# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, February 23, 2006

**JUDGMENT**

**in the name of the Republic of Latvia**

**in case No. 2005-22-01**

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš as well as the justices Romāns Apsītis, Aija Branta, Ilma Čepāne, Juris Jelāgins, Gunārs Kūtris and Andrejs Lepse

under Article 85 of the Republic of Latvia Satversme (Constitution), Articles 16 (Item 1), 17 (Item 11 of the first Part), $19^2$ and $28^1$

on the basis of the constitutional claim by Ingus Strautmanis

in written proceedings at January 31, 2006 Court session reviewed the matter

**" On the Compliance of the Words "Defendant, Accused or Suspect", Incorporated in Section 14, Item 4 of the first Part of the Law "On the Insolvency of Undertakings and Companies" (in the Wording, which was in Effect till June 15, 2005) with Articles 92 and 106 of the Satversme"".**

## The establishing part

**1.** On September 12, 1996 the Saeima adopted the Law "On the Insolvency of Undertakings and Companies" (henceforth – the Insolvency Law). In Item 4 of its first Part of Section 14 (restrictions regarding administrators) it was determined that the person, who has been **sentenced** in regard of crimes against property, economic crimes, crimes while holding office in a State institution, crimes against the administration of justice or crimes regarding administrative procedures regardless of termination or extinguishment of a conviction may not be appointed administrators.

On May 29, 2003 the Saeima passed the Law ”Amendments to the Law on Insolvency of Undertakings and Companies”. By this Law it was determined that a person ”who has been sentenced, is a defendant, accused or suspect in a criminal matter in regard of crimes against property, economic crimes, crimes while holding office in a State institution, crimes against the administration of justice or crimes regarding administrative procedures may not be appointed administrator”. By the above Law additional restrictions regarding administrators (persons who are defendants, accused or suspect) were established.

On May 19, 2005 the Saeima adopted the Law ” Amendments to the Law ”On the Insolvency of Undertakings and Companies””. When elaborating Amendments, the norm of Section 14, Item 1 of the first Part of the Law was included in Item 4 of Section 16 of the Law, but in Section 14, Item 1 of the first Part it was determined that the duties of an administrator shall not be realized in a concrete insolvency process, if he/she is a defendant, accused or suspect in a criminal matter, which is connected with the activities of the administrator in the respective insolvency process.

**2.** On January 1, 2003 **the submitter of the constitutional claim** Ingus Strautmanis (henceforth – the submitter) acquired the qualification of ”a certified administrator”. On December 13, 2004 the State Agency ”Insolvency Administration” (henceforth – Insolvency Administration) issued a certificate, by which the submitter was conferred the right of performing the duties of the administrator of Corruption Combating and Prevention Bureau till Dcember 31, 2009. At the beginning of 2005 the Corruption Combating and Prevention Bureau initiated a criminal matter, in which – in accordance with the offence envisaged in Section 183 (the second part) of the Criminal Law- the submitter was in the status of a suspect. Taking into consideration the above circumstance the Insolvency Agency addressed the court with a request to remove the submitter from the duties of the administrator. The Court removed the submitter from the duties of the administrator of several insolvency processes by applying Section 14, Item 4 of the First Part of the Insolvency Law.

In his constitutional claim the submitter disputes the conformity of the words ”a defendant, accused or suspect”, used in the norm of Section 14, Item 4 of the first Part of the Law ”On the Insolvency of Undertakings and Companies” (wording, which was in effect till June 15, 2005; henceforth – the impugned norm) with Articles 92 and 106 of the Satversme.

The submitter holds that the impugned norm violates the right of being presumed innocent until the guilt of a person has been established in accordance with law, which is determined in Article 92 of the Satversme. Just because of the impugned norm the submitter was recalled from fulfilling the duties of the administrator of several insolvency processes. Besides, he stresses that the impugned norm denies him the right of applying for the post of an administrator in other insolvency processes. The submitter holds that by removing the person from fulfilling the duties of an administrator, if he/she is in the status of a defendant, accused or suspect, his rights are substantially violated. Besides, the Insolvency Law does not envisage the possibility of restoring the person to the post of administrator in case if he/she is found not guilty.

The submitter points out, that the impugned norm groundlessly restricts also his right to freely chose his employment and workplace according to his abilities and qualifications, which is determined in Article 106 of the Satversme. His qualification of the administrator of insolvency processes is confirmed by the certificate, issued by the Insolvency Administration and to receive it one has to meet certain requirements: to have adequate education, specific practice etc. However, the impugned norm forbids holding the post of the administrator to a person, who has not been recognized as guilty and thus it restricts the right of a person to freely choose employment according to his/her qualification.

