THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, June 27, 2003

JUDGMENT
in the name of the Republic of Latvia

in case No. 2003 – 04 – 01

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

on the basis of the constitutional claim by Aina Strode,

pursuant to Article 85 of the Republic of Latvia Satversme (Constitution), Articles 16 (Item 1), 17 (Item 11 of the first part) and 281

holding the proceedings in writing

reviewed the case

"**On the Compliance of Articles 82 (the Fifth Part) and 453 (the Second Part) of the Civil Procedure Law with Articles 91 and 92 of the Republic of Latvia Satversme".**

The establishing part

1. On October 14, 1998 the Saeima passed the **Civil Procedure Law** (henceforth- CPL), in the first part of Article 82 determining that physical entities may conduct court proceedings themselves or with the help of authorized legal representatives. In its turn the second part of Article 453 of CPL incorporates the provision that the cassation claim shall be signed by the submitter of the claim or his/her authorized representative. If the representative submits the claim then authorization

or another document, confirming the rights of the representative shall be attached to the claim.

On October 31, 2002 the Saeima adopted the ”Amendments to the Civil Procedure Law”, determining that the Law shall take effect as of January 1, 2003. The fifth part was added to Article 82, which envisages that ”physical and legal entities shall conduct court proceedings at the cassation courts with the help of an advocate”, but the second part of Article 453 was expressed in the following wording: ”The advocate shall sign the cassation claim. The document, confirming the authority of the advocate shall be attached to the claim” (henceforth – the challenged norms). In accordance with Article 34 (Item 9) of the Law ”On Advokatūra” the Latvian Council of Sworn Advocates (henceforth – the Council of Advocates) shall assign sworn advocates and sworn advocate assistants (henceforth – the advocates) to criminal cases and to cases in courts and pretrial investigation agencies, and to represent indigent persons and persons who are unable, with good cause, to secure legal counsel. Article 61 of the Law ”On Advokatūra” determines that the chief judge may assign a sworn advocate to conduct a criminal case or the case of an indigent client. In conformity with Articles 58 and 61 of the Law such advocate shall be awarded payment from State budget resources. The amount of the payment shall be determined and collected for the benefit of the State in accordance with procedures and cases established by law.

2. **The submitter of the constitutional claim** holds that everyone, regardless of his/her financial position, experiences the right of defending himself in person or through legal assistance of his/her own choosing. She expresses the viewpoint that the challenged legal norms violate her rights, as she - like the greatest part of people – cannot afford paying for the services of an advocate. Thus she is denied the right to fair court, which is guaranteed in Article 92 of the Republic of Latvia Satversme (henceforth – the Satversme). Besides, to her mind, the challenged legal norm is discriminating, thus - not in the compliance with Article 91 of the Satversme. In 2000 the submitter of the claim addressed the Council of Advocates with the request to appoint an advocate for conducting the proceedings free of charge. She received the refusal, because advocates shall not be appointed to represent the claimant in reviewing a civil matter

3. The institution, which has passed the challenged legal norms – **the Saeima -** does not agree with the viewpoint of the submitter of the claim. It stresses the following arguments: first of all, the right of defending the rights in a fair court, included in Article 92 of the Satversme, is not absolute. It may be restricted. Restrictions, which are determined by law, have a legitimate aim, namely, to ensure qualitative

and professional legal representation in complicated cases, often met with as regards civil matters at the cassation court. Secondly, the restriction is in conformity with the principle of proportionality as Articles 9 (Item 9) and 61 of the Law ”On Advokatūra” anticipate cases and the procedure of conducting cases for indigent persons. Expenses of the advocates, connected with conducting proceedings, are awarded form State budget resources. The Saeima notes that an indigent person is a person, who obtains the above status if his/her income and financial position are unconformable with the level determined by the municipality. Therefore such a person – in the compliance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention) - has the right of defending the rights in a fair court. Besides, the Saeima stresses that the challenged legal norms are in compliance with Article 91 of the Satversme, as the norms do not envisage a differentiated attitude and equally refers to all the persons, who submit a cassation claim to the court of cassation instance.

