



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, May 20, 2003

JUDGMENT

in the name of the Republic of Latvia

in case No. 2002 – 21 – 01

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

in the presence of the sworn advocate Jānis Rozenbergs – the representative of the submitters of the constitutional claim Aldis Baums, Zigurds Markovičs and Jānis Rozenbergs as well as the sworn advocate Ilmārs Bišers – the representative of the submitter of the constitutional claim Edmunds Lukevics,

and the sworn advocate Lauris Liepa – the representative of the institution, which has passed the challenged acts – the Saeima,

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

on April 22, 2003 in the public hearing reviewed the case

”On the Compliance of Article 27 (the Fourth Part) and the Text of Article 28 (the Second Part) ”...for the Time Period until the Age of 65 Years” of the Higher School Law and Article 29 (the Fifth Part) of the Law ”On Scientific Activity” with Articles 91 and 106 of the Republic of Latvia Satversme””.

The establishing part

1.

1.1.

On November 10, 1992 the Republic of Latvia Supreme Council passed the Law "On Scientific Activity". Article 29 of the Law determined the system of academic positions in state scientific institutions. On June 13, 1996 the Saeima adopted the Law by which Article 29 of the Law "On Scientific Activity" was expressed in a new wording. The fifth part of the Article envisaged that administration positions and academic positions in state scientific institutions and organizations, as well as positions in elected collegiate scientific institutions may be occupied by persons until reaching the age of 65 years, except cases when the respective person has received the complied permission from the Ministry of Education and Science and the Latvian Council of Science on extending the age limit for a certain period.

On May 20, 1998 the Saeima adopted the Law by which Article 29 of the Law "On Scientific Activity" was amended once again. At the moment the fifth part of Article 29 of the Law determines that "administrative positions (director, director's deputy, manager of a scientific structural unit) in state scientific institutions and positions in elected collegiate scientific institutions can be held by persons until reaching 65 years of age. Academic positions in state scientific institutions can be held by persons without limitation of age if their scientific qualifications and work productivity comply with criteria determined by Latvian Council of Science".

1.2.

On November 2, 1995 the Saeima passed the Higher School Law. Article 27 (the first sentence of the fourth part) of it establishes that "the elected positions of professor, associated professor, assistant professor and administrative positions (rector, prorector, dean) in higher schools may be held until the age of 65 years". In its turn, in conformity with the second part of Article 28 of the Law "professors shall be elected according to the provisions of Article 33 of this Law, in an open competition for six years, and rector shall conclude with him/her an employment contract for all the elected time or for the time period until the age of 65 years". In compliance with this Law similar norms are incorporated also in the Satversmes of the higher schools.

1.3.

On October 15, 1998 amendments were made to the Republic of Latvia Satversme (henceforth – the Satversme) in accordance with which it was supplemented with Chapter VIII "Human Rights" (Articles 89 – 116). Article 91 of the Satversme determines: "All human beings in Latvia shall be equal

before the law and the courts. Human rights shall be realized without discrimination of any kind". In its turn the first sentence of Article 106 of the Satversme establishes: "Everyone has the right to freely choose their employment and workplace according to their abilities and qualifications".

2.

2.1.

On October 31, 2002 **Aldis Baums, Zigurds Markovičs and Jānis Rozenbergs** submitted a constitutional claim to the Constitutional Court, requesting to declare the fourth part of Article 27 of the Higher School Law with regard to elected positions of professor, associated professor and assistant professor as well as the text of the second part of Article 28 "for the time period until 65 years of age" (henceforth – the challenged norms of the Higher School Law) as unconfordable with Articles 91, 106 and 116 of the Satversme.

All three submitters of the claim have reached the age of 65 years. To their mind the challenged norms violate the norms guaranteed by Article 106 of the Satversme and determine discriminating restrictions to their right of freely choosing their employment and workplace. Their rights have been restricted not because of their abilities and qualifications (permitted in Article 106) but because of their age. They have lost neither their qualification nor their abilities. The higher schools have asked them to continue their former activities but for lower salaries and on the basis of a terminated contract. However, the higher schools have the possibility of making an offer of professor's position, because "none of their previous positions has been liquidated as needless or because of financial reasons".

2.2.

On December 3, 2002, **Edmunds Lukevics** submitted a constitutional claim to the Constitutional Court, requesting to declare Article 29 (the fifth part) of the Law "On Scientific Activity" as well as Article 27 (the first sentence of the fourth part) and the text of Article 28 (the second part) "or to the time period until 65 years of age" of the Higher School Law as unconfordable with Articles 82, 91 and 106 of the Satversme, Articles 7 and 31 of the International Covenant on Economic, Social and Cultural Rights and Article 1 (Section I), Article 1 (Section II) and Article 20 (Section III) of the European Social Charter.

