THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, October 6, 2003

JUDGMENT
in the name of the Republic of Latvia

in case No. 2003 – 08 – 01

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, justices Anita Ušacka, Romāns Apsītis, Ilma Čepāne, Juris Jelāgins, Andrejs Lepse and Ilze Skultāne

on the basis of the constitutional claim by Inga Deržaveca

under Article 85 of the Republic of Latvia Satversme (Constitution), Articles 16 (Item 1), 17 (Item 11 of the first part) and 28^1 of the Constitutional Court Law

on October 6, 2003 at the Court session, holding the proceedings in writing

reviewed the case

"On the Compliance of Article 96 (the first sentence of the second part)of the Criminal Procedure Law of Latvia with Articles 89 and 92 of the Republic of Latvia Satversme (Constitution)".

The establishing part

1. On February 5, 1992 the Republic of Latvia Supreme Council passed the law under which the second part of Article 96 of the Latvian Criminal Procedure Law was expressed in the following

wording: ” Only the Republic of Latvia advocate act as the defense counsel in a criminal case”.

This legal norm took effect as of March 1, 1992.

On April 27, 1993 the Republic of Latvia Supreme Council adopted the Republic of Latvia Law ”On Advokatūra” (henceforth –the Law on Advokatūra), which took effect on May 21, 1993. Article 4 of the Law determines that only advocates, admitted under oath (sworn advocates) and sworn advocate assistants shall be allowed to act and practice as advocates in Latvia.

December 16, 1966 UNO International Covenant on Civil and Political Rights (henceforth – the Covenant) is in effect in the Republic of Latvia since July 14, 1992. The third part of Article 14 of the Covenant establishes that everyone shall be entitled to several minimum guarantees in the determination of any criminal charge against him, also to guarantee of defending himself in person or through legal assistance of his own choosing.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention) is in effect in the Republic of Latvia since June 13, 1997. Similarly to the Covenant, Article 6 (Item ”c” of the third part) of the Convention determines that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing. Besides the Convention establishes that the person, shall be given free legal assistance when the interests of justice so require and if he has not sufficient means to pay for it.

2. **The submitter of the constitutional claim –** Inga Deržaveca (henceforth – the submitter) challenges the conformity of Article 96 (the first sentence of the second part) of the Latvian Criminal Procedure Law with Articles 89 and 92 of the Republic of Latvia Satversme (Constitution).

   The submitter holds that the challenged norm contradicts the third part of Article 14 of the Covenant and also violates her ”right to a fair hearing”, which has been formulated in Article 6 of the Covenant for the Protection of Human Rights and Fundamental Freedoms. Even though the Criminal Procedure Law uses both terms – ”the defense counsel” and the ”advocate”, the submitter points out that the legislator ”has included a narrower interpretation

of the notion ”defense counsel” in the Law, as the advocates are only a small part of the body of persons, who may carry out the functions of the counsel”. To the mind of the submitter, any person, who has sufficient knowledge on the criminal procedure, may act as the defense counsel in a criminal matter. Education obtained at the Faculty of Law should not be demanded as the precondition for carrying out the duties of the defense counsel.

Besides the submitter in her claim expresses the viewpoint that the ”right to the assistance of counsel”, determined in Article 92 of the Satversme, is by the greatest number of people often understood as the assistance only by the advocate, forgetting that they experience the right to defend themselves in person or through legal assistance. The submitter points out that ”advokatūra” has a monopoly in our state and therefore the assistance by an advocate is groundlessly expensive. Not in all the cases the payment for the assistance of the advocate complies with the volume and quality of assistance.

3. The institution, which has passed the challenged act - **the Saeima** – disagrees with the viewpoint of the submitter because of several reasons. The Saeima points out that the last sentence of Article 92 of the Satversme envisages that everyone has a right to the assistance of counsel, and it does not guarantee the right to use legal assistance of some other kind.

In its written reply the Saeima reiterates that the right of choosing the counsel is not absolute and may be restricted. The Saeima mentions the decision by the Commission of the European Court of Human Rights No. 722/60, which stresses that the right of choosing the defense counsel is not absolute and may be ”restricted by the state to regulate the participation of the lawyer at the court proceedings”.

