



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Riga, January 26, 2005

## JUDGMENT in the name of the Republic of Latvia

in case No. 2004-17-01

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

on the basis of the constitutional claim by Inga Deržaveca

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 28<sup>1</sup>

in written proceedings at December 8, 2004 Court session reviewed the case

**”On the Compliance of the Norm ”Use of Narcotic and Psychotropic Substances without a Physician’s Designation”, Included in the First Part of Section 253<sup>2</sup> of the Republic of Latvia Criminal Law with Article 96 of the Republic of Latvia Satversme””.**

### The establishing part

1. On October 17, 2002 the Criminal Law was supplemented with Section 253<sup>2</sup>, the first part of which envisages criminal liability for ”use of narcotic or psychotropic substances without a physician’s designation” (henceforth – the impugned norm).

On May 11, 1993 Latvia acceded to the following UNO Conventions to fight illicit dispensation and illegal use of narcotic and psychotropic substances:

- 1) March 30, 1961 Single Convention on Narcotic Drugs and Amendments, elaborated in accordance with 1972 Protocol on amendments to March 30, 1961 Single Convention on Narcotic Drugs;
- 2) February 21, 1971 Convention on Psychotropic Substances;
- 3) December 20, 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

2. **The applicant of the constitutional claim** Inga Deržaveca (henceforth – the submitter) requests the Republic of Latvia Constitutional Court (henceforth – the Constitutional Court) to assess the conformity of the impugned norm with Article 96 of the Republic of Latvia Satversme (henceforth – the Satversme) and declare it invalid.

2.1. On January 21, 2003 the submitter was inflicted an administrative penalty – 30 lati - in accordance with Article 46 of the Latvian Administrative Misdemeanor Code for using narcotic and psychotropic substances without a physician's designation. On January 29, 2003 repeated use of narcotic and psychotropic substances without a physician's designation was established and a criminal matter was initiated. On March 4, 2004 the court passed a judgment of guilty of a crime, established in the first part of Section 253<sup>2</sup> of the Criminal Law, and sentenced her with deprivation of liberty for six months.

2.2. The submitter holds that the fundamental right to inviolability of private life, incorporated in Article 96 of the Satversme, includes the right to use any of the intoxicating substances, which are accessible in the State. She acknowledges that in the interests of public morality the State experiences the right of regulating public use of intoxicating substances. Use of alcohol and tobacco is regulated by the law, in its turn in regard to the use of narcotic and psychotropic substances it has been replaced by total prohibition. The submitter holds that for public use of narcotic and psychotropic substances the same responsibility should be established as for the use of alcohol and tobacco.

The submitter stresses that it is inadmissible to provide for criminal liability if narcotic and psychotropic substances are used in one's house or apartment. The submitter substantiates the above conclusion by the statement of Harlan – the judge of the USA Supreme Court, namely, that man's home is a place where he expects privacy [Katz v. United States, 389 U.S. 347 (1967)].

2.3. It is pointed out in the claim that the impugned norm is directed to addicts- users of narcotic and psychotropic substances. The submitter holds that drug addiction is an illness and use of narcotic and psychotropic substances is the expression of illness and not a criminal activity. Thus to her mind one must not be punished. The submitter refers to the USA Supreme Court Verdict in case "Robinson v. California" [370 U.S. 660 (1962)], by which the legal norm of the California State, which makes it a criminal offense for a person to be

addicted to the use of narcotics, was declared as unconstitutional. The USA Supreme Court concluded that in accordance with the above norm a person was passed a verdict of guilty in a crime and was punished just because of his illness and that shall be regarded as a cruel punishment.

The submitter refers also to the third part of Article 222<sup>8</sup> of the Latvian Criminal Code, which envisages release of a person from criminal liability if it has of his/her own accord agreed to turn to the medical institution to be treated for narcotic and psychotropic substance addiction. Lack of the above regulation in the Criminal Law to her mind makes the impugned norm similar to the legal norm of the California state.