4. **The Council of Advocates** points out that the challenged legal norms are not directed to restriction of fundamental rights of a person; their objective is to ensure adequate review of cases at the court of cassation instance. However, the mechanism, regulating remuneration for the services of an advocate, who renders assistance to an indigent person in preparing and reviewing the cassation claim has not been envisaged. The Council of Advocates accepts applications on rendering legal assistance free of charge from the handicapped persons and pensioners (whose pension is smaller than 80 lats per month), from persons, who have the status of unemployed or indigent families. In these cases the Council of Advocates itself reaches the decision on rendering legal assistance free of charge. In 2002 118 applications were examined, out of which 40 have been satisfied – mainly in cases on turning persons out of the flat, on incurring material detriment, dismissal, levy of subsistence etc. In 2003 no applications on rendering legal assistance free of charge at the cassation instance have been satisfied. It can be explained by the limited financial possibilities of the Council of Advocates, because the State does not provide for financing the work of advocates in civil cases.

5. **The Ministry of Justice** furnishes the same information, namely, the Ministry has not claimed resources from the state budget for conducting court proceedings in civil or administrative cases of indigent persons because the Council of Advocates has not expressed such a proposal. Thus, no resources have been envisaged for the above aim.

6. **The Supreme Court** positively assesses the amendments in the civil procedure legislature, as the number of incoming cases with unconformable cassation claims to the Supreme Court Senate (henceforth – the Senate) has decreased, and that allows to spend more time on the cases to be reviewed under cassation. Besides the challenged legal norms discipline the advocates. The submitted cassation claims are being substantiated better at the present moment.

   In 2001 out of 549 cases the decision on terminating the cassation proceedings was adopted on 40% cases. In its turn in 2002 this number was even greater – 42% out of 694 cases. Up to May 31, 2003 the Senate has received 331 cassation claims and the cassation proceedings were terminated on 87 cases. Up to May 31, 2002 the Senate had received 390 claims and proceedings were terminated on 135 cases.

The concluding part

1. Article 92 of the Satversme determines that ”everyone has the right to defend their rights and lawful interests in a fair court. […] Everyone has a right to the assistance of counsel”. The contents of the Article shall be interpreted as read together with Article 89 of the Satversme, which establishes that ”the State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia”. From the Article follows that the aim of the legislator has not been to oppose norms of human rights, incorporated into the Satversme, to the international ones. Quite to the contrary – the objective of the legislator has been to achieve mutual harmony of the norms. In cases, when there is doubt about the contents of the human rights included in the Satversme, they should be interpreted in compliance with the practice of application of international norms of human rights (*August 30, 2000 Constitutional Court Judgment in case No. 2002-03-01; and October 22, 2002 Judgment in case No. 2002-04-03).*

1.1. Article 14 of the International Covenant on Civil and Political Rights also envisages that ” in the determination of rights and obligations in a suit of law everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. Article 6 of the Convention also determines that ”in the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

   The European Court of Human Rights (henceforth –ECHR) has established that the Convention does not directly formulate the right of

everyone to appeal at the court. However, this right follows from the first part of the Convention Article 6, as it would be absurd to incorporate the fundamental requirements for reviewing the case at the court, without envisaging the right of appealing at the court (*see ECHR Judgment in case Golder v. the United Kingdom).* At the same time the Court acknowledged that the right of appealing at the court is not absolute. This right may be restricted as far as the person is not deprived of it in point of fact.