The Saeima points out that persons, who have adequate qualification, shall be allowed to render legal assistance. Advocates may be considered as adequate persons for rendering professional legal assistance because of the requirements to a person, when being admitted to the group of sworn advocates. The Law ”On Regulated Professions and Acknowledgement of Professional Qualification” also refers to advocates. The oath of an advocate is binding on advocates in their professional activity, besides the Law determines responsibility for unqualified legal assistance, as well

as for the violation of normative acts and professional ethics. Therefore the Saeima stresses ” that just by the assistance of the advocate it is possible in a criminal process to efficiently secure implementation of fairness and interests of the accused person”.

4. **The Latvian Council of Sworn Advocates** when answering to questions asked by the Constitutional Court, points out that the challenged norm creates the needed preconditions for qualitative, accessible and duly protection of the persons, who are criminally liable. Besides the Council stresses that it is possible to secure professional and qualitative protection, if the provisions of Article 96 of the Criminal Procedure Law of assignment advocates and on the state payment for the assistance of the advocate in pre-trial investigation or at court been observed.

5. When answering to the questions of the Constitutional Court **the Prosecutor General's Office** stresses that defense at the proceedings of a criminal case should be entrusted to sworn advocates as they have adequate education, qualification and experience. The Prosecutor General's Office additionally points out that problems arise in cases of mandatory defense, when the law provides for the state to guarantee counsel. In these cases remuneration for advocate's activities is calculated in the procedure determined by the Cabinet of Ministers. Advocates are not interested in the above cases and it results in a formal process. In their turn the defendants are not satisfied with the quality of advocates' performance. Therefore the issue on securing an efficient control mechanism of the above performance shall be discussed.

6. **The Senate of the Criminal Cases Department of the Supreme Court** in its reply points out that the number of sworn advocates is sufficient to secure accessible and qualitative defense at criminal proceedings for all persons. The Department stresses that the problem is connected with the remuneration for the performance of sworn advocates, besides the funds allotted by the state and not the number of sworn advocates is the determinant factor.

   The Riga Regional Court in its reply to the Constitutional Court expresses the viewpoint that only a sworn advocate may act as defense counsel. The Riga Regional Court points out that from the formal viewpoint the professional society of sworn advocates might serve as the quality guarantor of the quality of the services,

however quality of the advocate performance depends on the effective activities of the Board of Sworn Advocates. Review of cases is often postponed because the advocates are engaged therefore the Riga Regional Court has concluded that the number of sworn advocates is insufficient. **Both the Zemgale and Kurzeme Regional Courts** in their replies also stress that the number of sworn advocates is insufficient. **The Vidzeme Regional Court** holds that the number of sworn advocates cannot be regarded as the factor for securing the quality of defense. In its turn **the Latgale Regional Court** in its reply points out that part of the judges are of the viewpoint that only a sworn advocate may act as the defense counsel, others hold that close relatives, who are lawyers by education, could be entrusted to carry out the functions of an advocate. Besides, the level of payment for the activities of advocates in Latvia is very low if compared with that of the Western European states. The Latgale Regional Court also points out that the number of sworn advocates is sufficient; however the places of their practice are disproportionately distributed.

7. **The State Bureau of Human Rights** in its reply points out that international instruments do not determine legal assistance only by an advocate, but accentuates the quality of legal aid and general access to it. The Bureau expresses the viewpoint that sworn advocates may happen to be the most qualitative counsel, however a great part of the suspects, accused persons or defendants are not able to pay for their services and thus remain without any defense, but legal aid is an essential element when ensuring the right to a fair court. The Bureau holds that the challenged norm is a proportionate restriction, which serves the interests of the parties of criminal proceedings. The present practice of ensuring defense counsel in Latvia does not comply with the standards of international instruments, and the reason of it is inefficient application of the challenged norm. It is pointed out that the greatest problem is connected with state appointed counsel as the state ensured defense is usually formal.

8. **The Institute of Human Rights of the Latvian University Law Faculty** in its reply points out: to assess the compliance of the challenged norm with Article 92 of the Satversme, one has to ascertain whether the notion ”the advocate’, incorporated into Article 92, is used in a narrower or wider meaning. The Bureau of Human Rights also stresses that the right to a fair court is not absolute. In their reply they stress that the provision of the

challenged act, namely, that only an advocate may be defense counsel in a criminal process, may be justified if there are no circumstances which in practice may hinder the implementation of the right of the suspected and accused person or the defendant to defense.

