



LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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**The Separate Opinion
of the Justice of the Constitutional Court
of the Republic of Latvia
Juris Jelāgins
on 21 April 2009, in Riga
in Case No. 2008-35-01**

"On Compliance of the Law "On the Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community" with Article 101 of the *Satversme* (Constitution) of the Republic of Latvia".

The Constitutional Court of the Republic of Latvia (hereinafter – the Constitutional Court), on 3, 4 and 10 March 2009, at an open court hearing, examined the case "On Compliance of the Law "On the Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community" (hereinafter – the Law on Ratifying the Lisbon Treaty) with Article 101 of the *Satversme* (Constitution) of the Republic of Latvia".

The submitters of the constitutional complaint hold that their right, guaranteed by Article 101 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*, to participate in the work of the State, i.e., to participate in a referendum on the Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community has been infringed upon.

The Constitutional Court passed a judgement and ruled that the Law on Ratifying the Lisbon Treaty had been adopted in the procedure established by the *Satversme* and, thus, was compatible with the first part of Article 101 of the *Satversme*.

The author of the separate opinion does not uphold this ruling by the Court, because he is of the opinion: if the Law on Ratifying the Lisbon Treaty was adopted in the procedure established by the *Satversme*, then a violation of the fundamental rights of the parties submitting the constitutional complaint cannot be established and, therefore, legal proceedings in the case had to be terminated.

Pursuant to Article 85 of the *Satversme*, the Constitutional Court “shall review cases concerning the conformity of laws with the Constitution”. Section 1(1) of the Constitutional Court Law, in turn, provides that the Constitutional Court “shall adjudicate matters regarding the conformity of laws and other regulatory enactments with the Constitution”, whereas Section 16 of this Law sets out that the Court adjudicates matters regarding: 1) conformity of laws with the Constitution; 2) conformity of international agreements signed or entered into by Latvia (also until the confirmation of the relevant agreements in the *Saeima*) with the Constitution; 3) conformity of other laws and regulations or parts thereof with the norms (acts) of a higher legal force”. Thus, reviewing of such cases, where compliance of legal norms with legal norms of higher legal force must be examined, falls within the jurisdiction of the Constitutional Court.

The Law on Ratifying the Lisbon Treaty is a constitutional-level law. Thus, the Constitutional Court has the right to examine compliance of the procedure, in which this Law was adopted, with the *Satversme*. I.e., the Constitutional Court had to establish, whether due to inappropriate adoption of the Law on Ratifying the Lisbon Treaty the fundamental rights established in Article 101 of the *Satversme* of the parties submitting the constitutional complaint had been infringed upon.

After Latvia advanced the aim to become a Member State of the European Union (hereinafter – the EU), it was established that amendments had to be introduced to some articles of the *Satversme*. A working group, established especially for this purpose, proposed amendments to Article 68 and Article 79 of the *Satversme*. The amendments were based on finding of the legal doctrine, pursuant to which the core of the *Satversme* (Article 1, 2, 3, 4 and 6) is not amended upon Latvia’s accession to the European Union (*see: Kādēļ Latvijas*

konstitūcijā nepieciešami labojumi? Darba grupas Satversmes grozījumu izstrādāšanai piedāvātā projekta teorētiskais pamatojums. Jurista Vārds, 2001. gada 15. maijs, Nr. 14).

The *Saeima*, performing its function of the constitutional legislator, supported this opinion of the working group and Article 68 and Article 79 of the *Satversme* were adopted in new wording.

Separation of the power of the *Satversme* or of the constitutional legislation and the legislative power is substantiated by the principle of constitutional supremacy. This means that the constitution is a special law that cannot be revoked or amended in the regular legislative process. Usually, a special procedure has been established for amending the constitution (*see: Heun W. Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth-Century German Constitutionalism. University of Göttingen, Germany. Ratio Juris, Vol. 16, Issue 2, p. 195 – 205, 4 Jun 2003, Limbach J. The concept of the supremacy of the Constitution. The Modern Law Review. – Vol. 64, Nr. 1 (2001), p. 1-10.*).

Since it was recognised that Latvia's accession to the European Union did not change the core of the *Satversme*, the law, which ratified "The Treaty of Accession between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Republic of Slovakia concerning the accession to the European Union" (hereinafter – Treaty on Accession to the EU), was not put to a national referendum in accordance with the procedure defined in Article 77 of the *Satversme*, assuming that it had acquired the force of a law in anyway.

