



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, February 15, 2005

JUDGMENT in the name of the Republic of Latvia in case No. 2004 – 19 – 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 on the basis of the constitutional claim by Juris Āzers under Article 85 of the Republic of Latvia Satversme (Constitution) as well as Articles 16 (Item 1), 17 (Item 11 of the first Part) and 28¹ of the Constitutional Court Law in written proceedings at January 18, 2005 Court session reviewed the case

”On the Compliance of Section 21, Paragraph 3 of the Civil Procedure Law with Articles 1 and 92 of the Republic of Latvia Satversme”.

The establishing part

1. Section 21, Paragraph 3 of the Civil Procedure Law (hereinafter – the impugned norm) determines: ”in a matter adjudicated by a judge sitting alone, the removal application shall be adjudged by the judge himself/herself”.

In accordance with Section 19 (the fourth Paragraph) a participant in the matter may apply for removal of a judge if the judge has not recused himself/herself, stating the reasons for the recusal. The obligation of the recusal is established in Paragraphs two and three of this Section, in its turn the first Paragraph enumerates the cases when the judge shall recuse himself/herself, if there are concrete and not connected with the individual attitude of a judge circumstances, but in accordance with Paragraph 4 a judge does not have the right to participate in the adjudicating of a matter if he/she ” has a direct or indirect personal interest in the outcome of the matter or if there are other circumstances as create well-founded doubt as to his or her objectivity”.

2. The applicant of the constitutional claim (hereinafter- the submitter) Juris Āzers requests to declare the impugned norm as unconformable with Articles 1 and 92 (the first sentence) of the Republic of Latvia Satversme (hereinafter - the Satversme). The submitter requests to declare the impugned norm invalid as of June 2, 2004.

The submitter is the defending party in a civil matter, which is being adjudicated by the judge sitting alone. During the process of adjudication of the matter the defendant had doubt about the objectivity of the judge and on June 2, 2004 he applied for removal of the judge. The judge did not recuse herself on the basis of the impugned norm.

- 2.1. The submitter holds that in such a way his right to a fair court, fixed in Article 92 of the Satversme, has been violated. From the constitutional claim indirectly follows that to the viewpoint of the submitter the right to apply for removal of the judge is included in the right, protected by Article 92 of the Satversme. To his mind the mechanism of realization of this right – namely the impugned norm - makes it ineffective. "One may doubt whether the judge, even if he/she is not corrupt, but just for this or that reason dislikes one of the parties, psychologically will be able to publicly acknowledge his/her partiality and remove himself/herself with a formal decision".

Envisaging the potential objections to the viewpoint, expressed in the constitutional claim, the submitter rejects the argument that the possibility of appeal is a sufficiently good measure for curing the defects of the proceedings. First of all, appealing is possible only after the judgment of the court of the first instance has been reached, therefore a participant in the matter, who – possibly because of partiality of the court is considered as the party, which has lost the matter. Secondly, it follows from the argument that "it is not mandatory to observe the principle of impartiality in the court of the first instance, because the defects of the court of the first instance [...] may possibly be cured by a higher instance. The submitter points out that Article 92 of the Satversme guarantees the right to a fair court in all its instances, including the court of the first instance. Thirdly, it may happen that because of the lack of money persons will not be able to address the court of the appellate instance in order to set right the violation conceded by the court of the first instance.

- 2.2. The submitter is laconic when explaining that the impugned norm violates the rights following from Article 1 of the Satversme: "Article 92 is closely connected with the principle of democracy, fixed in Article 1 of the Satversme and the principle of justice, following from it".

3. The institution, which has passed the impugned norm – the Saeima – in its written reply disagrees that the norm restricts the fundamental rights of the submitter and requests to declare the claim ungrounded and reject it.

The Saeima stresses that in the first Paragraph of Section 19 of the Civil Procedure Law as well as in Item 4 the existence of the above circumstances shall be assessed by the judge objectively. The Saeima points out that "the profession of a judge, qualification, necessary for taking up the duties of office, and the guaranteed independence ensures that a judge may objectively assess whether there are any circumstances, which could create doubt about his/her impartiality".