It is pointed out in the claim that the envisaged restrictions incorporated into the fifth part of Article 29 of the Law "On Scientific Activity" (henceforth – the challenged norm of the Law "On Scientific Activity") refer to the most responsible positions of the state scientific institutions. To carry out the duties of the positions one has to master comprehensive knowledge, obtained earlier and the ability to pass the above knowledge to the others. The submitter

stresses that he is the Director of the Institute of Organic Synthesis of Latvia, Head of the Laboratory of Metal-organic Chemistry of the Institute, author of 1532 scientific publications, the most quoted Latvian scientist in the scientific editions of the world. He has delivered lectures at the Universities of France, Japan and Sweden.

He holds that many well-known scientists of the world— after reaching considerable age - have contributed much to the advancement of science. Even though all people become old and their work productivity gradually diminishes, equal restrictions for holding the positions shall not be applied to everybody. As the submitter of the claim has reached the age of 65, the challenged norm of the Law "On Scientific Activity" denies him the right of holding the former positions at the Institute of Organic Synthesis, but the challenged norms of the Higher School Law do not allow him to run for the position of professor at the Faculty of Chemistry of the Latvian University.

3.

3.1.

The institution, which has passed the challenged norms – the Saeima in its written reply on the compliance of the challenged norms with the Satversme points out that the duty of higher schools is to take care about training young scientists and ensure the possibility of their becoming part of the academic processes of the world. Scientific and creative work takes place at the higher schools in order to prepare both - well-educated, professional specialists in different sectors of science or art and new scientists. Thus the succession of performance of higher schools is ensured.

The objective of the challenged norms of the Higher School Law is not to get free of persons, who have reached the age of 65 years and who hold the above positions. The objective of these norms is to ensure advancement of science and art as well as "rejuvenate" the academic and administrative personnel. The Law prohibits holding the above positions to the persons, who have reached 65 years of age, but it does not limit their right of continuing scientific research. Besides- in conformity with Article 27 (the fourth part) of the Higher School Law - the rector of any higher school may conclude individual contracts with the pensioned academic personnel, also on carrying out scientific research and envisaging specific payment for a certain amount of work, taking into consideration the qualification of the person.

The Saeima stresses that in 1997 491 professor staff units were assigned to the Latvian higher schools and to the end of 2002 295 professors have been elected. The Saeima holds the viewpoint that "the personnel of the highest academic level is gradually becoming younger" and to their mind abrogation of the challenged norms of the Higher School Law will hinder the process. The public gain in the above case is greater than the restriction of the rights of

individuals. Besides- the Saeima holds that one has also to take into consideration the fact that , e.g., Article 84 of the Satversme envisages that ” the age of retirement from office for judges may be determined by law”.

3.2.

In its written reply on conformity of the challenged norm of the Law ”On Scientific Activity” with the Satversme, the **Saeima** points out that essential duty of any subject of scientific activity is to carry out scientific and connected with acquirement and perfection of scientific qualification activities. Activities of scientific institutions, the objective of which is ensurance of succession of specialists in scientific work shall be based on carrying out scientific research and preparation of young specialists. The Saeima stresses that the restrictions established by the challenged norm of the Law ”On Scientific Activities” ”refer only to persons, who determine the main directions of scientific activities of the state scientific institutions or who are managing the administration of the institutions, and do not restrict the right of the persons to carry out scientific activities”.

The Saeima expresses the viewpoint that the objective of the restrictions, established by the challenged norm of the Law ”On Scientific Activity” is not to get free of persons, who have reached the age of 65 years and are engaged in scientific work, but to ensure advancement of science and ”rejuvenation” of the administrative and leading personnel of state scientific institutions.

The Saeima stresses that the aim of the challenged norms is ”successful advancement of scientific sectors and preclusion of rapid aging of the teaching staff”. As in the public interests the rights of only a limited number of individuals are restricted by the challenged norms the restriction complies with the principle of proportionality. Besides, when looking at the practice of the Member States of the European Union in the sphere of determining age limit for the higher school professors, one can see that in these states the mandatory pensioning age – from 61 to 70 – has been determined.

4.

During the process of preparing the case for review four higher schools were asked to express their viewpoint on the conformity of the challenged Higher School Law norms with Articles 91 and 106 of the Satversme. The Senate of the **Riga Technical University** (henceforth – RTU) holds that the norms have to be abrogated. It is becoming more and more difficult to find employees for the positions to which refer age limitations. This fact in its turn makes it difficult to organize a qualitative study process. 144 staff units of professors are anticipated for RTU but at the moment only 61 professors are working at the higher school but 31 associated professors carry out the duties of the professors. Because of the low amount of grants and small salaries it is

especially difficult to find masters of computer sciences, engineering and natural sciences who are ready to become candidates for a doctor's degree. RTU stresses that "for the time being one has to give up the idea of dismissing highly qualified and talented specialists who have reached the age of 65 years". At the moment RTU concludes individual contracts for a year with the professors who are 65 years of age and want to continue working in the position. But their salary is twice less than the salary of the elected professor. The Senate of RTU backs the viewpoint that senates of higher schools shall be endowed with the right of allowing persons, who have reached the age of 65 years, participating in the competition for the above positions. However the persons shall be elected to the positions for a period of three years and not more than two times.

