THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, November 27, 2003

JUDGMENT
in the name of the Republic of Latvia

in case No. 2003 – 13 – 0106

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, justices Juris Jelāgins, Romāns Apsītis, Ilma Čepāne, Andrejs Lepse and Ilze Skultāne pursuant to Article 85 of the Republic of Latvia Satversme (Constitution), Articles 16 (Items 1 and 6), 17 (Item 5 of the first part) and 28^1 on the basis of the claim by the Republic of Latvia Prosecutor General, holding the proceedings in writing on October 28, 2003, at the Court session reviewed the case

"**On the Compliance of Section 57 (the first part), Section 136 (Items 2 and 3 of the third part) and Section 143 (Items 2 and 3 of the fourth part) of the Labour Law with Article 106 of the Republic of Latvia Satversme (Constitution), Articles 1, 2 and 4 of the June 28, 1930 Convention Concerning Forced Labour and Article 1 of the June 25, 1957 Convention Concerning the Abolition of Forced Labour".**

The establishing part

1. On June 20, 2001 the Saeima adopted the Labour Law, Section 57 (the first part) of which determines that " an employer has the right to assign an employee the performance of work not provided for by an employment contract for a period not exceeding one month within a period of one year in order to avert the consequences caused by *force majeure* , an unexpected event or other exceptional circumstances, which adversely affect or may affect the normal course of activities in the undertaking. In case of idle time, an employer has the right to assign an employee the performance of work not provided for by an employment contract for a period not exceeding two months within a period of one year". The third part of Section 136 of the Labour Law

establishes that ” an employer has the right to employ an employee on overtime without his or her written consent in the following exceptional cases: … 2)to prevent the consequences caused by *force majeure* , an unexpected event or other exceptional circumstances, which adversely affect or may affect the normal course of work activities in the undertaking; 3) for the completion of urgent, unexpected work within a specified period of time”. In its turn part four of Section 143 determines that ” individual employees with a written order by the employer may be engaged to work during the week’s day of rest, granting at the choice of the employee rest on another day of this week or paying compensation in conformity with the provisions of Section 68 of this law in the following cases: … 2) to prevent the consequences caused by *force majeure*, an unexpected event or other exceptional circumstances which adversely affect or may affect the usual course of activities in the undertaking; 3) for the completion of urgent, unforeseen work within a specified period of time” (henceforth – the challenged norms).

The Labour Law took effect on June 1, 2002.

Already on December 10, 1991 the Republic of Latvia Supreme Council adopted the Constitutional Law ”The Rights and Obligations of a Citizen and a Person”. Article 20 of this Law envisages prohibition of forced labour.

Since June 13, 1997 The European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention) is in effect in the Republic of Latvia. The Convention determines that ” no-one shall be required to perform forced or compulsory labour” (the second part of Article 4).

On October 15, 1998 Amendments were made to the Republic of Latvia Satversme (henceforth – the Satversme), in accordance with which the Satversme was supplemented by Chapter VIII ”Fundamental Human Rights” (Articles 89 – 116). Article 106 of this Chapter includes norms, which establish: ”Forced labour is prohibited. Participation in the relief of disasters and their effects and pursuant to a court order shall not be deemed forced labour”.

On June 28, 1930 The International Labour Organization adopted the Convention (No.29) Concerning Forced Labour (henceforth – ILO Convention No. 29). Latvia has not ratified the above Convention.

On June 25, 1957 ILO adopted the Convention (No. 105) Concerning the Abolition of Forced Labour (henceforth – ILO Convention No. 105). Latvia acceded to this Convention at the time when the Republic of Latvia Supreme Council adopted May 4, 1990 Declaration ”On the

Accession of the Republic of Latvia to International Instruments Relating to Human Rights". On January 27, 1992 the ratification act of the Republic of Latvia was registered by ILO. However, the text of the Convention was neither translated into the Latvian language nor published in the official newspaper.

2. **The submitter of the claim** - The Republic of Latvia Prosecutor General (henceforth – the submitter) challenges conformity of Articles 57 (the first part), 136 (Items 2 and 3 of the third part) and 143 (Items 2 and 3 of the fourth part) with Article 106 of the Satversme , Articles 1, 2 and 4 of the ILO Convention No.29 and Article 1 of the ILO Convention No. 105.