The Institute of the Human rights stresses: to evaluate conformity of the challenged norm with the Satversme and international standards it is necessary to find answers to several questions, e.g., is the number of sworn advocates sufficient if it is compared with the number of initiated cases, how expensive the services of a sworn advocate are and how efficient is the mechanism of rendering legal assistance for state fees; whether the law, which determines criteria and procedure for appointing an advocate, does not permit arbitrariness of the persons, who adopt decisions, thus allowing just a certain range of persons to become sworn advocates, at the same time denying the possibility of other persons with the same qualification doing so.

9. **The Centre of Human Rights and Ethnic Studies of Latvia,** when analyzing the norms, incorporated into Articles 87 and 92 of the Satversme and international instruments, also points out that the challenged norm doubtlessly restricts the right of the person to choose his/her defense counsel. The Centre stresses that one has to take into consideration the practice of securing defense to the suspects, accused persons and defendants. According to information, which is at the disposal of the centre, in practice duly, accessible and qualitative defense is not ensured to all the persons. However, by taking into consideration the interests of the suspected and accused persons as well as defendants, one has to admit that the requirement for a representative of the above persons has to have good knowledge of the law but experience in criminal proceedings is also well-grounded.

The concluding part

1. The right to a fair court is one of the most important rights. It includes also the right of the person to legal aid. The norm, incorporated into the Satversme, reads as follows: everyone has the right to the assistance of counsel.

1.1. When interpreting the notion ”an advocate” one has to first of all take into consideration the philological interpretation. Different dictionaries give several interpretations of the legal notion ”an advocate”. The Dictionary of Juridical Terms (Riga, Nordik, 1998, p.8) identifies the advocate as ”**a lawyer** who gives legal advice and prepares documents on legal issues to the client, is in charge of the legal case of the client and- when necessary – represents his/her interests in civil, criminal or administrative cases and court proceedings”. The Dictionary of the Latvian Language (Riga, Avots, 1998, p. 33) identifies the advocate as ”**the lawyer**, who represents the accused person at the court, gives legal advice and –if authorized to do so – also carries out other legal assignments”. The Dictionary of Foreign Words (edited by J.Baldunchika, Riga, Jumava, 1999, p.23) identifies an advocate as ”1.**a lawyer** , who defends or represents legal interests of individuals or organizations at the court process as well as gives legal advice, elaborates drafts of documents etc.; **2. a person,** who orally or in writing defends somebody or something ”. In the Dictionary of Foreign Words, (edited by D.Guļevska, Riga, Norden, 1996, pp. 16 -17) advocate is identified as **1. a lawyer,** who renders professional aid for defense at the court, renders legal advice or prepares drafts of legal documents; **2. a defense counsel”.** The Latvian – English, English - Latvian Glossary of Legal Terms (Riga, Kamene, 2000, p.6) identifies an advocate as ” **a lawyer,** professional and independent representative of the advocate office (advokatūra), who participates in review of cases at the court and in pre-court investigation as **a counsel and representative** to render legal aid to persons on their request as well as carries out other legal activities”. The Latvian Conversational Dictionary (Vol.I, Riga, Gulbis publishing house, 1927 -1928, column 165-166) does not give the interpretation of the term ”advocate”, however it includes the interpretation of the term ” counsel”. Counsel has been interpreted as ”a person, who defends the innocence, rights and interests of the accused. The court may appoint sworn advocates and their assistants, private advocates and the candidates as defense counsel”.

Thus the philological interpretation gives proof of the fact that the legal notion ”advocate” has several meanings.

1.2. The legal notion ”advocate shall be interpreted also systemically, by analyzing it in the context with other legal norms. The challenged norm establishes that only an advocate may act as the counsel in a criminal case. However, the Criminal Procedure Law uses two terms, namely, both ”an advocate” and ” a counsel”. In the understanding of the Criminal Procedure Law the terms are synonyms. Besides Article 4 of the Law ”On Advokatūra” envisages that only advocates admitted under oath and sworn advocate assistants shall be allowed to act and practice as advocates in Latvia.

Article 18 of the Criminal Procedure Law determines that the right to defense shall be insured to suspected and accused persons as well as to the defendants. It means that the court, the procurator and the person, advancing the procedure, shall guarantee that the suspected and accused persons as well as the defendants have the possibility of defending themselves by means and under the procedure envisaged by law, namely, that the person may choose the counsel or defend himself / herself as well as refuse from the counsel. Article 98 of the Criminal Procedure Law determines the cases, when the presence of the counsel in the criminal proceedings is mandatory and the person may not refuse from the counsel. If the suspected and the accused person or the defendant does not choose the counsel, then the person, advancing the procedure, the procurator or the court shall guarantee participation of the counsel in the court process. Article 34 (Item 9) of the Law ”On Advokatūra” anticipates the possibility of assigning advocates to criminal cases and to cases in courts and pretrial investigation agencies to represent indigent persons and persons who are unable to secure legal counsel. In theses cases the legal aid shall be paid up in conformity with the confirmed advocate reimbursement tax from the state budget funds (see case material pp.61-63). It means that in certain cases the state has the obligation of guaranteeing participation of the counsel in the criminal legal action.