3. **The institution, which has passed the impugned act – the Saeima –** in its written reply expresses the viewpoint that the constitutional claim is ungrounded and requests to declare the impugned norm as conformable with Articles 92 and 106 of the Satversme.

The Saeima points out that the former and already null and void wording of the norm has been applied to the submitter. The Insolvency Law in the wording, which was in effect till June 15, 2005, did not *ex verbis* envisage cases, when a person might be recalled from fulfilling the duties of the administrator. For example, if the person would be in the status of a defendant during the period of fulfilling the duties of the administrator and not at the moment of appointment. Thus, such situations have been solved by interpreting the norms of the Insolvency Law.

The Saeima holds that the interpretation, expressed by the courts, founded on the thesis – ”if the restriction refers to appointment then it shall in a greater deal refer to the period of holding office” – is admissible and even necessary. However, this interpretation may not be used in cases, when other norms of the law clearly forbid it. Legal norms may not be interpreted separately one from the other, as well as

just on the actual circumstances of the matter. They stress that the above conclusion is established by Section 28 (Item 1 of the first Part) of the Insolvency Law in the wording, which was in effect till June 15, 2005. It is determined in this Item that an administrator shall be removed only ”if the administrator does not comply with the provisions of Section 13 of this Law, or the restrictions specified in Section 14 of this Law were not complied with upon his/her appointment”. The Saeima stresses that from the viewpoint of legal technique a specifying participial phrase ”by appointing him/her” is included in the Law with a specific purpose. The phrase ”by appointing him/her” is included in the Law so that the administrator – on the basis of the impugned norm- might be removed only then, if he has had the status of the defendant, accused or suspect already at the moment of being appointed. The case law also testifies it. For example, the Kurzeme Regional Court rejected application of the impugned norm in cases like the one of the submitter. Thus the potential violation of the rights of the submitter has arisen as the result of interpretation and application of the norm.

When adopting May 19, 2005 Amendments to the Insolvency Law and envisaging *expressis verbis* restrictions for the administrator during the period of carrying out duties and not only in the moment of appointment, different interpretation of the norms of the above Law, which exists in practice in cases of appointment of an administrator, has been averted. The Insolvency Law incorporates the solution, which has been recognised in the practice of several courts, that is, the administrator is removed, if he/she is, for example, a suspect, defendant or accused in a criminal matter, which is connected with the activity of the administrator in the concrete insolvency process.

The Saeima concludes that from the claim and the documents attached to it, as well as from the systemic analysis of the Insolvency Law and conclusions of the court practice follows that the impugned norm does not refer to the restriction of the fundamental right of the person, which the submitter mentions.

However, the Saeima additionally indicates to the necessity of the norm as its aim is to ensure objective, uninterrupted and efficient procedure of the insolvency process. The Saeima stresses that the State has the duty of ensuring adequate activities of its institutions as well as of determining such regulation which guarantees that the processes comply with public interests. One of the ways for reaching the above aim is to determine qualification and objectivity principles for persons, who have been entrusted a substantial role in implementation of functions, important for the society. The administrator of insolvency process implements such a function. Thus the restriction has a legitimate aim and the measures have been chosen to reach the aim. Besides, it is not

possible to use more considerate means in the insolvency process – dismissal, as the administrator is appointed for carrying out his/her duties in a concrete insolvency process, but is not appointed to hold an office as the representatives of other professions (for example, judges, procurators, lawyers etc.). The Saeima holds that the above restrictions are proportionate to the legitimate aim.

## The concluding part

**4.** The second sentence of Article 92 of the Satversme determines that everyone shall be presumed innocent until their guilt has been established in accordance with law. One of the most significant principles of a law-governed state – presumption of innocence is fixed in this norm. It is incorporated also in Article 11 of the Universal Human Rights Declaration, Article 6, Item 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Covenant on Civil and Political Rights.

In the Latvian legal system presumption of innocence has been fixed in two ways – in Article 92 of the Satversme as one of the fundamental rights of a persons and in Section 19 of the Criminal Procedure Law as the fundamental principle of criminal process.

Presumption of innocence is a constitutional fundamental right, which is mainly expressed in a criminal process. It protects a person, who is presumed or stated to have committed a criminal offence, from being deemed guilty, before it has not been proved under the procedure established by law and ruled by a decision on the criminal matter, which has taken effect. In the case law of the European Court of Human Rights the conclusion has been fixed that the right to be presumed innocent attaches only to an individual charged with a criminal offence (*see: Gomien D., Harris D., Zwaak L. Law and practice of the European Convention on Human Rights and the European Social Charter. Council of Europe Publishing. 1996, p. 182).*

Presumption of innocence is created by three elements:

1) it protects a person, so as he/she is not found guilty, while the guilt has not been proved in accordance with the law. This process is especially binding on the criminal process developers – investigators, procurators, judges;
2) a person does not have to prove his/her innocence. The burden of proof lies on the process developers– investigator and prosecution;
3) all the reasonable doubt about the offence, which cannot be averted shall be assessed as being in favour of the accused persons. Proof,

established under the procedure, determined by law, shall be the basis of a non-rehabilitating ruling (*also of a judgment of conviction).*

**5.** To recognize whether the impugned norm violates the fundamental rights, fixed in the second sentence of Article 92 of the Satversme, one has to establish violation of at least one element of the presumption of innocence.