   The submitter holds that the challenged norms permit forced or obligatory labour as they give to the employer the right to assign an employee the performance of work not provided for by an employment contract, overtime work or work during the week's day of rest without the consent of the employee. The challenged norms do not envisage participation in the relief of disasters and their effects with an exception of cases when there is need of averting the consequences, which may adversely affect the normal course of activities. The submitter points out " the requirements of the challenged norms are not directed to use of forced labour for public purposes or as an extraordinary undertaking, but envisages for the employer the right of assigning the employee – without the latter's consent - the performance of unforeseen work, which is connected with economical interests of the enterprise and ensures the normal course of activities and accomplishment of urgent work". The order of the employer is mandatory to the employee, even though he/she has not consented to it, and, when disobeying the order the employee may receive punishment or it may serve as the basis for terminating the labour contract.

   It is stressed in the claim that liquidation of the consequences of the disaster is not the subject regulating legal relations of the Labour Law norms, but the subject regulating the norms of the Civil Protection Law. The requirements, included in the challenged norms may not be attributed to the exceptional cases, mentioned in part 2 of the ILO Convention NO. 29, as the work, not provided for by the labour contract, overtime work and work during the week's day of rest are not directed towards ensuring the existence of the residents or their part or towards averting threat etc. but towards ensurance of the usual economic activity of one person.

   After getting acquainted with the materials in case, the submitter expressed his viewpoint in a written form, backing the claim.

3. The institution which has passed the challenged act – **the Saeima -** does not agree to the viewpoint of the submitter for several reasons. First of all the Saeima points out that the Labour Law was elaborated to ensure the compliance of the legal labour relations with both – the international instruments binding on Latvia and ILO Conventions as well as with the Directives of the European Union concerning labour laws. Thus the norms, incorporated into the Labour Law shall be interpreted in context with the requirements included in the international instruments.

Secondly, the Saeima points out that the challenged norms envisage exceptional cases. The employer, when assigning an employee the performance of work not provided for by an employment contract shall meet all the requirements, included in the norms. Namely, he has to establish whether consequences of *force majeure*, unexpected circumstances or other extraordinary event, which adversely affect or may affect the normal course of activities in the undertaking, have set in or in cases, when a rush and unexpected order has to be completed. Besides, when assigning the employee the performance of work, not provided for by the employment contract, the employer has to observe the time limit determined in the challenged norm. He/she has also the duty of paying the employee appropriate work remuneration. The Saeima stresses that the condition on completion of urgent, unexpected work within a specified period of time shall be interpreted in the most narrow way and by it such work, the urgency of which has been determined by objective circumstances, that do not depend on the will of the employer, is meant. This norm has been included already in the March 24, 1922 Law on Working Hours.

In the written reply it is pointed out that Article 106 of the Satversme does not give the definition of the juridical notion ”forced labour”. The third sentence of Article 106 only states what shall not be deemed forced labour. The international instruments, namely, the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, enumerates which work shall not be deemed forced labour. In the context of international documents the term ”forced labour” shall not include service in case of an emergency or calamity threatening the life or well-being of the community.

The Saeima points out that the Committee of the European Council, when evaluating the conformity of the laws on abolition of forced labour in the Member States has advanced the following criteria on forced labour: has the employee volunteered, is the particular work unjust and burdensome. The European Court of Human Rights, in its turn, in its practice has stated that volunteering or non-volunteering is not the main

criterion when evaluating the conformity with the notion of forced labour.

4. **The Ministry of Welfare and the Ministry of Justice** when answering the questions asked by the Constitutional Court, point out that when elaborating the Draft Labour Law one of the main objectives was to ensure legal regulation of the compliance of labour relations with the international laws. Besides, the Labour Code, which was in effect earlier, also regulated performance of work not provided for in the employment contract (Article 27), overtime work (Article 57) and work during the week's day of rest (Article 66). Therefore the viewpoint that the Labour Law shall keep those norms of the Labour Code, which are not at variance with the international legal norms, binding on Latvia, the requirements of the European Union and the market economy, existing in the State was backed. Both – the Ministry of Welfare and the Ministry of Justice stress that the cases anticipated in the challenged norm are exceptional and the norms shall be interpreted in a narrow way.

5. **The State Labour Inspection** points out that violation of the challenged norm has been observed in practice. During check-ups it has been established that in most cases the employers do not realize accurate registration of the labour hours or do not do it at all, that there are no written agreements on overtime work, that the employers are assigning employees the performance of work not provided for by the employment contract and during the week's day of rest without any written agreement. Besides, the employees do not pay the remuneration provided for by law for additional work, for work in particular circumstances, for night work, for overtime work, for work during the week's day of rest or holiday, as well as remuneration envisaged in part two of Article 57 of the Labour Law for the performance of work not provided for by an employment contract.