The Saeima also reminds in the written reply that "in case if because of probable partiality of a judge an erroneous judgment has been reached", it may be appealed against.

To the viewpoint of the Saeima the removal application shall not be adjudged by another judge. First of all, this judge would need some time to assess the application for removal of the judge, and thus adjudication of the matter would be delayed. Secondly, it would be very difficult or even impossible for another judge to establish partiality in regard to one of the participants of the matter on the basis of the participant himself/herself. Thirdly, the Saeima holds that the principle of independence does not allow such a solution, because if "another judge, when reviewing the removal shall start adjudicating the matter, assess the circumstances and evidence in the matter and take decisions on them then it would not be the decision of the first judge but the decision of another judge". Besides, the Saeima concludes that in such a case the principle of continuity of the court will be violated.

4. The Constitutional Court asked the Chairman of the Supreme Court Andris Guļāns, the State Human Rights Bureau (hererinafter – SHRB), the reader of the Latvian University Faculty of Law – Daina Ose, the President of the Latvian Association of Judges Ivars Bičkovičs, as well as the professor of the Latvian University Faculty of Pedagogics and Psychology PhD Sandra Sebre and the associate professor Dr.psych. Viesturs Reņģe to express their viewpoints on the matter.

- 4.1. To the viewpoint of the Chairman of the Supreme Court facts, which may create a well-founded doubt about the objectivity of a judge may be established, therefore the judge "to whom the law has given the rights and made responsible for solving civil and often very complicated disputes" is able to adequately apply Section 19 (Item 4 of the first Paragraph) to himself/herself. Nobody, with an exception of the judge himself/herself can know better whether the application

for removal is well-founded. The status and qualification requirements allow relying on his/her ability to adjudicate the applications for the removal. Besides, a judge is able to assess his/her objectivity regardless of the fact whether it is done on his/her initiative or when assessing the application for the removal. A.Guļāns adds that there is no sense in arguing about the partiality of the judge not knowing what judgment will be announced and "thus only the possibility of submitting an appeal against the court judgment protects the participants in the matter against an ungrounded refusal to accept the removal".

- 4.2. I. Bičkovičs points out that "from the status of the profession of a judge and the qualification requirements [...] follows the possibility of relying on the skill of the judge and his/her ability to establish the circumstances, enumerated in Section 19 (the first Paragraph) of the Civil Procedure Law and act in accordance with the requirements of the law". Besides, the above ability does not depend on the fact whether the judge assesses the right to participate in the adjudication of the matter on his/her own initiative or after receiving the application for removal of the judge. I. Bičkovičs holds that the possibility to submit an appeal claim protects the participants in the matter well enough from the consequences of ungrounded non-acceptance of the application for removal. To his mind the decision on non-acceptance of the application on removal shall not be appealed against, as it allows the participant in the matter to delay the court procedure.
- 4.3. SHRB agrees with the argument, included in the Saeima written reply, that from the status of the profession of a judge and qualification requirements follows the possibility to rely on his/her ability to apply to himself/herself Section 19 (the second Paragraph) of the Civil Procedure Law as well as – after receiving the application for removal – Item 4 of the first paragraph of Section 19. SHRB indirectly points out that the possibility of submitting an appeal claim protects the participants in the matter from ungrounded refusal of removal.
- 4.4. D.Ose holds that the judge, when assessing the existence of the circumstances, enumerated in Section 19 (Item 4 of the first Paragraph), may concede the "influence of the subjective factor", because Section 97 (the first Paragraph) of the Civil Procedure Law, in conformity with which the court assesses the evidence in accordance with its own convictions, envisages it. The issue on whether application for removal influences the objectivity of a judge is an issue of psychological nature and the answer to it depends on the personality of the judge.

However, D.Ose acknowledges that the Civil Procedure Law does not have a consequent attitude as regards taking the decision on removal. The impugned norm envisages that the judge himself/herself shall take the decision on his/her removal application. However, Section 21 (Item 1 of the fourth Paragraph) establishes that in a matter being adjudicated collegially, the removal application in regard to one judge shall be adjudged by the rest of the court.