3. The institution, which has passed the impugned norm – **the Republic of Latvia Saeima** (henceforth – the Saeima) does not agree with the arguments of the submitter, stated in the constitutional claim and requests the Constitutional Court to declare the claim as ungrounded and raise an objection to it.

3.1. The Saeima points out that the impugned norm has been incorporated in the Criminal Law on the suggestion of the State President in order to determine differentiated liability and punishment to the users of narcotic and psychotropic substances and for spread of the substances.

It is mentioned in the written reply that even though the Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances ”does not clearly state that criminal liability shall be provided also for illegal use of narcotic and psychotropic substances, this activity is unmistakably closely and inseparably connected with the fact of acquisition and storage of narcotic and psychotropic substances”. Latvia is not the only state, which establishes liability for use of narcotic and psychotropic substances and the normative acts of Norway, Sweden and Finland incorporate norms, which determine imprisonment for it.

3.2. The Saeima holds that the fundamental right to inviolability of their private life, determined in Article 96 of the Satversme, is not absolute and Article 116 of the Satversme allows restricting the right. The restriction of human rights, established in the impugned norm is justifying, because:

- 1) it has been determined by law;
- 2) it has a legitimate aim – to protect public security, welfare and morality;
- 3) it shall be considered as a social necessity, because illicit use of narcotic and psychotropic substances is hazardous for the mental and physical health of persons; it causes addiction; provokes violence and unlawful behavior of other forms. As the result the drug addict endangers himself and the persons around him, destroys family and creates very serious problems in public life.

4) it is proportionate, as criminal liability is envisaged only in those cases when narcotic and psychotropic substances without a physician's designation have been used repeatedly in the period of one year. Besides, the court has the right of applying alternative penalties. The norms on illicit use of narcotic and psychotropic substances, included in both – the Criminal Law and the Latvian Misdemeanor Code may be regarded as stimulating measures for the person to have a motivation to agree to medical treatment for narcotic and psychotropic substance addiction of free will. The Latvian Misdemeanor Code (the second Part of Section 46) envisages release of person from administrative liability, if he/she of his/her free will has turned to a medical institution for medical help. In its turn the Criminal Law (the fourth Part of Section 59) establishes that a court may release a person from serving a sentence if this person has agreed to medical treatment for narcotic and psychotropic substance addiction.

4. After getting acquainted with the materials in case the **representative of the submitter** Ārijs Pencis (hereinafter – the representative of the submitter) inter alia points out that in the written reply by the Saeima there is not included an extended substantiation of the fact that private use of narcotic and psychotropic substances endangers public safety, welfare and morality and in what a way.

The representative of the submitter concedes that the impugned norm could have been passed with the aim of protecting public safety and welfare; however, no-one has proved that such restrictions are necessary in a democratic society.

To the viewpoint of the representative of the submitter it would be necessary to differentiate private and public use of narcotics and psychotropic substances. He holds that narcotic and psychotropic substance addicts shall not be punished but medically treated, even under compulsion.

5. In accordance with the information furnished by **the Republic of Latvia Supreme Court** on the basis of the data by the Department of Management of Court Activities of the Court Administration in 2003 18 persons have been adjudged under the first Part of Section 253<sup>2</sup> of the Criminal Law; out of them 12 have been sentenced to deprivation of liberty and six – to a conditioned sentence. In 2003 the Senate of the Supreme Court received no cassation complaints from the persons, who have been sentenced under the above Section, but in 2004 the Criminal Department of the Senate has reviewed two cassation complaints. The defendants have made complaints against the procedural violations during the review of the matters.

6. **The Republic of Latvia Prosecutor General's Office** informs that in 2003 and nine months of 2004 in eight criminal matters on use of

narcotic and psychotropic substances without a physician's designation the procurators have taken the decision on termination of the criminal matter, in accordance with Section 5<sup>4</sup> of the Criminal Procedure Law conditionally releasing the person from criminal liability. These decisions have been taken in cases, when the person used light psychotropic substances and the particular persons were imposed the obligation to be medically treated for psychotropic substance addiction.

