, it could be considered that the fact that advocacy as a professional organisation is established, which, taking care for the professionalism, responsibility and education of its members, ensures legal assistance in appropriate quality, is compatible with the interests of society as a whole and of individual persons – the clients of those who provide legal assistance. In this way advocates are said to be usually subject to liability and control by the state. Thus, to guarantee the quality of legal assistance, the State could establish in the contested norm differential treatment of persons, who have chosen an advocate as the provider of legal assistance, and persons, who have chosen another provider of legal assistance.

It is alleged that also the issue, which persons may be representatives in civil cases, is a matter of law policy. The legal regulation in this matter is said to be liberal, since the parties in civil proceedings are granted broad discretion, which complies with the private autonomy of a party. However, the legislator, in view of the fact that it has been granted broad discretion in adopting norms of procedural law, may adopt a paternalistic stance and restrict the range of providers of legal assistance. The legitimate aim of the contested norm is said to be, definitely, the introduction of a uniform legal procedure that would

promote the rule of law. Therefore the State, allegedly, may provide that a party, which chooses an advocate, enjoys advantages in recovering his costs of legal assistance, whereas the party, which does not choose an advocate, does not have this advantage. This procedure is said not to cause a violation of a person's right to a fair trial that is guaranteed in the Satversme.

14. The person, who was summoned to the court hearing upon the request of the Saeima, – **sworn advocate Linards Muciņš** – drew attention to the fact that in examining the contested norm the fact that an advocate belongs to the system of courts should be taken into consideration. In the law “On Judicial Power” the legislator had clearly provided that the court is comprised not only of judges, but also of persons belonging to the system of courts, *inter alia*, advocates. This affiliation is said to be the grounds for the advocate's special role in legal proceedings and in conducting the matter. An advocate, as a person belonging to the judicial power, is said to have both special rights and privileges, but also specific obligations and restrictions.

It also should be taken into account that in attracting a person, who is not an advocate, for conducting the matter, private law relationship is established, whereas the regulation on an advocate's activities and the legal assistance provided by an advocate is based in the public law. I.e., a person, who is not an advocate, may represent a party before court only on the basis of an authorisation, thus, this person has the same rights as the person, who grants the authorisation; moreover, the authorised person is restricted by the will of the authorising party. Whereas an advocate provides legal assistance in conducting a matter on the basis of a public act – a retainer, and may freely choose the tactics for defending his client's interests, but the advocate's rights, established by public law, are more extensive than those of his client.

The State, by establishing the institute of advocacy and providing that in civil proceedings legal assistance to parties in conducting the matter is provided by an advocate, has subjected the provision of legal assistance to public legal control. Whereas the legal assistance provided by another person is not subject to control and the regulation by the State. Since the State has assumed responsibility for the quality of legal assistance that is provided by an advocate, the State could also envisage in the contested norm differential

treatment of persons, who are not advocates, but provide legal assistance. Therefore the State, allegedly, had the right to provide that only the costs of legal assistance provided by an advocate are to be compensated for; moreover, the costs of this assistance is strictly regulated in the advocate's remuneration rates.

### **The Findings**

**15.** The constitutional complaint comprises the request to examine the compatibility of the contested norm with Article 91 and Article 92 of the Satversme.

At the court hearing the Applicant's representative specified the claim by noting that the contested norm was incompatible with the first sentence in Article 91 and the first sentence in Article 92 of the Satversme (*see transcript of the Constitutional Court hearing of 13 January 2014, Case Materials, Vol. 2, pp. 188 and 189*).

Thus, in the case under review the compatibility of the contested norm with the first sentence in Article 91 and the first sentence in Article 92 of the Satversme must be examined.

**16.** The contested norm provided that the costs related to conducting a matter as "costs related to the assistance of an advocate."

Divergent opinions have been expressed in the case both with regard to the way, in which the contested norm should be interpreted, i.e., whether it provided that all costs for the legal assistance provided by any person or only of the legal assistance provided by the persons referred to in the Advocacy Law, as well as with regard to the legal consequences that the contested norm causes.

Therefor in the case under review, in order to establish the limits of the claim, first of all the content and legal consequences of the contested norm should be established (*see Judgement of 6 June 2012 by the Constitutional Court in Case No. 2011-21-01, Para 8.1, and Judgement of 28 June 2013 in Case No. 2012-26-03, Para 12.1*).

**16.1.** The Applicant holds that the concept “advocate” used in the contested norm should be interpreted in compliance with the interpretation of the legal concept “counsel” provided by the Constitutional Court in Cases No. 2003-04-01, No. 2003-08-01 and No. 2003-10-01.

In the Judgement by the Constitutional Court referred to above, the term “counsel” has been examined in its constitutional law meaning, understanding by it “a person’s right to receive legal assistance, by freely choosing a counsel and representative in different cases from a range, as extensive as possible, of qualified lawyers, in some cases provided for by law, also from the range of other persons (*Judgement of 6 October 2003 by the Constitutional Court in Case No. 2003-08-01, Para 1.3 of the Findings*).