The Senate of **the University of Latvia** (henceforth – LU) upholds the viewpoint that both – the challenged norms of the Higher School Law and the challenged norm of the Law "On Scientific Activity" "comply with the higher school development interests and their application is based on Article 116 of the Republic of Latvia Satversme".

The Latvian Academy of Arts (henceforth – LAA) has pointed out that the fourth part of Article 27 of the Higher School Law shall be amended so as to ensure the possibility of being able to work at the higher school until the age of 70 years and increase the possibilities of concluding more "flexible" contracts.

The Senate of the **Latvian Agricultural University** (henceforth – LAU) holds that it is necessary to leave unchanged "the provisions on age limit as changing the provisions does not solve the problem of "rejuvenating" the academic personnel but just makes it more complicated and hard to solve".

As the Senate of the **Latvian Academy of Sciences** (henceforth – LAS) did not have one and the same viewpoint on the usefulness and compliance with the Constitution of the age limitation incorporated into the challenged norms, the President of the LAS Jānis Stradiņš expressed his opinion on the issue to the Constitutional Court. On the one hand – there is the necessity of replacement of generations at the higher schools and research institutions. However solution of this problem is connected with increasing of funding to the sectors of science and higher education. On the other hand, during the LAS Senate meeting the conclusion that these norms shall be assessed by taking into consideration the general situation of education in Latvia has been expressed. J Stradiņš holds that the restrictions, determined in the challenged norms, have only partly reached their objective, i.e., favouring involvement of the young generation in the academic body and in administrative positions at the state scientific institutions. Therefore other - more efficient methods shall be used. J. Stradiņš is of the opinion that many of the scientists, who have reached the age of 65 years could successfully continue their work at the state scientific institutions and higher schools.

The board of **the Latvian Scientists' Society** (henceforth – LSS) holds that for the time being usefulness of the challenged norms of the Higher Education Law and the Law "On Scientific Activity" is questionable, because further application of these norms might create the situation in the sector of Latvian science that experienced scientists because of formal reasons are excluded from the scientific management but the inflow of young scientists is minimal and insufficient. The LSS Board expresses the viewpoint that the challenged norms might be useful under circumstances when the state maximally supports advancement of science in Latvia, granting the needed funds and furthering the interest of young scientists to participate in the activities of scientific institutions. At the present time the challenged norms do not ensure natural alteration of generations in the sector of science.

The Board of Latvian Science (henceforth – BLS) holds that exchange or alteration of generations at the scientific institutions and higher schools cannot be performed by administrative methods. In the greatest number of European and world states, in which age limits have been determined, the above limits function under essentially different conditions of funding for science and quite different social guarantees for the scientists. In cases, when the age of a person inconveniences carrying out the administrative job, change of the respective employee may be done by other juridical means. If the challenged legal norm of the Law "On Scientific Activity" remains in force, then the amount of financial means for science in Latvia shall be substantially increased.

5.

When preparing the case for review it was established that Article 27 (the second and third sentence of the fourth part) of the Higher School Law does not incorporate restrictions of rights, challenged by A.Baums, Z. Markovičs and J. Rozenbergs in their constitutional claim. Besides their constitutional claim does not include legal justification needed to declare the unconformity of the above norms of the Higher School Law with the Satversme.

In its turn I.Bišers - the representative of the submitter of the constitutional claim E.Lukevics sent the letter to the Constitutional Court, in which he explained that E.Lukevics does not challenge the compliance of Article 29 (the second sentence of the fifth part) of the Law "On Scientific Activity" with the Satversme.

Taking into consideration the above circumstances the Constitutional Court at its Organizational session terminated the proceedings on the compliance of Article 27 (the second and third sentences of the fourth part) of the Law "On Scientific Activity" and Article 29 (the second sentence of the fifth part) with Articles 91 and 106 of the Satversme.

6.

At the Court session the **representative of the submitters of the constitutional claim J.Rozenbergs** expressed the viewpoint that the challenged norms of the Higher School Law deny the possibility of participating in public competitions for the academic positions of professor, associated professor and assistant professor to persons, who have reached 65 years of age. To his mind these norms in fact interdict persons of 59 or more years of age from serious scientific work. He stressed that the professors, who have not been elected, in accordance with the third part of Article 28 of the Higher School Law are denied the possibility of carrying out research and perform educational job. There are no reasons, why administrative methods and not public competition shall be used when choosing the most adequate candidate for the position. The restrictions, incorporated into the challenged norms of the Higher School Law to his mind are not useful as –when applying them – the higher schools are not able to ensure that all the academic staff units are filled.