7. **The Republic of Latvia Department of the Places of Detention** points out that in 1992 - 1993 the treatment for narcotic addiction in places of detention was liquidated. Therefore the Department does not have legally substantiated data on the number of the imprisoned persons, who are narcotic and psychotropic substance addicts. There is no possibility to undergo medical treatment for narcotic and psychotropic substance addiction.
8. When answering to the questions of the Constitutional Court **the State Drug Addiction Treatment Agency** points out that use of narcotic and psychotropic substances without a physician's designation may cause dangerous after-effects to health and life of the person as well as create many public social problems. The State Drug Addiction Agency informs that medical treatment for narcotic and psychotropic substance addiction is free of charge. At the places of deprivation of liberty such treatment is not accessible at this moment; however, in the State Program on Narcotic Control and Restriction of Narcomania for 2004-2008 it is envisaged to realize the above possibility.
9. **Riga Narcomania Prophylaxis Centre** points out that the specific harm of use of narcotic and psychotropic substances without a physician's designation is connected with the powerful effect of the above substances, which creates negative after-effects for the health of the user; and these effects in their turn create social consequences. The society is compelled to financially support the addict :” Support may be expressed in two ways: illegally – the addict robs the fellow-citizens so as to get money to pay for the substances; or – in case of unemployment – lives on social aid”. The society has also to pay the costly treatment expenses.

The Narcomania Prophylaxis Centre observes that interruption of illicit use of narcotic and psychotropic substances, connected with the placement of the person in the institution of deprivation of liberty does not worsen his/her condition and does not create any threat to the state of health. Quite to the contrary – it may just improve the state of health of the person.

## The concluding part

10. Article 96 of the Satversme determines that everyone has the right to inviolability of their private life. The right of an individual to private life is also protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention) and Article 17 of the International Covenant on Civil and Political Rights, which determines that no one shall be subjected to arbitrary or unlawful interference with his privacy. In accordance with the practice and legal doctrine of the European Court of Human Rights the right to private life includes the most different spectrum of the rights of an individual. It protects the physical and moral integrity, honor and reputation, use of person's name and identity, personal data of a person and concerns other aspects, connected with private life (*see: van Dijk P., van Hoof G.J.H. Theory and Practice of the European Convention on Human Rights. Third Edition. – the Hague, London, Boston: Kluwer Law International, 1998, p. 489*).

The right to private life means that the individual has the right to its private home, the right to live as he likes, in accordance with his nature and wish to develop and improve the personality, tolerating minimum interference of the state or other persons. The right includes the right of an individual to be different, retain and develop virtues and abilities, which distinguish him from other persons and individualizes him (*see: Loucaides L.G. Personality and Privacy under the European Convention on Human Rights // The British Yearbook of International Law 1990. – London: Clarendon Press, 1991, p. 175*).

The right to private life includes the right to one's body, also the right to do harm to one's health, even to commit suicide (*see: Nowak M.U.N. Covenant on Civil and Political rights. CCPR Commentary.- Kehl. Strasbourg. Arlington: N.P. Engel, Publisher, 1993, p. 297*). Even though use of tobacco, alcohol, narcotic and psychotropic substances also noticeably harms person's health, the choice to use or not to use the above substances is included in the contents of privacy of an individual.

**Thus, determination of criminal liability for use of narcotic and psychotropic substances without a physician's designation shall be regarded as a restriction of the right to inviolability of human life.**

11. The greatest part of fundamental rights, fixed in the Satversme, is not absolute and in certain circumstances the state may restrict them.