However, the Constitutional Court has also noted that “the legislator, in view of the particularities of each procedure, has the right to define the range of persons, who may provide legal assistance or be counsels or representatives in a case in a particular procedure” (*Judgement of 6 October 2003 by the Constitutional Court in Case No. 2003-08-01, Para 2 of the Findings*). The legislator may use one and the same legal concept in different legal norms and, even more so, in different fields of law with an independent meaning (*compare Judgement of 7 June 2012 by the Constitutional Court in Case No. 2011-19-01, Para 9*). Thus, in the norms of the Satversme and other legal norms, *inter alia*, in the contested norm, one and the same legal concept, in this case – “advocate”, may have a different content.

Pursuant to the interpretation provided by the Senate in the most recent valid rulings (*see Judgement of 23 November 2011 by the Senate Department of Civil Cases of the Supreme Court in Case No. SKC-377/2011, Para 9, and Judgement of 21 March 2012 in Case No. SKC-308/2012, Para 12*), the legal concept “advocate” in the contested norm should be understood only as the persons referred to in Section 4(1) of the Advocacy Law, i.e.: 1) sworn advocates; 2) assistants to sworn advocates; 3) citizens of the European union member states, who have obtained the qualification of an advocate in one of the member states of the European Union; 4) advocates of third countries, who practice in Latvia in accordance with the international agreements on legal assistance conclude by Latvia (hereinafter jointly – an advocate in the meaning of CPL).

**16.2.** The contested norm *per se* does not provide, whether the costs related to conducting a matter, including the costs of legal assistance, should be compensated for. The compensation for such costs is envisaged in CPL Section 44.

Whereas it follows from the application and the statements made by the Applicant's representative at the court hearing, that Para 1 of CPL Section 33(3) is contested insofar it does not envisage within the framework of civil proceedings the right to receive compensation for legal assistance provided by a person, who is not an advocate in the meaning of CPL (hereinafter also – the contested regulation).

The Saeima and some of the summoned persons have, however, expressed the following opinion: even though the contested regulation prohibits from receiving compensation for costs related to conducting a matter in civil procedure, the Applicant has the right to submit a separate claim and thus recover the costs that it incurred by receiving legal assistance from a person, who is not an advocate in the meaning of CPL (*see written reply by the Saeima, Case Materials, Vol.1, p. 48, and written opinion by the Association for Supporting Advocates, Case Materials, Vol.1, pp. 153 and 154*).

However, this opinion is unfounded. The Senate has recognised that the dispute regarding costs that are regulated by civil procedure norms, is to be adjudicated in accordance with these norms and that the norms of substantive law cannot be applied in adjudicating this dispute. The issue of compensation for the costs that a party has incurred by authorising a representative to conduct the matter, is to be adjudicated in court only in compliance with CPL norms (*see Judgement of 21 January 2009 by the Senate Department of Civil Cases of the Supreme Court in Case No. SKC-6, and Judgement of 6 April 2011 in Case No. SKC-143/2011, Para 7*). This means that a person has no possibility to claim the compensation for such costs of legal assistance that are not referred to in the contested norm.

Hence, in the case under review, the contested regulation must be examined insofar it prohibits the party, in favour of who the civil case has been adjudicated, to receive compensation for the costs of legal assistance from the other party in case, where such assistance has been provided by a person, who is not an advocate in the meaning of CPL.

**17.** The first sentence of Article 92 of the Satversme provides: “Everyone has the right to defend his or her rights and lawful interests in a fair court.”

The Constitutional Court has noted that the concept of “fair court” referred to in Article 92 of the Satversme comprises two aspects, i.e., “fair court” as an independent institution of judicial power, which adjudicates the case, and “fair court” as a due procedure, compatible with a judicial state, in which the case is examined (*see, for example, Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings*).

In the case under review the compatibility of the contested norm with Article 92 of the Satversme must be examined in the second aspect, in view of the fact that the contested norm is a norm of civil procedure, which regulates compensation for costs related to conducting a matter – costs of legal assistance.

**18.** Within the framework of civil procedure the right to a fair trial comprises several elements, *inter alia*, the right to free access of court or the accessibility of court (*see Judgement of 30 March 2011 by the Constitutional Court in Case No. 2010-60-01, Para 19*). In view of the fact that the State has the obligation to both establish independent and unbiased courts and the obligation to ensure a number of procedural guarantees, the demand to ensure to persons access to court and the possibility for persons to use these guarantees is well-founded. Namely, the fairness of adjudication procedure would be meaningless, unless accessibility of this procedure were ensured (*see Judgement of 20 April 2012 by the Constitutional Court in Case No. 2011-16-01, Para 8.1*).

It has been repeatedly recognised in the case law of the Constitutional Court that introduction of various payments restricts the fundamental right of free access to court (*see, for example, Judgement of 20 April 2012 by the Constitutional Court in Case No. 2011-16-01, Para 8.2*). Likewise, in a situation, where a person cannot afford the legal assistance he needs because of financial considerations, but the State does not ensure such an assistance, restrictions to a person’s right to access to court can be identified (*see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01, Para 6 of the Findings*).