Besides, D.Ose reminds that the judges adjudge removal applications themselves also at the civil proceedings of our neighboring states. To her mind, one may conclude that the qualification requirements for the profession of the judge are sufficient enough and the judge is able to objectively apply Section 19 (Item 4 of the first Paragraph).

The possibility to object against an ungrounded refusal to accept removal by submitting an appellation claim to her mind guarantees a quick process of the adjudication and is best of all linked with the principle of procedural economy, as such a procedure gives the possibility for the participant in the matter of ascertaining about the objectivity of the judge during the process of the adjudication of the matter.

- 4.5. *PhD S.Sebré and Dr.psych. V.Reņģe*, to whose viewpoint agrees also Associate professor *PhD Ivars Austers*, point out that the results of researches confirm that people are inclined to overestimate their cultural virtues, which are positively evaluated. In case of the professional role of a judge it is socially more preferable to have the ability of precisely assessing his/her own interest in the outcome of the matter and establishing circumstances, which might create doubt about objectivity. Therefore the authors of the written reply hold that "judges will have the tendency not to assess the potential degree of interest. This tendency is not intentionally purposeful".

The viewpoint has been expressed in the reply to the Constitutional Court that in case of removal application the above tendency increases. After receiving removal application the judge is motivated to look for, remember and take into consideration the information, which speaks in favor of professional competence and standards. Namely, from all the accessible information and facts special attention shall be paid to those, which better conform to the aim of assessment – i.e. to prove his/her impartiality.

5. After preparation of the matter for the adjudication the submitter, when getting acquainted with the materials in the matter, expresses doubt about the argument on presuming a groundless refusal of removal as

substantiation for appealation, as in this instance the matter is also adjudicated on its merit. Thus, to his mind, there is no efficient use of expressing objections in the appealation claim against partiality of the court instance.

The submitter also maintains that the principle of procedural economy is subordinated to the principle of a fair court and sparing time is not a legitimate aim of restricting human rights. Besides, statistics on the removal applications, their adjudication and the further proceedings in the particular matters shall be analyzed to correctly assess the importance of the principle.

The submitter does not agree with the viewpoint that the requirements for the profession of a judge ensure his abilities to adequately apply Section 19 (Item 4 of the first Paragraph) of the Civil Procedure Law in regard for himself. The submitter holds: "The fact that the law determines something does not mean that it is implemented in life". To his viewpoint, the argument, if formulated a little bit differently, shall read like this: "A judge is able to determine his/her own objectivity, because the law determines that he shall be a Latvian citizen, honest and independent."

The concluding part

6. It follows from the norms of the Civil Procedure Law on removal or recusal of a judge that the aim of this legal institute is to secure court objectivity.
 - 6.1. The first sentence of Article 92 of the Satversme establishes that "everyone has the right to defend their rights and lawful interests in a fair court". The concept of "a fair court" is not complete without the guarantees of court objectivity, therefore the Constitutional Court has repeatedly declared it as one of the elements of Article 92 of the Satversme (*see: e.g. March 5, 2002 Judgment in case No. 2001-10-01, Item 2 of the concluding part; June 20, 2002 Judgment in case No. 2001-17-0106, Item 2 of the concluding part; and October 6, 2003 judgment in cases No. 2003-08-01, Item 5 of the concluding part*).
 - 6.2. Besides, in accordance with Article 89 of the Satversme "the State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia". It can be seen from this Article that the aim of the legislator has been to reach mutual harmony between the norms included in the Satversme and the international norms of human

rights (*see; e.g. June 27, 2003 Judgment in case No. 2003-04-01, Item 2 of the concluding part and January 17, 2005 Judgment in case No.2004-10-01, Item 7.1.*) Therefore the contents of the human rights norms, incorporated in the Satversme shall be interpreted as read together with the norms included in international human rights documents. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) determines: ” In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal, established by law”. In its turn Article 14 of the International Covenant on Civil and Political rights establishes:” in the determination of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. The Universal Declaration of Human Rights mentions the right to an impartial court in Article 10.

6.3. Therefore there is no doubt that the rights to a fair court, guaranteed in Article 92 of the Satversme, include the right to impartial court.