An individual, if he by his behavior does not violate the rights of other persons, may freely realize his right to private life. The state often restricts this right in cases, when the behavior of the individual is not

consonant with universally recognized norms of morality and other social norms or when the behavior is turned against the health of the person itself, for which the society feels responsible (*see: Nowak M., p. 297*).

Several restrictions of the right to inviolability of private life are declared as justifiable. In accordance with Article 116 of the Satversme, inter alia, the right to inviolability of private life 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, and public safety, welfare and morals. Article 8 (the second Part) of the Convention also determines that there shall be no interference by a public authority of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Thus the right to inviolability of private life may be restricted if the restriction has been determined by law, complies with the legitimate aim and is needed in a democratic society.**

12. The impugned norm, which establishes the restriction of fundamental rights fixed in Article 96 of the Satversme, was included in the Criminal Law by October 17, 2002 Law "Amendments to the Criminal Law".

**Thus the restriction of the fundamental rights, included in the impugned norms, is determined by law.**

13. The scientific commentary on Section 253<sup>2</sup> of the Criminal Law stresses that use of narcotic and psychotropic substances without a physician's designation if commission thereof is repeated within a period of one year is a criminal offense, which "endangers public safety in the sector of circulation of narcotic and psychotropic substances and health of the population" (*Krastiņš U., Liholaja V., Niedre A. Scientific and Practical Commentary on the Criminal Law. Vol. 3. The Specific part. – Riga: AFS, 2003, p.259*).

In democratic states the contents of the concept "public safety" is oriented to the protection of public interests. The Constitutional Court agrees to the viewpoint of the Saeima that far-reaching consequences of illicit distribution of narcotic and psychotropic substances will negatively influence not only the particular user of the substances but also the economic, political and cultural foundations of the society; and holds that the main legitimate aim for the restriction of the fundamental right to be assessed is public safety.

**Thus, the impugned norm has a legitimate aim.**

14. To establish whether the restriction of fundamental rights is needed in a democratic society, it shall be assessed if the restriction is socially necessary, if it complies with the necessity and is proportionate to it.

14.1. In accordance with Section 5 of the Medical Treatment Law everyone has a duty to take care of and everyone is responsible for his or her own health, the health of the nation, and the health of his or her relatives and dependants. Use of narcotic and psychotropic substances is at variance with this duty. The State Drug Addiction Treatment Agency points out that use of narcotic and psychotropic substances without medical designation, ignoring doses and terms recommended by the doctors, causes the possibility of excessive use of the substances, but that may lead to addiction, which is a chronic disease and develops much sooner than alcohol addiction. Narcotic and psychotropic substance addiction is a risk factor for falling ill with AIDS, C and B virus hepatitis; and that very often leads to overdosing of narcotic and psychotropic substances, which may end lethally (*see Vol. 2 of the matter, p. 132*).

In addition to the already mentioned dangerous after-effects on the health and life of the individual, narcotic and psychotropic substances may also seriously affect behavior of a person, brain operation and the general state of health. Even use of marihuana, though it is regarded to be a "light" narcotic, may cause serious and irreversible brain pathologies. According to the observation by Oxford University physiology professor Greenfield use of marihuana does not cause just euphoria, it often creates also agitation, panic and paranoia (*see: Greefield S. Marihuana and the Brain// Diena, January 2, 2002, p.2*).

The Constitutional Court does not agree with the viewpoint of the submitter and also that expressed in the science of criminal law (*see: e.g. Ashworth A. Principles of Criminal Law. Fourth edition.- Oxford: Oxford University press, 2003, pp. 53-54*) that narcomania concerns only the user of narcotic and psychotropic substances and therefore determination of criminal liability is inadmissible. As a matter of fact narcomania concerns the whole society. The addict causes especially hard suffering to his/her relatives.