The contested regulation does not envisage the possibility for the Applicant as the party (defendant), in favour of which the civil case has been adjudicated, to demand compensation for the costs of legal assistance that has been provided by a person, who is not an advocate in the meaning of CPL. Thus, a situation has evolved, where the Applicant has made payments, which, in the Applicant's opinion, had been necessary to conduct the matter before the court efficiently, but the compensation of which cannot be achieved.

Thus, to examine, whether the contested regulation complies with the Satversme, it must be established, whether the provision that a person, even if the civil case has been adjudicated in its favour, is not compensated for some particular costs of adjudication restricts the right to free access to court.

**19.** The contested norm as part of the regulation on costs of adjudication is included in CPL Section 33 "Adjudication Costs". Pursuant to CPL Section 33(1), the costs of adjudication are: 1) court costs (state fee, office fee, and costs related to hearing the case) and 2) costs related to conducting a matter (including costs of legal assistance provided by an advocate, as well as costs related to attending court sittings and costs related to gathering evidence). In assessing, whether a payment should be recognised as such that restricts the right of access to court, it must be taken into consideration that two types of State's obligation follow from the requirement to ensure this right.

**19.1.** Firstly, the State must refrain from adopting such regulation that would establish incommensurate additional obligations for a person, for example, to make a payment or meet other pre-requisites to gain access to court.

Thus, the Constitutional Court has recognised that a person's right to free access to court is restricted by the obligation to make such payments that should be considered as court costs in the meaning of CPL Section 33(2) – the obligation to pay the state fee (*see Judgement of 4 January 2005 by the Constitutional Court in Case No. 2004-16-01, Para 7.2*). Moreover, a person's free access to court is also restricted by the obligation to make such payments, which are not referred to in CPL Section 33, but should be considered as adjudication costs in a broader sense, for example, to pay security for submission of cassation or ancillary complaint (*see Judgement of 14 March 2006 by the Constitutional Court in Case No. 2005-18-01, Para 9, and*

*Judgement of 20 November 2008 in Case No. 2008-07-01, Para 6*). This right is restricted also by the obligation to pay a deposit in the insolvency procedure of a legal person in order to submit the respective application in court (*see Judgement of 20 April 2012 by the Constitutional Court in Case No. 2011-16-01, Para 8.2*).

In those instances, when the content of the fundamental rights enshrined in the Satversme must be established, the interpretation of these fundamental rights in the practice of applying international fundamental rights must be taken into account (*see, for example, Judgement of 30 August 2000 by the Constitutional Court in Case No. 2000-03-01, Para 5 of the Findings*).

The finding that the establishment of some litigation costs, in particular, court fees, is to be considered as a restriction to the right to a fair trial has been embedded also in the judicature of the European Court of Human Rights (*see, for example, Judgement of 19 June 2001 by the European Court of Human Rights in Case “Kreuz v. Poland”, Application No. 28249/95, Para 60*), *inter alia*, also with regard to legal persons engaged in business activities (*see Judgement of 26 July 2005 by the European Court of Human Rights in Case “Podbielski and PPU Polpure v. Poland”, Application No. 39199/98, Para 65 et seq.*). Access to court may be restricted also by a requirement, for example, to pay security for compensation for the other party’s costs of adjudication before hearing the case (*see, for example, Judgement of 13 July 1995 by the European Court of Human Rights in Case “Tolstoy Miloslavsky v. the United Kingdom”, Application No. 18139/91, Para 59–61*).

However, all these payments share the fact that they must be made either before the case is initiated or before the hearing of the case is commenced. Such payments as a pre-requisite for the possibility of a person to achieve adjudication of a dispute before a court pertains to the State’s obligation to abstain from establishing regulation that would hinder access to court. Therefore the constitutionality of such payments must be examined in accordance with the criteria for restrictions upon fundamental rights, i.e., by verifying, whether such payments have been established by law, whether they have a legitimate aim and whether they abide by the principle of proportionality. Thus, such payments must be separated from the case under review, since the aforementioned payments directly restrict a person’s access to court.

**19.2.** Secondly, the European Court of Human Rights has repeatedly recognised that not only the negative, but also positive obligations for a State follow from the right to a fair trial enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) (*see, for example, Judgement of 9 October 1979 in Case “Airey v. Ireland”, Application No. 6289/73, Para 25, and Judgement of 15 February 2005 in Case “Steel and Morris v. the United Kingdom”, Application No. 68416/01/73, Para 60, and Judgement of 13 March 2007 in Case “Laskowska v. Poland”, Application No. 77765/01, Para 57*). I.e., the State must establish regulation and, if necessary, envisage financial and organisational resources to ensure to a person free access to court. Thus, in certain cases the State has the obligation to adopt regulation that eases access to court.