   The officials of the Inspection draw up acts – orders on the established violation, which include instructions for preclusion of the violation or otherwise the employer is fined.

   The Inspection expresses the viewpoint that application of Article 143 (Item 3 of the fourth part) in practice may create problems, if the employer interprets the Item extensively as at the present moment there is neither the official interpretation nor the court practice on the issue.

6. **The State Human Rights Bureau** when answering to the questions asked by the Constitutional Court points out that part of the challenged norms – Article 57 (part 1), Article 136 (Item 2 of the third part) and Article 143 (Item 2 of the fourth part) are not at variance with Article 106 of the Satversme and the requirements, incorporated in international

instruments. In its turn, it is disputable whether Article 136 (Item 3 of the third part) and Article 143 (Item 3 of the third part), which envisage the completion of urgent, unexpected work within a specified period of time, comply with the Satversme and the requirements of the international instruments, as the conformity depends on application of the norm in practice. The Bureau stresses the employees are unprotected as concerns labour relations, especially in the private sector and the control is insufficient.

7. **The Latvian Confederation of Employers (**henceforth – the LCE) in its reply to the Constitutional Court points out that the challenged norms are needed as the normal course of activities in the undertaking may be affected by unexpected and not depending on the will of the employer circumstances. The LCE holds that assigning the employees the performance of work in cases, established in the challenged norms is not directed towards economic benefit or profit of the undertaking but means normal ensurance of work in it, and that is in the interests of everybody : the employer, the employees and possibly even the community. Thus the challenged norms are not unconformable with ILO Convention No.105, which prohibits using forced labour as a method for mobilization of the productive forces and using it for reaching the objectives of economic growth.

   The LCE points out that the Republic of Latvia has not ratified ILO Convention No. 29 therefore it cannot be considered as binding on Latvia. Moreover, the challenged norms are not at variance with this Convention as the Labour Law determines certain limitations for assigning the employees the performance of work not provided for by the employment contract, for overtime work and for work on week's days of rest.

8. **The Alliance of Latvian Free Trade Unions (**henceforth – ALFTU) in its reply to the Constitutional Court points out that the challenged norms in their essence are not unconformable with Article 106 of the Satversme and ILO Conventions on forced labour and its prohibition.

ALFTU points out that the employer has not the right to always assign an employee the performance of work not provided for by the employment contract, as the legislator envisages this right just for averting the consequences caused by *force majeure*, an unexpected event or other exceptional circumstances. It is stressed in the reply that in the understanding of ILO Convention No. 105, the forced or obligatory work is not connected with the employer and the permanent
position (post). It follows from the text of the Convention that by forced labour involvement of a person in another kind of work, with which it has

no legal labour relations, by the order of the state or municipality institution, is meant.

The Labour Law envisages assignment of the employee the performance of work not provided for by an employment contract only in the undertaking or enterprise of the same employer.

ALFTU points out that Article 1 of the ILO Convention No. 105 mentions the cases when the Member States are not allowed to use forced or obligatory labour i.e. because of political motives, for furthering the economic development, for ensurance of discipline, as the punishment for participation in a strike, and as the discriminating means as to race and social, national or religious origin.

None of the challenged norms envisages assignment of an employee the performance of work not provided for by an employment contract, overtime work or work on week's free days because of the reasons, mentioned in the Convention.

The concluding part

1. To evaluate the conformity of the challenged norms with the abolition of forced labour determined in Article 106 of the Satversme one has to clarify the contents of the notion "forced labour".

1.1. Article 106 of the Satversme does not give the definition of forced labour. It only names the kinds of work, which shall not be deemed forced labour – participation in the relief of diasters and their effects and work pursuant to a court order.

Prohibition of forced labour is incorporated into several international instruments on human rights, among them also in the Convention and ILO Conventions No. 29 and No. 105.

Article 4 of the Convention establishes that forced labour is prohibited but just as Article 106 of the Satversme does not give the definition of forced labour either.

The European Court of Human Rights makes use of the definition of forced labour, which is determined in Article 2 (the first part) of the ILO Convention No. 29. The European Court of Human Rights regards this definition as binding, as Article 4 of the Convention has been adopted on the basis of ILO Convention No. 29 (*Law of the European Convention on Human Rights. London, Dublin, Edinburgh, Butterworths, 1995, p. 92).*

ILO Convention No. 29 was adopted to set free the native inhabitants of colonies from forced labour. The Second World war and the time after it brought with them a new wave of forced labour, the motives of which usually were political. Under totalitarian regimes forced labour served as the means for reaching economical aims. On June 25, 1957 ILO Convention No. 105, which is regarded as a supplement and not a new version of ILO Convention No 29 was adopted to put an end to forced labour under the new circumstances.