I.Bišers – the representative of the submitter of the constitutional claim stresses - ungrounded is the viewpoint that persons, who have reached 65 years of age , cannot work as organizers of scientific activity. Article 116 of the Satversme permits restrictions to the fundamental rights in order to reach the legitimate aims, determined in the norm. However I.Bišers denies "that professors and leaders of scientific institutions , who are older than 65 years of age, will threaten safety of Latvia or morals of Latvian people". He points out that Latvia has to observe international instruments, like the International Covenant on Economic, Social and Cultural rights, which prohibit discrimination because of old age. Besides I.Bišers asks to pay attention to Article 7 of the Labour Law, which envisages that all persons, without any age limit have equal rights to employment.

Both – J.Rozenbergs and I.Bišers expressed a common view that abilities and qualification of persons have to be assessed objectively and that can be done only by Scientific Councils and Boards of Professors of the higher schools. Therefore- to their mind – there is no reason to deny the right of participating in the competition for vacant positions at higher schools and state scientific institutions to persons, who have reached 65 years of age.

The Saeima representative Lauris Liepa expresses the viewpoint that the restrictions, incorporated into the norms of the Higher School Law and the Law "On Scientific Activity" are ingredient part of the science reform and are well-grounded. Restrictions have to be determined by law, directed to reaching a legitimate aim and are to be needed in the democratic society. In accordance with the practice of European Court of Human Rights the last criterion includes two elements: first of all the restrictions shall be socially needed and, secondly, they have to be proportionate. The legitimate aim of the restrictions, included

in all the challenged norms is "to ensure the development and modernization of the sector, which is especially important in a democratic society – science". It can be reached only by involving young scientists in the process. In such a way the democratic state system is being protected.

Besides, to the mind of the Saeima representative, the challenged norms of the Higher School Law encourage the academic personnel, especially the teaching staff in advanced years to take care of preparing scientists who are able to substitute them and to continue their work. The fourth part of Article 27 of the Higher School Law ensures the possibility of, first of all, elderly professors continuing their work at the higher schools and, secondly, the specialists of the younger generation filling the elected academic positions. Besides, if there is no possibility of filling all the academic vacancies with young employees, norms of the Higher School Law does not prohibit concluding individual contracts with elderly specialists.

Age limits, mentioned in the challenged norms to his mind shall be read together with age limits, which refer to other equally responsible positions like those of judges, procurators and officials of the civil service. If the challenged norms are repealed, the main problem - lack of young specialists in the sector of higher education and science – will not be solved.

The invited person – the LAS President J.Stradiņš pointed out that science funding envisaged for 2003 is the lowest if compared with all the other European Union candidate states. No other circumstances – just the age limitations, incorporated into the challenged norms – favouring intake of young specialists in the sector of science and higher education have been anticipated. Thus these norms do not encourage advancement of science in Latvia. To his mind quality, working abilities and talent of persons shall serve as the most adequate criteria when choosing pretenders to specific positions in higher schools and state scientific institutions. At the LAS Senate several academicians supported the idea of leaving the challenged norms in effect, however many academicians expressed the viewpoint that the activity of the norm should be suspended or even repealed.

The invited person – the LU Rector Ivars Lācis – explained that the rector concludes individual contracts with the pensioned academic personnel for different periods of time on the proposal of the corresponding faculty. Determining of the salary to the employees has also been decentralized and the amount of it, if compared with the salary the persons has had when being elected, may decrease or increase.

The invited person – the Rector of RTU Ivars Knēts stressed that because of shortage of funds RTU concluded individual contracts with the pensioned professors, envisaging lower salaries in comparison with those, which had been determined for them at the time of their being elected

professors. Besides, just because of insufficient funds RTU has no possibilities of employing young candidates for a doctor's degree. Therefore, to his mind, the restrictions, incorporated into the challenged norms of the Higher School Law, have not reached their aim – to create a potential of young academic personnel. At the present moment about 40 positions of a professor are not filled at RTU, in 2003 eight professors – but in 2004 – four professors, who have reached the age of 65 years, shall leave their jobs.

The invited person – the Director of the Department of Higher Education and Science Jānis Čakste pointed out that the Ministry of Education and Science within the limits of possibility was trying to stimulate involvement of young scientists in academic personnel. he stressed that competition for the professor positions at higher schools is different. For example, one cannot compare situation at the RTU with that at the Riga University named after Stradiņš. The challenged norms have not favoured intake of younger elements in the academic personnel at the former, but at the Riga University named after Stradiņš "professors are queuing up".

The concluding part

1.

Article 106 of the Satversme determines the right of every person to freely choose their employment and workplace. As the Court has concluded before, Article 106 of the Satversme protects persons against discrimination in the labour market and guarantees the right of every individual to freely choose the profession, however, realization of the right is inseparably connected with the abilities and qualifications of persons (*see the Constitutional Court Judgment in case No. 2001-16-01, Item 2 of the concluding part//Latvijas Vēstnesis, 05.06.2002 No. 84- 2659*). Thus, in the understanding of Article 106 of the Satversme, the right to freely choose employment and workplace first of all means equal access to labour market to every person and, secondly, the fact that the state is not allowed to determine restricting criteria but only requirements for abilities and qualification, which are necessary for the person to carry out the duties of the position.