In those cases, where the obligation of the State to implement measures for realising the rights defined in Article 92 of the Satversme follows from this Article, the Constitutional Court examines, whether the State has fulfilled this obligation. Moreover, if this obligation envisages elaboration and adoption of regulation with particular content, then the Constitutional Court assesses the content of this obligation and whether the legislator has fulfilled its obligation in full (*see, Judgement of 6 June 2012 by the Constitutional Court in Case No. 2011-21-01, Para 7 –12*).

The contested regulation pertains to the obligation of the State to establish such regulation on adjudication costs that would foster access to court. This regulation would have to be recognised as being incompatible with the first sentence in Article 92 of the Satversme, if it were established that the State has not fulfilled its obligation properly or, in fulfilling it, had exceeded the limits of its discretion.

Thus, in the case under review the content of the State’s obligation and the scope of the State’s discretion particularly in regulating the compensation for costs of legal assistance in civil procedure must be established.

**19.3.** In assessing the State’s obligations with regard to civil procedure norms that follow from the right to a fair trial, the Constitutional Court has recognised that Article 92 of the Satversme provides, in particular cases, the obligation of the State to ensure qualified legal assistance to persons, who cannot afford it themselves (*see Judgement of 27 June 2003 by the*

*Constitutional Court in Case No. 2003-04-01, Para 5 of the Findings*). Thus, in particular cases, the State's obligation referred to above extends insofar that the State must ensure payment for legal assistance from public resources.

The European Court of Human Rights has underscored repeatedly that the member states of the Convention, in fulfilling the obligation to ensure access to court in civil procedure, have broad discretion in establishing regulation on adjudication costs. This discretion is particularly broad with regard to the way, in which access to court in civil procedure is ensured to legal persons, and in deciding, whether and in what way legal assistance is also ensured to these persons (*see, for example, Judgement of 22 March 2012 by the European Court of Human Rights in Case "Granos Organicos Nacionales S.A. v. Germany", Application No. 19508/07, Para 18 and 46*).

In adjudicating cases that are linked to free access to court, *inter alia*, with regard to issues of the accessibility of legal assistance, the European Court of Human Rights considers Recommendations No. R(81) 7, R(93) 1 and R(2000) 21 by the Council of Europe Committee of Ministers as a relevant source in interpreting the Convention (*see, for example, Judgement of 22 March 2007 by the European Court of Human Rights in Case "Sialkowska v. Poland", Application No. 8932/05, Para 53 et seq.*).

The Committee of Ministers of the Council of Europe has noted in the Recommendation No. R(81) 7 "On Measures Facilitating Access to Justice" that "except in special circumstances a winning party should in principle obtain from the losing party recovery of his costs including lawyers' fees, reasonably incurred in the proceedings." (*Council of Europe Committee of Ministers recommendation of 14 May 1981 No. R(81)7 "On Measures Facilitating Access to Justice", Para 14 of Appendix "Principles"*). I.e., neither the situation, where the State would not establish any procedure for compensating for the adjudication costs, nor a situation, where the State would provide that all *de facto* adjudication costs incurred by a person, without assessing in any way, whether such expenditure had been necessary for effectively conducting a matter in court, would comply with the rule of law.

Thus, the right to a fair trial can be affected only by such regulation that does not envisage for a person, in whose favour the case has been adjudicated, compensation for such adjudication costs that should be considered as necessary costs for conducting a matter before court.

**Thus, the obligation of the State to adopt such legal norms that establish a fair regulation of issues related to compensating for the costs of legal assistance follows from the first sentence in Article 92 of the Satversme.**

**19.4.** To assess, whether the contested regulation affects the right to free access to court, it must be established, whether it essentially denies to a person the compensation for such adjudication costs that should be considered as being necessary costs for conducting the matter before court effectively.

A person usually turns for legal assistance in civil proceedings if he considers that he will not be able, within the framework of adversarial principle, defend his civil rights that have been infringed upon or contested. Therefore, the right to qualified legal representation is a person's fundamental right that ensures exercise of other rights (*see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01, Para 2.2 of the Findings*).

Moreover, as the Constitutional Court has repeatedly found, representation and qualified legal assistance can be provided not only by an advocate, whose qualification and ability to provide legal assistance can be presumed, but in some cases also by other persons with corresponding legal education and experience in jurisprudence (*see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01, Para 4.1 and 4.2 of the Findings, and Judgement of 6 November 2003 in Case No. 2003-10-01, Para 6 of the Findings*).

Thus, both a person's costs for legal assistance that has been provided by an advocate and a person's costs for legal assistance that has been provided by a person, who is not an advocate in the meaning of CPL, *per se* cannot be considered as being inexpedient adjudication costs, which the person had no need to make. However, in view of the legislator's broad discretion in regulating adjudication costs, the procedural regulation, which does not envisage compensation for the latter type of costs for legal assistance, cannot be considered as an obstacle in person's access to court, if it complies with the general principles of law, *inter alia*, the principle of equality.