The Constitutional Court has also repeatedly pointed out: even though the Satversme does not directly envisage cases in which the right to a fair court might be restricted, however this right is not absolute. The Satversme is a single aggregate body and the norms, incorporated into it, shall be interpreted systemically (*see October 22, 2002 Constitutional Court Judgment in case No. 2002-04-03 and November 26, 2002 Judgment in case No. 2002-09-01*). Presumption that it is not allowed to determine any limitations to the rights envisaged in Article 92 of the Satversme for every particular person, would be at variance with both – fundamental rights of other persons, guaranteed by the Satversme and the other norms of the Satversme (*see November 26, 2002 Constitutional Court Judgment in case No. 2002-09-01).*

1.2. Article 86 of the Satversme establishes that " decisions in court proceedings may be made only by bodies upon whom jurisdiction regarding such has been conferred by law and only in accordance with procedures provided for by law". When interpreting Article 92 of the Satversme as read together with Article 86, one may conclude that the right to defend the rights at a fair court may be restricted by law if the restriction (as the ECHR has resolved with regard to the rights, anticipated in the first part of Article 6 of the Convention) has been conferred by law, has a legitimate aim and the restriction is proportionate to that aim (*see ECHR Judgment in case Fayed v. the United Kingdom).*

2. Article 6 of the Convention does not assign the Contracting States with the duty of forming cassation or appellate courts. However, if they are formed, then in their activities they should take into consideration Article 6 of the Convention (*see ECHR Judgment in case Delcort v. Belgium).*

States, which do not admit a system of leave to appeal to the third court or which do not admit the possibility for the third court to reject part of an appeal, could consider introducing such systems aiming at limiting the number of cases meriting a third judicial review. Even though the right to control of a higher court is an essential ingredient of the right to a fair court, implementation of the above right has caused an increase in

the number of appeals and problems in the length of appeal proceedings. The Council of Europe Committee of Ministers holds that the above problems may affect everyone's right to a hearing within a reasonable time under paragraph 1 of Article 6 of the Convention (*see Council of Europe Committee of Ministers February 7, 1995 Recommendation No. R95/5/ "On the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases").*

2.1. The cassation instance has a special function, which establishes the specifics of the process of the cassation court. In difference from the "Soviet" cassation model the essential feature of the Latvian cassation institute is the fact that the conclusive importance does not lie in the interests of the parties, which are sufficiently protected when reviewing the case in the first two instances of the court, but in legal public interests. Only *quaestiones iuris* – i.e. issues on the rightness of appliance of material and procedural norms - are reviewed by the cassation instance. The cassation principle is of a legal public nature as it is directed to uniform application and interpretation of legal norms throughout the State (*see Bukovskis V. Textbook on Civil Procedure. Riga, published by the author in 1933, pp. 461 – 464).* Appeals to the third court should be used in particular in cases, which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the cases would contribute to such aims (*see Council of Europe Committee of Ministers February 7, 1995 Recommendation No. R95/5/ "On the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases).*

2.2. The Saeima reasonably points out that the restrictions, incorporated into the challenged norms, envisage better protection of the rights of persons, as Article 477 of the CPL determines that the decision of the cassation instance allows of no appeal. Therefore drawing up of a qualitative claim and qualified representation at the cassation instance - which can be achieved only if there is an adequate, skillful and experienced representative – is in the interests of physical and legal entities. The right to qualified juridical representation is one of the fundamental human rights, which ensures also implementation of other rights.

As every person had the right of drawing up a cassation appeal, the cassation court was overloaded with unconformable claims, which lacked juridical substantiation. Besides, the legislator, when demanding invitation of a qualified person, has wanted to limit the right of any person to speak at the court process. If the person is

represented by a qualified lawyer, the Senate may review legal issues but not listen to reasons, which do not refer to legal issues.

Therefore the restrictions have two legitimate aims. The first - to ensure qualified legal representation at the court of cassation instance for the parties; the second – to ensure adequate performance of the cassation court.

3. The principle of proportionality determines that in cases, if the public authority restricts the rights and legitimate interests of a person, a reasonable balance between the public and individual interests has to be taken into consideration.