Restrictions envisaged in the challenged norms of the Higher School Law refer to elected academic (professor, associated professor and assistant professor) and administrative (rector, pro-rector and dean) positions. In accordance with the fourth part of Article 27 of the Law the above positions may not be held by persons who have reached 65 years of age. In its turn the second part of Article 28 of the Law anticipates that the rector shall conclude with the professor an employment contract for all the elected time or for the time period until the age of 65 years.

Article 29 (the first sentence of the fifth part) of the Law "On Scientific Activity" determines similar restrictions, referring to administration positions (Director, Deputy Director, Head of scientific structural units) of the state scientific institutions as well as to positions in elected collegiate scientific institutions. As in compliance with this norm of the Law "On Scientific Institutions" persons, who have reached 65 years of age may not hold the above positions", legal labour relations with these persons are terminated and the employer shall give notice to the person.

Thus both – the challenged norms of the Higher School Law and the challenged norm of the Law "On Scientific Activity" denies to persons, who have reached 65 years of age, the possibility of running for the above positions on equal grounds and thus the equal access to labour market, guaranteed in Article 106 of the Satversme, is not ensured to these persons.

The public and juridical thought on discrimination for the reasons of old age in different times has differed. In the middle of the last century attitude to people of the older generation became more discriminating if compared with the viewpoint, dominating at the beginning of the century. In many European states prohibition of holding a number of posts after reaching a certain age has been determined. The Saeima rightfully points out that the summary, elaborated by the European Council (*see University Teachers in Europe. Career structures and status. Ed. By Suzanne Baudemont. Strasbourg: Council of Europe, 1995*) affirms that a certain age limit, after reaching which several officials and teachers of higher schools have to leave their posts, is determined in the greatest number of European states. For example, in the eighties of the last century there was the viewpoint that it would be wrong for the age limits to be set so high as to encumber the tertiary sector with older teachers, most of whom no longer have inventive minds, thereby slowing down the intake of younger elements in the academic sector (*see Reform and Development of Tertiary /Post-Secondary/ Education in Southern Europe. Strasbourg: Council of Europe, 1980, page. 414*).

However, taking into consideration the process of aging of people and the development of human rights, the above viewpoint has changed. Namely, the human rights envisage a general prohibition of discrimination for the reasons of age of the person, but prohibition of employment because of old age is admissible only in rare and exceptional cases, if there are especially important reasons for it.

Article 6 of the International Covenant for Economic, Social and Cultural Rights determines that State Parties to the Covenant recognize the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses or accepts. In its turn by Article 2 the State parties undertake to guarantee that the rights shall be exercised without any discrimination. Protocol 12 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms, which has been signed also by the Republic of Latvia, anticipates guaranteeing to any person enjoyment of rights set forth by law without discrimination. In compliance with Article 21 of the European Charter of the European Union Fundamental Rights, any discrimination on the basis of old age is forbidden. Besides, the European Council November 20, 2000 Directive 2000/78 EC establishes that up to December 2, 2003 the Member States of the European Union shall pass all the acts, necessary for implementation of the Directive. Its Article 2 determines prohibition of direct and indirect discrimination. In conformity with the first part of Article 6 differences of treatment on the grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives and if the means of achieving that aim are appropriate and necessary. Similar norms can be found also in other international documents (*see the Constitutional Court Judgment in case No. 2001-12-01, Item 3.1.2. of the concluding part//Latvijas Vēstnesis, 20.03.2002, No. 44 /2169/*).

Besides the Constitutions adopted in the European countries during the last few years preclude discrimination on the grounds of old age. Thus, Article 6 (part two) of the Republic of Finland sets forth that without a justifiable reason differences of treatment may not be applied on the grounds of old age. Article 8 (the second part) of the Switzerland Confederation Constitution also prohibits discrimination of persons on the grounds of old age.

In its turn since June 1, 2002 in compliance with Article 7 of the Labour Law equal rights of everybody to employment, fair, secure and healthy working conditions as well as to fair remuneration shall be guaranteed without any direct or indirect discrimination and not depending on the years of age of a person. Article 29 of the Labour Law determines that, when establishing legal employment relations and during the period of existence of the legal employment relations, especially when advancing the employee, setting forth the labour conditions, payment or vocational training, as well as when breaking the contract, difference of treatment are prohibited, also on the grounds of old age.