It follows from the constitutional complaint and the statements made by the Applicant's representative at the court hearing that the Applicant holds that the contested norm is incompatible with the Satversme not because the State would have the obligation to envisage compensation for the costs of legal

assistance in full to all persons, but because the legislator in the regulation on this issue has allowed differential treatment, on the one hand, of persons, to whom legal assistance is provided by persons, who are advocates in the meaning of CPL, and, on the other hand, of persons, to whom legal assistance is provided by other persons.

**Thus, to establish, whether the contested regulation complies with Article 92 of the Satversme, its compliance with the principle of equality enshrined in the first sentence of Article 91 of the Satversme must be examined.**

20. The first sentence in Article 91 of the Satversme provides: “All human beings in Latvia shall be equal before the law and the courts.”

The Constitutional Court has noted that the principle of equality enshrined in this norm of the Satversme prohibits state institutions from adopting such norms that without reasonable grounds allow differential treatment of persons who under similar and according to particular criteria comparable circumstances. The principle of equality allows and even demands differential treatment of persons, who are under different circumstances, as well as allows differential treatment of persons, who are under similar circumstances, if there are objective and reasonable grounds for it. The principle of equality must also guarantee the existence of a uniform legal order. However, such uniformity of legal order does not mean levelling, since equality allows differential treatment, if it can be justified in democratic society (*see, for example, Judgement of 3 April 2001 by the Constitutional Court in Case No. 2000-07-0409, Para 1 of the Findings, and Judgement of 21 June 2012 in Case No. 2011-20-01, Para 15*).

To assess, whether the contested norm complies with the first sentence in Article 91 of the Satversme, the Constitutional Court must establish:

- 1) whether and which persons (groups of persons) are under similar and according to particular criteria comparable circumstances;
- 2) whether the contested norm establishes similar or differential treatment of these persons;
- 3) whether this treatment has objective and reasonable grounds, i.e., whether it has a legitimate aim and whether the principle of

proportionality has been complied with (*see, for example, Judgement of 18 February 2011 by the Constitutional Court in Case No. 2010-29-01, Para 12*).

**21.** The Applicant holds that in the case under review two groups of persons can be compared: firstly, all those persons, who are parties to civil proceedings and in favour of whom the case has been adjudicated and that have incurred costs for the legal assistance that has been provided by an advocate in the meaning of CPL, and, secondly, all those persons, who are parties to civil proceedings (among them also the Applicant), in favour of whom the case has been adjudicated, but who have incurred cost for legal assistance that has been provided by a person, who is not an advocate in the meaning of CPL.

The opinion of the Saeima that the aforementioned groups are not comparable in the aspect of the legal assistance only because the assistance provided by an advocate is presented by a public act – a retainer, but another person provided such assistance on the basis of civil law authorisation is ungrounded. As the Applicant notes, with good reason, a contract of authorisation is not the only contract that can bind a person, who is a party to civil proceedings, and a person, who is his representative and at the same time provides legal assistance. Similarly to an advocate, who can at the same time act as the authorised representative on the basis of an authorisation and provide legal assistance on the basis of a retainer, another person may at the same time be a representative on the basis of an authorisation and provided legal assistance on the basis of another civil law contract, for example, a contract for work.

Thus, the groups of persons to be examined in the case under review have the following features in common: 1) the status of a party in civil proceedings; 2) a case has been adjudicated in their favour, and 3) costs that they have incurred due to the need to turn for legal assistance.

**Thus, both groups of persons are under similar and comparable circumstances.**

**22.** Upon finding that groups of persons are under similar and comparable circumstances, it must be established, whether the treatment of these groups of persons is or is not differential.

As noted above, the contested regulation provides that in civil procedure a person must be compensated for the costs of legal assistance, if it has been provided by a person, who is an advocate in the meaning of CPL. Whereas if legal assistance to a person has been provided by another person, who is not an advocate in the meaning of CPL, then the costs of legal assistance must not be compensated for.

**Hence, the comparable groups of persons are treated differentially.**

**23.** Upon finding that groups of persons, who are under similar and comparable circumstances, are treated differentially, the Constitutional Court must examine: 1) whether the differential treatment has a legitimate aim, and 2) whether the differential treatment complies with the principle of proportionality.

**24.** The Saeima notes that the legislator with the contested norm has established a presumption with regard to the quality of legal assistance provided by an advocate in civil proceedings and ensured to persons some advantages if they choose an advocate as the provider of legal assistance (*see, written reply by the Saeima, Case Materials, Vol. 1, p. 52*). Hence, the differential treatment established by the contested norm is said to have two closely interconnected legitimate aims: firstly, protection of other persons' interests, in particular, the interest of society in receiving qualified legal assistance, and, secondly, protection of the democratic state order, which manifests itself as proper functioning of the judicial system.

The Constitutional Court has repeatedly noted that the effectiveness of legal proceedings helps to protect the rights of other persons and therefore can serve as the legitimate aim of differential treatment (*see Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 12.2, and the Judgement of 24 November 2010 in Case No. 2010-08-01, Para 15*). By encouraging persons to receive legal assistance from a person, who is appropriately qualified for it, it is possible to reduce significantly the number of those cases, when legal remedies are not used sufficiently correctly or skilfully; as well as to promote reaching fairer outcome in the framework of legal proceedings based upon the adversarial principle. Thus, the assistance by a qualified lawyer not only facilitates the protection of the rights of the person,

who receives this assistance, but also fairer and more effective course of legal proceedings in general.