In its turn the Civil Procedure Law determines that representatives shall be: advocates; officials or employees of legal persons – in cases of these persons; employees, authorized by the state and local municipalities or legal persons, whom the law authorizes to represent the rights of other persons or interests, protected by law; physical persons’ ascending or

descending relatives, spouses, sisters or brothers of the whole blood; as well as the person, who on the basis of a warrant governs the property of the warrantor; one of procedural partners assigned by other partners; patented warrantors – in cases on industrial property; persons, to whom representation has been provided for in other laws.

The Law on Administrative Process determines that any legal or physical person with a capacity to act may act as a representative. The Constitutional Court does not envisage any restrictions whatsoever to the range of persons, who may act as representatives in the process.

At the same time it is necessary to analyze the provisions, included in the international instruments, namely, the Covenant, the Declaration, and the European Charter of the Fundamental Rights as well as the other legal acts of the European Union.

Article 14 (3)(d) of the Covenant determines that the person may defend himself in person or through legal assistance of his own choosing. Besides in cases if the person does not have sufficient means to pay for the defense counsel and where the interests of justice so require, legal assistance is assigned to him/her. Article 6 (3)(c) of the Declaration anticipates a similar formulation, namely: everyone has the right of defending himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, he shall be given it free when the interests of justice so require. Article 47 (the second part) of the European Charter of Fundamental Human Rights determines that everyone has the right of receiving a legal advice and the right to defense and representation.

Also in the English legal term thesauruses the contents of the notion ”lawyer” (which is used in all international documents and is translated into the Latvian language as advocate) is expressed in different terms such as ”advocate, attorney, attorney-at-law, barrister, barrister-at-law, counsel, counselor, counselor-at-law, jurisconsult” (Burton’s Legal Thesaurus, 3rd. Ed., McGraw-Hill, 1998 p.331) as ”a person learned in the law, attorney, counsel, solicitor, a person licensed to practice law” (Black’s Law Dictionary, 4th.Ed., West Publishing Co., 1951, p.1033); as a person learned in the law; as an attorney, counsel,

or solicitor; a person licensed to practice law" (Black's Law Dictionary, 6th. Ed., West Publishing Co., 1990, p.888). The legal notion "lawyer" is translated into the Latvian language as an advocate, representative, counsel, attorney, a person learned in the law , a person, who has the right to act (practice).

Thus, when investigating the legal notion "lawyer" from the viewpoint of mutual coherence of legal norms, one may conclude that it has several meanings.

1.3. To complete the analyses of the term "the lawyer", one has to ascertain the sense and aim of the norm, incorporated into Article 92 of the Satversme. The aim of the legislator, when fixing into the Satversme the right of everyone to the assistance of counsel as an integral part of a fair court, has been to secure duly, accessible and qualitative legal aid in civil, administrative and criminal processes as well as at the Constitutional Court process to every person. It is based on one of the most important national and international legal principles – the principle **of justice.**

The right to the assistance of a lawyer need not be understood as the right of a person to request assistance of an advocate. In the narrow meaning the legal notion "lawyer" is attributed only to the case when the person does not have sufficient means to pay for the services of a legal counsel and then it is the duty of the state to secure legal assistance. The fact that a person does not have the duty to ask the advocate to render legal aid is also confirmed by the norms, determined in the Criminal Procedure Law, namely, that a person experiences the right of refusing from the counsel and defend himself/herself in person.

Thus the aim of Article 92 of the Satversme when determining that everyone has the right to the assistance of the counsel has not been to infringe the right of a person to a fair court. The legal notion "the counsel", which is incorporated into Article 92 of the Satversme shall be interpreted in a more extensive sense, understanding by it the right of a person to receive legal assistance by freely choosing his/her counsel or representative from a wider range of qualified lawyers and in cases, provided for by law, also from the range of other persons.