Ungrounded is the viewpoint of the Saeima, that the restrictions, determined in the challenged norms of the Law "On Scientific Activity" may be compared with the restrictions established by other legal norms, like those referring to judges, procurators, officials of the state civil service, police and border guards. These persons are either state officials or employees, representing the judicial power and their legal employment relations are not based on contracts. In their turn the employees of the higher schools and the state research institutions, mentioned in the challenged norms are in legal employment relations. If – after reaching the age, determined by law - the period of time is extended for the person, who is a state official or represents the judicial power, the employment

provisions are not changed. But if the rector wishes to engage academic teachers, who have reached 65 years of age, new contracts shall be signed and as the experience shows, the provisions of these (salary, work to be accomplished, working hours etc.) may essentially differ and be much worse in comparison with the previous contracts (*see Vol. I. pages 41 – 44 of the case*).

Besides the provision of Article 27 (the fourth part) of the Higher School Law, namely, that "the rector... may conclude individual contracts" also means that, firstly, the rector alone takes the decision whether it is possible and necessary to employ a 65 year old person. Secondly, the status of the professor, associated professor or assistant professor. i.e., the status of an employed person may change, as there is a possibility of concluding not only the employment contract but also the company contract and in that case the assistant professor, associated professor or the professor shall not be regarded as an employee in the understanding of labour rights and he/she will no more be protected by the legal norms of employment rights.

2.

The Constitutional Court has already earlier taken the decision that the rights, mentioned in Article 106 of the Satversme may be restricted only in cases set forth by law, for the protection of vital public interests and by observing the principle of proportionality [see *the Constitutional Court Judgment in case No. 2002-20-0103, Item 3 of the concluding part/Latvijas Vēstnesis, 24.02.2003, No. 62 (2827)*]. Article 116 of the Satversme determines that "the rights set out in Article 106 may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, public safety, welfare and morals".

It means that the restrictions to the rights, fixed in Article 106 of the Satversme shall

- a) be set forth by the law;
- b) be in compliance with the legitimate aim the State wishes to reach when establishing the restriction;
- c) comply with the principle of proportionality.

3.

3.1.

As the challenged norms, which contain the restrictions of fundamental rights, fixed in Article 106 of the Satversme, were set forth by the laws adopted at the Saeima, proclaimed under the procedure envisaged by law and are valid,

the Court holds that there is no doubt about the fact the restrictions have been determined by law.

3.2.

The Saeima holds that the objective of the restrictions, incorporated into the norms of the Higher School Law is "to ensure the intake of a younger academic and administrative personnel and the advancement of the higher school activity and the development of the branches of science". Persons, who hold the positions, mentioned in the challenged norms, to a great extent determine the quality of the performance of the higher school as well as the advancement of the particular sector of science or the higher school. Therefore, the professor shall, for example, carry out research or creative work, which complies with the requirements of the contemporary level and shall ensure highly qualitative study courses in the particular sector of science or art.

In its turn the restriction, fixed in the challenged norm of the Law "On Scientific Activity" to the mind of the Saeima has been incorporated with the aim to encourage the intake of younger administrative and principal personnel as well as advancement of branches of science". The restriction "is necessary to ensure for specialists of the younger generation the possibility of qualifying for the elected and administrative positions of the state scientific institutions as the number of administrative and elected positions of the above institutions is limited".

The above objectives, which the legislator has tried to reach by including the restrictions to the fundamental rights in the challenged norms, are relevant for the development of the higher education, science and art. However the Saeima in its written replies has not connected the restrictions on the basis of old age with any of the categories mentioned in Article 116 of the Satversme.

One cannot agree with the viewpoint, expressed by the Saeima at the Court session that the legitimate aim of the restrictions is to ensure advancement of science and modernization to protect the democratic state structure. Protection of the democratic state structure against the activities, which are directed to liquidation or disturbance of the structure, is one of the legitimate aims, mentioned in Article 116 of the Satversme and for reaching it proportionate restriction of the rights, even those, named in Article 106 of the Satversme, is permissible. One cannot deny that the development of the higher school and science is important to any society, any state structure and form, also in a democratic republic. Yet ungrounded is the viewpoint that persons, who have reached 65 years of age and are holding the positions, mentioned in the challenged norms could endanger the democratic structure of the state. **Thus the legitimate aim of the restrictions to the fundamental rights included in the challenged norms of the Higher School Law and the Law "On**

Scientific Activity” is not and cannot be the protection of the democratic structure of the State.

Besides, restrictions (included in the challenged norms) to the fundamental rights, established in Article 106 of the Satversme are not directed also towards the protection of the rights of other people, public safety and morals, mentioned in Article 116 of the Satversme.

As an appropriate level of education and science is an inalienable precondition of the successful state development, the Court holds that **the aim of the restrictions, defined in the challenged norms is the insurance of public welfare.** Even though the protection of public welfare mainly means the general material welfare of the society, it may be attributed to immaterial values, which are necessary to the functioning of a more harmonious society. However, by including in the concept "public welfare" also immaterial elements, one has to observe maximum discretion, as public consensus and harmony in the democratic system are only relative values" (*see: Levits.E. "Approximation of Fundamental Issues of Human Rights in Latvia"// "Human Rights in Latvia and in the World", edited by I.Ziemele. Riga, 2000, pages 286 – 287*).