As Latvia is a Member State of the Convention the Judgments of the European Court of Human Rights are binding on it and it shall respect the conclusions on the interpretation of international legal norm, incorporated in the judgments.

ILO Convention No. 29 cannot be regarded as binding on Latvia as it has not been ratified. Ratification of ILO Convention No.105 cannot be regarded as being completed either, as in accordance with Article 2 of the Law " On the Procedure by which Laws and Other Acts, Adopted by the Saeima, State President and the Cabinet are Promulgated, Published, Take Effect and Being Valid" and Article 16 of the Law "On the Republic of Latvia International Agreements" publication of it in the State language in the official newspaper shall be made.

Taking into consideration the above circumstances ILO Conventions No. 29 and No. 105 shall be used in the Constitutional Court Judgment only for argumentation.

1.2. Article 2 of ILO Convention NO. 29 determines that "the term "forced or obligatory labour" means any work or service which the person is compelled to do because of the threat of punishment and which the person has not volunteered to do". In its turn Article 1 of ILO Convention No. 105 establishes that "every Member State of the International Labour organization, which ratifies this Convention, undertakes the duty of abolishing all the forms of forced or obligatory labour: a) as the means for political enforcement or education or as the punishment for having and propagating political viewpoints, which contradict political, social and economical opinion of the ruling state system; b) as the method for mobilizing the workers and using them for the development of the economy; c) for the reasons of working discipline; d) as the punishment for participation in strikes; e) as the means for racial, social, national and religious discrimination".

As ILO Convention No. 105 is regarded as the supplement to ILO Convention No. 29, specifics of forced labour included in both conventions shall be analyzed.

The European Court of Human Rights declares that the definition of forced labour, incorporated into ILO Convention No. 29, shall be regarded as the starting point for interpretation of Article 4 of the Convention. When interpreting the notion ”forced labour” the European Court of Human Rights points out that two circumstances shall be taken into consideration: whether the work is performed against the will of the person and whether the duty of performing it is ”unjust” or its performance ”oppressive” (*see the European Court of Human Rights October 27, 1983 Judgment in case ”Van der Musselev. Belgium”).*

Thus forced labour is any work or service, which is unjust and oppressive and which the person has not volunteered to perform.

2. Article 106 of the Satversme determines: ” participation in the relief of disasters and their effects and work pursuant to a court order shall not be deemed forced labour”.

In comparison with the Satversme, Article 4 (the third part) of the Convention mentions a greater number of work, which shall not be deemed forced labour, - any work required to be done in the ordinary course of detention; any service of a military character; any service exacted in case of an emergency or calamity threatening well-being of the community; any work or service, which forms part of normal civic obligations. Article 8 (the third part) of the International Covenant on Civil and Political Rights envisages the same.

A similar enumeration of work can be found also in Article 2 (the second part) of Article 29 of ILO. In accordance with it forced labour shall not include work or services, which are performed while being in mandatory state service and which have military specifics; work or services that are included in the duties of a citizen as well as insignificant municipal services performed for public purposes.

The exceptional cases envisaged in Article 106 of the Satversme, Article 4 (part three) of the Convention and Article 2 (part two) of the ILO Convention No.29 have been determined to protect public security and welfare, besides, only as extraordinary measures. The above work is of publicly legal nature and is assigned by the public legal subjects. Administrative or criminal liability may set in if the person refuses to perform the above work, e.g., for the refusal to perform any work

required to be done in the course of detention, for evading from mandatory state service.

The Satversme and the international human rights instruments testify that they are against forced labour of publicly legal nature, against assignment of people for performing work on the basis of the order by the state or municipal institutions i.e. without the existence of legal labour relations.

The publicly legal nature of forced labour was stressed also when debating on Article 20 of the constitutional Law "The Rights and Obligations of a Citizen and a Person". When answering to the question, asked at the plenary session the reporter on the draft law R.Rikards said: "Forced labour is the work, which was organized in the USSR – like sending people to the collective farms…" (*Verbatim report of the Republic of Latvia Supreme Council October 16, 1991 session).*

There is no reason to hold that the prohibition of forced labour, enshrined in the Satversme does not concern the private sector. It follows also from international human rights instruments, inter alia, also ILO Convention No. 29. The first part of its Article 4 determines that state public institutions may not allow forced labour in the interests of private persons, companies and associations.

Thus forced labour is prohibited not only in publicly legal but also in civil relations – legal labour relations, which are regulated by the Labour Law.