To evaluate whether the legal norm complies with the proportionality principle one has to ascertain if the means, used by the legislator are **suitable** for achieving the legitimate objective and if it is not possible to attain the objective by other means, which would **less limit** the rights of an individual as well as show whether the activity of the legislator is **proportionate.** If, after evaluating the legal norm, it is acknowledged that it does not comply with even one of the above criteria, it is unconformable with the principle of proportionality and illegitimate (*see March 19, 2002 Constitutional Court Judgment in case No. 2001-12-01).*

4. The legislator has determined that the means for reaching the above legitimate aim shall be mandatory representation at the cassation court, allowing choosing the representative only from among advocates and demanding that the cassation claim shall be drawn up by the advocate.

4.1. In its May 14, 1981 Annex to Recommendation No. R(81)7 ”Measures facilitating access to justice”, the Council of Europe Committee of Ministers has pointed out that ” where, having regard to the nature of the matter involved, it would be desirable for an individual to put his own case before the courts in order to facilitate access to justice, then representation by a lawyer should not be compulsory”. However this recommendation cannot be referred to the court of cassation instance as it fulfils a specific function. By allowing any person to appeal at the Senate would mean unnecessarily loading the cassation court with job and its performance would be hindered and that would violate the rights of other persons.

Determination of the mandatory representation serves the purpose for the representative – the lawyer – not only to evaluate the necessity of appealing at the court but also to choose the most adequate form to do it.

Mandatory representation is envisaged also in the laws of other states. Thus, for example, Article 27 of the Austrian Civil Procedure Law states that at regional courts (*Bezirksgericht)*, when reviewing cases in which the sum of the claim exceeds 4000 euro as well as at all the instances of the Supreme Court representation by an advocate is of absolute obligation (*absolute Anwaltspflicht).* The parties are not allowed to conduct proceedings. In its turn paragraph 85 of the Estonian Civil Procedure Law advances similar, though less strict requirements, namely, it does not forbid a person to conduct proceedings at the cassation court, but it determines that ”only sworn advocates shall be representatives and - as the representatives of the parties on the basis of an agreement –they may submit the cassation claim to the state court”.

The authorities stress that the abilities of advocates in ensuring qualified legal representation and rendering juridical assistance shall not be underestimated. The law determines several requirements for the profession: higher school of law education, a certain experience in the profession, necessity of taking examinations etc. The institute of advocates has an extremely noticeable importance in the ensurance of qualified legal representation as the advocate is not only the representative, whose task is to assist the party during the court process and in reaching the final aim of the person, who has authorized him/her, but also the that of the defender of rights. The advocate, when taking his oath, becomes a person, belonging to the judicial system, who undertakes the obligation of protecting the rights of the individuals in the interest of public welfare and in its name (*see Bukovskis V. pp.200-202).*

Consequently, the means, chosen by the legislator on the whole are appropriate for reaching the legitimate aims.

4.2. One has to agree with the viewpoint of the submitter of the application that side by side with the advocates there are other adequately qualified persons, who are able to ensure **qualified legal representation.** Even though up to January 1, 2003 the principle of representation by an advocate at the court of the cassation instance, as can be seen from the Saeima verbatim reports, materials of the Legal Affairs Committee etc., was mandatory, the legislator has not sufficiently assessed the necessity of the challenged legal norms, namely, the existence of more considerate means for reaching the legitimate aims.

The Constitutional Court holds that there are such means for reaching the legitimate aims, especially for ensurance of qualified legal representation at the cassation court. For example, judges and

procurators are able to conduct court proceedings (in cases envisaged by law) as well as advocates, so can doctors of juridical sciences, specific non-governmental or state financed institutions, which render juridical assistance , also persons, who have higher juridical education and who have taken examination, which attests their skills and abilities etc.

The Council of Europe Committee of Ministers in its March 2, 1978 Resolution 78(8) ”On Legal Aid and Consultations” also stresses the necessity of qualified legal representation. It determines that persons of professional qualification, who are engaged in legal practice in accordance with the law, should render legal aid, especially in cases ”when in accordance with the law representation of the person at the respective state court is mandatory”. As far as it is possible the person shall be given the possibility of freely choosing a qualified representative, e.g. advocate.

Thus there exists the possibility of determining more considerate means for securing qualified legal representation at the court of the cassation instance.