Moreover, the using of qualified legal assistance also ensures that the adjudication costs that the recipient of legal assistance incurs are predictable and reasonable. Hence, also the interests of the person, who is the losing party in civil proceedings, are protected in civil procedure. This person is protected against the risk that he would have to compensate for unfair cost, i.e., such costs that are not related to the provision of legal assistance in the particular case or ungroundedly high costs.

**Thus, the establishment of the contested regulation has had a legitimate aim.**

**25.** To assess, whether the contested regulation complies with the principle of proportionality, it must be established: 1) whether the measures used by the legislator are appropriate for reaching the legitimate aim; 2) whether such action is necessary, i.e., whether the legitimate aim cannot be reached by other measures, less restrictive upon a person's rights and legal interests; 3) whether the legislator's action is proportional or appropriate, i.e., whether the benefit gained by society exceeds the damage inflicted upon a person's rights and legal interests (*see, for example, Judgement of 19 march 2002 by the Constitutional Court in Case No. 2001-12-01, Para 3.1 of the Findings*).

**26.** The measures chosen by the legislator are appropriate for reaching the legitimate aim, if this aim is reached by the particular regulation (*see, for example, Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 13*).

In the case under scrutiny, the legitimate aim of the differential treatment established by the contested regulation would be met, if in the framework of civil procedure this regulation is an appropriate solution for creating a system of qualified legal assistance and if the possibility to receive legal assistance from an advocate in the meaning of CPL has been objectively ensured to persons.

**26.1.** The legislator, in fulfilling its obligation to establish a procedure pursuant to which persons are guaranteed the right to qualified legal assistance,

has established in Latvia advocacy as a system, in the framework of which strict pre-requisites are set for admitting new members and where a control mechanism functions to supervise the compliance with the requirements set for an advocates professional activities and ethical standards, maintenance and improvement of qualification, as well as regulates issues related to legal assistance provided by an advocate.

In this regard, it must be taken into consideration that compared to 2003, when the Constitutional Court pointed to deficiencies in the work of advocacy, significant improvements have been made to the organisation of advocacy, i.e.: 1) the restriction on the number of advocates has been lifted. Currently a maximum number has not been set, and any person, who complies with the requirements set in the Advocacy Law and has passed the exam of a sworn advocate, is admitted into the ranks of sworn advocates; 2) professional liability of sworn advocates and assistants to sworn advocates has been strengthened, *inter alia*, by creating a mechanism for elective insurance of professional activities, as well as envisaging the obligation for the advocate to inform the client on whether his professional activities are insured; 3) the disciplinary liability of advocates has been strengthened i.e., a committee of disciplinary cases has been established, which examines issues of violations in advocates' professional activities; 4) a mechanism has been established for supervising compliance with the ethical requirements set for advocates; 5) the Latvian Council of Sworn Advocates has established a mechanism for improvement of professional skills, in the framework of which sworn advocates have the obligation to improve their professional qualification.

Moreover, in examining, how appropriate the contested norm is for reaching the legitimate aim, both the provisions of the law "On the Regulated Professions and the Recognition of Professional Qualifications" and Latvia's international commitments must be taken into consideration.

Namely, in becoming a member state of the European Union, Latvia has confirmed: if a person has been granted the title of an advocate, then the professional activities of such a person can be equated to such regulated professional activity or a set of regulated professional activities, with regard to commencement or performance of which in other European Union member states appropriate requirements with regard to professional qualifications have been set in the regulatory enactments of the particular state. In accordance with

Section 30 of the law “On the Regulated Professions and the Recognition of Professional Qualifications”, advocate is a regulated profession in Latvia. Whereas Para 3 of Section 34(1) of this law provides that the special system for the recognition of professional qualifications is applied in recognising the right of advocate to practice, if an advocate of a European Union Member State wishes to practice (*inter alia*, provided legal assistance in civil proceedings) in Latvia under the professional title of his home country.

Hence, the profession of an advocate is a regulated profession not only in Latvia, and the status of an advocate granted in Latvia allows practicing also in other member states of the European Union (*see [http://ec.europa.eu/internal\\_market/qualifications/index\\_en.htm](http://ec.europa.eu/internal_market/qualifications/index_en.htm), accessed on 23 January 2014*).

Thus, the contested regulation must be viewed as part of the uniform legal regulation aimed at introduction and maintenance of a system, in the framework of which the fundamental rights of persons enshrined in Article 92 of the Satversme would be ensured.

**26.2.** With regard to persons’ objective possibilities to receive legal assistance from an advocate, the quantitative and financial aspect in the accessibility of an advocate should be predominantly considered.