**5.1.** Presumption of innocence prohibits treating a person in such a way that it was as if proved he/she has committed offence. However presumption of innocence does not prohibit establishing restrictions to a person, if such are necessary for reaching a respective legitimate aim and the principle of proportionality is being observed.

Thus for example, presumption of innocence does not prohibit deprivation of liberty when applying arrest as a security measure (*see: Creifelds Rechtswörterbuch. 15. Auflage, S.1340).*

**5.2.** Any security measure causes restrictions of the rights of certain persons. The scope of the restriction is determined by circumstances, connected with the person, which are established in the concrete situation, for example, the possibility of committing a new crime. In every respective case the court assesses whether the information, which is at the disposal of State institutions, substantiates the necessity of restricting the rights of a person; however, it does not assess whether the person has or has not committed the crime, the person is accused of.

Any other restriction, which the legislator envisages for the accused person shall be assessed first of all from the viewpoint of those fundamental norms, which are restricted by the respective norm.

**5.3.** When bringing a charge against a person, the State, on the one hand, recognizes that at the disposal of its institutions there is enough information on the offence committed by the person; and – on the other hand – it also undertakes responsibility about the possibility of this information being erroneous. For example, in case if the court acquits the person, expenses, created to the person in connection with the arrest, are remunerated.

Bringing a charge against some person may influence his/her public reputation. Presumption of innocence gives to the accused several additional procedural guarantees in the criminal procedure, so as to create the possibility of regaining that reputation. However, presumption of innocence in itself does not prohibit establishing of

temporary restrictions to a person, which are connected with his/her reputation, as far as other norms of the Satversme permit such restrictions.

**5.4.** The impugned norm shall not be attributed to any elements of the presumption of innocence. However, the restriction included in it regarding employment of a certain kind (administrator of the insolvency process) is connected with the legal status of a person in the criminal process.

**Thus the impugned norm does not violate fundamental rights of the submitter, which are fixed in the second sentence of Article 92 of the Satversme** .

**6.** The first sentence of Article 106 of the Satversme determines that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. By the notion ”employment”, which is incorporated in Article 106 of the Satversme, one shall understand work which demands adequate qualification and which is the source of means of existence of a person or as the profession, which is closely connected with the personality of an individual. It shall be attributed to employment in both – the private and the public sector**,** moreover – also to professions in which legal employment relations are not based on contracts regulated by the Labour Law (*sk. Satversmes tiesas 2003. gada 18. decembra sprieduma lietā No. 2003-12-0106 7. punktu; see the Constitutional Court December 18, 2003 Judgment in matter No. 2003-12-0106; Item 7).*

**6.1.** An administrator is not appointed to a post in a respective insolvency process by a court ruling. Thus the notion ”employment” shall be attributed also to the post of the administrator. The German Federal Constitutional Court has concluded that taking into consideration the development of the above sector, the activities of the insolvency process administrator shall not any more be regarded as additional activities to the profession of a lawyer or an entrepreneur. Activity of an administrator quite often has become a self-dependent profession, which helps to many persons to obtain and maintain the material basis both as the only profession and alongside with another profession (*see: BVerfG, 1BvR 135/00 vom 03.08.2004; Absatz – No.28 http://www.bverfg.de/entscheidungen/rk20040803_1bvr013500.html*) .

**6.2.** The impugned norm includes restrictions regarding appointment of administrators, inter alia determining the prohibition of appointing the person an administrator if he/she is a defendant, accused or

suspect in a criminal matter in regard of crimes against property, economic crimes, crimes while holding office in a State institution, crimes against the administration of justice or crimes regarding administrative procedures.

**Thus the impugned norm includes the restriction to freely choose the employment according to one's abilities and qualifications.**

**7.** Article 116 of the Satversme determines that the rights set out in Article 106 "may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, public safety, welfare and morals". Thus the restriction to rights, envisaged in Article 106 shall be assessed in accordance with the criteria of Article 116.

It means that the restriction of rights, fixed in Article 106 of the Satversme shall meet the following requirements:

a) it shall be determined by law;
b) it shall comply with the legitimate aim, which the State is trying to reach by determining the above restriction;
c) it shall comply with the principle of proportionality.