2. Even though the notion ”a lawyer” has to be interpreted more extensively and shall not be referred only to sworn advocates, the legislator - by taking into consideration specifics of every process - experiences the right of determining the range of those persons, who may render legal assistance and act as counsel or representative of a certain case . There is no doubt that a criminal process is a specific process and the counsel needs special knowledge. The objective of a criminal process is to quickly and completely discover crimes, find the guilty persons and secure applying of the right laws so that every person, who has committed a crime, would receive a fair penalty but – in its turn no innocent (not guilty) person would be held liable and sentenced. On the one hand the norms of criminal procedure regulate the lawful procedure and way of establishing crimes and ascertaining the persons, who have committed the offence as well as the procedure of application of the penalty. On the other hand, all the above: discovery of committed offences, finding the persons who are guilty and the procedure of the review of a case are regulated in the criminal procedure norms in such a way as to guarantee the observation of the legal interests of the suspected and accused persons and defendants, as well as those of the victims and the witnesses. No-one shall be declared guilty in committing a crime and sentenced unless his/her guilt has been proved under the procedure envisaged by law and has been declared by a court judgment, which has taken legal effect.

By taking into consideration the fact that the criminal process is a specific process one cannot agree with the viewpoint expressed by the submitter that any person may act as counsel in a criminal process. The Constitutional Court agrees with the viewpoint, expressed in the Saeima written reply, that only qualified lawyers shall act as counsel in a criminal process as the counsel may successfully carry out his/her duty only if he has adequate legal knowledge. At the moment the legislator has restricted the range of these persons and determined that only a sworn advocate may act as counsel in a criminal process.

The Constitutional Court acknowledges that the right to a fair court is not absolute and may be restricted. In several of its judgments (*see the Constitutional Court June 27, 2003 Judgment in case No. 2003-03-01; June 27, 2003 Judgment in case No. 2003-04-01; April 23, 2003 judgment in case No. 2002-20-0103; November 26 2002 Judgment in case No.2002-09-01)* the

Constitutional Court has decided that in certain circumstances the state experiences the right of restricting the right to a fair court, which is guaranteed by the Satversme. The fundamental rights may be subject to restrictions in circumstances provided for by law in order to protect public interests and if the principle of proportionality is observed. Thus the court has to assess whether the restriction of the right to a fair court complies with the following requirements:

a) if it has been established by law;
b) whether it complies with the legitimate aim, which the state wants to reach by determining the restriction;
c) if there are no other means, which would less infringe the right of the person;
d) whether it complies with the principle of proportionality.

3. As the challenged norm, which contains the infringement of the fundamental rights, incorporated into Article 92 of the Satversme, is determined passed by the Saeima law, which has been promulgated in the procedure conformable with the law in effect , the Constitutional Court holds that there is no doubt the infringement has been determined by law.

4. The aim of the legislator when passing the challenged norm was to secure duly, accessible and qualitative counsel in the criminal process to all persons. This objective was later incorporated also in the Law on Advokatūra. The Court agrees that this objective is legitimate, even though it has to be assessed whether the challenged norm achieves the above aim.

The model in accordance with which advocates may act as counsel in a criminal process is the most widely used one. However a legal norm "… cannot be understood without regard for functioning, and in practice the envisaged procedure comes into contact with reality…" (*Meļķisis E. Interpretation of Legal Norms, the 2nd. Edition, Riga, the Latvian University, 2000, p.34).* Therefore to establish whether the objective determined by the legislator is being reached it is necessary to analyze the performance of the challenged norm in practice. It in its turn may be done by evaluating the institute of legal counsel determined in the Law on Advokatūra, the aim of which inter alia is to secure duly, accessible and qualitative counsel in a criminal process to all persons.

The Law on Advokatūra determines the activity of sworn advocates in Latvia. The Law regulates professional and corporative activity of advocates (sworn advocates and sworn advocate assistants). The Law establishes also the procedure for becoming a sworn advocate. First of all the person has to comply with the requirements of Article 14 of the Law, he/she shall submit an application (to which are attached references on the professional activity and moral character) to the Council of Sworn Advocates. The person shall successfully complete the advocate examination and after the person has passed it, the Council of Sworn Advocates reaches the decision either to admit him/her to the sworn advocates or to reject the application. The Latvian Council of the Sworn Advocates chooses the topics for the advocate examination and examines him/her. In accordance with Article 43 of the Law if the application has been rejected for substantive reasons, the Council decision is not appealable, however from the contents of the Article it is not clear what can be regarded as substantive reasons. If the person is admitted to the sworn advocates, Latvian Council of Sworn Advocates reports the admission to the Chief Justice of the Supreme Court, who shall administer the oath to the newly admitted sworn advocate. The law also determines the rights, duties and responsibilities of sworn advocates, the procedure of admission of sworn advocate assistants, their rights and duties as well as training, responsibilities of sworn advocate assistants and supervision over their legal work. In accordance with Article 85 of the Law a sworn advocate may not have more than one assistant.