7. The submitter holds that the impugned norm violates the right to an impartial court, in their turn - the Saeima and the persons, who have explained their viewpoint in the matter, maintain that the possibility to submit an appeal claim protects the above right. The Constitutional Court also holds that this is an essential argument, which shall be taken into consideration, when assessing the compliance of the impugned norm with Article 92 of the Satversme. In difference from the other arguments, expressed on the matter, it is connected with a principally important civil procedure approach - in this case it is procedural economy. The written reply by the Saeima does not point out whether the possibility to submit appeal claim testifies that the fundamental rights of the submitter are not restricted or if it may be regarded as justification of the restriction. Therefore this argument shall be assessed by clarifying whether the precondition, established in the first Part of Article 19² of the Constitutional Court Law, namely, violation of the fundamental rights of a person exists. Only in case, if the above violation exists, its justifiability shall be assessed.

7.1. The impugned norm determines the procedure under which on the initiative of the participants in the matter is being verified whether any of the circumstances, which forbid the particular judge to adjudge the matter, exists. The submitter has also acknowledged the procedural essence of this norm, by pointing out in the claim that it envisages the ”procedure of realization” of Section 19 (the fourth Paragraph) of the Civil Procedure Law. This procedure of realization

shall be assessed only in case if the institute of recusal were a mandatory requirement following from Article 92 of the Satversme.

- 7.2. The institute of recusal exists also in other states. It is one of the means to ensure impartiality of the court. When getting acquainted with the normative acts, regulating civil procedures of several states, it can be seen that any of them, first of all determines that the judge shall have the obligation to recuse himself/herself from the adjudication of the matter, if a well-grounded doubt on his impartiality may arise and, secondly, the participants in case have the right of applying for the removal of a judge. In its turn the procedure of adjudicating removal is different. For example, in France, Canada and Germany the law does not allow the judge to recuse himself/herself after receiving an application for the removal. It is usually done by the higher court official or the higher instance court, the decisions of which allow of no appeal. Another solution has been chosen for example in Bulgaria, Estonia, Finland and Sweden: in case of a judge taking decisions sitting alone, then adjudication of the recusal depends on him/her. In Sweden it is possible to appeal against the decision on non-acceptance of the recusal. Thus regulation of one and the same legal institute is manifold.
- 7.3. Comparison of the above jurisdiction allows concluding that the institute of the recusal is subordinated to the duty of a judge to remove himself/herself from the adjudication of a matter, besides, the concept of this legal institute is not logically connected with a particular procedure of its implementation. It is possible to secure court impartiality in several ways. Moreover: it is possible to do it without using the institute of the recusal. The Saeima and the persons, heard during the period of preparation of the matter for review, reasonably point out that even non-acceptance of the application for recusal may serve as the basis for appellations and thus the right of the person to impartial court is protected. This viewpoint is substantiated by an essential on principle reason: the procedure of the adjudication of removal, established in the impugned norms serves for procedural economy.

The Saeima and the persons, heard during the period of preparation of the matter for review, have expressed concern that – if an appeal under neighboring claim against the decision on non-acceptance of the recusal were permitted, the work-load of courts would increase. This concern is well- grounded. In Article 3 (Item "d") of February 7, 1995 Recommendation Rec(1995)5 on Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases (<http://cm.coe.int/ta/rec/1995/95r5.htm>) the states are requested to

consider the possibility of "postponing the right to appeal in certain interlocutory matters to the main appeal in the substantive case". Appellation against the decision by a neighboring claim is not the only possible regulation; however, implementation of any other solution will need use of much more resources of the court system than under the present procedure.