**8.** The impugned norm has been determined by the law, passed and published under adequate procedure. Thus there is no doubt that the restriction of fundamental rights has been determined by law.

**9.** The State has the duty of ensuring adequate activities of its institutions, as well as determining such regulation, which guarantees implementation of State power in compliance with public interests. One of the ways how to reach it is determining qualification and impartiality requirements to persons, who have been entrusted to realize functions significant to the State or society.

These restrictions have a legitimate aim and in its wider sense it concerns both – the democratic structure of the State and public safety. To reach this aim stricter requirements are advanced in normative acts for applicants to certain appointments, a specific procedure for appointment is determined and cases of removal or dismissing of the official are substantiated. For example, one of the requirements to a sworn advocate is flawless reputation. Besides in Article 15, Item 4 of the "Law on Advokatūra" establishes that a person, who has been convicted, accused or suspected may not become sworn advocate. A similar restriction is determined for applicants to the post of a judge, a prosecutor or a sworn bailiff. It forbids persons, who are suspected or accused in a criminal case to stand for the above posts.

Restrictions to appointment are determined also to the administrators of insolvency process, inter alia those, which are established in the impugned norm. Such restrictions **have a legitimate aim – legal, effective and uninterrupted course of the insolvency process.**

**10.** To assess if the impugned norm reaches the above aim, it shall be established whether the measures, chosen by the legislator are adequate and directed to provide legal, effective and uninterrupted course of the insolvency process.

**10.1.** The legislator has determined only some groups of criminal offence to which the restriction included in the impugned norm refers. The above offences are mainly those, which may prejudice the professional activities of the administrator or his/her reputation. Criminal offences against transport safety, person's health, nature environment etc. are not included in the above groups of offence.

**10.2.** Restrictions to professions may be stricter than in other sectors to persons, who perform, functions, significant to the State (like judges, procurators, lawyers, sworn bailiffs etc.). It concerns also the criteria, which are connected with the personality of the applicant.

When determining such restrictions the legislator has tried to achieve that only applicants with flawless reputation are nominated for the post of an administrator, the performer of which shall guarantee the efficiency of the insolvency process. The status of a person in criminal process may influence both – the reputation of the applicant to the post of an administrator and delay the course of the insolvency process.

**Thus, the measures, chosen by the State, are appropriate for reaching the legitimate aim.**

**11.** Besides, one shall assess whether the legitimate aim, established by the legislator when prohibiting to appoint a person an administrator if he/she is a defendant, suspected or accused, may not be achieved by measures, restricting the rights of a person to a lesser degree.

During the course of the insolvency process removal of an administrator for a period of time and appointment of another administrator is not envisaged. If such a possibility were anticipated then – in place of the removed administrator - another administrator – substitute would have to be looked for. That in its turn may introduce uncertainty in the course of the insolvency process. The Saeima reasonably points out that such a temporary situation is inadmissible, as it would not advance a legal, effective and uninterrupted course of insolvency process.

**Thus it is not possible to find a more considerate measure in the above case.**

**12.** It follows from the materials in the matter that the impugned norm was applied to the submitter by removing him from the duties of the administrator of several insolvency processes. The Law ”On the Insolvency of Undertakings and Companies” in the wording, which was in effect till June 15, 2005 did not *expressis verbis* anticipate the possibility of removing a person from the duties of an administrator, if it had obtained the status of accused during the period of carrying out the duties but not at the moment of his/her appointment.

The decision regarding resignation or dismissal of an administrator is regulated by Section 362 of the Civil Procedure Law. In accordance with it courts assess the actual circumstances of every respective case and take decisions on the removal of the administrator. Case law regarding this issue is different (*see pp. 16-23 of the materials in the matter).*

Article 16 of the Constitutional Court Law determines authority of the Constitutional Court. After receiving the constitutional claim the Constitutional Court reviews cases regarding compliance of legal norms with norms of higher legal force.

Thus the Constitutional Court is not authorized to assess interpretation of the impugned norm by the court of general jurisdiction.

## The operative part

On the basis of Articles 30-32 of the Constitutional Court Law the Constitutional Court

**hereby rules:**

to declare the words ”defendant, accused or suspect”, incorporated in the norm of Section 14 ( Item 4 of the first Part) of the Law ”On the Insolvency of Undertakings and Companies” (in the wording which was in effect till June 15, 2005) as conformable with Articles 92 and 106 of the Republic of Latvia Satversme.

**The Judgment is final and allowing of no appeal.**
**The Judgment takes force as of the day of its publishing.**

The Chairman of the Court session A.Endziņš