All the advocates acting in Latvia are united in a Latvian Collegium of Sworn Advocates. The Latvian Council of Sworn Advocates is the managerial, controlling and executive body of the Latvian Collegium of Sworn Advocates, and their rights and duties are determined by Article 34 of the Law. The Council of Sworn Advocates consists of 9 members, who are elected for the period of 3 years. The Council of Sworn Advocates experiences the right of taking decisions on many issues, also administering of the examination for a person becoming a sworn advocate. After successful completion of the examination the Council is authorized to reach the decision –either to admit the person to sworn advocates or sworn advocate assistants or not. The Council shall also decide on the disciplinary sanctions of sworn advocates , determine the number of sworn advocates necessary to provide sufficient legal assistance to court and pre-trial investigation agencies, decide at which regional courts the sworn advocates shall act, manage the organizational matters of the Latvian Collegium of Sworn Advocates etc. One may conclude that the Latvian Council of Sworn

Advocates is endowed with rights of choice and extensive authority when reaching decisions on the above issues.

At the moment there are 599 practicing sworn advocates and 91 sworn advocate assistants in Latvia (*see page 219 of the case material).* Taking into consideration the data submitted by the Council of Sworn Advocates the number of sworn advocates has increased in the last five years – from 525 sworn advocates in 1999 to 599 in 2003 and there are 2,33 million inhabitants in the State. If we compare the data then we see that in 1940 there were 273 practicing sworn advocates, 113 sworn advocate assistants and 78 private advocates in Latvia. At that time there were 1,88 million inhabitants in the state (*see The State and the History of Law in Terms and Notions, comp. by P.Valters, Riga, Divergens, 2001, p. 152).*

In compliance with Article 45 of the Law on Advokatūra, the sworn advocates shall work at the regional courts. The data, submitted by the Council of Sworn Advocates, the distribution of advocates is as follows: 460 sworn advocates act at the Riga Regional Court (out of them 417 practice in the city of Riga), 43 sworn advocates practice at the Kurzeme Regional Court, 26 – at the Latgale Regional Court, 31- at the Vidzeme Regional Court, 36 – at the Zemgale Regional Court. Besides, all the sworn advocate assistants – with an exception of one, who works at the Latgale Regional Court - work at the Riga Regional Court.

The practice shows that the number of cases to be reviewed at all the court instances has the tendency of increasing. Thus the data, submitted by the Ministry of Justice, show that during the last five years district (city) courts have reviewed about 10,517 cases; in their turn in 1999 the regional courts had reviewed 2025 cases, but in 2002 – 2692 cases (*see the case material p. 203).* In 1998 the Criminal Cases Department of the Supreme Court reviewed 368 criminal cases under appellate procedure, but in 2002 – 638 criminal cases (*see page 212 of the case material).*

When analyzing the realization of the challenged norm in practice one has to take into consideration that the norm has remained from the Soviet legal system. Initially, in 1961 the norm was expressed in the following wording: advocates as well as representatives of the Trade Union and other public organizations may act as counsel in a criminal case. Later, on January 12, 1990 the norm was amended by the law passed by the Supreme Soviet of the LSSR. The law determined that

only advocates could act as defense counsel. One shall also take into consideration such arguments as the extension of the legal regulation after the renewal of the independence and the complicated essence of the legal regulation as several international legal norms were incorporated into the national legal system. The process of approximation of the national legal system with the norms of European Union is also taking place. Essential changes take place also in the sector of the higher education. In 1993 when the Law on Advokatūra was passed, one could obtain higher education in law only at the University of Latvia. At the present moment it can be done at several establishments of higher education.

The duty of the Constitutional Court is neither to analyze the tendencies of increase of number of advocates, distribution of advocates and their assistants throughout the regions, the possibility of lawyers of equal qualification to become sworn advocates nor to analyze the quality of legal assistance rendered by sworn advocates. However, taking into consideration the factual material of the case, answers to questions received from the regional courts, the Supreme Court, the Council of Sworn Advocates, Centers of Practice and Aid in Law of the higher educational establishments, the State Bureau of Human Rights, the Latvian Ethnic and Human Rights Study Centre, the Institute of Human Rights etc., as well as the legal regulation of advocate and other lawyer professional organizations in other states and the international standards of this sector, the Constitutional Court expresses doubt whether it is possible to secure to all persons in a criminal process duly, accessible and qualitative counsel and thus to reach the aim of the challenged norm – to guarantee the right to a fair court with the existing legal regulation in the sector of advokatūra.