Firstly, compared to the situation ten years ago, when the Constitutional Court found that the number of advocates in Latvia was insufficient, it has increased, whereas the number of inhabitants has decreased. In 2003 there were 599 sworn advocates in Latvia (*see Judgement of 6 October 2003 by the Constitutional Court in Case No. 2003-08-01, Para 4*), but currently there are 1236 sworn advocates and 14 citizens of other European Union member states, who have obtained the status of an advocate in other members states of the European Union, but are practicing in Latvia (*see the transcript of the Constitutional Court sitting of 12 November 2013, Case Materials, Vol. 2, p. 68*). Thus, the number of advocates has more than doubled, and the assistance they provide has become more accessible in quantitative terms.

Secondly, as regards the possibility to receive legal assistance from an advocate, the financial aspect is also significant.

The Ombudsman states that the legal assistance by other persons and not advocates is more often used by persons with lower income, since the assistance provided by advocates is said to be more expensive, but the

compensation for the costs related to it can be claimed only if a positive outcome has been reached (*see Ombudsman's written opinion, Case Materials, Vol.1, p. 116*). The Ombudsman, however, has not provided concrete facts to substantiate this statement.

Persons with lower income in particular should be interested in receiving qualified legal assistance, since it not only would protect these persons against unreasonable expenditure, but would also guarantee that as the result of legal proceedings their financial status would not deteriorate. Moreover, it should be taken into consideration that, in difference to the situation of 2003, a person, whose financial possibilities are limited, i.e., a poor person or person with low income, "State Ensured Legal Aid Law", adopted in 2005, guarantees the possibility to receive qualified legal assistance.

Whereas it follows from the explanations provided by the Applicant's representative at the court hearing that the Applicant had chosen to receive legal assistance from a particular person, who is not an advocate in the meaning of CPL, not because the legal assistance provided by this person *per se* would be cheaper or better qualified, but because this person already previously had earned the Applicant's trust. Thus, the situation should be rather assessed as an exception.

Hence, if a person, nevertheless, chooses to receive legal assistance from such providers of this service, who are not advocates in the meaning of CPL, this does not at all mean that the contested regulation as a whole is not appropriate for reaching the legitimate aim.

**26.3.** It follows from the materials of the case that the accessibility of legal assistance is significantly influenced by the validity of costs related to this assistance.

The statement made by the Saeima that advocates had "certain rates" (*see written reply by the Saeima, Case Materials, Vol. 1, p. 51*) only partially reflects the actual situation. However, in this respect the provisions made in Section 57 of the Advocacy Law should be taken into consideration, i.e., that sworn advocates, upon accepting to conduct a matter, must make an agreement with the client in writing, *inter alia*, on the amount of remuneration. Moreover, the advocate's client or a person from whom the costs related to advocate's assistance are recovered, always has the possibility to turn to the Latvian

Council of Sworn Advocates and request to assess the validity of remuneration set by the particular advocate.

Whereas no such effective mechanism exists with regard to other providers of legal assistance. Therefore the validity of respective costs is more convincing in those cases, where legal assistance has been provided by a person, who is an advocate in the meaning of CPL.

**Hence, the contested regulation is appropriate for reaching the legitimate aim.**

27. The Constitutional Court has repeatedly found in its judgements that it does not have to assess, to what extent the alternative means would or would not be better suited to solve the situation (*for example, Judgement of 8 March 2006 by the Constitutional Court in Case No. 2005-16-01, Para 15.8, and Judgement of 13 February 2009 in Case No. 2008-34-01, Para 22*). The jurisdiction of the Constitutional Court envisages only verification, whether in the particular case the possibilities to employ some alternative measures, which would be less restrictive upon the fundamental rights established in the Satversme, but would allow reaching the legitimate aim in the same quality, have been duly considered (*see Judgement of 30 January 2012 by the Constitutional Court in Case No. 2011-09-01, Para 14*). It follows from the materials in the case that two alternative measures could be considered.

Firstly, the proposal for draft law “Amendments to the Civil Procedure Law” (*draft law No. 15/Lp10*), examined by the Saeima in June and July 2011, which envisaged the following wording of the contested norm: “1) costs for the legal assistance provided by an advocate or other qualified lawyer;” (*the table of proposals for the third reading of draft law No. 15/Lp10 3. Available: [http://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/webAll?SearchView&Query=\(\[Title\]=\\*civilprocesa\\*\)&SearchMax=0&SearchOrder=4](http://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/webAll?SearchView&Query=([Title]=*civilprocesa*)&SearchMax=0&SearchOrder=4), accessed on 30 January 2014*). This proposal was analysed at the sittings of the Saeima Legal Affairs Committee on 7 and 14 June, assessing the general situation in the provision of legal assistance and, *inter alia*, changes in the organisation and work of advocacy (*see audio recording of the sitting of 14 June 2011 of the Saeima Legal Affairs Committee, Case Materials, Vol. 2*). However, it was established that this proposal had a number of deficiencies. It was noted, in particular, that this regulation would significantly hinder the

work of courts, as then they would have to assess the qualification of each provider of legal assistance, who is not an advocate in the meaning of CPL. As the member of the Saeima G. Bērziņš pointed out at the sitting of the Saeima on 21 July 2011, “by adopting such norm, an additional obligation would be imposed upon courts to assess the qualification of a lawyer, possibly, by requiring references and other evidence, and this would burden the court system even more” (*transcript of the Saeima sitting of 21 July 2011. Available: <http://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/DBC56756CC92A8BC22578D90039A625?OpenDocument>, accessed on 30 January 2014*).