Consequences of use of narcotic and psychotropic substances are much more dangerous than the consequences of use of alcohol and tobacco. Much greater sums of money than for purchase of alcohol and tobacco are necessary to purchase narcotic and psychotropic substances. Many drug addicts are not able to work. Trying to get cash for buying narcotic and psychotropic substances the above persons often commit crimes. In accordance with the data of the Republic of Latvia Ministry for the Interior the users of narcotic and psychotropic substances commit larceny and robbery (*see Vol.4 of the matter, p.116*). Therefore the Constitutional Court, not denying the dangerousness of use of other intoxication substances, holds that the viewpoint of the submitter,

namely, that use of narcotic and psychotropic substances shall be regulated by the same norms, which regulate use of tobacco and alcohol, is groundless.

The summary of 2004-2008 Draft Program for Controlling of Narcotics and Limitation of Narcomania stresses that the greatest part of victims of narcomania are young people and this fact will seriously influence the public state of health of Latvia and the further social and economic development of the State. Medical treatment of narcotic and psychotropic substance addicts is hard, long and requests great expenses (*see: Vol.1 of the matter, p.212*). Taking into consideration the spread of narcomania in the State and its special dangerousness, the legislator has the right to determine distinctive restrictions for the circulation of narcotic and psychotropic substances.

**Thus the restriction of fundamental rights to be assessed is of social necessity, as the health of an individual is inherent not only of personal but also of social value.**

14.2. In accordance with Section 35 (the second Part) of Criminal Law the objective of sentence is not only to punish the offender but also to achieve that the convicted person or other persons comply with the law and refrain from committing criminal offences. General prevention is an important aspect of the impugned norm. One may agree with the viewpoint of the representative of the submitter that the threat of criminal penalty will not deter those persons, who are addicts, from using narcotic and psychotropic substances. However, the threat might motivate individuals, who have not yet become narcotic and psychotropic substance addicts, not to start using the substances or give up using them.

The legislator has supplemented the Criminal Law with the impugned norm to separate the liability of the users of narcotic and psychotropic substances from that of the persons spreading the above substances. Earlier all persons, also the users of narcotic and psychotropic substances, who had no intention to realize the substances were inflicted a penalty in accordance with the first Part of Section 253 – for Unauthorized Manufacture, Acquisition, Storage, Transportation and Conveyance of Narcotic and Psychotropic Substances. For the above offense deprivation of liberty for a term from two to seven years was determined. Supplementing the Criminal Law with Section 253<sup>2</sup>, sanctions for activities with narcotic and psychotropic substances in small amounts without an intention to realize them were noticeably reduced.

The viewpoint of the submitter that determination of criminal liability for use of narcotic and psychotropic substances means turning against people, who are ill is ungrounded because of several reasons.

First of all, the individual is administratively and after that criminally liable not because he/she is an addict but for use of narcotic and psychotropic substances,

that is, in cases when expertise confirms existence of the substances in his/her organism. Reference of the submitter to the Judgment in the matter "*Robinson v. California*" is not well-grounded as the impugned norm to be assessed by the Constitutional Court and the practice of its application differs from the legal norm assessed by the USA Supreme Court, which was declared as unconstitutional. The Court of the State of California explained to the jury that in accordance with the law the accused may be found guilty even if they do not believe evidence that he has used narcotics and proving only the fact that he is an addict.

Secondly, the viewpoint, expressed at the time of elaboration of the draft Law "Amendments to the Criminal Law" that use of narcotic and psychotropic substances is connected with acquisition and storage of the substances, for which criminal liability is determined in the same Section of the Criminal Law, shall also be taken into consideration. Therefore it would not be logical if for unauthorized acquisition or storage of narcotic and psychotropic substances criminal liability were determined but when an individual was "caught" while using them, or it was established that the substances had been used, no liability would be determined.

14.3. One of the most essential provisions for considering restriction of fundamental human rights justifying, is its proportionality to the social necessity because of which it has been determined. It means that one shall assess whether the public gain from passing of the impugned norm is greater than the harm done to the fundamental rights of an individual. The State has to observe and protect to maximum the right of an individual to inviolability of private life and interference is allowed only in strictly determined cases, when it is important for protecting public interests.