5. From the first and fourth sentences of the Satversme Article 92 follows that the right of everyone to the assistance of the advocate shall be understood as the subjective right to qualified legal aid, namely, to protect his/her rights and legitimate interests, the person has the right of receiving the necessary legal aid from the persons, who have obtained the needed knowledge and skills. The right to the advocate in the understanding of Article 92 of the Satversme, firstly includes the right to qualified legal aid and, secondly, - the obligation of the State to render such aid to persons, who cannot afford finding it themselves. Every person, accused of a crime has the right of receiving efficient and qualified legal aid without charge, if he/she is unable to pay for it. Every indigent person has the right to it in all the cases, in which mandatory representation is determined or if the interests of proceedings demand it (the potential grievous effects of the case and complicated proceedings). The contents of the right of every person to the aid of advocate, following from Article 92 of the Satversme is not exhaustive, it can be enlarged but not restricted.

The European Court of Human Rights in the case *Airey v. Ireland* determined that the first part of Article 6 of the Convention may sometimes assign the states with the obligation of securing legal aid in cases, when it is necessary to efficiently ensure access to court. ” It may be in cases when the legal representation is mandatory, as it has been determined in legal acts of several Contracting Parties with regard to different types of the process or if the process is complicated”. Article

47 of the European Union Charter of Fundamental Rights also fixes the right to efficient protection of rights and a fair court. The third part of the Article establishes that ” legal aid is rendered to persons, who do not have sufficient means as far as such aid is needed to ensure access to court”.

5.1. The Saeima in its written reply indicates to Articles 34 (Item 9) and 61 of the Law ”On Advokatūra”, which anticipate assigning an advocate to conduct a case of an indigent client. Such advocate shall be awarded payment from state budget resources in accordance with procedures prescribed by law.

For receiving state financed legal aid the person shall meet certain requirements. The Saeima points out that in the understanding of the Law ”On Advokatūra” the indigent person is a person, who has been recognized to be the indigent person. Criteria for obtaining the above status are envisaged in the Cabinet of Ministers February 25, 2003 Regulations No. 97 ”Procedure under which a Family or a Person Living Separately shall be Recognized as Indigent” (henceforth – Regulations).

The Regulations have been passed in accordance with Article 33 of the Law ”On Social Aid”. Article 32 of the Law defines the objective of social aid, namely, to render social aid allowance to needy families (persons) to satisfy their fundamental needs and to favor participation of able persons in improvement of the situation they are in. Regulations, which were elaborated to specify the range of persons, who have the right to social aid and whose fundamental needs it is necessary to improve, do not include objective criteria for determining the range of persons, who experience the right of claiming the aid of a qualified advocate in conducting proceedings in the court of the cassation instance.

Also those persons, who are not recognized as indigent persons in the understanding of the Regulations, are not always able to pay for the services of the advocate. If the above Regulations were considered as the only criterion for receiving state financed legal aid, the range of the persons, who need legal aid, would be seriously and groundlessly narrowed.
In difference from the Civil Procedure Law of the *midwar period (see Articles 303, 1010 – 1012, 1022 and the Commentary. Konradi F., Zvejnieks T. The Civil Procedure Law with explanations.- Riga: issued by the State Printing House, 1939)* no legal act regulates the rights of indigence in the civil process. Namely, no detailed directions on the procedure of receiving services of the advocate as well as criteria of claiming for it are envisaged. The procedure of appealing against the

refusal of legal aid and other essential nuances of the proceedings has not been incorporated into the normative acts either.

Thus the legal norms, incorporated into the Regulations and the Law "On Advokatūra", are insufficient for securing free of charge legal aid to persons, who need it.

5.2. Groundless is the viewpoint, expressed in the Saeima written reply that the challenged norms comply with the first part of Article 6 of the Convention " as free of charge legal aid in a civil matter is ensured to the persons, who do not have sufficient means".