Insufficient increase in the number of advocates, their unequal distribution throughout regions and the fact that the Collegium of Sworn Advocates is the only professional organization of advocates in Latvia, the extensive freedom of action of the Latvian Council of Sworn Advocates (also the right to determine the number of sworn advocates and the procedure of becoming a sworn advocate or sworn advocate assistant, make decisions on the ethics and other violations of sworn advocates) as well as the lack of an efficient controlling mechanism, the fact that there is no possibility of appealing against the decision of admittance to the sworn advocates may create an artificial deficiency of legal services and rise in prices of the services. It in its turn may lead to violation of the rights guaranteed by Article

92 of the Satversme. It is important to secure that the counsel in a criminal process is efficient and not formal.

Thus even though the challenged norm has a legitimate aim, it is not attained, as at the present moment the professional organization of sworn advocates is not able to guarantee realization of the right to a fair court in practice.

5. It has to be assessed whether the legitimate aim, which the legislator has determined i.e. to allow rendering legal aid in a criminal process only to those lawyers, who are the members of the Collegium of Sworn Advocates, cannot be reached by means, infringing the rights of a person in a lesser degree. One of such means could be enlargement of the range of qualified practicing lawyers, who would experience the right of acting as counsel in a criminal process.

The issue on the enlargement of qualified practicing lawyers is connected with the standards of qualification of the practicing lawyers. The Law "On Regulated Professions and the Recognition of the Vocational Qualification" is presently in effect. The purpose of this law is to ensure the compliance of professional activity to a particular quality requirements and criteria as well as to protect publicly important professions against unskilled persons being engaged in them by establishing increased requirements for those professions. Article 30 of this Law determines regulated professions of lawyers: sworn notary, aspirant sworn notary and advocates. However this norm is formal and it is evident that this regulation is insufficient. The Constitutional Court holds that the Law shall incorporate explicit qualification criteria and a more extensive legal regulation, determining adequate standards is needed. Establishment of explicit and definite qualification standards would be one of the preconditions for increasing the number of qualified practicing lawyers (also advocates).

The qualification standards shall be based upon recommendations of the European Council, which determine the unified in the European Member States principles of activity of lawyers. On October 25, 2005 the European Council Committee of Ministers has adopted Recommendation Rec (2000) 21 "On the Freedom of Exercise of the Profession of Lawyer" as well as its Explanatory memorandum. In the understanding of the above

Recommendation ”lawyer” means a person qualified and authorized according to the national law to plead and act on behalf of his/her clients, to engage in the practice of law, to appear before the courts or advise and represent his/her clients in legal matters. The recommendation determines the fundamental principles of the activities of the lawyer:

1) all necessary measures should be taken to respect, protect and promote the **freedom of exercise of the profession of lawyer** without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human rights;
2) decisions concerning the authorization to practice as a lawyer or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, **should be subject to a review** by an independent and impartial judicial authority;
3) all necessary measures should be taken in order to ensure a high standard of legal training and **morality** as a prerequisite for entry into the profession and to provide for the continuing education of lawyers;
4) bar associations or **other lawyers' professional associations** should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly;
5) all necessary measures should be taken to ensure that **all persons** have effective access to legal services provided by independent lawyers;
6) lawyers should be allowed and encouraged to form and join **professional local, national and international associations** which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.

Similar principles in the sector of criminal process have been established earlier in Havana, Cuba in 1990 UNO 8th. Congress. (Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba,

27 August to 7 September 1990). It should be noted that the above principles refer also to persons, who carry out the functions of an advocate even if they do not have the formal status of the advocate.
The number of qualified practicing lawyers (also advocates) could be increased also taking into consideration the historic experience. Namely, before 1940 in Latvia there were both – the sworn advocates and private advocates, who were not members of the Collegium of Sworn Advocates. The experience of other states, which use means (like not limiting the number of advocates), restricting the right of a person to a fair court to a lesser degree, shall be taken into consideration. Some states allow not only the advocates but also professors of higher schools (in Germany and France) and practicing lawyers (Finland) to act as defense counsel. The issue on the creation of several collegiums of advocates, e.g., at regional courts or organizations of professional practicing lawyers shall be discussed. The issue on licensing of practicing lawyers could also be discussed.