3.3.

To check the proportionality of the restrictions included in the challenged norms with the defined legitimate aim, namely, the protection of the public welfare, the above restriction shall be evaluated by bearing in mind the necessity of it in the democratic society. In this case one has to consider the possibility of reaching the legitimate aim with the help of the means used by the legislator: may the aim be reached by other means, which will restrict the rights and legal interests of an individual less and whether the benefit of the society will be greater than the loss incurred to the rights and lawful interests of an individual. If, after evaluating the legal norm, it is acknowledged that it does not comply with even one of the above criteria, then it shall be considered as not being in conformity with the principle of proportionality and illegitimate [*see the Constitutional Court Judgment in case No. 2001-12-01, Item 3.2. of the concluding part// Latvijas Vēstnesis, 20.03.2002, No.44(2619)*].

The Constitutional Court agrees with the Saeima viewpoint that in order to further the development of higher education and science it is necessary to ensure that the specialists of the younger generation may qualify for the leading administrative and elected positions of both -the state scientific institutions and higher schools, including the above academic positions. However, the main criterion for holding the position shall be qualification and abilities of the applicant.

In accordance with the first part of Article 28 of the Higher School Law, professor is internationally recognized specialist, who, correspondingly to the contemporary level, performs scientific research or artistic creative work and ensures high quality studies in his/her specific branch of science or art. The Cabinet of Ministers September 9, 2001 Regulations No. 391 "The Procedure of Assessment of Scientific and Pedagogical Qualification of the Applicant to the Position of Professor and Associated Professor" envisages very high qualification criteria. Adequacy of the applicant for the post of professor or associated professor is assessed by taking into consideration their scientific publications in those journals, which are entered into the universally recognized list of scientific publications under review, confirmed by the Latvian Scientific Council, as well as their participation in scientific conferences and internationally financed research projects and programmes. A mandatory precondition is professor's contribution in the process of training young scientists – doctors. Besides, the scientific and pedagogical qualification of the applicant for the position of professor or associated professor is assessed by the Board of Professors of the particular branch.

In conformity with the Law "On Scientific Activity" very high qualification criteria are envisaged for scientists as well. In accordance with Article 11 of this Law a doctor's (and habilitated doctor's) scientific degree may be obtained by persons, who have independently carried out original research, whose results are recognized as an important contribution in the research of scientific problems and have received international scientist circle recognition. Independent international experts evaluate the compliance of the results of research with international standards.

The research of the Higher Education Board affirms that the restrictions, included in the challenged norms, have turned out to be ineffective to reach the aim advanced by the Saeima. Namely, since 1995, when age limitations were established, aging of the higher academic personnel in Latvia has continued: 31 percent of the professors are older than 60 years of age, $\frac{3}{4}$ - older than 50, but only 2 percent are younger than 40 years (*see Rivža B., Kondratovičs U. Latvian Universities to the New Europe//History of Latvia, 2003, No.1/49/, page 10*). In its turn up to the end of 2002 only 295 professors were elected but the State needs 491 professors (*see the Saeima January 17, 2003 supplement to the written reply No. 1-1/7, Vol.1 of the case, page 153*). Thus – the number of professors is not sufficient to ensure activity and advancement of the higher education and science.

It is not possible to reach qualitative advancement of the higher education and science if the determinant criterion for holding a certain academic or scientific position is only the age of the person and not his/her professional abilities. "Restrictions based on the assumption that person's *mental abilities* automatically decrease with age shall be *eliminated*. First of all, mental development of elderly persons is very different and the universal assumption

on the decrease of mental abilities is too imprecise and precarious to accept general restrictions to fundamental rights on the basis of it. Secondly, the above assumption shall be regarded as normatively inadmissible, because it is at variance with the philosophical conception on human dignity. Thirdly, the normative conception on the ideal of a human being (*Menschenbild*) does not permit making the scope of fundamental rights dependable on generally presumed abilities and intelligence (which greatly differ in all ages). [*Levits E. On the Principle of Legal Equality// Latvijas Vēstnesis, 08.05.2002., No. 68 (2833)*]. Thus the age limit alone, established in the challenged norms, is insufficient for serving as the general criterion for prohibition of employment in specific professions, positions and activities.

One of the main preconditions for involving qualified specialists of the younger generation, who are able to substitute the scientists of the older generation in the sphere of higher education and science, is guaranteeing the material- technical basis and appropriate salaries for the young specialists. Otherwise, as the salaries in the non-governmental sector are much higher and thus- the public prestige of scientists is low – it is difficult to provoke interest of going in for science.

On June 6, 1996 at the Saeima plenary session, when the amendments to the Law "On Scientific Activity" were discussed, the deputy Guntars Grīnblats warned about the possibility of the above situation, stating that just because of the low salary "the youth has no interest in working in the sector of science". The deputy envisaged "Very few scientific leaders and researchers, who are habilitated doctors and able to supervise elaboration of doctor thesis of the young scientists will remain in Latvia. Thus, we can say that by the law we fire elderly people but there is no possibility of substituting them by young people" (*see Vol.1, page 227 of the case*).