The first part of Article 68 of the *Satversme* provides that “[a]ll international agreements, which settle matters that may be decided by the legislative process, shall require ratification by the *Saeima*”, whereas Article 73 of the *Satversme* provides that agreements with other nations may not be submitted to national referendum. I am of the opinion that the Treaty on Accession to the EU may not be considered as a treaty that settles a matter that may be decided by the **legislative process**. The Treaty on Accession to the EU settles a matter that may be decided in **the process of constitutional legislation**, and therefore applying the prohibition envisaged by Article 73 of the *Satversme* to it would be incorrect.

The constitutional legislator, by adopting Article 68 and Article 79 of the *Satversme* in new wording, recognised that, upon accessing to the EU, there were no grounds for holding a national referendum in the procedure set out in Article 77 of the *Satversme*. Therefore the third part was added to Article 68 of the *Satversme*, pursuant to which, the matter of acceding to the European Union had to be put for the national referendum in the form of a plebiscite, prior to ratifying the Treaty on Accession to the EU. A plebiscite is held with respect to an abstract matter, in difference to voting by the people in the form of a referendum, in which the people exercise their regular legislative right or the rights of the constitutional legislator (*see: Dišlers K. Ievads Latvijas valststiesību zinātne. R., A. Gulbis, 1930, 112. – 115. lpp.*).

At the same time, the same quorum and the number of votes given required for a positive result was applied to the new wording of the second part of Article 79 of the *Satversme* on plebiscite as the one set for adopting regular laws, but not for the constitutional laws. Latvia joined the European Union in compliance with the provisions of the second and third part of Article 68 and of Article 79 of the *Satversme*.

Likewise, the law on “Treaty Establishing a Constitution for Europe” (hereinafter – the Law on Ratifying the Constitution for Europe), by which the Treaty Establishing a Constitution for Europe, which was signed on 29 October 2004 in Rome, was ratified in the procedure established in the second part of

Article 68 of the *Satversme*, i.e., adopting it with a qualified majority vote by the members of the *Saeima*.

“Treaty Establishing a Constitution for Europe” was intended as the constitution of the EU, which, in case it were adopted, would replace the Treaties Establishing the EU (*see: Norman P., The accidental constitution: The story of the European Convention. Brussels: EuroComment, 2003, p. 403 – 406*).

In difference to the adoption of the Treaty on Accession to the EU, this time, i.e., before adopting the law ratifying the Treaty on Establishing a Constitution for Europe, a plebiscite was not held, because the members of the *Saeima* did not demand it. Neither was the law on ratifying the Treaty on Establishing a Constitution for Europe put for a national referendum in the procedure established by Article 77 of the *Satversme*, because, obviously, it was considered that it did not amend the content of the articles that constitute the core of the *Satversme*.

The law on ratifying the Treaty on Establishing a Constitution for Europe was not contested at the Constitutional Court. However, soon after that, ratification thereof in other Member States of the European Union was suspended and the law on ratification was revoked.

The Lisbon Treaty was drafted to replace the Treaty on Establishing a Constitution for Europe as amendments to the EU basic document that was in force, rather than a new EU legal document of a constitutional level (*see: Craig P. The treaty of Lisbon: Process, architecture and substance. European Law Review. – Vol. 33, No.2 (2008), p. 137 – 166*).

The submitters of the constitutional complaint hold that in order for the ratification act, by which Latvia adopts and approves of the Lisbon Treaty, to enter into effect, a national referendum had to be held in the procedure established by Section 77 of the *Satversme*, because this treaty amends the content of Article 2 of the *Satversme*; however, if the Constitutional Court were to recognise that it was not required to hold a national referendum in the procedure established by Article 77 and the first part of Article 79 of the *Satversme*, then the national referendum should have been held in the procedure

established by the fourth part of Article 68 and the second part of Article 79 of the *Satversme*.

The ratification of the Lisbon Treaty should have been put to a national referendum in the procedure established by Article 77 and the first part of Article 79 of the *Satversme*, if the Law on the Treaty on the Accession to the EU had been adopted in the same procedure. As is well known, at its time it was not adopted in this procedure.

However, the fact that accession to the EU did not proceed in the procedure established by Article 77 of the *Satversme* does not preclude the possibility that amendments to the basic documents of the EU could be such that would require to implement ratification by organising a vote by the people in the form of a national referendum. That would be required if as the result of ratifying the Lisbon Treaty one of the provisions constituting the core of the *Satversme* would be amended. Therefore, in the particular case, the Constitutional Court verified, whether the law ratifying the Lisbon Treaty amended the content of Article 2 of the *Satversme*, violating the fundamental rights of the parties submitting the constitutional court that were enshrined in Article 101 of the *Satversme*, i.e., the right to participate in a national referendum.