3. In cases, envisaged in the challenged norms the employer assigns the employee the performance of work not provided for in the employment contract, overtime work or work on week's days of rest. The objective of the challenged norm is to avert consequences caused by *force majeure*, an unexpected event or other exceptional circumstances, which adversely affect or may affect the normal course of activities in the undertaking as well as for completion of urgent unforeseen work within a specified period of time. Therefore one may not agree with the statement included in the claim that forced labour is envisaged for the objectives of economic development.

Part three of Section 56 of the Labour Law establishes that "an employer does not have the right to ask an employee to perform work not provided for by an employment contract, except in cases set out in Section 57 of this Law". The first part of Section 57 in its turn determines the right of the employer, side by side with the above aims, to assign an employee the performance of work not provided for also

in case of idle time. However, one has to agree with the viewpoint, expressed in the Saeima written reply, that this norm is an exception. The employer may not arbitrarily assign the employee the performance of work not provided for by the employment contract. The second part of Section 57 of the Law envisages that the employer has a duty to pay an employee appropriate work remuneration for the performance of work, the amount of which remuneration may not be less than the previous average earnings of the employee. Besides, the challenged norm incorporates also the restriction as to the length of the assignment; namely, the employer may assign the employee the performance of work not provided for by an employment contract for a period not exceeding one month, in case of idle time – for a period not exceeding two months. Thus the employer, when assigning the employee the performance of work not provided for by an employment contract, even in case of idle time, shall observe all the requirements, included in Section 57 of the Labour Law.

Part three of Section 136 of the Labour Law determines the exceptional cases when the employer for reaching the above aims has the right to employ an employee on overtime without his/her written consent. Even though the challenged norm allows to employ an employee on overtime without his/her written consent, in compliance with the second part of Section 136 of the Law, written order of the employer is required. Parts three and four of this Section determine time restrictions for overtime work. If overtime work continues for more than six consecutive days, the employer needs a permit from the State Labour Inspection for further overtime work, except in cases when repetition of similar work is not expected. Overtime work may not exceed 48 hours within a four-week period and 200 hours within a calendar year. The employer has also to take into consideration the certain range of persons, whom it is prohibited to employ in overtime work. Besides, Section 68 of the Labour Law envisages supplement for overtime work. Thus assigning the employee the performance of overtime work is an exception as compared to the general procedure of the activities of the undertaking.

Section 143 (part four) of the Labour Law envisages that individual employees with a written order by the employer may be engaged to work during the week's day of rest only for reaching the above aim. Besides the employer has the duty of granting at the choice of the employee rest on another day of the week or paying compensation in conformity with the provisions of Section 68 of this Law. Thus assigning the employee the performance of work in the week's day of rest is also an exception from the usual procedure.

One of the specifications of forced labour is the fact that the person has not volunteered to perform the work. To declare that a certain work is forced labour it has to be work from the performance of which the person has no possibility to refuse. For example, if the employee's identification documents have been taken away, if they are kept watch over or they are physically forced to perform it, as well as when remuneration has been retained. The labour agreement envisages the possibility of giving notice, therefore, even though the challenged norm does demand receiving consent of the employee, activities, mentioned in it cannot be regarded as forced labour.

The second specification of the forced labour is that it may not be used as the means for political enforcement or as the method of mobilizing the workers for reaching the aims of economic development, as the aim of labour discipline, as the punishment for participation in strikes as the means for race, social, national or religious discrimination (*see Article 1 of the ILO Convention No. 105).*

In our days slavery and kidnapping for the reason of using people as labour force, ordering servants perform forced labour, forced labour on the basis of unpaid debts, trading people, forced labour in the places of detention, forced labour of children are some of the main forms of forced labour (*see Zwangsarbeit: Seit langem verboten und geächtet, aber nicht ausgerottet. ILO- Nachrichten 2/2001, www.ilo.org/public/german/region/europro/bonn/-download/ilo-nl210.pfd,23.10.2003.).*

The challenged norms are directed towards ensurance of normal working procedure of an undertaking and are in the interests of both – the employer and the employee.

The challenged norms do not serve as the aims and means incorporated in the international instruments, which may not be used and the restrictions envisaged in them forbids qualifying the work as unjust and cruel.

Thus we may conclude that the work, envisaged in the challenged norms cannot be regarded as forced labour in the understanding of Article 106 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 Section 57 (the first part), Section 136 (Items 2 and 3 of the third part) and Section 143 (Items 2 and 3 of the fourth part) as being in compliance with Article 106 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