Even though the national conception of the advancement of science in the Republic of Latvia, elaborated in 1998 anticipated the necessity of ensuring state funding – 0,8% of the state total inland production for the scientific activity up to end of 2001 and further yearly growth of funding of 0,1% from the state total inland production, this has not been achieved. In conformity with the state budget programme "Zinātne", in 1998 and 1999 the funding was 0,22% of the state total inland product, in 2000 – 0,20% but in 2001 – 0,18 (*see the Ministry of Education and Science 13.02.2003 letter No. 1-17/253 to the Constitutional Court, Vol.2, page 111*). At the present moment the state funding, granted for science in Latvia is relatively the lowest, if compared with other Candidate States of the European Union [*see the opening statement of professor J.Stradiņš at the spring general meeting of the Latvian Academy of Sciences, held on April 10, 2003// Latvijas Vēstnesis, 15.04.2003, No. 58 (2823)*].

The practice of the LU, RTU, LAA and LAU testifies that in the last few years there is no competition for the academic positions. The number of

applicants does not exceed the number of vacancies, but in several cases there have even been no applicants for all the published vacancies (*see Vol.2, pp. 89 and 93, Vol.3, page 33 of the case*). Taking into consideration the above situation it shall be inadmissible to forbid persons qualify for the positions mentioned in the challenged norms, without considering their abilities and qualification and only because of the fact that they have reached 65 years of age. Therefore well-grounded is the viewpoint of the Minister of Education Kārlis Šadurskis that the envisaged procedure may lead to the situation when the shortage of professors endangers the existence of several higher schools (*see April 22, 2003 letter No. 1-17/364, Vol.3, page 33 of the case*).

It is impossible to further the process of reaching the aim of the state - advancement of higher education and science just by limiting the range of persons, who may qualify for the positions, mentioned in the challenged norms on the grounds of old age. The legislator, to ensure intake of young specialists, may use other - less offending means, which will not restrict the fundamental rights of persons. There is the possibility, e.g., of electing the persons, who have reached the above age, for a shorter period of time.

In accordance with Article 28 (the second part) of the Law "On Scientific Activity", a state scientific institution is managed by a director, who is elected by the scientists' collegiate administrative institution (dome, council, senate) and affirmed to the position by the Minister of Science and Education or other corresponding minister. In its turn, the fourth part of the Article establishes that the director shall be discharged from office in the procedure determined in the Regulation of the State scientific institution.

The copy of the Statutes of the Latvian Institute of Organic Chemistry (director E.Lukevics), submitted to the Court, states that the Scientific Board of the Institute is authorized to reach the decision "on the administrative structure, numeral and personal body of the Institute" as well as to determine the rights and obligations of the director (*see Vol.1, pp. 108-109 of the case*). However, the Statutes envisage neither the requirements for the candidates of the post of the director and the procedure of their election nor the period of time for holding the post and the procedure of discharging from office. In their turn, statutes of other scientific institutions are more specific. For example, the Statutes of the RTU Inorganic Chemistry Institute envisage that the director of the institute shall be elected under tender procedure by secret ballot for the period of five years. Besides the Scientific Board has the right of taking the decision both -on the elections for the position of the director before the end of the previous period and on changes of the personnel. **Therefore the Constitutional Court holds that normative acts shall incorporate more precise qualification criteria for the applicants to administration positions of the state scientific institutions, as well as for the applicants to the posts of professors and associated professors as it will ensure transparency and advancement of unified requirements.**

Article 106 of the Satversme envisages that the main criterion for qualifying for the academic and administrative positions, established in the challenged norms, shall be abilities and qualification but not old age of the person. **Thus the prohibition, incorporated into the challenged norm, which sets age limit to the fundamental right enshrined in Article 106 of the Satversme, is unconfirmable with the principle of proportionality.**

4.

When establishing that the norms of the Higher School Law and the Law "On Scientific Activity" are unconfirmable with even one Satversme Article, the above norms shall be considered as illegal and null and void. There is no necessity to assess the compliance of these norms with Article 91.

The substantive part

On the basis of Articles 30 -32 of the Constitutional Court Law, the Constitutional Court decided:

to declare the first sentence of Article 27 of the Higher School Law and the text of Article 28 (the second part) "or for the time period until the age of 65 years" as well as Article 29 (the first sentence of the fifth part) of the Law "On Scientific Activity" as unconfirmable with Article 106 of the Republic of Latvia Satversme and null and void as of the date of the announcement of the Judgment.

The Judgment takes effect as of the moment of its announcement. The Judgment is final and allowing of no appeal.

The judgment was declared in Riga on May 20, 2003.

The Chairman of the Court session

Aivars Endziņš