Upon joining the EU, our constitutional legislator held that by ratifying the Treaty on the Accession to the EU, the articles constituting the core of the *Satversme* were not amended, and therefore only a plebiscite was held. Upholding the findings made by the Constitutional Court and being of the opinion that, theoretically, the content of Article 2 of the *Satversme* may be amended, without introducing textual changes to it, the *Saeima* acted in accordance with the finding that Article 2 of the *Satversme* was not amended, because the idea of the sovereignty of the people was not revoked. The sovereignty of the people is retained because the people are not denied the so-called right to final say. This right can be exercised because people retain the right to secede from the EU.

If at the time, when Latvia accessed to the EU, the possibility to secede from it existed only on the basis of general documents of international law (*Vienna Convention on the Law of Treaties. Vienna, 23 May 1969. United*

Nations, Treaty Series, vol. 1155, p. 331), which were used by Greenland in its time, now the right to secede has been defined *expressis verbis* in the Lisbon Treaty itself. As the materials of the working group, which drafted amendments to Article 68 and Article 79 of the *Satversme*, as well as the transcripts of the *Saeima* sittings show (see *Case Materials, Vol. 3, pp. 144, 146, 162, 166, and 171*), the “loss of the (final) say” by the people was recognised as the “red line”, the overstepping of which would require holding of a referendum in the procedure established by Article 77 of the *Satversme*. There were no grounds to assess, whether, by ratifying the Lisbon Treaty, other articles of the *Satversme*’s core were amended, in the framework of this case, i.e., in interconnection with Article 101 of the *Satversme*. However, apparently, such “red line” exists also with respect to other provisions included in the core of the *Satversme*, for example, the provision: “Latvia is an independent state”. In this regard, ratification of a treaty by which Latvia would join the European Union as a federal state could be recognised as being such a line.

The answers to the following questions could serve as the main criteria for deciding, whether a vote by the people in the form of a referendum should be held. First, whether following adoption of the respective legal acts the sovereign rights of the people of Latvia could be lost; secondly, whether Latvia loses or does not lose its independence. The core of the *Satversme* is changed, to a large or smaller extent, following the adoption of each constitutional-level norm. For example, by adopting Article 89 of the *Satversme*, which provides that “[t]he State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia”, in fact, the scope of the content of the articles constituting the core of the *Satversme* was changed. I.e., not every amendment to the content of the articles constituting the core of the *Satversme* requires adoption thereof in a referendum. Even the following question could be asked: should any textual amendment to the articles that constitute the core of the *Satversme* be approved by organising a vote by the people in the procedure established in Article 77 of the *Satversme*? For example, should a referendum be held, if the *Saeima* was to amend Article 1 of the *Satversme*, providing that “Latvia is an independent democratic republic

governed by the rule of law”)? Of course, a referendum would not be necessary, since it can be established through interpretation that Latvia is a state governed by the rule of law.

Since the law on ratifying the Lisbon Treaty was adopted in a procedure established by the *Satversme*, there are no grounds to recognise that the rights of the submitter of the constitutional complaint, defined in Article 101 of the *Satversme*, had been infringed upon.

Interpretation of Article 68 of the *Satversme* shows that the plebiscite before ratifying the Treaty on the Accession to the EU is initiated by the *Saeima*, whereas the plebiscite regarding changes to the conditions of Latvia’s membership in the European Union, if it is demanded by at least half of the members of the *Saeima*. The constitutional legislator has left the issue of holding or not holding a national referendum regarding new conditions of membership in the European Union in the care of the *Saeima* members. The members did not request holding a national referendum to establish the people’s view on ratification of the Lisbon Treaty. The fundamental rights granted to the parties submitting the constitutional complaint in Article 101 of the *Satversme*, i.e., the right to participate in a national referendum, would be infringed upon, if the members of the *Saeima* were obliged to request a national referendum, but did not do that. The provision of the fourth part of Article 68 of the *Satversme* is clearly worded to mean that only the members of the *Saeima* have the right to request a national referendum.

Therefore a violation of the rights enshrined in Article 101 of the *Satversme* with respect to the parties submitting the constitutional complaint could be established only if at least half of the members of the *Saeima* had requested a national referendum, but it had not been held. Members of the *Saeima* did not submit a request like this. Thus, in this case a violation of the fundamental rights of the parties submitting the constitutional complaint could not be established.

A finding follows from Section 19² (1) of the Constitutional Court Law that a case can be examined on the basis of a constitutional complaint, if a violation of the fundamental rights established in the *Satversme* has occurred.

However, if such violation of fundamental rights is not present, then legal proceedings in the case are impossible and, pursuant to Section 29 of the Constitutional Court Law, must be terminated.

Justice of the Constitutional Court

J. Jelāgins