The Cabinet of Ministers in its regular report "On the Implementation of the 1966 International Covenant on Civil and Political Rights in the Republic of Latvia in the Period from 1995 to January 1, 2002" states that in January of 2002 Agreement on the Project "Support to the System of Justice in Latvia" was signed; under the project it was just planned to start a dialogue with private legal firms, rendering legal aid to insure free of charge legal aid to the indigent members of Latvian society [*see October 29, 2002 newspaper "Latvijas Vēstnesis"No. 156 (2731)]*.

At the Plenum of the Supreme Court, which took place on February 10, 2003, the Chairman of the Civil Case Department of the Supreme Court Senate Mārtiņš Dūdelis stated: the fact that there are many people, who cannot pay for the services of the advocate, causes one of the problems of the judicial system [*What has the 2002 performance of the Supreme Court been like// Latvijas Vēstnesis, Annex The Word of the Jurist, 18.02.2003, No. 7 (265)*].

The Council of Advocates in their letter to the Constitutional Court pointed out that in 2003 applications on free-of-charge legal aid in the cassation instance have not been satisfied as the state does not ensure remuneration for services of advocates in civil cases. The Ministry of Justice in its letter to the Constitutional Court admits that it had not required financing for it and the state budget does not envisage funds for conducting proceedings in civil or administrative case of indigent persons (*see II Vol. pp. 99-100; 125-126 of the case).*

On May 15, 2003 at the meeting of the Secretaries of State "Conception for the Creation of the System of Legal Aid in Latvia" (MSS- 719) (henceforth – the Conception) was proclaimed. It is stated that " **no system of state supported legal aid exists in the sector of civil law", but that is at variance with the rights, guaranteed in the Satversme and the Convention.** To eliminate unconformity with the

legal norms of the Satversme and international legal norms, ”a state financed system of legal aid in civil matters shall be created”.

The Conception substantiates the above necessity not only with the norms of the Satversme and the Convention but also with the necessity of implementation of the European Union Council Directive 2002/8/EK. The Directive embraces all the aspects of civil proceedings (also commercial law, labour law, consumer protection), regardless of the fact in what court instance the matter is being reviewed. The Directive grants persons, who do not have sufficient resources, with the right to paid-up legal aid (regardless of the fact whether they are the citizens of the European Union or the citizens of the third countries, legally residing in the Contracting State). The legal aid includes also the services of the advocate or some other person, who is authorized to represent the parties at the court. If the all-embracing system of legal aid in civil matters were not introduced but only the Directive were introduced to November of 2004 then the situation would arise under which the residents of Latvia – in comparison with the residents of other states of the European Union, who would receive the legal aid, would be discriminated in their own State.

Thus at the present moment **the funding for ensuring the services of the state financed advocate for conducting civil and administrative matters of indigent persons (**even at the court of cassation instance) **is not envisaged.**

6. The restrictions, incorporated into the challenged legal norms have been determined by law and they have legitimate aims. The means, used by the legislator are appropriate for reaching the legitimate aims, namely – by determining the mandatory representation of the advocate at the cassation instance, qualified legal representation and adequate performance of the cassation instance may be ensured. However, the legislator, when determining the principle of mandatory representation, had the possibility of **envisaging more considerate means** for reaching the legitimate aims. Besides, the **restrictions**, determined by the legislator, **are not proportionate,** as state financed legal aid is not ensured and the challenged legal norms deny persons the right of access to the court. Thus, the public benefit is not greater than the loss of the rights and legitimate interests of an individual. In a law-based-state the protection of the rights and interests shall be secured, not only declared. However the valid normative regulation is evidently insufficient and does not ensure the implementation of the rights, guaranteed in Article 92 of the Satversme.

Thus the challenged legal norms do not comply with the principle of proportionality and are unlawful.

As the challenged norms are unconformable with one of the Satversme Articles, then there is no necessity of assessing their conformity with other Articles of the Satversme.

The substantive part

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

decided:

to declare the fifth part of Article 82 and the second part of Article 453 of the Civil Procedure Law as unconformable with Article 92 of the Satversme and null and void as from January 1, 2003.

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of it publication.

The Chairman of the Court session A.Endziņš