Secondly, it follows from the materials of the case, that an alternative measure could be a procedure envisaging that providers of legal assistance register in a state register, as well as minimum requirements to be set for such persons, for example, with regard to the level of legal education (*see written opinion by the Ombudsman, Case Materials, Vol. 1, p. 116, and the transcript of the Constitutional Court sitting of 12 November 2013, Case Materials, Vol. 2, p. 73*). However, the establishment of such a system parallel to the advocacy *per se* would not exclude differential treatment of those providers of legal assistance, who could not or would not wish to be included in this parallel system.

**Thus, the legitimate aim cannot be reached by alternative measures in the same quality.**

28. Finally, it must be established, whether the benefit that society gains from the differential treatment established by the contested regulation exceeds the damage inflicted upon a person’s rights and legal interests.

The Applicant holds that the benefit gained by society does not exceed the infringement upon its rights and legal interests, since qualified legal assistance to a party in civil proceedings could be provided not only by advocates. Since currently legal acts do not prohibit other person from providing legal assistance in civil proceedings, the benefit to society from the differential treatment envisaged by the contested norm is said to be questionable (*see the transcript of the Constitutional Court sitting of 19 November 2013, Case Materials, Vol. 2, p. 142*).

However, in the case under review, the benefit to society manifest itself as reaching the specified legitimate aims as completely as possible, i.e.,

establishment of such system of legal assistance that would ensure trusted and accessible legal assistance that be presumed to be qualified to every person in need of it, and thus protects both person's right to a fair trial and other fundamental rights. Moreover, persons, against who the case has been adjudicated, are protected against the obligation to cover ungrounded or incommensurate costs. Thus, smoother legal proceedings are facilitated and the role of judicial power in society is strengthened, at the same ensuring unhindered functioning of a democratic state order.

Whereas in assessing the adverse consequences caused to a person, it is important to take into consideration the fact that a person can choose: whether to receive legal assistance from an advocate and thus, if the case is adjudicated in his favour, to receive compensation for the respective costs from the other party, or to receive legal assistance from a person, who is not an advocate in the meaning of CPL, and, hence, waive the possibility to receive compensation for these costs. If the person opts for the second variant, it, *inter alia*, means that the possibility to recover costs for legal assistance is not the decisive factor and that other factors are more important, for example, trusting the particular provider of legal assistance. The Applicant's representative also admitted at the court hearing that in talks with her clients the issue regarding compensation of the costs of legal assistance "frequently is not asked at all or is of secondary importance" (*see the transcript of the Constitutional Court sitting of 19 November 2013, Case Materials, Vol. 2, p. 141*).

It must also be taken into consideration that not only the requirements of regulatory enactments, but also norms of ethics are binding upon an advocate, and that includes the obligation to provide to a client unbiased information on the prospects to succeed in the case, in particular, regarding the prospects when submitting a cassation complaint. Moreover, there would be grounds to expect that he knows judicature and, thus, will not mislead the client, for example, by submitting such cassation complaint that has not chances of being accepted. Whereas there are grounds to expect that the Latvian Council of Sworn Advocates will ensure such mechanism that would constantly improve the qualification of advocates and maintain it on a continuously high level.

And finally, it must be taken into account that the contested regulation does not prohibit the person himself from self-representation before the court and present legal arguments or to receive legal assistance form a particular

person, whom he trusts and who is not an advocate in the meaning of CPL. The right to access to court in now way means that a person should ensure the legal assistance that he needs only with the mediation of one particular advocate or other particular person. Access to court, essentially, is ensured, if a person has sufficiently extensive possibilities to choose the provider of legal assistance from among advocates and if the State has established a regulation, which, if the case has been adjudicated in favour of the person, envisages compensation of costs related to this assistance in reasonable amount.

Hence, the benefit to society from the contested norm exceeds the damage inflicted upon an individual.

**Thus, the differential treatment, which has been established by the contested regulation, complies with the principle of proportionality. Hence, the legislator in adopting the contested norm has not exceeded the limits of its discretion and the contested norm complies with the first sentence in Article 91 of the Satversme and the first sentence in Article 92 of the Satversme.**

### **The Substantive Part**

On the basis of Section 30 – 32 of the Constitutional Court Law, the Constitutional Court

**held :**

**to recognise Para 1 of Section 33(3) of the Civil Procedure Law as being compatible with Article 91 and Article 92 of the Satversme of the Republic of Latvia.**

The Judgement is final and subject to appeal.

The Judgement enters into force on the day of its pronouncement.

Chairperson of the court sitting

G. Kūtris