D.Ose holds that the model of regulation of the recusal institute is not compatible with the viewpoint on impossibility of entrusting the decision on the recusal to another judge. She points out that the Civil Procedure Law is not consistent as concerns the issue on the adjudication of the recusal, as Section 21 (Item 1 of the fourth Paragraph) determines: if the application for removal is in regard to one judge, it shall be adjudged by the rest of the court; but Item 2 determines: if the removal has been applied for in regard to more than one judge, it shall be adjudged by the same court in full panel. In the proceedings of appellation another body of the court assesses whether the judge should have removed himself/herself or accepted the recusal. However, the Constitutional Court holds that discrepancies, with which one comes across in this case, are more apparent than real. The court of appellate instance, when assessing the legitimacy of the body of the first instance court in accordance with Section 19 of the Civil Procedure Law has a different task if compared to the adjudication of the recusal, as then there is the judgment adjudged by the first instance, which helps to follow the course of thought of the judge and trace the potential partiality. In its turn, in case when the rest of the court adjudicates the application for removal in regard to one judge or the court in full panel adjudicates the application in regard to more judges or the court in full panel, it shall be taken into consideration that the above decisions are taken by the court, regardless of the number of judges. In this case the regulation does not differ from the procedure, envisaged in the impugned norm.

7.4. The submitter asserts that the principle of procedural economy is "subordinated to the principle of justice". However, the Constitutional Court has reiterated that procedural economy is an element of the contents of Satversme Article 92 (*see: e.g. March 5, 2002 Judgment in case No. 2001-10-01, Item 5 of the concluding part and October 11, 2004 Judgment in case No. 2004-06-01, Item 14*); therefore the statement of the submitter is erroneous. However, deciding from the context of the statement one may conclude that it is more directed to the collision between the principle of procedural economy and the principle of impartiality of the court. However, even then the viewpoint of the submitter on the mutual hierarchy of this principle is ungrounded. Principles differ from other legal sources just because inter alia one cannot arrange them in the succession of hierarchy. If the principle of the court impartiality would be declared as a superior principle of procedural economy in

all cases, then one should have to conclude that every increase of the guarantee of impartiality justifies any decrease of procedural economy, even if the first is insignificant but the second – important. Therefore the legal science acknowledges that – in cases of collision among the legal principles they shall be assessed by taking into consideration the particular situation and circumstances (*see: e.g. Iljanova D. Collision of Legal Norms and Principles, The Law and the Rights, 2000, Vol.2, No. 8(12), p. 251; Alexy, R. A Theory of Constitutional Rights, Oxford University Press, 2002, pp. 96-100*). Even assuming that the regulation on the adjudication of the recusal, which differs from the impugned norm, would advance observation of the principle of court impartiality, one has to admit that the gain shall not be at disproportionate variance with the interests of procedural economy.

- 7.5. After getting acquainted with the materials in case, the submitter points out that - when assessing the impugned norm - the Constitutional Court should take into consideration statistics on the number of applications for the recusal submitted to the Latvian courts, their discharge or non-discharge as well as the number of particular matters, which are appealed at other instances. However, the Constitutional Court holds that it is impossible to anticipate how the "statistically average" proceedings will develop if the applications for the removal of judges, who adjudicate matters sitting alone, would be decided under a different procedure. Therefore the data of the existing situation cannot be compared even with forecast. **Thus, there is no reason to question the choice of the legislator to determine just the above procedure for adjudicating the applications for the recusal.**

In the case law of the Constitutional Court of Germany it is acknowledged that – if one lacks the knowledge on the rightness of the potential means of activity and "when choosing between several potentially suitable routes to reaching a legal goal the legislature enjoys a prerogative of assessment and decision" [*BVerfGE 90, 145 (182)*]. The legislator has extensive freedom of action in determining the regulation of the civil procedure, if the protection of fundamental rights is ensured (*January 17, 2005 Judgment in case No.2004-10-01, Item 9.1*). The Constitutional Court does not deny that another procedure for the adjudication of applications for the recusal is possible, however, in accordance with Article 19² (the first Part) of the Constitutional Court Law, its duty is to assess the compliance of the impugned norm with the fundamental rights, determined in the Satversme but not to substitute the freedom of action of the legislator with its viewpoint on a more rational solution.