While assessing the proportionality of the restriction of fundamental rights the Constitutional Court established several circumstances.

First of all, criminal liability for use of narcotic and psychotropic substances without a physician's designation is envisaged only in case if it has been repeated within a period of one year. In accordance with Article 46 of the Latvian Misdemeanor Code for use of narcotic and psychotropic substances for the first time the person is administratively liable and is imposed a fine of 75 lati or an administrative arrest for 15 days and nights is applied to the person. If the individual has been administratively liable for use of narcotic and psychotropic substances, he has the possibility of evaluating his/her behavior and in future give up the use of the substances.

Secondly, even if it is established that within a period of one year the person has repeatedly used narcotic and psychotropic substances without a physician's designation, there are several feasibilities to release the person from criminal liability or serving a sentence. For example, as the offence, determined in the

impugned norm, is a criminal infringement, then a person may be conditionally released from criminal liability by a prosecutor, if, taking into account the nature of the offence and the harm caused, information characterizing the accused and other circumstances of the matter, there is acquired a conviction that the accused will not commit further criminal offences. In such a case the prosecutor – with an agreement of the person - may impose the obligation to undergo treatment for alcoholism, narcotic, psychotropic, toxic or other substance addiction. As the information furnished by the Republic of Latvia Procurator General's Office testifies, the prosecutors have repeatedly adopted the decision to terminate criminal cases on use of narcotic and psychotropic substances without a physician's designation (*see Vol. 4 of the matter, p. 115*).

In accordance with the fourth part of Section 59 of the Criminal Law, a court may release a person, who has committed a criminal violation on account of alcoholism, narcotics addiction or toxic substance addiction, from serving a sentence, if this person has agreed to medical treatment for alcoholism, narcotic addiction or toxic substance addiction, from serving a sentence. The sentence shall be served if the person has not commenced undergoing the medical treatment within the time specified by the court or, after this, has avoided undergoing the medical treatment.

Thirdly, the submitter and her representative hold that the persons, who are narcotic and psychotropic substance addicts, shall not be punished but be compulsory medically treated. However, the conclusions of specialists testify that it is not possible to reach positive results if the individual does not undergo treatment on his/her own free will and active involvement. Mandatory treatment is permissible only in regard to persons, who are under age. Contrary to the statement of the representative of the submitter such a treatment, in accordance with Section 49 (the third Part) of the Protection of the Rights of the Child Law and the Republic of Latvia Cabinet of Ministers December 16, 2003 Regulations No 726 "The Procedure under which mandatory medical treatment of children, who have mental or behavioral disturbances because they are dependent of alcoholic beverages, narcotic, psychotropic or other intoxicating substances shall be organized; and the procedure of ensurance of mandatory medical treatment to children at the educational institutions of social correction" is allocated in the State budget.

Fourthly, the court, when assessing the circumstances in the matter, may adjudge one of the three alternative sentences – deprivation of liberty for a term of two years, community service or a fine not exceeding fifty times the minimum monthly wage for use of narcotic and psychotropic substance without a physician's designation.

In accordance with the information, furnished on October 22, 2004 by the Department of the Republic of Latvia Places of Deprivation of Liberty "only two persons, who have been adjudged under the first part of Section 253<sup>2</sup> of the

Criminal Law are serving their sentences” (*see: Vol. 4 of this matter, p. 118*). It testifies that the sentence restricting the individual for a criminal violation most of all – deprivation of liberty – is applied only in rare cases.

**Thus the restriction of fundamental rights, determined in the impugned norm is proportionate and needed in a democratic society.**

### **The substantive part**

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

**hereby rules:**

**to declare the norm, incorporated in the first part of Section 253<sup>2</sup> of the Criminal Law, ”use of narcotic and psychotropic substances without a physician’s designation” as conformable with Article 96 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