To more completely guarantee the right of the person to a fair court, at the same time enlarging the range of renders of legal services, one of the means after obtaining the higher education in law could be introduction of a unified and independent practice examination. It would ensure a clear, obvious and supervised training of practicing lawyer. Thus the process would be fairly and objectively regulated and would come into effect in a fair and objective form.

Thus the right to a fair court may be restricted but it should be done with the help of means, which are infringing the right to a lesser degree.

Therefore the limitations, determined by the legislator are not proportionate, as not all the persons in a criminal process are secured by an effective counsel and thus the challenged norm does not allow making use of the right to a fair court. As the Constitutional Court has pointed out in one of its judgments, rights shall be not only declared but also implemented in practice (*see the Constitutional Court June 27, 2003 Judgment in case No. 2003 -04-01).*

Thus the limitation incorporated into the challenged norm is not proportionate, because the public benefit is not greater than the loss caused to the rights and legitimate interests of an individual.

6. The legislator, when taking the decision on securing duly, accessible and qualitative legal aid in several types of processes,

including that of the criminal process, should take into consideration the requirements of the European Union. It is necessary so that after the new Member States join the Union , efficient implementation of the legal system of the European Union is secured.

When Latvia becomes a full-fledged member of the European Union, one of the freedoms of the European Union – free movement of persons and services, will refer to our State. Thus the Latvian advocates and other practicing lawyers will be able to compete in the service market of the Union of Europe. This sector is regulated by several secondary legal acts of the European Union. Very important are two directives. One is Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, which regulates short period provision of legal services in another member state of the European Union. The other one is Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a member state other than in which the qualification was obtained. The first Directive refers only to rendering of legal aid, in its turn the second – to the rights of establishment and free movement of employees.

After joining the European Union the advocates of Latvia will have extensive possibilities to act. They will experience the possibility of being employed in public institutions or private enterprises as well as to practice in other Member States of the European Union. Thus there shall be such a legal regulation in a state, which allows the Latvian advocates and practicing lawyers to render legal services in other member states of the European Union on the basis of the principle of equality. The legal regulation in Latvia shall not differ from that of the other Member States of the European Union, otherwise inequality and deformation of competition may arise and that can become an obstacle in implementation of free movement of persons. The economical and professional requirements envisage that lawyers shall render legal services in the whole European Union and create different professional associations, which can be joined by lawyers of one or several states.

One shall take into consideration also the fact that the 2nd. Chapter of the Republic of Latvia positional talks ”Free

Movement of Persons" has resolved to recognize and implement *acquis communautaire* in the sector of free movement of a person. To approximate Latvian legislature with the European Union requirements referring to advocates, Latvia expressed resolution to elaborate the Law " On Regulated Professions and the Recognition of the Vocational Qualification". This Law was passed by the Saeima on June 20, 2001 and took effect as of July 20 of the same year. However, the essence of the liabilities, following from the above Directives, is incorporated into the law just by enumerating separate requirements of the Directives. It, in its turn may vitally hinder reaching of the objectives, mentioned in the Directives. Furthermore, Latvia had undertaken the liability of elaborating the Amendments to the Law On Advokatūra as well as the Cabinet of Ministers Regulations "Requirements to the Professional Qualification of the European Union Member State Advocates Practicing in the Republic of Latvia and Regulations on their Professional Practice" to the end of 2001. However, only recently the Saeima reviewed in the second reading the amendments to the Law on Advokatūra with incorporated requirements of the European Union.

Thereby it is necessary to amend the regulation of the right to legal aid in such a way that it corresponds to the requirements of the European Union.

Thus the challenged norm does not secure the right of the person to duly, qualitative and accessible legal aid, guaranteed in Article 92 of the Satversme and does not guarantee the right of a person to efficient realization of a fair court.

7. As the challenged norm contradicts one of the Satversme Articles – Article 92, there is no need to assess its conformity with Article 89 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 Article 96 (the first sentence of the second part) of the Latvian Criminal Procedure law as **unconformable with** Article 92 of

the Satversme and **null and void** from March 1, 2004 if the legislator does not amend the legal regulation of the performance of advocates so that it complies with the standards of the European Union and the European Council and guarantees the right to a fair court in the full range.

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 A.Endziņš