8. When assessing whether under the existing procedure the right of a person to a fair court is being protected, the Constitutional Court refers to the above statement on the harmony of Latvian and international interpretation of the norms of human rights (see Item 6.2. of this Judgment) and points out that the practice of application of these norms may be used for ascertaining the contents of the fundamental rights, established in the Satversme. Therefore one should take into consideration that in accordance with the case law of the European Court of Human Rights (henceforth – ECHR) the defects, resulting from the decisions of the court of the first instance, may be cured by the appellate instance (*see: Adolf v. Austria [1982] ECHR 2, paras. 38-41 and Edwards v. the United Kingdom [1992] ECHR 77, para.39; De Cubber v. Belgium [1984] ECHR 14, para.33*). The issue on the violation of the right to a fair court ”shall be assessed by considering the proceedings as a whole including the decision of the appellate court” and taking into account its role in the proceedings (*Edwards v. the United Kingdom, para.34; see also e.g. Helmer v. Sweden [1991]ECHR 44, para.31; Ektabani v. Sweden [1988] ECHR 6, para. 27*). In accordance with the Civil Procedure Law the appellate instance adjudicates matters on the merits, therefore it may cure any of the defects done by the court of the first instance.

The Constitutional Court disagrees with the statement of the submitter that in the above case ”procedural fairness at the first instance does not matter”. The Civil Procedure Law determines that a judge shall recuse himself/herself from the adjudication of the matter if any of the circumstances, mentioned in the first Paragraph of Section 19 exists. One has to agree that one of the guarantees for fair implementation of the above duty is the high level of requirements to persons, who have been appointed and confirmed to the office of a judge. The submitter is entitled to the right of protection against the consequences of non-implementation of the above duty, following from Article 92 of the Satversme; however, as several measures for ensurance of the court impartiality exist, he has no right to demand a concrete mechanism of protection. In this case the legislator is free to choose any of the adequate measures (*see: Alexy, pp.308-389*). Article 92 of the Satversme would protect the subjective right of the submitter to the existence of the institute of the recusal in case, if it were the only measure for ensuring court impartiality. In the same way the Satversme does not demand coexistence of several parallel instruments protecting the right to a fair court. Procedural rights are not end in themselves, they are needed just for reaching fair results (*see: Galligan, D.J. Due Process and Fair Procedures: A Study of Administrative Procedures, Clarendon Press, 1997, p. 415*). Undoubtedly, procedural rights have their own self-contained value, however, this conclusion only supplements the above, namely, that all the stages of proceedings shall be considered as a whole.

9. The submitter points out with good reason that introduction of neighbouring claim is not the only way to change the existing regulation. His viewpoint that in some cases the impugned norm is an ineffective mechanism of realization of the institute of recusal also seems to be correct; because – as is acknowledged by PhD S.Sebré, Dr.psych. V.Reņģe and PhD I.Austers – the judges may have a tendency, even though not deliberate and purposeful, of not assessing the potential degree of personal interest. However, the above experts of psychology point out that after the recusal claim has been applied, the judge is motivated to look for, remember and take into consideration the information, which is inclined to speak in favour of professional competence and standards, and to them belongs also the ability to objectively assess the existing or seeming personal interest in the outcome of the matter to be adjudicated; therefore this feature shall be regarded as one making the judge to be aware of the potential reasons for accepting the recusal. One may agree with the viewpoint of the submitter that curing of procedural defects on appeal has a less educative effect on the judicial system and the society as a whole (*see: also e.g. Galligan, pp. 416-417*). However, every one of the remarks characterizes the viewpoint of the submitter on a more rational regulation of the civil procedure and does not substantiate why Article 92 of the Satversme directly protects the right of applying for the recusal.

10. The submitter holds that the impugned norm is unconformable also to Article 1 of the Satversme. He has not submitted arguments to substantiate his viewpoint, but has just pointed out that "Article 92 relates to the principle of democracy, fixed in Article 1 of the Satversme and the principle of justice, following from it ". Also when expressing his viewpoint on the materials in the matter, the submitter has not added the legal justification.

Thus, neither the constitutional claim nor the viewpoint, submitted to the Constitutional Court after getting acquainted with the case material, gives sufficient legal justification for assessing of the compliance of the impugned norm with Article 1 of the Satversme.

The substantive part

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

hereby rules:

to declare the third Paragraph of Section 21 of the Civil Procedure Law as conformable to Article 92 of the Republic of Latvia Satversme.

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of its publishing.

The Chairman of the Court session

Aivars Endziņš